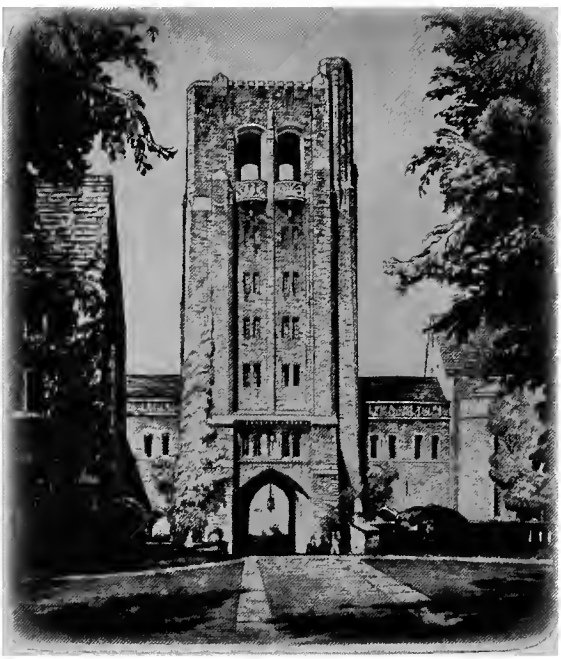

A

TREATISE ON WILLS.

BY
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OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

IN TWO VOLUMES.

VOL. II.

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WITH LARGE ADDITIONS TO THE TEXT AND NOTES, AND REFERENCES TO AMERICAN DECISIONS.

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GIFTS to the heir, whether of the testator himself, or of another, are so frequently found in wills, and, where these instruments are the production of persons unskilled in technical language, the term *heir* is so often used in a vague and inaccurate sense, that to ascertain and fix its signification in regard to real and personal estate respectively, whether alone or in conjunction with other phrases which most usually accompany it, is a point of no inconsiderable importance. Like all other legal terms, the word *heir*, when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import; in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in question, in case of intestacy.[1] It is clear, therefore, that where a testa-
[2] tor devises real estate simply to his *heir, or to his heir at law, or his right heirs, the devise will apply to the person or persons answering this description at his death, and who, under the recent enactment regulating the law of inheritance, (*a*) would take the property in the character of devisee, and not as formerly, by descent.[2] And the circumstance that the expression is *heir*, (in the singular,) and that the heirship resides in, and is divided among, several individuals as co-heirs or co-heiresses, would create no difficulty in the application of this rule of construction; the word "heir" being in such cases used in a collective sense, as comprehending any number of persons who may happen to answer the description; and which persons, if more than one, would, if there were no words to sever the tenancy, be entitled as joint tenants. (*b*)

And it is to be observed, that such a devise (though contained in a will made before the year 1838) vests in the heir an estate in fee simple, *without words of limitation*, or any equivalent expression, on the ground, (to use the quaint though significant language of an early judge,) (*c*) that "the word heir is nomen

(*a*) 3 & 4 Will. IV. c. 106, § 3.
(*b*) Mounsey *v.* Blamire, 4 Russ. 384.
(*c*) Per Pollexfen, in Burchett *v.* Durdant, Skinn. 205. See also Beviston *v.* Hnssey, Id. 385, 563.

[1] See 2 Williams, Ex. (2d Am. ed.) 808, 809. The testator directed the remainder of his estate to *be equally divided among the heirs*, and it was held that he meant his own heirs under the statute of distributions. Baskin's Appeal, 3 Barr. (Penn.) 304; Kiser *v.* Kiser, 2 Jones, Eq. (N. C.) 28. And where the bequest in a clause of the will was, "the money to be divided among my heirs as above mentioned," it was held to be confined to the persons specifically mentioned in the preceding part of the will. *Ex parte* Artz, 9 Maryland, 65.

[2] See 4 Kent, (5th ed.) 412, note, 506, 507.

collectivum: and it is all one to say heirs of J. S., as to say heir of J. S., and heirs of that heir; for every particular heir is in the loins of the ancestor, and parcel of him."

Upon the same principle it is well settled, that a devise to *the heirs of the body* of the testator or of another, confers an estate tail; which estate, it is to be observed, will (unless stopped in its course by the disentailing act of the tenant in tail) devolve to all persons who successively answer the description of heir of the body.

* The leading authority for this doctrine is Mande- [3]
ville's case, (*a*) the circumstances of which aptly illustrate the peculiar mode of devolution in such cases. John De Mandeville died leaving issue by his wife, Roberge, two children, Robert and Maude. A. gave certain lands to Roberge, and to the heirs of John De Mandeville, her late husband, on her body begotten; and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert, (heir of the body of his father, being a good name of purchase,) and that then, when he died without issue, Maude, the daughter, was tenant in tail of the body of her father, per formam doni. "In which case, it is to be observed," says Lord Coke, "that albeit Robert, being heir, took an estate tail by purchase, and the daughter was no heir of his (John's) body at the time of the gift, yet she recovered the land per formam doni, by the name of heir of the body of her father, which, notwithstanding her brother was, and he was capable at the time of the gift; and, therefore when the gift was made, she took nothing but in expectancy, when she became heir per formam doni."

As a devise to the heir general, in the singular, confers (as we have seen) an estate in fee simple, in like manner with a devise to the heirs in the plural, on the ground that the word "heir," as nomen collectivum, includes the heirs of such heir, so, on the same principle, a devise to the heir of the body in the singular, would doubtless be held to confer an estate tail by purchase on the person or persons first answering the description of heir of the body; but it has never been decided whether, under a devise to the heir of the body in the singular, the property would devolve successively to every individual
* who should answer the description of heir of the body, [4]
in like manner as under a devise to heirs of the body in the plural; or whether the estate would vest in, and be confined to, the individual who should first answer the description of heir of the body, and who would take an estate tail by purchase. The latter was evidently the opinion of Mr. Justice Taunton, in the case of Doe d. Winter *v.* Perratt, (*b*) who after

(*a*) Co. Litt. 26. See also Southcote *v.* Stowell, 1 Mod. 226, 237; 2 Mod. 207–211; Wills *v.* Palmer, 5 Burr. 2615; S. C. 2 Bl. 687.

(*b*) 3 M. & Scott, 597, post, 385.

citing Mandeville's case, (*a*) and Southcott *v.* Stowell, (*b*) said, "In these instances, the estate tail arises out of proper words of limitation *in the plural number*, denoting a certain continuous line of posterity 'heirs of the body.' But no such effect can be given to the words 'heir,' 'heir of the body,' 'right heir,' or 'next,' or 'first heir,' where they constitute only a mere designatio personæ." The case, however, did not raise this precise point, as the words "male *heir*," occurring in the will then before the Court, were held to mean male *descendant*, in which sense they could not operate to confer an estate tail by force of the doctrine under consideration, any more than those words themselves would if employed by the testator. It seems difficult, however, to reconcile with this doctrine the case of Whitelock *v.* Heddon, (*c*) where A devised to his grandson C all his estates, to him, his heirs, and assigns, except as thereinafter mentioned; that is to say, provided that in case his (testator's) son B should have any son or sons begotten or born in lawful matrimony, then he devised the said estates *to such* (*d*) *male issue as his son B should or might have at the time of C's attaining the age of twenty-one years;* but in case his said son B should [not] have any male issue, then he directed
[5] that C should *receive the rents until twenty-one, as above mentioned; it was held, that a son of B, in ventre matris, on C's attaining his majority, (and who was the eldest son in esse at that period, the first being dead,) *took an estate tail* by force of the word "issue," and not a fee simple by the effect of the word "estates." Lord C. J. Eyre said, that as the objects were the sons of the testator's son, who, it appeared, were to have his bounty in preference to the son of his daughter, (for such C was,) and *as "issue" was a collective term*, capable of being descriptive of either person or interest, or both, he thought it reasonable to understand the word "issue" in its largest sense, so as to deem it descriptive of an estate tail male to the sons of B, as many as there should be, in order of succession.

It is evident that the Court did not construe the words "male issue" as synonymous with heirs male of the body, inasmuch as the devise was held to take effect in favor of the son of B in the lifetime of his father, so that the words were read as importing heir *apparent* of the body,—a mode of construction which seems to bring the case into direct collision with Doe *v.* Perratt, in regard to the nature of the estate conferred by the

(*a*) Ante, 3.
(*b*) 1 Mod. 226, 237; 2 Mod. 207, 211.
(*c*) 1 Bos. & Pull. 243.
(*d*) Eyre, C. J., reasoned upon the word "such," as if it meant such sons before mentioned; but the expression was, "such male issue as my said son shall or may have." The word, therefore, evidently had reference to the succeeding words of the context.

devise; and, upon this point, the case of Whitelock *v.* Heddon (but which unfortunately was not cited in Doe *v.* Perratt) must be considered as overruled.

Where a testator has thrown into the description of heir an additional ingredient or qualification, the devise must answer the description in both particulars. Thus, a devise to the right heirs *male* of the testator, or to the right heirs *of his name*, is, according to the early cases, * to be read as a devise to the heir, provided he be a male, or provided he be of the testator's name, (as the case may be;) and, consequently, on the principle just stated, if the character of heir should happen to devolve to a person not answering to the prescribed sex or name, the devise would fail. [6]

Thus, in Ashenhurst's case, (*a*) where the devise was to the *right heirs male* of the testator forever; it was held, both in B. R. and in the Exchequer Chamber, that, as the testator died leaving no other issue than three daughters, (who were, of course, his heirs general,) the devise failed, and did not apply to his next collateral heir male.

So, in Counden *v.* Clerke, (*b*) where a testator, having issue a son and a daughter, and two granddaughters the issue of his daughter, devised an annuity out of certain lands to his grandchildren, and a legacy to his brother; and then declared that the lands should descend unto his son, and if he died without issue of his body, then to go unto his (the testator's) *right heirs of his name and posterity*, equally to be divided, part and part alike; and then to his granddaughters he devised another annuity out of the land. The question was, whether the devise to the right heirs of his name and posterity was a good devise to the testator's brother, who was of his name, but was not his heir. It was held, that the brother was not entitled, and that the devise was void. (*c*)

(*a*) Cited Hob. 34; 2 Roll. Abr. 416, (F.) pl. 5.

(*b*) Moore, 860, pl. 1181; S. C. Hob. 29. See also Starling *v.* Ettrick, Pre. Ch. 54; Lord Ossulston's case, 3 Salk. 314; S. C. Co. Litt. 25, a.

(*c*) But there is not ground to contend, that a devise to the heirs male of the testator operates as a devise to the heirs male *of his body*, seeing that it has been long settled, that a devise to A and his heirs male, or to A and his heirs female, confers an estate tail special (Baker *v.* Wall, 1 Lord Raym. 185); and such is likewise the effect of a devise to A for life, and, after his death, to his right heirs male forever (Doe d. Lindsey *v.* Colyear, 11 East, 548); the word "heirs" being, in these several cases, construed to mean heirs *of the body*. Indeed, the opinion of the Court seems to have been in favor of such a construction in Lord Ossulston's case, 3 Salk. 314; S. C. Co. Litt. 25, a, where one Ford, having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male forever; and the three sons being dead without issue, the whole Court held, that the brother could not take as male heir—First, *because a devise to heirs male operates as a limitation to heirs male of the body*, and the brother could not be heir male of the devisor's body; Secondly, because the remainder to the heirs male were words of purchase, and by purchase the brother could not take as heir male, his niece being the heir at common law. As the case on the latter ground accords with the antecedent authorities above stated, it would not be safe or correct to

[7] * It remains to be considered how far the doctrine of the preceding cases is applicable to limitations to heirs *of the body.* Sir E. Coke (*a*) lays down the following distinction, " That where lands are given to a man and his heirs female of his body, if he dieth leaving issue a son and a daughter, the daughter shall inherit, for the will of the donor, the statute working with it, shall be observed. But in the case of a purchase it is otherwise; for if A have issue a son and a daughter, and a lease for life be made, the remainder to the heirs females of the body of A, and A dieth, the heir female can take nothing, because she is not heir; for she must be heir and heir female, which she is not, because her brother is heir."

The latter branch of this proposition has been the subject of much controversy. Lord Cowper, in the well-known
[8] case of Brown *v.* Barkham, (*b*) denied it to be * law, and so decided; and though the propriety of his determination was questioned by Lord Hardwicke, before whom the case was brought by a bill of review, (*c*) and though Mr. Hargrave has defended the position of his author with his usual acuteness and learning, (*d*) yet subsequent cases appear to have established, in opposition to Coke's doctrine, that a limitation, either in a will or deed, to the heirs special of the body by purchase, will take effect in favor of the designated heir of the body (if any) *though he or she be not the heir general of the body.* Thus, in the case of Wills *v.* Palmer, (*e*) it was held, that, under a devise in remainder to the heirs male of the body of A, (a person who had no estate of freehold under the will,) the second son of A was entitled as heir *male* of the body, though he was not heir general of the body, which character belonged to a granddaughter, the child of a deceased elder son.

This case was followed by Evans d. Weston *v.* Burtenshaw, (*f*) in which the same construction was applied to the limitations of a marriage settlement. In this state of the authorities, it seems unnecessary to encumber the present work with a statement of the numerous early cases on the subject, (*g*) which

treat it as an adjudication on the first point; though, if the Court had been called upon to decide the case, it is pretty evident what the decision would have been. The doctrine of these cases was recognized in the recent case of Doe d. Winter *v.* Perratt, 5 Barn. & Cress. 65, and 3 M. & Scott, 605, where, however, the question before the Court was (as we shall presently see) different.

(*a*) Co. Litt. 24, b.

(*b*) Pre. Ch. 442, 461. See also Amb. 8.

(*c*) Co. Litt. 25, a.

(*d*) Id. 24, b.

(*e*) 5 Burr. 2617.

(*f*) Co. Litt. 164.

(*g*) The reader who wishes to examine these cases will find the authorities on one side fully stated in Mr. Hargrave's note above referred to, and those on the other, in Mr. Powell's Treatise on Devises, vol. i. p. 319, 3d ed.; these authors having both displayed much industry in the search for cases to support their respective views. It should be observed, that Mr. Hargrave's strictures were written before the cases of

(conflicting as they are) cannot exert much influence on a question which has been the subject of three distinct adjudications of a comparatively recent * date, all concurring to support the more convenient and liberal construction. [9] It is probable, indeed, that a Judge less abhorrent of technical and rigid rules of construction than Lord Mansfield, would have hesitated to decide as his lordship did in Wills *v.* Palmer, and Evans *v.* Burtenshaw, in the teeth of the high authority of Lord Coke; but it is still more probable that the Courts, at the present day, would refuse to set the question again afloat, by attempting to overrule those cases, even if they disapproved of the principle on which they were decided.

And here it may be proper to notice, that, in order to entitle a person to *inherit* by the description of heir male or heir female of the body, it is essential, not only that the claimant be of the prescribed sex, but that such person trace his or her descent entirely through the male or female line, as the case may be. Thus, it is laid down by Littleton, that "if lands be given to a man and the heirs male of his body, and he hath issue a daughter, who has issue a son, and dieth, and after the donee die, in this case the son of the daughter shall not inherit by force of the entail; for whoever shall inherit by force of a gift made to the heirs male, ought to convey *his descent wholly by the heirs male.*" (*a*)

It is otherwise, however, in the case of gifts to the heir male or female by *purchase;* for, if lands be devised to A for life, and after his decease, to the heirs male of the body of B, and B have a daughter who dies in his lifetime, leaving a son who survives B, (all this happening in the lifetime of A, the tenant for life,) such grandson is entitled, under the devise, as a person answering the description of heir male of the body of B, he being not only the immediate heir of B, (though the heirship is * derived through his deceased mother,) (*b*) [10] but being also of the prescribed sex. (*c*)

It should be observed, however, that in the case of Oddie *v.* Woodford, (*d*) which arose on the celebrated will of Mr. Thel-

Wills *v.* Palmer, and Evans *v.* Burtenshaw, and that, in many of the cases cited by him, the devise was to the heirs general; as to which it is not attempted to impugn the doctrine for which he contends.

(*a*) Co. Litt. 25, a.

(*b*) Hobart, 31; Co. Litt. 25, b.

(*c*) This distinction, however, seems to have been lost sight of by Mr. Justice Taunton, in the recent case of Doe d. Winter *v.* Perratt, 3 M. & Scott, 395, who, on the authority of the above-cited passage in Littleton, seems to have considered, that, even under a devise to the heir male of the body *by purchase,* the heir must derive his title entirely through males, and that the male issue of a deceased daughter could not, under any circumstances, support a claim. The case, however, did not raise the point; and others of the learned Judges in the same case expressly recognized the distinction stated in the text.

(*d*) 3 Myl. & Craig. 584.

lusson, (*a*) and also in Bernal *v.* Bernal, (*b*) a devise to male descendants was held to be confined to males claiming through males, and not to comprise descendants of the male sex claiming through females; but in neither of these cases does the rule in question seem to have been impugned, the decision having, in each instance, been founded on the context. In Oddie *v.* Woodford, Lord Eldon dwelt much on the association of the word "*lineal*" with male descendant; the expression being "eldest male lineal descendant." The word "lineal," indeed, may seem, in strictness, not to materially add to the force of the word "descendant;" but his lordship considered that, having regard to all parts of the will, and to the rule which imputes to a testator an additional meaning for each additional expression, the anxious repetition of the word "lineal" in every instance, indicated an intention to confine the devise to persons of male lineage. But though neither Lord Eldon nor Lord Cottenham questioned the rule of construction, which reads a devise simply to the male descendant of A as applying to the male
[11] issue of a female line; yet their respective * decisions teach the necessity of caution in the application of the rule, and of a diligent examination of the context, before such an hypothesis is adopted.

Since, therefore, the son of a deceased female may take by purchase under the description of heir male, it follows that several individuals, as grandsons, may become entitled under a devise to heirs male, or even (as several co-heirs make but one heir) to heir male in the singular. As where a testator devises real estate to the heir male of his body, and dies without leaving any son or daughter surviving him, but leaving grandsons the issue of several deceased daughters, the sons of the several daughters respectively, or, if more than one, the eldest sons of the several daughters are concurrently entitled, under such devise, as the heir or heirs male of the testator. Under such circumstances, however, considerable difficulty is occasioned if the testator has prefixed to the word "heir" any expression showing that he had in his view a single individual; as in the case suggested by Lord Coke, (*c*) who says, "If lands be devised to one for life, the remainder to the next heir male of B, in tail, and B hath issue two daughters, and each of them hath issue a son, and the father and the daughters die; some say the remainder is void for uncertainty; some say the eldest shall take because he is the worthiest; and others say that both of them shall take, for that both make but one heir."

A question of this nature was elaborately discussed in the recent case of Doe d. Winter *v.* Perratt, (*d*) where a devise in

(*a*) 3 Myl. & Craig. 559.
(*b*) 3 Myl. & Craig. 559.
(*c*) Co. Litt. 25, b.
(*d*) 5 Barn. & Cress. 41; S. C. 3 M. & Scott, 505.

remainder was "to the first male heir of the branch of my uncle Richard Chilcott's family;" the facts being that, at the date of the will, the uncle was dead, *leaving [12] five daughters, of whom the eldest died before the remainder fell into possession, leaving several daughters, one of whom (who was living) had a son; and it was held, in the House of Lords, reversing a judgment in the King's Bench, that such son, as the sole male descendant of the eldest daughter, was entitled in preference to, and in exclusion of, the male issue of the younger daughters, of whom some were living and some were dead, each having a son or sons, who were older than the grandson of the eldest daughter; the Court being of opinion that the word "first" prefixed to the words "male heir," which were construed to mean male *descendant*, referred to priority of line, and not to priority of birth; and, consequently, that a younger male descendant of the eldest daughter was to be preferred to an elder male descendant of a younger daughter, and also to him who had, by the decease of his mother *first* acquired the character of a "male heir." (*a*)

It is clear that no person can sustain the character of *heir, properly so called, in the lifetime of the an- [13] cestor, according to the familiar maxim, nemo est hæres viventis.[1]

Therefore, where (*b*) a man having two sons, devised lands to the younger son and the heirs of his body, and, for want of such issue, to the heirs of the body of his elder son, and the younger died without issue in the lifetime of the elder; it was held, that the son of the elder could not take under the devise. (*c*)

The great struggle, however, in cases of this nature, has generally been to determine whether the testator uses the word "heir" according to its strict and proper acceptation, or in the sense of heir apparent, or in some inaccurate sense.

(*a*) In favor of the claim of the stock of the eldest daughter, some reliance appears to have been placed on Harper's case, which is thus stated in Hale's MSS., Co. Litt. 10, h: "Harper having a son and four daughters, namely, A, B, C, and D, devises to the son in tail, remainder to B and C for life, remainder proximo consanguinitatis et sanguinis of the devisor; and in Easter, 17 James, by two justices against one, the remainder vests in all the daughters, when the son dies without issue; but afterwards, Michaelmas, 20 James, per totam curiam, it vests in the eldest daughter only, and not in all the daughters—first, because proximo; secondly, because an express estate is limited to two of the daughters." Perriman *v.* Pierce, Hale's MSS. See S. C. in Palmer, 11, 303; 2 Roll. Rep. 256, nom. Perin *v.* Pearce, Bridg. 14; O. Bendloe, 102, 106. It was also observed, that though the course of descent among females is to all equally, yet that, for some purposes, the elder is preferred; as in the case of an advowson held in coparcenary, in which the first right to present is conceded to the elder; and so under a partition made by a third person among parceners, in which the elder has the choice of the several lots.

(*b*) Challoner *v.* Bowyer, 2 Leon. 70. See also Archer's case, 1 Co. 66.

(*c*) It will be observed, that the failure of the devise in this case is a consequence of the rule, which requires that a contingent remainder should vest at the instant of the determination of the preceding estate. Ante, vol. i. p. 778.

[1] See Bowers *v.* Porter, 4 Pick. 208, 209.

Sometimes the context of the will shows that he intends the person described as heir to become entitled under the gift in his ancestor's lifetime; the term being used to designate the heir apparent, or heir presumptive. (*a*)

As in the case of James *v.* Richardson, (*b*) where a man devised lands to A and his heirs during the life of B, in
[14] trust for * B, and, after the decease of B, to the heirs male of the body of B *now living*, and to such other heirs male or female as B should have of his body, the words "heirs male of the body now living" were held to be a good description of the son and heir apparent, living at the time of the making of the will, to which period the word "now" was considered to point. (*c*)

So, in the case of Lord Beaulieu *v.* Lord Cardigan, (*d*) a bequest of personal estate to the heir male of the body of A, to take lands in course of descent, being followed by a gift in default of such heir male to A himself for life, the testator was considered to have explained himself to use the words "heir male" as descriptive of the son or heir apparent.

Again, in the more recent case of Carne *v.* Roch, (*e*) where a testator gave his real and personal estate to the *heir at law* of A, and in case such heir at law should die without issue, then he devised the same to the *next heir at law of A*, and his or her issue, and in case all the *children* of A should die without issue, then over. A was living at the date of the will, and at the death of the testator; and it was held, that her eldest son had an estate tail under the will.[1]

In this case, it was probably considered, that the testator had, by the word "children," explained himself to use the words

(*a*) The reader scarcely need be reminded of the difference between an heir apparent, and an heir presumptive. An heir apparent is the person who will *inevitably* become heir, in case he survives the ancestor. The heir presumptive is a person who will become heir in the same event, provided his or her claim is not superseded by the birth of a more favored object. Thus, if a man has an eldest or only son, such son is his heir apparent. If he has no child, but has a brother or sister, or any other collateral relation, such relation is his heir presumptive, because liable to be postponed by the birth of a child; so if his only issue be a daughter, such daughter, being liable to be superseded by an after-born son, is heir presumptive.

(*b*) James *v.* Richardson, T. Jon. 99; 1 Eq. Ca. Ab. 214; S. C. 1 Vent. 334; 2 Vent. 311, nom. Burchet *v.* Durdant, Raym. 330; 3 Keb. 32; Pollex. 457.

(*c*) Ante, vol. i. p. 278.

(*d*) Amb. 533.

(*e*) 4 M. & Pay. 862.

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[1] A legacy to the lawful heirs of A, when it appears in the will that he is living, is equivalent as a description, to a legacy to his next of kin, or to his children. Simms *v.* Garrot, 1 Dev. & Bat. Eq. 393. A general devise to the "heirs" of a person, who is then living, but is not referred to as living, is void. Heard *v.* Horton, 1 Denio, 165. But a devise to the heirs of one, who is stated in the will to be living, is a valid disposition in favor of those who would be his heirs if he should then die. Ib. See Bowers *v.* Porter, 4 Pick. 198.

"heir at law" as synonymous with *eldest son.* And this construction has prevailed in some other cases where the indication of intention was less decisive and unequivocal.

As, in Darbison d. Long *v.* Beaumont, (*a*) where the [15] *testator, after creating various limitations for life and in tail, devised his estates to the *heirs male of the body of his aunt E. L. lawfully begotten*, remainder to the testator's own right heirs; *he also gave £100 to his said aunt E. L.*, and £500 to her children; he likewise gave to A (who was his heir at law) an annuity out of the said hereditaments, and a legacy to her children. The prior limitations determined in the lifetime of E. L., upon which the question arose, whether A., the eldest son of E. L., could take; to whose claim it was objected, that, his mother being living, he was not heir. But it was adjudged, in the Exchequer, which judgment (after being reversed in the Exchequer Chamber) was ultimately affirmed in the House of Lords, that A was entitled under this devise; it being evident from the whole will, that the eldest son was the person designed to take by the appellation of the heir male of the body of the testator's aunt E. L.; and that although the word "heir," in the strictest sense, signified one who had succeeded to a dead ancestor, yet, in a more general sense, it signified an heir apparent, which supposed the ancestor to be living; that the testator took notice that the sons of E. L. were living at that time, by giving them legacies; and also that E. L. was likewise living, by giving her a legacy; (*b*) and, therefore, he could not intend that the first son should take strictly as heir, that being impossible in the lifetime of the ancestor; but as heir apparent, he might and was clearly intended to take.

So, in Goodright d. Brooking *v.* White, (*c*) where the testator, after devising certain life annuities to three daughters, and an annuity to M. another daughter, during *the [16] joint lives of herself and the testator's only son R., gave the estate (subject to the annuities) to his daughter M. for two years, with remainder to R., his son, for ninety-nine years, if he should so long live; and subject thereto, he devised the same to R.'s heirs male, *and to the heirs of his daughter M.*, jointly and equally, to hold to the heirs male of R. lawfully begotten, and to the heirs of M. jointly and equally, and their heirs and assigns forever; and for want of heirs male lawfully begotten of the body of R., at the time of his decease, the testator devised the same, charged as aforesaid, to the heirs and assigns of M. lawfully begotten of her body, to hold to the

(*a*) 1 P. W. 229; 3 Br. Parl. Ca. (Toml. ed.) 60; et vid. James *v.* Richardson, ante, 14.

(*b*) But might not the testator have calculated on E. L. surviving him, and afterwards dying before the remainder to her heir took effect in possession?

(*c*) 2 Blackst. 1010.

heirs and assigns of M. forever. R., the son, had at the date of the will, a son and two daughters; and M., the testator's daughter, then had one son. R. died in the lifetime of M. It was contended, that the devise to the heir of M. was void, his mother being alive at the expiration of the preceding estates; but the Court held that her son was entitled. De Grey, C. J., said, that the testator took notice that M. was living, *by leaving her a term and a subsequent annuity*, and meant a present interest should vest in her heir, that was, her heir apparent, during her life.[1] Blackstone thought that, as the testator had varied the tenure of M.'s annuity from that of the other sisters, *theirs* depending on their own single lives, and *hers* on the joint lives of herself and her brother R., it was plain the testator had in his contemplation that *she might survive R.*, as, in fact, she did; and therefore, the word *heir* must be construed as equivalent to *issue*, in order to make him take in her lifetime, agreeably to the intent of the testator.

[17] In the case of Doe d. Winter *v.* Perratt, (*a*) a testator * devised lands to his kinsman, John Chilcott, in terms conferring an estate tail male; and, in default of male heir by him, directed the lands to fall *to the first male heir* of the branch of his (the testator's) uncle, Richard Chilcott's family, paying unto such of the daughters of the said R. Chilcott, as should be then living, the sum of £100 each, at the time of taking possession of the said estates. John Chilcott died without issue. R. Chilcott was dead when the testator made his will, having left five daughters, several of whom (including the eldest) died before the remainder fell into possession. The eldest daughter left several daughters, one of whom had a son, who was the only male descendant of the eldest daughter. Each of the other deceased daughters left sons, and each of the living daughters had also sons, some of whom were born before the grandson of the eldest daughter. The question between these several stocks was, which of them was entitled under the denomination of "first male heir." Mr. Justice Holroyd and Mr. Justice Littledale held, that the son of the daughter *who first died*, leaving male issue, was entitled: dissentiente Mr. Justice Bayley, who was of opinion that the son of the *eldest of the daughters*, who had a son, was entitled, whether such daughter were living or dead, and without regard to the relative ages of the sons of the several daughters; the learned Judge thinking that "heir" here meant heir apparent of the eldest daughter. The case was brought by writ of error into the House of Lords; and the House submitted to the Judges the question (among

(*a*) 5 Barn. & Cress. 48; S. C. in Dom. Proc. 3 M. & Scott, 586.

[1] Jourdan *v.* Green, Dev. Eq. 270.

others) whether the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living. The opinion of four out of five Judges (namely, Justices Taunton, Bosanquet, Bayley, and C. J. Tindal) was *in the affirmative; and this opinion was founded on [18] the circumstances of the testator's knowledge of the state of his uncle Richard's family; that his uncle was then dead; that he had left no heir male; but only daughters; that legacies were given to such of the daughters as should be living when the remainder vested, to be paid by the person who was to take under the description of "first male heir," not "of my daughters," or "of daughters," or of any one daughter specifically, but "of the branch of my uncle Richard Chilcott's family;" all which it was considered amounted to a demonstration that the testator used the word "heir" to denote a person of whom the ancestor might be living. Mr. Justice Taunton, Mr. Justice Bosanquet, and Lord C. J. Tindal, however, did not (like Mr. Justice Bayley) construe the words "male heir" as meaning *heir apparent*, but as importing male *descendant;* and, therefore, as applying to the grandson (being the only male descendant) of the eldest daughter; the effect of which was to read the words in question as a devise to "the male descendant of the eldest branch of my uncle Richard Chilcott's family;" and this construction seems to have been adopted by the House of Lords. If the eldest daughter had had more than one grandson, preference would, according to the principle of the decision, no doubt, have been given to the eldest of such grandsons, if they were the offspring of the same parent, or the son of the eldest daughter, if not.

Where a testator shows by the context of his will, that he intends by the term *heir* to denote an individual who is not heir general, such intention, of course, must prevail, and the devise will take effect in favor of the person described. Thus, if a testator says, "I make A B my sole heir," or "I give Blackacre to my heir male, *which * is my brother A B;* [19] this is, it seems, a good devise to A B, although he is not heir general. (*a*)

Again, (*b*) it is laid down, that "if a man, having a house or land in borough English, buy lands lying within it, and then, by his will, give his new-purchased lands to his heir of his house and land in borough English, for the more commodious use of it, such heir in borough English will take the land by the devise as hæres factus, not natus or legitimus; for the intent is certain, and not conjectural.

So, in the case cited by Lord Hale, in Pybus *v.* Mitford, (*c*) where a man having three daughters and a nephew, gave his

(*a*) Hob. 33. (*b*) Hob. 34. (*c*) 1 Vent. 381.

daughters £2000, and gave the land to his nephew by the name of his *heir* male, provided that, if his daughters "troubled *the heir*," the devise of the £2000 should be void; it was adjudged that the devise to the nephew was good, although he was not heir general; (because the devisor expressly took notice, that his three daughters were his heirs;) and that the limitation to the brother's son by the name of heir male was a good name of purchase.

Again, in the case of Baker *v.* Wall, (*a*) where the testator having issue two sons, devised to A, his eldest son, his farm, called Dumsey, to him and his heirs male for ever; adding, "if a female, my next heirs shall allow and pay to her £200 in money, or £12 a year out of the rents and profits of Dumsey, and shall have all the rest to himself, I mean my next heir, to him and his heirs male for ever." A died, leaving issue a daughter
[20] only; and *the question now was, whether, in event, C, the younger son of the testator, was entitled. And the Court held, that he was: first, because it was manifest that the devise to A was an estate tail male; secondly, that it was apparent that the devisor had a design, that if A had a daughter she should not have the lands; for the words, "if a female, then my next heir," &c., must be intended, as if he had said, "But if my son A shall have only issue a female, *then* that person who would be my next heir, if such issue female of A was out of the way, shall have the land:" and to make his intent more manifest, the testator gave a rent to such female out of the lands; for she could not have both the land and a rent issuing out of it. By the words "to *him*," it was apparent that he intended the *male* heir; so that it was the same thing as if he had said, "I mean my next heir male." And as to the objection, that C was male, but not *heir*, (for J. D., a female, was right heir to the devisor,) the Court said, that if the party take notice that he has a right heir, and specially exclude him, and then devise to another by the name of heir, this shall be a special heir to take.

But in the case of Goodtitle d. Bailey *v.* Pugh, (*b*) where the devise was to the eldest son of the testator's only son, begotten or to be begotten, for his life; and the testator added, "and so on, in the same manner, to all the sons my son may have; if but one son, then all the real estate to him for his life, and for want of heirs in him, *to the right heirs of me (the testator) forever, my son excepted, it being my will he shall have no part of my estates, either real or personal.*" The testator left his son and

(*a*) 1 Lord Raym. 185; S. C. Pre. Ch. 447, 464, 465, 468; 1 Eq. Ca. Abr. 12, 214. See also Rose *v.* Rose, 17 Ves. 347, where the phrase "my heir under this will" was held, in reference to certain pecuniary legacies, to point to the testator's residuary legatee.

(*b*) 3 B. P. Cas. (Toml. ed.) 454. See also Butl. Fea. 573, 575; S. C. cit. 2 Mer. 348.

three daughters. The son died without issue, having enjoyed the *lands for his life. The daughters con- [21] tended, that they were the personæ designatæ under the devise *to the testator's own right heirs, his son excepted;* for that the son, who was the proper heir, was plainly and manifestly excluded by the express words. And of this opinion were Lord Mansfield and the rest of the Court of King's Bench, who held, that the words were to be interpreted, as if the testator had said, "Those who would be my right heirs, if my son were dead." This judgment, however, was reversed in the House of Lords, with the concurrence of the judges present, who were unanimously of opinion that no person took any estate under the will by way of devise or purchase.

This is an extraordinary decision, and high as is the authority of the Court by which it was ultimately decided, its soundness may be questioned, as the will contains not merely words of exclusion in reference to the son, (which, it is admitted, would not alone amount to a devise,) but a positive and express disposition in favor of the person who would be next in the line of descent, if the son were out of the way. In this case, we trace but very faintly the anxiety, generally imputed to judicial expositors of wills, ut res magis valeat quam pereat.

It is next to be considered how far the construction of the word "heir" is dependent upon, or liable to be varied by the nature of the property to which it is applied.

If the subject of disposition be real estate of the tenure of gavelkind, or borough English, or copyhold lands held of a manor in which a course of descent different from that of the common law prevails, it becomes a question, whether, under a disposition to the testator's heir as a purchaser, the intended object of gift is the heir general at common law, or his heir quoad the particular property which is *the [22] subject of the devise; and the authorities at a very early period established the claim of the common-law heir; (*a*) supposing, of course, that there is nothing in the context to oppose the construction.

With respect to the personalty, too, it is often doubtful whether the testator employs the term "heir" in its strict and proper acceptation, or in a more lax sense, as descriptive of the person or persons appointed by law to succeed to property of this description. Where the gift to the heirs is by way of substitution, the latter construction has sometimes prevailed; an example of which occurs in the case of Vaux *v.* Henderson, (*b*) where a testator bequeathed to A $200, "and failing him by decease before me, *to his heirs;*" and the legacy was held to belong to the next of kin of A living at the death of the testa-

(*a*) Co. Litt. 10, a, 22, b; Robinson's Gavelkind, 117, 118.
(*b*) 1 Jacob & Walk. 388, n.

tor. Sir R. P. Arden, M. R., too, in Holloway *v.* Holloway, (*a*) was strongly disposed to give the same construction to the word "heirs," applied to personalty; though his opinion on another question rendered the point immaterial.[1]

But cases of this description must not be understood to warrant the general position that the word *heirs*, in relation to personal estate, imports *next of kin*, especially if real estate be combined with personalty in the gift;[2] which circumstance, according to the principle laid down by Lord Eldon in Wright *v.* Atkyns, (*b*) affords a ground for giving to the word, in reference to both species of property, the construction which
[23] it would receive as to * the real estate, if that were the sole subject of disposition.

Thus, in the case of Gwynne *v.* Muddock, (*c*) where a testator gave all his real and personal estate to A for life; adding, after her death, his "*nearest heir at law* to enjoy the same;" Sir W. Grant, M. R., held, that the heir at law took both the real and personal estate, not the realty only, the testator having blended them in the gift. And even where the entire subject of gift is personal, the word "heir," unexplained by the context, must be taken to be used in its proper sense.

Nor will the construction be varied by the circumstance, that the gift is to the heir in the singular, and there is a plurality of persons conjointly answering to the description of heir. (*d*) Thus, under the words "to my heir £4000," three co-heiresses of the testator were held to be entitled; Sir J. Leach, M. R., observing, "Where the word is used not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word 'heir.'" (*e*)

The words "heirs" and "heirs of the body," applied to personal estate, have been sometimes held to be used synonymously with "children"—a construction which, of course, requires an explanatory context.[3]

(*a*) 5 Ves. 503.
(*b*) Coop. 111; S. C. 19 Ves. 299. See also Pyot *v.* Pyot, 1 Ves. Sen. (4th ed.) 335, where, however, the words of the will being applicable rather to personalty, the construction which obtains, in regard to this species of property, predominated as to both real and personal estate.
(*c*) 14 Ves. 488.
(*d*) See 2 Lord Raym. 829.
(*e*) Mounsey *v.* Blamire, 4 Russ. 384.

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[1] See 4 Kent, (5th ed.) 537, note; Ricks *v.* Williams, 1 Badg. & Dev. Eq. 1; McCabe *v.* Spruil, ib. 189; Wright *v.* Trustees Meth. Epis. Church, 1 Hoff. Ch. 212, 213; Croom *v.* Herring, 4 Hawks, 393.
[2] Evans *v.* Salt, 6 Beavan Ch. 266.
[3] See Shepherd *v.* Nabors, 6 Alabama, 631; Pratt *v.* Flamer, 5 Harr. & Johns. 10.

As, in the case of Loveday *v.* Hopkins, (*a*) where the words were: "Item, I give to my sister Loveday's *heirs* £6000"—"I give to my sister Brady's children equally £1000." At the date of the will, Mrs. Loveday had two * children [24] one of whom was a married daughter, who afterwards died in the lifetime of the testatrix, leaving three children. Mrs. Loveday was still alive, and her surviving child claimed the legacy. Sir Thomas Clarke, M. R., was clearly of opinion, that the testatrix intended to give the £6000 to the children of Mrs. Loveday, the same as in the subsequent clause to Brady's children, and had not their descendants in view; or if she had, yet as she had not expressed herself sufficiently, the Court could not construe the will so as to let them in to take. His honor, therefore, held the surviving child to be entitled to the legacy.[1]

(*a*) Amb. 273.

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[1] Brailsford *v.* Heyward, 2 Desaus. 18; Bowers *v.* Porter, 4 Pick. 198; Richardson *v.* Wheatland, 7 Metcalf, 173, 174. Under a devise to A and his heirs, and to B, who is one of the heirs of A, B takes as devisee and also as heir. Stowe *v.* Ward, 1 Dev. 67; S. C. 3 Hawks, 604. But where a father, by his will, gave one child a specific legacy, and added, "with which she must be contented without receiving any further dividend from my estate," and then devised his land to "my children," the words were held to be construed "the rest of my children." Hoyle *v.* Stowe, 2 Dev. 318.

CHAPTER XXX.

GIFTS TO FAMILY, DESCENDANTS, ISSUE, NEXT OF KIN, RELATIONS, PERSONAL REPRESENTATIVES, EXECUTORS OR ADMINISTRATORS, AND PERSONS OF TESTATOR'S BLOOD OR NAME.

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The word *family* has been variously construed, according to the subject-matter of the gift and the context of the will.[1] Sometimes the gift has been held to be void for uncertainty.

As, in Harland *v.* Trigg, (*a*) where a testator gave leasehold estates to his brother, "J. H. forever, hoping he will continue them in the family," Lord Thurlow thought it too indefinite to create a trust, as the words did not clearly demonstrate an object. The testator's brother was tenant for life in remainder, with remainder to his issue in strict settlement, of some freehold lands, and the testator had given some other leaseholds to the same uses; and it was contended that the leaseholds in question were intended to be subject to the same limitations, so far as the nature of property would admit; but his Lordship considered that this was not authorized. He said, the testator understood how to make his estates liable to those uses, and intended something different here.

So, in Doe d. Hayter *v.* Joinville, (*b*) where a testator devised

(*a*) 1 B. C. C. 142. (*b*) 3 East, 172.

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[1] The acceptation of the word "family" may be narrowed or enlarged by the context of the will, so as, in some instances, to mean children, or in others, heirs, or it may even include relations by marriage. See 2 Williams, Ex. (2d Am. ed.) 818, 819; Blackwell *v.* Ball, 1 Keen, 176; Woods *v.* Woods, 1 My. & Craig, 401; Grant *v.* Lyman, 4 Russ. 292; Doe *v.* Flemming, 2 Cr. Mees. & Ros. 638; Sugden, Powers, (4th Lond. ed.) 525; 2 Story, Eq. Jur. § 1065, b, § 1071; Harland *v.* Trigg, 1 Bro. C. C. (Perkins's ed.) 142–144, and notes; MacLeroth *v.* Bacon, 5 Ves. (Sumner's ed.) 168, and note (*a*).

and bequeathed residuary real and personal estate
[26] *to his wife for life, and, after her decease, one half to his wife's "family," and the other half to his "brother and sister's family," share and share alike; and it appeared that, at the date of the will, the testator's wife had one brother who had two children, and the testator had one brother and one sister, each of whom had children, and there were also children of another sister, who was dead. Upon these facts, it was held, that both the devises were void, from the uncertainty in each case as to who was meant by the word "family;" and in the latter case, also, from the uncertainty whether it applied to the family as well of the deceased, as of the surviving sister; and also whether it referred to the brother; which, however, the Court thought it did not.

Again, in the more recent case of Robinson *v.* Waddelow, (*a*) where a testatrix, after bequeathing certain legacies, in trust for her daughters, who were married, free from the control of any husband, for life, and, after their decease, for their respective children, gave the residue of her effects, to be equally divided between her said daughters *and their husbands and families;* Sir L. Shadwell, V. C., after remarking, that, as, in the gift of the legacy, "any" husband extended to future husbands, in the bequest of the residue, the word "husbands" must receive the same construction, declared his opinion to be, that such bequest as to the husbands and families was void for uncertainty. "The word 'family,'" said his Honor, "is an uncertain term; it may extend to grandchildren as well as children. The most reasonable construction is to reject the words 'husbands and families.'" It was accordingly decreed that the daughters took the residue absolutely as tenants in common. (*b*)

[27] *It will be observed, that, in Harland *v.* Trigg, and Robinson *v.* Waddelow, the subject of gift was personal estate; and in Doe *v.* Joinville, it consisted of both real and personal property, and not of real estate exclusively—a circumstance which we shall see has been deemed material.

Sometimes the word *family* or "house" (which is considered as synonymous) has been held to mean "heir." [1] A leading authority for this construction is the often-cited proposition of Lord Hobart, in the case of Counden *v.* Clerke, (*c*) that if land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house.

(*a*) 8 Sim. 134. See also Stubbs *v.* Sargon, 2 Kee. 253, ante, vol. 1, p. 333.

(*b*) No doubt the testator's real intention was to assimilate the residuary bequest to the legacies; but the V. C. seems to have considered that this hypothesis savored too much of mere conjecture.

(*c*) Hobart's Rep. 29.

[1] See 2 Story, Eq. Jur. § 1071.

So, in Chapman's case, (*a*) where C., seised in fee of three houses, devised that which N. dwelt in to his three brothers amongst them, and N. to dwell still in it, and they to raise no ferme; and willed his house that T., his brother, dwelt in, to him, and he to pay C. £3 6*s.* to find him to school with, and else to remain to the house: the words "and else to remain to the house" were construed to mean the chief, most worthy and eldest person of the family. (*b*)

These authorities were recognized and much discussed in the more recent case of Wright *v.* Atkyns, (*c*) which was as follows:—

A testator devised all his manors, &c. as well leasehold as freehold and copyhold, in certain places, and all other *his real estate, unto his mother, C., and her heirs for [28] ever, in the fullest confidence that, after her decease, she would devise *the property to his family*. The question was, what estate the mother took. It was contended for her, on the authority of Harland *v.* Trigg, that the word "family" was too indefinite to create a trust in favor of any particular objects, and, therefore, that she took the fee. But Sir W. Grant, M. R., relying on the early authorities before referred to, held, there was no uncertainty in the object. It was a trust for the testator's heir. He said: "Cases relative to personal property, or to real and personal comprised in the same devise, or where the meaning is rendered ambiguous by other expressions or dispositions, will not bear upon this question. In the case of Harland *v.* Trigg, Lord Thurlow doubted whether 'family' had a definite meaning. The authorities above alluded to were not cited. *The case related to leasehold estate*, and it was, by other dispositions in the will, rendered uncertain in what way the testator willed the family to take the benefit of the leasehold estates, it being contended he meant to give them to the same uses to which the real estate was settled."

The case was brought before Lord Eldon by appeal. His Lordship admitted the general rule, that, if a man devises lands to A B, with remainder to his *family*, inasmuch as the Court will never hold a devise to be too uncertain, unless no fair construction can be put upon it, the heir at law, as the worthiest of the family, is the person taken to be described by that word. But several circumstances embarrassed the question in this case; one was, that leaseholds were included, *which was not noticed at the Rolls;* and the others were, that it was not a trust simply, but a power which might be exercised at any time

(*a*) Dyer 333, b.

(*b*) But was not the word "house" used in the same sense as in the former part of the will, the effect of the clause being merely to declare that the charge should merge or sink in the property, which was the subject of the devise?

(*c*) 17 Ves. 255.

[29] during the life of the donee, before which period *the object might be dead; and the remaining circumstance was founded on the objection, why should the testator have given this lady a power of devising, if by the words "his family" he only meant his heir at law? As to the first of these circumstances, his Lordship was of the opinion that the word *family*, as had been decided with regard to relations, (*a*) used in a devise of both real and personal estate, must receive the same construction as to both;[1] and he denied the authority of the case, cited 1 Taunt. 266, in which, under a limitation to the family of J. S., the real estate was held to go to the heir at law, and the personalty to the next of kin. In regard to the two other circumstances, his Lordship thought they could not vary the construction; for it was merely what might happen in the case of a similar power to appoint among relations, where all the relations might die before the exercise of the power, or there might originally be but one relation; and it could not be contended, that these circumstances would make any difference in the construction; and, therefore, not in the present case. (*b*) Lord Eldon, accordingly, affirmed the decree at the Rolls.

In the next case, (*c*) the word *family*, applied to real estate, was construed to mean heir *apparent*. A very illiterate testator devised lands into his "sister C.'s family, to go in heirship for ever;" and it was held, that the eldest son and heir apparent of C. was entitled, though it was admitted that the word "family," in another part of the will, and applied to personal

[30] property, meant children; *the Court thinking it no objection, that the same word, when elsewhere applied to a different subject, would receive a different construction.

It is evident that the construction, which reads the word "family" as synonymous with *heir*, only obtains where real estate is included in the disposition; it certainly never would be applied to a bequest of personalty only; and with regard to a gift comprehending both real and personal estate, the point is far from being clear; for though Lord Eldon appears, by Sir Geo. Cooper's report of Wright *v.* Atkyns, to have argued (and most convincingly) that the gift was to be construed as if it had actually embraced, in its operation, both species of property;

(*a*) Coop. 111; 19 Ves. 299. See also 1 Turn. 143.
(*b*) This is a very brief summary of his Lordship's elaborate judgment, which deserves the reader's perusal.
(*c*) Doe d. Chattaway *v.* Smith, 6 Man. & Selw. 126.

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[1] The word "issue" in a will was held on the context to have two different meanings as to two moieties of a devised estate. Carter *v.* Bentall, 2 Beavan, 551.
But, unless there appears a clear intention to the contrary, when a word occurs twice in the same instrument, it is to receive the same meaning in both places. Ridgway *v.* Munkittrick, 1 Dru. & War. 84.

yet as this is at variance with Mr. Vesey's report of the same case, and as the learned Judge, who originally decided it, treated the gift as comprising real estate exclusively, and it was cited as a case of that kind by Lord Ellenborough, in Doe d. Chattaway *v.* Smith, (*a*) it cannot confidently be regarded as an authority for applying the construction in question to a gift comprising both real and personal estate.

In some cases the word *family* has been held to mean *children*. Thus where (*b*) a testator devised the remainder of his estate to be equally divided between "brother L.'s and Sister E.'s family," it was held, by Sir W. Grant, M. R., that the children of L. and E. took as well the real as the personal estate, per capita. In this case the only questions in regard to the objects of the gift were, whether the children took per stirpes, and whether L. and E. were included; both which were decided in
* the negative. In MacLeroth *v.* Bacon, (*c*) the hus- [31]
band was held to be included in the term *family* by force of the context; Sir R. P. Arden, at the same time admitting that, in general, under a power to appoint to A. and her family, the husband is excluded.

The word *family* has also been construed as synonymous with *relations*.[1] (*d*)

Thus, in the case of Cruwys *v.* Colman, (*e*) where a testatrix, after bequeathing her property to her sister for life, whom she made executrix, declared it to be her desire, that she (the sister) should bequeathe "at her own death, to those of her own family, what she has in her own power to dispose of that was mine." Sir W. Grant, M. R., held, that the expression, "of her own family," was equivalent to *of her own kindred*, or of her own relations; and she not having exercised the power, it was, therefore, a trust for her next of kin.

It should seem, then, that a gift to the *family* either of the testator himself, or of another person, will not be held to be void for uncertainty, unless there is something special, creating that uncertainty. The subject-matter and the context of the will are to be taken into consideration. It is observable that wherever the word "family" has been construed to mean children, no one was interested in insisting on its receiving the more en-

(*a*) 1 Mau. & Selw. 129.
(*b*) Barnes *v.* Patch, 8 Ves. 604. See also MacLeroth *v.* Bacon, 5 Ves. 159, [Sumner's ed. 168, Perkins's note (*a*)]; and Doe d. Chattaway *v.* Smith, 5 Mau. & Selw. 126.
(*c*) 5 Ves. 159.
(*d*) As to which see post.
(*e*) 9 Ves. 319.

[1] 2 Williams, Ex. (2d Am. ed.) 818, 819; 2 Story, Eq. Jur. § 1071.

larged signification of relations; for there being no other objects than children, either construction carried it to the same persons; if there had been issue of deceased children, who would have been excluded as children, but might have taken as relations, the question might have arisen. It seems very probable, that, in such a case, the Courts would adopt the more extensive construction, *authorized as it is by the case of Cruwys *v.* Colman, and according to the view suggested of the other decisions, not contradicted by those decisions. Every case, however, must depend upon its particular circumstances.

[32]

A gift to *descendants* receives a construction answering to the obvious sense of the term; namely, as comprising issue of every degree.[1]

In the case of Crossley *v.* Clare, (*a*) a devise of real estate "to the descendants of A now living in and about B, or hereafter living anywhere else," and a bequest of personalty in the same words, were held to apply to all who proceeded from the testator's body, so that grandchildren were entitled, and a great great grandchild was not included, only because born after the date of the will, the words "*now* living" excluding him. It is remarkable, that the decree is silent as to the claim of the great grandchildren who were also parties to the suit, and, if living in B, at the date of the will, were of course included. In Legard *v.* Haworth, (*b*) the word "descendants" was held to refer to children and grandchildren who were objects of an antecedent gift.

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 the place of, his or her parent.[2] (*c*) 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.

Thus, in Rowland *v.* Gorsuch, (*d*) where the testator, as to the residue of his fortune, willed that the descendants *or representatives* of each of his first cousins deceased, should partake in equal shares with his first cousins then alive; Sir Lloyd Kenyon, M. R., considered that the gift applied to first cousins, and all persons who were descendants of first cousins, and who, in quality of descendants, would be enti-

[33]

(*a*) Amb. 207.
(*b*) 1 East, 120.
(*c*) Butler *v.* Stratton, 3 B. C. C. 367.
(*d*) 2 Cox, 187.

[1] See 2 Williams, Ex. (2d Am. ed.) 811.
[2] See Phillips *v.* Garth, 3 Bro. C. C. (Perkins's ed.) 69, note (*b*), and cases cited.

tled, under the Statute of Distributions, to represent them. He had some doubt whether they were to take per capita, or per stirpes; but, upon the whole, he thought that no person taking as representative could take otherwise than as the statute gives it to representatives, *i. e.* per stirpes.

The word *issue*, when not restrained by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree. (*a*)[1] And here the distribution is per capita, not per stirpes. The case of Davenport *v.* Hanbury (*b*) presents a simple example: The bequest was to M. or her issue. M. died in the lifetime of the testator, leaving one son living, and two children of a deceased daughter. Sir R. P. Arden, M. R., held, that these three objects were entitled per capita; and, there being no words of severance, they took as joint tenants.

In the case of Leigh *v.* Norbury, (*c*) we have an instance of the same mode of construction applied to a deed. By indenture, in consideration of an intended marriage, A assigned to trustees all his personal estate, upon trust to permit him to enjoy the same during his life, and, after his decease, in trust for such persons as he should appoint, and, in default of appointment, for the *lawful *issue* of A. A made no appointment, and died leaving several children, some of whom had children. Sir W. Grant, M. R., held, that the property was divisible among all the children and grandchildren per capita. He said, it was clearly settled, that the word "issue," unconfined by any indication of intention, includes all descendants. Intention, he said, was required for the purpose of limiting the sense of that word to children. [34]

In Freeman *v.* Parsley, (*d*) a testator devised and bequeathed a moiety of his personal estate, and of the proceeds of his real estate, (which he directed to be sold,) to T., his heirs, &c. to be divided among A, B, C, and D; "but in case of their decease, or any of them, such deceased's share to be divided among the *lawful issue* of such deceased, and, in default of such issue, such share to be equally divided among the survivors." B, C, and D died in the testator's lifetime, leaving children and grandchildren. Lord Loughborough held, that all were entitled, though he expected that it was contrary to the intention. His Lordship

(*a*) Haydon *v.* Willshere, 3 Durn. & East, 372; Hockley *v.* Mawbey, 1 Ves. Jun. 150; Wythe *v.* Thurlstan, Amb. 555; 1 Ves. Sen. 195, stated more correctly 3 Ves. 258; Horsepool *v.* Watson, 383; Bernard *v.* Montague, 1 Mer. 434.
(*b*) 3 Ves. 257 [Sumner's ed. note (*a*)].
(*c*) 13 Ves. 340.
(*d*) 3 Ves. 421.

[1] 2 Williams, Ex. (2d Am. ed.) 809, 810; Sibley *v.* Perry, 7 Ves. (Sumner's ed.) 522, Perkins's note (*a*) and cases cited; Ram on Wills, c. 7, p. 53; c. 15, § 3, p. 115; Ferrill *v.* Talbott, Ril. Ch. 247; Kingsland *v.* Rapelye, 2 Edw. 1.

regretted, that there was no medium between the total exclusion of the grandchildren, and admitting them to share with their parents.

It will be perceived, that, in all the preceding cases, the subject of disposition was personal estate, or (which is identical for this purpose) the produce of realty. Probably, however, the construction of the word "issue" would not be varied when applied to real estate. It is true, indeed, that the word "issue," when preceded by an estate for life in the ancestor, is frequently construed (as we shall hereafter see) as synonymous with heirs of the body, and as such conferring an estate tail, on the ground that this is the only mode in which the testator's bounty
[35] can *be made to reach the whole class of descendants born and unborn; and it must be confessed, that the same reasoning applies, to a certain extent, in the case now under consideration; for, to adopt any other interpretation, narrows the range of objects, by confining the devise to issue living at a given period, and thereby excluding, it may be, an unlimited succession of unborn descendants, on whom an estate tail would, if not barred, devolve (as in Mandeville's case). But whatever may be the plausibility or force of such analogical reasoning, it has received but little countenance from the cases; there being, it is believed, no direct adjudication in favor of such a construction, while positive authority may be cited against it: as, in the case of Cooke *v.* Cooke, (*a*) where it was held, that, under a devise to the issue of J. S., the children and grandchildren took concurrently an estate for life.

Seeing that the construction, which obtained in this case, has the merit of letting in all the existing issue concurrently, instead of vesting the property in the eldest or only son, (as would generally be the effect of the alternative construction above suggested,) it seems probable that it will be hereafter followed in a similar case; and there appears to be an increased motive for its adoption, now that, under such a devise, (if contained in a will made or republished since the year 1837,) the issue would take the fee.

At all events, if the devise to the issue not only confers an estate in fee, but also contains words of distribution, (which are obviously inconsistent with holding the word "issue" to be synonymous with heirs of the body,) it is clear that issue of every degree are entitled as tenants in common.

Thus, in the case of Mogg *v.* Mogg, (*b*) where, un-
[36] der a *devise to trustees, to pay the profits to the children begotten and to be begotten of M. for their lives, (which vested the legal estate pro tanto in the trustees,) and after the decease of such children, the testator devised the estate

(*a*) 2 Vern. 545. (*b*) 1 Mer. 654.

to the lawful issue of such children, *to hold unto such issue, his, her, and their heirs, as tenants in common*, without survivorship, (and which was held to execute the use *in the issue*,) the Court of King's Bench, on a case from Chancery, certified (*a*) that the issue of such of M's children as were *living at the testator's decease took the remainder in fee, expectant on the estate pur auter vie of the trustees as tenants in common;* and this certificate was confirmed by Sir W. Grant, M. R.

The word "issue," however, may be, and frequently is, explained by the context to bear the restricted sense of *children*.[1] A clause substituting issue for their *parents*, it seems, has such effect, the word "parent" so used being considered to import, according to its ordinary meaning, *father* or *mother*, as distinguished from, and in exclusion of, a more remote ancestor.

Thus, in the case of Sibley *v.* Perry, (*b*) where a testator made certain bequests to several persons, if living at his decease, and, if not, he directed that their lawful *issue* should take the shares which their respective *parents*, if living, would have taken; and he made other bequests to the lawful issue living, at certain periods, of other persons; Lord Eldon thought it was clear, as to the former class, that children were intended, and that this was a ground for giving to the word "issue" the same construction in the other bequests.

On the same principle, in the case of Hampson *v.* Brandwood, (*c*) it was considered that a limitation in a deed
*to the first male issue, *lawfully begotten by A*, was [37]
restricted to *sons;* but the construction seems to have been aided by the context, the next limitation being expressly to *daughters*.

Difficulty, however, often arises from the testator having used the words *issue* and *children* synonymously, rendering it necessary therefore, in order to avoid the failure of the gift for uncertainty, that the prevalency of one of these respective terms should be established. Lord Hardwicke thought, that, where the gift was to several, or the respective *issues* of their bodies, in case any of them should be dead at the time of distribution—viz: to each, or their respective *children* one fourth, followed by a gift to survivors, in case any of them should be dead without issue, the word "children" was not restrictive of "issue" previously mentioned, the videlicet being merely explanatory of the shares to be taken, and not of the objects to take. The word

(*a*) See answer to the query, 1 Mer. 689.
(*b*) 7 Ves. 532 [Sumner's ed. 527, note (*a*)].
(*c*) 1 Madd. 381.

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[1] See Merrymans *v.* Merrymans, 5 Munf. 440; Sibley *v.* Perry, 7 Ves. (Sumner's ed.) 522, Perkins's note (*a*) and cases cited.

"children," therefore, was to be construed as meaning *issue*, and not "issue" abridged to *children*.[1] (*a*)

A devise or bequest to *next of kin* vests the property in the persons (exclusively of the widow) who would take the personal estate,[2] in case of intestacy under the Statutes of Distribution; subject, however, to this material qualification, that it is confined to those who answer the description of next of kin properly so called, to the exclusion of persons who claim by representation under the express clause in the statute of Charles, (*b*)

[38] *entitling the children of the brothers and sisters of the intestate to stand in the place of, and represent their deceased parents. The claim of these representatives has been the subject of many conflicting dicta and determinations. In their favor were the dictum of Lord Kenyon, (*c*) and the decisions of Mr. Justice Buller, (*d*) and Sir J. Leach. (*e*) On the other side were ranged the strongly expressed opinions of Lord Thurlow, (*f*) Lord Eldon, (*g*) and Sir W. Grant, (*h*) and a decision of Sir T. Plumer. (*i*)

Such was the perplexing state of the authorities antecedently to the case of Elmesley *v.* Young, which was as follows: A fund was settled by indenture, upon trust, after failure of certain previous trusts, for such persons as should, at the decease of A, be his *next of kin*. A died, leaving a brother, and the children of a deceased brother. Sir J. Leach, M. R., held, that the children of the deceased brother were entitled to participate in (*i. e.* to take a moiety of) the fund; his Honor's opinion being, that the words "next of kin" imported next of kin according to the Statute of Distributions. (*k*) The case was then brought, by appeal, before Lords Commissioners Shadwell and Bosanquet, who, after a full examination of the conflicting authorities, held

(*a*) Wyth *v.* Blackman, 1 Ves. Sen. 196. See also Horsepool *v.* Watson, 3 Ves. 383; Royle *v.* Hamilton, 4 Ves. 437; Datzell *v.* Welsh, 2 Sim. 319, stated post; Doe d. Simpson *v.* Simpson, 5 Scott, 770, also stated post. The case of Cursham *v.* Newland, 2 Scott, 105, presents the converse ease; for, in a will, where both words were used indifferently, "issue" was restrained to *children*. See also Jennings *v.* Newman, 10 Sim. 219.

(*b*) 22 & 23 Car. II. c. 10, explained by 29 Car. II. c. 30.

(*c*) Stamp *v.* Cooke, 1 Cox, 234.

(*d*) Phillips *v.* Garth, 3 B. C. C. 64.

(*e*) Hinchley *v.* Maclarens, 1 Myl. & Keen, 27.

(*f*) Pbillips *v.* Garth, 3 B. C. C. 64.

(*g*) Garrick *v.* Lord Camden, 14 Ves. 372.

(*h*) Smith *v.* Campbell, Coop. 217.

(*i*) Brandon *v.* Brandon, 3 Swanst. 312.

(*k*) 2 Myl. & Keen, 82.

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[1] To effect the manifest intention of the testator, the word "children" may be taken as synonymous with *issue*. Merrymans *v.* Merrymans, 5 Munf. 440.

[2] Williams, Ex. (2 Am. ed.) 815; Phillips *v.* Garth, 3 Bro. C. C. (Perkins's ed.) 69, note (*b*) and cases cited; 4 Kent, (5th ed.) 537, in note; Wright *v.* Trustees of Method. Epis. Church, 1 Hoff. Ch. 213; M'Cullough *v.* Lee, 7 Ohio, 15.

that the trust applied to the next of kin in the strictest sense of the term, excluding persons entitled by representation under the statute, and, consequently, that A's surviving brother was entitled to the whole fund. (*a*) This decision, concurring
*as it does with the opinions of three of the greatest [39]
equity Judges of recent times, may, it is hoped, be considered to have finally settled this long agitated question.

The construction of the words "legal representatives," or "personal representatives," has presented another perplexing and fruitful topic of controversy.[1] Each of these terms, in its strict and literal acceptation, evidently means "executors," or "administrators," who are, properly speaking, the "personal representatives" of their deceased testator or intestate; but as these persons sustain a fiduciary character, it is improbable that the testator should intend to make them beneficial objects of gift; and almost equally so, that he should mean them to take the property as part of the general personal estate of their testator or intestate, which is, in effect, to make *him* the legatee. Accordingly, in numerous cases, the term "legal representative," or "personal representative," has been construed as synonymous with *next of kin*, or rather as descriptive of the person or persons taking the personal estate under the Statutes of Distribution, who may be said, in a loose and popular sense, to "represent" the deceased.

Thus, in the case of Bridge *v.* Abbot, (*b*) (which is a leading authority for this construction,) a testatrix made a bequest to certain persons, and, in case of the death of any of them before her, (the testatrix,) to his or her *legal representatives;* and Sir R. P. Arden, M. R., held the next of kin to be entitled. This construction has been also adopted in several recent cases. As, in Baines *v.* Ottey, (*c*) where a testator gave certain real and personal estate to trustees, in trust for such persons as A (a married woman) should appoint, and, in default of appointment, for her separate use, and, at her decease, to convey the
real estate to such *person or persons as would be the [40]
heir at law of the said A, and to assign the personal estate to such person or persons as would be the *personal representative* of the said A; Sir J. Leach, M. R., held the next of kin to be entitled.

Again, in the case of Cotton *v.* Cotton, (*d*) where a testator bequeathed the residue of his property to his executors, to be

(*a*) 2 Myl. & Keen, 780.
(*b*) 3 B. C. C. 224. [See Perkins's ed. 227, note (*a*) and cases cited.] See also Long *v.* Blackall, 3 Ves. 486.
(*c*) 1 Myl. & Keen, 465.
(*d*) 2 Beav. 67.

[1] 2 Williams, Ex. (2d Am. ed. 820, et seq.; Taylor *v.* Beverley, 1 Collyer, Ch. 108.

divided between the gentlemen thereafter named, *or the legal representatives* of the said gentlemen, in the proportion that the sums set against their names bore to each other. The testator wrote the names of twelve persons, opposite to which he placed different figures. One of these persons was dead at the date of the will, having left a will. Lord Langdale, M. R., held, that the next of kin of the deceased person named by the testator, not the residuary legatees, were entitled.

And as a testator is supposed to have a different meaning whenever he uses a different expression, it is always a circumstance favorable to the construction which reads the words "legal" or "personal representatives" as denoting *next of kin*, that there is elsewhere in the same will, and in reference to another subject of disposition, a gift to the executors or administrators of the same individual.

Thus, in the case of Walter *v.* Makin, (*a*) where a testator gave £450 to trustees, in trust for his son for life, and after his son's decease to pay thereout two legacies of £100 each to two of his daughters, and to pay the residue to the *legal representatives* of his son; and he gave the residue of his personal estate to his son, his *executors*, *administrators*, *and assigns;* Sir L. Shadwell, V. C., held, that the words "legal representatives" meant next of kin.

[41] * So, in the case of Robinson *v.* Smith, (*b*) where the bequest was to M., his executors, &c. in trust to pay the interest to the testator's daughter, S., wife of M., for her separate use for life, and, after her decease, to pay the trust moneys to such persons as S. by will should appoint, and, in default, to her *personal representatives*. S. died in her husband's lifetime, without having made any appointment, and her husband claimed the fund as her administrator; but Sir L. Shadwell, V. C., decided that the next of kin of the wife were beneficially entitled.

Indeed, so strong has been the leaning sometimes in favor of the construction which gives to words pointing at succession or representation the sense of next of kin, that even a gift to *executors* or *administrators* has been thus construed.

As in the case of Palin *v.* Hills, (*c*) where a testator, after bequeathing certain pecuniary legacies, declared that, in case of the death of any or either of the legatees, his or her legacy should go *to his or her executors or administrators;* Sir J. Leach, M. R., held, that the residuary legatee of one of the legatees, who died in the testator's lifetime, was entitled to the legacy;

(*a*) 6 Sim. 148.

(*b*) 6 Sim. 47. In another case, in the same volume, (Styth *v.* Monro, 6 Sim. 49,) the word "representatives" was construed, by force of the context, as synonymous with *descendants*.

(*c*) 1 Myl. & Keen, 470. But see Wallis *v.* Taylor, 8 Sim. 241, stated post, 44.

but his decree was reversed by Lord Brougham, C., who decided in favor of the next of kin, on the authority of the case of Bridge *v.* Abbot; (*a*) his Lordship thinking, that a gift to executors or administrators was wholly undistinguishable from a gift to legal representatives.

From cases of this description, however, we must carefully * distinguish those in which the words "executors and administrators," or "legal representatives," are used as mere words of limitation. [42]

As in the common case of a gift to A and his executors or administrators, or to A and his legal representatives, which will, beyond all question, vest the absolute interest in A. (*b*) The same construction, too, in some instances, has been applied in cases of a more doubtful complexion; as where the bequest was to A for life, and, after his decease, to his executors or administrators. (*c*)

In the case of Price *v.* Strange, (*d*) a testator devised real estate to his wife during widowhood, and, at her death or marriage, to trustees, upon trust for sale, and directed that, in case the death or second marriage of his wife should not happen until his youngest child, being a son, should have attained twenty-three, or, being a daughter, should have attained that age, or be married with consent, his trustees should immediately after the receipt of the money arising from the said real estates, pay and divide the same among such of his children as should be then living, *and the legal representative or representatives of him, or them, as should be then dead;* and in case such death or marriage of his said wife should happen during the minority of any of his said children, then the testator directed the trustees to pay an equal proportion of the said money to such of his children as should, at that time, be entitled to receive their shares, in case he, she, or they had been then living, *and, if dead, then to his, her, or their legal representatives:* Sir J. Leach, V. C., was of opinion that these words operated as words * of limitation, and that a child attaining twenty-three, who died during the widowhood of the wife, took a vested interest. [43]

And it should seem, that where the word "assigns" is subjoined to "executors and administrators," they are always read as words of limitation, and not as designating *next of kin.*

Thus, in Grafftley *v.* Humpage, (*e*) where a sum of £4000 was bequeathed by A to trustees, in trust for his wife and daughter, and the survivor, for life, for their separate use, and,

(*a*) Ante, 39.
(*b*) Lugar *v.* Harmar, 1 Cox, 250.
(*c*) Co. Litt. 54, b.; Socket *v.* Wray, 4 B. C. C. 483.
(*d*) 6 Madd. 159.
(*e*) 1 Beav. 46. See also Hames *v.* Hames, 2 Keen, 646.

after the decease of the survivor, in trust for the daughter's children, if any, and if none, then the testator gave one moiety of the £4000 to his brother I., and the other moiety to such persons as the daughter should, by deed or will, appoint, and in default, to *the executors, administrators, or assigns* of the daughter. The daughter died in the lifetime of her husband, childless, and without having made any appointment; and the husband was, on the ground above mentioned, held to be entitled as her administrator.

Supposing the words "executors" or "administrators" not to be used as words of limitation, the question arises, whether the property so given vests in the persons answering such description for their own benefit, or is to be administered as part of the personal estate of the testator or intestate.[1]

The former result, indeed, is so manifestly contrary to probable intention, that the case of Evans *v.* Charles, (*a*) in which this construction prevailed, has been generally condemned; and the Judge, whose solitary approbation the decision has elicited, did not choose to follow its authority; (*b*) and such a
[44] construction would * be the more palpably absurd, now that, by express enactment, (*c*) executors are excluded from taking beneficially, by virtue of their office, even the undisposed-of personal estate of their testator. Accordingly, it seems to be established, that, unless a contrary intention appears by the context, whatever is bequeathed to the executors or administrators of a person vests in them as part of the personal estate of the testator or intestate.

Thus, where (*d*) a testator bequeathed £500 to B during the life of A, and if B died in A's lifetime, then to such persons as B should by will appoint, and, in default of appointment, *to his executors or administrators;* Lord Langdale, M. R., held, that the executor of B was bound to apply the legacy according to the purposes of the will. It is singular that no claim was advanced by the next of kin, on the authority of the case of Palin *v.* Hills.

If, however, the testator explicitly declares that the executors or administrators shall be entitled for their own benefit, this construction must prevail against any suggestion as to the improbability of such a mode of disposition.

As, in Wallis *v.* Taylor, (*e*) where the testatrix bequeathed a

(*a*) 1 Astr. 128. See also Churchill *v.* Dibben, Sugd. Pow. (4th ed.) 276, n.
(*b*) See Long *v.* Blackall, 3 Ves. 483.
(*c*) Vide stat. 1 Wm. IV. c. 40.
(*d*) Stocks *v.* Dodsley, 1 Keen, 325. See also Hames *v.* Hames, 2 Keen, 646.
(*e*) 8 Sim. 241.

[1] If a legacy be given to an executor in that character, he cannot take it, unless he qualifies and makes himself executor. Rothmaler *v.* Myers, 4 Desaus. 215.

fund to trustees, in trust to pay the interest for the separate use of her daughter for life, and, after her decease, upon trust to transfer the principal to her executors or administrators, *to and for his, her, or their use and benefit absolutely forever;* Sir L. Shadwell, V. C., held, that the husband of the daughter, on his taking out administration, was absolutely entitled for his *own benefit. [45]

In this case, the point of contention was not so much whether the administrator was entitled in his own right beneficially, or in his representative character, (this being, in regard to a husband-administrator, a matter of no importance, unless there are creditors, as he retains the property for his own benefit,) but whether, according to the case of Palin *v.* Hills, the bequest was not to be construed as applying to the next of kin. The testator's intimation, that the legatees should take for their own benefit, was not only consistent with, but, perhaps, was rather favorable to, this construction, as tending to show that the testator had in his view persons who might reasonably be presumed to be intended as beneficial objects of gift.

The word *relations*, taken in its widest extent, embraces an almost illimitable range of objects; for it comprehends persons of every degree of consanguinity, however remote, and hence, unless some line were drawn, the effect would be, that every such gift would be void for uncertainty. In order to avoid this consequence, recourse is had to the Statutes of Distribution; and it has been long settled, that a bequest to relations applies to the person or persons who would, by virtue of those statutes, take the personal estate under an intestacy, either as next of kin, or by representation of next of kin.[1] (*a*)

It was formerly doubted whether this construction extended to devises of real estate; but the affirmative was decided in the case of Doe d. Thwaites *v.* Over, (*b*) where a testator devised all *his freehold estates to his wife for life, and, [46] at her decease, to be equally divided *among his relations on his side;* and it was held, that the three first cousins of the

(*a*) 3 Ch. Rep. 77; Pre. Ch. 402; Gilb. Eq. Ca. 92; 1 Atk. 469; Ca. Temp. Talb. 251; 2 Eq. Ca. Ab. 368, pl. 13; Dick. 50, 380; Amb. 70; 1 Durn. & E. 435, n. 437, n.; 3 B. C. C. 234; 4 Id. 207; 8 Ves. 38 [Sumner's ed. note (*a*)]; 9 Ves. 319 [Sumner's ed. note (*c*) and cases cited]; 3 Mer. 437, 689. But as to *powers* in favor of relations, see 2 Sugd. Pow. (6th ed.) 255, 262.

(*b*) 1 Taunt. 263.

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[1] Green *v.* Howard, 1 Bro. C. C. (Perkins's ed.) 33 note (*a*) and cases cited; McNeilledge *v.* Galbraith, 8 Serg. & R. 43; McNeilledge *v.* Barclay, 11 Serg. & R. 103; Rayner *v.* Mowbray, 3 Bro. C. C. (Perkins's ed.) 235, note (1) and cases cited; 2 Williams, Ex. (2d Am. ed.) 812, 813. See Grant *v.* Lyman, 4 Russ. 92; 4 Kent, (5th ed.) 537, note; Wright *v.* Trustees Meth. Epis. Church, 1 Hoff. Ch. 213; M'Cullough *v.* Lee, 7 Ohio, 15; Devisme *v.* Mellish, 5 Ves. (Sumner's ed.) 529, note (*a*). The bequest of a residue to a daughter, and at her death within age, to the testator's "nearest relations or connections, according to the laws of the Commonwealth," does not, in Pennsylvania, include his widow. Storer *v.* Wheatley, 1 Penn. State Rep. 506.

testator, who were his next of kin at his death, were entitled.[1] A counter claim was made by the heir at law, who was the child of a deceased first cousin, and who contended, that the devise was void for uncertainty. One of the first cousins, who was the nearest paternal relation, also claimed the whole, as being designated by the words "on my side;" but the Court was of opinion, that those words did not exclude the maternal relations, they being as nearly related to the testator as the relations ex parte paterna.

The rule which makes the Statute of Distributions the guide in these cases, is not departed from on slight grounds. Thus, the exception out of a bequest to relations, of a nephew of the testator (who was the son of a living sister) was not considered a valid ground for holding the gift to include other persons in the same degree of relationship, and thereby let in the children of a living sister, to claim concurrently with their parent, and other surviving brothers, sisters, and the children of a deceased brother of the testator. (*a*)

There is, it seems, no difference in effect between a gift to *relations* in the plural, and *relation* in the singular; the former would apply to a single individual, and the latter to any larger number; the term *relation* being regarded as nomen collectivum. And this construction obtained in one case (*b*) where the expression was "my *nearest* relation of the name of the Pyots."

The Statute of Distributions not only determines the objects of a gift to relations, but also regulates the proportions
[47] *in which they take, the gift being held to apply to the next of kin, and the person whom the statute admits by representation, the whole taken per stirpes, not per capita; that is, the property is distributed proportionably among the stocks, not equally among the several individual objects of every degree.[2]

Thus, if a testator bequeathes personal estate to his relations, and dies leaving a child and two grandchildren, the children of a deceased child, and also a great grandchild sprung from the same stock, but whose parent is dead, the property is divisible into moieties; one of which goes to the surviving child of the testator, and the other is again divided into thirds, two of which belong to the two surviving grandchildren of the testator, and the remaining third to the child of the deceased grandchild; as the statute allows representation among lineal descendants through all the degrees indefinitely. If, however, the testator

(*a*) Rayner *v.* Mowbray, 3 B. C. C. 234.
(*b*) Pyot *v.* Pyot, 1 Ves. Sen. 337.

[1] See next preceding note.
[2] Tillinghast *v.* Cook, 9 Metcalf, 143, 147, 148; Daggett *v.* Slack, 8 Metcalf, 450. See Kean *v.* Roe, 2 Harring. 103.

had himself left no descendant, and the facts above suggested were applicable to the family of a deceased brother, the second moiety would have been distributable solely among the two surviving grandchildren of the deceased (*i. e.* the testator's great nephews,) to the exclusion of the great grandchildren (*i. e.* the testator's great-great-nephews); as the Statute of Distributions does not admit of representation among collaterals beyond brothers' and sisters' children.[1]

If, however, the testator has introduced into the gift expressions pointing at equality of participation, of course the statutory mode of distribution is excluded, and all the objects of every degree are entitled in equal shares. (*a*)

And even in the absence of any expressions of this nature, such is the destination of the property in analogy to the statutory rule, under a gift to relations, where [48] all the objects within the line are of equal degree; for instance, if the testator left no child but nine grandchildren descended from two stocks, the property would be divisible, not (as in the case before suggested) into moieties, one to the children of each deceased child, but among all the grandchildren pari passu *i. e.* each would take one ninth; the distribution in the one case being per stirpes, and in the other per capita.

The objects of a gift to "relations" are not varied by its being associated with the word "near." (*b*) But where the gift is to the "nearest relations," the next of kin will take, to the exclusion of those who, under the statute, would have been entitled by representation. Thus, surviving brothers and sisters would exclude the children of deceased brothers and sisters, (*c*) or a living child or grandchild, the issue of a deceased child or grandchild. Where, however, the testator added to a devise to nearest relations, the words "as sisters, nephews, and nieces," Sir Lloyd Kenyon, M. R., directed a distribution according to the statute; and they were held to take per stirpes, though it was contended, that all the relations specified should take per capita, including the children of a living sister. His Honor, however, thought that the testator had a distribution according to the statute in his view; at all events, that the contrary was not sufficiently clear to induce him to depart from the com-

(*a*) Thomas *v.* Hole, Cas. Temp. Talb. 251; Green *v.* Howard, 1 B. C. C. 31; Rayner *v.* Mowbray, 3 Id. 234; Butler *v.* Stratton, Id. 369.

(*b*) Whithorne *v.* Harris, 2 Ves. Sen. 527. See also 19 Ves. 403.

(*c*) Pyot *v.* Pyot, 1 Ves. Sen. 335; Marsh *v.* Marsh, 1 B. C. C. 293; Smith *v.* Campbell, 19 Ves. 400 [Sumner's ed. note (*c*) and cases cited]; S. C. G. Coop. 275, But see Edge *v.* Salisbury, Amb. 70.

[1] By the law and practice of Connecticut, where the testator bequeathes the residue of his personal property to his heirs, and when the will is executed, and when the testator dies, his only heirs are children of deceased brothers and sisters, and the representatives of others that are dead, the nephews and nieces will take *per stirpes* and not *per capita*. Cook *v.* Catlin, 25 Conn. 387.

mon rule. The children of the living sister, therefore, were excluded. (*a*)

As relations by the half-blood are within the statute, so they are comprehended in gifts to next of kin and to
[49] *relations; and a bequest to the next of kin of A "of her own blood and family as if she had died sole, unmarried, and intestate," has received the same construction. (*b*)

A gift to next of kin or relations, of course, does not extend to relations by affinity, (*c*) unless the testator has subjoined to the gift expressions declaratory of an intention to include them. Such, obviously, is the effect of a bequest expressly to relations "by blood or marriage," which lets in all persons married to relations. (*d*) It is clear that a gift to next of kin or relations does not include a husband (*e*) or wife;[1] (*f*) and such has been also the adjudged construction of a bequest to "my next of kin *as if I had died intestate;*" (*g*) the latter words being considered not to indicate an intention to give to the persons entitled under the statute at all events; *i. e.* whether next of kin or not.

A difficulty in construing the word *relations* sometimes arises from the testator having superadded a qualification of an indefinite nature; as where the gift is to the *most deserving* of his relations; or to his *poor or necessitous* relations. In the former case, the addition is disregarded, as being too uncertain; (*h*) and the better opinion, according to the authorities is, that the word *poor* also is inoperative to vary the construction, though
[50] the cases are somewhat conflicting. (*i*) In an *early case, (*k*) it was said that the word "poor" was frequently used as a term of endearment and compassion; as one often says, my poor father, &c.; and accordingly a countess (but who, it seems, had not an estate equal to her rank) was held to be entitled under such a bequest. In Widmore *v.* Woodroffe, (*l*)

(*a*) Stampe *v.* Cooke, 1 Cox, 234.
(*b*) Cotton *v.* Scarancke, 1 Madd. 45.
(*c*) Maitland *v.* Adair, 3 Ves. 231 [Sumner's ed. note (*b*)].
(*d*) Devisme *v.* Mellish, 5 Ves. 529 [Sumner's ed. note (*a*)].
(*e*) Watt *v.* Watt, 3 Ves. 244 [Sumner's ed. note (*a*)]; Anderson *v.* Dawson, 15 Ves. 537; Bailey *v.* Wright, 18 Ves. 49 [Sumner's ed. note (*a*)].
(*f*) Nicholls *v.* Savage, cit. 18 Ves. 53.
(*g*) Garrick *v.* Lord Camden, 14 Ves. 372.
(*h*) Doyley *v.* Attorney-General, 4 Vin. Abr. 485, pl. 16; S. C. 2 Eq. Ca. Abr. 194, C. 15.
(*i*) Widmore *v.* Woodroffe, Amb. 636; S. C. Anon. 1 P. W. 376.
(*k*) Anon. 1 P. W. 376.
(*l*) Amb. 636.

[1] In the ordinary sense, neither the husband nor wife can be said to be next of kin to each other. 3 Kent (5th ed.) 136; Watt *v.* Watt, 3 Ves. (Sumner's ed.) 244, note (*a*) and cases cited; Whitaker *v.* Whitaker, 6 Johns. 112; Hoskins *v.* Miller, 2 Dev. 360; Dennington *v.* Mitchell, 1 Green, Ch. 243; Byrne *v.* Stewart, 3 Desaus. 135; Storer *v.* Wheatley, 1 Penn. State Rep. 506, cited ante, 33, in note.

a testator bequeathed two thirds of his property *to the most necessitous of his relations* by his father's and mother's side; and Lord Camden said the bequest would stand upon the word *relations* alone, *the word poor being added, made no difference;* there was no distinguishing between the degrees of poverty. This decision may be considered to have overruled the earlier cases of Jones *v.* Yeale (*a*) and Attorney-General *v.* Buckland, (*b*) in each of which a gift to *poor relations* was extended to necessitous relations *beyond* the Statutes of Distribution.

In several cases, gifts to poor relations seem to have been regarded as charitable dispositions.

Thus in the case of Isaac *v.* Defriez, (*c*) where the bequest was to the testator's own and his wife's "poorest relations," to be distributed proportionably, share and share alike, at the discretion of his executors, it seems to have been considered as a charity, but was confined to persons who were within the Statutes of Distribution.

So in Brunsden *v.* Woolredge, (*d*) where B. bequeathed £500 on a certain event, to be distributed among his mother's poor relations. Also W. (the brother of B.), devised real estates to A and his heirs, in trust to sell to pay debts, and pay the overplus to such of his mother's *poor relations*, as A, his heirs, &c., should think objects of charity; Sir Thomas Sewell, M. R., held, that the *construction of both wills was, [51] "such of my mother's relations as are poor and proper objects." He said the difference was, that the latter gave a discretionary power to the executor, and the former did not.

Again in the case of White *v.* White, (*e*) a legacy of $3000 for the purpose of putting out poor relations apprentices was supported as a charity.

In the case of Mahon *v.* Savage, (*f*) a testator bequeathed to his executor £1000, to be distributed among his (the testator's) *poor relations*, or such other objects of charity as should be mentioned in his private instructions. He left no instructions; and it was held by Lord Redesdale that the testator's design was to give to them as objects of charity, and not merely as relations. His Lordship thought that the executors had a discretionary power of distribution, and need not include *all* the testator's poor relations.

This case is clearly distinguishable from a simple gift to poor relations; for the additional words denoted that charity was the main object of the testator. The same remark applies to the will of W. in Brunsden *v.* Woolredge; which decision, in regard

(*a*) 2 Vern. 381.
(*b*) Cited 1 Ves. Sen. 231.
(*c*) Amb. 495; more correctly, 17 Ves. 373, n.
(*d*) Amb. 507; S. C. Dick. 380.
(*e*) 7 Ves. 423; see Attorney-General *v.* Price, 17 Ves. 371.
(*f*) 1 Sch. & Lef. 111.

to the will of B., is not reconcilable with Widmore *v.* Woodroffe; but the Court probably allowed itself to be influenced by the terms of the other will.

In a subsequent case, (*a*) Sir J. Leach, M. R., held that a devise of real estates to trustees "in trust to pay the rents to such of my *poor relations* as my trustees shall think most deserving," was a charitable trust, and consequently was void as a gift of an interest in land.

[52] The question, however, which more than any other has * been the subject of controversy in gifts to next of kin and relations, refers to the period at which the objects are to be ascertained;[1] in other words, whether the person or persons who happen to answer the description at the testator's death, or those to whom it applies at a future period, are intended. Where a devise or bequest is simply to the testator's own next of kin, it necessarily applies to those who sustain the character at his death. It is equally clear, that where a testator gives real or personal estate to A (a stranger) during his life, or for any other limited interest, and afterwards to his own next of kin, those who stand in that relation at the death of the testator will be entitled, whether living or not at the period of distribution; (*b*) there being nothing in the mere circumstance of the gift to the next of kin being preceded by a life or other limited interest to vary the construction; the result in fact being the same as if the gift had been "to my next of kin, *subject to a life interest in A.*" The death of A is the period, not when the objects are to be ascertained, but when the gift takes effect in possession.

Where the gift is to the next of kin of a person then actually dead, or who happens to die before the testator, the entire property (at least, if there be no words severing the joint tenancy) vests in such of the objects as survive the testator. (*c*) If it be to the next of kin or relations of a person who outlives the testator, of course the description cannot apply to any individual or individuals at his (the testator's) decease, or at any other period during the life of the person, whose next of kin

[53] are the objects of * gift. (*d*) The vesting must await his death, and will apply to those who first answer

(*a*) Hall *v.* Attorney-General, Rolls, 28 July, 1829.

(*b*) Harrington *v.* Harte, 1 Cox, 131. See also 3 B. C. C. 284; 4 Id. 207; 3 East, 278; 3 Mer. 689.

(*c*) Vaux *v.* Henderson, 1 Jack. & Walk. 388, *n.* There being no words of severance, the question, whether the gift could be read as applying to such of the next of kin as survive the testator, did not arise, as they were entitled quacunque.

(*d*) Danvers *v.* Earle of Clarendon, 1 Vern. 35.

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[1] 2 Williams, Ex. (2d Am. ed.) 816, 817, 818; Spink *v.* Lewis, 3 Bro. C. C. (Perkins's ed.) 358, note (*a*); Jones *v.* Colbeck, 8 Ves. (Sumner's ed.) 38, Perkins's note. (*a*)

the description, without regard to the fact whether by the terms of the will the distribution is to take place then or at a subsequent period. (*a*)

The rule of construction, which makes the death of the testator the period of ascertaining the next of kin, is adhered to, notwithstanding the terms of the will confine the gift to the next of kin *living* at the period of distribution; for this merely adds another ingredient to the qualification of the objects, and makes no farther change in the construction. Indeed, it rather affords an argument the other way.

Thus, where (*b*) a testator directed personal estate, and the produce of real estate, to be laid out for accumulation for ten years, and then a certain part thereof divided among such of the next of kin and personal representatives of B, *as should be then living*, Lord Thurlow held, that the next of kin at the testator's death, *surviving the specified period*, were entitled; *for it was plain that the testator meant some class of persons, of whom it was doubtful whether they would live ten years.*

The same construction prevails, though the tenant for life, at whose death the distribution is to be made, is himself one of the next of kin. As where (*c*) a testator bequeathed £5000 in trust for his daughter for life, and after her decease for her children living at her decease, in such shares as she should appoint; and in case she should leave no child, then as to £1000 part thereof in trust for the executors, administrators, and assigns of the daughter; and as to £4000, the remainder, in trust for the person or persons who should be his heir or heirs [54] at law. The daughter died without leaving children. She and two other daughters were the testator's heirs at law, Sir R. P. Arden, M. R., held, the heirs *at the time of the testator's death* to be entitled, from the absence of expression, showing that these words were necessarily confined to another period, which, he said, required something very special. He thought the word "heirs" was to be construed as next of kin, but this it was unnecessary to determine, the daughters being entitled quacunque via.

But it should seem that if there is a gift to a person for life, with remainder to the testator's relations, and the person taking the life interest is the *sole* next of kin at the death of the testator, the gift will be considered as referring to the person answering the description at the death of the tenant for life.

Thus in the case of Jones *v.* Colbeck, (*d*) where a testator devised the residue of his estate to the children of his daughter M., and until she should have children, or if she should survive them, then to the separate use of M. during her life; and after the decease of his said daughter and her children, in case they

(*a*) Cruwys *v.* Colman, 9 Ves. 319.
(*b*) Spink *v.* Lewis, 3 B. C. C. 355.
(*c*) Holloway *v.* Holloway, 5 Ves. 399.
(*d*) 8 Ves. 38.

should all die under twenty-one, that the residuum should go and be distributed *among his relations* in a due course of administration. The daughter was the only next of kin at the testator's death. Sir W. Grant, M. R., thought it was clear that the testator intended to speak of relations not at the time of his own death, but at that of his daughter, or her issue under twenty-one; his Honor deeming it impossible that the testator could mean that the relations who were to take in that event, were the daughter herself, who the testator evidently thought would survive him.

[55] *But might not the testator, instead of giving to the daughter nominatim, choose to give to her by a description, which if she died in his lifetime would carry his bounty to other objects? Sir R. P. Arden's principle was, that where a testator has constituted his devisees by a general description, these words must be considered as referring to the death of the testator, "unless by the context, or by the express words, they plainly appear to be intended otherwise;" but this principle seems to have been somewhat relaxed in the last case, and perhaps still more so in those remaining to be stated, in which a strong disposition is manifested to adhere to the doctrine of the case of Jones *v.* Colbeck. Thus in Briden *v.* Hewlett, (*a*) where a testator bequeathed all his personalty in trust for his mother for life, and after her decease, unto such persons as she by will should appoint; and in case his mother should die without a will, then *to such person or persons as would be entitled to the same by virtue of the Statute of Distributions.* The mother was the testator's sole next of kin at his death; and Sir J. Leach, M. R., held that she was not entitled absolutely in this character, and that the property devolved to the testator's next of kin at the time of the decease of the mother. "It is impossible," said his Honor, "to contend that this testator meant to give the property in question absolutely and entirely to his mother, because he gives it to her for life, with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons as would be entitled to it by virtue of the Statute of Distributions. Entitled at what time? The word 'would' imports that the testator intended his next of kin at the death of his mother."

[56] *And even where the construction which refers the description to next of kin at the period of distribution, was excluded by a declaration that the next of kin should take vested interests at the testator's death, this was considered as not affording a ground for letting in the prior legatee for life, (who was the sole next of kin at that period,) but the gift was held to apply to the persons who would have been next of kin

(*a*) 2 Myl. & Keen, 90. But see Harvey *v.* Harvey, post, 74, n.

at the testator's death, *if the legatee for life had been then dead*, without issue, the context appearing to aid this construction.

Thus, in the case of Bird *v.* Wood, (*a*) where the bequest was to the testatrix's daughter for life, and, after her death, as she should appoint, and, in default of appointment, to her (the testatrix's) next of kin, to be *considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter.* The daughter having died childless, and without making any appointment, Sir J. Leach, V. C., held, that the persons who would be next of kin at the testatrix's death, if her daughter had been then dead without children, were plainly intended. The daughter herself could not be such next of kin; for they were to take at her death.

The exception of the daughter's children seems to give rather a special character to this case.

And it seems, that if property be given to a testator's next of kin in defeasance of a prior gift in favor of persons, who, if they survive him, will be his next of kin at his death, the gift is considered as pointing to next of kin at a future period.

As where (*b*) a testator bequeathed the residue of his personal estate, upon trust (among other things) to raise the sum of £200, and pay the same to his son J., and he gave the interest * of the residue of the personalty [57] to his (testator's) widow for life; and after her decease, one moiety to his son C., and the other moiety thereof to J. By a codicil he declared, that in case his son C. should die in the lifetime of the testator's widow, and his son J. should be living, he gave to J. the share of C.; but in case C. and J. should both die in the lifetime of the testator's wife, he directed, that, after her decease, the whole of the residue of his personal estate, after securing a certain annuity, should go to, and be divided among *all and every his* (*the testator's*) *next of kin, in equal shares.* C. and J. survived the testator, and died in the lifetime of the widow. Sir W. Grant, M. R., held, that, as the testator had given by express bequest to his sons, who were his next of kin living at his death, he must, when he used the term "next of kin," have meant his next of kin at some other period than at his decease, and, therefore, that the next of kin *at the death of the widow*, and not at the death of the testator, were entitled.

It is to be observed, however, that the sons, even if they survived the testator, were not *necessarily* his *sole* next of kin at his death, as he might have had other children.

And the circumstance, that the prior legatee, whose interest, on his death without issue, or other such contingency, is divested in favor of the ulterior gift to the testator's next of kin, was

(*a*) 2 Sim. & Stu. 400. (*b*) Miller *v.* Eaton, Coop. 272.

one of such next of kin at the time of his (the testator's) death has been deemed a sufficient ground for construing the words to import next of kin at the happening of the contingency.

Thus, in the case of Butler *v.* Bushnell, (*a*) where
[58] a testator bequeathed certain shares in his *residuary estate to his daughters for their lives, and, after their respective deceases, to their children; and, in case there should be no child or children of his daughters respectively, who should attain twenty-one or marry, then, *in trust for such person or persons who should happen to be his (the testator's) next of kin according to the Statute of Distributions.* One of the daughters, who survived the testator, died without issue; and Sir J. Leach, M. R., decided that her share devolved to the testator's next of kin at the decease of the daughter, and not to the next of kin at his own death, on the ground of the improbability that the testator should mean to include, as one of his next of kin, the person upon whose death, without issue, he had expressly directed that the property should go over.

Of course, if property be given upon certain events to such persons as shall *then* be next of kin or relations of the testator, the persons standing in that relation at the period in question, whether so or not at the death of the testator, are, upon the terms of the gift, entitled. (*b*)

It is worthy of remark, that, in all the cases in which the words "next of kin" have been held to refer to next
[59] *of kin at the period of distribution, the subject of gift was personal estate; and it seems somewhat doubtful how far the construction would apply to devises of real estate, seeing the stronger disinclination of the Courts, in reference to realty, to suspend the vesting. It is also observable, that in every instance in which this construction has prevailed, the person on whose decease the gift over to next of kin was made to take effect, was the expectant next of kin at the date of the will; and, therefore, the cases do not necessarily decide what would be the effect where such persons became next of kin through subsequent events occurring in the testator's lifetime. These remarks are suggested by the case of Pearce *v.*

(*a*) 3 Myl. & Keen, 232.

(*b*) Long *v.* Blackall, 3 Ves. 486. It should be observed, that the cases of Jones *v.* Colbeck, and Miller *v.* Eaton, which are here referred to special grounds, have been cited by a respectable text-writer, as authorities for the position that a bequest to the next of kin after a life interest, *refers to those who answer the character at that time*, 1 Rob. on Wills, 3d. ed. 432. This is not only directly opposed to the general principles which govern the vesting of estates,† but also to the strong line of authorities before cited in support of the contrary general rule; to which may be added Holloway *v.* Holloway, and other cases of the same class before mentioned. It is, moreover, inconsistent with the principle on which Sir W. Grant rested his decision in each of the first-mentioned cases themselves, as will be seen by a perusal of his judgments.

† As to which, see ante, vol. 1, p. 726.

Vincent, (*a*) where a testator devised lands to his cousin, T. Pearce, *for life*, and, after his decease, to such of the testator's relations of the name of Pearce (being a male) as his cousin T. Pearce should by deed appoint, and, in default of appointment, to such of the testator's relations of the name of Pearce (being a male) as T. Pearce should adopt, if he should be living at the time of the decease of T. Pearce; and, in case T. Pearce should not have adopted any such male relation of the testator, or, in case he should have done so, and there should not be any such male relation living at the decease of T. Pearce, then the testator devised the property to *the next or nearest relation or nearest of kin of himself of the name of Pearce, (being a male,) or the elder of such male relations, in case there should be more than one* of equal degree, who should be living *at the testator's decease*, his heirs, executors, administrators, and assigns, forever. The will also contained a power to T. Pearce, to lease for any term not exceeding seven years. T. Pearce, the tenant for life, died without issue, and without having *executed the powers of appointment or adoption given by the will. The nearest of kin of the testator, living at the time of his decease, (which occurred in 1814,) were — first, his cousin T. Pearce, (the devisee for life,) aged sixty-seven; secondly, his cousin Richard Pearce, the son of another uncle, and who was aged sixty-six; and, thirdly, William Pearce, a younger brother of Richard. The testator had a brother named Zachary, who, if living at his death, would have been his nearest of kin; but it appeared that he went to sea, and had not been heard of since 1795. The question was, what estate, assuming Zachary to have died without issue in the lifetime of the testator, Thomas or Richard took under the ultimate limitation? Sir John Leach, M. R., sent a case on this point to the Judges of the Court of Exchequer, who certified their opinion, that Thomas took an estate in fee in the real estate, and the absolute interest in the personalty. The M. R., being dissatisfied with the certificate, sent a case to the Common Pleas, the Judges of which were of the same opinion; and these certificates, after some argument, were confirmed by Lord Langdale, (who had in the mean time succeeded Sir J. Leach at the Rolls,) and whose judgment contains a very clear statement of the principle of the decision. "The question is," said his Lordship, "whether Thomas Pearce, being devisee for life, and filling the character of the person to whom the testator has given his estates in certain events, is, because he is tenant for life, to be excluded from taking under the description in the ultimate limitation, which he afterwards

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(*a*) 1 Cromp. & Mees. 598; 2 Myl. & Keen, 800; 2 Scott, 347; 2 Bing. N. C. 328; 2 Keen, 230, S. C.

filled? It is tolerably clear, that a vested interest was given to the person who should, at the time of the testator's death, answer the description in the ultimate limitation, which vested interest might have been divested by the appointment
[61] of Thomas Pearce, or by his adoption of a male * relation of the name of Pearce, but was, in default of such appointment or adoption, to take effect. If it should so happen, that Thomas Pearce, the devisee for life, should also, at the death of the testator, answer the description of the person who is to take under the ultimate limitation, ought he, because he fills the two characters, to be excluded from taking under that limitation? It is argued, that he ought, because the gift to Thomas Pearce for life, and the restrictions put upon him in his character of tenant for life, are wholly inconsistent with an intention on the part of the testator to give him the absolute power over the estate. But the testator could not have had in his view and knowledge, that the ultimate gift, which is limited to a person unascertained at the date of his will, would go to Thomas Pearce. The argument derived from intention does not apply in this case; and I am of opinion that upon the true construction of the will, Thomas Pearce took under the ultimate limitation, not because he was the individual person intended by the testator to take, but because he answers the description of the person to whom the estates are ultimately given."

Sometimes (as in the last case) it is made part of the description or qualification of a devisee or legatee, that he be of the testator's name.[1] The word "name," so used, admits of either of the following interpretations:—First, as designating one whose name answers to that of the testator (which seems to be the more obvious sense;) and secondly, as denoting a person of the testator's family; the word "name" being, in this case, synonymous with "family" or "blood." The former, as being the more natural construction, prevails in the absence of an explanatory context; and such is most indisputably its meaning, when found in company with some other term or expression, which would be synonymous with the
[62] * word "name," if otherwise construed; for no rule of construction is better established, or obtains a more unhesitating assent, than that where words are susceptible of several interpretations, we are to adopt that which will give effect to every expression in the context, in preference to one that would reduce some of those expressions to silence.

Thus, where a testator gives to the next *of kin* of his name, (*a*)

(*a*) Jobson's case, Cro. Eliz. 576.

[1] 2 Williams, Ex. (2) Am. ed. 814, 815.

or to the next of his name *and blood*, (*a*) it is evident that he does not use the word "name" as descriptive of his relations or family only, because that would be the effect, if the mention of the name were wholly omitted, and the gift had been simply to his next of kin or the next of his blood; and hence, according to the principle of construction just adverted to, it is held, that the testator means additionally to require that the devisee or legatee shall bear his name. Where, on the other hand, the testator gives to the next of his name, (*b*) there is ground to presume that he intends merely to point out the persons belonging to his family or stock, without regard to the surname they actually bear. Such was the construction which prevailed in the case of Pyot *v.* Pyot, (*c*) where a point of this nature underwent much *discussion. A testatrix devised her estate, real [63] and personal, to trustees, and their heirs, executors, administrators, and assigns, in trust, first, for her daughter Mary, and her heirs, executors, administrators, and assigns, forever; provided, that, if she (Mary) died before twenty-one or marriage, then in trust to convey and assign all the residue of her estate to her *nearest relation of the name of the Pyots*, and to his or her heirs, executors, administrators, and assigns. Mary died under twenty-one, and unmarried. At the death of the testatrix, there were three persons then actually of the name of Pyot, namely, the plaintiff, and also his two sisters who were then unmarried, but who married before the happening of the contingency. There was also a sister, who, prior to the making of the will, was married, and, consequently, at the death of the testatrix, was not of that name. An elder brother of these persons had died before the testatrix, leaving a son also of the name of Pyot, who was her heir at law, but who, of course, was one degree more remote than the others. On behalf of the heir at law, it was insisted—First, that this devise to the "nearest relation" was void for uncertainty, because the word "relation" was not nomen collectivum; for no words were of that description, except such as had no plurals: Secondly, that, if it was not void, then the heir at law was the person meant by "nearest relation;" for the testatrix had in view a single person, and could not intend to give it to all her relations. But Lord Hardwicke

(*a*) Leigh *v.* Leigh, 15 Ves. 92.

(*b*) But see Bon *v.* Smith, Cro. El. 532, where a declaration by the testator, that, in a certain event, lands should remain to the next of his name, was considered to require that the devisee should have borne the testator's name. The point, however, did not call for adjudication; and the propriety of the dictum was (as we shall see) questioned by Lord Hardwicke, in the case of Pyot *v.* Pyot, 1 Ves. Sen. 337, post, who seems to have included in his condemnatory strictures Jobson's case, Cro. El. 576, where the language of the will was different; the devise being "to the next *of kin* of my name," and which, therefore, according to the reasoning in the text, was properly construed as importing that the devisee should, in addition to being of the testator's family, bear his name.

(*c*) 1 Ves. Sen. 335, Belt's ed.

said, that a devise was never to be construed absolutely void for uncertainty, unless from necessity; and if this necessarily related to a single person, it would be so, as there were several in equal degree of the name of Pyot. But he did not take it so: the term "relation" was nomen collectivum as much as
[64] heir or kindred. "Then," continued *his lordship, "taking this to be nomen collectivum, as I do, there is no ground in reason or law to say, the plaintiff should be the only person to take; because there is no ground to construe this description to refer to the actual bearing the name at that time, but to refer to the stock 'of the Pyots.' If it refers to the name, suppose a person of nearer relation than any of those now before the Court, but originally of another name, changing it to Pyot by act of Parliament, that would not come within the description of nearest relation of the name of Pyot; for that would be contrary to the intention of the testatrix; and yet that description is answered, being of the name of Pyot, and, perhaps, nearer in blood than the rest. Then suppose a woman nearer in blood than the rest, and marrying a stranger in blood of the name of Pyot; that would not do; and yet, at the time of the contingency, she would be of the name. In Jobson's case, and in Bon *v.* Smith, (which was a case put at the bar by Serjeant Glanville, which was often done in those times, but cannot be any authority,) *it is next of kin of my name*, (*a*) which is a mere designation of the name, and is expressed differently here. It may be a little nice; but, I think, '*the Pyots*' describe a particular stock, and the name stands for the stock; but yet it does not go to the heir at law, as in the case of Dyer, because it must be *nearest relation*, taking it out of the stock; from which case it also differs, as the personal is involved with the real; and it was meant that both should go in the same manner; and shall the personal go to the heir at law? Then this plainly takes in the plaintiff and his two sisters unmarried at the time of making the will, although married before the contingency; and
[65] I think *the other sister, not before the Court, is equally entitled to take with them; the change of name by marriage not being material, nor the continuance of the name regarded by the testatrix."

Where a gift to persons of the testator's name is held, according to the more obvious sense, to point to persons whose names answer to that of the testator, of course it does not apply to a female who was originally of that name, but has lost it by marriage. As in Jobson's case, (*b*) often before cited, which was a devise of lands in tail, the remainder to the next of kin of the testator's name. The next of kin, at the date of the will, and

(*a*) This is not accurate; vide ante, p. 62, note (*c*).
(*b*) Cro. El. 576. See also Bon *v.* Smith, Id. 332.

also at the death of the testator, was his brother's daughter, who was then married to J. S.; and on the death of the tenant in tail, without issue, the question was, whether she should have had the land; and it was held, that she should not, because she was not then of the name of the devisor.

Another question is, whether gifts of this nature apply in cases the converse of the last, *i. e.* to a person who, being originally of another name, has subsequently acquired the prescribed name by marriage, or by voluntary assumption, either under the authority of a royal license, or the still more solemn sanction of an act of Parliament, or without any such authority. (*a*)

In the case of Leigh *v.* Leigh, (*b*) the testator, after limiting estates to his two sisters and their issue in strict settlement, devised the property, on failure of those estates, to the first and nearest of his kindred, being male *and of his name and blood*, that should be living at the *determination of [66] the estates before devised, and to the heirs of his body; Lord Eldon, with Mr. Baron Thompson, and Mr. Justice Lawrence, held, that a person, who answered the other parts of the description, but of another name, was not qualified, in respect of the name, by his having, before the determination of the preceding estates, obtained his Majesty's license that he and his issue might use the surname of Leigh instead of his own name, and having since assumed it.

That the design of the testator, in this case, was the exclusion of the female line, and that he was not influenced solely by attachment to the name, (one of which objects he must have had in view,) appeared from his not having imposed the obligation of assuming his name upon the issue of his sisters taking under the prior limitations.

The remaining question, applicable to the gifts under consideration, is, at what time the devisee or legatee must answer the prescribed qualification or condition in regard to the name, supposing the will to be silent on the point.

If the devise confers an estate in possession at the testator's decease, that obviously is the point of time to which the will refers; and even where the devisee might, in other respects, take at the testator's decease an absolutely vested estate in remainder, it should seem that the same construction prevails. Such was the unanimous opinion of the Court in the two early cases of Bon *v.* Smith, (*c*) and Jobson's case, (*d*) where lands were devised to A in tail, with remainder to the next of the testator's name, or the next of kin of his name; and it was admitted, in both cases, that the testator's daughter, if she had

(*a*) As to the voluntary assumption of a name, ante, vol. 1, p. 848.
(*b*) 15 Ves. 92.
(*c*) Cro. El. 532.
(*d*) Cro. El. 576.

[67] *answered the description *at the death of the testator*, would have been entitled.

But in the case of Pyot *v.* Pyot, (*a*) Lord Hardwicke considered that a different rule is applicable to executory devises, which are fettered with such a condition. The devise there was (as we have seen) to A and her heirs, and, in case she should die before twenty-one or marriage, then to the testator's nearest relation of the name of the Pyots; and his lordship expressly distinguished the case before him from Jobson's case, where he said it was not a contingent limitation over upon a fee devised precedent, nor was it a contingent, but a vested remainder, and, therefore, referred to the time of making the will; [quære, the death of the testator?] whereas in the case before the Court, the description of the person must refer to the time of the contingency happening; viz. such as, at that event, should be the testator's nearest relation of the name of the Pyots. (*b*)

If such a construction can be sustained, it must embrace all executory gifts to persons answering a prescribed character, as to next of kin, heir, and other such persons; for it is difficult to perceive any valid reason for making the gifts under consideration the subject of any peculiar rule in this respect, and, as general doctrine, his lordship's proposition would have to contend with a large amount of authority, including those cases in which (as we have seen) the words "next of kin" have been held to designate the next of kin at the time of distribution, on other special grounds: (*c*) for it would have been idle to discuss the question, whether an executory gift to the next of

[68] *kin applied to the person answering the description of next of kin when such gift took effect in possession, on the special ground that the prior legatee was sole next of kin, or one of the next of kin at the death of testator, if, by the general rule, an executory bequest to next of kin applied to the persons answering the description when the bequest took effect in possession. (*d*)

(*a*) 1 Ves. Sen. 335, Belt's edit.; ante, 63.

(*b*) See further, on this point, Gulliver *v.* Ashby, 4 Burr. 1940; Lowndes *v.* Davies, 2 Scott, 74; ante, vol. 1, 848.

(*c*) Ante, p. 53.

(*d*) A case respecting the construction of gifts to next of kin has recently been decided, which is so important, that although the more apposite place for its introduction (ante, p. 38) has been closed by the press, it has been deemed advisable to state it in this place. The case here referred to is Withy *v.* Mangles, (Rolls, 30th of July, 1841, 4 Jurist, 717) where the question was, as to who were entitled under the ultimate limitation in a marriage settlement in favor of "such persons or person as shall be the next of kin of E. M. at the time of her decease?" E. M. died, leaving a child, and also her father and mother, each of whom claimed one equal third share of the property as next of kin: Lord Langdale, M. R., decided, that the parents, though postponed by the Statutes of Distribution to children, were, nevertheless, entitled concurrently with the child as being of equal degree. His Lordship observed, "All writers on the law of England appear to concur in stating, that, in an ascending and

descending line, the parents and children are in an equal degree of kindred to the proposed person; and, I think, that, except for the purposes of administration and distribution in cases of intestacy, and except in cases where the simple expression may be controlled by the context, the law of England does consider them to be in equal degree of consanguinity. The law of England gives a preference to the child over the parent in distribution; but I think we cannot, therefore, conclude with respect to every distribution of property, made in words to give the same to persons equally next of kin, the parents are to be held more remote than the child."

CHAPTER XXXI.

DEVISES AND BEQUESTS TO CHILDREN. (a)

I. *Whether Gifts to Grandchildren.*
II. *What class of Objects, as to period of birth, they comprehend; where, 1st, The Gift is immediate,* i. e. *in Possession; 2dly, There is an anterior Gift; 3dly, Possession is postponed till a given Age; 4thly, Effect where no Object exists at the time of its falling into Possession; 5thly, Words "born" or "begotten," or "to be born or begotten," &c.; 6thly, As to Children* en ventre.
III. *Whether Children take* per stirpes *or* per capita.
IV. *Children described as consisting of a specified number, which differs from the actual number.*
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VI. *Limitation over, as referring to* having *or* leaving *Children.*
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(a) The writer has labored to render this subject as clear and intelligible as possible; for, as scarcely a will comes into operation in which a gift to children is not contained, it is important that the rules of construction relating to them should be familiarly known.

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I. The legal construction of the word *children* accords with its popular signification; (*a*) namely, as designating the immediate offspring; for in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as issue. (*b*) It has sometimes been asserted, however, that a gift to children extends to
[70] grandchildren, where there is no *child.[1] Thus, in Crooke *v.* Brookeing, (*c*) though the claim of grandchildren to be entitled in conjunction with a surviving child under a bequest to "children," was rejected, yet the Lords Commissioners considered, that, if there had been no child,

(*a*) The French word *enfans* receives the same construction; Duhamel *v.* Ardouin, 2 Ves. Sen. 162.

(*b*) Wythe *v.* Blackman, 1 Ves. Sen. 196; Gale *v.* Bennett, Amb. 681; Chandless *v.* Price, 3 Ves. 99; Royle *v.* Hamilton, 4 Ves. 437.

(*c*) 2 Vern. 106.

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[1] Grandchildren may claim a devise under the description of children, where there are no children. Ewing *v.* Handley, 4 Litt. 349; Drayton *v.* Drayton, 1 Desaus. 327.

Grandchildren took under the words "my surviving children," in Devaux *v.* Barnwell, 1 Desaus. 499.

But the word children used in a will need not be construed to mean grandchildren, unless a strong case of intention, or necessary implication, requires it. Izard *v.* Izard, 2 Desaus. 303; Tier *v.* Pennell, 1 Edw. 354; Marsh *v.* Hague, 1 Edw. 174; Moor *v.* Raisbeck, 12 Sim. 123; Osgood *v.* Lovering, 33 Maine, 464; Cromer *v.* Pinckney, 3 Barb. Ch. 466. See Hone *v.* Van Shaick, 3 Edw. 474; Cutter *v.* Doughty, 23 Wendell, 522; Ruff *v.* Rutherford, 1 Bailey, Eq. 7; Hallowell *v.* Phipps, 2 Whart. 376; Dickinson *v.* Lee, 4 Watts, 82; Mowatt *v.* Carow, 7 Paige, 328; Phillips *v.* Beall, 9 Dana, 1; Pemberton *v.* Parker, 5 Binn. 601; Smith *v.* Cose, 2 Desaus. 123.

But a power to appoint to children, will not authorize an appointment to grandchildren. Robinson *v.* Hardcastle, 2 Bro. C. C. 344; 4 Kent, (5th ed.) 345 and note.

Sons and daughters, in a will, will extend to grandchildren, to prevent their being cut off. Smith's case, 2 Desaus. 123, note. Remainder to "children and their heirs" includes the testator's granddaughter. Neave *v.* Jenkins, 2 Yeates, 414. Legacies to all "my nephews and nieces," do not extend to great nephews and nieces. Shull *v.* Johnson, 2 Jones Eq. (N. C.) 202.

they might have taken Lord Avanley, too, in the subsequent case of Reeves *v.* Bryer, (*a*) laid it down, that "children may mean grandchildren, where there can be no other construction; but not otherwise." Sir W. Grant, also, seems rather to have assented to, than denied the doctrine, though (*b*) he refused to apply it to a case in which there was a gift to the children of several persons deceased equally per stirpes, and one of the persons was, at the making of the will, dead, leaving grandchildren, but no child; his Honor being of opinion, that, as there were children living of the other persons, as to whom, therefore, the gift was clearly confined to those objects, he was precluded from giving the word a different signification in the other instance. The same learned Judge, on another occasion, (*c*) refused to let in a great-grandchild, under the description of "grandchildren," there being grandchildren; though he admitted, that, "where there is a total want of children, grandchildren have been let in, under a liberal construction of 'children.'" No such case, however, it is conceived, can be found; and the doctrine appears to rest solely on the dicta of the Lords Commissioners, who decided Crooke *v.* Brookeing, Lord Alvanley and Sir W. Grant.

If the extension of gifts to children to more remote descendants were confined to cases in which, but for this construction, the gift, *according to the state of events at the* *time [71] *of its inception*, (*i. e.* of the making of the will,) never could have had an object, as in the case of a gift to the children of A, a person then being, to the testator's knowledge, dead, leaving grandchildren only, (*d*) it is not denied, that a strong argument in favor of such a doctrine might be drawn from cases, in which words have been carried beyond their ordinary signification, from the want of other persons or things more nearly answering to the terms of description used, (*e*) in order to avoid the evident absurdity of supposing the testator to have made a gift without an actual or possible object. But this reasoning does not apply to a case in which the gift, being to the children of a person *living*, might in event include objects subsequently coming in esse; so that no inference, that the testator does not mean children properly so called, arises from the fact of there being no child when he makes the gift. To apply the doctrine in question to such a case, is to allow the construction to be influ-

(*a*) 4 Ves. 698. See also his Lordship's judgment in Royle *v.* Hamilton, 4 Ves. 439.

(*b*) Radcliffe *v.* Buckley, 10 Ves. 198.

(*c*) Earl of Orford *v.* Churchill, 3 V. & B. 59.

(*d*) Which, as before suggested, occurred, in respect of one class of children, in Radcliffe *v.* Buckley. The case of Lord Woodhouslee *v.* Dalrymple, 2 Mer. 419, stated next chapter, would probably be considered as aiding the argument for an extension of the bequest to grandchildren *in such a case.*

(*e*) Day *v.* Trig, 1 P. W. 286, ante, vol. 1, p. 330; Doe d. Dumphreys *v.* Roberts, 5 Barn. & Ald. 407, ante, vol. 1, p. 721.

enced by subsequent circumstances, in opposition to a well-known rule. Besides, it denies to a testator the power of giving to children, to the exclusion of descendants of another generation, (which is certainly a possible intention,) without using words of exclusion, though he might reasonably suppose the intention to exclude them was sufficiently apparent by the mention of another class of objects, and not of them. In the case of a gift to A, and, after his death, to his children living at his decease; and if he dies without leaving children, to B and his children, the testator may choose to prefer A and his children, to B
[72] and his * children; but it does not follow that he intends the same preference to extend to the *grandchildren* of A. It seems probable, therefore, that the Courts at this day would not apply to grandchildren a gift to children, on account of there being in event no immediate objects, as such a construction is clearly inconsistent with sound principles of interpretation; and all the authority which can be adduced in its favor consists of dicta, which, in some cases, (*a*) are rather weakened by the decisions with which they stand associated. (*b*) If a gift to children may, in the eventual absence of children, be applied to grandchildren, pari ratione, it might, in the absence of both, be extended to a more remote class, as great-grandchildren; and of course, on the same principle, a gift to grandchildren might, under similar circumstances, be extended to issue of a more distant degree. Indeed, in Hussey *v.* Kirkely, (*c*) Lord Northington expressed an opinion that the word *grandchildren* would without further explanation, comprehend great-grandchildren;[1] the term being, he thought, in common parlance, used rather in opposition to children, than as confined to the next generation; but, in the case before his Lordship, the testator had explained this to be his construction, by applying in another part of his will the term "grandchild" to a great-grandchild.
And the contrary of Lord Northington's doctrine was
[73] determined by Sir W. Grant, in the case of the * Earl of Orford *v.* Churchill, (*d*) in which, however, it is

(*a*) See Radcliffe *v.* Buckley, 10 Ves. 195.
(*b*) In the case of Loveday *v.* Hopkins, Amb. 273, Sir T. Clarke, M. R., held, that grandchildren were not entitled under a bequest to "heirs," because the term appeared by the context of the will to be used in the sense of children. Sir Edward Sugden has shown (Pow. 6th ed. vol. 2, 273), that a power to appoint among children cannot be exercised in favor of grandchildren. He does not advert to any distinction in the case of there being no children. According to the doctrine, which the present writer has endeavored to refute, such a power would *in that event* extend to grandchildren.
(*c*) 2 Ed. 194; S. C. nom. Hussey *v.* Dillon, Amb. 603.
(*d*) 3 Ves. & Bea. 59.

[1] See Royle *v.* Hamilton, 4 Ves. (Sumner's ed.) 437. Great-grandchildren do not take under the designation of grandchildren, unless where it plainly appears that such was the intention. Hone *v.* Van Shaick, 3 Edw. 474.

remarkable that neither his Lordship's dictum nor decision was noticed.

It should be observed, however, that in a considerable class of cases (*a*) the word child or children has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring, and been considered to have been employed as nomen collectivum, or as synonymous with *issue* or *descendants;* in which general sense it has often the effect, when applied to real estate, of creating an estate tail. Where this construction has prevailed, however, it has generally been aided by the context. But even if the fact were otherwise, those cases would afford no authority for extending the word "children" to grandchildren in the cases under consideration. *There* it was synonymous with issue in *all* events, *here* it is to be so construed only in *certain* events, leaving the signification of the word, therefore, dependent on circumstances arising subsequently to the making of the will, or it may be, to the death of the testator. The cases, therefore, are not analogous.

It remains to be observed, that a gift to children does not extend to children by affinity; consequently a grandson's widow has been held not to be entitled under a devise to grandchildren. (*b*)

II. But the question which has been chiefly agitated in devises and bequests to children is, as to the point of time at which the class is to be ascertained, or, in other words, as to the period within which the objects must be born and existent;[1] supposing the testator himself not *to have expressly [74] fixed the period of ascertaining the objects, which, of course, takes the case out of the general rule; for example, a gift to children "now living," applies to such as are in existence at

(*a*) Vide post.
(*b*) Hussey *v.* Berkeley, 2 Ed. 194.

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[1] Where a legacy is given to a class of individuals, it will take in all who answer the description at the time the gift shall take effect. Swinton *v.* Legare, 2 M'Cord, Ch. 440; Jenkins *v.* Freyer, 4 Paige, 47; Cole *v.* Crayon, 1 Hill, Ch. 322; Walters *v.* Crutcher, 15 B. Monroe (Ky.) 2.

Where there is a fixed period for distribution, in a devise to children, all the children born before that time will be let in, and none others. Myers *v.* Myers, 2 M'Cord, Ch. 256; Haskins *v.* Tate, 25 Penn. State Rep. 249. But if the period is left indefinite, or if the gift is *per verba in præsenti*, none but those born before the death of the testator can take. Myers *v.* Myers, *supra.* Jenkins *v.* Freyer, 4 Paige, 47; Van Hook *v.* Rogers, 3 Murph. 178. See Hansford *v.* Elliott, 9 Leigh, 79; Meares *v.* Meares, 4 Iredell, 192.

Where a testator gives to legatees, who shall be living at the time of actual distribution, the court will fix a year as the proper period. Brooke *v.* Lewis, 6 Madd. 358.

For a statement of the principles and a full citation of the cases on this subject, see Andrews *v.* Partington, 3 Bro. C. C. (Perkins's ed.) 404, note (*a*) by Eden, 2 Williams, Ex. (2d Am. ed.) 697, *et seq.*

the date of the will, (*a*) and those only; and a gift to children living at the decease of A will extend to children existing at the prescribed period, whether the event happens in the testatator's lifetime, (supposing that they survive him,) or after his decease. (*b*) The following are the rules of construction regulating the class of objects entitled in respect of period of birth under general gifts to children.

1st. That an *immediate* gift to children, (*i. e.* a gift to take effect in possession immediately on the testator's decease,) whether it be to the children of a living (*c*) or a deceased person, (*d*) and whether to children simply or to all the children, (*e*)
[75] and whether there be a gift over *in case of the decease of any of the children under age or not, (*f*) comprehends *the children living at the testator's death (if any)*, and those only;[1] notwithstanding some of the early cases, which make the date of the will the period of ascertaining the objects. (*g*)

It is scarcely necessary to observe, that this and the succeeding rules apply to issue of every degree, as grandchildren, great-grandchildren, &c., though cases to the contrary are to be found, especially at an early period. As in Cook *v.* Cook, (*h*) where under an immediate devise, (*i. e.* a devise in possession,) to the *issue* of J. S. (which was held to apply to the children and grandchildren,) a son born after the death of the testator was allowed to participate.

(*a*) James *v.* Richardson, 1 Vent. 334; 2 Vent. 311; Burchet *v.* Durdant, T. Raym. 330. See also Attorney-General *v.* Bury, 1 Eq. Ca. Ab. 201; Crosby *v.* Clare, 3 Swanst. 320, n.; Abney *v.* Miller, 2 Atk. 593; Blundell *v.* Dunn, 1 Madd. 433.

(*b*) Allan *v.* Callow, 3 Ves. 289. Where a testator gave a legacy to A his daughter for life, and after her death to his grandson B; and if he should die in the lifetime of A, then to the children of C who should be then living; it was held, that the bequest was confined to the children of C living at the death of A, and that the point was so clear, that the costs of the suit occasioned by the refusal of the executor to pay the legacy without the opinion of the court, must fall on himself. Harvey *v.* Harvey, 3 Jurist, 949. And here it may not be amiss to observe, that a child who is made a legatee for life, is not thereby incapacitated from claiming under a bequest of the ulterior interest to the testator's children, living at his (the testator's) decease. Jennings *v.* Newman, 3 Jur. 748.

(*c*) 2 Vern. 105; 1 Eq. Ca. Ab. 202, pl. 20; Pre. Ch. 470; 2 Vern. 545; 1 Ves. Sen. 209; 2 Ves. Sen. 83; Amb. 273; Id. 348; 1 B. C. C. 532, n.; Id. 500; 1 Cox, 68; 2 Cox, 190; 2 B. C. C. 658; 3 B. C. C. 352; Id. 391; 14 Ves. 576.

(*d*) Viner *v.* Francis, 2 Cox, 190.

(*e*) Heath *v.* Heath, 2 Atk. 121; Singleton *v.* Gilbert, 1 B. C. C. 542, n.; S. C. 1 Cox, 68; Scott *v.* Horwood, 5 Madd. 332.

(*f*) Davidson *v.* Dallas, 14 Ves. 576. But as the gift over necessarily suspends the distribution as to all, until the eldest attains twenty-one, ought not the children born in the interval to have been let in, seeing that these rules always aim at including as many objects as possible?

(*g*) See Northey *v.* Strange, 1 P. W. 341; S. C. nom. Northey *v.* Burbage, Gilb. Rep. Eq. 136.

(*h*) 2 Vern. 545.

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[1] A legacy to the children of A is to be divided among those born at the death of the testator. Simms *v.* Garrot, 1 Dev. & Bat. Eq. 393. See Hill *v.* Chapman, 1 Ves. (Sumner's ed.) 405, note (*b*) and cases cited.

2dly. That where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, *but all who may subsequently come into existence before the period of distribution.* (*a*)[1] Thus in the case of a devise or bequest to A for life, and after his decease to his children, or, (which is a better illustration of the limits of the rule, since, in the case suggested, the parent being the legatee for life, all the children who can ever be born * necessarily come in esse during the [76] preceding interest,) to A for life, and after his decease to the children of B, the children (if any) of B living at the death of the testator, together with those who happen to be born during the life of A, the tenant for life, are entitled, but not those who may come into existence after the death of A. (*b*) The rule is the same where the life interest is not of the testator's own creation, but is anterior to his title. (*c*)

In cases falling within this rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares (*d*) subject to the diminution of those shares, (*i. e.* to their being divested pro tanto,) as the number of objects is augmented by future births, during the life of the tenant for life; and, consequently, on the death of any of the children during the life of the tenant for life, their shares (if their interest therein is transmissible) devolve to their respective representatives; (*e*) though the rule is sometimes inaccurately stated, as if existence at the period of distribution was essential.[2] (*f*)

(*a*) 2 Mod. 104; 1 Atk. 509; 2 Atk. 329; Amb. 334; 1 Ves. Sen. 111; 1 Cox, 327; Cowp. 309; 1 B. C. C. 542; Id. 386, 537; 5 Ves. 136 [Sumner's ed. Perkins's note (*a*)]; 8 Ves. 375; 15 Ves. 122; 10 East, 503; 1 Mer. 654; 2 Mer. 363; 1 B. & B. 449; 3 Dowl. 61; 4 Madd. 495.

(*b*) Ayton *v.* Ayton, 1 Cox, 327.

(*c*) Walker *v.* Shore, 15 Ves. 122.

(*d*) Ante, 74.

(*e*) Attorney-General *v.* Crispin, 1 B. C. C. 386; Devisme *v.* Mello, Id. 537; Middleton *v.* Messenger, 5 Ves. 136.

(*f*) See judgment in Matthews *v.* Paul, 3 Swanst. 339; Houghton *v.* Whitgreave, 1 Jac. & Walk. 150. See also Crooke *v.* Brookeing, 2 Vern. 106.

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[1] Carroll *v.* Hancock, 3 Jones, Law, (N. C.) 471.

[2] To let in children born after the death of the testator, there must be some subsequent period of distribution fixed, or it must depend on some contingency, and not be left indefinite. Swinton *v.* Legare, 2 M'Cord, Ch. 440; Jenkins *v.* Freyer, 4 Paige, 47; Battel *v.* Ommaney, 4 Russ. 70. See Turner *v.* Patterson, 5 Dana, 292.

A testator devised *all the remainder of his estate, both real and personal, to his daughter S. A. and the children born of her body, including all his wife had the improvement of during her life, after the decease of his said wife.* S. A. had three children when the will was made, and a fourth was born afterwards in the testator's lifetime, all of whom survived the testator, and two more were born after his decease. It was held, that "the children of her body," meant all the children she might have. "This will not appear," remarks Mr. Justice Wilde, "to be a strained construction of the words, when it is observed, that as to part of the property, the devise was prospective; it being a remainder after a life estate to the widow. If the devisor had intended to

The preceding rule of construction applies not only where the future devise (*i. e.* future in enjoyment) consists of a limitation of real estate by way of remainder, or a corresponding gift of personalty, (of which there cannot be a remainder, properly so called,) but also to executory gifts made to take effect in defeasance of a prior gift. Therefore, if a legacy be given to B son of A, and, if he shall die under the
[77] age of twenty-one, *to the other children of A, it is clear that on the happening of the contingency all the children who shall *then* have been born, (including of course, the children, if any, who may have been living at the testator's death,) are entitled. (*a*) The principle, indeed, seems to extend to every future limitation.

But it is to be observed that the subjecting of lands devised to trusts for partial purposes, as the raising of money, payment of annuities, or the like, by which the vesting in possession is not postponed, does not let in children born during the continuance of those trusts.

Thus, in the case of Singleton *v.* Gilbert, (*b*) where A devised her real estate to trustees for five hundred years, to raise £200, and then to other trustees for one thousand years, out of the rents to pay the interest thereof, and certain life annuities; and, subject to the said terms, she gave the estate to all and every the child and children of her brother T. in tail, as tenants in common. One question was, whether a child born after the death of A, but in the lifetime of the annuitants, could take jointly with two others born before A's death. It was insisted, on behalf of such child, that the devise was to be considered as vesting at the time when the trusts of the term were satisfied, and, consequently, that it let in all such children of T. as were then alive. Lord Thurlow admitted that where the legacy is given with any suspension of the time, so as to make the gift take place either by a fair or even by a strained construc-

(*a*) Haughton *v.* Harrison, 2 Atk. 329; Ellison *v.* Airey, 1 Ves. Sen. 111. [See the remarks on this case in Mr. Eden's note to Andrews *v.* Partington, 3 Bro. C. C. (Perkins's ed.) 404, note (*a*)]; Stanley *v.* Wise, 1 Cox, 432.

(*b*) 1 Cox, 68; S. C. 1 B. C. C. 542, n.

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limit his bounty to the children living when he made his will, he would have named them, or used words to show, that he meant so to limit it." Annable *v.* Patch, 3 Pick. 363. In the above case, S. A. and her four children, living at the time of the testator's death, took an estate together in fee simple in the real property—in the part in which the widow had a life estate, a vested remainder, which opened to let in the two after-born children, and in the rest a qualified fee, so limited, as to admit their claims by way of executory devise. See Dingley *v.* Dingley, 5 Mass. 535. And it seems also, that the after-born children were entitled to share in the personal property by way of executory devise. Ib. See Dingley *v.* Dingley, 5 Mass. 535, 537; Parkman *v.* Bowdoin, 1 Sumner, 366, 367; Weston *v.* Foster, 7 Metcalf, 300; Gardner *v.* James, 6 Beavan, 170; Yeaton *v.* Roberts, 8 Foster, (N. H.) 459; Ballard *v.* Ballard, 18 Pick. 41; Phillips *v.* Johnson, 14 B. Monroe, (Ky.) 172; Ward *v.* Saunders, 3 Sneed, (Tenn.) 387.

tion, (for so, he said, some of the cases go,) at a future period, then such children shall take as are living at that period. But this was an estate given directly, although given charged with the terms, and *therefore he could not [78] consider the after-born children as entitled.

The reader will perceive, that the rule which makes a gift to children comprehend all who come into existence before the time of distribution, is peculiar to these favored objects; (*a*) for, according to the general rules governing the vesting of estates, and which have been applied to relations, (*b*) and other classes of objects, the gift clearly would apply, *and be confined*, to those who were living at the death of the testator. It is true, indeed, that this peculiarity of construction extends to brothers and sisters; thus a gift to A for life, and after his death to his brothers, has been held to include the brothers born during the life of A; (*c*) but such a gift is substantially a gift to children, the only difference being, that they are described by reference to their fraternal, instead of their filial, relation; (*d*) and the same observation applies to a gift to nephews and nieces, (*e*) which is in effect a gift to the children of brothers and sisters. Such cases, therefore, are no exceptions to the statement, that the rule in question is peculiar to gifts to children.

3dly. It has been also established, that where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply to those who are living at the death of the testator, and who come *into [79] existence before the first child attains that age, *i. e.* the period when the fund becomes distributable in respect of *any* one object, or member of the class.[1] (*f*) And the result is the same where the expression is "*all* the children." (*g*)

(*a*) Many cases might be suggested in which a gift to objects in esse would open and let in future objects; as to A, and the heirs of the body of B a person living, or to A and any wife whom he shall marry. See Mutton's case, Dy. 274, b.

(*b*) Ante, 52.

(*c*) Devisme *v.* Mello, 1 B. C. C. 536; Doe d. Stewart *v.* Sheffield, 13 East, 526. See also Leake *v.* Robinson, 2 Mer. 363.

(*d*) It is clear that a gift to brothers and sisters extends to half-brothers and sisters. The point was adverted to arguendo, in Leake *v.* Robinson, 2 Mer. 363, which did not require its determination.

(*e*) Balm *v.* Balm, 3 Sim. 492.

(*f*) 1 Ves. Sen. 111; 1 B. C. C. 530; Id. 582; 3 B. C. C. 401; Id. 416; 2 Ves. Jun. 690; 3 Ves. 730; 6 Ves. 345; 8 Ves. 380; 10 Ves. 152 [Sumner's ed. note (*a*)]; 11 Ves. 238; 3 Sim. 417, 492; 2 Kee. 221; Hughes *v.* Hughes, 3 Bro. C. C. 434. But see 5 Sim. 174.

(*g*) Whitbread *v.* Lord St. John, 10 Ves. 152 [Sumner's ed. note (*a*)].

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[1] See 2 Maddock, Ch. 13, 21, 22; 2 Williams, Ex. (2d Am. ed.) 797, 798; Hill *v.* Chapman, 1 Ves. (Sumner's ed.) 405, and note. A bequest of a residue "unto all the children of B. equally, when they shall severally attain the age of twenty-five years," includes all the children born before one attains that age, although born after the death of the testator, but does not include those born after one attains that age.

This rule of construction must be taken in connection with, and not as in any measure intrenching upon the two preceding rules. Thus, where a legacy is given to the children, or to all the children of A *to be payable at the age of twenty-one*, or to Z for life, and after his decease to the children of A, *to be payable at twenty-one*, and it happens that any child in the former case at the death of the testator, and in the latter at the death of Z, have attained twenty-one, so that his or her share would be immediately payable, no subsequently born child will take; but if at the period of such death no child should have attained twenty-one, then all the children of A who may subsequently come into existence before one shall have attained that age, will be also included. (*a*)

And the construction is not varied by the circumstance of the trustees being empowered to apply all or any part of the shares of the children for their advancement before the distribution, (the word "shares" being considered as used in the sense of "*presumptive* shares;") (*b*) nor is any such variation produced by a clause of accruer, entitling the survivors or a single survivor, in the event of the death of any or either of the children, as the expression "said children" so occurring, means the children designated by the prior gift, whoever they
[80] may be, and is, therefore, applicable *no less to an after-born child, whom the ordinary rule of construction admits to be a participator, than to any other. (*c*)

The rule in question, as it respects the exclusion of children born after the vesting in possession of *any* of the shares, has been viewed with much disapprobation; and Lord Thurlow, in Andrews *v.* Partington, said, he had often wondered how it came to be so decided; there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children. In marriage settlements, however, one at least of the parents generally takes a life interest, so that the shares do not vest in possession until the number of objects is fixed. The rule has gone, Lord Eldon remarked, (*d*) upon an anxiety to provide for as many children as possible with convenience. Undoubtedly it would be very inconvenient, especially in the case of legacies payable *instanter*, if the shares of the children were, by reason of the possible accession to the number of objects by future births, unascertainable during the whole life

(*a*) Clarke *v.* Clarke, 8 Sim. 59. See also Matthews *v.* Paul, 2 Swanst. 328.
(*b*) Titcomb *v.* Butler, 2 Simons, 417.
(*c*) Balm *v.* Balm, 3 Simons, 492.
(*d*) Barrington *v.* Tristram, 6 Ves. 348.

Hubbard *v.* Lloyd, 6 Cush. 522; Curtis *v.* Curtis, 6 Madd. 14; Gilbert *v.* Boorman, 11 Vesey, 238; Andrews *v.* Partington, 3 Bro. C. C. 401; Leake *v.* Robinson, 2 Meriv. 393.

of their parent; and though this inconvenience is actually incurred, as we shall presently see, in some cases, (*a*) in which the gift runs through the whole line of objects, born and unborn, even after vesting in possession in the existing children, yet it will be found in such cases either that the construction was adopted ex necessitate rei, (there being no alternative but either to admit *all* the children, or hold the gift to fail in toto for want of objects,) or, that the admission of all the children was compelled by some expressions of the testator.

* The principle of the rule under consideration [81]
seems to apply to all cases in which the shares of the children are made to vest *in possession* on a given event, as on marriage; in which case the marriage of the child who happens to marry first, is the period for ascertaining the entire class. But an important exception obtains in the case of legacies which are to come out of the general personal estate, and are made payable at a given age (say twenty-one); in which case it seems that the bequest is confined to children in existence at the death of the testator, on account of the inconvenience of postponing the distribution of the general personal estate until the majority of the eldest legatee, which would be the inevitable effect of keeping open the number of pecuniary legatees. (*b*) But, this argument of inconvenience, it is obvious, does not apply where the number of objects affects the *relative* shares only, and not the aggregate amount. (*c*)

The rule in question, so far as regards the exclusion of children born after the vesting in possession of any one of the distributive shares, has been sometimes departed from upon grounds which can scarcely be considered as warranting that departure.

Thus, where (*d*) a testator bequeathed $300 to the children of his sister S., to be equally divided *at their respective ages of twenty-one or marriage*, with interest, and failing the share of any, to the survivors, and failing the share of *all*, then to G. One of the questions was, whether the legacy belonged to a child of S. born at the making of the will, to the exclusion of those since born, or to be born? * Lord [82]
Hardwicke thought it was meant for the benefit of *all the children S. should have;* for the testator, knowing she had but one then, had yet given it to *children*, had pointed out survivors, and given it over to another branch of his family, which could not mean till all failed.

It is clear that none of these circumstances would now be

(*a*) See post, p. 88.
(*b*) Ringrose *v.* Bramham, 2 Cox, 384. And see Storrs *v.* Benbow, 2 Myl. & Keen, 46.
(*c*) Gilmore *v.* Severn, 1 B. C. C. 582, and notes.
(*d*) Maddison *v.* Andrew, 1 Ves. Sen. 58.

held to take the bequest out of the ordinary rule. Its being to children in the plural, with a provision for survivorship, was consistent with that construction; as was the word "all" which was satisfied by referring it to the children of any class who took shares.

In Hughes *v.* Hughes, (*a*) a testator gave real and personal estate in trust for the maintenance of all the children of his three daughters, A, B, and C, share and share alike, *until the youngest of his said grandchildren should attain twenty-one;* and in case of the death of any of them before the youngest should attain twenty-one, leaving children, then to such children, and when such youngest grandchild should have attained twenty-one, then he gave one full proportionable share to such of his said grandchildren as should be then living, and the children of such as should be dead. A question arose on the claim of the subsequently born grandchildren to be admitted to a participation with those living at the testator's death. Lord Thurlow during the argument said, when the gift is general, it is always confined to the death of the testator. Where there is a gift for life, or the distribution is postponed to a future time, then children born during the life, or before that time, are let in. But his Lordship, on a subsequent day, decided in favor of the after-born grandchildren, the gift being to *all the grandchildren.* But, according to the *decree, as stated by Mr. Eden, (afterwards Lord Henley, which corrects the seeming inaccuracy of the case, it was declared that the residue should be devisible among the grandchildren of the testator living at his death, and who had been since born, and who should be born, *until the youngest of such* (*b*) *grandchildren should attain the age of twenty-one.* The expression "*all the children,*" noticed by Lord Thurlow, has been held, we have seen, to be inadequate to enlarge the construction. (*c*)

[83]

Lord Loughborough seems to have thought that where a devise or bequest of the nature of those under consideration is followed by a gift over, in case the parent die without issue, all the children, without reference to the period of vesting in possession, are entitled. Thus, where (*d*) a testator devised, on a certain event, the produce of the sale of certain freehold estates to be divided between the children of his daughters E. and R., such of the children as should be sons *to be paid at their respective ages of twenty-one,* and such as should be daughters at their respective ages of twenty-one, or days of marriage respectively;

(*a*) 3 B. C. C. 352, 434. See S. C. though not S. P. 14 Ves. 256.

(*b*) "Such," it is presumed, refers to the grandchildren living at the testator's death.

(*c*) Whitbread *v.* Lord St. John, 10 Ves. 152. See also Heath *v.* Heath, 2 Atk. 131; Singleton *v.* Gilbert, 1 Cox, 68; S. C. 1 B. C. C. 542, n.; Scott *v.* Harwood, 5 Madd. 332.

(*d*) Mills *v.* Norris, 5 Ves. 335, [Summer's ed. Perkins's note (*a*) and cases cited.]

and the testator bequeathed the residue of his personal estate to be equally divided between *the child and children* of his said two daughters, *in like manner as the money to arise from his real estate;* and, in case any child of his said daughters should marry and die in the lifetime of their respective mothers, then he directed that the issue of such child should stand in the place of their parent; *and, in case his said daughters should die without issue*, or such issue should die without issue in the lifetime of his said daughters, then over. * It appeared, [84] in the consideration of another question, that Lord Loughborough had previously decided, that the latter disposition extended to all the children of testator's daughter, without reference to the age of twenty-one, by force of the clause limiting it over in case of the failure of issue of the daughters.

It is not easy to perceive any solid ground for allowing to these words such an effect upon the construction. They either mean a failure of issue generally, in which case the gift over is void, or, which seems to be the better construction, they refer to children, (*a*) and, according to the opinion of Sir W. Grant, in Godfrey *v.* Davis, (*b*) and the established rules of construction, the words importing a failure of issue are referable to the objects included in the previous gift.

It is to be observed, that Maddison *v.* Andrew, and Mills *v.* Norris, were decided at a period when the rule against which they seem to militate was not so well settled, or, at all events, they show that it was not so uniformly adhered to, as it now is. The uncertainty in which these cases tended to involve the doctrine has been completely removed by subsequent decisions. (*c*)

4thly. We are now to consider the effect upon *immediate* and *future* gifts to children of a failure of objects at the period when such gift would have vested in possession. With regard to immediate gifts, (*d*) it is well settled that if there be no object in esse at the death of the testator, * the gift will [85] embrace *all* the children who may subsequently come into existence, by way of executory gift.

Thus, in Weld *v.* Bradbury, (*e*) a testator bequeathed certain moneys to be put out at interest; one moiety to be paid to the younger children of M. living at his (the testator's) death, and the other moiety *to the children of S. and N.* Neither S. nor N. had any child living at the date of the will, (*f*) or at the death of the testator. It was held to be an executory devise,

(*a*) See Vandergucht *v.* Blake, 2 Ves. Jun. 534, and other cases treated of in a subsequent chapter.

(*b*) 6 Ves. 43.

(*c*) See cases referred to, ante, 79.

(*d*) Where a person taking a preceding life-interest dies in the testator's lifetime, the gift is of course treated as immediate. Haughton *v.* Harrison, 2 Atk. 321.

(*e*) 2 Vern. 705. See also Haughton *v.* Harrison, 2 Atk. 329.

(*f*) This was immaterial.

[qu. bequest?] to such children as they or either of them should *at any time* have.

So, in Shepherd *v.* Ingram, (*a*) a gift of the residue of the testator's real and personal estate to such child or children as A should have, taking upon them the name of S., was held to embrace all after-born children, there being no child at the testator's death.

Devises and bequests of this nature have given rise to two questions: 1st, As to the destination of the income between the period of the testator's death and the birth of a child; 2dly, As to the appropriation of the income between the birth of the first and the birth of the last child.

With respect to the first, if the subject of gift be a sum of money, it is sufficient to say that the legacy is not payable until the birth of a child. It is also clear, that where a *residue* of personalty is given in this manner, the bequest will carry the intermediate produce as part of such residue. (*b*) On the other hand, if it were a devise of real estate, the rents accruing be-
[86] tween the death of the testator *and the birth of a child would devolve upon the heir as real estate undisposed of, unless there was a general residuary devise; (*c*) nor would the circumstance of there being an immediate devise of the real estate to trustees (*d*) vary the principle, the only difference being, that the heir would take the equitable, instead of the legal interest. The great difficulty, however, in these cases, is to determine whether the will indicates an intention to accumulate the immediate rents for the benefit of unborn objects. A question of this kind was much considered in the case of Gibson *v.* Lord Montford, (*e*) where A gave his freehold and personal estate to trustees, in trust to pay certain annuities and legacies out of the produce of his personal, and, in case of deficiency, out of his real estate, and he gave the residue of his real and personal estate *to such child or children as his daughter* B *should have*, whether male or female, equally to be divided between or among them. If B should die without issue of her body, then over. By another clause, A directed, that upon the deaths of the persons to whom the annuities for lives were given, such annuities as should fall in from time to time should go back to the residue, *and go to those in remainder over.* By a codicil, he added, provided his daughter died without issue, but *if she should leave a child or children, such annuities as fell in should be divided among them, share and share alike.* B having no child at the death of

(*a*) Amb. 273.
(*b*) Harris *v.* Lloyd, 1 Turn. & Russ. 310. See Bullock *v.* Stones, 2 Ves. Sen. 521.
(*c*) Harris *v.* Lloyd, 1 Turn. & Russ. 310, and Hopkins *v.* Hopkins, Cas. Temp. Talb. 44.
(*d*) Bullock *v.* Stones, 2 Ves. Sen. 521.
(*e*) 1 Ves. Sen. 485.

the testator, it became necessary to determine the destination of the immediate income. It was admitted, that, as to the personal estate, it passed by the residuary clause, but the accruing profits of the real estate subject to the charges were claimed *by the heir as undisposed of. Lord Hardwicke, after [87] a long argument on the terms of the will, and, after admitting that the heir was entitled to what was not given away by express words or necessary implication, held that the intermediate profits passed to the trustees for the benefit of the devisees; his Lordship thinking upon the whole, there was an intention to accumulate; for which he relied partly on the fact of the real and personal estate being comprised in one clause (*a*) and on the expression in the will and codicil respecting the annuities.

The other question arising on these gifts to children is, as to the destination of the income accruing in the interval between the births of the eldest and the youngest child, with respect to which it is settled, (nor could it have been doubted upon principle,) that the children for the time being take the whole.

This question came before Lord Northington, in the case of Shepherd *v.* Ingram, (*b*) on the construction of the will already stated, at the instance of three of the children of the testator's daughter, who had, subsequently to the judicial consideration of the will on the former occasion, come into existence, and now prayed (their parent being yet alive) to have an account of the profits, and that so much as became due from the birth of the first child until the second was born, might be declared to belong to the first, and, after the birth of the second, until a third was born, to belong to the first and second child, and so on to the others; and his Lordship was very clearly of opinion, that the children (*c*) took a defeasible interest in the residue, suggesting the case of a legal devise of a residue *to [88] the daughters, with a subsequent clause declaring, that if all the daughters should die in the lifetime of their mother, then the residue should go over; that would be an absolute devise with a defeasible clause, and the daughters in that case would be clearly entitled to the interest and profits till that contingency happened.

In a subsequent case, (*d*) it was held by Lord Loughborough that a child subsequently born was entitled to a share in the bygone income, in equal participation with children antecedently in existence; but this was founded on the special terms of the gift, which expressly comprised the "interest and produce;" and

(*a*) On this point, vide Ackers *v.* Phipps, 9 Bligh, N. S. 430, and other cases commented on, ante, vol. 1, p. 596.

(*b*) Amb. 448, ante, 85.

(*c*) The word in the report is "daughters," but this was evidently used in mistake for children.

(*d*) Mills *v.* Norris, 5 Ves. 335.

his Lordship admitted the general rule to be as decided in Shepherd *v.* Ingram, which case was also followed by Lord Langdale in the recent case of Scott *v.* Earl of Scarborough. (*a*)

The next inquiry is, as to the rule of construction which obtains, where the gift to the children is preceded by an anterior interest, and no object comes into existence before its determination; as in the case of a gift to A for life, and after his decease, to the children of B; and B has no child until after the death of A. It is clear that in such a case, if the limitation to the children of B were a legal remainder of freehold lands, it would fail by the determination of the preceding particular estate before the objects of the remainder came in esse. (*b*) This rule, however, originating in feudal principles, is not applicable to equitable limitations of freehold estate, and accordingly it has been held, that in a similar devise, by way of trust, the ulterior limitation does not fail by the non-existence of objects during the life of A, the tenant for life, but takes effect in favor of such objects
[89] whenever they come into existence. Thus, in *the case of Chapman *v.* Blisset, (*c*) where lands were devised to trustees upon certain trust during the life of A, and at his decease as to one moiety in trust for the children of A, and as to the other moiety in trust for the children of B. B had no child born until after the decease of A; and it was held that such after-born child was entitled to the latter moiety; Lord Talbot observing, that, "in regard to trusts, the rules are not so strict as at law; for the whole legal estate being in the trustees, the inconvenience of the freehold being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented." The same doctrine would seem to hold in regard to bequests of personal estate; to which it is obvious none of the rules governing contingent remainders are applicable. As some of the positions, however, advanced by a very learned Judge, in the case of Godfrey *v.* Davis, (*d*) may seem to be inimical to such a conclusion, it will be necessary to examine that case.

A bequeathed annuities to several persons for life, and directed that the first annuity that dropped in *should devolve upon the eldest child,* male or female, for life, of H.; and he directed that as the other annuities dropped in, they should go to increase the annuities of the survivors, and so to the last survivor, except as to two individuals named; and when the said annuitants were all dead, the whole property to devolve upon the heirs male of P. *At the death of the first annuitant, H. had no legitimate child* (the claim of a natural child was disallowed); (*e*) but he afterwards married, and had a child, who claimed the annuity. Sir

(*a*) 1 Beav. 156.
(*b*) Ante, vol. 1, p. 786.
(*c*) Cas. Temp. Talb. 145.
(*d*) 6 Ves. 43.
(*e*) See next chapter.

W. Grant, M. R., said: "It is clearly established by Devisme *v.* Mello, (*a*) and many other cases, *that where [90] a testator gives any legacy or benefit, not as persona designata, but under a qualification and description, at any particular time, the person answering the description at that time is the person to claim; and, if there are any persons answering the description, they are not to wait to see whether any other persons shall come in esse, but it is to be divided among those capable of taking, when by the tenor of the will he intended the property to vest in possession. (*b*) That case was much considered by Lord Thurlow, and seems to have settled the law upon the subject. The first question is, whether it is clear the testator meant any given set of persons should take at any given time; if so, it is clear that all persons answering that description, whether born before *or afterwards*, (*c*) shall take; but, if there are no such persons, it shall not suspend the right of others, but they shall take as if no such persons were substituted. Before that case, this point was not quite so clear. (*d*) Where the gift is to all the children of A at twenty-one, if there is no estate for life, it will vest in all the children coming into existence until one attains the age of twenty-one. (*e*) Then that one has a right to claim a share, admitting into participation all the children then existing. So if it is to a person for life, and after the death of that person, then to the children of A, the intention is marked, that until the death of the person entitled for life, no interest vests [qu. in possession?] When that person dies, the question arises whether there are then any persons answering that description; if so, they take, without *waiting to [91] see whether any others will come in esse answering the description. *If it is given over, in the event that there are no children, and there are no children at that period, the person to whom it is given over takes.* It is clear this testator meant these annuities to commence at his death, and that each annuitant should receive a proportionable share of his fortune, with benefit of survivorship and right of accruer, subject upon the death of the first annuitant to the substitution of the eldest child of H. Upon the death, therefore, of the first annuitant, unless there was some person who had a right of substitution in the room of that person, and there was no such person, it was to go among the survivors. *The person substituted, namely, the first child of H., cannot now claim.* That construction is much fortified by the manner in which it is given over, for it is perfectly clear that

(*a*) 1 B. C. C. 537.
(*b*) This is indisputable, see ante, p. 75.
(*c*) The words "or afterwards," are not consistent with the preceding position, or with the general rule.
(*d*) Singleton *v.* Singleton, Ayton *v.* Ayton, 1 B. C. C. 542, n.
(*e*) See ante, p. 79.

he meant the persons to whom it is given over under the description of the heirs of P. to take upon the death of the persons to whom it was first given over. If the first construction contended for is to prevail, those persons, supposing all the other annuitants claiming by survivorship were dead, must wait not only the death of the survivor, but also the death of H., for during his life there would be a possibility that a child might be born, who upon that construction might say he was the survivor."

It is evident, therefore, that the judgment of the M. R. was partly founded upon the particular circumstances of the case; and yet no one can read that judgment without seeing that in his opinion the rule was universal, that a bequest to children as a class, to fall into possession on the determination of an anterior interest, failed *if there was no object at that period;* and he seems to have considered this as a necessary consequence of holding that such objects (if any) would have taken to the
[92] *exclusion of subsequently born children. That the one proposition is not invariably a corollary of the other, is established, we have seen, by the cases respecting *immediate* gifts to children, which, although they extend only to such children (if any) as are in existence at the death of the testator, yet in case of there being at that period no child, will embrace the *whole* range of unborn children. (*a*) Upon what principle a different construction could be supported, in the case of an executory bequest preceded by a bequest for life, it is difficult to discover, unless it were for the sake of assimilating the construction to that of a legal remainder, but which is decisively negatived by the construction that has been applied to equitable limitations, as to which we have seen the rule is different; and the inevitable conclusion, it is conceived, is that, by analogy to the latter class of devises, *a bequest to A for life, and after his death to the children of B, is not defeated by the non-existence of an object at the death of A, but will take effect in favor of* ALL *the subsequently born children as they arise;* assuming, of course, that the terms of the bequest do not bring it within the restrictive rule stated in the third division of the present section.

The doctrine above suggested is tacitly recognized in the case of Wyndham *v.* Wyndham, (*b*) where a testator bequeathed the residue of his estate to A for life, but if she shall die leaving any child or children, then the trustees were to pay the principal to them; but if A should die without any child or children, then he left the residue *to the younger children of B,* if he should have any, and if not he left it to C. A died without children before B had any, and B afterwards died without having had a child; and the question in this cause was, as to what

(*a*) Ante, 85.

(*b*) 3 B. C. C. 58.

*became of the income in the interval between the deaths of A and B; which question of course assumes, [93] that the property did not go over to C immediately on the death of A without a child, but remained in expectancy during the whole life of B, to await the event of his having children.

This view of the subject, too, seems to derive some support from a more recent decision, establishing that an executory bequest to children, to arise on an event which was to defeat a prior gift, did *not* fail by the absence of any object at the determination of such prior interest.

The case (*a*) alluded to is, where a testator devised the reversion in a moiety of certain real estate to his sister A., subject to a charge in the following terms: "The sum of £500 I also deduct out of the said part of my estate to my niece M., daughter of my brother R., to be paid when most convenient to my sister A., bearing interest three months after my decease. Whenever this £500 shall be paid by my sister A., I do require that it be put into government or any other security by her trustee P., whom I appoint to act as such, as he shall think most to her advantage; and that the said M. shall receive the said £500, with the accumulated interest, *either on the day of marriage or at the age of twenty-one*, as shall be thought best. *Should the said M. not survive either of those periods, and there be no child or children of the said R., then I would have the said sum of £500 revert to my sister A.; but, in case of other children of R., I would have the said sum equally divided, share and share alike.*" M. died under age, and unmarried. R. had no other child at that time, but other children were born afterwards; and the question was, whether such subsequently born children *were entitled. Sir T. Plumer, V. C., adverted [94] to Godfrey *v.* Davis as having been decided upon the principle, that a period being distinctly fixed when the distribution was to take place, the children born after that period were not entitled. "Are there (said his Honor) any words in this will fixing the time when a share is to vest, so as to exclude after-born children? The property is not given on the children attaining twenty-one, or marriage; it is a reversionary fund, which is a strong circumstance, and the gift to A. is expressed in unambiguous terms. If the after-born children are excluded, it must be in the teeth of the words of the will, which only give it to A. 'if there be no child or children of the said R.'" (*b*) And his Honor accordingly decided in favor of the children of R.

This case shows that an executory bequest, in derogation of a preceding gift, does not fail for want of objects at the period of taking effect (though if there had been any such it would

(*a*) 2 Madd. 124. (*b*) As to this, see post.

have been confined to them); (*a*) and that in the opinion of the learned Judge who decided it, the case of Godfrey *v.* Davis sustains no general doctrine to the contrary, but is referable to its special circumstances.

In another case, (*b*) where lands were by settlement limited to A for life, remainder to B for life, remainder to trustees for five hundred years, in trust to raise £1000 for such persons as B should appoint, and, in default of appointment, *to the executors, administrators, and assigns of C:* and A and B died in the lifetime of C, so that B, having made no appointment, there was at the determination of their estates no object of the trust of the term, since C could have no executor or administrator in her* lifetime; it was contended, therefore, that the limitation failed, as in the case of a devise of real estate to the heirs of a person living at the determination of the prior estates; but Sir T. Plumer, M. R., said *he did not see that the analogy could be applied.* The case, however, was not distinctly decided upon this point.

[95]

So, in the earlier case of Lord Beaulieu *v.* Lord Cardigan, (*c*) where the testator bequeathed an exchequer annuity, which was granted for a term of years to his grandson, Lord Montague, for so many years as he should live, and after his death for such person as, *at the time of Lord Montague's death* should be heir male of Lord Montague's body, to take lands of inheritance from him by course of descent, for the residue of the term; *and in case there should be no such heir male, then in trust for such person as should be heir male of the body of Duke John,* to take lands by course of descent, for the residue of the term; and, in case there should be no such person as should be such heir male, then in trust for Duke John for life, with remainder to such person and persons as should be entitled by virtue of his said will to the rents of the real estate thereby devised. Lord Montague died without issue before Duke John had a son; and it was held by Lord Northington, that the gift in question took effect in favor of a son who was born six years after this event; his Lordship observing, that if the limitation to the son of Duke John was to depend on the words "*living at the time of the death of Lord Montague,*" it would defeat the intention of the testator; for he meant that the sons of Duke John should take after [qu. in substitution for?] the sons of Lord Montague.

The weight of authority, therefore, is decidedly in favor of the position, that all gifts to children, preceded by an *anterior interest, will embrace the objects existing at the death of the testator, and those who may come in esse before the determination of such interest; *and that in all*

[96]

(*a*) Ellison *v.* Airey, 1 Ves. Sen. 111, and other cases cited, ante, 75.
(*b*) Horseman *v.* Abey, 1 Jac. & Walk. 381.
(*c*) Amb. 533.

such cases, except in the instance of a legal remainder of real estate, if there be no object at the time of the vesting in possession, all the children subsequently born will be let in, unless the terms of the gift restrict it to a *narrower* class of objects.

The doctrine, however, of the preceding cases may seem to be encountered by some remarks occurring in the case of Bartleman *v.* Murchison, (*a*) where an annuity was bequeathed to A for life, and, after her decease, to B, "*if a widow*, but not otherwise, but to revert back to any child or children after her death;" and it was held, that B, who was married at the death of A, and afterwards became a widow, was not entitled on such subsequent widowhood; Lord Brougham observing—"Although, in construing bequests of personal, the same technical strictness does not prevail as in devises of real estate, the same rules are to a great extent applicable;" and then, after adverting to the construction of *bequests* to children, as comprehending the same persons as devises to these objects, his Lordship remarked: "It is only following out the same principles, to hold, *that a person*, to whom a legacy is given in a particular character, and by a particular description, shall not be entitled to it, unless he be clothed with that character and answer that description at the moment when the legacy might vest in possession."

It will be observed, that, in this case, the bequest was to an individual named, if then answering a certain description, and not to a class, though perhaps the principle applicable to the respective cases is not widely different.

*And here the student should be reminded, that [97] where, in the preceding observations, mention is made of the *objects at the period of distribution*, this is not intended to designate children *existing* at that period; for it has been already shown, that all who have existed in the interval between the death of the testator and the period of distribution, whether living or dead at the latter period, are objects of the gift, and may therefore not improperly be termed objects *at that period;* their decease, before the period of distribution, having no other effect than to substitute their respective representatives, supposing, of course, the interest to be transmissible.

It is to be observed, that the rules fixing the class of objects entitled under gifts to children are not in general varied by a limitation over, in case the parent should die without children, or in case *all* the children die, &c., as these words are construed merely to refer to the objects of the preceding gift. It is true, indeed, that in Hutcheson *v.* Jones, some stress was laid by Sir T. Plumer, V. C., on the words giving the property over in default of a child or children, as importing that the ulterior gift was not to take effect unless in the event of the failure of *all*

(*a*) 2 Russ. & My. 136.

the children; but in Andrews *v.* Partington, (*a*) a pecuniary legacy to *all* the children of A., payable at twenty-one or marriage, with a bequest over in case *all* the children died before their shares became payable, was confined to children who were in esse when the first share became payable. So, in the more recent case of Scott *v.* Harwood, (*b*) where the devise was to the use and behoof of all and every the child and children of A. lawfully begotten, and their heirs forever; and in case the said children of A. should all die before they attained the
[98] age of twenty-one years, then over; * Sir J. Leach, V. C., held, that the children of A. living at the testator's death were exclusively entitled, and that *in the devise over "the testator must, by necessary inference, be considered as speaking of the children to whom the estate is given."* If it be objected, that in this case the expression "the said children" required such a construction, the answer is, that the preceding gift being to *all* the children, the referential expression had the same force as if the same terms were repeated, and consequently the effect of the whole would be, according to Sir T. Plumer's doctrine in Hutcheson *v.* Jones, that the estate was not to go over until the failure of *all* the children.

5thly. We are now to consider how the construction is affected by the words "*to be born*" or "*to be begotten*," annexed to a devise or bequest to children; with respect to which the established rule is, that if the gift be immediate, so that it would but for the words in question have been confined to children (if any) existing at the testator's death, they will have the effect of extending it to *all* the children who shall ever come into existence; (*c*) since, in order to give to the words in question *some* operation, the gift is necessarily made to comprehend the whole.

Thus, in the well-known and important case of Mogg *v.* Mogg, (*d*) where a testator devised a certain property called the Mark Estate to trustees, in trust to pay the rents towards the support and maintenance of the child and children begotten *and to be begotten* of his daughter, Sarah Mogg; it was
[99] contended, that, notwithstanding * the words "to be begotten," the devise could apply to only the children born before the testator's death, as those words might be satisfied by letting in the children born after the date of the will before the death of the testator; but the Court of King's Bench (on a case from Chancery) certified, that all the nine children of Sarah Mogg, including five who were born after the death of

(*a*) 3 B. C. C. 401, [Perkins's ed. notes.]
(*b*) 5 Madd. 322.
(*c*) Mogg *v.* Mogg, 1 Mer. 654. In the marginal note of the report these words are omitted. The case is deserving of attentive perusal, as it illustrates almost every rule regulating the classes of children entitled under immediate and future devises.
(*d*) 1 Mer. 658.

the testator, took under the devise; and Sir W. Grant, M. R., expressed his concurrence in the certificate.

This rule of construction, however, does not apply to general pecuniary legacies, where the effect of letting in children born after the death of the testator would be to postpone the distribution of the general estate, (out of which the legacies are payable,) until the death of the parent of the legatees.

Thus, in the case of Sprackling *v.* Raneir, (*a*) where a testator in a certain event gave a legacy to the sons and daughters of his daughter lawfully begotten *or to be begotten;* a child born after the death of the testator was held to be excluded.

So, in the latter case of Storrs *v.* Benbow, (*b*) where a testator bequeathed £500 "to each child *that may be born* to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship;" Sir J. Leach, M. R., held that the gift was confined to children living at the testator's death, his Honor considering that the words "may be born," provided for the birth of children between the making of the will and the death of the testator; and he observed, that, to give a different meaning to the words, would * impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until the deaths of his brothers' children. (*c*) [100]

It seems to be established, too, that the expression children *to be* born or children *to be* begotten, when occurring in a gift, under which *some* class of children born after the death of the testator would, independently of this expression of futurity, be entitled, so that the words may be satisfied without departing from the ordinary construction, that construction is unaffected by them.

Thus in the case of Paul *v.* Compton, (*d*) where a testator bequeathed the residue of his personal estate in trust for his wife for life, and after her decease unto such of his daughters and such of their children as she should by will appoint, recommending her "to provide for such child or children as may *hereafter be born* of my said two daughters;" and, in default of such disposition, then in trust for the children of the daughters; Lord Eldon held that this power to the wife did not authorize her to appoint to children *not born in her lifetime.*

So in Whitbread *v.* Lord St. John, (*e*) his Lordship decided, that a bequest unto and among the child and children of A. born

(*a*) 1 Dick. 344.
(*b*) 2 Myl. & Keen, 46. See also Butler *v.* Lowe, 10 Sim. 317.
(*c*) The reason lastly assigned by the M. R. is the only one which characterizes this class of accepted cases. The former argument would apply equally to cases within the general rule, stated ante, p. 98.
(*d*) 8 Ves. 375.
(*e*) 10 Ves. 152.

and to be born, as many as there might be, *when and as they should attain their age of twenty-one years, or be married* with consent, was confined to his children living at the death of the testator and those who afterwards came in esse before the first share vested in possession, according to the rule before adverted to. (*a*) But if the bequest is to "such children as shall hereafter be born during the lives of their respective parents," of
[101] *course this construction is excluded by the express terms of the will, and all the after-born children will be let in, whether born before the period of distribution (*b*) or not.

It has been decided, too, that the words "which shall be begotten," or "to be begotten," annexed to the description of children or issue, do not *confine* the devise to future children; but that the description will, notwithstanding these words, include the children or issue in existence antecedently to the making of the will. (*c*)

This doctrine is as old as the time of Lord Coke, who says, (*d*) that as procreatis shall extend to the issues begotten *afterwards*, so procreandis shall extend to the issues begotten *before*.

And it seems that even the words "*hereafter* to be born" will not exclude previously-born issue, (*e*) to prevent, Lord Talbot has said, the great confusion which would arise in descents by letting in the younger before the elder. But, as a rule of construction, it must be founded on presumed intention; it supposes that the testator, by mentioning future children, and them only, does not thereby indicate an intention to exclude other objects, and in this view is certainly an exception to the maxim, expressio unius est exclusio alterius. (*f*)

[102] * Sir William Grant thought, (*g*) that a gift over, in case certain persons "*shall* happen to die in my lifetime," though strictly importing futurity, might be understood as speaking of the event at whatever time it may happen, whether before or after the will.

(*a*) See ante, p. 78.

(*b*) Scott *v.* Earl of Scarborough, 1 Beav. 156.

(*c*) Doe d. James *v.* Hallett, 1 Man. & S. 124. See the same principle applied to a deed, Hewitt *v.* Ireland, 1 P. W. 426.

(*d*) Co. Litt. 20, b.

(*e*) Hebblethwaite *v.* Cartwright, Cas. Temp. Talbot, 31; which seems to overrule the position of Lord Hale, that the words "in posterum procreandis" exclude sons born before, on account of the peculiar force of "in posterum;" Hal. MSS. cit. Harg. and Butl. Co. Litt. 20, b. n. 3; 3 Vern. 87.

(*f*) Compare the principle in these cases with that of Shuldam *v.* Smith, 6 Dow, 22, ante, vol. 1, p. 746. The cases in the text strongly exemplify the anxiety of the courts to avoid giving devises to children an operation that will restrict them to certain classes of children. See judgment in Matchwick *v.* Cock, 3 Ves. 611; where after-born children were admitted to participate in a provision for maintenance out of income in favor of "children" generally, though the disposition of the property itself, out of which the income was to arise, (and the objects of which it might be presumed were intended to be the same as those of the maintenance provision,) was confined to the existing children.

(*g*) In Christorpherson *v.* Naylor, 1 Mer. 326.

The preceding citation from Lord Coke has anticipated the observation, (which properly finds a place here,) that a gift to children "born" or "begotten," will extend to children coming in esse subsequently to the making of the will, and even after the death of the testator, where, the time of distribution under the gift being posterior to that event, the gift would by the general rule of construction, include such after-born children.[1]

Thus, where (*a*) a testator bequeathed certain funds to trustees in trust for his wife for life, and after her decease, in trust to transfer the same unto and among all and every the child and children lawfully *begotten* of the testator's nephews and niece by their then or their late respective wives and husband: Sir J. Leach, V. C., held, that the bequest comprehended after-born children. Indeed, his Honor's decision in their favor seems to have been carried so far as to let in children born after the death of the widow which was the period of distribution; in which respect the decision is clearly untenable.

So in the case of Ringrose *v.* Bramham, (*b*) children born in the interval between the making of the will and the death of the testator, were let in under a bequest to A.'s children; "£50 to every child he *hath* by his wife E., to be paid to them by my executors as they shall come * of age." It was [103] even contended that the bequest extended to children born after the death of the testator, and before the majority of the eldest; and the Master of the Rolls (Sir R. P. Arden) rested his objection to this construction, not solely on the force of the word "hath," but on other grounds; particularly that it would have the effect of postponing the distribution of the general residue, until the number of pecuniary legatees could be ascertained.

It is not to be inferred, however, that because the Courts in the preceding cases have refused to allow the claims of after-born children to be negatived by expressions of a loose and equivocal character, they would deny all effect to words studiously inserted with the design of restricting a gift to children to existing objects, though the reason or purpose of the restriction may not be apparent; as in the instance of a gift to children "now living," which we have seen is confined to children in existence at the date of the will. (*c*)

6thly. It should be observed, that in the application of the preceding rules, and indeed, for all purposes of construction, a child en ventre sa mere is considered as a child in esse.[2] This was

(*a*) Browne *v.* Groombridge, 4 Madd. 495.
(*b*) 2 Cox. 384.
(*c*) Vide ante, vol. 1, p. 278.

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[1] Annable *v.* Patch, 3 Pick. 363.
[2] A child in *ventre sa mere*, will take a share in a fund bequeathed to children, under

finally established in the case of Doe *v.* Clarke, (*a*) which was an ejectment directed by Lord Thurlow, in consequence of a difference of opinion between his Lordship and Sir Lloyd Kenyon, M. R., on the claim of a posthumous child under a gift to all the children of C. who should be *living* at the time of his death; his Lordship maintaining the competency, and his Honor the incompetency of the child en ventre sa mere to take as a "living" child. (*b*)

[104]* The case of Clarke *v.* Blake afterwards came before Lord Loughborough, (*c*) on the equity reserved, and his Lordship, in conformity to the decision of the Court of Common Pleas, held the posthumous child to be entitled. Indeed so completely is the point now set at rest, that the claim of a child en ventre sa mere under a bequest "to the child and children begotten and to be begotten on the body of A, who should be *living* at B's decease," was admitted sub silentio in the much-discussed case of Mogg *v.* Mogg. (*d*)

It being thus settled that children en ventre were entitled under the description of children *living*, the only doubt that remained, was whether they would be held to come under the description

(*a*) 2 H. B. 379.

(*b*) Clarke *v.* Blake, 2 B. C. C. 321, [see Perkins's ed. 320, note (1) and cases cited,] overruling Pierson *v.* Garnett, 2 B. C. C. 47; Cooper *v.* Forbes, Id. 63; Freeman le *v.* Freemantle, 1 Cox, 248.

(*c*) 2 Ves. Jun. 673.

(*d*) 1 Mer. 654. See also Rawlins *v.* Rawlins, 2 Cox, 425. These cases demonstrate that the distinction laid down in Northey *v.* Strange, 1 P. W. 341, between a devise to children generally, and to children living at a given period, with reference to the admission of children en ventre, is unfounded; nor would it have been deemed worthy of remark, had not the case been cited by a recent writer, (1 Belt's Ves. Sen. 113, Editor's note,) without an explicit denial of its authority.

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a general description of children. Petway *v.* Powell, 2 Dev. & Bat. Eq. 312; Swift *v.* Duffield, 5 Serg. & R. 38; 2 Williams, Ex. (2d Am. ed.) 801, 802.

A testator bequeathed the residue of his personal estate to such of his grandchildren as should be living at his decease, in equal portions; and it was held, that a grandchild, born within nine months after the testator's death, was entitled to a share of such residue. Hall *v.* Hancock, 15 Pick. 255.

A provision made for a child in *ventre sa mere*, which is afterwards born before the death of the testator, was held not to extend to an after-born posthumous child, although the division of the property was suspended until the eldest son became twenty-one, and the division was to be made between "all his children now born or to be born." Burke *v.* Wilder, 1 M'Cord, Ch. 551. See also Sinkler *v.* Sinkler, 2 Desaus. 127; Howes *v.* Hening, M'Clel. & Young, 295; Storrs *v.* Benbow, 2 My. & Keen, 46.

Under the Statute of Distributions, posthumous children take equally as other children. Burnett *v.* Mann, 1 Ves. Sen. 156; 2 Kent, (5th ed.) 424. So in the application of the strict doctrines of remainders in the real law, an infant *en ventre sa mere* is decreed to be *in esse*, for the purpose of taking a remainder, or any other estate, which is for his benefit. 4 Kent, (5th ed.) 249; Steadfast *v.* Nicoll, 3 John. Cas. 18; Swift *v.* Duffield, 5 Serg. & R. 38; Marsellis *v.* Thalkimer, 2 Paige, 35. It has been expressly provided by the Revised Statutes of New York, (vol. 1, p. 724, § 30, 31,) that where a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parent. This is regarded as the universal rule in the United States. See 4 Kent, (5th ed.) 280, 412.

of children *born;* and that question also has been decided in the affirmative. (*a*) The result then is to read the words "living," and "born," as synonomous with *procreated;* and, to support a narrower signification of such terms, words pointedly expressive of an intention to employ them in a special and restricted sense, must be used.

It should be observed, that in Bennett *v.* Honeywood, (*b*) Lord Apsley considered that the admission of children en ventre was confined to devises to children, and refused to let in such a child under a devise to relations. This decision does not appear to have been expressly overruled; but it is conceived that the present doctrine, and the * principle upon which the [105] late cases have proceeded, that a child en ventre sa mere is for all purposes a child in existence, and even *born*, conclusively negative any such distinction.

III. Sometimes questions arise on the construction of clauses substituting the children of legatees who die before the period of distribution or enjoyment.[1] Most of these questions will be found in other parts of the present work, especially in a subsequent chapter, which treats of the period to which words providing against the death of a prior devisee or legatee, coupled with a contingency, are to be considered as referring. But there is one point which it is convenient to notice in this place, because the cases seem to establish a construction which is, it seems, hardly reconcilable with the principles of analogous cases, and may therefore be treated as peculiar to clauses of substitution in favor of *children.* The point occurs where children are substituted for legatees dying before a given period, (usually the period of distribution,) without any express requisition that the children thus substituted shall survive such period. The question is, whether the substituted gift is by necessary intendment to be construed as applying only to such issue as may happen to be living at such period, or whether the issue surviving the parents are absolutely entitled; in other words, whether the gift to the issue is by implication subject to the same contingency of survivorship as the gift to the parents. The prevalent notion, before adjudication had thrown any light on the subject, seems to have been, that in

(*a*) Trower *v.* Butts, 1 Sim. & Stu. 181. See also Whitelock *v.* Heddon, 1 Bos. & Pull. 243.

(*b*) Amb. 708.

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[1] A residuary bequest in the words, viz: "to my six brothers and sisters, and to their respective heirs of their bodies, but no further, and these must be alive at the death of my wife," was held to mean, that the brothers and sisters were to take if they were then living; if not, then that their children were substituted legatees, excluding their grandchildren. Vanghan *v.* Dickens, 2 Dev. & Bat. Eq. 52. See Price *v.* Lockley, 6 Beavan, Ch. 180; Salisbnry *v.* Petty, 3 Hare, V. Ch. 86.

such cases it was not allowable to engraft on the gift to the issue an implied qualification, in order to assimilate their interest to that of their parents; and this strictness of construction
[106] was considered * to be warranted by the apparently analogous cases establishing that accruing shares are not, by necessary implication, subject to clauses of accruer which the testator has in terms applied to original shares only; there being, it is thought, no such irresistible inference that the testator has the same intention in regard to original and the accruing shares, as to supply the defect of expression. That the application of this strict rule defeats the probable intention, is obvious, and therefore it is not surprising that in the present instance the Courts should have been disposed (express authority not forbidding) to adopt the more liberal construction, by extending the qualification affecting the shares of the original objects of gift, to their children; in other words, by requiring that the children should survive the period of distribution, as expressed with regard to their parents, in whose place they stand.

Thus in the case of Eyre *v.* Marsden, (*a*) where a testator gave his real and personal estate to trustees, upon trust to sell, and out of the income of his estate to pay certain life annuities to his children; and the testator then directed his trustees to accumulate the income of his realty and personalty for the benefit of his grandchildren, and after the decease of his surviving child, if not sold before, to sell and distribute the proceeds among his grandchildren who should be living at the time of his (the testator's) decease, in equal shares, except the shares of F. M., the son of a deceased daughter, half of whose share in his (the testator's) estate and effects, he gave to his brother G. M.; *and in case any of his grandchildren should die before his, her, or their share or shares should become payable, leaving lawful issue, then such issue should be entitled to the share which his, her, or their deceased parent would be entitled to if then living;* but in case of the death of any of the
[107] * grandchildren without leaving issue before he, she, or they should become entitled to receive his, her, or their share or respective shares, in manner aforesaid; the testator then gave the share or shares of such grandchild or grandchildren, among the surviving grandchildren, *to be paid at the same time and in the same manner as before mentioned, touching the original share or shares of his said grandchildren.* One of the questions was, whether the shares of grandchildren dying leaving children, *who also died before the period of distribution,* vested in those deceased children, or passed over to the surviving grandchildren. Lord Langdale, M. R., considered that the

(*a*) 2 Kee. 564.

children of dying grandchildren were not entitled to stand in the place of their parents, unless they were living at the period of distribution. His Lordship said, "He (the testator) meant an aggregate and previously undivided fund, to be distributed and divided on the death of his surviving child. Interests were previously vested; but up to that time, the vested interests were subject to be divested: and I think the plain intention of the testator cannot be carried into effect, without applying this principle to every interest which became vested under this part of the will, in the different events which happened; to the interests in the accrued shares which became vested in the grandchildren, and to the interests in the original or accrued shares, which became vested in the children of grandchildren."

But no case appears to have carried this principle so far as Crowder *v.* Stone, (*a*) where, in the construction of a gift to survivors, in the event of any of the legatees dying without issue, before the period of distribution, Lord Lyndhurst considered it to be necessary in order to entitle a deceased legatee to retain her share as against the survivors, not only that she should leave issue living at her * decease, but that such issue should survive the period of distribution; a construction which, though probably effecting the testator's intention, seemed, in this case, to strain his language. [108]

IV. It often happens that a gift to children describes them as consisting of a specified number, which is less than the number found to exist at the date of the will. In such cases it is highly probable that the testator has mistaken the actual number of the children; and that his real intention is, that all the children, whatever may be their number, shall be included. Such, accordingly, is the established construction, the numerical restriction being wholly disregarded. Indeed, unless this were done, the gift must be void for uncertainty, on account of the impossibility of distinguishing which of the children were intended to be described by the smaller number specified by the testator.[1]

Thus, in Tompkins *v.* Tompkins, (*b*) where a testator, after bequeathing £20 to his sister, gave to her *three* children £50

(*a*) 3 Russ. 217.

(*b*) Cit. 2 Ves. Sen. 564; S. C. cit. 3 Atk. 257, and stated from the Register's Book, 19 Ves. 126. See the same principle applied to bequests to servants, in Sleech *v.* Thorington, 2 Ves. Sen. 561.

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[1] A testator devised his estate to his wife and three children, if his wife should not be *enceinte* at his death, but, if she should be, then to her and his four children. He lived, had the fourth child, and his wife was *enceinte* with the fifth. All the children were allowed equal shares of the estate. Adams *v.* Logan, 6 Monroe, 175. A devise of the testator's farm to his two nieces, the daughters of J. V., and his grandson. J. V. had three daughters, nieces of the testator. The three took two thirds of the farm. Vernon *v.* Henry, 6 Watts, 192.

each; and the legatee had *four:* Lord Hardwicke held, that they were *all* entitled.[1]

So, in Scott *v.* Fenoulhett, (*a*) a bequest to C. of £500, "and the like sum to each of his daughters, if *both* or *either* of them should survive Lady C.," was held to belong to *three* daughters who were living when the will was made. It was contended, in this case, that the bequest was intended for two daughters who resided very * near the testator, the third living at a great distance from him; but as the point had not previously been raised in the cause, and it appeared that the testator knew the last-mentioned daughter, Lord Thurlow refused an inquiry.

[109]

Again, in Stebbing *v.* Walkey, (*b*) where a testator bequeathed certain stock unto "the *two* daughters of T. in equal shares," during their lives; and, if *either* of them should die, then to pay the whole to the survivor during her life, and in case *both* should depart this life, then the whole to fall into the residue. T. had *three* daughters, all of whom were held to be entitled; the M. R., Sir Lloyd Kenyon, declaring, that he yielded to the authority of the cases, and not to the reason of them.

So, in Garvey *v.* Hibbert, (*c*) Sir W. Grant, on the authority of the last case, held *four* children to be entitled under a bequest "to the *three* children of D." of £600 each. In this case, a question arose, whether, in the adoption of this construction, the aggregate amount of the three legacies was to be divided among the four, or each of the four was to take a legacy of the same amount as was given to each of the three: the counsel for the legatees contended only for the former; but the M. R., on the authority of Tomkins *v.* Tomkins, (*d*) adopted the latter construction.

Again, in Berkeley *v.* Pulling, (*e*) where a testator directed his property to be divided into *eight* equal shares, and then proceeded to dispose of them among the children of A and B, giving to some two, and to others one, but enumerating seven only; Lord Gifford, M. R., considering that this was evidently a mistake, held, that the property should be divided into seven shares.

In cases the converse of the preceding, *i. e.* where the number of children mentioned in the will exceeds the actual number, * of course there is no hesitation in holding

[110]

(*a*) 1 Cox, 79; S. C. cit. 2 B. C. C. 86, [see Perkins's ed. 85, 86, notes,] where it is erroneously stated to be a bequest to *two* daughters.
(*b*) 2 B. C. C. 85, [Perkins's ed.] notes.
(*c*) 19 Ves. 125 [see Sumner's ed. note (*a*)]; 1 Roper, Legacies, by White, c. 2, § 18, p. 143, 144.
(*d*) Ante, 108.
(*e*) 1 Russ. 496.

[1] Harrison *v.* Harrison, Tamlyn, 278; Garth *v.* Meyrick, 1 Bro. C. C. (Perkins's ed.) 30, 31, notes.

all the children to be entitled; and, in a recent case, (*a*) a trust for the five daughters of the testator's niece, E., was held to apply to a daughter of E., (and who was the only daughter at the date of the will,) and not to sons, of whom there were five at the date of the will; it being considered, it should seem, that the mere correspondence of number was not sufficient to indicate that the word "daughters" was written by mistake for *sons*.

The case of Harrison *v.* Harrison (*b*) presents an example of both the preceding rules; the bequest being to "the two sons and the daughter of T. L., £50 each." There were one son and five daughters living at the date of the will, all of whom were held to be entitled.

Of course, if the number mentioned by the testator agree with the number existing at the date of the will, there is no ground for extending the gift to after-born children. (*c*)

On the same principle as that which governed the preceding cases, it has been decided, that where (*d*) a testator bequeathed the residue of his personal estate to be divided equally among his *seven* children, A, B, C, D, E, and F, (naming only *six*,) and it turned out that he had eight children when he made his will, but from other parts of his will it appeared that the testator considered one of his children as fully provided for; the *seven* other children were entitled.

In West *v.* Lord Primate of Ireland, (*e*) a testator desired that his executor would at his (the executor's) decease bequeath* 1000 guineas to Lord C. "for the use of his [111] *seventh or youngest child, in case he should not have a seventh child living*." At the testator's death, Lord C. had six children living, and at the death of the executor, ten. The executor bequeathed the money in the words of the original will, and Lord Thurlow held, that the youngest child at *his* death was entitled. (*f*)

V. Where a gift is to the children of several persons, whether it be to the children of A and B (*g*) or to the children of A and the children of B, (*h*) they take per capita, not per stirpes.[1]

(*a*) Lord Selsey *v.* Lord Lake, 1 Beavan, 151.
(*b*) 1 Russ. & Myl. 72.
(*c*) Sherer *v.* Bishop, 4 B. C. C. 55
(*d*) Humphreys *v.* Humphreys, 2 Cox, 184. See also Garth *v.* Meyrick, 1 B. C. C. 30.
(*e*) 2 Cox, 258; S. C. 3 B. C. C. 148.
(*f*) But did not the language of the bequest import that the youngest was only to become entitled in case there was no *seventh* child at the time of ascertaining the object?
(*g*) Weld *v.* Bradbury, 2 Vern. 705; Lugar *v.* Harmar, 1 Cox, 250.
(*h*) Lady Lincoln *v.* Pelham, 10 Ves. 166. See also Barnes *v.* Patch, 8 Ves. 604; Walker *v.* Moore, 1 Beav. 607.

[1] *Ex parte* Leith, 1 Hill, Ch. 153. Where a devise is to children and grand-

The same rule applies, where a devise or bequest is made *to a person* described as standing in a certain relation to the testator, and *the children* of another person standing in the same relation, as to "my brother A and the children of my brother B;" (*a*) in which case A takes only a share equal to that of one of the children of B, though it may be conjectured that the testator had a distribution according to the statute in his case. And of course it is immaterial that the objects of gift are the testator's own children and grandchildren; as where (*b*) a legacy was bequeathed "equally between my son David and the children of my son Robert."

But this mode of construction will yield to a very faint glimpse of a different intention in the context. Thus the mere
[112] fact, that the annual income, until the distribution * of the capital, is applicable, per stirpes, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital. (*c*)

Where (*d*) a testator bequeathed "his fortune" to be equally divided between any second or younger sons of his brother J. and his sister S.; and in case his said brother and sister should not leave any second or younger son, the testator gave and bequeathed his said fortune to his said brother and sister; it was held, that there being no son of J., and but one younger son of S., such younger son took the whole.

Here it may be observed, that where the gift is to A and B's children, or to "my brother and sister's children," (the possessive case being confined to B and the sister,) it is read as a gift to A and the children of B, or to the brother and the children

(*a*) Blackler *v.* Webb, 2 P.W. 383.
(*b*) Williams *v.* Yates, 1 C. P. Coop. 177.
(*c*) Brett *v.* Horton, Rolls, July 20, 1841, Rep. 4 Jur. 696.
(*d*) Wicker *v.* Mitford, 3 B. P. C. (Toml. ed.) 442. And see Malcom *v.* Martin, 3 B. C. C. 50.

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children, or to brothers and sisters, and nephews and nieces, to be equally divided between them, and the devisees are individually named, they take *per capita* and not *per stirpes*. Kean *v.* Roe, 2 Harr. 103; Shull *v.* Johnson, 2 Jones Eq. (N. C.) 202. See Brewer *v.* Opie, 1 Call, 212. But in a case where the testator devised the residue of his estate as follows, "to be equally divided between the children of my sister B and their heirs forever, and the children of my sister C and their heirs for ever," and C survived the testator, B being dead, the latter having seven children and the former four, it was held, that the residue of the estate should be divided into two equal portions, between the children of B and C. Alder *v.* Beall, 11 Gill & John. 123. See Bool *v.* Mix, 17 Wendell, 119; Walker *v.* Griffin, 11 Wheat. 375; Roome *v.* Counter, 1 Halst. 111. So where the devise was of property to be divided as follows: "between the children of my brother J. deceased, and the children or heirs of my sister C. deceased, and my brother Jacob, or his heirs or legal representatives," it was held, that the children described took *per stirpes* and not *per capita*. Tissel's Appeal, 27 Penn. State R. 55. So a bequest of a certain fund "to the bodily heirs of my three daughters R., C., and K." passes the fund to be shared *per stirpes* and not *per capita*. Lowe *v.* Carter, 2 Jones Eq. (N. C.) 377.

of the sister, (*a*) as it strictly and properly imports, and not to the respective children of both, as the expression is sometimes inaccurately used to signify.

So a bequest of a residue to be divided among "the children of my late cousin A, and my cousin B, and their lawful representatives," has been held to apply to B, not to his children. (*b*)

VI. Another subject of inquiry is, whether a gift over, in case of a prior devisee or legatee dying without *children*, (*c*) *means without *having had* or without *leaving* a child. [113]

In Hughes *v.* Sayer, (*d*) a testator bequeathed personally to A and B, and upon either of them dying without children, then to the survivor; and if both should die without children, then over; and it was held to mean children living at the death. The great question in this case was, whether the word "children" was not used as synonymous with *issue* (*e*) indefinitely, in which case the bequest over would have been void; and the M. R. seems to have thought, that whether it meant *issue* or *children*, it referred to the period of the death. (*f*)

So, in the case of Thicknessse *v.* Liege, (*g*) where a testator devised the residue of his estate in trust for his daughter for life, and after her decease among her issue, the division to be when the youngest should attain twenty-one; and if any of them should be then dead, leaving lawful issue, the guardian of such issue to take his or her share. *But if his daughter happened to die without any child*, or the youngest of them should not arrive to twenty-one, and none of them should have left issue, then over. The testator's daughter at the time of his death had one child, who had four children, but they, as well as their mother, all died in the lifetime of the daughter, so that she died without leaving issue at her death; and it was held, that the devise over took effect.

But the words *without having children* are construed to mean, as they obviously import, without having *had* a child.

Thus, in the case of Weakley d. Knight *v.* Rugg, (*h*)

(*a*) See Doe d. Hayter *v.* Joinville, 3 East, 172. If, however, A and B were husband and wife, (as if the bequest were to John and Mary Thomas's children,) no doubt the construction would be different; it would be held to apply to the children of both.

(*b*) Lugar *v.* Harmar, 1 Cox, 250.

(*c*) Of course this question *may* arise where the person, whose issue is referred to, is not the prior legatee, but it happens rarely to have presented itself in such a shape.

(*d*) 1 P. W. 534.

(*e*) As to which see Doe d. Smith *v.* Webber, 1 B. & Ald. 713, and ante, 33.

(*f*) But see Massey *v.* Hudson, 2 Mer. 135.

(*g*) 3 B. P. C. (Toml. ed.) 365.

(*h*) 7 Durn. & E. 322. See also Maule *v.* Stone, 2 Simons, 490.

[114] where *leasehold property was bequeathed to A, " and in case she die without *having* children," over: it was held, that the legatee's interest became indefeasible on the birth of a child.

In Wall *v.* Tomlinson, (*a*) a residue, which was given to A " in case she should have legitimate children, in failure of which," over, was held to belong absolutely to A on the birth of a child, who died before the parent. " Failure " here evidently referred not to the child, but to the event of " having children."

The word *leaving* obviously points at the period of death. Thus a gift to such children, or issue, as a person may leave, is held to refer to the children or issue who shall survive him, in exclusion of such objects as may die in his lifetime; and this construction was applied in a recent case (*b*) to a gift to the lawful issue of A and B and of such of them as should *leave* issue, the latter words being considered as explaining, that the word " issue," in the first part of the sentence, meant those who were left by the parent; the consequence of which was, that the children, who did not survive the parent, were not entitled to participate with those who did.

Although, as we have seen, the word " leaving " prima facie points to the period of death, yet this term, like all others, may receive a different interpretation by force of an explanatory context. Where a gift over is to take effect in case of a prior legatee for life, whose children are made objects of gift, dying without *leaving* children, it is sometimes construed as meaning, in default of objects of the prior gift, even though such gift should not have been confined to children living at the death of the parent.

[115] * Where the gift over is in the event of *two* persons, husband and wife, not leaving children, the question arises, whether the words are to be construed, in case both shall die without leaving a child living at the death of *either*, or in case both shall die without leaving a child, who shall survive *both*.

As in the case of Doe d. Nesmyth *v.* Knowls, (*c*) where the devise was to William Smyth and Mary his wife, and the survivor of them, during their lives, then to Mary their daughter, or, if more children by Mary, equal between them; and, *in case they leave no children*, to their heirs and assigns forever; it was held, that the fee simple became vested under the last devise, when the survivor of William and Mary (namely, William) died, leaving no children of their marriage surviving him, though a child was living at the death of Mary, Mr. Justice Bayley observing— " they cannot be said to leave no children till both are gone."

If the several persons on whose decease, without children, the

(*a*) 16 Ves. 413.
(*b*) Cross *v.* Cross, 1 Sim. 201.
(*c*) 1 Barn. & Adol. 324.

gift over is to take effect be not husband and wife, the obvious construction is to read the words as signifying, "in case each or every such person shall die without leaving a child living at his or her own respective decease," supposing, of course, that the testator is not contemplating a marriage between these persons, and their having children, the offspring of such marriage; a question which can only arise when the persons are of different sexes, and not related within the prohibited degrees of consanguinity; for the law will not presume that a marriage between such persons, *i. e.* an illegal marriage, was in the testator's contemplation.

VII. We are now to consider the construction of *gifts to younger children*, the peculiarity of which consists in this, that as the term *younger children* generally comprehends the branches not provided for of a family, (younger sons being excluded by the law of primogeniture from taking by descent,) the supposition that these are the objects in the testator's contemplation so far prevails, and controls the literal import of the language of the gift, that it has been held to apply to children who do *not* take the family estate, *whether younger or not*, (*a*) to the exclusion of a child taking the estate, whether elder or not. (*b*) Thus the eldest daughter, or the eldest son being unprovided for, has frequently been held to be entitled under the description of a younger child.

As where a parent, having a power to dispose of the inheritance to one or more of his children, subject to a term of years for raising portions for *younger children*, appoints the estate to a younger son, the elder will be entitled to a portion under the trusts of the term; (*c*) and, by parity of reason, the appointee of the estate, though a younger son, will be excluded. But it should be observed, that where the portions are to be raised for *children* generally, the child taking the estate is allowed to participate. (*d*)

The rule under consideration, however, applies only to gifts by parents or persons standing in loco parentis, and not to dispositions by strangers, in which the words * *younger* [117] *children* receive their ordinary literal interpretation. (*e*)

Nor is there any instance of its having been applied to a devise of *lands* without some indication in the context (*f*) of an inten-

(*a*) Chadwick *v.* Doleman, 2 Vern. 525; Beale *v.* Beale, 1 P. W. 244; Butler *v* Duncombe, Ib. 451; Heneage *v.* Hunlock, 2 Atk. 456; Pierson *v.* Garnett, 2 B. C. C. 38.

(*b*) Bretton *v.* Bretton, Freem. Eq. Ca. 158, pl. 204; 3 Ch. Rep. 1; 1 Eq. Ca. Ab. 202, pl. 18, S. C.

(*c*) Duke *v.* Doidge, 2 Ves. Sen. 203.

(*d*) Incledon *v.* Northcote, 3 Atk. 438.

(*e*) See Lord Teynham *v.* Webb, 2 Ves. Sen. 197; Hall *v.* Hewer, Amb. 203 Lady Lincoln *v.* Pelham, 10 Ves. 166.

(*f*) See Heneage *v.* Hunlock, 2 Atk. 456.

tion, on the part of the testator, to use the term *younger children* as contradistinguished from an elder or provided-for son. (*a*) Therefore it is conceived, that, if real estate were devised simply to the younger children of A, the devise would apply to such children as would be entitled under a devise to children generally, with the exception of the child (whether a son or daughter) being the eldest at the time of the vesting. It may be observed, that a bequest to "the youngest child of" A has been held to apply to an *only* child. (*b*)

Another question, which has been much agitated, in construing gifts to younger children, respects the period at which the objects are to be ascertained.

It is clear that an immediate devise or bequest to younger children applies to those who answer the description at the death of the testator, there being no other period to which the words can be referred. (*c*)

It might seem, too, not to admit of doubt upon principle, that where a gift is made to a person for life, and after his decease to the younger children of B, it vests at the death of the testator in those who then sustain this character; subject to be divested pro tanto in favor of future objects coming in esse during the life of A.

[118] In the case of Lady Lincoln *v.* Pelham, (*d*) the bequest * was to A for life, and after her death, to her children; and, in case she should have none, or they should all die under twenty-one, then to the *younger children of B;* and A having no child, the younger children of B at the death of the testator, were held entitled to a vested interest. Lord Eldon, however, seems to have thought that this construction was aided by the terms of another bequest; and his lordship laid some stress on the circumstance, that the bequest did not proceed from a parent, or a person standing in loco parentis.

In regard to parental provisions of this nature, certainly a peculiarity of construction seems to have obtained, the leading authority for which is Chadwick *v.* Doleman, (*e*) where a father, having a power to appoint portions among his younger children, to be raised within six months after his death, by deed appointed £2600, part of the entire sum, to his son T., describing him as his second son. No power of revocation was reserved. T. afterwards became an elder son, whereupon the father made a new appointment in favor of another son; and the Lord Keeper held, that the second was valid, the first appointment being

(*a*) Hall *v.* Luckap, 4 Sim. 5, seems to be a case of this kind.
(*b*) Emery *v.* England, 3 Ves. 232.
(*c*) Coleman *v.* Seymour, 1 Ves. Sen. 209.
(*d*) 10 Ves. 166.
(*e*) 2 Vern. 528. See also Loder *v.* Loder, 2 Ves. Sen. 531; Broadmead *v.* Wood, 1 B. C. C. 77; Savage *v.* Carroll, 1 Ball & Beatty, 265.

made upon the tacit or implied condition of the appointee not becoming an elder son before the time of payment.

It should seem, then, that a gift by a father or a person assuming the parental office, in favor of younger children, is, without any aid from the context, to be construed as applying to the persons who shall answer the description at the time when the portions become payable. The object of thus keeping open the vesting during the suspense of payment, probably is to prevent *a child from taking a portion as younger child, [119] who has become, in event, an elder child, (*a*) and also, perhaps to prevent the inheritance (which is often charged with portions to younger children) from being burdened with the payment of portions which are not eventually wanted. Shutting out of view these particular cases of parental provisions, (the propriety of which it is too late to question,) and applying to bequests to younger children the principles established by the cases respecting gifts to children in general, it would seem, that, in every case of a future gift to younger children, whether vested or contingent, provided its contingent quality did not arise from its being limited in terms to the persons who should be younger children at the time of distribution, or any other period, the gift would take effect in favor of those who sustained the character at the death of the testator, and who subsequently came into existence before the contingency happened, as in the case of gifts to children generally; and, consequently, that a child in whom a share vested at the death of the testator, would not be excluded *by his or her becoming an elder be- [120] fore the period of distribution. With this conclusion, however, it is not easy to reconcile the two following cases.

Thus, in Hall *v.* Hewer, (*b*) A. having devised lands to trustees, to raise £6000, afterwards wrote a letter (which was proved as a codicil) to J., one of his trustees, which contained the following passage: "I have given you and W. a power to mortgage for payment of £6000, and I beg that that sum may be lent to W., and that you will take such securities from him as

(*a*) Under this rule, however, a younger child might happen to lose his portion by becoming an elder child, without acquiring the family estate. For instance, suppose lands to be devised to A for life, with remainder to his first and other sons in tail male, charged with portions to his younger children, payable at the decease of A. A has three sons, the eldest of whom dies in the lifetime of A leaving issue male; the second son having, by the decease of his elder brother, become in event the eldest son, would lose his portion as younger son, though the estate had devolved to the issue of his elder brother; probably, however, it would be held, that, under such circumstances, the second son was not such an elder son as the rule contemplated, namely, the elder son *taking the estate*. From some remarks of Sir Thomas Plumer, in the case of Matthews *v.* Paul, it is to be inferred, that his Honor did not consider that the construction could be carried to this extent; but in this and some other parts of his judgment, the line is not very distinctly drawn between parental provisions and dispositions by a stranger in favor of younger children. It is to the former only that the construction here suggested could, it is conceived, apply.

(*b*) Amb. 203.

he can give, to indemnify you and your children from payment of it; and, in case of your death without children, I desire it may be *secured to the younger children of W.*" Lord Hardwicke held, that the £6000 did not vest until the death of J., and then in such persons as were at that time younger children of W., and, consequently, that a younger child who became an elder during the life of J. was excluded. The grounds of this decision are wholly unexplained, and are not apparent.

In Ellison *v.* Airey, (*a*) £300 was bequeathed to E., to be paid at her age of twenty-one or marriage, and interest in the mean time for her maintenance and education; but if she died before twenty-one or marriage, then to the *younger children of testatrix's nephew F.*, equally to be divided to or among them, the eldest son being excluded from any part thereof.

[121] Lord Hardwicke was of opinion, that it meant such as should be younger * children at the death of E. before twenty-one or marriage, *the legacy being contingent until that period.*

But as the fact of their being younger children at the period of distribution was no part of their qualification, could it properly form a ground for varying the construction? In the case of a devise to A in fee, and if he die under twenty-one to B, it has long been established that B takes an executory interest, transmissible to his representatives, (*b*) and it cannot be material whether the executory devise is in favor of a person nominatim, or as the member of a class upon whom the interest has devolved at the death of the testator, or at any subsequent period before the happening of the contingency. (*c*)

It does not appear that either of the preceding cases involved the application of the peculiar rule respecting parental provisions, or that Lord Hardwicke so regarded them; nor is it even clear that his Lordship considered the construction exclusively applicable to gifts to younger children; for it will be remembered, that in the case of Pyot *v.* Pyot, (*d*) the same eminent Judge laid down the rule generally, that an executory or contingent gift to persons by a certain description, applied to such of them only as answered the description at the happening of the contingency. If there is any such rule, of course the cases under consideration do not exist as a distinct class. We are too much in the dark as to the ground of decision in Hall *v.* Hewer, and Ellison *v.* Airey, to found any general conclusion upon those

(*a*) 1 Ves. Sen. 111. This case has been frequently cited in the present chapter as an authority for admitting children born before the time of distribution. As such, it is unquestionable, and has always been regarded as a leading case; but this is quite distinct from the point now under consideration.

(*b*) Goodtitle *v.* Wood, Willes, 211.

(*c*) As to the general distinctions between gifts to classes and individuals, see ante, vol. 1, p. 295.

(*d*) Ante, 62.

cases, nor, on the other hand, is it safe wholly to disregard them.

It is clear, however, that an express exclusion of the son who shall be elder *at the time of death of the tenant for life*, will * have the effect in like manner of restricting a [122] gift to younger children to such as shall *then* sustain the character. (*a*)

And the same construction was given to the expression "an eldest son," in the case of Matthews *v.* Paul, (*b*) which deserves some consideration.[1] A testatrix gave to trustees certain bank stock, upon trust to pay the dividends to her daughter M. for life, and, after her decease, to P. her husband, for his life, and, after his decease, upon trust to transfer the said stock unto all the children of M., if more than one, (*except an eldest son,*) share and share alike, *the same to be vested interests*, and transferable *at their, his, or her, ages or age of twenty-one years*, and in the mean time to invest their respective shares of the dividends for such children's future benefit; and, in case any such children or child should die under the said age, leaving any children or child, then the share of every such child to go among their, his, or her children; otherwise to go to the survivors or survivor, and to be transferable in like manner as their original share; and, in case M. should leave no children or child at her decease, or, leaving such, they should all die under the age of twenty-one years without children as aforesaid, then over. The testatrix then gave certain terminable imperial annuities and other stock to the same trustees, in trust to receive the dividends, and invest the same in government stock, to accumulate until the expiration of the imperial annuities, and thereupon to transfer all such stocks, as well original as accumulated, unto and among all and every the children of her said daughter, if more than one, (*except an eldest son,*) equally share and share * alike; [123] and if but one, then the whole to such one, or only child, the same to be vested interests, and transferable, at such times and in such manner as the bank stock thereinbefore given. One of the younger children became an elder between the periods of the death of the testatrix and the expiration of the imperial annuities, but before any younger child had attained twenty-one, which raised the question as to the point of time to which the exception of an elder son was referable. Sir T. Plumer, M. R., held, first, that the shares vested when one of the

(*a*) Billingsley *v.* Wills, 3 Atk. 219. (*b*) 3 Swanst. 328.

[1] A testator bequeathes legacies to the two oldest children of a person, not naming them, and after the death of one of them, makes a codicil confirming his will, so far as not altered by the codicil, and takes no notice of the legacies. Held, the two oldest children living at the testator's death should take the legacies. Miles *v.* Boyden, 3 Pick. 213.

younger children attained twenty-one, and not before. With respect to the period at which the phrase "an eldest son" was to be applied, he considered that three different times might be proposed; the date of the will, the death of the testatrix, and the time when the fund was directed to be distributed. After showing that neither the first nor the second could be intended, he came to the conclusion, that, in all cases of legacies, payable to a class of persons at a future period, the constant rule has been, that all persons coming in esse, and answering the description at the period of distribution, should take. The same rule must, he thought, be applied to persons excluded. There could not be one time for ascertaining the class of those who are to take, and another to ascertain the character which excludes.

But it is to be observed, that though in gifts to children, the time of distribution is the period of ascertaining the number of objects to be admitted, yet it is not necessary to wait until this period in order to see whether children living at the death of the testator, or at any other period to which the vesting is expressly postponed, be objects or not; and it would seem, therefore, upon the principle of his Honor's own reasoning, to be equally unnecessary to wait until the period of distribution, in order
[124] * to know whether an elder son, in existence at the time of the vesting, would be excluded. In the case of a gift to A for life, and after his death to the children of B, to vest at twenty-one, it may be affirmed of every child who has attained twenty-one in the lifetime of B, that he is an object; (*a*) and, by parity of reasoning, it would seem to follow that if any child who would, but for the clause of exclusion, have been an object, comes in esse, the exception is ascertained to apply to him. (*b*)

It is singular, that though the M. R. took some pains to show that the legacy did not vest until one at least of the younger children attained twenty-one, and he used the fact as an answer to the argument for applying the description to the death of the testator, yet he never once addresses himself to the inquiry whether *the period of vesting* was not that to which the term "eldest son" was to be referred. It is submitted, upon the general principles which govern these cases, and which were applied by Lord Eldon to a bequest to younger children, in Lady Lincoln *v.* Pelham, that this *was* the period of ascertaining the individual upon whom the character of eldest son had devolved, whether he was marked out as the sole object of the gift, or for the purpose of being excluded from it. If the gift had been to A for life, and after her decease to "an eldest son" of A, to be

(*a*) Ante, 78.

(*b*) But if the *youngest* child were excepted, it would obviously be necessary to wait until the period of distribution, in order to know who would be the youngest, the exception embracing the last-born object of the class.

vested and transferable when the younger children or child of A should attain twenty-one, it could not have been doubted for a moment that the person who was eldest son at the period of vesting, whether in the lifetime of A or not, was absolutely entitled, and yet this is precisely the case of Matthews *v.* Paul, * substituting a gift for the exception. Another [125] remark occurs on this judgment: that though at the outset his Honor treats the case as one in which the provision proceeded from a stranger, (being by a grandmother in the lifetime of the parent, without any indication of an intention to stand in loco parentis,) yet he afterwards cites, in support of his decision, Chadwick *v.* Doleman, (*a*) and other cases of provisions by parents.

And here it may be remarked, that where there is a gift to the elder son in terms which would carry it to the eldest *for the time being*, and there is another gift in the same will to younger children generally, the latter will receive a similar construction, to prevent the same individual taking under each character. (*b*) Such seems at least to be the effect of the case of Bowles *v.* Bowles, though in the judgment of Lord Eldon no general position of this nature is distinctly advanced.

It is clear that if there be an express limitation over in case of a younger son becoming the eldest before a given age or period, this prevents his being excluded by becoming the eldest son under *other* circumstances, by force of the often-cited principle, (*c*) exclusio unius est inclusio alterius. Indeed, Lord Gifford, in the case referred to, was of opinion that a declaration that the children attaining twenty-one, &c. in the lifetime of the parent, should take vested interests, was sufficient to entitle a child who was a younger child at this period, but subsequently became the eldest. This conclusion, it is conceived, goes far to support the doctrine which has been here contended for in opposition * to Matthews *v.* Paul; for as the doubt is [126] not as to the period of vesting, but whether such period is the time of ascertaining the object to be excluded, the declaration in question seems not to be very material. Besides, whatever is its effect, the declaration as to vesting in Matthews *v.* Paul, seems to be equivalent in principle. The result of Lord Gifford's determination is, that in the case of gifts to younger children, not involving the peculiar doctrine applicable to parental provisions, the time of vesting is the period of ascertaining who are to take under the description of younger children, and who is to be excluded as an elder child.

(*a*) Ante, 118.

(*b*) Bowles *v.* Bowles, 10 Ves. 177. See Sansbury *v.* Read, 12 Ves. 175, where younger children were held to be entitled on a very obscure will.

(*c*) Windham *v.* Graham, 1 Russell, 331. This case arose on the construction of a marriage settlement, but the principle seems not to be different on that account.

That this is the rule in regard to devises of real estate appears by the recent case of Adams *v.* Bush, (*a*) where a testator devised freehold estate to his uncle A for life, remainder to the wife of A for life, remainder to all and every the child and children of A, *other than and except an eldest or only son*, and their heirs, and if there should be no such child *other than an elder or only son*, or being such, all should die under twenty-one, then over. At the death of the testator, A had two sons, B and C; B died in A's lifetime, and it was contended that according to the cases respecting gifts to younger children, especially Matthews *v.* Paul, C was not entitled, as he did not answer the description of younger child when the remainder vested in possession; but the Court certified (it being a case from Chancery) that the devise took effect in favor of C, the second son, he being the younger son *at the death of the testator*.

This case relieves the point of construction which has been the subject of discussion in the preceding remarks, from the uncertainty which previously existed, so far at least as
[127] respects devises of real estate, and it is * hoped that the same sound principles will be applied to bequests of personal estate, at least such of them as are not governed by the peculiar doctrine applicable to parental provisions in favor of younger children. There seems to be no solid difference between such bequests and devises of real estate.

The present chapter will be concluded with the case of Langston *v.* Langston, (*b*) which is remarkable for the great difference of opinion that existed in regard to the true construction of the will. The question was, whether the first son of the testator's son A was excluded, under a clause which directed trustees to convey to him (A) for life, with remainder to trustees to preserve, with remainder to the *second*, third, fourth, fifth, and all and every *other* son and sons of A successively, as they should be in seniority of age and priority of birth, in tail male, with remainder to the testator's second and other sons successively in tail male, with numerous remainders over. The eldest son of A claimed an estate tail male expectant on the decease of A. The Court of King's Bench, on a case from Chancery, certified that he took no estate. Sir J. Leach, M. R., (being, as it should seem, dissatisfied with this opinion,) sent a case to the Judges of the Common Pleas, who certified that the first son of A took an estate tail male, and the M. R. decreed accordingly, at the same time recommending that the case should be carried to the House of Lords, which was done; and that House, after much consideration, affirmed the decree of the Court below. Lord Brougham founded his conclusion, that the eldest son took an estate tail male, upon the general

(*a*) 8 Scott, 405. (*b*) 8 Bligh, N. S. 16.

context of the will, in which various terms of years and limitations were made dependent on the existence or non-existence of an eldest son, in a manner which rendered them in the highest degree absurd, if the eldest son took no estate;
* and his Lordship even considered that the language [128]
of the particular devise itself bore out the construction, as the words "other" sons, extended to the whole range, including the eldest. "But it is said," observed his Lordship, "that 'other' always means 'younger,' 'posterior,' and I leaned at first towards this view of the subject: it is a very plausible argument, and in ordinary cases, it is true in point of fact. If you were to say (in the usual way) first, second, third, fourth, and *other* sons, 'other' must mean the sons after the fourth. But why does it mean those after the fourth? Only because you had before enumerated all that come before the fourth, for you had said first, second, third, and fourth. But suppose you had happened to omit the first, and instead of saying first, second, third, fourth, and other sons, you had said second, third, fourth and other sons, leaving out the first, then it is perfectly clear that 'other' no longer is of necessity confined to the fifth, sixth, and seventh; but rather ex vi termini, includes the first, because the first is literally the one who answers the description of something other than the second, third, and fourth. The word 'other' would then just as grammatically, as strictly, and as correctly, describe the first as the fifth, sixth, or seventh son, because the eldest son is a son other than the second, other than the third, other than the fourth. The only reason why 'other' in all ordinary cases, and in the common strain of conveyancing, means a younger son, is, that no one ever thinks of leaving out the elder, and to begin with the second, then 'other' would of course always suggest to one's mind the idea of the unnamed elder son, as well as the unnamed younger sons."

CHAPTER XXXII.

DEVISES AND BEQUESTS TO ILLEGITIMATE CHILDREN.[1]

I. *Children in existence when the will is made, capable of taking. What is a sufficient description of them.*
II. *Gifts to Children en ventre.*
III. *Gifts to Children not in esse.*
IV. *General conclusions from the cases.*

EXISTING illegitimate children capable of taking.
Gifts to children, prima facie, mean legitimate children.
Not extended to illegitimate children upon mere conjecture, [p. 130.]
Lord Eldon's observations upon Cartwright *v.* Vawdry, [p. 130.]
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Bastards take under description of children, where, [p. 135.]
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Remark on Gill *v.* Shelley, [p. 137.]
What shows that testator does not contemplate marriage, [p. 137.]
Effect where testator provides for his wife and children by another woman in same will, [p. 139.]
Parol evidence admissible, to what extent, [p. 139.]
Rule with suggested qualification, [p. 140.]

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[1] Where there are legitimate children to answer the description of "children," the rule of law is, that legitimate children only can take. Bayley *v.* Mollard, 1 Russ. & My. 581; Frazer *v.* Pigott, 1 Younge, 354; 2 Williams, Ex. (2d Am. ed.) 803; Shearman *v.* Angel, 1 Bai. Eq. 351; Wilkinson *v.* Adam, 12 Price, 470; Gardner *v.* Heyer, 2 Paige, 11; Ram on Wills, c. 6, p. 50, 51; Meredith *v.* Parr, 2 Younge & C. (N. S.) V. Ch. 525; Kent *v.* Barker, 2 Gray, 235. But natural children may take under this description, if the will itself manifests an intent to include them in the term "children," either by express designation. or by necessary implication. Wilkinson *v.* Adam, 1 Ves. & Bea. 462; S. C. 12 Price, 470. The proof of the intent to include natural children in the term "children," must come from the will only; extrinsic evidence being inadmissible to raise a construction by circumstances, except for the purpose of showing that illegitimate children have, at the date of the instrument, acquired the reputation of the children of the testator, or the person named in the instrument. Wilkinson *v.* Adam, 1 Ves. & Bea. 422; Swaine *v.* Kennerley, Ib. 469; Gardner *v.* Heyer, 2 Paige, 11; Collins *v.* Hoxie, 9 Paige, 88; Shearman *v.* Angel, 1 Bai. Eq. 351. See also Harris *v.* Lloyd, 1 Turn. & Russ. 310; Mortimer *v.* West, 4 Russ. 370; 2 Williams, Ex. (2d ed.) 804, 805; 4 Kent, (5th ed.) 4113, 44; Cooley *v.* Dewey, 4 Pick. 93; Brewer *v.* Blaugher, 14 Peters, 178; Heath *v.* White, 5 Conn. 228; Ferguson *v.* Mason, 2 Sneed, (Tenn.) 618. An illegitimate child may take by particular description, before its birth. Dawson *v.* Dawson, Madd. & Geld. 292; Evans *v.* Massey, 8 Price, 22; Gordon *v.* Gordon, 1 Meriv. 141; 2 Williams, Ex. (2d Am. ed.) 805, 806.

"To my children;" "to the mother of my children;" held to extend to illegitimate children, [p. 140.]
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Construction not to be made to depend on the fact whether legitimate children come in esse, [p. 143.]
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I. ILLEGITIMATE children, born at the time of the making of the will, may be objects of a devise or bequest, by any description which will identify them. (*a*) Hence, in the case of a gift to the natural children of a man or of a woman, or of one by the other, it is simply necessary to prove that the objects in question had, at the date of the will, acquired the reputation of being such children. It is not *the fact*, (for that the law will not inquire into,) *but the reputation of the fact*, which entitles them. The only point, therefore, which can now be raised in relation to such gifts is, whether, according to the true construction of the will, it is clear that illegitimate children were the intended objects of the testator's bounty; for, let it be remembered, that though illegitimate children in esse may take, under any disposition by deed or will adequately describing them, yet it has long been an established rule, that a gift to children, sons, daughters, or issue, imports primâ facie *legitimate* children or issue,[1] excluding those who are illegitimate, agreeable to the rule, "Qui ex damnato coitu * nascuntur, inter liberos non computen- [130] tur." (*b*) Nor will expressions, or a mode of disposition affording mere conjecture of intention, be a ground for their admission.[2]

(*a*) Metham *v.* Duke of Devon, 1 P. W. 529.
(*b*) Hart. *v.* Durand, 3 Anst. 684, post, p. 135. See also Cartwright *v.* Vawdry, 5 Ves. 530; Harris *v.* Stewart, cited 1 Ves. & Bea. 434.

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[1] Gardner *v.* Heyer, 2 Paige, 11; 2 Williams, Ex. (2d Am. ed.) 804; Kent *v.* Barker, 2 Gray, 235.

[2] The testator devised a part of his estate to his "mother" for life, and, at her death, to *her children;* and devised another part of his estate to a sister. The testator and the "sister" were illegitimate children of the "mother," who, at her

This is well illustrated by the case of Cartwright *v.* Vawdry, (*a*) where A having *four* children, *three legitimate and one illegitimate*, (the latter being an ante-nuptial child of himself and his wife,) bequeathed to *all and every such child or children*, as he might happen to leave at his death, for maintenance until twenty-one or marriage, then in trust to pay *such child or children one fourth* part of the income of his estates; but in case there should be only one such child who should attain that age or marriage as aforesaid, then to pay the whole income to such only child, if the others should have died without issue; and there was a limitation to survivors in case of the death of any of the children under age, unmarried, and without issue. It was contended that the distribution into fourths plainly indicated that the illegitimate daughter was in the testator's contemplation, *there being four children including her* when the will was made, and that all the expressions applied to females, showing that he meant existing daughters, not future issue, which might be male or female. But Lord Loughborough decided against the illegitimate daughter. He said it was impossible that an illegitimate child could take equally with lawful children in a devise to children. This decision has been commended by Lord Eldon, who in a subsequent case addressing himself to the argument urged on behalf of the illegitimate daughter, (*b*) observed, "That the direction to apply the income in fourths only afforded conjecture; as if between the time
[131] *of his will and his death, one or two of these children had died, the division into fourths would have been just as inapplicable as it was in the case that happened. The question, therefore, only comes to this, whether the single circumstance of his directing the maintenance in fourths compelled the Court to hold by necessary implication, that the illegitimate child was to take by implication with the others, as much as if she had been in the plainest and clearest terms persona designata; *and my opinion is, that this circumstance is by no means sufficient.* The will would have operated in favor of all his children, however numerous they might have been, and in favor of subsequent legitimate children, even if every legitimate child he had before had died. *It was, therefore, impossible to say he necessarily means the illegitimate child; as it is not possible to say he meant those legitimate children.* That will

(*a*) 5 Ves. 530.

(*b*) See judgment in Wilkinson *v.* Adam, 1 Ves. & Bea. 464, which is replete with learning on this subject.

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death, left two other legitimate children surviving her. Held, that, describing the mother and her illegitimate daughter by the terms "mother" and "sister," did not sufficiently manifest the intention of the testator to include the latter in the devise to the children of the former; and that the legitimate children alone were entitled to take. Shearman *v.* Angel, 1 Bail. Eq. 351.

would have provided for children living at the time of his death, though not at the date of his will. It could not be taken to describe two classes of children, both legitimate and illegitimate. Without extrinsic evidence, it was impossible to raise the question. The will itself furnished no question whether legitimate or illegitimate children were intended; the question upon which the Court was to decide was furnished by matter arising out of, not in, the will." [1]

These observations afford a more satisfactory explanation of the grounds of Lord Loughborough's decision, than is to be found in his Lordship's own judgment. It will be useful to keep in view the circumstances of the case, and Lord Eldon's comment upon them, when we proceed to examine some recent adjudications noticed in the sequel.

And it is clear that the fact of there being no other than illegitimate children when the will takes effect, or at
* any other period, so that the gift, if confined to legiti- [132]
mate children, has eventually failed for want of objects, does not warrant the application of the word "children" to the former objects.

Thus in Godfrey *v.* Davis, (*a*) where a testator, after giving certain annuities, desired that the first annuity that dropped in might devolve upon the "*eldest child*, male or female, for life, of W." At the time the will was made, W. had several illegitimate children, who were known to the testator, but no others; and he had no legitimate child then, or when the first annuitant died. (*b*) Sir W. Grant, M. R., held, that there was not sufficient to entitle any of the illegitimate children, for, whatever the real intention of the testator might be, and though it could hardly be supposed he had not some children then existing in his contemplation, yet as the words were "the eldest *child*," *such persons only could be intended as could entitle themselves as children by the strict rule of law;* and no illegitimate child could claim under such a description, unless particularly pointed out by the testator, and manifestly and incontrovertibly intended, though in point of law not standing in that character.

So in Kenebel *v.* Scraftan, (*c*) where a testator being unmarried, directed that *in case he should have any child or children by M.* (a woman with whom he cohabited,) a sum of money should be raised *for such child or children;* it was held that he contemplated a marriage with her, and making a provision for the issue of such marriage; and consequently that the will was not revoked

(*a*) 6 Ves. 43.
(*b*) As to question arising out of this, see supra, 89.
(*c*) 2 East, 530.

[1] See ante, 93, note.

by his marriage with M., (*a*) and the birth of a child.
[133] Lord *Eldon, in reference to this case, (*b*) has said, "We may conjecture that he meant illegitimate children if he did not marry, yet notwithstanding that may be conjectured, the opinion of the Court was, as mine is, that *where an unmarried man*, describing an unmarried woman as dearly beloved by him, *does no more than make a provision for her and her children, he must be considered as intending legitimate children, as there is not enough upon the will itself to show that he meant illegitimate children;* and my opinion is, that *such intention must appear, by necessary implication, upon the will itself.*"[1]

Again, in the more recent case of Harris *v.* Lloyd, (*c*) a trust "for *all and every the child and children*" of the testator's son, was held not to apply to illegitimate children, though he had no other than illegitimate children at the date of the will, and these had always been treated and recognized by the testator as his grandchildren.

So, in the case of Mortimer *v.* West, (*d*) where a testator, after bequeathing an annuity to his wife and M., (a woman with whom he lived,) created a trust of his residuary real and personal estate in favor of certain illegitimate children of M. by himself, naming them, and describing them as the children of M., "together with every *other* child born of the body of the said M.;" it was held, that this description did not embrace two illegitimate children of M. born subsequently to the will and before the execution of a codicil (which was contended to be a republication of the will, thereby bringing the terms of the description down to the date of the codicil); the Lord Chancellor (Lyndhurst) being of opinion that there was nothing to show by necessary implication that the testator intended the bequest to be to illegitimate children.

[134] *And even if the testator, in such codicil, recognize as his own an illegitimate child born since the execution of his will, this is not sufficient to entitle such child to claim under a bequest in the will, in favor of the future illegitimate children of the testator by a particular woman. (*e*)

But the strongest case of this kind is Bagley *v.* Mollard, (*f*) where testator gave the residue of his property equally between

(*a*) As to this, ante, vol. 1, p. 106.
(*b*) In Wilkinson *v.* Adam, 1 Ves. & E. 465.
(*c*) 1 Turn. & Russ. 310.
(*d*) 3 Russ. 370.
(*e*) Arnold *v.* Preston, 18 Ves. 288.
(*f*) 1 Russ. & Myl. 581.

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[1] Shearman *v.* Angell, 1 Bai. Eq. 351. Parol evidence of intention is not admissible in such case. Ib.; Gardner *v.* Heyer, 2 Paige, 11; ante, 94, note; 2 Williams, Ex. (2d Am. ed.) 804.

the children of his son W. and of two other children; and it was held, that an illegitimate child of W. was not entitled to share in the residue, *though the testator, in the same will, had made a specific bequest to her, by the description of the only surviving child of his son.*

In all the preceding cases, legitimate children were, or might have been, entitled under the bequest; and this possibility (according to the principles of construction already laid down) was fatal to the claim of the illegitimate children. In none of the wills was there such a manifestation of an intention to use the word *children* in any other than its ordinary legal signification, (namely, legitimate offspring,) as could form the ground of a judicial determination; and they show, that the circumstances of the testator being a bachelor, and having illegitimate children at the time of the will, and of some of such children being the express objects of his bounty, and described as the "children" of the person to whose "other" children the gift in question is made, are not sufficient to divert the word from its established signification. In such cases, the conjecture, though highly reasonable, that the testator meant by the devise to discharge the moral obligation of providing for his illegitimate offspring, is sacrificed to the general principle that "children," in its primary and unexplained sense, imports legitimate children only.

[135] * It is of course no objection to the claim of illegitimate children that they are styled children, if they are otherwise identified, as in the case of a legacy to "my son John, or my granddaughter Mary," the testator having no child or grandchild of those names, except such as are illegitimate. (*a*)

It is equally clear, that where the devise is to the children "*now living*" of a person who has no other than illegitimate children at the date of the will, they are entitled. (*b*)

Upon the same principle, a gift to the "children of *the late* C.," a person who, at the date of the will, was dead, leaving illegitimate, *but no legitimate*, children, has been held to be good as to such illegitimate children. (*c*)

The characteristic feature of these cases, as distinguished from those of the former class, is, that, according to the state of facts existing when the will was made, legitimate children *never could have claimed* under the gift.

In some instances, however, of gifts to the children of a *deceased* person, illegitimate objects have been excluded, though such exclusion was not called for by the principle which negatives the claim of objects of this description, if in any event such

(*a*) Rivers's case, 1 Atk. 410.

(*b*) Blundell *v.* Dunn, cited 1 Madd. 433, though the construction was somewhat aided by the context.

(*c*) Lord Woodhouselee *v.* Dalrymple, 2 Mer. 419. The terms of the bequest show that the fact of C.'s death was known to the testator.

claim might have come into competition with, and have been superseded by, the claim of legitimate children.

As, in Hart *v.* Durand, (*a*) where the bequest was "to the sons and daughters of the *late* J. D.," and there was only one legitimate child, (a daughter,) to whom, it was contended, the words "sons and daughters," in the plural could not apply;
[136] and, consequently, that an illegitimate * son and daughter then existing might be admitted; but the Court decided against their claim; the Chief Baron (Macdonald) observing, that the introduction of these objects would not satisfy both the words, *i. e.* sons and daughters.

So, in Swaine *v.* Kennerley, (*b*) Lord Eldon decided, that, under a devise to all and every the child and children of the testator's *late* son, a single legitimate child was entitled, to the exclusion of two children, who were illegitimate, but all of whom were living at the date of the will; and his Lordship refused to receive extrinsic evidence, to show that the illegitimate children were intended.

It will be observed, that, in both these cases, as there was only one legitimate child living at the time of the making of the will, the terms of the gift, which embraced a plurality of objects, could not be satisfied without letting in the illegitimate children; and the argument, (which is conclusive in the case of a gift to the children of a *living* person,) that the testator *may* have contemplated an accession to the number of objects by future births, or their total change by means of births and deaths, is inapplicable where (as in this instance) the parent was dead when the will was made. These cases, therefore, appear to have carried the exclusion of illegitimate children a step too far; and it is not surprising to find that they have been since departed from.

Thus, in the case of Gill *v.* Shelley, (*c*) where A. by a testamentary appointment gave her real and personal estate to her husband M. for his life, and directed that, after his death, such residue should be divided amongst certain classes of
[137] persons mentioned in her will; adding, * "amongst whom I include the children of the *late* Mary Gladman." Mary Gladman was then dead, having left two children, one legitimate, and the other (being born before her marriage) illegitimate. Sir J. Leach, M. R., said, that, if Swaine *v.* Kennerley, and Hart *v.* Durand, had not been distinguishable from the case before him, he should have felt no hesitation in overruling them; and decreed, that the illegitimate child was entitled to share in the residue.

(*a*) 3 Amb. 684.
(*b*) 1 Ves. & Bea. 469.
(*c*) At the Rolls, 28 Jan. 1831, stated Wigram on Ambiguities in Wills, and the Admissibility of Extrinsic Evidence, (2d ed.) p. 31.

The only apparent distinction between these cases and Gill *v.* Shelley is, that in them the bequest was to *child* and children, but which, it is conceived, makes no real difference, since the testator evidently uses the singular number, not with a view to the then existing state of the class, but in contemplation of the possible event of its being reduced to a single object in the interval between the making of the will and the death of the testator. It is submitted, therefore, that the cases of Swaine *v.* Kennerley, and Hart *v.* Durand, may be considered as overruled.

It has been shown, that where a testator, married or unmarried, gives to his children by a woman not then his wife, he will be presumed (the contrary not appearing) to mean legitimate children, and, by necessary consequence, to contemplate marriage with her. But it is settled, that if a married man, after making a disposition in favor of his children by a particular woman, shows by the context of the will, that he expects both his wife and the woman in question to survive him, this, being incompatible with the supposition of his contemplating marriage with her, is considered to indicate that he means *illegitimate* children only.

Thus, in the well known case of Wilkinson *v.* Adam, (*a*) *where a testator, being married, but having [138] children by a woman named Ann Lewis, *devised to his* wife for life a certain mansion-house, and, after her decease, to Ann Lewis, (who then lived with him,) for life, provided she continued single and unmarried; and, subject thereto, he devised the whole of his estate, (after limiting a term of years thereout,) *in trust for the children which he might have by the said Ann Lewis*, share and share alike, and to his, her, and their heirs forever; and, in default of such child or children, over. He also bequeathed to Ann Lewis an annuity for the care, management, and guardianship of each of the children. By a codicil, (but which, being unattested, was inoperative to affect the construction of the devise,) (*b*) the testator declared that his meaning was to include three children of the said Ann Lewis, (naming them.) The question was, whether the illegitimate children of the testator by Ann Lewis, living at the time of the making of the will, could take under the devise in the will. It was contended, on the authority of the preceding cases, that the testator must be considered to contemplate the events of his wife dying and his marrying Ann Lewis, and having legitimate children by her; that the intention was clear that after-born children should take, and it would be extremely difficult on the words to hold the devise good as to those already born, and not as to those afterwards born. But Lord Eldon, assisted by Thompson, B., and Le Blanc, J., and Gibbs, J., held, that the three children were

(*a*) 1 Ves. & Bea. 422. (*b*) Supra, vol. 1, 69.

entitled by the effect of the whole will. The Judges grounded their opinion on the manner in which the testator described the children themselves, and Ann Lewis, their mother, as
[139] living with him whilst his wife was then *alive, the mode in which he appointed her guardian of such children, the limiting her annuity, and her compensation for the guardianship to the time of her continuing single and unmarried, (*a*) with many other passages in the will; and they laid particular stress on the devise of the mansion to the testator's wife for life, and, after her decease, to Ann Lewis for her life, and then to the children; for, supposing these devises to take place in the order in which they stood, *the wife of the testator must have survived him, and his children by Ann Lewis must consequently have been illegitimate.* (*b*) Lord Eldon concurred generally with the Judges as to illegitimate children being intended; and, with regard to the objection that they could not take as a class, though they might by a description amounting to designatio personarum, his Lordship considered that as decided by Metham *v.* Duke of Devon, (*c*) whatever might have been his opinion if it were res integra. In concluding an elaborate judgment, his Lordship expressed his opinion, that it was impossible that the testator, a married man, with a wife, who, he thought, would survive him, providing for another woman to take after the death of his wife, and for children by that woman, could mean any thing but illegitimate children. They took, therefore, by necessary implication, on the face of the will. (*d*)

Lord Eldon's doctrine, that the intention to give to illegitimate children (as distinguished from legitimate chil-
[140] ren) *must appear on the face of the will, is not to be understood as precluding all inquiry into the state of the testator's family.[1] Thus, in the case of a devise to "my children now living," (*e*) or "to the children of A," a *deceased person*, (*f*) it is not known, by a mere perusal of the will, whether legitimate or illegitimate children were intended; and yet when it is ascertained that there were no other than the latter objects in existence, the conclusion that he meant illegitimate children, is irresistible.

(*a*) These circumstances alone were clearly insufficient to vary the construction.

(*b*) Unless in the case of a divorce, which a man, especially when making a provision for his wife, can hardly be supposed to contemplate. It is singular, however, that this possible event was not adverted to in a case which underwent such elaborate discussion.

(*c*) 1 P. W. 529.

(*d*) This is a very brief summary of the grounds of the judgment, which should be perused by every inquirer into this subject.

(*e*) Blundell *v.* Dunn, cit. 1 Madd. 433, ante, p. 135.

(*f*) Lord Woodhouselee *v.* Dalrymple, 2 Mer. 419, ante, p. 135.

[1] See ante, 97, and note.

The characteristic of these cases is, that, according to the events existing *at the making of the will*, legitimate children never could have claimed under the bequest, and, therefore, could not have been in the testator's contemplation. The rule (expressed in accommodation to the cases in question) may be stated thus: *in order to let in illegitimate children under a gift to children, it must be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken.* This, it is submitted, is the spirit and meaning of Lord Eldon's position in Wilkinson *v.* Adam, and forms a test by which the claim of illegitimate children is always to be tried. Unfortunately, however, this principle has not been invariably adhered to; and even the anxious effort of Lord Eldon, to place the doctrine on a firm and intelligible basis, has not had the effect of securing uniformity of decision on this important subject.

Thus, in Beachcroft *v.* Beachcroft, (*a*) where a testator, who resided in the East Indies, and was a bachelor, and had had several children by a native woman, bequeathed as follows: "*To my children*, the sum of pounds sterling, 5000 each; **to the mother of my children*, the sum of sicca [141] rupees 6000, which I request my executors will secure to her in the most advantageous way." The question was, whether the illegitimate children were entitled. Sir T. Plumer, V. C., decided in the affirmative. He referred to Goodinge *v.* Goodinge (*b*) and Crone *v.* Odell, (*c*) as authorities that parol evidence was admissible as to the state of the testator's family when he made his will; and observed, that, in the case of a latent ambiguity, parol evidence was admissible to prove the identity of the person intended to take, whether an individual or a class. That it had been established by Metham *v.* Duke of Devon, and Wilkinson *v.* Adam, that illegitimate children might take as a class; that if the words had been "my present children," they might have taken as a class, to be ascertained by evidence, and, being unmarried, (*d*) he must have meant his illegitimate children. His Honor admitted that the word "present" was not introduced in this will; but he observed, that the general presumption is, that a man, sitting down to make his will, designs a benefit to some existing object, and it was extravagant to suppose that the testator had only future possible children in view, disregarding those whom he was in the habit of denominating and treating as his children. Giving to each a definite portion, £5000, and the ultimate residue to his collaterals, showed that he had a definite

(*a*) 1 Madd. 430.
(*b*) 1 Ves. Sen. 231.
(*c*) 1 Ball & Beatty, 481.
(*d*) That this circumstance alone will not let in illegitimate children, see Kenebel *v.* Scraftan, 4 East, 530.

number in view, and that he recognized his legitimate relatives as having a preferable title to a part of his fortune. That was rational enough, if he was providing for illegitimate children, but was very unlikely, if he was providing for future legiti-
[142] mate children. *"For all these reasons (said his Honor) I think it is reasonable to interpret the words 'my children,' in the same way as if he had said 'my *present* children.' But this construction of the will does not depend merely upon the first clause of it; for the next clause clearly shows what was meant, 'To the mother of my children the sum of sicca rupees, 6000, which I request,' &c. Was that a provision proper for the intended wife of a man of his fortune? Is it probable that, after giving one whom he thought fit to be his wife so small a sum, he should think it necessary that his executors should secure it for her? (*a*) Did any body ever describe his wife by the term 'mother of my children?' If she had no children, she would not have taken under this bequest. This second clause of the will is explanatory of the first; for, when once it is understood he therein meant to describe some person who had already become the mother of his children he then had, he must, under the term 'children,' have comprehended children already born, and, consequently, as he was unmarried, his illegitimate children; and he must be supposed to have used the same word children in the preceding clause in the like sense. I think, therefore, it is clear, that existing persons were meant, and that they take, as in the case of Wilkinson *v.* Adam, as designated persons."

A case more embarrassing to a Judge could hardly have occurred, for no man, reading this will with the knowledge of the testator's situation, could really entertain a doubt as to illegitimate children being the objects intended; but that there was ground for holding *judicially* that such objects, and such alone, were "*upon the face of the will*" manifestly and incon-
[143] trovertibly pointed out, is not equally *clear. The circumstance of the amount of the bequest to the children and their mother, and the terms in which it was given, as differing from the mode in which a testator would refer to and provide for his future wife and her children, furnished exactly that species of conjecture, which in Cartwright *v.* Vawdry, (*b*) was held insufficient to let in the illegitimate child. Indeed, the division into fourths in that case supplied a stronger argument than the frame of the will in the case under consideration; and with respect to the argument founded on the bequest to the mother of the children, as showing that the testator referred to existing children, that is, children then having a "mother," it is

(*a*) Compare the general scope of this reasoning with that of Lord Eldon, in Wilkinson *v.* Adam, 1 Ves. & Bea. 460.

(*b*) Ante, 130.

to be observed, that the bequest to the mother is wholly dependent on, and is regulated by, the construction of the gift to the children; for if the gift to the children standing alone, would extend to future legitimate children, then the gift to their mother would be a gift to the mother of the testator's legitimate children, in other words, to his wife.

In the course of his judgment, the Vice-Chancellor is made to say, "That no case has been found, where, when the word children has been used in the will of a putative father, who has no legitimate children, it has been held that illegitimate children cannot take;" (*a*) but the remark is inconsistent with fact, for in Godfrey *v.* Davis, (*b*) one of the cases cited by the learned Judge, the bequest *actually failed* from the incompetency of an illegitimate child to take under a bequest to the "eldest child" of A.; it is true a legitimate child was subsequently born, (the parents of the illegitimate children having married,) but his claim was rejected, on account of his not having been alive when
* the interest vested in possession. (*c*) It is evident [144]
that this respectable Judge was strongly influenced by a desire (and who would not have felt it?) to prevent the unfortunate objects of the testator's illicit connection from being unjustly stripped of their parental provision; but the mischievous effect of such determinations is indicated by the fact, that the case has been cited by a text-writer, in support of the general proposition, that a bequest to children by a bachelor, having illegitimate children, applies to such children. (*d*)

Another modern case, which it is difficult to reconcile with the principles deducible from the general current of the authorities, is Frazer *v.* Piggot, (*e*) where a testator, after bequeathing certain bank annuities to the legitimate and illegitimate children by name of his two sons William and John, gave the residue of his estate to his said sons equally, and directed that if either of them should die in his lifetime, the moiety of his deceased son should go to his *children;* but if both his sons should die in his lifetime, he gave the same to and amongst all their *children* equally. Both the sons died in the testator's lifetime, John leaving three legitimate and two illegitimate children, and William leaving three illegitimate but no legitimate children. It was held that the illegitimate children of John were not entitled to share with the legitimate children in the residue, but that the illegitimate children of William, who left no legitimate child, were to be admitted. Lord Lyndhurst,

(*a*) It is remarkable that the rule is stated with the same erroneous qualification in regard to the fact of the existence of legitimate children, by Mr. Roberts. See 1 Rob. on Wills, (3d ed. 83.)
(*b*) 6 Ves. 43, ante, 89.
(*c*) Ante, 89.
(*d*) Preston on Legacies, 201.
(*e*) 1 Younge, 354.

C. B., said, "It seems to be clear upon the cases that, where there are any legitimate children to answer this description of children, then, according to the rule of law, the legitimate children only will take. If there be no legitimate children, then extrinsic evidence may be given of the persons who were
[145] intended; but when there are legitimate and *illegitimate children, legitimate children only will take under the description of children. In this case the illegitimate children of William Frazer, and the legitimate children only of John Frazer, appear to me to be entitled."

This decision, so far as it operated to admit the illegitimate children of William to participate in the residue, stands directly opposed to the principles and doctrines of the long line of cases treated of in this chapter, Cartwright *v.* Vawdry to Mollard *v.* Bayley, including a decision of the noble Chief Baron himself, when Lord Chancellor. (*a*) To say that illegitimate children can take under a bequest which would have applied to legitimate objects, if there had been any such, makes the construction of the will dependent on subsequent events, as the testator's son William, who was then living, might have had legitimate children in the interval between the making of the will and the testator's death; and as such children would have taken, the illegitimate children, according to the established doctrine of the cases, clearly could not. His Lordship's remark, as to the admissibility of extrinsic evidence, is no less exceptionable than his decision. The office of extrinsic evidence in these cases is to ascertain the state of facts existing at the date of the will, which often throws light upon a testator's intention, and is properly admissible for that purpose. (*b*) But if this eminent Judge is to be understood to mean, that because, in event no legitimate child happens to claim under a bequest to children, extrinsic evidence is admissible to show that the testator actually meant to comprise illegitimate children under the description of children, his position is directly encountered by a crowd of decisions and dicta, including those of Lord Eldon, who, we have seen, in his elaborate judgment in Wilkinson *v.*
[146] Adam, earnestly and *repeatedly inculcated the doctrine, that the intention in favor of illegitimate children must appear by necessary implication on the face of the will itself. If the testator's sons, John and William, had been dead at the date of the will, the decision would have been consistent with antecedent adjudications; and as they are called in the statement of the will, in the report of the case, the testator's *late* sons, a cursory perusal of the case is likely to lead to an impression that such was the fact; but from the tenor of

(*a*) See Mortimer *v.* West, 3 Russ. 370.
(*b*) Ante, vol. 1, p. 349.

the whole statement, it is evident, that the sons died *after* the making of the will, and therefore the attempt, in this manner, to reconcile the case with anterior determination, fails.

It is a consequence of the doctrine which excludes illegitimate children, if legitimate children could have taken under the gift, that they cannot both take under the same description, or as belonging to the same class. This was pressed as an argument against the illegitimate children in Wilkinson *v.* Adam, for it was said, that if the testator had had legitimate children by Ann Lewis, they would have taken, and it was clear that both could not take under the same description. The Judges who decided that case did not assent to this as a general rule, but they were of opinion that if, in the event suggested, both could not take, the illegitimate children would take exclusively. Lord Eldon said it was very difficult to persuade him that both could take under the same description; but, he added, that if, upon the context of the will, illegitimate children were proved to be intended, *the question would never have arisen*, as then marriage and the birth of children would have been a revocation. With great deference to his Lordship, however, it is submitted, that the question would have been precisely the same on the point of revocation; for as marriage and the birth of children did not, even *in the then state of [147] the law, revoke a will in which the children are provided for, it followed that if legitimate children could take under the description of children, the will would not be revoked; if otherwise, it would.

But legitimate and illegitimate children may of course be comprehended in the same devise, under a *designatio personarum* applicable to both; as where a testator, having four children, two of each kind, gives to his *four* children *then living*. This would be a gift to them, not as a fluctuating class, with a possibility of future accessions, but to four designated individuals; and it being found that, to make up the specified number, it was necessary to include as well those who strictly and properly answered to that character, as those who had obtained a reputation of being such persons, the inevitable conclusion is, that the latter were included in the testator's contemplation.

On the same principle, where it is to be collected from the language of the will that the testator intends to give to the children of himself by another person, whether they shall turn out to be legitimate or not, they are entitled in either character.

As where (*a*) a testator, reciting that he had lately married, in Scotland, Jane W., the sister of his late wife, bequeathed personal estate in trust for his said wife, Jane, for life, and after her decease, to the children of him and his said wife Jane; and he

(*a*) Bayley *v.* Snelham, 1 Sim. & Stu. 78.

declared that his wife Jane *and her children should take the provisions thereinbefore made for them, in the same manner as if she had been married to him according to the usage of the church of England*, and such marriage had been valid according to the law of England. It appeared that the marriage was void, according to the law of Scotland, which nullifies every
[148] marriage * between persons within the prohibited degrees of propinquity or affinity; and the question then was, whether the child born at the date of the will, being illegitimate, could take under the bequest; which Sir J. Leach, V. C., decided in the affirmative.

Even though it were clear, (and it would certainly be difficult to deny,) that had the testator subsequently married Jane W., and had legitimate children by her, they would have taken under the bequest; the case, it is conceived, forms no exception to, or contradiction of, the doctrine that both legitimate and illegitimate children cannot take, as belonging to the same class; since the latter, it is evident, took, not by virtue of the bequest to children simply as such, *but under the clause providing for the event of the marriage proving to be invalid*, and which must be considered as extending the bequest to illegitimate as well as legitimate children. In effect, therefore, it was a gift to the children, legitimate or illegitimate, of A; and the case merely shows that they may take under a *designatio personarum* applicable to both.

But though the decision, it is conceived, may *thus* be rendered consistent with the general principles of the authorities, yet it should not be concealed that the Vice-Chancellor, as his judgment is reported, decided it on the broad ground, that a bequest in those terms to the testator's children by Jane would apply to any child who had acquired the reputation of being such; and his Honor is even made to cite Wilkinson *v.* Adam as authorizing the proposition, that illegitimate children might take under such a bequest as occurred in that case, without at all adverting to its special circumstances, which Lord Eldon so elaborately commented on, and distinctly made the ground of his decision; which rendered the case the strongest authority against
[149] his Honor's doctrine; though * some of his Lordship's positions, we have seen, require to be a little modified in regard to gifts to the children of a deceased person.

II. It is now clear that a gift to a natural child of which a particular woman is enceinte, *without reference to any person as the father*, is good. Thus, in Gordon *v.* Gordon, (*a*) where a testator recited that he had reason to believe that A was then pregnant *by him*, and subsequently directed that the child *of which she was then pregnant*, (not repeating the words "by me,")

(*a*) 1 Mer. 141. See also judgment in Earle *v.* Wilson, 17 Ves. 532.

should be sent to England, and the expense paid for by an annuity, &c. Two questions were raised; first, whether the bequest was not void, on the principle of the early authorities, as a gift to an unborn bastard; secondly, whether it was not invalid, as a gift to an illegitimate child en ventre sa mere *by a particular man.* (*a*) Lord Eldon said: "Upon the first of these, which is the general question, I remain of my former opinion, that it is possible to hold, consistently with the opinion of Lord Coke, that if an illegitimate child en ventre sa mere is described, so as to ascertain the object intended to be pointed out, it may take under that description. Then, with regard to the application of that principle to the present case, I studiously abstain from expressing any opinion as to what it would be if the words were to 'my child,' while I decide that the words being only 'the child with which A is now pregnant,' those words will do, so as to give effect to the will in its favor."[1]

The distinction between the preceding case and those in which the parentage of the father forms part of the description, is obvious. Where the gift is to the child *with [150] which a particular woman is enceinte, generally, the fact of birth is the sole ground of title, and that is easy of ascertainment. On the other hand, a gift to the child with which a woman is enceinte, *by a particular man*, introduces into the description of the object a circumstance which the law treats as uncertain, (a bastard being, in respect of his paternal parent at least, filius nullius,) and which it cannot, properly, permit to be inquired into; and the devise is therefore, unless the fact in question can be assumed, necessarily void.[2] And this principle, it seems, extends even to gifts by a testator to his own child, if the fact of his parental relation to the object be unequivocally made part of the qualification.

Thus in the case of Earle *v.* Wilson, (*b*) where a testator bequeathed to "such child or children, if more than one, as M. may happen to be enceinte of *by me*," Sir W. Grant held it to be void.[3] There was no gift, he said, to the child of which M. might be enceinte, except as the child of the testator. It was not a matter of indifference to him whether that child should have been begotten by him or another man; therefore he could not do what was required, that is, reject the words "by me" as superfluous. "Suppose," the learned Judge observed, "the

(*a*) See infra. (*b*) 17 Ves. 528.

[1] A devise by the father, to an unborn illegitimate child, in which the mother was described, has been held valid. Pratt *v.* Flamen, 5 Harr. & Johns. 10. See also Beachcroft *v.* Beachcroft, 1 Madd. 234 (Phil. ed.); Gardner *v.* Heyer, 2 Paige, 11; 2 Kent, (5th ed.) 217; 2 Williams, Ex. (2d Am. ed.) 805.

[2] See 2 Williams, Ex. (2d Am. ed.) 805.

[3] See 2 Williams, Ex. (2d Am. ed.) 805.

words, 'as she may happen to be enceinte of by me,' could be taken to mean, 'as she is now enceinte of by me,' in which there is considerable difficulty; yet if the rule at law does not acknowledge a natural child to have any father before its birth, the change of phrase would not have the effect of making the bequest good. He means to give to an unborn bastard by a description which the law says such person cannot answer; and if you take away that part of the description, non constat that the gift would ever have been made."

[151] It will be observed that Lord Eldon, in the case * of Gordon *v.* Gordon, (*a*) cautiously abstains from giving an opinion on the point decided by Sir W. Grant, in Earle *v.* Wilson, and had, it seems, obtained the concurrence of that learned Judge in the opinion he then pronounced. But the authority of Earle *v.* Wilson has been since questioned in the case of Evans *v.* Massey, (*b*) in which a testator, who resided in India, devised as follows: "Having two natural children, *and the mother supposed to be now carrying a third child*, I bequeath the whole of my property in England at this time, or now on the seas proceeding to England, to be divided equally between them, that is to say, if another child should be born by the mother of the other two, in proper time, that such child is to have one third of such property." The testator appointed certain persons guardians of *his* children, and in the bequest of the residue, expressed himself thus, "after paying *my* natural children as aforesaid." The question was, whether the bequest to the child en ventre sa mere was made to it as the child of the testator, or whether, on the other hand, it was not to the child with which the woman was enceinte, without reference to the father, as an essential part of the description. Richards, Ch. B., was of opinion, that the bequest was good. He considered the case to be distinguished from Earle *v.* Wilson, as to which, however, he observed, that he did not understand the grounds upon which it proceeded, and therefore could not entirely accede to it; that the decision excited surprise at the time, and that some of the Judges had intimated upon several occasions dissatisfaction with it. After adverting to what fell from Lord Eldon in Gordon *v.* Gordon, the learned Chief Baron proceeded, "We have therefore only to inquire, in this case, whether there be, in the terms of the present bequest, worded as it is, such a condition precedent annexed to it by the testator as by

[152] * necessary construction requires, in order to give effect to the bequest, the child must be shown to be the testator's child, and that he meant to give it only in case the child should be his; and that not only by matter of implication or argument, but of clear illustration. The testator's words are,

(*a*) 1 Mer. 141, stated ante, p. 149.

(*b*) 8 Pri. 22.

'Having two natural children, and the mother supposed to be now carrying a third child.' Now he does not say, 'with which she is pregnant *by me*,' but merely that she is supposed to be pregnant generally, and the time of her delivery would prove that fact; then he bequeathes to such child the legacy in question. It is quite clear that there is nothing in the words of the bequest *so far*, asserting that the child was his, or that he thought so; for, although there can be no doubt that he did think so, yet he does not in terms make such supposition the obvious and sole motive of the bequest. The words are quite general, merely particularizing the child that she was then supposed to be carrying, and that would certainly have excluded an after-begotten child, if his then supposition should turn out to have been incorrect. Now the only difficulty arises from the testator having afterwards, in alluding to the children, called them *his;* and upon that it has been considered that this case is within the reasoning and the principle of the decision in Earle *v.* Wilson, because the testator, it is said, plainly means to assert that the children are his, and that the legacy is given to the unborn child as one of his children, and that it is given to it entirely on that consideration, as the basis and condition precedent of the gift. I do not, however, think that these subsequent words can be considered as so applying to the bequest itself, as to modify and control it. They were merely a reference to it, and were not intended to have any effect upon it. The allusion does not show that he meant the child to take only in case of its being * his, nor does it amount to an asser- [153] tion that the child was his, or that the testator considered he was giving to it the legacy solely as his child."

It is to be inferred from the observations of the Chief Baron, that the principle upon which he founded his objection to the case of Earle *v.* Wilson, is this: that where a testator gives to the child or children with which a particular woman is enceinte *by him*, although he describes the child as his own, yet that he intends to make it the object of his bounty at all events, assuming his parental relation to the child as a fact *not further to be inquired into;* but, as the learned Judge thought that in the case before him the child was not so described, the case of Earle *v.* Wilson remains uncontradicted by his decision. It is clear, however, that the Courts will not act upon the principle of that case, unless the testator's intention to make the fact of his parentage to the unborn infant an essential part of its description, be unequivocally demonstrated.

III. The preceding sections leave untouched the question respecting the validity of a devise or bequest to the illegitimate children, *not* in esse, of a particular woman, without reference to the father. The state of the law on the subject seems to be

this: the early authorities are opposed to gifts to such objects, on the ground "that the law will not favor such a generation, nor expect that such shall be;" (*a*) and modern authority is silent upon the subject. Dicta, however, have been thrown out by recent Judges which cast a doubt upon the old opinion. In Wilkinson *v.* Adam, (*b*) Lord Eldon observed, that he knew no law against such a devise; but his Lordship afterwards
[154] said, (*c*) *that whether the cases in Lord Coke, (*d*) which are all cases of deeds, had necessarily established, that no future illegitimate child could take under any description in a will, whether that was to be taken as the law, it was not necessary to decide in that case. He would leave that point where he found it, without any adjudication.

Undoubtedly, if the objection to gifts of this description was referable simply to the ground of uncertainty, there would be no difficulty in saying, in opposition to the early authorities, that such a devise might be sustained, as it is evident that a gift to the future illegitimate children of a *woman* does not involve greater uncertainty than such a devise to legitimate children. But it is conceived that there remains a serious objection to the validity of such dispositions, on grounds of public policy.

To support the great interests of morality, is part of the policy of every well-regulated state, and has long been a principle of the law of England, which has uniformly refused validity to provisions offering a direct incentive to vice; as in the case of bonds given with a view to cohabitation, the fate of which is well known. The same principle, it may be contended, applies to gifts in favor of the objects in question. It is true that *here* the unoffending offspring, and not the delinquent parent, is the subject of them; but it requires no great insight into the ordinary springs and motives of human action, to perceive that bounty to the offspring may act as a powerful engine to subvert the chastity of the parent. Suppose a large estate to be devised to every future *illegitimate* child of an indigent woman, would not such a provision hold out a strong encouragement to incontinency? Cases might be suggested which would place the argument of immoral tendency in a strong point of
[155] view; but as such a question *is not likely to occur, since, in gifts to future illegitimate children, they are generally described as the offspring of a particular man, which renders them indisputably void, the writer will only farther observe, that the view which has been taken of the subject is not at all prejudiced by the decisions, establishing the validity of gifts to bastards en ventre; for as in these cases the immoral act, which it is the policy of the law to discourage, has been done, the argument on which the objection is founded, does not

(*a*) See Cro. El. 409.
(*b*) 1 Ves. & Bea. 446.
(*c*) 1 Ves. & Bea. 468.
(*d*) Co. Litt. 3 *b*.

apply, and they fall within the principle which allows validity to provisions founded on the consideration of *past* cohabitation.

IV. Upon the whole, the general conclusions from the cases seem to be:—

1st. That illegitimate children may take by any name or description which they have acquired by reputation *at the time of making the will;* but that,

2d. They are not objects of a gift to *children*, or *issue* of any other degree, unless a distinct intention to that effect be manifest upon the face of the will; and if, by possibility, *legitimate* children could have taken as a class under such gift, illegitimate children *cannot;* though children, legitimate and illegitimate, may take concurrently under a designatio personarum applicable to both.

3d. That a gift to an illegitimate child en ventre sa mere, *without reference to the father*, is indisputably good.

4th. That a gift to the future, *i. e.* the unprocreated illegitimate children of a *man*, or of a woman by a particular man, *is clearly void.*

5th. That a gift by a testator to his *own* illegitimate children ventre sa mere has been decided in one instance, namely, * in Earle *v.* Wilson, to be also void; but the [156] point admits of considerable doubt.

6th. That it is very questionable whether, at this day, a gift to the *future* illegitimate children of a particular woman, even irrespective of the father, can be sustained, against the objection founded on the immoral tendency of such a disposition.

CHAPTER XXXIII.

JOINT TENANCY, AND TENANCY IN COMMON.

I. *Joint Tenancy, Tenancy by entireties, and Tenancy in common.*
II. *What Words create a Tenancy in common.*
III. *Some Miscellaneous Questions.*

JOINT tenancy and tenancy in common.
Devisees joint tenants, when.
Husband and wife tenants by *entireties*, when; and take the share of *one* only.
Devisees in tail tenants in common, when; though made joint tenants of the freehold, [p. 158.]
Joint tenancy in chattels; in pecuniary legacies and residues of personalty, [p. 159.]
Rule where objects of a concurrent gift may become entitled at different times, [p. 159.]
Tenancy in common under gift to children as a class without words of severance, [p. 160.]
Executory trusts, [p. 161.]
What words create a tenancy in common, [p. 161.]
Expressions which create a tenancy in common, [p. 162.]
"In joint and equal proportions." "Equally." "Respectively." "Severally." "Between them." "All to have part alike," &c. [p. 162.]
Charge upon the legatees in moieties, [p. 162.]
Direction in respect of one legatee's "share," [p. 163.]
Leaning in favor of tenancy in common, [p. 163.]
Words creating a tenancy in common rejected by force of context, [p. 164.]
"After decease of E. and G." read after decease of survivor, [p. 165.]
Remark on preceding cases, [p. 166.]
Distinction between joint tenancy and tenancy in common as to lapse, &c. [p. 167.]
Implied gift creates a tenancy in common, when, [p. 168.]
Effect upon power, of lapse of some of the shares, [p. 168.]

I. UNDER a devise or bequest to a plurality of persons concurrently, it becomes necessary to consider whether they take joint or several interests; and that question derives its importance mainly from the fact, that survivorship is incidental to a joint tenancy, but not to a tenancy in common.[1] (*a*)

(*a*) Any joint tenant may, however, by his own conveyance, sever the tenancy as to his own share, and, consequently, destroy the jus accrescendi between himself and his companions.

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[1] In America, the title by joint tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary, as in cases of titles held by trustees. 4 Kent, (5th ed.) 361, 362; Frewen *v.* Relfe, 2 Bro. C. C. 224. Except also in case of conveyance, or devise to husband and wife. See 4 Kent, (5th ed.) 362; Shaw *v.* Hearsay, 5 Mass. 521; Fox *v.* Fletcher, 8 Mass. 274; Varnum *v.* Abbott, 12 Mass. 474, 479; Draper *v.* Jackson, 16 Mass. 480. See also Stratton *v.* Best, 2 Bro. C. C. (Perkins's ed.) 240, note (*a*); Rus-

A devise to two or more persons simply, it has been long settled, makes the devisees joint tenants; but it should be observed, that where the objects of the devise are husband and wife, who are in law regarded as one person, they take not as joint tenants, but *by entireties;* the consequence of which is, that neither can, by his or her own separate conveyance, affect the estate of the other. (*a*)

Another consequence of this unity of person in husband and wife is, that where a gift is made to them concurrently with other persons, they are considered as, and *take [158] the share of, *one* only. Thus, if property be given to A, and B his wife, and C, (a third person,) A and B will take one moiety, and C the other, not A and B two thirds, and C the remaining third. (*b*)

But an exception to the rule, that a devise to two or more creates a joint tenancy, exists in certain cases where the estate conferred by the devise is an *estate tail;* for where lands are devised to several persons, and the heirs of their bodies, who are not husband and wife de facto, or capable of becoming such de jure, either from their being of the same sex, or standing related within the prohibited degrees of consanguinity, inasmuch as the devisees cannot, either in fact or in contemplation of law, (as the case may be,) have common heirs of their bodies, they are "by necessity of reason," as Littleton says, "tenants in common in respect of the estate tail." (*c*) As this reason, however, applies only to the inheritance in tail, and not to the immediate freehold, the devisees are joint tenants *for life*, with several inheritances in tail; so that on the death of one of them, whether he leave issue or not, the surviving devisee becomes entitled for life to his share under the joint tenancy, (*d*) and the inheritance in tail descends to the issue (if any) subject to such estate for life. (*e*)

(*a*) Doe d. Freestone *v.* Parratt, 5 Durn. & E. 652.

(*b*) See Lewin *v.* Cox, Moore, 558, pl. 759; S. P. Anon., Skinn. 182; Co. Litt. 187 (*a*). Would it make any difference as regards this doctrine, that the wife was described without reference to her conjugal character? It is conceived not.

(*c*) Co. Litt. 184 *a*. See also Elizabeth Puntley's case, Dyer, 326 *a*; Cook *v.* Cook, 2 Vern. 545; Perry *v.* White, Cowp. 777.

(*d*) Wilkinson *v.* Spearman, in Dom. Proc. cit. Cook *v.* Cook, 2 Vern. 545, and Cray *v.* Willis, 2 P. W. 529. See also Co. Litt. 182 *a*.

(*e*) Sometimes a result of this kind is produced by the terms of the will, of which an example is afforded by the late case of Doe d. Littlewood *v.* Green, 1 Mee. & W. 229, where a testator devised his real estates to his nieces, E. and J., equally between them, to take as joint tenants, and their several and respective heirs and assigns forever; and it was held, that they took estates as joint tenants for life, with remainder, expectant on the decease of the survivor, to them as tenants in common.

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sell *v.* Long, 4 Ves. (Sumner's ed.) 551, note (*a*); Burghardt *v.* Turner, 12 Pick. 534; Miller *v.* Miller, 16 Mass. 59; Adams *v.* Frothingham, 3 Mass. 352.

See also, for cases on this subject, 2 Hilliard's Abr. Law of Real Estate, c. 4, p. 42, 43, 44; Sackett *v.* Mallory, 1 Metcalf, 355.

A bequest of chattels, whether real or personal, to a plurality of persons, unaccompanied by any explanatory words, confers a joint, not a several interest,[1] (*a*) and that whether the gift be by way of trust or not; (*b*) and, notwithstanding the disposition of the Courts of late years to favor tenancies in common, the same rule is now established as to money-legacies and residuary bequests, (*c*) in opposition to some early authorities, (*d*) and the doubts thrown out by Lord Thurlow, in Perkins *v.* Baynton. (*e*) It is observable, however, that, in another case which came before his Lordship, (*f*) he relied wholly upon the words of severance, as constituting the legatees of a money legacy, tenants in common; from which Lord Alvanley inferred that he had never made the observations imputed to him; (*g*) but Lord Eldon has referred to them in a manner which leaves no doubt of the fact, although his Lordship has now placed the general question beyond controversy, by stating his own opinion generally to be, "that a simple bequest of a legacy or a residue of personal property to A and B without more, is a joint tenancy." (*h*)

The rule that a gift to two or more simply creates a joint tenancy, applies indiscriminately to gifts to individuals
[160] and gifts *to classes, including, it should seem, dispositions in favor of children, notwithstanding Lord Hardwicke's objection, in Rigden *v.* Vallier, (*i*) to apply the construction to provisions by a father for his children, on account of its

(*a*) Shoore *v.* Billingsley, 1 Vern. 482; Willing *v.* Baine, 3 P. W. 115; Barnes *v.* Allen, 1 B. C. C. 181.

(*b*) Aston *v.* Smallman, 2 Vern. 556.

(*c*) 1 Vern. 482; Sir T. Jones, 162; 2 P. W. 347, 529; 3 Id. 113; 4 B. C. C. 15; 3 Ves. 629, 632; 6 Ves. 129; 9 Ves. 197.

(*d*) Cox *v.* Quantock, 1 Ch. Cas. 238; Saunders *v.* Ballard, 3 Ch. Rep. 214; 2 P. W. 489.

(*e*) 1 B. C. C. 118 [Perkins's ed. note (1)]. The case of Warner *v.* Hone, 1 Eq. Ca. Ab. pl. 10, cited by his Lordship, does not apply, as it was the bequest of a leasehold house, and there were words of severance.

(*f*) Joliffe *v.* East, 3 B. C. C. 25.

(*g*) See Morley *v.* Bird, 3 Ves. 630, [Sumner's ed. note.]

(*h*) Crooke *v.* De Vandes, 9 Ves. 201 [Sumner's ed. note (*b*)].

(*i*) 2 Ves. Sen. 258.

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[1] "Joint-tenancy in chattels," it is remarked by Mr. Chancellor Kent, "is very much restricted. It does not apply to stock used in any joint undertaking, either in trade or agriculture; for the forbidding doctrine of survivorship would tend to damp the spirit and enterprise requisite to conduct the business with success. When one joint partner in trade, or in agriculture dies, his interest or share in the concern does not survive, but goes to his personal representatives. Subject to these exceptions, a gift or grant of a chattel interest, to two or more persons, creates a joint tenancy; and a joint tenant, it is said, may lawfully dispose of the whole property. In legacies of chattels, the Courts, at one time, leaned against any construction tending to support a joint tenancy in them; and testators were presumed to have intended to confer legacies in the most advantageous manner." 2 Kent, (5th ed.) 350, 351.

But it has been since established, that, where a legacy is given to two or more persons, they will take a joint tenancy, unless the will contains words to show that the testator intended a severance of the interest, and to take away the right of survivorship. 2 Kent, (5th ed.) 351; Morley *v.* Bird, 3 Ves. (Sumner's ed.) 628, note (*a*).

subjecting them to be defeated by survivorship. However, a gift by will, under which all the members of a class are not necessarily entitled at the same instant of time, but which vests the property in such as are living at the death of the testator, with a liability to be divested pro tanto in favor of after-born objects, was recently decided to create a tenancy in common. A bequeathed stock in the public funds to B for life, and, after her decease, the capital to the children when they arrived at the age of twenty-one years; it was contended, that the legatees were tenants in common, according to the position in Coke on Litt. 188 a, that "if lands be demised for life, the remainder to the right heirs of J. S. and J. N., J. S. hath issue, and dieth, and, after, J. N. hath issue, and dieth, the issues are not joint tenants, because the one moiety vested at one time, and the other moiety vested at another time." Sir L. Shadwell, V. C., said, "It is contrary to the rule of law, that persons, who are to take at different times, can take as joint tenants; the property must vest at once. From the necessity of this case, the children who attained twenty-one, must take as tenants in common." (*a*)

It is observable, that, in the case of Stratton *v.* Best, (*b*) (which was not cited to the V. C.,) a contrary rule was applied to the limitations of a deed. By a marriage settlement, lands were limited, in trust for the intended husband for ninety-nine years, if he should so long live, with remainder, subject to a power of appointment, in trust * for the intended [161] wife for life, with remainder in trust for all and every the child and children of the husband by the intended wife, and their heirs forever. It was contended, that as the shares of children would vest at different times, they were tenants in common; but Lord Thurlow held, that a joint tenancy was created; observing, that, whether the settlement was to be considered as the conveyance of a legal estate [qu. to the trustees ?] or a deed to uses, would make no difference, and that the vesting at different times would not prevent its being a joint tenancy.

In the passage cited from Lord Coke, the great commentator refers to a demise (*b*) at common law, and his doctrine has been usually considered as not applying to conveyances to uses or to wills; but both Lord Thurlow and Sir L. Shadwell concurred (and this was their only point of agreement) in disregarding this distinction.

It should be observed, that, in carrying into effect executory trusts, the Courts will not make the objects joint tenants, without a positive and unequivocal expression of intention to that effect. Thus, where (*c*) trustees were directed, as soon as the testator's

(*a*) Woodgate *v.* Unwin, 4 Sim. 129.
(*b*) 2 B. C. C. 233 [Perkins's ed. 240, note (*a*)].
(*c*) Marryatt *v.* Townly, 1 Ves. Sen. 102.

three daughters attained their respective ages of twenty-one, to convey to them, and the heirs of their bodies, and their heirs, as joint tenants, and, for want of such issue, over; Lord Hardwicke decreed, that the conveyance should be made to the daughters as tenants in common, with cross-remainders, which he thought was the best mode of giving effect to these words.

II. The question next to be considered is, what words will operate to create a tenancy in common. It may be
[162] stated *generally, that all expressions importing division by equal or unequal shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality, will have this effect. Thus, it has been long settled that the words "*equally to be divided*" will create a tenancy in common; (*a*) and so, of course, will a direction, that the subject of gift shall be distributed, "*in joint and equal proportions.*" (*b*)

A devise or bequest to several persons "*equally amongst them,*" (*c*) or "*equally,*"[1] (*d*) or "*respectively,*" (*e*) or with a limitation to their heirs, "as they shall *severally* die," (*f*) or to several "*between them,*" (*g*) has been held, in contradiction of some of the very early cases, (*h*) to make the objects tenants in common. And a similar construction has been given (*i*) to a devise to several, their heirs and assigns, "*all to have part alike and every of them to have as much as the other.*" So where (*k*)

(*a*) 1 Salk. 226; 1 Vern. 65; 2 Vern. 430; 1 Eq. Ca. Ab. 292, pl. 6; Moore, 594; 1 P. W. 14; 1 Lord Raym. 622; 12 Mod. 296; 2 P. W. 280; 3 B. P. C. (Toml. ed.) 104; 1 Wils. 165; 3 B. C. C. 25; Id. 215; 1 Dowl. & Ryl. 52; 2 Barn. & Ald. 464, 636.

(*b*) Ettricke *v.* Ettricke, Amb. 656.

(*c*) Warner *v.* Hone, 1 Eq. Ca. Ab. 292, pl. 10.

(*d*) Lewin *v.* Dodd, Cro. El. 443; S. C. nom. Lewin *v.* Cox, 695; S. C. Moore, 558, pl. 759; Denn *v.* Gaskin, Cowp. 657.

(*e*) Torrett *v.* Frampton, Sty. 434; Folkes *v.* Western, 9 Ves. 456. See also Marryatt *v.* Townley, 1 Ves. Sen. 101.

(*f*) Sheppard *v.* Gibbons, 2 Atk. 441.

(*g*) Lashbrook *v.* Cock, 2 Mer. 70.

(*h*) See Lowen *v.* Bedd, 2 And. 17.

(*i*) Thorowgood *v.* Collins, Cro. Car. 75. See also Page *v.* Page, 2 P. W. 489.

(*k*) Loveaeres d. Mudge *v.* Blight, Cowp. 352.

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[1] The words, "the same to be equally divided between them, both in quantity and quality," &c. in a devise of real estate, by a father to his sons, creates a tenancy in common. Walker *v.* Dewing, 8 Pick. 520; Burghardt *v.* Turner, 12 Pick. 534; Eliot *v.* Carter, 12 Pick. 436; Emerson *v.* Cutler, 14 Pick. 108; Griswold *v.* Johnson, 5 Conn. 363.

A grant of land in fee to two persons "jointly, to be equally divided between them," creates a tenancy in common, by virtue of Mass. Stat. 1785, c. 62, § 4, if not at common law. Burghardt *v.* Turner, 12 Pick. 534.

The words "equally to be divided in equal shares," in a will, creates a tenant in common. Drayton *v.* Drayton, 1 Desaus. 329.

So the words, "share and share alike." Bunch *v.* Hurst, 3 Desaus. 288. See also Woodgate *v.* Unwin, 4 Sim. 129; Westcott *v.* Cady, 5 John. Ch. 334.

So "jointly and severally," under the Stat. of Mass. 1785, c. 62, § 4, Miller *v.* Miller, 16 Mass. 61.

the devise was to A and B of lands, to be enjoyed *alike*, Lord Mansfield held that they were tenants in common, considering that word as synonymous with *equally*.

Again, where (*a*) A bequeathed a term of years to her two daughters, they paying yearly to her son £25 by quarterly payments, *viz: *each of them* £12 10*s.* yearly, out of the rents of the premises, during his life, if the term so long continued; Lord Chancellor Jefferies held this to be a tenancy in common, the £25 *being to be paid by the daughters in moieties.* [163]

In another case (*b*) A bequeathed his personal estate to his sons R. and J., and provided, that if J. should be desirous to be put out apprentice, a competent sum should be raised "*in part of the* SHARE," to which he would become entitled; and Macdonald, C. B., held that the latter words were decisive of the testator's intention to create a tenancy in common.

The preceding cases evince the anxiety of later Judges to give effect to the slightest expressions affording an argument in favor of a tenancy in common; an anxiety which has been dictated by the conviction, that this species of interest is better adapted to answer the exigencies of families than a joint tenancy of which the best quality is, that the right of survivorship, may, at the pleasure of the co-owners respectively (if personally competent) be defeated by a severance of the tenancy.

This leaning to a tenancy in common was acknowledged in a case (*c*) where a testator bequeathed to A and B £10,000, to be equally divided between them, when they should arrive at twenty-one years, and to carry interest until they should arrive at that age. It was contended that the fund was to be divided *at twenty-one*, the legatees in the mean time taking it jointly; and that, therefore, by the death of one under age, it survived to the other; but Lord Thurlow decided otherwise; observing that the Court decrees a tenancy in common as much as it can.

Of course, expressions which, standing alone, would create *a tenancy in common, may be controlled and neutralized by the context; and such it seems, is the effect of the testator's postponing the enjoyment of an ulterior devisee, or legatee, until the decease of the *survivor* of the several co-devisees or legatees for life, which, it is thought, demonstrates an intention that the property shall, in the mean time, devolve to the survivors, under the jus accrescendi which is incidental to a joint tenancy. [164]

Thus, in Armstrong *v.* Eldridge, (*d*) where a testator devised the residue of his real and personal estate to trustees, in trust to

(*a*) Kew *v.* Rouse, 1 Vern. 353; S. C. 1 Eq. Ca. Ab. 292, pl. 7.
(*b*) Gaut *v.* Lawrence, Wight. 395.
(*c*) Joliffe *v.* East, 3 B. C. C. 25.
(*d*) 3 B. C. C. 215. See also Doe d. Calkin *v.* Tompkinson, 2 Man. & Selw. 165.

sell, and apply the interest from time to time to the use of his grandchildren F., C, R., and M., *equally between them, share and share alike*, for and during their several and respective natural lives, *and after the decease of the survivor of them*, in trust to apply the principal to and among the children of his grandchildren: Lord Thurlow said, that although the words "equally to be divided," and "share and share alike," were, in general, construed, in a will, to create a tenancy in common, yet where the context showed a joint tenancy to be intended, the words should be construed accordingly; and in this case the interest was to be divided among four while four were living, among three while three were alive, and nothing was to go to the children while any of the mothers were living.

And the same construction has prevailed even where the ulterior devise was not in terms, after the decease of the survivor, but after the decease or the deceases of the prior legatees; it being considered that the property is not to go over until the decease of all the legatees, though the words, especially in the latter case, might seem to admit of being construed
[165] after the "respective" deceases, if the Court* had felt particularly anxious to avoid the rejection of the words creating a tenancy in common.

Thus in Tuckerman *v.* Jefferies, (*a*) where the testator devised to A and B, to be equally divided between them during their natural lives, *and after the deceases of A and B* to the right heirs of A forever: it was held, that they were joint tenants, notwithstanding the words "equally to be divided;" it being considered that the whole was to go over to the heirs of A at once on the decease of the survivor, not that they should take by moieties at several times.

So, in the case of Pearce *v.* Edmeades, (*b*) where a testator bequeathed the residue of his estate to trustees, in trust to pay the interest, dividends, and produce thereof to his daughter M. for life, and after her decease unto and between her two children E. G. and G. G., during their respective lives *in equal shares; and from and after the decease of the said E. G. and G. G.*, upon further trust, to pay or transfer and divide the same unto and between all and every the child or children, if more than one, of the said Elizabeth Goldsmith and George Goldsmith, in equal shares; and if but one, then to such only child, and if there should be no child of the said E. G. and G. G., living at the time of their decease, or born in due time after the death of the said G. G., then upon further trust, for the testator's legal personal representatives. The testator and E. G. died, the latter leaving children, whereupon the entire income was claimed by G. G. as the only survivor; and Lord Abinger, C. B., held that

(*a*) 3 Bac. Ab. 681, (6th ed.) (*b*) 3 You. & Coll. 246.

he was entitled. "It has been settled," said his Lordship, "by a series of decisions, that the words 'respectively,' and 'in equal shares,' when not controlled by other words in a will, shall be taken to indicate the nature of an estate or interest bequeathed, and shall constitute a tenancy in common. But when these words are combined with, or followed by others which would make a tenancy in common inconsistent with the manifest design of the subsequent bequest of the testator, they may be taken to indicate, not the nature but the proportion, of the interest each party is to take. In the present case the bequest to G. G. and E. G., during their lives, is of the interest and dividends only of the residue of the testator's estate. The corpus of the residue is not to be divided or possessed by the legatees till after the decease both of G. G. and E. G.; and then it is to be divided amongst such of their children only as shall be living at the death of the survivor. It is clear, therefore, that the mass of the property is to be divided amongst the children who might survive both the parents, per capita and not per stirpes. This would be quite inconsistent with a tenancy in common of the parents. Again, the testator, by his care in pursuing this property through three generations, and bequeathing it, upon failure of these, to his then personal representatives, shows that he meant to die intestate of no part of it; but as the interest and dividends only are devised to his grandchildren, G. G. and E. G., and nothing is devised to their children till the death of both, it would follow, that if G. G. is not entitled to the whole interest and dividends accruing after the death of E. G. during his life, the portions of interest and dividends which she took in her lifetime would be undevised during the remainder of G. G.'s life." [166]

As in the three preceding cases no act had been done to sever the joint tenancy (if any) between the several devisees or legatees, it was not necessary to determine whether the effect of the will was to confer a joint interest, with its incidental right of survivorship, or to create a tenancy in common with an implied gift to the survivor for life. Indeed, no allusion is made to the latter point, except in Pearce *v.* Edmeades, and even there it does not appear to have formed the prevailing ground of determination, though perhaps less violence is done to the language of the will by implying a positive gift to the survivor than by rejecting the words of severance. (*a*) [167]

(*a*) Where the objects are more than two, the implication, in order to complete the purpose of filling up the chasm which would otherwise occur between the decease of the first and last of the tenants for life, must either give joint estates carrying the right of survivorship, or, which would seem better, must, on the decease of each tenant for life after the first, deal with the accruing share or shares of such deceased tenant or tenants for life, in like manner. For instance, suppose the devise to be to A, B and C, as tenants in common for life, and after the decease of

III. It follows as a consequence of the survivorship which is incidental to a joint tenancy, that if the devise fail as to one of the devisees, from its being originally void, (*a*) or subsequently revoked, (*b*) or by reason of the decease of the devisee in the testator's lifetime, (*c*) the other or others will take the whole. But the rule is different as to tenants in common, whose shares, in case of the failure or revocation of the devise to any of them, descend to the heir at law (or if the will is subject to the new law, the residuary devisee) of the testator; (*d*) unless
[168] * the devise be to the objects as a class, in which case the individuals composing the class at the death of the testator are entitled among them, whatever be their number, to the entirety of the subject of gift.[1] (*e*)

Here it may be observed, that where a trust is raised by implication, in default of execution of a power of distribution, from the absence of an express gift, (*f*) it is now settled that the objects take *as tenants in common;* (*g*) but it should seem that under an implied gift resulting from a power of *selection*, they are joint tenants.

Where a power is given by will to appoint property among several objects, and the subject, in default of appointment, is given to them individually (and not as a class) *as tenants in common*, a question sometimes arises whether, by the death of any of the objects, the power is defeated in respect of the shares of those objects. The established distinction seems to be, that if all the objects survive the testator, and one of them afterwards dies in the lifetime of the donee of the power, the power remains as to the whole. (*h*) But, on the other hand, if any object dies in the testator's lifetime, by which the gift lapses pro tanto, the power is defeated to the same extent. (*i*)

the survivor over. A dies; upon which, A's share passes to B and C, it is presumed, as tenants in common. Next, B dies; his original share devolves, by implied devise, to C; but unless his accruing share (*i. e.* the one half of A's share which came to B on A's decease) can pass to C, such share would be undisposed of during the remainder of his (C's) life. The implication, therefore, if admissible at all, must, it is presumed, in order to complete its purpose, give B.'s accruing share, as well as the original one, to C.

(*a*) Dowset *v.* Sweet, Amb. 176.

(*b*) Humphrey *v.* Tayleur, Amb. 136.

(*c*) Davis *v.* Kemp, Cart. 45; S. C. 1 Eq. Ca. Ab. 216, pl. 7; Carth. 3.

(*d*) Cresswell *v.* Cheslyn, 2 Ed. 123. S. C. on Appeal, 3 B. P. C. (Toml. ed.) 246.

(*e*) But see ante, vol. 1, p. 287.

(*f*) See ante, vol. 1, p. 485.

(*g*) Reade *v.* Reade, 5 Ves. 744 [see Sumner's ed. 747, note (*a*)], overruling Maddison *v.* Andrew, 1 Ves. Sen. 57.

(*h*) Boyle *v.* Bishop of Peterborough, 1 Ves. Jun. 299; Butcher *v.* Butcher, 9 Ves. 382; S. C. 1 Ves. & Bea. 79.

(*i*) Reade *v.* Reade, 5 Ves. 744. See also 1 Sudg. Pow. (6th ed.) 534, where great pains have been taken to establish the position in the text, in opposition to some

[1] See Sackett *v.* Mallory, 1 Metcalf, 356, 357.

If, however, under the gift in default of appointment, * the objects are joint tenants, or the gift is to a class, [169] of course, the decease of any object, even in the testator's lifetime, as it does not occasion any lapse, leaves the power wholly unaffected.

It may be observed, that as an appointment cannot be made in favor of a deceased child, whose share under the gift over had vested, the only mode by which the testator's bounty can be made to reach his representatives is to leave a portion of the fund unappointed; in which case the representatives of the deceased child will take his share (but of course *only* his share) in the unappointed portion. Lord Eldon, it is true, expressed his disapproval of this "device," in Butcher *v.* Butcher, (*a*) but his Lordship appears to have objected to it as proceeding upon the erroneous notion that it was necessary to enable the donee to appoint the remainder of the fund to the surviving objects; whereas, according to Boyle *v.* Bishop of Peterborough, his power extended over *the whole* fund. It may be observed, that to avoid all such questions, powers should always be framed so as to authorize an exclusive appointment to one or more of the objects, notwithstanding the recent enactment (*b*) which enables the donee of a power of distribution to appoint nominal shares to any of the objects. It must not be forgotten that the omission to give a share to each object would still be fatal to the appointment.

remarks of the present writer in his volume appended to the third edition of Powell on Devises, p. 374, which remarks he has not here repeated; for though he is still unable to discover any solid ground for the alleged difference of effect in regard to the power, where the partial failure of the gift takes place *before*, and where it occurs *after* the death of the testator, yet as the cases commented on by the distinguished writer in question seem to favor such a doctrine, and as it is really of more importance that the rules on such points should be certain, than that they should be decided in the manner most consistent with principle, he has not felt disposed to revive the discussion.

(*a*) 1 Ves. & Bea. 92.

(*b*) 1 Will. IV. c. 46.

CHAPTER XXXIV.

ESTATES IN FEE, WITHOUT WORDS OF LIMITATION.

I. *What estate passes by an indefinite devise under wills made before* 1838.
II. *When enlarged to a fee by a charge of debts, legacies, or annuities.*
III. ——— *by a devise over in case of death of prior devisee under age, &c.*
IV. *Effect of words "Estate," "Property," "Real Effects," "Inheritance," "Remainder," "Reversion," "Interest," "Part," "Share," "Perpetual Advowson," &c.*
V. *Effect of recent enactment as to Wills made or republished since* 1837.

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I. NOTHING is better settled than that a devise of messuages, lands, tenements, or hereditaments, (not estate,) without words of limitation, occurring in a will which is not subject to the newly enacted rules of testamentary construction, confers on the devisee an estate for life only, (*a*) notwithstanding the testator may have commenced his will with a declaration of his intention to dispose of his whole estate,[1] (*b*) or may have given a nominal legacy to his heir, (*c*) or may have declared an intention wholly * to disinherit him, or the will may [171] contain an antecedent devise to the heir for life of the testator's property, which is the subject of dispute, (*d*) or the devise in question may be to a class, embracing the heir, as to the testator's children, (*e*) or, lastly, notwithstanding there may, in another part of the will, or in the immediate context, be a devise expressly for life, affording the argument, therefore, that the testator meant something more, or at least different, by an indefinite devise; (*f*) though any, or, it is conceived, the whole of these circumstances concur in the same will, it is indisputably clear that such a devise will confer only an estate for life.[2]

(*a*) Taylor *v.* Hodges, 3 Ch. Rep. 87; Deacon *v.* Marsh, Moore, 594; Bullock *v.* Bullock, 8 Vin. Ab. 238, pl. 10; Roe d. Kirby *v.* Holmes, 2 Wils. 80 *b*; Doe d. Bowes *v.* Blackett, Cowp. 235; Doe d. Crutchfield *v.* Pearce, 1 Pri. 353.

(*b*) Denn *v.* Gaskin, Cowp. 657; S. C. Doug. 731; Doe d. Child *v.* Wright, 8 Durn. & E. 64; Doe d. Small *v.* Allen, ib. 497.

(*c*) Roe d. Callow *v.* Bolton, 2 Bl. 1045; Right *v.* Sidebotham, Doug. 730; Roe d. Peter *v.* Daw, 3 Mau. & Selw. 518.

(*d*) Awse *v.* Melhuish, 1 B. C. C. 519; Right d. Compton *v.* Compton, 9 East, 267.

(*e*) Dickins *v.* Marshal, Cro. El. 330.

(*f*) Goodtitle d. Richards *v.* Edmonds, 7 Durn. & East, 633; Awse *v.* Melhuish, 1 B. C. C. 519; Doe d. Bristoe *v.* Clarke, 2 New Rep. 343; Doe d. Viner *v.* Eve, 5 Adolph. & Ell. 317; Silvey *v.* Howard, 6 Adolph. & Ell. 253.

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[1] See Varney *v.* Stevens, 22 Maine, 331.

[2] If there be a devise to one generally of freehold and personal estates, without any words of limitation, he will take an estate for life only in the freehold, but the personal property absolutely. Newton *v.* Griffith, 1 Harr. & Gill, 111; Hawley *v.* Northampton, 8 Mass. 3; Bailey *v.* Duncan, 4 Monroe, 257; Jones *v.* Doe, 1 Scam. 276; Jackson *v.* Wells, 9 Johns. 222; Jackson *v.* Embler, 14 Johns. 198; Jackson *v.* Bull, 10 Johns. 148; Conoway *v.* Piper, 3 Harring. 482; Wheaton *v.* Andress, 23 Wendell, 452; Hall *v.* Goodwyn, 4 M'Cord, 442; Scanlan *v.* Porter, 1 Bailey,

This rule of construction is entirely technical, as, according to popular notions, the gift of any subject simply, comprehends all the interest therein. A conviction that the rule is generally subversive of the actual intention of testators, always induced the Courts to lend a willing ear whenever a plausible pretext for a departure from it could be suggested. Hence have arisen the various cases in which indefinite devises have been, by implication, enlarged to a fee simple, which cases form the next subject of consideration.

II. It has been long settled that where a devisee, whose estate is undefined, is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee, on the ground

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427; Wright *v.* Denn, 10 Wheat. 204. Unless, in respect to the real estate, there be a manifest intention to give a fee. Wait *v.* Belding, 24 Pick. 129, 133; Cook *v.* Holmes, 11 Mass. 528, 531; 4 Kent, (5th ed.) 5, 6, 7; Harris *v.* Harris, 8 Johns. 141; Jackson *v.* Wells, 9 Johns. 222; Jackson *v.* Embler, 14 Johns. 198; Ferris *v.* Smith, 17 Johns. 221; Morrison *v.* Semple, 6 Binn. 94; Steele *v.* Thompson, 14 Serg. & R. 84; Wright *v.* Denn, 10 Wheat. 204; Beall *v.* Holmes, 6 Harr. & Johns. 209, 210. But, if such intention is manifest, a fee simple estate will pass, without words of limitation or perpetuity. Ib.; Johnson *v.* Johnson, 1 Munf. 549; Waring *v.* Middleton, 3 Desaus. 249; Clark *v.* Mikell, 3 Desaus. 168; Whaley *v.* Jenkins, 3 Desaus. 80; Engle *v.* Burns, 5 Call. 463; Brailsford *v.* Heyward, 2 Desaus. 290; Josselyn *v.* Hutchinson, 21 Maine, 340; Godfrey *v.* Humphrey, 18 Pick. 539; Jackson *v.* Babcock, 12 Johns. 389; Fogg *v.* Clark, 1 N. Hamp. 163; Butler *v.* Little, 3 Greenl. 239; Bradstreet *v.* Clarke, 12 Wendell, 602; Baker *v.* Bridge, 12 Pick. 27; 4 Kent, (5th ed.) 5, 6, 7; Ib. 536, *et seq.*; Beall *v.* Holmes, 6 Harr. & Johns. 205; Johnson *v.* Johnson, 1 McMullen, 346; Sargent *v.* Towne, 10 Mass. 303; Jenkins *v.* Clement, State Eq. Rep. 72; Dunlap *v.* Crawford, 2 M'Cord, 171; Dice *v.* Sheffer, 3 Watts & Serg. 419; Areson *v.* Areson, 5 Hill, 410; Cordry *v.* Adams, 1 Harring. 439; Russell *v.* Elden, 15 Maine, 193; Smith *v.* Berry, 8 Ohio, 365; Parker *v.* Parker, 5 Metcalf, 134; Fox *v.* Phelps, 17 Wendell, 393; Den *v.* Bowne, 3 Harr. 210; Allen *v.* Hoyt, 5 Metcalf, 324; Pattison *v.* Doe, 7 Indiana, 282; Pratt *v.* Leadbetter, 38 Maine, 9; Lummus *v.* Mitchell, 34 N. Hamp. 39. The words, "I give my lands;" "all the rest, residue and remainder of my real estate;" "all my real estate," have been held severally to pass a fee without other words of limitation or inheritance. Smith *v.* Berry, 8 Ohio, 365; Parker *v.* Parker, 5 Metcalf, 134; Godfrey *v.* Humphrey, 18 Pick. 537. See Josselyn *v.* Hutchinson, 21 Maine, 339.

If an estate be given to a person generally, or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexed to it a power of disposition of the reversion. See 4 Kent, (5th ed.) 535, 536; Jackson *v.* Coleman, 2 Johns. 391; Herrick *v.* Babcock, 12 Johns, 389; Jackson *v.* Robins, 16 Johns. 587, 588; Flintham's case, 11 Serg. & R. 16; De Peyster *v.* Howland, 8 Cowen, 277; Den *v.* Humphreys, 1 Har. 25; Moore *v.* Webb, 2 B. Monroe, 282; Ramsdell *v.* Ramsdell, 21 Maine, 288; Culbertson *v.* Duly, 7 Watts & Serg. 195; Inman *v.* Jackson, 4 Greenl. 237.

By statute in Virginia, Kentucky, Mississippi, Missouri, Alabama, and New York, and probably in other States, the word "heirs," or other words of inheritance, are no longer necessary to create or convey an estate in fee; and every *grant or devise* of real estate, made subsequent to the statute, passes all the interest of the grantor or testator, unless the intent to pass a less estate or interest appears in express terms, or by necessary implication. See 4 Kent, (5th ed.) 7, 8; Fuller *v.* Gates, 8 Paige, 325.

In New Jersey, Maryland, North Carolina, South Carolina, Tennessee, and Massachusetts, it has been declared, by statute, that a *devise* of lands shall be construed to convey a fee simple, unless it appears, by express words or manifest intent, that a lesser estate was intended. 4 Kent, (5th ed.) 8; Ib. 537, 538, and notes; 1 Harr. & Gill, Rep. 138, note; Denn *v.* Smilcher, 2 Green, 53; Fay *v.* Fay, 1 Cushing, 93.

that if he took an estate for life only, he might be damnified by the determination of his interest * before re- [172]
imbursement of his expenditure;[1] and the fact that actual loss is rendered highly improbable by the disparity in the amount of the sum charged relatively to the value of the land, does not prevent the enlargement of the estate. (*a*)

For the same reason the future or contingent nature of the charge[2] does not, as sometimes contended, prevent it from enlarging the estate. (*b*) In the cases of Abrams *v.* Winshup (*c*) and Doe *v.* Phillips, (*d*) the charge was contingent in effect, though not in express terms, (being liable, under the general rule, (*e*) to failure in the event of the devisee's dying before majority,) and no attempt was made to found a distinction on this circumstance, which indeed seems precluded by the principle that makes the *possibility* of loss the ground of the enlargement of the estate, as such possibility evidently exists as well where the charge is contingent as where it is absolute. So it is wholly immaterial whether the devisee is directed to pay simply, or to pay out of the land. (*f*)

Where a devisee, who is directed to pay the testator's debts, is also appointed executor, the injunction is considered to have relation, not to his duty as executor to discharge the debts, but to his character of devisee of the land, in which, therefore, he takes a fee. (*g*)

The rule under consideration, however, is confined to indefinite devises; for where the direction to pay is imposed on a person to whom there is given an express estate for life, (*h*) or an estate tail, (whether limited in express terms, or arising con-

(*a*) Moone *v.* Heaseman, Willes, 440; Doe *v.* Holmes, 8 Durn. & East, 1; Goodtitle *v.* Maddern, 4 East, 496.
(*b*) Merson *v.* Blackmore, 2 Atk. 341; Doe *v.* Allen, 8 Durn. & East, 497.
(*c*) 3 Russ. 350.
(*d*) 3 Barn. & Adolph. 753.
(*e*) Ante, vol. 1, p. 756.
(*f*) Doe *v.* Snelling, 5 East, 87.
(*g*) Dolton *v.* Hewer, 6 Madd. 9; also Doe *v.* Phillips, 3 Barn. & Adolph. 753.
(*h*) Goodtitle *v.* Edmonds, 7 Durn. & E. 635. See also Willis *v.* Lucas, 1 P. W. 474.

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[1] Where the charge is on the estate, and there are no words of limitation, the devisee takes an estate for life only; but where the charge is on the person of the devisee in respect to the estate in his hands, he takes a fee by implication. Jackson *v.* Bull, 10 Johns. 148; Jackson *v.* Martin, 18 Johns. 31; Jackson *v.* Merrill, 6 Johns. 185; Spraker *v.* Van Alstyne, 18 Wendell, 200; Harris *v.* Fly, 7 Paige, 421; M'Lellan *v.* Turner, 15 Maine, 436; Gibson *v.* Horton, 5 Harr. & Johns. 177; Beall *v.* Holmes, 6 ib. 208; Lithgow *v.* Kavenagh, 9 Mass. 161; 10 Wheat. 231; Gardner *v.* Gardner, 3 Mason, 309, 312; Cook *v.* Holmes, 11 Mass. 528; Bowers *v.* Porter, 4 Pick. 198, 203; Wait *v.* Belding, 24 Pick. 129; Dunlap *v.* Crawford, 2 M'Cord, Ch. 177; Parker *v.* Parker, 5 Metcalf, 134; Fox *v.* Phelps, 17 Wendell, 393; Lindsay *v.* M'Cormack, 2 A. K. Marsh, 229; Ferguson *v.* Zepp, 4 Wash. C. C. 645; Tanner *v.* Livingston, 12 Wendell, 83; Jackson *v.* Housel, 17 Johns. 281.

[2] A contingent charge on the estate devised will not carry a fee. Jackson *v.* Harris, 8 Johns. 141.

[173] structively by implication from * words introducing the devise over,) (*a*) the charge is inoperative to enlarge such estate for life or estate tail, to a fee simple.[1]

It is well established, too, that the mere imposition of a burden on the land (without saying by whom it is to be borne) has not the effect of enlarging the estate of any devisee;[2] as where lands are devised to A, after debts and legacies are paid, or subject to or charged with the payment of debts or legacies, which, in a will that is subject to the old law, confers only an estate for life. (*b*) And though undoubtedly two cases may be adduced, (*c*) in which devises seeming to belong to this class were held to carry the fee, yet one of these cases professedly recognized, while it actually departed from (*d*) the principle, which distinguishes between charges on the land merely, and charges on the devisee in respect of the land; and in the other case, the Lord Chief Justice (Best) broadly laid it down that every charge on the land, without distinction, converted an indefinite devise into a gift of the fee; a position which stands directly opposed to the general doctrine of prior cases, and is also irreconcilable with, and must, therefore, be considered as overruled by a more recent adjudication. (*e*)

The same principle applies to annual sums charged on real estate, which, if directed to be paid by the devisee of an undefined estate, will enlarge that estate to a fee simple, whether the will directs the annual sum to be paid by the devisee, without more, or by the devisee, out of the land. (*f*)

[174] * And it is immaterial that the current income of the property exceeds the annual sum charged, unless such sum ceases with the estate of the devisee, because, leaving out of consideration possible fluctuations in value, the devisee might, notwithstanding such excess, be damnified, if the annuity should happen to endure beyond his life estate.

Where the annuity and the estate of the devisee are both indefinite, the alternative presented itself either to restrict the annuity to the life of the devisee of the land, or to enlarge the estate of the devisee of the land to a fee; and the latter hypothesis was adopted, as being most consistent with probable intention.

(*a*) Denn *v.* Slater, 5 Durn. & E. 535; Doe *v.* Owens, 1 Barn. & Adolph. 318.
(*b*) Denn *v.* Moor, 5 Durn. & E. 558; S. C. in Dom. Proc. 1 Bos. & Pull. 247. See also Fairfax *v.* Heron, Prec. Ch. 67.
(*c*) Doe *v.* Richards, 3 Durn. & E. 356; Gully *v.* Bishop of Exeter, 12 Moore, 591.
(*d*) But see 1 Cromp. & Mees. 41.
(*e*) Doe d. Clark *v.* Clark, 1 Cromp. & Mees. 39.
(*f*) Spicer *v.* Spicer, Cro. Jac. 527; Baddeley *v.* Leapingwell, 3 Burr. 1533; Jenkins *v.* Jenkins, Willes, 650; Goodright *v.* Stocker, 5 Durn. & East, 93; Right *v.* Compton, 9 East, 265, overruling Ansley *v.* Chapman, Cro. Car. 157.

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[1] East *v.* Troyford, 31 Eng. Law & Eq. 62.
[2] Ante, 125, note; 4 Kent, (5th ed.) 540.

Where the devise is to a person expressly for life, he paying an annuity to another also expressly for life, the direction to pay the annuity is inoperative (as we have seen the charge of a gross sum is under similar circumstances) to enlarge the devisee's estate; and in such case, it seems, that the annuity continues a burden on the land during the life of the annuitant, even after the determination of the estate of the devisee, who was, in the first instance, made the medium of payment. (*a*) These positions, it will be observed, leave open the question as to the effect of directing a person, who takes an express estate for life, to pay an annuity to another indefinitely. There would seem to be some ground in such a case, to contend that the annuity was intended to be coextensive only with the estate of the person who is directed to pay it, and, consequently, ceased on the death of the payer, being in fact an annuity for the joint lives of himself and the *annuitant; but the writer is not [175] aware of any decision on the point.

In consistency with the principle which applies, as we have seen, to charges of gross sums, the imposition of an annuity on any devised lands, in terms which do not make its payment the personal duty of any devisee, leaves the estate created by the will wholly unenlarged and unaffected; (*b*) which doctrine is so well settled, that the difficulty of reconciling every decision (*c*) does not cast the slightest shade of doubt over the principle.

III. The fee simple is also held to pass by an indefinite devise, where it is succeeded by a gift over, in the event of the devisee dying under the age of twenty-one years; such devise over being considered to denote that the prior devisee is to have the inheritance in the alternative event of his attaining the age in question, since, in any other supposition, the making the ulterior devise dependent on the contingency of the devisee dying under the prescribed age is very capricious, if not absurd. (*d*)

The force of this reasoning is somewhat diminished, where the devise over confers an estate for life only; but the rule nevertheless applies to such cases, (*e*) as it also does where the contingency is the dying of the prior devisee under any other age than majority; (*f*) and it is not restrained (as has been sometimes laid down by text-writers) to cases in which the prior devise is to the children *of a devisee for [176] life; (*g*) nor does it matter that another contingency is

(*a*) Willis *v.* Lucas, 1 P. W. 474.
(*b*) See Doe *v.* Clayton, 8 East, 141.
(*c*) See Andrew *v.* Southouse, 5 Durn. & E. 291.
(*d*) Doe *v.* Cundall, 9 East, 600; Marshall *v.* Hill, 2 Maule & Selw. 608; Doe *v.* Coleman, 6 Price, 179, overruling Fowler *v.* Blackwell, 1 Com. 353.
(*e*) See Frogmorton *v.* Holiday, 3 Burr. 1618.
(*f*) See Doe *v.* Coleman, 6 Price, 179.
(*g*) Doe *v.* Cundall, 9 East, 600.

associated with that of death under the prescribed age: for instance, an indefinite devise would be enlarged to a fee simple by means of a devise over to take effect on the prior devisee dying under age, *and without leaving lawful issue.* (*a*) In fact, the implication may be plausibly contended for, even where the contingency with which death is associated does not relate to the age of the devisee at all; as, in the case of a devise to A, and, if he dies without leaving issue living at his decease, then to B in fee. (*b*) However this may be, authority forbids the extension of the doctrine to cases in which the devise over in fee arises on a collateral event wholly unconnected with the decease of the prior devisee; for, in a case where lands were devised to the testator's wife, with remainder to A and B as tenants in common, and the testator provided that in case C should disturb his said wife in the enjoyment of the premises, the same should go to D in fee; it was held, that A and B took estates for life only. (*c*)

It is also abundantly clear, that, where an indefinite devise is to take effect in derogation of, or in substitution for a pre-
[177] vious devise in fee, (being the converse of the *cases just mentioned,) no enlargement of estate takes place. Thus, if lands are devised to A and his heirs, and, in the event of his dying under the age of twenty-one, and without issue, to B, B will take an estate for life only.[1] (*d*) Indeed, the seeming absurdity that a testator should mean to defeat an estate in fee for the purpose of substituting a mere life interest, (which would be the gist of the argument for expanding the second devise to a fee simple,) is wholly avoided by holding that the second devise defeats the first pro tanto only, which appears to be the sound construction. (*e*)

It has been sometimes laid down, that where lands are devised

(*a*) Toovey *v.* Bassett, 10 East, 460.

(*b*) See Moone *v.* Heaseman, Willes, 138; also Hutchinson *v.* Stephens, 1 Kee. 240. In this case, though it is difficult to discover any other ground for the decision than such as is furnished by the doctrine suggested, yet the judgment of Lord Langdale, M. R., does not distinctly recognize that doctrine.

The several points fully stated in the text will be found very fully discussed in the writer's volume appended to the 3d edition of Powell on Devises, p. 399, *et seq.*; but as such points cannot arise under wills made or republished since the year 1837, and may, therefore, never arise at all, the writer has thought the space occupied by the discussion may, in the present work, be more usefully appropriated to the consideration of questions of more enduring utility.

(*c*) Roe *v.* Blackett, Cowp. 235.

(*d*) Middleton *v.* Swain, Skinn. 339; Beviston *v.* Hussey, Id. 285; Fairfax *v.* Heron, Pre. Ch. 67; Doe *v.* Holmes, 2 Wils. 80.

(*e*) As to the substituted devise for life defeating the prior fee pro tanto, vide ante, vol. 1, p. 782.

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[1] Where lands are devised in fee, with a limitation over, to which no words of inheritance are annexed, the ulterior devise will, notwithstanding, be in fee. Jackson *v.* Staats, 11 Johns. 337.

to trustees in fee, in trust for a person, without any words of limitation, the cestui que trust takes an equitable interest coextensive with the legal estate of the trustees, *i. e.* a fee.

The case, however, commonly cited as an authority for this proposition, contains other circumstances by which the determination of the Court may have been influenced;—a testator (*a*) devised to A and B, *and their heirs*, all that *estate* he had lately purchased of H., called L., in the parish of S., *in trust for* Joan, the wife of P., and James, her son; one moiety of the profits to be applied to the separate use of Joan, and the other moiety to be laid up, or otherwise improved, till James should *arrive at twenty-one; and if Joan should die during [178] the minority of James, then the trustees were to lay up the profits for the benefit of her son, and after the decease of Joan, to permit James to enter upon and enjoy *the whole*, as soon as he attained twenty-one. In a case out of Chancery, the question was, what estate James the son took. It was contended, that he had an estate in fee, not only on the ground that the legal inheritance was given to the trustees, but also inasmuch as the devise of "the whole" had relation to the word "estate" in the former part of the devise. (*b*) On the other side, it was said that the beneficial interest was not to be measured by the estate of the trustees, and that the word "estate" was applicable only to the devise to them, the expression "the *whole*" merely referring to both moieties. The Court certified that James the son took a fee, but on which of these grounds does not appear.

Possibly, however, the case of Bateman *v.* Roach (*c*) may be referred to this ground; the devise there having been simply to trustees *and their heirs*, in trust for J. and S. for their lives, remainder *to the children of the said J., and to the children of the said S.*, by her then husband; they to receive the profits thereof when they came of age. The only question raised was as to admission of the representatives of children born subsequently to the will; and the Court was of opinion, that they were entitled, *and that the children took a fee as tenants in common.* It is as difficult to find a ground for their taking a fee, unless the one suggested be admitted, as for their taking as tenants in common.

*It should be observed, moreover, that, in the case [179]

(*a*) Challenger *v.* Sheppard, 8 Durn. & East, 597. See also Hutchinson *v.* Stephens, 1 Kee. 240; but the case contained other circumstances, and no attempt seems to have been made to sustain the construction that the devise took an equitable estate in fee simple, on the ground that the devise to the trustees embraced the legal fee, and that the interest of the cestuis que trust was intended to be coextensive.

(*b*) As to the operation of the word *estate*, see next section.

(*c*) 9 Mod. 104—a book of doubtful authority, and containing in this very volume a case in which the fee was held to pass on grounds that are clearly untenable; Carpenter *v.* Chapman, 9 Mod. 92.

of Newland *v.* Shephard, (*a*) Lord Macclesfield held, that, under a devise by a testator to trustees in fee, upon trust to pay the *produce* and interest to such of his grandchildren as should be living at the time of his decease, until they should come to the age of twenty-one years, or be married, the grandchildren took the fee, his Lordship reasoning much on the testator's having vested the fee in the trustees, and given the "*produce*" to the children; though it appears by the Register's book (*b*) that the word "produce" was not in the will. In either case, the construction was altogether unwarranted, and the soundness of the decision has been denied by Lord Hardwicke. (*c*)

Upon its authority, however, Lord Keeper Henley, in Peat *v.* Powell, (*d*) held that where a testator gave all his real and personal estate to his executors, in trust for his younger son G. till he should attain twenty-one, and then the trust to cease, G. took the whole beneficial interest; his Lordship observing, that *the trust only* was to continue during the minority, and that the case of Newland *v.* Shephard was much stronger.

IV. The proper and technical mode of limiting an estate in fee simple is to give the property to the devisee and his heirs, or to him, his heirs, and assigns forever;[1] but such an estate may, even under wills made before 1838, be created by any [180] expressions, however informal, *which denote the intention. Thus, the inheritance in fee was held to pass by a devise to A *in fee simple*, (*e*) or to A *forever*, (*f*) or to him *and his assigns forever*, (*g*) but not to a person and his assigns simply, which gives an estate for life only, (*h*) or to A *and his successors*, (*i*) or to A *et sanguini suo;* (*k*) to two *et heredibus*, omitting suis); (*l*) to a man *and his*, *and to do what he will with*

(*a*) 2 P. W. 194; S. C. 2 Eq. Ca. Ab. 329, pl. 4. Mr. Cruise, 6 Dig. 641, has inaccurately stated this case to have been recognized in Challenger *v.* Sheppard, 8 Durn & E. 597, ante, 177.
(*b*) See Mr. Cox's n., 2 P. W. 194.
(*c*) In Fonerean *v.* Fonereau, 3 Atk. 316.
(*d*) Amb. 387; S. C. 1 Ed. 479.
(*e*) Br. Devise, pl. 31; Baker *v.* Raymond, And. 51; 8 Vin. Ab. 206, pl. 8.
(*f*) Co. Litt. 9 *b*; Whiting *v.* Welkings, 8 Vin. Ab. 206; 1 Bulst. 219; 2 Lord Raym. 1152. See also Heath *v.* Heath, 1 B. C. C. 148.
(*g*) Co. Litt. 9 *b*.
(*h*) Id.
(*i*) Webb *v.* Herring, Roll. Rep. 399, pl. 25; S. C. 8 Vin. Ab. 209, pl. 1.
(*k*) Co. Litt. 9 *b*; Downhall *v.* Catesby, 8 Vin. Ab. 206, pl. 10.
(*l*) Br. Estates, pl. 4; 8 Vin. Ab. 208, pl. 18.

[1] No technical words are necessary to devise a fee. Jackson *v.* Babcock, 12 Johns. 389. The words "I devise my lands," in a will, are sufficient to pass an estate of inheritance. Smith *v.* Berry, 8 Ohio, 365. So the words "I will and bequeath to my son R. one half of my plantation whereon I now live." Dunlap *v.* Crawford, 2 M'Cord, Ch. 177. See ante, 124, 125, note.

it, (*a*) and even to him *and his* simply; (*b*) to A *to give and sell*; (*c*) to A *to give and sell, and do therewith at his will and pleasure*; (*d*) or to a person to her own use, *to give away at her death to whom she pleases*; (*e*) or *to be at the discretion of* a person. (*f*)

And in a recent case, (*g*) where a testator, after giving to his wife and her heirs and assigns forever, all the residue of his personal estate, made her "full and whole executrix of a freehold" house, it was held that the fee passed to the wife.

But it has been decided that a devise of lands to a person by her "*freely to be possessed and enjoyed*," (*h*) passes only an *estate for life;[1] though, in an earlier case, similar [181] words were held to give a fee, (*i*) but there were other grounds for the construction, particularly an annuity to be paid *by the devisees* out of the estate; (*k*) which charge, in the opinion of Lord Mansfield, also showed that the word "freely" could not refer to exemption from incumbrances; and to this Lord Ellenborough also adverted in Goodright *v.* Barron.

It has been long established, that a devise of a testator's *estate* includes not only the *corpus* of the property, but the whole of his interest therein;[2] (*l*) and the same effect has been given to the word "estates" in the plural number, (*m*) notwithstand-

(*a*) Latch. 36.
(*b*) Id. In some manors copyholds are so limited.
(*c*) Co. Litt. 9 *b*; 8 Vin. Ab. 206, pl. 8.
(*d*) Whiston *v.* Cleyton, Br. Dev. pl. 39; 1 Leon. 156; 8 Vin. Ab. 234, pl. 2; Jennor *v.* Hardy, Id. 1 Leon. 283.
(*e*) Timewell *v.* Perkins, 2 Atk. 102. Where such a phrase is added to an *express* estate for life, it confers a power only. See Tomlinson *v.* Dighton, 1 P. W. 149.
(*f*) Whiston *v.* Cleyton, 1 Leon. 156; 8 Vin. Ab. 235, pl. 7. See also Goodtitle *v.* Otway, 2 Wils. 6.
(*g*) Doe d. Hickman *v.* Haslewood, 6 Adolph. & Ellis, 167.
(*h*) Goodright d. Drewry *v.* Barron, 11 East, 220.
(*i*) Loveacres d. Mudge *v.* Blight, Cowp. 352.
(*k*) Ante, p. 173.
(*l*) 2 Lev. 91; 3 Keb. 180; 1 Mod. 100; 3 Mod. 45, 228; 3 Keb. 49; 4 Mod. 89; 1 Show. 349, 396; 1 Salk. 236, 239; 1 Com. 337; 2 Vern. 690; Pre. Ch. 264; 2 Vern. 564; 12 Mod. 594; 2 Lord Raym. 1324; 2 P. W. 524; 1 Eq. Ca. Ab. 178, pl. 18; 3 P. W, 294; Cas. Temp. Talb. 157; Amb. 181; 2 Atk. 38, 102; 3 Atk. 486; 1 Ves. Sen. 10; 2 Id. 48; 2 Bl. 938; 1 H. Bl. 223; Willes, 296; Llofft, 95, 100; 4 D. & E. 89; 1 Bos. & Pull. New Rep. 335; 11 East, 518; 3 Brod. & Bing. 85; 2 Sim. 264.
(*m*) Macaree *v.* Tall, Amb. 181; Fletcher *v.* Smiton, 2 Durn. 656; Roe d. Allport *v.* Bacon, 4 Man. & S. 366. See also Jongsma *v.* Jongsma, 1 Cox, 362.

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[1] See Wright *v.* Denn, 10 Wheat. 204; Willis *v.* Bucher, 3 Wash. C. C. 369.

[2] The word "estate" passes a fee. Jackson *v.* Merrill, 6 Johns. 185; Jackson *v.* Delancy, 13 Johns. 537; Jackson *v.* Babcock, 12 Johns. 389; Jackson *v.* Delancy, 11 Johns. 365; Josselyn *v.* Hutchinson, 21 Maine, 340; Godfrey *v.* Humphrey, 18 Pick. 539; Hungerford *v.* Anderson, 4 Day, 368; Brown *v.* Wood, 17 Mass. 68; Frazer *v.* Hamilton, 2 Desaus. 573; Crugea *v.* Heyward, 2 Desaus. 422; Huxtep *v.* Brooman, 1 Bro. C. C. (Perkins's ed.) 437, notes; Hodgken *v.* Lloyd, 2 Ib. 539, note (4); Churchill *v.* Dibben, 9 Sim. 447; Turbett *v.* Turbett, 3 Yeates, 187; Morrison *v.* Semple, 6 Binn. 97; Whaley *v.* Jenkins, 3 Desaus. 80; 4 Kent, (5th ed.) 535; Kellogg *v.* Blair, 6 Metcalf, 322; Campbell *v.* Carson, 12 Serg. & R. 54; Doughty *v.* Browne, 4 Yeates, 179.

ing the doubts expressed by Lord Hardwicke, in Goodwyn *v.* Goodwyn. (*a*)

And it is now settled, that the word *estate* will carry the inheritance, though it be accompanied by words of locality, or other expressions referable exclusively to the *corpus* of the property. Thus, the fee has been held to pass by a devise of "my estate," or "my estates," (*b*) "*at A.*" or "*in A.*," (*c*) (for the idle distinction between *at* and *in* would not now be
[182] endured,) or "my estate *of* **Ashton*," (*d*) or (which it was said would have been the same in construction) "my *Ashton estate*," (*e*) and so of "all my *estate*, lands, &c., *called* or known *by the name of the Coal Yard, in the parish of St. Giles, London*," (*f*) or of "all that estate *I bought of A.*" (*g*)

So in the case of Gardner *v.* Harding, (*h*) it was held that a devise to G. of "my freehold *estate, consisting of* thirty acres of land, more or less, with the dwelling-house, and all the erections on the said farm, situate at ——, in the county of ——, *now in the occupation of G.*" vested in G. an estate in fee simple.

So where (*i*) a testator gave to his wife H. all his real and personal *estates* whatsoever, *that is to say, his land, houses, and all other buildings situate in Stamford Bridge, in the county of York, upon his estate*, and likewise all his household furniture and stock in trade unto the said H., it was decided that H. took the fee in the real estate.

The preceding cases seem to overrule Pettiward *v.* Prescott, (*k*) where Sir W. Grant, M. R., held, that a devise to R. P. of the testator's "*copyhold estate at Putney, consisting of three tenements, and now under a lease to A. B.* for a term," &c., conferred an estate for life only, his Honor being of opinion that the testator did not mean to speak of the quantity of interest, but merely of the corpus or subject of disposition. The M. R. relied upon the dictum of Lord Kenyon, in Fletcher *v.* Smiton, (*l*) who cited Lord Hardwicke's observation in Goodwyn

(*a*) 1 Ves. Sen. 226.
(*b*) Macaree *v.* Tall, Amb. 181.
(*c*) Ibbetson *v.* Beckwith, Cas. Temp. Talb. 157; Barry *v.* Edgeworth, 2 P. W. 523; Tuffnell *v.* Page, 2 Atk. 37; S. C. Barn. Ch. Rep. 9; Holdfast d. Cowper *v.* Marten, 1 Durn. & E. 411; Uthwatt *v.* Bryant, 6 Taunt. 317, stated infra.
(*d*) Chichester *v.* Oxenden, 4 Taunt. 176; S. C. on Appeal, 4 Dow. 92.
(*e*) Id.
(*f*) Roe d. Child *v.* Wright, 7 East, 259; and see Price *v.* Gibson, 2 Ed. 115; Stewart *v.* Garrett, 3 Sim. 398.
(*g*) Bailis *v.* Gale, 2 Ves. Sen. 48.
(*h*) 3 J. B. Moore, 565. See also Paris *v.* Miller, 5 Man. & S. 408; but vide infra.
(*i*) Denn d. Richardson *v.* Hood, 7 Taunt. 35.
(*k*) 7 Ves. 541. See also Charlton *v.* Taylor, 3 Ves. & Bea. 160, where his Honor avoided deciding whether a reference to the occupation restrained the operation of the word "estate."
(*l*) 2 Durn. & E. 658.

v. Goodwyn, (*a*) that *no case had occurred in which [183]
it had been held that a fee passed by the devise of an estate, if the testator added, *in the occupation of any particular tenant;* but Lord Kenyon omits the subsequent remark of this great lawyer, *that there was no reason why such words should restrain it more than locality*, which, he observed, would not.

In some recent cases, too, a doctrine has been advanced which seems to be scarcely reconcilable with the preceding cases. Thus in the case of Doe *v.* Clarke, (*b*) where the devise was in the following words: "I also give and bequeath to my brother, Richard Clarke, all that dwelling-house, malt-kiln, stable, and garden, with all lands appertaining to the same, lately in the possession of John Steele, of Wybunbury, or his mortgagee; the said *property* lying and being in the township of Wybunbury." One of the grounds on which it was contended that this devise passed the fee, was, that the word "property" occurred in it; but the Court observed, that the word "property" was not used there to describe the quantum of the estate to be taken, but the local situation of the premises; and accordingly the devisee was held to take only an estate for life.

The rule which reads the word "estate," as comprising the testator's interest in the land, though accompanied with words referring to locality, has sometimes been considered as going too far; but the censure seems unjust. The additional expressions only show that the testator had the corpus of the land in his contemplation, to describe which is unquestionably always *one* of the offices of the term *estate* so used. The interest cannot be included without the locality, but the locality may without the whole interest. Why then should the word be deprived of the larger meaning by expressions showing that the testator had the other in his view?

*It is clear that the word *estate* is not prevented from [184]
carrying the fee, by the circumstance of the testator having used the same word in another devise, where it can have no such operation, because the devisee's interest is there expressly confined to his life.

Thus, in Randall *v.* Tuchin, (*c*) where a testator devised to his niece J. fourteen dwelling-houses, with their appurtenances, (minutely describing them,) *all which estates*, being copyhold, and held of the manor of *K.*, he devised to the said J., for her

(*a*) 1 Ves. Sen. 228.
(*b*) 1 Cromp. & Mees. 39. See also Doe *v.* Tucker, 3 Barn. & Adolph. 473, stated post, 188.
(*c*) 6 Taunt. 410, and Ibbetson *v.* Beckwith, Cas. Temp. Talb. 157. But see the observation of Willes, C. J., in Moone *v.* Heaseman, Willes, 138, in regard to the word "inheritance," which is inconsistent with the principle of these and many other cases.

separate use, *for her life*, and after her decease to her son M.; it was held, that M. took the fee by force of the word *estates;* which, it was considered, was farther strengthened by a direction introduced into the devise, that so long as W. should choose to live in a certain house, (part of the devised property,) and should keep the same in repair, he should not be charged more than his present rent. (*a*)

By parity of reason, too, it is clear that where the word *estate* occurs elsewhere in the same will, in company with express words of limitation in fee, its operation to confer the inheritance is not thereby restrained. (*b*)

[185] *And as neither the association of the word "estate" with words of locality, nor its being used elsewhere in conjunction with express words of limitation prevents it from passing the fee, so those circumstances conjointly occurring in the same will, are equally inoperative to produce this effect.

Thus where (*c*) a testator devised a rent-charge to the issuing out of all his real *estate*, lands, tenements, and hereditaments in P., and then devised his said estate, lands, &c. to M., her heirs and assigns forever; but in case she should die under twenty-one, and without lawful issue, then he devised his said *estate*, lands, &c., unto A. during her life, and after her decease the testator devised all his said *estate*, &c., to the children of H. as tenants in common: Lord Gifford, M. R., held, that, notwithstanding the connection of the word estate with locality and words of limitation, it was sufficient to carry a fee to the children of H. His Lordship, however, hesitated to compel a purchaser to take a title depending on that construction; but the purchaser consented to a case being sent to the Court of King's Bench, and that Court being of opinion that the children of H. took the fee, a specific performance was decreed.

So where (*d*) a testator devised the moiety of the rents of his *estate* named Islington and Cove's Penn, in the parish of St. Mary, Islington, to be divided equally among his grandchildren; the other moiety of the rents of his said estate and Penn he devised to his son, R. Stewart, and his heirs forever; Sir L. Shadwell, V. C., held that the grandchildren took the fee, on the

(*a*) The cases stated in the text seem to overrule Awse *v.* Melhuish, 1 B. C. C. 519, where Mr. Baron Eyre held, that a devise by a testator of all his estates and effects, lands and hereditaments, to A and B, during their joint lives, *and to the survivor of them*, did not carry a fee to the survivor, because the same words were used in devising the express estate during the joint lives. But see Doe *v.* Gwillim, 2 Nev. & Man. 247, stated post, p. 188.

(*b*) Uthwatt *v.* Bryant, 6 Taunt. 317, stated infra. See also Ibbetson *v.* Beckwith, Cas. Temp. Talb. 157, cited by Mr. Cox, in his note to Chester *v.* Painter, 2 P. W. 336, as overruling that case; but the word *estate* does not occur in the devise in fee in the former case. The principle stated in the text extends to all words having the force of including the interest. Norton *v.* Ludd, 1 Lutw. 755, infra, post, p. 191.

(*c*) Wilkinson *v.* Chapman, 3 Russ. 145.

(*d*) Stewart *v.* Garrett, 3 Sim. 398.

ground that the devise of the rents of the estate was the same as a devise of the estate itself.

* It has been sometimes thought that the word *estate* [186] if used as synonymous with, and as referential to, an anterior term of description, not capable of carrying the fee, is equally restricted in its operation.

Thus where (*a*) a testator devised to his daughter £20 a-year out of the profits of his *estate* or lands *at Eaton*, and then devised to his grandson B. *his messuage at Eaton, with the houses and hereditaments thereunto belonging, and certain parcels of land at Eaton;* and he declared his further will to be, that B., when he arrived at the age of twenty-one years, should enter upon and enjoy *the above-mentioned estate*, with the hereditaments thereunto belonging, situate at Eaton aforesaid. But he provided that if B. should run away from his profession, all his right, title, and claim to the *estate* of lands and houses devised to him should devolve and *descend* to his brother M.; it was held, that the word *estate*, being by its reference restricted to the antecedent words of devise, did not pass a fee, as those antecedent words would not do so; though the Court decided that other expressions in the will had that effect. (*b*)

In Randall *v.* Tuchin, Gibbs, C. J., referred to this case as decided on the principle, that the word *estate* was merely used as a word of reference, and meant no more than the expression to which it referred. In opposition to such a principle, however, may be adduced the case of Roe d. Allport *v.* Bacon, (*c*) where a testator devised his lands, messuages, and tenements, to his wife for her life, and after her decease then all the "*said estates*" to be divided among his sons, J., G., H.. and P., and his son-in-law C., share and share alike; and it was held, that the sons and son-in-law took the fee.

* So in the case of Uthwatt *v.* Bryant, (*d*) where a [187] testator devised *all his freehold lands, tenements, tithes, hereditaments, and premises, in the parish of B.*, to certain persons for life, with remainders over, and on a given event devised *his said freehold estate in the parish of B.* to his daughters, as tenants in common; and in case such his said children should die in the lifetime of his wife, then he devised all his said freehold estate in the parish of B. to his wife and her heirs forever: It was contended, that inasmuch as the testator had twice described the subject of devise by words not capable of carrying the fee, when he afterwards devised it by the term, "the said freehold estate in the parish of B.," he thereby gave only the

(*a*) Doe d. Bates *v.* Clayton, 8 East, 141.

(*b*) Principally a direction that N. B. (the husband of one of the testator's co-heiresses at law) should not come upon any of his hereditaments.

(*c*) 4 Mau. & Selw. 366.

(*d*) 6 Taunt. 317; but see Doe *v.* Clarke, 1 Cromp. & Mee. 39.

same thing as he had before given, and that therefore the daughters took estates for life only; but the Court certified that they took the fee.

It is established that the word *estate*, occurring merely in the introductory clause in the will, by which the testator professes in the usual manner his intention to dispose of all his worldly and temporal estate, will not have the effect of enlarging the subsequent devises in the will.[1] (*a*) As where a testator says, "As to all my worldly estate, I dispose thereof as follows;" and then proceeds to devise his real estate by a description which will not include the interest, as "lands, tenements, hereditaments," &c.

Questions frequently arise whether the word *estate*, occurring in a devise which gives an express life estate only, can be extended by implication to a subsequent limitation of the same property, wherein the subject of devise is described by some other term. On this point it has been decided, (*b*) that
[188] where a testator devised to his wife * E. all his freehold and leasehold messuages, houses, lands, and tenements, and *all his estate and interest therein*, for her natural life, and after her decease he devised *his said messuages, houses, lands, and tenements*, to S. and M. as tenants in common, the latter devisees took estates for life only, the words *estate and interest* being left out in the devise to them.

So in the case of Doe *v.* Tucker, (*c*) where a testator devised "unto my dearly beloved wife Jane, my freehold *estate*, called Pouncetts, during her natural life," and then after bequeathing his stock, goods, and chattels to her for life, he added, "Item, all the above *bequeathed lands*, goods, and chattels, I give and devise" to, &c., mentioning his children, without words of limitation. The question was, whether a fee passed by the devise to the children, and it was decided in the negative.

A nice question of this nature occurred in the case of Doe *v.*

(*a*) Ibbetson *v.* Beckwith, Cas. Temp. Talbot, 157; Frogmorton *v.* Wright, 2 Bl. 889; Loveacres d. Mudge *v.* Blight, Cowp. 354; Denn d. Gaskin *v.* Gaskin, Id. 657; Wright *v.* Russell, cited Cowp. 661; Doe d. Small *v.* Allen, 8 Durn. & E. 503; but see Grayson *v.* Atkinson, 1 Wils. 333.

(*b*) Roe d. Bowes *v.* Blackett, Cowp. 235.

(*c*) 3 Barn. & Adolph. 473. See this case referred to, 7 Adolph. & Ell. 206; and see some remarks, 2 Hay. & Jarm. Conc. Wills, (3d ed.) 240.

[1] Whaley *v.* Jenkins, 3 Desaus. 80. Introductory words to a will cannot vary the construction, so as to enlarge the estate to a fee, unless there be words in the devise itself sufficient to carry the interest. Such introductory words are like a preamble to a statute, to be used only as a key to disclose the testator's meaning. 4 Kent, (5th ed.) 540, 541; Beall *v.* Holmes, 6 Harr. & Johns. 205; Finley *v.* King, 3 Peters, 346; Barheydt *v.* Barheydt, 20 Wendell, 576.

The words *temporal goods* may be borrowed from the preamble of a will, and coupled with a devising clause, to enlarge a life estate into a fee simple. Goodrich *v.* Harding, 3 Rand. 280. See Watson *v.* Powell, 3 Call, 265; Davies *v.* Miller, 1 Call, 127; Winchester *v.* Tilghman, 1 Har. & McHen. 452.

Gwillim, (*a*) where the testator thus expressed himself: "As touching such worldly *estate* wherewith it has pleased God to bless me, I give, demise, and dispose of the same in the following manner." He then gave the whole of his *estates* and chattels to his wife during her widowhood, adding, "but demeatly to go to my dear children as I have appointed and disposed to them, in lots and in money: Second, to my son J., I leave ten pounds out of my goods and chattels to be paid him: Thirdly, to my son H., I leave the pece of ground, called, &c., to him, his lawful aires forever, and if no aires, to his next brother and his lawful aires forever: Fourthly, to my son G., I leave the pece of ground, &c. [similar devises to other sons, with words of inheritance]; also, to my *son J., I leave my [189] *dwelling-house and nail-shop, and sider-mill, stables and pigs-cot, garden, brewhouse, and the pece of ground adjoining it;* also my goods, and chattels, and living stock that I shall leave; also to my daughter M., I leave the house called, &c. and to her son H. and her lawful aires forever." The Court of King's Bench held, that J. took an estate for life only in the dwelling-house, nail-shop, &c.; the Court relying chiefly on the circumstance, that the testator had used words of limitation in every other instance; and one learned Judge expressed his indisposition to carry the effect of the word "estate" further than had been done already.

But it cannot be doubted that where a testator devises an estate, with or without words of locality, to A for life, and then gives "*the same*" to B, the latter devise would carry the inheritance. (*b*) In the case of Wight *v.* Leigh, (*c*) indeed the contrary seems to have been taken for granted; but the point underwent no discussion, and was probably overlooked.

Of course the operation of the word "estate" to confer an estate in fee, may be controlled by the context. As where (*d*) the testator devised to his nephew G. all his *estates*, lands, tenements, and hereditaments in H., with a general limitation over in case any of his nephews died under twenty-one, (*e*) and in a subsequent part of his will declared it to be his intent to prevent waste by making his nephews *tenants for life only:* and authorized them, in *case they married, to make [190] settlements upon their wives, and dispose of their estates among the issue of such marriages: it was held that G. took only an estate for life.

(*a*) 5 Barn. & Adolph. 122; S C. 2 Ncv. & Man. 247.
(*b*) See Challenger *v.* Sheppard, 8 Durn. & E. 597, ante, 177.
(*c*) 15 Ves. 564, stated post.
(*d*) Bruce *v.* Bainbridge, 5 Moore, 1; S. C. 2 Brod. & Bing. 123. The principle above stated seems to be the true ground of this decision, though it was much urged as turning on the effect of the word "issue." In the devise in question, however, the mention of issue occurs only in the power.
(*e*) That this would also have given the devisee an implied fee, see ante, p. 175.

But it has been held, (*a*) that the mere circumstance of the testator's subjecting the property to a certain annuity during the life of the devisee, *with a considerable augmentation of it after her decease*, did not evince an intention to give her only an estate for life, under a devise *of all his property both real and personal forever*.

This leads to the remark, that the word *property*[1] is equivalent to *estate*, in its operation to pass the interest as well as the land; (*b*) and the same construction has also been given to a devise of the residue of the testator's "real effects;" (*c*) though it will be remembered that the word *effects* will not, unaided by the context, comprehend land, (*d*) which, of course, is always a preliminary inquiry.[2]

And here the reader is referred to a former chapter, for many instances in which the fee has been held to pass by very informal expressions, such as "all I am worth," and other similar phrases, which were adjudged not only to embrace real estate, (this being, in fact, the principal point of contest,) but also to confer on the devisee an estate of inheritance.

It is clear, that the word *inheritance* will carry the fee; (*e*) and Lord Holt seems to have considered the word *hereditaments* (*f*) to be *equivalent; but it is now established that a devise of hereditaments carries only an estate for life. (*g*) A devise of "all my copyhold in the said hamlet of H., has received a similar construction. (*h*)

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It has been held, that a remainder in fee will pass by the word *remainder*.[3] Thus, in the early case of Norton *v.* Ludd, (*i*) A having the remainder in fee, subject to a life estate in his mother, devised the lands to his sister for life after the decease

(*a*) Doe d. Lady Dacre *v.* Roper, 11 East, 518.

(*b*) Roe d. Shell *v.* Pattersou, 16 East, 221; Nicholls *v.* Butcher, 18 Ves. 194; Patton *v.* Randall, 1 Jac. & Walk. 189.

(*c*) Hogan *v.* Jackson, Cowp. 299; S. C. in Dom. Proc.; 3 B. P. C. (Toml. ed.) 388, stated ante, vol. 1, p. 666. See also Grayson *v.* Atkinson, 3 Wils. 333, stated ante, vol. 1, p. 667.

(*d*) Ante, vol. 1, p. 668.

(*e*) Purefoy *v.* Rogers, 2 Saund. 388 *b*; Widlake *v.* Harding, Hob. 2; S. C. nom. Whitlock *v.* Harding, Moore, 873, Ca. 1218. According to the report in Moore, the expression was "my lands of inheritance," which it is pretty clear would not now be held to confer more than an estate for life, as the word "inheritance" is merely to identify the lands. As to the expression "trustees of inheritance," see post, next chapter. As to the term "inherit," see East *v.* Twyford, 31 Eng. Law & Eq. 62.

(*f*) Smith *v.* Tindall, 11 Mod. 103. See also Lydcott *v.* Willows, 3 Mod. 229.

(*g*) Hopewell *v.* Ackland, 1 Salk. 239; Canning *v.* Canning, Moseley, 240; Denn d. Mellor *v.* Moor, 5 Durn. & E. 558; 8 Id. 175; 1 Bos. & Pull. 558, S. C.; Doe d. Small *v.* Allen, 8 Durn. & E. 503.

(*h*) Doe d. Winder *v.* Lawes, 7 Adol. Ell. 195.

(*i*) 1 Lutt. 755.

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[1] 4 Kent, (5th ed.) 535.

[2] See Ferguson *v.* Zepp, 4 Wash. C. C. 645.

[3] See Ellis *v.* Essex Merrimack Bank, 2 Pick. 243; Bowers *v.* Porter, 4 Pick. 198; Whitney *v.* Whitney, 14 Mass. 88; Ray *v.* Enslin, 2 Mass. 554; Baker *v.* Bridge, 12 Pick. 27; Jackson *v.* Staats, 11 Johns. 337; Frazer *v.* Hamilton, 2 Desaus. 578.

of his mother, then he to give J. C. the *whole remainder of all those lands* he had devised to his sister, if he should survive his sister; but if he died before his sister, then his will was, that the whole remainder and reversion of all the said lands should be to the use of his sisters and their heirs forever. It was contended, that J. C. took only an estate for life, for that these words referred merely to the remainder of the lands, and not of the interest; but the Court said that could not be, as the whole of the lands had been before devised. It referred to the residue of the estate undisposed of to his sister, and, consequently, a fee passed to J. C.

So, in the case of Bailis *v.* Gale, (*a*) a reversion *in fee* was held to pass under a devise of the "*reversion*" of certain tenements. But in the anterior case of Peiton *v.* Banks, (*b*) (which was not cited in Bailis *v.* Gale,) where a man devised lands to his wife for life, and as to the said lands, he gave *the reversion* to A and B, to be *equally divided betwixt [192] them; it was held, that A and B were tenants in common *for life* only; and Sergeant Maynard, at the bar, said he remembered a stronger case, in which a man having given lands to his wife for life, devised *the reversion* to A and B, *A being his heir at law;* yet it was adjudged that B took an estate for life only.

The only distinction between these cases and Bailis *v.* Gale is, that, in the latter, the testator's estate consisted of a reversion, whereas in the two cases just stated, the subject to which the word "reversion" was applied, was the interest remaining *undevised*, after the limitations created by the will. This circumstance, however, seems not to vary the principle, and it is probable that the word *reversion* would now be held, on the authority of Bailis *v.* Gale, to pass a fee, even in cases of the latter class.

But though the words *remainder* and *reversion*, applied to property of this description, will pass the testator's entire interest therein, yet it is clear that the terms *residue* and *remainder*, as ordinarily used in residuary clauses, will not have such effect.

It has been held, that a devise of freehold lands, with *all right and title to the same*, carries the fee,[1] (*c*) and the word "interest," would unquestionably have the same effect. (*d*) Whether the word *part* or *share*[2] is to be deemed inclusive of the testator's

(*a*) 2 Ves. Sen. 48. But see And. 284.
(*b*) 1 Vern. 45.
(*c*) Sharp *v.* Sharp, 4 Moore & Pay. 445.
(*d*) Andrew *v.* Southouse, 5 Durn. & E. 292.

[1] A devise of all one's right carries a fee simple to the devisee. Newkirk *v.* Newkirk, 2 Caines, 345; 4 Kent, (5th edit.) 535.
[2] See Richardson *v.* Noyes, 2 Mass. 26.

interest, seems to be vexata quæstio. In Bebb *v.* Penoyre, (*a*) A and B. being seized in fee of an estate in undivided moieties, A devised to B his *half part.* As B was the testator's heir at law, it was not necessary to determine the quantum of his estate under the devise; but Lord Ellenborough thought
[193] *that the words were sufficient to carry a fee, and intimated his dissent from the case of Pettiwood *v.* Cooke. (*b*) His Lordship, however, as elsewhere noticed in regard to another learned judge, (*c*) misconceived this case; the original devise giving an estate tail, and not the fee simple, as was represented at the bar. The case of Middleton *v.* Swaine (*d*) was more immediately in point, but was said to be distinguishable, inasmuch as the word "share" referred to the corpus of the subject, which consisted of New River shares. In the subsequent case of Paris *v.* Miller, (*e*) a testatrix devised as follows: "I devise and bequeath my *share* of the Bastile, and other *estates*, situate at C., and now in the occupation of Mr. T., &c., to my sister W.;" and W. was held to take the fee; Lord Ellenborough observing, that the words "my share" were used as denoting the interest; those which follow, the thing devised, and its locality; and the latter words, which described the occupation, related to the last antecedent, namely, the estates, and not to the word "share."

But if the word "share" be capable proprio vigore of carrying the fee as being descriptive of the testator's interest, there seems to be no reason why it should be restrained by words of locality, or other expressions applicable to the corpus of the land, seeing that the word "estate" (*f*) is not neutralized by such an association. Although, however, in the case of Paris *v.* Miller, the Court appears to have thought that the word "share" would pass the fee, yet it cannot safely be considered as an author-
[194] ity for this position, for, independently of such *reasoning, there was strong ground to contend that the devisee took the inheritance by force of the word "estates."

V. Perhaps there was no one of the old rules of testamentary construction which so directly clashed with popular views, as that which required words of limitation, or some equivalent expression, to pass the inheritance; and hence the attention of the framer of the recent act of 1 Vict. c. 26, was naturally directed to the abolition of this technical doctrine. Accordingly, by section twenty-eight it is enacted, "That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other

(*a*) 11 East, 160.
(*b*) Cro. El. 52.
(*c*) See Moone *v.* Heaseman, Wiles, 143; and remark 2 Jarm. Pow. 403, n. See also Woodward *v.* Glasbrook, 2 Vern. 388.
(*d*) Skinn. 339. (*e*) 5 Mau. & S. 408. (*f*) Vide ante, 181.

the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."[1]

The effect of the enactment, it will be observed, is not wholly to preclude, with respect to wills made or republished since the year 1837, the question, whether an estate in fee will pass without words of limitation, but merely to reverse the rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now an estate in fee will pass by such a devise, "unless a contrary intention shall appear by the will." The onus probandi (so to speak) will, under the new law, lie on those who contend for the restricted construction; but as that construction rarely accords with the actual intention of a testator, it will probably not often occur, that the Courts will be called on to apply the proviso, which saves the effect of a restrictive context; so that there seems no reason to [195] apprehend that the newly enacted rule will be so prolific of qualifications and exceptions as that doctrine which it has superseded. Upon the whole, the enlargement of the operation of an indefinite devise, may be regarded as one of the most salutary of the new canons of interpretation which have emanated from the legislature.

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[1] The same rule has long since been established by statute in many of the United States. See ante, 124, 125, note.

CHAPTER XXXV.

ESTATES OF TRUSTEES.[1]

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[1] See, upon this subject, 4 Kent, (5th ed.) 288, *et seq.*; Fletcher on the Estates of Trustees, 10 vol. Law. Lib. 1–115; Willis on Trustees, Ib. pp. 72–120.

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THE question whether a devise to uses operates by virtue of the Statutes of Wills alone, or by force of those statutes concurrently with the Statute of Uses, has been the subject of much learned controversy. (*a*) The prevailing, and, it is conceived, the better opinion, is in favor of the latter hypothesis; the only objection to which seems to be, that, as the Statute of Uses preceded the Statutes of Wills, uses created under the testamentary power conferred by the latter statutes could not, at the time of the passing of the Statute of Uses, have been in the contemplation of the legislature. The futility of this objection has been so often exposed, that it is not intended here to revive the discussion, more especially as the point has not, in general, any practical influence on the construction of wills; for even those who assert that the Statute of Uses does not apply, admit, and the authorities conclusively show, (*b*) that a devise to A and his heirs, simply to the use of B and his heirs, would vest the fee simple in B, if not by force of the statute, yet in order to give effect to the manifest intention of the testator.

*Such intention, however, seems to be apparent only [197] when examined through the medium of the Statute of Uses. We must suppose the testator to be acquainted with the effect of that statute, in order to gather from such a devise an intention to confer the legal estate on the ulterior devisee. On the other hand, it is clear, that a devise to the use of A and his heirs in trust, for or for the use of B and his heirs, would vest the legal inheritance in A in trust for B, and not carry it on to B. Either this must be by the effect of the Statute of Uses forbidding the limitation of a use upon a use, or supposing that statute not to operate upon wills, it must be (as in the former case) the

(*a*) 1 Sand. Uses, 195; 2 Fonbl. Treat. Eq. 24; and 1 Sugd. Pow. (6th ed.) 173.
(*b*) Symson *v.* Turner, 1 Eq. Ca. Ab. 383, pl. 1, note (*a*); Harris *v.* Pugh, 12 Moore, 577. And see Hawkins *v.* Luscombe, 2 Swanst. 392; Doe *v.* Field, 2 Barn. & Adol. 564.

result of presuming the testator to intend by the devise in question to produce the same effect as such limitation introduced into a deed would have done by force of that statute. It is evident, therefore, that, in such cases, the question, whether the Statute of Uses applies to wills, does not arise. And in practice little or no attention seems to have been paid to the difficulty suggested by an eminent writer, (*a*) that, under a devise to A and his heirs, to the use of B and his heirs, if A should die in the testator's lifetime, the devise to B might possibly, under the Statute of Uses, fail at law for want of a seisin to serve the use. Indeed, the writer in question himself observes, in solution of his own difficulty, that, as every testator has a power to raise uses either by the joint operation of both statutes, or by force of the Statute of Wills only, possibly the Courts would, in favor of the intention, construe the devise as a disposition, not affected by the Statute of Uses, but as giving the fee to B immediately. Perhaps, however, there would be some difficulty, in principle, in adopting this construc-
[198] tion; *for, if, in the event of A surviving the testator, the use would have been executed by the operation of the Statute of Uses, to hold the result to be different, in consequence of the death of A in the lifetime of the testator, would be to make the construction of the devise dependent on events subsequent to its inception. Supposing the devise to be void at law, it is clear that equity would compel the heir to convey; but probably the Courts would struggle hard against adopting a construction which would invalidate it even at law. The occurrence of the question may of course be easily avoided by devising the estate immediately to uses, and not to a devisee to uses. (*b*)

Where property, in which a testator has an estate of freehold, is devised to one person in trust for or for the benefit of another, the question necessarily arises, whether the legal estate remains in the first-named person, or passes over to, and becomes vested in, the beneficial or ulterior devisee. If the devise is to the use of A, in trust for B, the legal estate (we have seen) is vested in A, even though no duty may have been assigned to him which requires that he should have the estate. Where, however, the property is devised to A and his heirs, to the use of, or in trust for, B and his heirs, the question, whether A does or does not take the legal estate, depends chiefly on the fact whether the testator has imposed upon him any trust or duty, the performance of which requires that the estate should be vested in him. If he has not, the legal ownership passes to the beneficial devisee; and

(*a*) 1 Sugd. Pow. (6th ed.) 175.

(*b*) See further, on this subject, Sugd. Pow. (4th ed.) 173, where it is shown, that an important question, on the construction of powers created by will, depends upon this point.

the first-named person is regarded as a mere devisee to uses, filling the same passive office as a releasee to *uses [199] in an ordinary conveyance by lease and release. And the fact, that the testator, in a series of limitations, employs sometimes the word *use*, and sometimes the word *trust*, is not considered to indicate that he had a different intention in the respective cases.

Thus, where (*a*) a testator devised lands to A and his heirs in trust, and for the several uses and purposes after mentioned, viz: to pay the rents to certain persons for the life of B, and, after her decease, *to the use* of C and D during their lives and the life of the longest liver, remainder to the use of A and his heirs during the lives of C and D, and the life of the longest liver, to preserve contingent remainders; and, after the several deceases of C and D, then *in trust* for the heirs male of the bodies of C and D; remainder to the use of T. in fee. After B's death, C and D suffered a recovery, which was contended to be void, on the ground that the limitation to the heirs male of their bodies was equitable, and, therefore, did not make them tenants in tail (a point which is discussed in a future chapter); but Lord Ellenborough observed, that the testator employed the words "use" and "trust" indifferently, and both were within the operation of the statute.[1] (*b*)

So, it is clear, that the mere change of language, in a series of limitations, by substituting words of direct gift to the persons taking the beneficial interest, for the phrase "in trust for" will not clothe such persons with the legal estate, if the purposes of the will, in any possible event, require that the legal estate should be in the trustees. (*c*)

But the Courts strongly incline to give the devise such a construction *as will confer on the trustees [200] estates coextensive with those interests which are limited in the terms of trust estates, if the other parts of the will can by any means be made consistent.

Thus, where (*d*) the testator's real estate was devised to trustees, their survivors or survivor, and their or his heirs, &c., to secure a life annuity, (which was to be paid out of the annual income,) and then in trust for the testator's children, until they

(*a*) Doe d. Collier *v.* Terry, 11 East, 377.

(*b*) It is evident, therefore, that his Lordship concurred in the doctrine, that uses created by will are within the Statute of Uses.

(*c*) Doe d. Tomkyns *v.* Willan, 2 Barn. & Ald. 84; Murthwaite *v.* Jenkinson, 2 B. & C. 357. See also Sandford *v.* Irby, 3 Barn. & Ald. 654.

(*d*) Doe d. Badden *v.* Harris, 2 Dowl. & Ryl. 36. See also Goodtitle d. Hayward *v.* Whitby, 1 Burr. 228; Edwards *v.* Symons, 6 Taunt. 212; Ackland *v.* Lutley, 9 Adol. & Ell. 880.

[1] A trust is merely what a use was before the Statute of Uses. Fisher *v.* Fields, 10 Johns. 495.

should attain twenty-one, "and then *unto* and among them, share and share alike, as tenants in common, and not as joint tenants;" and the will contained clauses empowering the trustees to grant leases of the estates, and, if they should think it advisable, to sell any part thereof, *at any time after his* (the testator's) *decease*. It was held, notwithstanding this expression, that the estate of the trustees was confined to the minority of the children, being so restricted by the express devise to them.

A devise of copyhold lands in trust for a minor, and *to be transferred* to him at twenty-one, has been held to give to the trustees a chattel interest only, determinable at the majority of the cestui que trust; the Court thinking that the words, "to be transferred," did not refer to a legal transfer of the estate by surrender, (in which case the trustees must have taken the fee to enable them to make such surrender,) but merely to the delivery of possession, and admission on the rolls of the manor. (*a*)

Where the person to whom real estate is devised for the benefit of another, is intrusted with the application of the
[201] rents, he must, according to the principle before * laid down, take the legal estate, in order that he may have a command over the possession and income.

In the case of Shapland *v.* Smith, (*b*) the trust was out of the rents, after deducting rates, taxes, repairs, and expenses, to pay such clear sum as remained, to S. during his life, and after his death, to the use of the heirs male of his body. The question was, whether the use for life was executed in S., who, if it were, was tenant in tail male, by force of the rule in Shelley's case. (*c*) Mr. Baron Eyre, sitting for Lord Thurlow, thought there was no difference between a trust to pay the rents to a person, and a trust to permit him to receive them, (see contra in the seqnel,) and, therefore, that the use, in this case, was vested in S.; but Lord Thurlow, on resuming his seat, determined, that, as the trustees were to pay taxes and repairs, the legal estate during the life of S. was in them.

In Silvester *v.* Wilson, (*d*) the testator devised that the trustees should, yearly, during the life of his son, J. W., receive the rents; and he ordered that they should be applied for the maintenance of the said J. W. The Court thought, that it was intended that the trustees should have a sort of discretion in the application of the money, and, therefore that they took the legal estate.

(*a*) Player *v.* Nicholls, 1 Barn. & Cress. 336.

(*b*) 1 B. C. C. 74 [See Perkins's ed. 75, 76, note (*a*)]. See also Brown *v.* Ramsden, 3 Moo. 612; Tenney d. Gibbs *v.* Moody, 3 Bing. 3.

(*c*) The question whether the trustees take any and what estate, is often raised in this manner. See Jones *v.* Lord Say & Sele, 8 Vin. Ab. 262, pl. 19; Silvester d. Law *v.* Wilson, 2 Durn. & E. 444; Curtis *v.* Price, 12 Ves. 89; Wykham *v.* Wykham, 18 Ves. 395; Biscoe *v.* Perkins, 1 Ves. & Bea. 485.

(*d*) 2 D. & E. 444. See also Doe *v.* Ironmonger, 3 East, 533.

Indeed, without regard to the exact degree of discretionary power lodged in the trustees, the mere fact that they are made agents in the application of the rents is sufficient to give them the legal estate, as in the case of a simple devise to A upon trust to pay the rents to B. And *it is immaterial in such a case, that there is no direct devise to the trustees, if the intention that they shall take the estate can be collected from the will. Hence a devise to the intent that A shall receive the rents and pay them over to B, would clearly vest the legal estate in A. (*a*) [202]

But where real estate is devised to one person upon trust, to permit and suffer another to receive the rents, the beneficial devisee takes the legal estate, and not the trustees. (*b*)

The distinction between a direction to pay the rents to a person, and a direction to permit him to receive them, though often condemned, cannot now be questioned. In the case of Doe d. Leicester *v.* Biggs, (*c*) Sir James Mansfield said it was miraculous how it came to be established, since good sense requires in each case that it should be equally a trust and that the estate should be executed in the trustee; for how could a man be said to permit and suffer who has no estate, and no power to hinder the cestui que trust from receiving?

Where the expressions to *pay unto* and *permit and suffer to receive* are both used, it seems that the construction will (in conformity to a rule discussed in a preceding chapter), (*d*) be governed by the posterior expression.

Thus in Doe d. Leicester *v.* Biggs, where the trust was "to pay unto or permit and suffer A to receive the rents," it was held, that the words "permit and suffer," coming last, controlled the former trust, "to pay," and consequently that the estate was vested in A. (*e*)

In the proposition that a devise to a person upon trust to permit another to receive the rents, vests the *legal estate in the latter, it is assumed that no duty is imposed on the trustee, either expressly or by implication, requiring that he should have the estate, for in such case it is clear the trustees will take the legal estate. [203]

Thus in Biscoe *v.* Perkins, (*f*) where a testator devised his real estate to his executors, their heirs, &c., for the life of his son A, to the intent to support the contingent remainders after limited,

(*a*) Doe *v.* Homfray, 6 Ad. & Ell. 106; Deering *v.* Adams, 37 Maine, 264; Oates *v.* Cooke, 3 Burr. 1686.

(*b*) Right d. Phillips *v.* Smith, 12 East, 455; Gregory *v.* Henderson, 4 Taunt. 772.

(*c*) 2 Taunt. 109.

(*d*) Ante, vol. 1, p. 412.

(*e*) But might not the alternative terms of the devise, in such a case, have been considered as giving the trustees an option? This would have avoided the repugnancy.

(*f*) 1 Ves. & Bea. 485. See also White *v.* Parker, 1 Scott, 542.

put in trust, nevertheless, to permit and suffer his said son to receive the rents for his own use during his natural life; and after his decease the testator devised the same to the first son of A in tail. Lord Eldon held that A did not take the legal estate, as the purpose of preserving the contingent remainders required that it should be in the trustees.

Upon the same principle, it has been often decided that a trust to permit a feme covert to receive the rents for her separate use, vests the estate in the trustees. (*a*)

And where (*b*) a trust to permit and suffer the testator's wife to receive the rents during her widowhood, was followed by a direction, that her receipts, *with the approbation of any one of his trustees*, should be good; it was held, that the legal estate was vested in the trustees, it being clearly intended that they should exercise a control.

And in a more recent case, (*c*) a similar construction was given to a direction to the trustees to permit the bene-
[204] ficial devisee to receive the *net* rents and profits; *this term being used, it was thought, in contradistinction to the *gross* profits, which were intended to be received by the trustees, and the surplus paid over to the person beneficially entitled, both purposes evidently requiring that the trustees should have an estate.

Where the duty imposed on the devisee is to sell or convey (*d*) the fee simple, he is held to take the inheritance to enable him to comply with the direction;[1] though in such a case it is too

(*a*) Harton *v.* Harton, 7 Durn. & E. 652; Doe d. Woodcock *v.* Barthrop, 5 Taunt. 381. See also Doe d. Stephens *v.* Scott, 1 Moore & Payne; *a fortiori*, where the direction is to pay them to her; Neville *v.* Sanders, 1 Vern. 415; S. C. 1 Eq. Ca. Ab. 382, pl. 1; Robinson *v.* Grey, 9 East, 1; Hawkins *v.* Luscombe, 2 Swanst. 375.

(*b*) Gregory *v.* Henderson, 4 Taunt. 772, which compare with Broughton *v.* Langley, Salk. 679; 2 L. Raym. 873; 1 Lutw. 823, S. C.

(*c*) Barker *v.* Greenwood, Exch. 24 Nov. 1838, reported 3 Jur. 25, S. C. 8 Law Journ. N. S. 5.

(*d*) Garth *v.* Baldwin, 2 Ves. Sen. 645; Doe d. Booth *v.* Field, 2 Barn. & Adol. 564; Doe d. Shelley *v.* Edlin, 4 Adolph & Ellis, 582.

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[1] A devise of an estate generally, or indefinitely, with power to convey in fee, carries a fee. Doe *v.* Howland, 8 Cowen, 277; 4 Kent, (5th ed.) 319. It is otherwise, if the power be to devise merely. Ib. But where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition, or to appoint the fee by deed or will be annexed; unless there should be some manifest general intent of the testator, which would be defeated by adhering to this particular intent. See 4 Kent, (5th ed.) 319, 320; Jackson *v.* Robins, 16 Johns. 588; Flintham's case, 11 Serg. & R. 16.

In cases of devises to executors, the earlier decisions established the distinction that a devise of land to executors to sell, passed the interest in it; but a devise that executors *shall sell*, or *that the lands shall be sold by them*, gave them but a power. This distinction was taken as early as the time of Henry VI., and it received the sanction of Littleton and Coke, and of the modern determinations. Litt. sec. 169; Co. Litt. 113 *a*, 181 *b*; Bergen *v.* Bennett, 1 Caines, Cas. in Err. 16; Jackson *v.* Scauber, 7 Cowen, 187; Peck *v.* Henderson, 7 Yerger, 18; 4 Kent, (5th ed.) 320; Bogert *v.*

much to affirm that the testator's intention cannot in any other manner be effected; for, by means of a power, the trustee might be authorized to convey without himself having an estate. It seems to be a more reasonable conclusion, however, that the testator, by devising the property to the person who is directed to make the conveyance or sale, intended not merely to make him the medium or instrument through which to vest the estate in the beneficial devisee, but that he should take an estate commensurate with the duty which was assigned to him; and the ground for this construction is obviously strengthened, when there are other purposes requiring that the trustee should have *some* estate.

In Bagshaw *v.* Spencer, (*a*) a devise to trustees and their heirs, upon trust out of the rents, or by sale or mortgage, to raise so much as should be sufficient for the payment of debts, legacies, and funeral expenses, and then as to one moiety upon trust for and to the use of B, for life, remainder to trustees to preserve contingent uses, &c., was held, by Lord Hardwicke, to vest the fee in the trustees, as they were "to sell the lands" by virtue of their estate.

* In this case the testator evidently intended the trustees to take the inheritance, as they were to raise the money either out of the rents, or by sale or mortgage of the estate, and the former purpose could not be answered by a mere power; though it is observable that the construction adopted by the Court rendered nugatory the trust for preserving contingent remainders. [205]

The mere fact, that the devised property is charged with debts or legacies, will not vest the legal estate in the trustees, unless they are directed to pay them, or the will contains some other indication of an intention to create a trust for the purpose.

Thus, where (*b*) the testator, as to his real and personal estate,

(*a*) 1 Ves. Sen. 142. See also Gibson *v.* Rogers, Amb. 93; Sawford *v.* Irby, 3 Barn. & Ald. 654; Doe *v.* Edlin, 4 Adol. & E. 582; Doe *v.* Woodhouse, 4 T. R. 89; Anthony *v.* Rees, 2 Cromp. & Jerv. 75; but see Hawker *v.* Hawker, 3 Barn. & Ald. 537.

(*b*) Kenrick *v.* Lord Beauclerk, 3 Bos. & Pull. 178.

Hertell, 4 Hill, 492; Greenough *v.* Welles, 10 Cushing, 571; Fay *v.* Fay, 1 Cushing, 93.

A devise of land to be sold by the executors, confers a power, and does not give any interest. Ferebee *v.* Proctor, 2 Dev. & Batt. 439; S. C. Dev. & Batt. Eq. Ca. 496; 4 Kent, (5th ed.) 320, notes. But when the power to sell is connected with directions to apply the proceeds upon trusts, the power is then in the nature of a trust, and becomes imperative upon the executors. They must sell and apply the proceeds according to the directions. Greenough *v.* Welles, 10 Cushing, 571, 576; Gibbs *v.* Marsh, 2 Metcalf, 243, 251. If, however, there is only a direction to the executors to sell and apply the proceeds in a particular manner, and there are no duties or trusts devolved upon them, which renders it necessary to imply a grant of the legal estate, the heirs at law would take the legal estate, subject to be divested immediately upon the execution of the power. Greenough *v.* Welles, 10 Cushing, 571, 577, 578.

subject to his debts, legacies, and funeral expenses, devised the same as follows, that is to say: unto M. and W. and their heirs, upon trust, and to and for the several uses, &c., following, that is to say: to the intent that they the said M. and W., or the survivor of them, or the heirs, executors, or administrators of such survivor, should in the first place apply the testator's personal estate in discharge of debts, funeral expenses, and such legacies as he might direct; and as to his real estates, subject to his debts and such charges as he might then or thereafter think proper to make, he gave and devised the same unto P. for his life, with remainders over. The Court held that the estate was executed in P., for his life. Lord Alvanley, C. J., said, unless it appeared manifestly that the testator intended that the trustees should be active in paying the debts, the legal estate would not vest in them. The question was, whether there were such apparent intention on the face of this will. It would, indeed, be much more convenient that the legal estate should be vested in trustees for the payment of the debts, than
[206] that the trust should be * executed by the devisee under the direction of a Court of Equity; for a Court of Equity could not enable the devisee to make a complete title to the estate. (*a*) But this, his Lordship added, was only an argument ab inconvenienti, from which we cannot construe the testator to have said, what, in fact, he has not said.

Here it may be observed that where real estate is devised to trustees for the payment of debts and legacies, though the property becomes applicable only in case of the deficiency of the personal estate, the trustees take the legal estate instanter, independently of the fact of the personalty proving deficient. (*b*) But it is otherwise where the devise is in terms made contingent on this event, (the language of the will being, "*in case* my personal estate shall not be sufficient to pay debts, &c., then I devise," &c.) But even in such case, the trustees, on the happening of the contingency, take an absolute fee simple in the whole, which continues in them, as to the residue of the property, after they have, by a sale of part of the estate, raised sufficient money to answer the charge. (c)

In the case of Hawker *v.* Hawker, (*d*) where an estate was made salable by trustees, in the event of the proceeds of another estate proving deficient to pay the testator's debts, it appears to have been considered, that having regard to the terms in which the estate was given to the beneficial devisees, in the event of its being wanted, (such devises being framed in the manner of

(*a*) This deficiency is now supplied by enactment, 1 Will. IV. c. 47, § 12.
(*b*) Murthwaite *v.* Jenkinson, 2 Barn. & Cress. 357. See also Doe *v.* Field, 2 Barn. & Adolph. 564.
(*c*) Doe d. Cadogan *v.* Ewart, 7 Adolph. & Ellis, 636.
(*d*) 3 Barn. & Ald. 537.

regular and formal limitations of the legal estate, including one to trustees for preserving contingent remainders,) the trustees had a power of sale only, and did not take the fee.[1]

* As, however, the estate was in the first instance [207] actually given to the trustees and their heirs, the point seems to have been one of great nicety and difficulty, and the propriety of the decision has been questioned by an eminent writer. (*a*)

A different construction prevailed in the recent case of Doe d. Cadogan *v.* Ewart, (*b*) where a testator devised to A, B, and C, and the survivors and survivor of them and the heirs of such survivor, (*c*) all his real estate charged with the payment of a life annuity and so much of his debts, legacies, funeral expenses, and the costs of proving his will, as his personal estate should not extend to, upon the trusts following; upon trust to pay the rents to his wife during widowhood, and after her decease, or marriage again, upon trust, to apply the rents for the maintenance of his daughter J., until she should attain twenty-five, and after her attaining that age, upon trust, charged as aforesaid, for her, and her heirs and assigns; but in case she should die without leaving issue, lawfully begotten, then the testator gave the said real estate to D and E, their heirs and assigns forever. And the testator ordained that the trustees, for the performance of his will, in order to raise money for the payment of his debts, funeral expenses, and legacies, should, with all convenient speed, after his decease, in case the residue of his personal estate should be insufficient for that purpose, *bargain and sell, and alien in fee simple, any part of his freehold lands before mentioned;* for * the doing whereof he gave to [208] his trustees and the survivors, &c., and the heirs, &c., full power and authority to grant, alien, bargain, and sell, convey and assure the same premises, or any part thereof, to any person or persons and their heirs forever, in fee simple, by all such lawful ways and means in the law as to them should seem fit. And the testator authorized the trustees and the survivors, &c., and the heirs, &c., to give receipts for the purchase money; and did commit the management of the estates and fortunes of his daughter to his trustees and executors, until she should

(*a*) 2 Sugd. Pow. (6th ed.) 127.

(*b*) 7 Adol. & Ell. 636. But see Doe *v.* Shotter, 8 Adol. & Ell. 905.

(*c*) These words might seem to make the trustees joint tenants for life, with a contingent remainder to two survivors, and a contingent remainder in fee to the survivor, (a construction which would be obviously inconvenient,) but it has been decided that where real estate is devised to several persons, and the survivors and survivor of them, and the heirs of such survivor, upon certain trusts commensurate with the fee simple, the devisees in trust are joint tenants in fee. Doe d. Young *v.* Sotherton, 2 Barn. & Adolph. 628.

[1] Ante, 149, note (1).

attain twenty-five. The testator's widow died in his lifetime. The personal estate proved insufficient to pay the debts, and it was held, that in this event the trustees took an absolute fee in the real estate, and not (as had been contended) a mere estate of freehold, until the testator's daughter attained twenty-five, with a power to sell for the payment of debts and legacies. (*a*)

An authority to grant leases of an indefinite duration has been in some cases considered to supply an agreement for holding trustees to take the inheritance, scarcely less cogent than a direction to sell.

Thus in the case of Doe d. Tomkyns *v.* Willan, (*b*) where a testator devised to trustees, their heirs, executors, administrators, and assigns, all his real and personal estates, in trust, to let the freehold estates *for any term they should think proper*, at the best improved yearly rent, and to pay one third of the rents of the freehold estates to the testator's wife for life, and to pay the rents of the other two thirds, and, after the death of the wife,
[209] the *remaining third to his daughter E. Longman, for her separate use, and after her death the testator devised his freehold and two thirds of his personal estate to his daughter's children, to be equally divided amongst them, and to be paid them at their respective ages of twenty-one years; and if his daughter died without leaving issue, then the testator devised his freehold estates to his wife for life, and after her death to his heir at law, as if he had died intestate. It was contended that the trustees took an estate determinable at the decease of the daughter, when the purposes of the trusts were satisfied; and that the authority to make leases for any term conferred a power, and was not a measure of their estate. It was held, however, that the trustees took the fee. Mr. Justice Bayley observed, "There are no words here which distinctly create a power in the trustees; and it seems to me, that when an estate is devised upon a trust, and the trustees are to demise for any term they think proper, (although at the best improved rent,) the true construction is, that they are to create a term out of their interest; and if so, they must have a reversion after that term entirely ceased." The learned Judge next adverted to the trusts respecting the application of the rents during the lives of the testator's wife and daughter, and proceeded to remark, "Then comes a limitation to her (the daughter's) children, and it is said, that that limitation gives to them the legal estate, and that, in that part of the will there is

(*a*) Sometimes a trust for a power of sale is to be exercised during the continuance of the trusts, and the question arises as to what is to be deemed a "continuance" thereof. It is clear that the mere fact of the estate being outstanding in the trustees by reason of their neglect to convey at the proper period, does not prolong their power. Wood *v.* White, 2 Kee. 664; but, as to this case, sec 4 Myl. & Craig, 460.

(*b*) 2 Barn. & Ald. 84.

a change of language, which shows that at that period of time all the former purposes of the trust were to cease. The language there used is not so clear as to satisfy my mind that that was necessarily the intention of the testator. That the interest, if defeasible, would continue until the death of E. Longman, and would not end when her first husband died, seems to me to *receive some confirmation from this, that if E. [210] Longman had no child by her first husband, the limitation to her children, as far as it regarded children by a future marriage, would have been a contingent remainder, and if the trustees did not take an interest coextensive with her life, but one which might determine on the death of her first husband, that contingent remainder might have been defeated by the acts of E. Longman in her lifetime. (*a*) The estate, therefore, to the trustees, seems necessary for the purpose of protecting the interests of the children; and, inasmuch as the words 'to them and their heirs,' are calculated to give them the fee, I am not prepared to say that they took less than the whole legal estate."

So in the case of Doe d. Keen *v.* Walbank, (*b*) where a testator devised lands to trustees and their heirs, upon trust to permit his daughter to enjoy the same, and take the rents during her life, exclusively of her husband; and after her decease, upon trust to the use of such child or children, and for such estate as she, notwithstanding her coverture, should by any deed or will appoint; and for want of such appointment, then to the use of the heirs of her body; and for default of such issue, to his own right heirs forever. Then, after several other devises to the trustees in the like terms, the testator concluded thus: "And I hereby will &c., that the said trustees, and each of them, shall, may, and do, in every respect, give receipts, pay money, and *demise the aforesaid premises*, or any part thereof, as shall be consistent with their duty and trust, or otherwise." It was held, that the trustees took the fee simple in the lands devised to them. Lord Tenterden, C. J., observed, in answer to the argument that the words might be held to confer a *power* of leasing, that the language of the clause was unlike that of any clause by *which a leasing power had been given, and that it [211] specified no limit or qualification as to duration, rent, or other matter, but seemed intended to authorize any lease that would not be considered in a Court of Equity as a violation of the duty of a trustee.

And where the authority to lease is accompanied by a direction to discharge taxes or other outgoings out of the rents and profits, the ground for giving to the trustees the legal estate is still more conclusive.

(*a*) As to this, vide post.
(*b*) 2 Barn. & Adolph. 554.

Thus, in the case of White *v.* Parker, (*a*) where a testator devised property to two trustees, in trust, as to three fourth parts, to pay *or permit and suffer* his wife and two daughters respectively *to receive* each one fourth of the *clear* yearly rents and profits, to their respective sole and separate uses; and as to the other fourth, in trust, to pay to *or permit and suffer* his son *to receive* the *clear* yearly rents and profits, with a contingent remainder; *and the trustees were empowered to demise the premises, reserving the best rent*, and were directed out of the rents and profits to pay and discharge all outgoings for taxes or otherwise, in respect of the premises, and to keep the premises in repair. It was held, that the legal estate in the whole vested in the trustees.

But in the recent case of Acland *v.* Lutley, (*b*) where a testator devised lands to A and B, upon trust, that they and their heirs did and should set and let the premises, and out of the rents and profits in the first place pay a debt owing by the testator to M., and, in the next place, pay certain legacies, which were to be paid as soon as the clear rents and profits would admit thereof; and from and after the debt and legacies were paid and discharged the testator gave the same to C, his heirs and assigns forever. It was contended that, according
[212] to the recent authorities, * the indefinite power of leasing constituted a ground for the trustees taking the fee; but the Court decided, that the estate of the trustees terminated on the discharge of the debt and legacies.

It does not appear from the judgment whether the Court considered this case to be distinguishable from Doe *v.* Willan (*c*) and Doe *v.* Walbank, (*d*) or that those cases had gone too far. In Doe *v.* Willan, (as here,) the disposition in favor of the beneficial devisees was in the language not of a trust but of an independent devise; but there were other purposes besides the power of leasing, requiring the trustees to take some estate (and it would seem an estate per autre vie, the trust being for the separate use of a woman) which did not exist in the case just stated. The same remark applies to Doe *v.* Walbank. In this state of the authorities it seems too much to affirm that the giving to trustees an indefinite power to grant leases constitutes, of itself, an adequate ground for holding them to take the fee.

The case of Trent *v.* Hanning (*e*) is remarkable for the difference of opinion which prevailed in regard to the effect of some very ambiguous words. The will was in the following terms:

(*a*) 1 Scott, 542.
(*b*) 9 Adolph. & Ell. 879.
(*c*) Ante, 208.
(*d*) Ante, 210.
(*e*) 1 Bos. & Pull. New Rep. 116; 10 Ves. 495; 7 East, 95, S. C.

"I do hereby give unto my wife £200 per annum during her natural life in addition to her jointure," (which was an annuity secured to her before marriage, out of his real estate,) "my just debts being previously paid, and I do give unto my younger children, £6000 each, to be paid when they severally come to the age of twenty-one; and I do appoint B, C, and D, as *trustees of inheritance* for the execution thereof." The Court of C. P. on a case from Chancery, held, that the trustees took no estate and had no power to create any; but Lord Eldon being * dissatisfied with this opinion, and considering [213] that upon this point turned the question, whether the annuity, debts, and portions, were a charge upon the real estate, sent a case to the King's Bench, three of the Judges of which (Ellenborough, Grose, and Le Blanc, dissentiente Lawrence) certified that the trustees took an estate in fee; they being of opinion that the words "trustees of my (*a*) inheritance," meant "trustees to inherit my estates for the execution of this my will."

The reader will have perceived (though the position has not hitherto been distinctly advanced) that the same principle which determines whether the trustees take any estate, regulates also the nature and duration of that estate; the established doctrine being (subject to certain positive rules of construction, lately propounded by the legislature, and which will be presently considered) that trustees take exactly that quantity of interest which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance; but whether the exigencies of the trust demand the fee simple, or can be satisfied by any, and what less estate. (*b*)

Thus in the case of a devise to a trustee and his heirs, upon trust *to pay and apply the rents* for the benefit of a person for life, and after his decease to hold the lands *in trust* for other persons; the direction to apply the rents, being limited to the cestui que trust for life, the estate of the trustee will terminate at his decease. (*c*) And it seems * that a [214] limitation to trustees and their heirs may be restrained by implication to an estate per autre vie even in a deed. (*d*)

And though (as we have seen) where the devise is to the *use*

(*a*) But the word "my" does not occur in the will as stated in the report.

(*b*) 8 Vin. Ab. 262, pl. 19; 3 B. P. C. (Toml. ed.) 457; 1 Eq. Ca. Ab. 383, pl. 4; 3 Taunt. 326, and Fea. C. R. 54, Butl. n.; Lucas, Rep. 523; 2 Stra. 798; Willes, 650; Cas. Temp. Talb. 145; 1 Ves. Sen. 485; 3 Burr. 1684; 2 Durn. & E. 444; 7 Id. 433, 652; 3 East, 533; 9 East, 1; 1 Ves. & Bea. 485; 2 Swanst. 375; 3 Bingh. 15; 5 J. B. Moore, 153; 1 Barn. & Cress. 721; 7 Id. 206.

(*c*) Doe d. Hallen *v.* Ironmonger, 3 East, 533; Robinson *v.* Grey, 9 East, 1. The case of Farmer *v.* Francis, 9 Moore, 310, seems contra, but the attention of the Court was directed exclusively to another point.

(*d*) Venables *v.* Morris, 7 Durn. & E. 342, and 437; Blacker *v.* Anscombe, 1 Bos. & Pull. New Rep. 25; Curtis *v.* Price, 12 Ves. 89.

of the trustees, they take the legal estate independently of the evidence of intention supplied by the nature of the trust; and though by a necessary consequence of this principle the extent of their estate must, if the will is clear and express on the point in like manner be regulated by the terms of the will; yet if the testator has affixed no express limit to its duration, such estate will, as in other cases, be measured by the exigencies of the trust or duty (if any) which is imposed on the devisees. (*a*)

And here it is proper to observe that where a will takes effect as an appointment under a power to appoint the use, any devise which it contains will vest the legal estate in the devisee, irrespectively of any purpose or duty requiring that he should have the estate, as such devise amounts to a mere declaration of the use of the instrument creating the power, in other words, a mere nomination of the cestui que use; consequently any limitation engrafted on the devise operates only on the equitable interest, though it be in terms *to the use* of the person or persons intended to take the estate beneficially.

And the result is the same in the case of devises of copyhold lands, (*b*) as wills of such property take effect merely as instruments directory of the uses of the previous surrender to the use of the will, which was formerly essential to the validity
[215] of the devise, and the operation of * which is now, by the statutes dispensing with the necessity of such surrender, (*c*) transferred to the will itself. It is clear, therefore, that a devise of copyhold lands simply to A and his heirs, in trust for B and his heirs, would vest the legal inheritance in A for the benefit of B, in fee. (*d*) Still, however, it should seem, according to the principle just stated, in regard to devises of freehold lands *to the use* of trustees, that the extent and duration of an estate conferred by an *indefinite* devise of copyholds would, like that of a devisee cestui que use of freeholds, (whose estate is undefined,) depend upon, and be regulated by, the nature of the trust reposed in the devisee.

But in the case of Houston *v.* Hughes, it was argued at the bar, and assumed by the Court, that as the copyholds included in the devise were not within the Statute of Uses, the trustees necessarily took the entire fee; however, this point does not appear to have been much canvassed, and the doctrine is not only irreconcilable with the principles of the analogous cases just stated, but is in direct opposition to the case of Doe d. Woodcock *v.* Barthrop, (*e*) which was not cited, and is as

(*a*) See Curtis *v.* Price, 12 Ves. 89, where the limitations were in a deed, which makes the case stronger.
(*b*) See Houston *v.* Hughes, 6 Barn. & Cress. 403.
(*c*) 55 Geo. III. c. 195, and 1 Vict. c. 26, § 4.
(*d*) Houston *v.* Hughes, 6 Barn. & Cress. 403.
(*e*) 5 Taunt. 382.

follows: A devised copyhold lands to B & C, and their heirs, in trust to permit D or her assigns to occupy the same, or to pay to, or permit her or her assigns to receive the rents, for her natural life, for her separate use, and, subject to such estate and interest of D, the testator devised the premises to such uses as D should, by her will, appoint, and in default of appointment, to her right heirs; it was held, that, under the limitation to B and C and their heirs, though not restricted in terms to the life of D, the estate was vested in B and C, and their heirs for * the life of D only, on whose decease the legal estate vested in the appointee of D, (who exercised her power,) and such appointee accordingly recovered in ejectment against the persons claiming under the surrenderee of the trustees. [216]

The same question may arise, and the same principle, it is conceived, would apply, with respect to leaseholds held for a term of years, which, it is well known, are not within the Statute of Uses. (*a*) Thus, a bequest of property of this description to A, simply in trust for B, would unquestionably vest the legal estate in A, although no duty or office were cast on him requiring that he should have the legal ownership; and, by necessary consequence, A must, in such a case, take the entire term, there being nothing to restrict or qualify his estate. It does not follow, however, that where a definite duty or office is imposed on the trustee he would take the entire legal estate in the term; for, as the law allows chattel interests in lands to be made the subject of an executory bequest after a prior limitation, not exhausting the whole term, even though the prior interest were an estate for life, it seems to be a necessary result of this doctrine, that such an executory bequest may be made ulterior to the partial or limited estate of a trustee; and it cannot be * material whether the restriction of the trustee's estate was in express terms, or resulted from the nature of the duty imposed on him. For instance, if a term of years were bequeathed to A, until B should attain the age of twenty-one years, in trust for the maintenance of B, and when he attained the age of twenty-one, then to B, there can be no doubt that the estate of the trustee would terminate at the majority of B from which time the property would vest in possession in B. And it is conceived, that [217]

(*a*) Not a little practical inconvenience has arisen from the exclusion of chattel interests in land from the operation of the Statute of Uses, whatever may have been the real ground of that exclusion; which is a point on which an entire coincidence of opinion appears not to exist. Where leaseholds for years are to be transferred from A to A and B jointly, (on the occasion of the appointment of a new trustee, or otherwise,) this purpose is only to be accomplished by the circuity of two deeds; one transferring the property from A to a third person, and another transferring it from such person to A and B jointly; whereas in the case of freeholds, such result might be attained by means of a single conveyance by A to B, *to the use* of himself and A. See 6 Jarm. Conv. 524, (3d ed.,) by Sweet.

the effect would be the same if the bequest were in the following terms: "I give my leasehold estate, called A, to B, his executors or administrators, (without any specification of estate,) upon trust to pay the rents to C during his minority, and when he shall attain twenty-one, then I give the same to C. The estate of B would cease at the majority of C, when the purposes of the trust would be at an end, although the bequest of B leaves undefined the nature and extent of his estate.

And here it may be observed, that where a testator has an equitable interest only, in the land which is the subject of a devise in trust, and such devise would, if the testator had the legal ownership, carry the dry legal estate only, unaccompanied by any duty or office, the trustee takes nothing under the devise; the effect being the same as if the land had been devised directly to the cestui que trust. If, however, the trusteeship created by the will is of a nature to involve the performance of any office or duty, (as a trust to sell or grant leases,) the devise, though failing so far as it purports to vest the legal estate in the trustee, has the effect of onerating him with the prescribed duty in respect of the devised equitable interest, no less than if the legal estate had passed under it. For instance, supposing the testator to devise lands in which he has only an equity of re-
[218] demption *to A in fee simple, in trust for B, the devise would not confer any estate, or impose any duty on A, but the entire beneficial interest would pass directly to B. If, on the other hand, the testator had devised such equity of redemption to trustees, upon trust for sale, though the trustees would not have acquired any actual estate at law, (the testator himself having none,) yet the property would be salable by the trustees in the same manner as if the legal ownership had become vested in them.

It is sometimes a question of difficulty (but which, as we shall presently see, cannot arise under wills that are regulated by the new law) to determine, whether a devise to persons, without words of limitation, to pay debts and legacies, raise a sum of money, secure a jointure, or the like, gives them the inheritance or a chattel interest only. In Cordall's case, (*a*) where the devise was to two persons, to hold for payment of legacies and debts, and afterwards to A for life, with remainders over; it was resolved, that this was no freehold in them, but only a term of years, "though it could not be said for any certain number of years."

So, in Carter *v.* Barnardiston, (*b*) where a testator devised, that, in case certain property should not be sufficient to pay his debts

(*a*) Cro. El. 315.
(*b*) 1 P. W. 505; S. C. 2 Eq. Ca. Ab. 224, pl. 5, 6; Dom. Proc. 3 B. P. C. (Tolm. ed.) 64.

and legacies, then his executors should receive the profits (*a*) of his real estate for payment of his debts and legacies, and, after those should be paid, then he devised certain lands to P. for life with remainders over; it was considered that the executors took a chattel interest only, until the debts and legacies were paid. (*b*)

* But in Gibson *v.* Lord Montfort, (*c*) where A gave [219] all his real and personal estate to trustees, their executors, administrators, and assigns, in trust to pay several annuities, sums, and legacies, out of the produce of the personal estate; if that should be deficient, then to pay the same out of the rents and profits arising by the real estate; and as to the residue of his real and personal estate, after provision being made for payment of the legacies, &c., he gave the same to the children of his daughter; Lord Hardwicke held, that the trustees took a fee; for that, if these pecuniary legacies were not paid, the real estate must be sold to satisfy them; that this was a purpose which it was impossible to serve unless the trustees had the inheritance. He said, that the objection, that the words of limitation were descriptive of a chattel interest, might have had weight, if there had not been a personal estate included in the devise.

It will be observed, that here the word "estate" was adequate to pass the fee independently of the trust; but this was not adverted to by Lord Hardwicke.

In the next case, however, a limitation to trustees and their personal representatives, to raise a sum of money, was held, under the circumstances, to confer a chattel interest only, in addition to an estate of freehold which they took for other purposes.

The case referred to is Doe d. White *v.* Simpson, (*d*) where a testator devised to A and B, and the survivor of them, and the executors and administrators of such survivor, certain lands, and the arrears of rents, and a bond and judgment given by C, a tenant, for rent due, in trust, that they, out of the rents and profits and arrears due, should pay two life annuities; and after payment thereof, * then, in trust, out of the residue [220] of the rents and profits, to pay to certain persons £800 for the children of W.; and, after payment of the said annuities and the £800, he devised the said estates to W for life, with remainders over. And the testator authorized A and B, and the survivor, his executors, &c., to grant building leases, as often as there should be occasion, for any number of years. It was held, that the trustees took the legal estate for the lives of the annuitants, together with a term of years sufficient for the pur-

(*a*) As to the question whether the moneys in these cases are raisable out of the annual profits, or authorize a sale, see infra.

(*b*) See also Hitchens *v.* Hitchens, 2 Vern. 403; S. C. Pre. Ch. 133.

(*c*) 1 Ves. Sen. 485.

(*d*) 5 East, 162.

pose of raising the £800, and not the fee. Lord Ellenborough relied much on the bond and judgment being coupled with the lands in the devise.

So, in the more recent case of Heardson *v.* Williamson, (*a*) where testator devised to A and B, and the survivor of them, and the executors or administrators of such survivor, an estate at P., and a tenement at S., and the fixtures of his shop, in trust for sale, and with the money arising from such sale, to pay off all such sums as should be owing upon mortgage of all or any of the estates thereinafter devised, and, if any surplus should remain, upon trust to pay such surplus to his wife; and the testator devised his other estates to his wife during widowhood, subject to an annuity, and to the annual payment of £100, until the mortgage debts thereinbefore directed to be paid by the sale aforesaid were discharged, and, after the decease of his said wife, in case the said debts should not have been paid off, the testator gave such estates to *A and B, and the survivor of them, and the executors or administrators of such survivor, in trust to let the same, and apply the rents in payment of the mortgage debts, if any should remain, until the whole should be paid by the gradual receipt of the rents;* and, after the decease or marriage
[221] of his wife, or the * liquidation of the mortgage debts, (as the case might be,) the testator devised the last-mentioned estates to his son for life, with remainder to such children as he should have in fee. The son executed a conveyance, which, if the estate limited to his children was a contingent remainder, (he then having had no child,) had destroyed such remainder; and hence arose the question, whether the trustees took the fee; if they did, the interests of the children, being equitable, of course, were indestructible. Lord Langdale, M. R., admitted, that the circumstance of the estate being limited to the trustees, and their executors or administrators, would not prevent the fee from vesting in them, if the purposes of the trust required it; but his Lordship observed, that they were to take only an estate until the debts were paid, and he did not see the least necessity for their having the reversion for that limited purpose.

The construction which gives to trustees an undefined chattel interest, either with or without a prior freehold, has been considered so inconvenient in its consequences, and so difficult of application, that its exclusion has (as we shall presently see) been made one of the objects of the recent legislative change in the rules of testamentary construction.

Even under the old law it was held that if the purposes of the trust could not be satisfied by an estate pur autre vie, or by such an estate with a chattel interest superadded, the trustees

(*a*) 1 Keen, 33.

took the fee, though the prescribed purposes did not require and could not exhaust the entire fee simple.

Thus, in the case of Harton *v.* Harton, (*a*) where the devise was to A and B, and their heirs, in trust to permit C (a *feme covert) to receive the rents during her life for [222] her separate use, and so as not to be subject to the debts, &c., of her husband, with remainder to the use of her sons successively in tail, remainder to her daughters in tail; and in default of such issue (without fresh words of gift) upon trust to permit D (another feme covert) to receive the rents for her separate use, with remainder to the use of her sons and daughters in tail in like manner, and so on to another feme covert and her children, and then to the use of E in tail, with reversion to the use of the testator's own right heirs. It was held, that the trustees took the fee; "that construction," it was said, "being necessary to give legal effect to the testator's intention to secure the beneficial interest to the separate use of the femes covert."

Of this case, Lord Eldon has observed, that "there being trusts for the separate use of married women, after various trusts not for married women, those trusts could not subsist unless the legal estate was in the trustees from the beginning to the end; and they relied on the non-repetition of a legal estate, there being a gift to the wife of one of the parties; and if there had been a repetition of the legal estate after every trust for a married woman, they would not have held the whole legal estate to be in the trustees." (*b*)

Perhaps it is not strictly accurate to say, that in this case a fee in the trustees was *necessary* to secure the beneficial interest to the femes covert; for though the trusts in favor of the second and third women could not arise until the failure of the objects of the intervening limitations in tail, yet still they must inevitably take effect, if at all, in their lifetime, and the fact that in reaching them the estate necessarily comprehended the objects of the *intervening limitations, with regard to [223] whom no purpose was to be answered requiring that the trustees should take an estate, might seem to be no reason for extending that estate to the limitations *subsequent* to the gifts to the several femes covert. But probably the Court thought it better to vest the whole fee in the trustees, than to create a particular estate which might extend to *some* of the beneficial devisees not within the scope of it, and would affect their relative situation, by preventing the devises in tail, to whom it extended, from suffering a recovery.

The case of Wykham *v.* Wykham, (*c*) presents a remarkable

(*a*) 7 Durn. & E. 652. See also Hawkins *v.* Luscombe, 2 Swanst. 391.
(*b*) See Hawkins *v.* Luscombe, 2 Swanst. 391.
(*c*) 11 East, 458; 8 Taunt. 316; 18 Ves. 395, S. C. As to a direction to settle, see Knocker *v.* Bunbury, 8 Scott, 414.

instance of contrariety of judicial opinion as to the estate authorized to be created by a power to jointure. A devised lands to his eldest son for life, remainder to that son's first and other sons in tail male, with remainder to the testator's other sons and their sons in like manner. The will contained a power to the devisor's sons, as they should become entitled in possession, "from time to time to grant, convey, limit, and appoint all or any parts, &c., *to trustees*, upon trust, by the rents and profits thereof, to raise and pay any yearly rent-charge, not exceeding £1000, as a jointure for any wife or wives that he or they should thereafter marry, for and during the term of such wife's natural life only." The devisor's eldest son B, in exercise of his power, conveyed and appointed the lands so devised to him, to trustees and their heirs, upon trust to raise and pay certain yearly rent-charges (amounting to £1000) to his intended wife for life as a jointure. After the death of B, but during the life of the jointress, his widow, the next tenant in tail, who was let into possession, suffered a recovery, the validity of which depended upon this, whether the appointment did or did not vest in
[224] *trustees an estate of freehold for the life of the jointress. If it did, the recovery was void for want of the immediate freehold, which was, in that case, outstanding; but in every other event, *i. e.* if the appointment passed no estate, or a chattel interest only, or the fee, it was good, in the former cases as a legal, and in the latter as an equitable recovery. The case coming on before Lord Eldon, he directed a case to be sent to the Court of King's Bench, who certified that the trustees took a fee. (*a*) The same question was then sent to the Common Pleas, and that Court was of opinion that the trustees took *no* estate. (*b*) On the case being again brought before Lord Eldon, on the conflicting certificates, he held, that the recovery was good, and that the estate which the trustees should have taken, was a term of years, with a proviso for cesser of it on payment of the rent-charge during the life of the jointress, and all arrears thereon at the time of her death, *as that would not have gone to disturb any of the subsequent uses.*

It is observable that, greatly as the several opinions varied in the construction of the devise, they all conducted to the same conclusion as to the recovery, which quacunque via, was good.

With regard to estates limited to trustees for preserving contingent remainders, it may be observed, that although they may not be (as such estates usually are) in terms confined to the life of the person taking the immediately preceding estate of freehold, yet they will be so restricted in construction, if the will disclose no other purpose, which requires that the trustees should take a larger estate.

(*a*) Wykham *v.* Wykham, 11 East, 458.
(*b*) Wykham *v.* Wykham, 3 Taunt. 316.

Thus, in the case of Doe d. Compere *v.* Hicks, (*a*) where a testator devised lands, after the decease of his wife, to his * father, A, for life, with remainder to B for life, and [225] after the determination of that estate, *unto trustees and their heirs, in trust to preserve contingent remainders from being defeated, and to make entries, and nevertheless to permit* B *to receive* the rents and profits during his life, and after his decease, unto the first and other sons of the body of B in tail male successively, and in default of such issue, unto his (testator's) brother, C, for life, and after that estate determined, *unto the trustees and their heirs to preserve the contingent remainders in manner aforesaid*, (with various remainders limited in a similar manner.) On an ejectment brought by one of the beneficial devisees, it was contended that the fee was in the trustees, under the unrestricted limitation to them and their heirs. But the Court was of opinion that, taking the whole instrument together, it appeared that the testator intended the trustees to take only an estate for the lives of the several tenants for life, in order to protect the contingent remainders. If the trustees had taken the whole interest in the estate, it was not necessary for the testator again to give them the same estate after all the subsequent estates for life.[1]

This decision has been noticed with approbation by Sir W. Grant, (*b*) and seems to be abundantly sustained by the principles of analogous cases. Lord Kenyon, in the course of his judgment, however, in allusion to the case of Venables *v.* Morris, (*c*) (which had been urged as an authority for holding the trustees to take the fee,) suggested that the result would be different where, under the limitations in question, any person had a power of appointment, which, his Lordship considered, would render it necessary that the fee should be in the trustees, *with a view to the possibility of the donee creating under the power * contingent remainders which might require pro-* [226] *tection.* In the case of Venables *v.* Morris, the limitations (in a deed) were to the use of A for life, with remainder to the use of trustees and their heirs for the life of A, to preserve contingent remainder to the use of B, (wife of A,) for life, remainder to the use of the same trustees *and their heirs, in trust to support the contingent uses, and permit B and her assigns to receive the rents;* and after the decease of A and B, to the use of the first and other sons of the marriage successively in tail, with remainder to the use of the first and other daughters successively in tail, remainder to the use of such persons as B

(*a*) 7 Durn. & East, 433. (*b*) See 12 Ves. 100.
(*c*) 7 Durn. & E. 342 and 437.

[1] See Smith *v.* Dunwoody, 19 Georgia, 238.

should by deed or will, appoint, and in default of appointment, to the use of the right heirs of B. B, by a deed poll, appointed the estate to the right heirs of A. The contest was between the heirs of A and the heirs of B, the former claiming under the limitation in the appointment, and the latter under the settlement. One of the points contended for by the heir of B was, that the remainder in fee being in the trustees, an equitable interest only passed to the heirs of A under the appointment, and which could not unite with the estate for life of A under the settlement; but the Court was of opinion that the heir of B was entitled quacunque via; for if the limitation to the heir of B, under the appointment, was a legal limitation, it united with B's estate for life, under the settlement, and conferred the fee; but if it did not, then it was a contingent remainder, in equity, to the heir, and he took by purchase. Lord Kenyon subsequently expressed a more decided opinion that the legal estate in fee was in the trustees, and the certificate of the Court (it being a case from Chancery) was in conformity to this opinion.

[227] The ground on which Lord Kenyon rested the certificate of the Court, involves a very extensive and no less novel doctrine, * and one which, in the absence of any confirmatory decision, cannot be relied on. To hold that the mere circumstance of there being included in the limitations a power of appointment, by virtue of which contingent remainders *might* be thereafter created, constitutes of itself a ground for vesting the fee simple in the trustees, is evidently going much farther than making trustees take the fee, because contingent remainders are actually created by the instrument containing the limitation to them; though even the latter more moderate doctrine has not been invariably countenanced by the authorities.

Thus, in the recent case of Heardson *v.* Williamson, (*a*) Lord Langdale, M. R., does not appear to have regarded the fact, that the will contained a contingent remainder of the devised estate, as a sufficient ground for holding the inheritance in fee to be in the trustees; while, on the other hand, in Cursham *v.* Newland, (*b*) trustees were held to take the fee under a will which appeared to supply no other ground for such a construction; and in Doe *v.* Willan, (*c*) and Houston *v.* Hughes, (*d*) Mr. Justice Bayley considered that the circumstance of contingent remainders being created by the will, favored the conclusion that the trustees took the legal inheritance.

In the case of Barker *v.* Greenwood, (*e*) too, it seems to have been regarded by Mr. Baron Parke in the same point of view,

(*a*) 1 Kee. 33, ante, 220. (*b*) 2 Moo. & Scott, 113.
(*c*) 2 Barn. & Ald. 84, ante, 208. (*d*) 6 Barn. & Cress. 420.
(*e*) 4 Mees. & W. 421.

though this able Judge disclaimed any reliance on the point; because the question in that case was not whether the trustees took the fee, but whether they took an estate pur autre vie, and the learned Judge considered it to be doubtful whether the trustees of such an estate would be bound, in the absence of an express trust, to preserve * contingent remainders, [228] a point upon which the writer is not aware of any decision. There certainly seems to be much difficulty in attaching any such obligation to the trustees, seeing that their estate is apparently created diverso intuito; at all events it is clear that such express direction to trustees to preserve contingent remainders, will not have any influence on the construction, if the will contains no such remainder; (*a*) nor where the subject of devise is a copyhold estate, as contingent remainders created of such property are not destructible, and therefore do not require any limitation of this nature for their preservation. (*b*)

It seems that where a will is so expressed as to leave it doubtful whether the testator intended the trustees to take the fee or not, the circumstance that there is included in the same devise other property which necessarily vests in the trustees for the whole of the testator's interest, affords a ground for giving to the will the same construction as to the estate in question. (*c*)

Here closes the long catalogue of decisions respecting the quality and extent of the estate conferred by devises in trust, from which the reader will have collected the principles that govern cases of this description, and the considerations which have been admitted to influence the construction, though, as the question is constantly presenting itself under new aspects and combinations of circumstances, difficulty will sometimes occur in the application of the established doctrine. Of all the adjudged points connected with the subject, that which has been deemed the least satisfactory, is the doctrine of those decisions (*d*) which, * in certain cases, gave to trustees, [229] whose estate was undefined, a term of years, (either with or without a prior estate for life,) determinable when the purposes of the trust should be satisfied.[1] To exclude the application of this inconvenient and very refined rule of construction, two enactments have been introduced into the statute of 1 Vict. c. 26. The 30th section provides, "That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise should be construed to pass the fee simple, or other the whole estate or interest

(*a*) Nash *v.* Nash, 3 Barn. & Adolph. 839.
(*b*) See Doe d. Woodcock *v.* Barthrop, 5 Taunt. 382.
(*c*) Houston *v.* Hughes, 6 Barn. & Cress. 403.
(*d*) Ante, pp. 218, 219.

[1] See Ellis *v.* Page, 7 Cushing, 164, 165.

which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

Section 31 provides, "That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

These clauses have been the subject of much criticism. (*a*) It is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of the 30th section [230] * would seem to be simply to negative the construction which, in certain cases, (*b*) gave to a trustee an undefined term of years, for it allows him to take an estate of freehold, or a *definite* term of years, either expressly or by implication; but the 31st section takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction; that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators) for purposes requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in Carter *v.* Barnardiston, an estate for years, or, as in Doe *v.* Simpson, an estate for life, with a superadded term of years, but) an estate in fee simple. The result, in short, is that trustees, whose estate is not expressly defined by the will, must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee. It is observable that this section allows the trustees to take an estate of freehold, not whenever the purposes of

(*a*) See H. Sugd. Wills, 127; Sweet on Wills Act, 154.
(*b*) Ante, p. 218.

the trust require such an estate, but only in the specified case of the "surplus rents and profits being given to a person for life," making no provision, therefore, for the case (a possible though not a frequently occurring one) of a trust of any other kind being created for a purpose coextensive with life; for instance, a trust to keep on foot a policy of life insurance. Possibly it would be *held that such a case is excluded [231] from the 31st section by the exception in the 30th section, and thus some effect would be given to this otherwise apparently idle clause of the statute; farther than this, (even if so far,) it is presumed the exceptive part of the 30th section could not be construed to qualify or control the operation of the 31st section, but decision alone can settle the point.

The enactments in question do not, beyond the particular cases which have been pointed out, interfere with the general doctrines of construction discussed in the present chapter. Even under wills made or republished since the year 1837, it may still be questionable whether trustees take *any* estate or only a power; also whether they take an estate limited to the lives of the tenants for life of the beneficial interest, or an estate in fee simple; and consequently there should be no relaxation in the anxious care of framers of wills to preclude ambiguity in this particular. It cannot, however, according to the suggested construction of the 31st section under *such* wills become a question, whether trustees take an estate in fee, or a chattel interest, in order to raise money, or for any other purpose.

The new doctrine would not, it is conceived, preclude the construction that trustees take an estate pur autre vie, with a power of sale over the inheritance. The writer is not aware, however, of any adjudged instance of such a construction, for where an estate is devised to trustees indefinitely, the authorities (with one solitary exception, (*a*) in which there seems to have been an opposing context,) conduct to the conclusion, that whatever duty is subsequently imposed on them, must be in virtue of their estate, the quality and duration of which are to be measured accordingly. The point, of course, depends on the conclusion to be fairly drawn from the entire will. (*b*)

(*a*) See Hawker *v.* Hawker, 3 Barn. & Ald. 537.

(*b*) In New Jersey, a naked trust estate descends to the oldest son, according to the law of primogeniture; such estates not being within the provisions of the Statute of Descents in that State. Wills *v.* Cooper, 1 Dutch. (N. J.) 137.

CHAPTER XXXVI.

WHAT WORDS CREATE AN ESTATE TAIL.[1]

PROPER terms of limiting an estate tail.
What informal expressions create an estate tail.
Limitation to "heirs male," or "right heirs male, forever."
Limitation over in default of "male heir," [p. 233.]

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[1] "Estates tail," as it is remarked by Mr. Chancellor Kent, "were introduced into the United States with the other parts of the English jurisprudence, and they subsisted in full force before our Revolution, subject equally to the power of being barred by a fine or common recovery." 4 Kent, (5th ed.) 14, 15. But they have been abolished in most of the United States, and the multifarious and complex learning connected with them has thereby become obsolete. Estates tail have been abolished in Virginia, 1776—New Jersey, 1820—New York, 1782—North Carolina, 1784—Kentucky, 1796. So in Tennessee and Georgia. In South Carolina and Louisiana, they do not appear to be known to their laws, or ever to have existed. See Den *v.* Small, 1 Spencer, 151; Saunders *v.* Hyatt, 1 Hawks, 247; Bramble *v.* Billups, 4 Leigh, 90; Thomason *v.* Andersons, 4 Leigh, 118; Ross *v.* Toms, 4 Dev. 376; Doe *v.* Craiger, 8 Leigh, 449; Tinsley *v.* Jones, 13 Grattan, 289.

In Alabama and Mississippi, a man may convey or devise land to a succession of donees then living, and to the heirs of the remainder-man.

In Connecticut, (Hamilton *v.* Hempstead, 3 Day, 332; Allyn *v.* Mather, 9 Conn. 114,) and in Vermont, (see Giddings *v.* Smith, 15 Vermont, 344,) Ohio, Illinois, and Missouri, if an estate tail be created, the first donee takes a life estate, and a fee simple vests in the heirs, or person having the remainder after the life estate of the grantee or first donee in tail. So in New Jersey. In Indiana, a person may be seised of an estate tail, by devise or grant, but he shall be deemed seised in fee after the second generation.

In Connecticut, there may be a special tenancy in tail, as in the case of a devise to A and his issue by a particular wife.

In Rhode Island, estates tail may be created by deed, but not by will, longer than to children of the devisee, and they may be barred by deed or will.

Estates tail exist in Massachusetts and in Maine, Lithgow *v.* Kavenah, 9 Mass. 167, 170, 173; Nightingale *v.* Burrell, 15 Pick. 104; Corbin *v.* Healey, 20 Pick. 514; Riggs *v.* Sally, 15 Maine, 408; Ide *v.* Ide, 5 Mass. 500, 502; Hawley *v.* Northampton. 8 Mass. 3; Williams *v.* Hichborn, 4 Mass. 189; Buxton *v.* Uxbridge, 10 Metcalf, 87; Cuffee *v.* Milk, ib. 366; Hall *v.* Thayer, 5 Gray, 523; Wight *v.* Thayer, 1 Gray, 284. So in Delaware and Pennsylvania (Eichelberger *v.* Burnitz, 9 Watts, 447; Elliott *v.* Pearsoll, 8 Watts & Serg. 38; Shoemaker *v.* Huffnagle, 4 ib. 437); subject, nevertheless, in all these States, to be barred by deed and by common recovery, and in two of these States by will, and they are chargeable with the debts of the tenant. 4 Dane, Abr. 621; Gauze *v.* Wiley, 4 Serg. & R. 509. See Roach *v.* Martin, 1 Harrington, 548; Waples *v.* Harman, ib. 223. Estates tail in Massachusetts, as at common law, descend to the oldest son, and to the oldest son of the oldest son. The law of descents in Massachusetts does not abrogate the rule of the common law in regard to estates tail. Wight *v.* Thayer, 1 Gray, 286, per Shaw, C. J. The law on this point seems to be otherwise in Connecticut. Hamilton *v.* Hempstead, 3 Day, 339; Allyn *v.* Mather, 9 Conn. 132.

In Maryland, estates tail *general*, created since Statute of 1786, are now understood to be virtually abolished, inasmuch as they descend, can be conveyed, are devisable and chargeable with debts, in the same manner as estates in fee simple. It is equally understood that estates tail *special* are not affected by the act of 1786. See Newton *v.* Griffith, 1 Harris & Gill, 111; Smith *v.* Smith, 2 Harr. & Johns. 314.

To A and "his heirs *lawfully begotten*," [p. 233.]
To heir of the body in the singular, [p. 233.]
Limitation to next or first heir male, [p. 234.]
To "next heir male," with superadded words of limitation, [p. 234.]
To next heir male and the heirs male of his body, [p. 235.]
"To heir male of the body," and his heirs, [p. 235.]
To A "et semini suo," or to A "and his issue," [p. 236.]
Remark on Willis *v.* Hiscox, [p. 236, note.]
To A and his heirs, and if he shall die without heirs of his body, [p. 237.]
Direction to grant a fee farm rent not conclusive against an estate tail, [p. 237.]
Devise over on failure of heirs valid, when, [p. 238.]
As to limitation over to the right heirs of the devisee, [p. 239.]
Estate tail generally cut down to an estate tail special by implication, [p. 239.]

A LIMITATION to a person and the heirs of his body creates an estate tail general.[1] If it be to him and the heirs *male* or the heirs *female* of his body, he takes an estate tail special, descendible in the male or female line, as the case may be. In the one case the land devolves upon the male issue, and, (unless the tenure be gavel-kind or Borough English,) (*a*) according to the law of primogeniture, in the other upon the females as coparceners. If the estate tail be general, it will run in this manner through both lines, in their established order of succession.

But though these are the correct and technical terms of limiting an estate tail, yet such an estate may be created in a will by less formal language; indeed, by any expressions denoting an intention to give the devisee an estate of inheritance descendible to his or some of his *lineal*, but not to his *collateral* heirs, which is the characteristic of an estate tail as distinguished from a fee simple. The former is transmissible to *lineal* descendants only; the latter in default of lineal devolves to *collateral*, and now to ascendant heirs.

A devise to A and his heirs male forever, (*b*) or to A and his heirs male living to attain the age of twenty-one, (*c*) or to A for life, and after his death to his heirs *male, or [233] his right heirs male, forever, (*d*) has been held to confer an estate tail male; the addition of the word "male," as a qualification of "heirs," showing that a class of heirs less extensive than heirs general was intended. And the same construction obtains, where a devise to a person and his heirs, (*e*) or to a person simply without any words of limitation, (*f*) is followed by a devise over in case of his death without an heir male.

(*a*) See Trash *v.* Wood, 4 My. & Craig. 324.
(*b*) Baker *v.* Wall, 1 Lord Raym. 185; S. C. 1 Eq. Ca. Ab. 214, pl. 12, stated ante, vol. 1.
(*c*) Doe d. Tremewen *v.* Permewan, 3 Per. & D. 320.
(*d*) Lord Ossulstone's case, 3 Salk. 336; Doe d. Earl of Lindsey *v.* Colyear, 11 East, 548.
(*e*) Denn d. Slater *v.* Slater, 5 Durn. & E. 335.
(*f*) Blaxton *v.* Slone, 3 Mod. 123.

[1] Hall *v.* Thayer, 5 Gray, 523.

It has even been decided that a devise to one, et hæredibus suis legitime procreatis, creates an estate tail, (*a*) though the addition merely describes a circumstance which is included in the definition of heir simply, an heir being ex justis nuptiis procreatus. Such was the doctrine of the early authorities, and it was recognized and followed in the more recent case of Nanfan *v.* Legh, (*b*) where a devise to H. when he should attain twenty-one, "and to his heirs *lawfully begotten* forever," was held to make the devisee tenant in tail only. In the same will other property was devised to H. and his heirs simply, which it was contended afforded an argument in favor of construing the devise in question to give an estate in tail; inasmuch as the testator, in varying the phrase, must have had a different intention. Being a case out of Chancery, we are not in possession of the reasons upon which the opinion of the Court was founded; but probably it was considered that the testator, by adding the expression "lawfully begotten," intended to engraft *some* qualification on the description of heir, and consequently must have meant an estate tail.

[234] It is clear that the words *heir* of the body (in the singular) *operate as words of limitation, and consequently confer an estate tail. Thus, it has been held, that under a devise to A for life, and after his decease, to the heir of his body forever, A is tenant in tail, (*c*) and a devise to A and such heir of her body as shall be living at her decease, has received the same construction. (*d*)

Nor is the effect varied by the word *next* or *first* being prefixed to "heir." [1]

Thus, in Burley's case, (*e*) a devise to A for life, remainder to the *next* heir male; for default of such male heir, then to remain, was adjudged to give an estate tail male to A.

So where (*f*) the devise was to M. and his wife for their lives, remainder to the *next* heir male of their two bodies, it was held, that M. and his wife were tenants in tail male.

Again, a devise to A for life, and after his death to the *first* heir male of his body, remainder over, has been adjudged to create an estate tail male. (*g*)

But though a devise to the *next* heir male, simply following a

(*a*) Church *v.* Wyatt, Moore, 637; Co. Litt. 20 *b.*; Harg. n. 2.
(*b*) 2 Marsh. 107; S. C. 7 Taunt. 85.
(*c*) Pawsey *v.* Lowdale, Sty. 249, 273. See also Wilkins *v.* Whiting, 1 Bulst. 219; 1 Roll. Ab. 896.
(*d*) Richards *v.* Bergavenny, 2 Vern. 324.
(*e*) Cited 1 Vent. 230.
(*f*) Miller *v.* Seagrove, Rob. Gavelk. 96; and see 1 Ves. Sen. 337.
(*g*) Trollop *v.* Trollop, Rob. Gavelk. 76; 1 Atk. 412; and see Goodright *v.* Pullyn, 2 L. Raym. 1437.

[1] A devise of land to the testator's "son W. and his oldest male heir forever," gives an estate tail to W. Cuffee *v.* Milk, 10 Metcalf, 366.

devise to the ancestor for life, does not confer on the heir an estate by purchase, (the words being construed as words of limitation,) yet if the testator has engrafted words of limitation on the devise to the next heir male, he is considered as indicating an intention to use the term "heir," as a mere descriptio personæ; in other words, as descriptive merely of the individual who fills the character of heir male at the ancestor's decease; the superadded words of limitation having the effect of converting the *expression, "next heir male," into [235] words of purchase, an effect, however, which (as will be shown at large in the sequel, does not, in general, belong to such superadded expressions of this nature. This rule of construction is founded on the authority of Archer's case, (*a*) where lands were devised to A for life, and after to the next heir male and the heirs male of the body of such next heir male, and it was unanimously agreed by the Court, that this was a contingent remainder to the heir, and that A was but tenant for life, and he having made a feoffment of the devised lands, it was held that such contingent remainder was destroyed.

But it should seem that this construction is not peculiar to such a case as Archer's; namely, where the word "next" is prefixed, and words of limitation are superadded to "heir male;" for a similar construction was adopted in a recent case, (Willis *v.* Hiscox,) (*b*) where the former circumstance was wanting. The devise was open to trust for the testator's son, W., for life, and after his decease for the heir male of his body begotten on a European woman, and the heirs of such heir male, and in case the son should die without leaving such heir male of his body, the trustees were to pay the rents equally between the testator's daughters, M. and A., for their lives, and the whole to the survivor; and after the decease of the survivor upon trust for the heir male of the body of M. and the heirs of such heir male, and in default of such heir male of her body, upon trust for the *heir male of the body of A, and the heirs of such heir male.* W. and M. both died without issue, after which, A, conceiving herself to be tenant in tail, suffered a recovery. A bill was filed by the heir male of the body of A. to compel a conveyance from the trustee; and Lord Cottenham considered his title so clear that he not only decided * in his favor, but com- [236] pelled the defendant trustee to pay the costs (*c*) of the

(*a*) 1 Co. 66.

(*b*) 4 Myl. & Craig. 197.

(*c*) This seems rather hard upon the trustee, as there was no authority directly in point, and the cases which had decided that a devise to the heir of the body (in the singular) of the devisee for life, without words of limitation engrafted thereon, operated to confer an estate tail (ante, p. 234); and also that superadded words of limitation had no effect in turning heirs male, in the plural, into words of purchase, afforded an argument in favor of the construction which the Court rejected, sufficiently plausible, one should have thought, to justify the trustee's refusal to convey

suit, which was occasioned by his refusal to convey without the direction of the Court. His Lordship said, "The mother has an estate expressly for life; and after her death, the devise is to the heir male of her body, in the singular number, with words of limitation to the heirs general of such heir, which, it is clearly settled, gives an estate for life only to the parent, and the inheritance, by purchase, to the heir of the body, as was decided in Archer's case, (*a*) and assumed by Hale in King *v.* Melling, (*b*) and subsequent cases. If indeed, that proposition were doubtful as a general rule, all doubt would have been removed in the present case; for the words of the limitation are the same as those used in the prior devise to the testator's son, and the particular description of the heir of that son proves that he must have taken by purchase."

A devise to A et semini suo, (*c*) or to A and his issue,[1] clearly creates an estate tail, as is shown more at large in a subsequent chapter.

So, where a testator, in the first instance, devises lands to a person and his heirs, and then proceeds to devise over the property in terms which show that he used the word
[237] "heirs," in the *prior devise, in the restricted sense of heirs of the body; such devise, of course, confers only an estate tail, the effect being the same as if the latter expression had been originally employed. Thus, if lands are devised to A and his heirs, and if he shall die without heirs of his body, or without heirs male of his body, or without an heir or heir male of his body,[2] then over to another, such devise vests in the devisee an estate tail general, or an estate tail male, as the case may be. (*d*)

Indeed, so well has this been settled from an early period, that, to found an argument in favor of a contrary construction, recourse is always had to special circumstances.

without judicial sanction. The tendency of such decisions is to increase the reluctance which is now very commonly felt by cautious and well-informed persons to undertake trusteeships.

(*a*) 1 Co. 66.

(*b*) 1 Vent. 214; and see Fearne, C. R. p. 148.

(*c*) Co. Litt. 9 *b*.

(*d*) Brown *v.* Jerves, Cro. Jac. 290; Chadock *v.* Cowley, Cro. Jac. 695; Teary *v.* Glover, cit. 3 Leon. 130, pl. 183; Cane *v.* James, Skinn. 19; Doe d. Neville *v.* Rivers, 7 Durn. & E. 276; but as to the effect of the recent statute (1 Vict. c. 26) on such devises, vide post.

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[1] A devise to one and his children, he having no children at the time, is equivalent to a devise to him and his issue, and creates an estate tail. Nightingale *v.* Burrell, 15 Pick. 104–114.

A deed to husband and wife, executed before the Revised Statutes of Massachusetts took effect, conveying land to be held by them during their lives and the life of the survivor, and by the heirs of their bodies, created an estate tail in the grantees. Steel *v.* Cook, 1 Metcalf, 281.

[2] See Hawley *v.* Northampton, 8 Mass. 3.

Thus, where (*a*) a testator devised lands to his wife for life, and after her death to J. his eldest son and his heirs, upon condition that J., as soon as the land should come unto him in possession, should grant to S., testator's second son, and his heirs, an annual rent of £4, and that *if J. should die without heirs of his body*, the land should remain to S. and the heirs of his body; it was contended that the intent was shown that J. should have a fee, otherwise he could not legally grant such a rent, to have continuance after his death; but it was resolved to be an estate tail; for being limited, that if he died without issue, then it should be to S. and his heirs of his body, *showed what heirs of J. were intended*, viz: *heirs of his body;* and though he was to make a grant of the rent, yet this, being by appointment of the donor, was not contra formam donationis, but stood with the gift, and it should bind the issue in tail.

The Court evidently considered the direction to grant
* the fee farm rent as conferring *a power*, or rather, per- [238]
haps, a trust coupled with a power, in which view it was consistent with an estate tail.

And here it should be observed that where real estate is devised over, in default of *heirs* of the first devisee, and the ulterior devisee stands related to the prior devisee so as to be in the course of descent from him, whether in the lineal or collateral line and however remote, as the prior devisee in that case could not die without heirs, while the devisee over exists, the word "heirs" is construed to mean heirs *of the body*, and accordingly the estate of the first devisee, by the effect of the devise over is restricted to an estate tail, and the estate of the devisee over becomes a remainder expectant on that estate. (*b*) This construction is induced by the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object.

But the Courts will not so construe the word heirs, where the devise over is to a stranger, however plausible may be the conjecture that it was so intended, and consequently the devise over is void for remoteness; (*c*) and formerly a relation of the half-blood or a parent or grandparent was, for this purpose, considered as a stranger, such persons being then excluded from taking by descent; (*d*) but the law, at least as to persons dying

(*a*) Dutton *v.* Engram, Cro. Jac. 427.

(*b*) 1 Roll. Ab. 836; 2 Lev. 162; Cro. Jac. 416, 695; 1 Freem. 4; 2 Eq. Cas. Ab. 305, pl. 2; 3 Lev. 70; 2 Stra. 849; Amb. 363; 2 Ed. 297; Cas. Temp. Talb. 1; 2 P. Wms. 370; Willes, 164; 1 P. W. 23; Willes, 164, n. 369; Doug. 266; Cowp. 234, 410, 833; 3 Durn. & E. 491, 488, n.; 2 Marsh. 170; 6 Taunt. 485. A few early decisions to the contrary, such as Hearn *v.* Allen, Cro. Car. 57, are overruled by the current of authorities.

(*c*) Grumble *v.* Jones, 2 Eq. Ca. Ab. 300; pl. 15; 11 Mod. 207; Willes, 166, n.; S. C. nom. Aumble *v.* Jones, 1 Salk. 238; Griffiths *v.* Grieve, 1 Jac. & Walk. 31.

(*d*) See Preston d. Eagle *v.* Funnell, Willes, 164.

[239] since the 31st of December, *1833, is now regulated by the statute of 3 & 4 W. IV. c. 106, which has admitted relations of the half-blood, and parents and other ancestral relations in the ascending line, to the heirship. (*a*)

Of course, the limiting of the estate over, in default of heirs of the body or issue, to the right heirs of the devisee, does not vary the construction, farther than to give the devisee the remainder in fee expectant on the estate tail.

Thus, where (*b*) a testator devised certain lands unto his son P. and his heirs forever, on condition that he paid W. £30 within one year after the death of the testator's wife, and he gave other tenements to other sons, adding the following clause: "Item. My will and mind is, that in case any of my said children unto whom I have bequeathed any of my real or copyhold estates *shall die without issue*, then I give the estate of him or her so dying unto his or their *right heirs* forever;" and it was held that the children took estates tail, with remainder in fee to themselves.

Sometimes an estate tail general is cut down to an estate tail special by implication.

As where (*c*) the devise was to the use of the testator's eldest son John and his heirs forever, and failing issue of John, to the use of James the second son and his heirs forever, and failing issue of that son, to the use of the third son George and his heirs forever, and failing his issue, to the use of every other son the testator should or might have, according to priority of birth; *and failing his (testator's) issue male*, then to his issue female and their heirs forever, and for want of issue female, then to the use of his (the testator's) heirs forever; it was [240] argued that the testator *evidently intended to postpone the female to the male line of issue, and that the latter part of the will was explanatory of the devise to the sons, showing that they were to take estates tail male only; for that the intent of postponing the issue female could not be answered without postponing his granddaughters as well as daughters, who were both comprehended under the general expression of his issue female; and of this opinion appears to have been the House of Lords, confirming a decree of the Irish Court of Exchequer. (*d*)

(*a*) See 1 Hayes's Introd. (5th ed.) p. 319.

(*b*) Brice *v.* Smith, Willes, 1.

(*c*) Fitzgerald and Leslie, 3 B. P. C. (Toml. ed.) 154. This seems to be the converse of the cases of Tuck *v.* Frencham, Moore, 13, pl. 50; S. C. 1 And. 81; and Doe d. Hanson *v.* Fyldes, Cowp. 833, stated ante, vol. 1, p. 425.

(*d*) This chapter, it is obvious, does not exhaust the general subject of which it professes to treat. The numerous instances in which the words *heirs of the body*, accompanied by explanatory expressions, and the words *children*, *son*, and *issue*, have operated to confer an estate tail, are fully discussed in subsequent chapters, to which, therefore, the reader is referred.

CHAPTER XXXVII.

RULE IN SHELLEY'S CASE.[1]

I. *Nature of the Rule. Requisites to its Operation; considered in Regard to the Estate of Freehold,—in Regard to the Limitation to the Heirs. Questions where one or both of the Limitations relate to several Persons.*

II. *Executory Trusts in Terms which would create an Estate Tail.*

III. *Practical Effect of the Rule considered.*

NATURE of the rule.
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Rule never infringed, [p. 242.]
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Will and schedule, [p. 244.]
Deeds creating and exercising powers, [p. 244.]
Legal and equitable interests, [p. 244.]
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[1] See the remarks on the rule in Shelley's case, in 4 Kent, (5th ed.) 214, *et seq.* The rule in Shelley's case has been received and adopted as part of the system of the common law in these United States. South Carolina, see Dott *v.* Cunningham, 1 Bay, 453. Carr *v.* Porter, 1 M'Cord, Ch. 60, was recently decided, after great consideration, by the Court of Appeals, upon the basis of the authority of the rule in Shelley's case. It has been assumed to be the rule in North Carolina, both in respect to land and chattels. Payne *v.* Sale, 3 Battle, 455; Davidson *v.* Davidson, 1 Hawks, 163. See Swain *v.* Roscoe, 3 Iredell, 200. In the case of Polk *v.* Faris, 9 Yerger, 209, after a very thorough and elaborate discussion, the rule in Shelley's case was declared to be the law of the land in Tennessee. The rule was admitted as binding authority in Virginia, in the case of Roy *v.* Garnett, 2 Wash. 9; Moore *v.* Brooks, 12 Grattan, (Va.) 135. It has been recognized as binding in Maryland, both in wills and conveyances by deed. Horne *v.* Lyeth, 4 Harr. & Johns. 431; Lyles *v.* Digge, 6 Harr. & Johns. 364. So in Pennsylvania, James's claim, 1 Dall. 47; Findlay *v.* Riddle, 3 Binn. 139. So in Ohio, M'Feely *v.* Moore, 5 Ohio, 465. It was formerly recognized in Connecticut. Bishop *v.* Selleck, 1 Day, 299, but it has since been abrogated by statute. The rule was abolished in Massachusetts in 1791, as to wills. See Steel *v.* Cook, 1 Metcalf, 282. And by the Revised Statutes of Massachusetts it has been abolished as to deeds also. Rev. Stat. c. 59, § 9. Respecting the statute of 1791, it is remarked by Mr. Chief Justice Parker, in Bowers *v.* Porter, 4 Pick. 206, that "without doubt it was the intention of the legislature by that statute to abolish the rule in Shelley's case, which had got to be received as the rule of the common law." This rule has also been in effect abolished in New Jersey, by statute, 1820. New Jersey Rev. Laws, 774. It was formerly recognized in New York. Brant *v.* Gelston, 2 Johns. Cas. 384; Kingsland *v.* Rapelye, 3 Edwards, Ch. 1. But it was abolished by the Revised Statutes, 1 vol. 725, § 28. See 4 Kent, (5th ed.) 229–233.

Although the rule in Shelley's case is abolished, either directly or in effect by statute, in many of the States, it is yet frequently referred to by way of illustration or argument. In Richardson *v.* Wheatland, 7 Metcalf, 172, it is remarked by Shaw, C. J., that "where a testator gives an estate to one for life, in terms, with a devise over to the general heirs, or heirs of the body, the natural presumption would seem to be, that the intent of the testator was, that it should be carried into effect liter-

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As to expressions negativing a larger estate, [p. 246.]
Interposition of trustees to preserve contingent remainders, &c., [p. 246.]
Rule in regard to limitation to the heirs, [p. 246]
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Distinction where there could not be joint heirs of the bodies, [p. 249.]
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ally, and that the first taker should have a life estate only, without power to alienate and defeat the claims of the heirs, who seem to be alike the objects of the testator's bounty. The rule in Shelley's case, therefore, would probably defeat the real intent of the testator. Assuming this to be the case, the legislature of Massachusetts passed an act apparently for the purpose of altering this rule, and directing that a construction should be put upon such a devise, better calculated to carry the testator's intent into effect. It was provided by Stat. 1791, c. 60, § 3, that such a devise should be construed to vest an estate for life in such devisee, and a remainder in fee simple in such heirs. This provision was reënacted, and extended to lands given by deed as well as by will, by the Rev. Stat. c. 59, § 9. Steel *v.* Cook, 1 Met. 282." See also 4 Kent, (5th ed.) 218.

Alienation by an enrolled conveyance, [p. 268.]
Operation of disentailing assurance upon estates intervening between the freehold and the limitation to the heirs, [p. 268.]
Further points suggested, [p. 269.]

I. The rule in Shelley's case is a rule of law, and not of construction. (*a*) The rule simply is, that, where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word *heirs* is a word of limitation, *i. e.* the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple.[1] (*b*)

[242] * This is well illustrated in the celebrated case of Perrin *v.* Blake. (*c*) There A., by his will, declared, that if his wife should be enceinte with a child at any time thereafter, (but which never happened,) and it were a male, he devised his real and personal estate equally to be divided between the said infant and his son W., when the infant should attain twenty-one; and he declared it to be his intent that none of his children should dispose of his estate for longer than his life; and to that intent he devised all his estate to the said W. and the said infant, *for the term of their natural lives;* remainder to G. and his heirs for the lives of the said W. and the infant; remainder *to the heirs of the bodies of the said W. and the said infant* lawfully begotten or to be begotten; remainder to the testator's daughters for the term of their natural lives, equally to be divided between them; remainder to G. and his heirs during the lives of the daughters; remainder to the heirs of the bodies of the said daughters, equally to be divided. The question was, what estate W. took. Lord Mansfield, Mr. Justice Asten, and Mr. Justice Willes, (Mr. Justice Yates dissentiente,) held, that he was tenant for life only; but their judgment was reversed by

(*a*) The comprehensive nature of the present work renders it impossible to present more than a brief outline of the chief practical points, connected with the rule in Shelley's case, which require the attention of the student or the practitioner; and this plan is the more willingly submitted to, since the subject has received an elaborate investigation from several writers, who have brought great learning and abilities to the task.

(*b*) Shelley's case, 1 Rep. 93; Thomas & Fraser's ed. vol. I, p. 227. The question was not directly raised in this case, but was incidentally much discussed. See some observations on the nature and origin of the rule, Fea. C. R. and Hayes's Supplem.; Prest. Est. vol. 1, c. 3. See also Earl of Bedford's case, Moor. 718; Whiting *v.* Welkings, 1 Bulstr. 219; Rundale *v.* Eeley, Cart. 170; Broughton *v.* Langley, 2 Lord Raym. 870; S. C. 2 Salk. 679, and cases passim in the next chapter.

(*c*) 4 Burr. 2579; 1 W. Blackst. 672; 1 Coll. Jur. 283; Harg. Law Tracts, 489, n.; Hayes's Inquiry, 227, n. S. C.

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[1] See a statement of the ruling in Shelley's case, by Shaw, C. J., in Richardson *v.* Wheatland, 7 Metcalf, 172. See also Bowers *v.* Porter, 4 Pick. 205; Moore *v.* Howe, 4 Monroe, 199; Williams *v.* Foster, 3 Hill, S. C. 193.

a majority of the Judges in the Exchequer Chamber, who held that W. took an estate tail.

An appeal was brought in the House of Lords, but was compromised.

[243] Since this solemn determination, (*a*) the rule in *question has been regarded as one of the most firmly established rules of property,[1] and, strictly speaking, no instance can be adduced of a departure from it. Undoubtedly, in many cases a devise to a person for life, and, after his death, to the heirs of his body, has been held, by force of the context, to give an estate for life only to the ancestor; (*b*) but this has been the result, not of holding the heirs of the body, as such, to take by purchase, but of construing those words to designate *some other class of persons* generally less extensive. The rule, therefore, was excluded, not violated, by this interpretation.

Whether the testator, by this or any other expression, mean to describe heirs of the body, is a totally distinct inquiry, and has, therefore, in the present Treatise, been separately discussed. (*c*) The blending of the two questions tends to involve both in unnecessary perplexity.

It is to be observed, that, to let in the application of the rule in Shelley's case, the limitations to the ancestor, and to his heirs, must be created by the same instrument.[2]

Therefore, where (*d*) A had, on the marriage of B, his son, settled lands on the son for life, remainder to the sons of that marriage successively in tail male, reversion to himself in fee, and by will devised the same to the issue of B by any other wife in tail male; it was held, that this devise did not make B tenant in tail, but gave his heir of the body an estate tail by purchase.

[244] But a will, and a schedule to it, are considered as one *instrument for the purposes of this rule; (*e*) and the same principle undoubtedly applies to a will and codicil, or several codicils.

(*a*) Indeed, for a long period antecedently, the point had been considered as settled beyond dispute; but in the interval between the judgment in B. R., and its reversal in the Exchequer Chamber, all was uncertainty. The profession beheld, with no small degree of consternation, a doctrine which had been regarded as an established principle of law, completely subverted. An interesting statement of the circumstances and progress of this case may be found in Mr. Hargrave's Law Tracts, and more particularly in Mr. Holliday's Life of Lord Mansfield—a book which, though not in high estimation as a biographical work, the writer remembers to have perused in his early days with much pleasure.

(*b*) See next chapter.

(*c*) As to where heirs of the body, children, sons, and issue, are used as words of limitation, see post.

(*d*) Moore *v.* Parker, Lord Raym. 37; S. C. Skinn. 558.

(*e*) Hays d. Foorde *v.* Foorde, 2 W. Blackst. 698.

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[1] See Bowers *v.* Porter, 4 Pick. 205; 4 Kent, (4th ed.) 216, 218.

[2] Coape *v.* Arnold, 31 Eng. Law & Eq. 133.

It is contended by Mr. Fearne, (*a*) that, where one limitation is contained in an instrument creating a power, and the other in an appointment under such power, the rule will apply; (*b*) but the position has been, with much reason, questioned by other learned writers. (*c*)

The rule in Shelley's case applies to equitable as well as legal interests; but the estate of the ancestor, and the limitation to the heirs, must be of the same quality, *i. e.* both legal or both equitable. It frequently happens, that a testator devises land in trust for a person for life, and, after his death, in trust for the heirs of his body, but gives the trustees some office in regard to the tenant for life, that causes them to retain the legal estate during his life, but which, ceasing at his death, does not prevent the limitation to the heirs of the body from being executed in them. In such cases, by the rule just stated, they take as purchasers. (*d*) The converse case of course may, but it rarely does occur. (*e*)

Where the limitations to the devisee for life, and to *the heirs of his body, both carry the legal estate, the [245] fact that one of them is subject to a trust does not prevent the application of the rule. Mr. Fearne, indeed, seems to have been of a contrary opinion; (*f*) but the affirmative has been successfully maintained by his learned editor and Mr. Preston, (*g*) on the well-known principle, that trust estates are not objects of the jurisdiction of Courts of Law.

In the recent case of Douglas *v.* Congreve, (*h*) real and personal estate were given to a feme covert for life, *for her separate use*, and, after her decease, to her husband for life, with remainder to the heirs of her body in tail, accompanied by a declaration that the aforesaid limitations were intended by the testator to be in strict settlement; and it was contended, that, as the testator had created a trust for the separate use of the devisee, she had merely an equitable interest, (the husband being a trustee for her,) with which the legal limitation to the heirs would not unite; but Lord Langdale conclusively answered this reasoning by observing, that the legal estate was vested in the wife, and that the power

(*a*) C. R. 75.
(*b*) Venables *v.* Morris, 7 Durn. & E. 342.
(*c*) Co. Litt. 299 *b*; Butl. n. Prest. Est. 324.
(*d*) Ante, p. 201.
(*e*) An unsuccessful attempt to support such a construction was made in the case of Nash *v.* Nash, 3 Barn. & Ald. 839, ante, where it is observable, that the trustees had not any office to perform other than the preservation of the contingent remainder, and there was no such remainder, unless the words "heirs of the body" were construed *children*; and the Court, by rejecting this construction, destroyed the force of the argument. This case serves to show, that the Courts are not disposed to strain the rules of construction for the purpose of preventing the application of the rule in Shelley's case.
(*f*) Cont. Rem. 35.
(*g*) Treat. on Estates, 311.
(*h*) 1 Beav. 59.

which the law gave to the husband over the real estate of his wife, does not alter the nature or quality of that estate.

The estate of freehold may be an estate for the life of the devisee himself, or of another person, or for the joint lives of several persons, and may be either absolute or determinable on a contingency, as an estate durante viduitate, (*a*) and may arise either by express devise, or by implication of law, (*b*) which must be, we have seen, a *necessary* implication.[1] (*c*)

[246] * It is to be observed, too, that words, however positive and unequivocal, expressly negativing the continuance of the ancestor's estate beyond the period of its primary express limitation, will not exclude the rule; (*d*) for this intention is as clearly indicated by the mere limitation of a life estate, as it can be by any additional expressions; and the doctrine, let it be remembered, is a rule of tenure, which is not only independent of, but generally operates to subvert the intention.

Upon the same principle, neither the interposition of a trust estate to preserve contingent remainders, between the estate for life and the limitation to the heirs of the body, (*e*) nor a declaration that the first taker shall have a power of jointuring, (*f*) or that his estate shall be without impeachment of waste, (*g*) or, if a woman, for her separate use, (*h*) or that the devisee shall have

(*a*) Merrill *v.* Rumsey, 1 Keb. 888; S. C. T. Raym. 126; Fea. C. R. 31; Curtis *v.* Price, 12 Ves. 89.

(*b*) Pybus *v.* Mitford, 1 Ventr. 372; Hayes d. Foorde *v.* Foorde, 2 W. Blackst. 698.

(*c*) Ante, vol. i. p. 460.

(*d*) Robinson *v.* Robinson, 1 Burr. 38; S. C. 2 Ves. Sen. 225; S. C. nom. Robinson *v.* Hicks, 3 B. P. C. (Toml. ed.) 180, stated infra; Perrin *v.* Blake, 4 Burr. 2579, ante, 242; Hayes d. Foorde *v.* Foorde, 2 W. Blackst. 698; Thong *v.* Bedford, 1 B. C. C. 313.

(*e*) Coulson *v.* Coulson, 2 Stra. 1125; Hodgson *v.* Ambrose, Doug. 337; S. C. in Dom. Proc. 3 B. P. C. (Toml. ed.) 416; Sayer *v.* Masterman, Amb. 344; Measure *v.* Gee, 5 Barn. & Ald. 510.

(*f*) King *v.* Melling, 2 Lev. 58; 1 Ventr. 225; 3 Keb. 42, S. C.

(*g*) Papillon *v.* Voice, 2 P. W. 471; Denn d. Webb *v.* Puckey, 5 Durn. & E. 299; Frank *v.* Stovin, 3 East, 548; Jones *v.* Morgan, 1 B. C. C. 206; Bennett *v.* Earl of Tankerville, 19 Ves. 170.

(*h*) Lady Jones *v.* Lord Say and Sele, 8 Vin. Ab. 262, pl. 19; S. C. in Dom. Proc. 3 B. P. C. (Toml. ed.) 458; though, in this case, it was held, that the estate for life was equitable, and the gift to the heirs carried the legal estate. See also Roberts *v.* Dixwell, 1 Atk. 607.

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[1] It was remarked by Parker, C. J., in Bowers *v.* Porter, 4 Pick. 207, that "it is unfortunate that this intention [to abolish the rule in Shelley's case] was not more clearly expressed [in the Statute of Massachusetts, 1791, c. 60]; for it certainly is not wholly without doubt, whether, in order to come within the operation of this statute, the estate for life should not be created by express terms in the will, and also whether the remainder to the heirs should not be expressly, and not by implication only, a fee simple." We are inclined to think, however, that where by construction of law a life estate is created, and in the same way a remainder to the heirs or children in fee, this statute will operate to prevent the application of the rule in Shelley's case.

no power to defeat the testator's intent, will prevent the remainder to the heirs attaching in the ancestor. (*a*)

With respect to the limitation to the heirs of the body, it is (as before suggested) immaterial whether they are described under that *or any other denomination*, since it is clear
* that in every case in which the word "issue" or "son" [247]
is construed to be a word of limitation, and follows a devise to the parent for life, or for any other estate of freehold, such parent becomes tenant in tail by force of the rule in Shelley's case. The words in question are read as synonymous with *heirs of the body*, and, consequently, the effect is the same as if those words had been actually used. Upon the same principle, in the converse case, *i. e.* where the words *heirs of the body* are explained to mean some other class of persons, the rule does not apply.

It is clear, too, that the limitation to the heirs of the body may arise by implication; [1] as (if the will is subject to the old law) in the case of a devise to A for life, and in case he shall die without heirs of his body, or without issue, then to B. Such a case (in which the first taker, beyond all doubt, has an estate tail) (*b*) is an exemplification of the rule in Shelley's case. A gift to the issue or to the heirs of the body is implied; and the effect is, that the devise is read as a gift to A for life, and, after his death, to his issue or heirs of the body, (*c*) which brings it to the common case illustrative of the rule. These positions are indisputable, but the first and third appear to be frequently lost sight of.

As no declaration, the most positive and unequivocal, that the ancestor shall take only, or his estate be subject to the incidents of, a life estate, will exclude the rule, so a declaration, that the heirs shall take as purchasers, is equally inoperative to have such effect. (*d*)

The rule in Shelley's case applies where the limitation to the heirs of the body is *contingent*. Thus, under a devise to A and B for their joint lives, with remainder * to [248]
the heirs of the body of him who shall die first, the heir takes by descent. (*e*)

It seems, however, that the mere possibility of the estate of freehold determining before the ancestor has heirs of his body (*i. e.* before his decease, since nemo est hæres viventis,) does not render the limitation contingent. Thus, where (*f*) lands were

(*a*) Roe d. Thong *v.* Bedford, 4 Mau. & Selw. 362.
(*b*) See post.
(*c*) See Lord Hardwicke's judgment in Lethieullier *v.* Tracy, as reported 1 Hammer's Cases, 56.
(*d*) See Harg. Law Tracts, 561.
(*e*) See 1 Preston on Estates, 316.
(*f*) Curtis *v.* Price, 12 Ves. 99.

[1] Ante, 181, note (1).

limited to A *during widowhood*, and, after her death, *to the heirs of her body*, (in which case it is evident that, by the marriage of A, her estate would be determined before she could have any heirs of her body,) Sir W. Grant, M. R., held that an absolute estate tail was executed in her; and this accords with the resolution of the Judges in the early case of Merrill *v.* Rumsey. (*a*)

The difference between these and the former cases is, that there the limitation is contingent in the very terms of its creation, and the rule, therefore, does not alter it in this respect; but in the latter cases, the limitation is merely contingent by the application of a principle of law governing remainders; and when the rule under consideration operates to prevent its taking effect as a remainder, it destroys its contingent quality. The same principle is applicable, in the case of a devise to A for the life of B, remainder to the heirs of his body; for as the limitations operate by force of this rule to give an executed estate tail, that estate is not affected by the circumstance of B, the cestui qui vie, dying in the lifetime of A, and, consequently, before he has any heir of his body. (*b*)

[249] It is essential to the operation of the rule in Shelley's *case, that the heirs of the body should proceed from the person taking the estate of freehold, and of that person only; for, if the devise be to A for life, and, after his decease, to the heirs of the body of A, *and of another person*, who might have a common heir of their bodies, it is a contingent remainder in tail to the heirs.

Thus in Gossage *v.* Taylor, (*c*) where the limitations were to the wife for life, remainder to the heirs to be begotten on the body of the wife by the husband, the heirs were held to take by purchase.

And the same construction prevailed in Frogmorton d. Robinson *v.* Wharrey, (*d*) where S. surrendered copyholds to the use of M., his then intended wife, remainder to the heirs of their two bodies lawfully to be begotten.

It may be observed, that, under such limitations, if the person taking the estate for life die in the lifetime of the other, the contingent remainder to the heirs fails; (*e*) for, as there could be no heir of their bodies, until the death of both, (nemo est hæres viventis,) the failure of the particular estate before that period defeats the remainder. (*f*)

But if, in such a case, the tenant for life, and the other per-

(*a*) T. Raym. 126; S. C. 1 Keb. 188. But see 1 Sid. 287.
(*b*) See Perkins, s. 337; Merrill *v.* Rumsey, 1 Keb. 188; S. C. T. Ray. 126; Fea. C. R 31.
(*c*) Sty. 325.
(*d*) 3 Wils. 125, 144; S. C. 2 W. Bl. 728. See also Lane *v.* Pannell, 1 Roll. Rep. 238, 317, 438.
(*e*) Lane *v.* Pannell, 1 Roll. Rep. 238, 317, 438.
(*f*) See this rule adverted to, ante, vol. i. p. 786.

son to whose heirs the limitation is made, are of the same sex, or, being of different sexes, are not actually married, and are so related by consanguinity or affinity, that they cannot have, or be presumed to have common heirs of their bodies, the effect is obviously different; for, as the testator cannot mean heirs issuing from them both, the limitation is to be read as a limitation to the heirs of the body of A the tenant for life, and to the heirs of the body of the *other person respec- [250] tively. The consequence is, that the former becomes by force of the rule, tenant in tail of one undivided moiety, and the heir of the latter takes the other moiety by purchase.

Pari ratione, if A and B were tenants in common for life, with remainder, as to the entirety, to the heirs of the body of A, he would be tenant in tail of one undivided moiety, and there would be a contingent remainder in tail to the heirs of his body in the other moiety.

Where the freehold is limited to husband and wife, concurrently, (and the same principle seems to apply in regard to persons capable, de jure, of becoming such,) with remainder to the heirs of their bodies, the heirs by the operation of the rule in question, take by descent. (*a*) And the effect, it should seem, would be the same, if *successive* estates for life were limited to the husband and wife, or to persons capable of becoming such, with remainder to the heirs of their bodies. (*b*)

Here it may be observed, that where there is a limitation to two persons jointly, with remainder to the heirs of the body of *one* of them, the disentailing assurance (now substituted for a common recovery) of the latter will acquire the fee simple in a moiety; (*c*) unless these persons are husband and wife, in which case, as they take by entireties, and not by moieties, neither of them singly and without the concurrence of the other, can make an effectual conveyance of the immediate freehold. (*d*)

Thus where the husband and wife were seised to them, and the heirs of the body of the husband, and the husband alone suffered a common recovery, with single voucher (in which recovery *he was tenant to the præcipe,) it [251] was held, that it did not bar the entail even in a moiety. (*e*)

Questions of this kind have most frequently occurred under limitations in marriage settlements, but they may of course arise under wills. In deciding on the application of the rule to such

(*a*) See Roe d. Aistrop *v.* Aistrop, 2 W. Bl. 1228.
(*b*) Stephens *v.* Bretridge, 1 Lev. 36; S. C. T. Raym. 36.
(*c*) Marquess of Winchester's case, 3 Rep. 1.
(*d*) Ante, p. 157.
(*e*) Owen's case, Litt. 578; Poll. 88, 337. See also Doe d. Freestone *v.* Parratt, 5 Durn. & E. 652.

cases, the first object should be, to see out of whose body the heirs are to issue; and if it be found that they are to proceed from any person who takes an estate of freehold, and him or her only, such person becomes tenant in tail. If from a person who takes an estate of freehold jointly with another not taking any such estate, it seems he or she will take an estate tail sub modo only. (*a*) If from a person who takes an undivided estate in common, he will then, we have seen, take an estate tail to the extent of that undivided interest; but if the heirs of the body are to proceed from two persons as husband and wife, and *one* of them only takes an estate for life, the heirs will be purchasers.

If the limitation is to husband and wife, and the heirs to be begotten *on* the body of the wife by the husband, this will be an estate tail in both; (*b*) for as the heirs are not in terms required to be of the body of either in particular, the construction is the same as if they were to issue from *both;* and, accordingly, we have seen, that where such a limitation occurred after an estate for life to the wife only, it was held, that she did not take an estate tail. (*c*)

On the other hand, if the devise be to the wife for life, and then to the heirs *of* her body to be begotten by the husband, she takes an estate tail special, by force of the rule under
[252] * consideration. (*d*) The distinction, it will be perceived, is between heirs *on* the body and heirs *of* the body.

So if the limitation were to the husband for life, remainder to the heirs of the body of the husband on the wife to be begotten, he would, by the application of the same principle, have an estate tail special. But if, in the former case, the estate for life had been limited to the *husband*, and, in the latter, to the *wife*, the heirs of the body would have taken by purchase.

Under limitations in special tail, if the tenant in tail survive the other person from whom the heirs are to spring, and there be no issue, such surviving tenant in tail becomes, as is well known, tenant in tail after possibility of issue extinct. In the case of Platt *v.* Powles, (*e*) it was decided that such was the situation of the testator's widow, to whom lands were devised *for life, and after her decease to the heirs of her body by him*, at the expiration of the period during which she might have had issue by the testator, namely, nine or ten months after his death. During that time, issue, being, in contemplation of law, possible, (irrespective of age,) and the devisee, therefore, being tenant

(*a*) See Fea. C. R. 41, *et seq.*
(*b*) Roe d. Aistrop *v.* Aistrop, 2 W. Bl. 1228; Denn d. Trickett *v.* Gillott, 2 Durn. & E. 431.
(*c*) Gossage *v.* Taylor, Sty. Rep. 325.
(*d*) Alpass *v.* Watkins, 8 D. & E. 516.
(*e*) 2 Man. & S. 65.

in tail, she might have acquired the fee by means of a common recovery.

II. It has been already observed, that the rule in Shelley's case applies as well to equitable limitations as to legal estates.[1] Mr. Fearne has labored to establish this conclusion, in opposition to the case of Bagshaw *v.* Spencer, (*a*) which was decided by Lord Hardwicke, on the ground of the difference of construction applicable to legal * and equitable [253] interests; a doctrine which has been overruled in a long series of cases, (*b*) including a subsequent decision of this eminent Judge himself. (*c*)

The preceding remarks, it should be observed, apply only to *executed* trusts; for between trusts *executed* and *executory* there is a very material difference, which requires particular examination.

A trust is said to be executory or directory where the objects take, not immediately under it, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested. As where a testator (*d*) devises real estate to trustees in trust *to convey* it to certain uses, or directs money to be laid out in land, *to be settled* to certain uses. In these cases, the direction to convey or settle is considered merely in the nature of instructions, or heads of a settlement, which are to be executed, not by a literal adherence to the terms of the will, which would render the direction to settle nugatory, but by formal limitations adapted to give effect to the purposes which the author of the trusts appears to have had in view.

Thus, when a testator devises lands to trustees with a direction to settle them, or bequeathes a money fund to be laid out in the purchase of lands to be settled, to the use of A for life; remainder to trustees during his life to preserve contingent remainders; remainder to the heirs of the body of A, (limitations under which, if literally followed, A would be tenant in tail, by force of the rule in Shelley's case,) courts of equity, presuming that the testator could not have so absurd an intention as that a conveyance should be made, * vesting in the first taker an estate, which would enable him immediately to acquire the fee simple by means of a disentailing assurance, execute the trust by directing a strict set- [254]

(*a*) Bagshaw *v.* Spencer, 1 Ves. Sen. 148; S. C. 2 Atk. 246, 570, 577. See Fea. C. R. 124, *et seq.*

(*b*) Bale *v.* Coleman, 2 Vern. 670; S. C. 1 P. W. 142; Wright *v.* Pearson, 1 Ed. 119; Austen *v.* Taylor, Id. 361; Jones *v.* Morgan, 1 B. C. C. 206. See also Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 559, inf.

(*c*) Garth *v.* Baldwin, 2 Ves. Sen. 646.

(*d*) See Hayes's Inquiry, 248, 249, and 270.

[1] See Tallman *v.* Wood, 26 Wendell, 9; 4 Kent, (5th ed.) 219.

tlement, *i. e.* limitations to the use of A for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail. (*a*)

So, in Leonard *v.* Earl of Sussex, (*b*) where lands were devised to trustees and their heirs for payment of debts and legacies, with a direction afterwards to *settle* what should remain unsold, one moiety to the testatrix's son H. and the heirs of his body by a second wife, with remainder over; and the other moiety to the testatrix's son F. and the heirs of his body, with remainders over, taking special care in *such settlement* that it should *never be in the power* of either of the sons to *dock the entail of either of their moieties;* (*c*)—It was held, that, in executing the settlement, the sons must be made only tenants for life, and should not have estates tail *conveyed* to them; but their estates for life should be without impeachment of waste; because here the estate was *not executed*, but only *executory;* and therefore the intent and meaning of the testatrix was to be pursued: she had declared her mind to be, that her sons should not have it in their power to bar their children, which they would have if an estate tail were to be conveyed to them. And the Court took it to be as strong in the case of an *executory* [trust in a] devise, for the benefit of the issue, as if the like provision had been contained in marriage articles; but had the
[255] *testatrix by her will devised to her sons an estate tail, the law must have taken place; and they might have barred their issue, notwithstanding any subsequent clause or declaration in the will, that they should not have power to dock the entail. (*d*)

So in Lord Glenorchy *v.* Bosville, (*e*) where the devise was to trustees and their heirs, in trust, till the marriage or death of A, to receive the rents and pay her an annuity for her maintenance, and as to the residue, to pay his debts and legacies, and after payment thereof in trust for A; and if she married a Protestant, after her age, or with consent, &c., then *to convey* the estate after such marriage to the use of her *for life*, without impeachment of waste, remainder to her husband for life, remainder to the *issue of her body*, with remainders over: Lord Talbot held that though A would have taken an *estate tail*, had it been the case of an *immediate devise*, yet that the trust, being *executory*, was to be *executed in a more careful and more accurate manner;* and that a conveyance to A for life, remainder to the husband

(*a*) Papillon *v.* Voice, 2 P. W. 471. See also Leonard *v.* Earl of Sussex, 2 Vern. 525, post; Earl Stamford *v.* Hobart, 3 B. P. C. (Toml. ed.) 31; Lord Glenorchy *v.* Bosville, Cas. Temp. Talbot, 3; Ashton *v.* Ashton, 1 Coll. Jur. 402; White *v.* Carter, 2 Ed. 366; S. C. Amb. 670; Horne *v.* Barton, Coop. 257.

(*b*) 2 Vern. 525.

(*c*) See observation infra.

(*d*) As to this, see ante, vol. 1, p. 813.

(*e*) Cas. Temp. Talb. 3. See also Ashton *v.* Ashton, 1 Coll. Jur. 525.

for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

Again in White *v.* Carter, (*a*) where a testator gave his personal estate to trustees to purchase land, to be settled and assured as counsel should advise, unto and upon the trustees and their heirs upon trust, and to go for the use *of A and his issue in tail male, to take in succession and priority of birth;* and there was a direction to the trustees to pay the dividends of the moneys until the purchase, to A *and his sons*, and issue male, Lord Northington decreed a strict settlement.

* The direction as to the moneys rendered this a very [256] clear case.

But a distinction has been sometimes taken between the effect of a clause directing the trustees to purchase land, *and settle it*, as in Papillon *v.* Voice, and White *v.* Carter, and a direction to them simply to purchase, the testator himself declaring the uses of the land so to be purchased. Thus in Austen *v.* Taylor, (*b*) where the testator devised lands to A for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A; and bequeathed personal estate to be laid out in land, *which should remain, continue, and be* to the same uses as the land before devised; Lord Northington, after observing, in reference to Papillon *v.* Voice, and Leonard *v.* Earl of Sussex, that there the trustees were directed *to settle, and that an estate tail would have been no settlement*, held, that the case before him was distinguishable, inasmuch as the testator had referred to no settlement by the trustees, but had declared his own uses and trusts; which being declared, he knew no instance where the Court had proceeded so far as to alter or change them; accordingly, A was to be tenant in tail in the lands to be purchased.

This case is stated by Mr. Ambler to have been dissatisfactory to the profession, which is denied by Lord Henley; (*c*) but Lord Eldon has spoken of the decision in terms which imply doubt of its soundness. (*d*) His Lordship also observed, that the Judges who decided Papillon *v.* Voice, and Austen *v.* Taylor, agreed in the principle, but differed in the application of it. The distinction upon which the latter case is founded, (or at least is usually supposed to be founded,) certainly has *not [257] been invariably adopted, for in Meure *v.* Meure, (*e*) where lands were devised to trustees in trust to sell, who with the money arising from the sale, were to purchase other freehold

(*a*) 2 Ed. 366.
(*b*) 1 Ed. 361; S. C. Amb. 376.
(*c*) See note, 1 Ed. 369.
(*d*) See Green *v.* Stephens, 17 Ves. 76; Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 574.
(*e*) 2 Atk. 265.

lands or some stock in the public funds, and then to permit A and his assigns to receive the interest and profits for his life, and after his decease to permit the plaintiff and his assigns to receive the interest and profits of the said money as aforesaid, or the rents and profits of the said land, if unsold, or such other lands as should be purchased, *during his natural life*, and after his decease, then in trust *for the use of the issue of the body of the plaintiff lawfully begotten*, and in default of such issue, over; Sir J. Jekyll, M. R., held, that in executing the trust, lands should be purchased, *and the plaintiff made tenant for life only.*

Here the lands to be purchased were devised immediately to these limitations, without any express direction to settle; and the terms used would, if applied to lands directly devised, clearly have made A tenant in tail, (*a*) and yet he was held to be tenant for life only.

So in Harrison *v.* Naylor, (*b*) where the testator directed his executors to purchase a freehold estate, and *gave and devised* such estate when purchased to A., to him and the heirs male of his body forever; and if A. should die without issue male, then he *gave and devised* the said estate to the heir male of his (testator's) daughter E., but if E. had no issue, then he gave and devised the said estate, on a certain condition, to his (testator's) next heir at law: And reciting that he was not certain whether it was possible to entail an estate not yet purchased, he directed his executors to consult some eminent lawyers; and if they held, that such entail, as was expressed in the will, was repugnant to law, then his personal estate should be equally divided
[258] between T. and E.: Lord Thurlow *said it was impossible to argue against A.'s having an estate tail, and that the money must be invested [in lands to be settled] to the use of A. and the heirs of his body, with a contingent remainder in tail to the person who should answer the description of heir male of E. at the time of her death, with remainder to the right heir of the testator; but counsel suggesting that, as this was an *executory trust*, the Court would interpose, after the estate tail to A., a limitation to trustees to preserve the contingent remainder to the heir male of E., the daughter, his Lordship was of opinion that such a limitation should be inserted, and declared that the uses were to be to A. and his heirs in tail male, *with remainder to trustees to support contingent remainders*, remainder to the heirs male of E., the daughter in fee; and if she should have no heirs male, then to the heir at law of the testator in fee.

By interposing the estate in the trustees, Lord Thurlow evidently treated the trust as executory, though the testator had in direct terms devised the purchased lands. In this respect, there-

(*a*) See post. (*b*) 2 Cox, 247.

fore, the case is another authority against Austen *v.* Taylor, of which, however, it may be observed, that to have made A. tenant for life only of the lands to be purchased, would have created a diversity between them and the lands devised, which the testator evidently intended should be held together. This distinguishes the case from and reconciles it with those just stated.

But even where there is a clear direction to the trustees to frame the settlement, the doctrine of some of the cases requires, that to warrant the introduction of limitations in strict settlement, it should be indicated by the context that the testator did not intend an estate tail to be created, according to the technical effect of the expressions used.

Thus, in the case of Seale *v.* Seale, (*a*) where a testator bequeathed *money to be laid out in the purchase [259] of lands, to be settled *on A and the heirs of his body*, Lord Cowper held, that A was absolutely entitled to the money not laid out; and though it was suggested that the Court would order a strict settlement, his Lordship observed, that in marriage articles the children are considered as purchasers; but in the case of a will, (as this was,) where the testator expresses his intent to give an estate tail, a court of equity ought not to abridge the bounty given by the testator.

This principle was carried to a great length in the subsequent case of Blackburn *v.* Stables, (*b*) where the testator devised the remainder of his real and personal estate in trust to his nephew J., and to M., his executor, for the sole use of a son of the said J., at the age of twenty-four; if he had no son, to a son of testator's great-nephew J.; but if neither of those had a son, then to a son of testator's great-niece's daughter E., with a direction to take his (testator's) name; but on whomsoever such his disposition should take place, his will was that he should not be put in possession of any of his effects till the age of twenty-four, nor should his executors give up their trust *till a proper entail were made to the male heir by him*, (the person so being entitled.) J., the nephew, had no son born at the testator's death, but his wife was then enceinte with a son, who was afterwards born, and attained twenty-four: Sir W. Grant, M. R., observed, that "it is settled that the words 'heir,' or 'heir male of the body,' in the singular number, are words of limitation, not of purchase, unless words of limitation are superadded, or there is something in the context to show that the testator did *not [260] mean to use the words in their technical sense. But there is nothing in the context of this will from which that can be collected; there is an absence of every circumstance that has commonly been relied on as showing such an intention. The word is 'heir,' not '*issue*.' There is *no express estate for life*,

(*a*) Pre. Ch. 421; S. C. 1 P. W. 290. (*b*) 2 Ves. & Bea. 367.

given to the ancestor; no clause that the estate shall be *without impeachment of waste; no limitation to trustees to preserve contingent remainders;* no direction so to frame the limitation that the first taker shall not have the power of barring the entail. Every thing is wanting that has furnished matter for argument in other cases; the words are therefore to be taken in their legal acceptation, and the son of J. is entitled to have the conveyance made to him *in tail male.*

So, in the subsequent case of Marshall *v.* Bousfield, (*a*) where a testator devised to a wife and her heirs, upon trust, that she should enjoy the estates during her life, and, after her decease, that the same *should be settled by able counsel*, and go to and amongst his grandchildren of the male kind, *and their issue in tail male*, and for want of such issue, upon his female grandchildren who should be living at his decease; but the testator declared that the shares and proportions of the male and female grandchildren, and their respective issues, should be in such proportions as his wife should by deed or will appoint; and, for want of such appointment, to the testator's own right heirs forever. The wife appointed in favor of the testator's grandson W., and the heirs male of his body. It was objected that this was an executory trust, under which W. would be made tenant for life, with remainder to his issue in strict settlement; but Sir T. Plumer, V. C., held, that the words "in tail male" applied to the grandchildren, and that no language was used
[261] which had been held in other cases to *give only an estate for life. He observed, that unless the grandchildren took an estate tail, the limitation, so far as regarded a grandson who was born after the testator's death, would be void, as being too remote. (*b*)

The latter circumstance constitutes a peculiarity in this case, which otherwise afforded strong arguments in favor of a strict settlement. The estate was to be settled *by able counsel*, (*c*) and the word was *issue*, not heirs of the body. (*d*) Confidence in the case, too, is weakened by the fact, that another determination of the same Judge on a question of this nature has been impeached. (*e*)

The reader should suspend any conclusion he may be disposed to draw from the two preceding cases of Blackburn *v.* Stables, and Marshall *v.* Bousfield, until he has carefully weighed them with Lord Eldon's decision in the subsequent case of Jer-

(*a*) 2 Madd. 166.

(*b*) But there was ground to contend that, as the limitation to the female grandchildren was confined to those living at his death, the same construction might be given to the gift to the *male* grandchildren.

(*c*) See White *v.* Carter, (2d ed.) 366; S. C. Amb. 670; Bastard *v.* Proby, 2 Cox, 6.

(*d*) See judgment in Meure *v.* Meure, 2 Atk. 265. And Blackburn *v.* Stables, 2 Ves. & Bea. 367, ante, p. 259.

(*e*) See Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 559.

voise *v.* Duke of Northumberland, (*a*) where the words were, "To my son R. I leave all my estates at" B., &c., "*to be entailed upon his male heirs;* and, failing such, to pass to his next brother, and so on from brother to brother, allowing £2500 each to be raised upon the estates for female children. The above-named estates are to be liable to all my debts at my decease, and to the fortunes left to my younger children, unless otherwise discharged. I direct my estate at M. to be sold, in order to raise money for the above-named legacies, and what falls short to be raised or charged on the other property at" B., &c. The legal estate was not in the testator. *In a [262] suit for declaring the right of all parties, Sir T. Plumer, V. C., decreed that R. was entitled to an *estate tail.* The estate was afterwards settled on the marriage of R., and was purchased by the Duke of Northumberland, under a power of sale in the settlement; but his Grace objecting to the title, a bill was filed to enforce specific performance. It was contended for him that the trust was merely directory, and that the Court, in executing it, would mould the limitations in the nature of a strict settlement; and Lord Eldon thought the contrary so doubtful, that he could not compel a purchaser to take the title. His Lordship, indeed, expressed a strong opinion that the trust was directory; and his observations leave us not much room to doubt that, if called upon to execute it, he would have decreed a strict settlement, and not have given R. an estate tail.

Lord Eldon in this case intimated that he did not think that the circumstance of the power being given to the devisee to charge a sum of money on the estate was a conclusive argument that he was to be only tenant for life, since, in many cases, powers are usefully given to a tenant in tail, enabling him to do certain acts more conveniently than by destroying the entail.

Most of the cases of this kind have arisen on marriage articles (*b*) to which the same principles are applicable as to executory trusts by will, with this difference, that, as it is in every case the object of marriage articles to provide for the issue of the marriage, the nature of the instrument affords a presumption of intention in favor of the issue, which does not belong to wills; and Lord Eldon, in the last case, (*c*) intimated *that the observations imputed to him in Countess of [263] Lincoln *v.* Duke of Newcastle, (*d*) were to be received with this qualification. (*e*)

The preceding cases do not clearly demonstrate the precise grounds on which courts of equity will execute a trust of the nature of those under consideration, by the insertion of limita-

(*a*) 1 Jac. & Walk. 559.
(*b*) See Fea. C. R. 90; 1 Prest. Est. 354.
(*c*) 1 Jac. & Walk. 571, 574.
(*d*) 12 Ves. 227, 230.
(*e*) See Rochford *v.* Fitzmaurice, 1 Conn. & Laws, 158.

tions in strict settlement. It has sometimes been thought that the principle extends to every case in which the testator has left *any thing to be done;* and that the Court only requires it to be shown that the trust is executory, in order to mould the limitations in this manner. Some of Lord Eldon's observations in Jervoise *v.* Duke of Northumberland have been supposed to go to this length; (*a*) and perhaps it is difficult to place the doctrine, consistently with the liberty which has been taken with the testator's expressions, upon a narrower basis; (*b*) but in the actual state of the decisions, it is too much to hazard a general position of this nature. No case has yet determined that a trust *in a will*, to settle lands simply on A and the heirs of his body, authorizes the Court to limit estates in strict settlement. The case of Leonard *v.* Earl of Sussex, it is true, had only the additional circumstance of a direction that it should not be in the power of A to dock the entail, with respect to which the writer fully concurs in the observation of a learned friend, (*c*) "that this rather weakened than strengthened the presumption, that the testator intended A to be merely tenant for
[264] life;" *the direction seeming rather to import that A was to take an estate tail, without the power of docking it. The case, however, was decided, and has been since generally referred to, as standing upon this ground; and it is to be observed also, that the case (*d*) of Seale *v.* Seale is a direct authority against applying the doctrine to the simple case suggested.

Indeed, some Judges have denied its application even to the case of a direction to settle lands upon A *for life*, and, after his death, to the heirs of his body Such was the opinion expressed by Sir J. Jekyll, in Meure *v.* Meure, (*e*) and Sir W. Grant, in Blackburn *v.* Stables, though the former decided that a different construction was to be given to the word "issue," and the latter, we have seen, was disposed to yield to a declaration that the estate should be *without impeachment of waste*, or that there should be a limitation *to trustees to preserve contingent remainders.* This distinction is certainly very refined. How can a testator intimate that he intends the object of the trust to be tenant for life more strongly than by expressly so limiting the estate? If the rule in Shelley's case be objected as destroying

(*a*) See Hayes's Inq. 262, n.

(*b*) If the courts are bound to require an indication that the testator intended only an estate for life, would it not seem that by parity of reason they are obliged to adhere to the testator's language, *ultra* this object, provided the will contain no further evidence that he does not mean an estate tail, *i. e.* by giving the ancestor an *equitable* freehold, and the heirs a *legal* remainder, thus making the heirs purchasers? Their not having done this, certainly affords an argument in favor of the hypothesis suggested.

(*c*) Hayes's Inq. 262, n.

(*d*) 1 P. W. 132, ante, 259. See also Sweetapple *v.* Bindon, 2 Vern. 536.

(*e*) 2 Atk. 265, ante, 257.

that inference of intention, the answer is, that neither of the other circumstances, to which this potency of operation is admitted to belong, prevents the application of that rule. In this respect they are all equally inoperative, though they all indicate an intention to confer an estate for life only. Even, therefore, if we hesitate to subscribe to the more general (though perhaps the more reasonable doctrine,) that a direction to settle authorizes the Court to adopt its own mode of settlement, without regard to the particular force of the terms used by the testator, and requires *distinct indication of intention* *that [265] the testator did not mean that the legal effect of those terms should be followed, yet even upon this principle the case under consideration would warrant the Court in moulding the limitations.

In fact, the case of Bastard *v.* Proby (*a*) is a direct authority in favor of the affirmative. A testator devised lands to trustees, in trust to lay out the rents for the benefit of his daughter J., until twenty-one or marriage; and, on her attaining that age, directed that the trustees should, *as counsel should advise, convey, settle, and assûre* the lands unto or to the use of, or in trust of, the said J. *for her life*, and, after her death, then *on the heirs of her body* lawfully issuing; and Sir Lloyd Kenyon, M. R., directed that conveyances should be executed limiting uses in strict settlement.

Where the testator, instead of employing technical terms, as in the cases just noticed, expresses himself in very brief, informal language, by directing *an entail to be made*, as in Blackburn *v.* Stables, and Jervoise *v.* Duke of Northumberland, it is useless to look for a specification of particulars, as that the devisee shall be tenant for life, &c.; the general indefinite nature of the testator's language forbids it; he may be supposed to have intended to exclude a strict interpretation by the use of terms the farthest removed from technicality, and which, in their popular sense, certainly mean something very different from placing the estate in the power of the first taker. No conveyancer receiving instructions for a settlement in these terms would hesitate to insert limitations in strict settlement; and the principle upon which Courts of Equity proceed in the execution of directory trusts is not very widely different. Considering Lord Eldon's *determination, in Jervoise *v.* Duke of North- [266] umberland, and more especially the doctrines advanced by him in his elaborated judgment in that case, it seems unsafe to rely on Blackburn *v.* Stables, to which it is extraordinary that his Lordship, in his comment upon the cases, makes no allusion. (*b*)

(*a*) 2 Cox, 6.

(*b*) See further, as to executory trusts, Fea. C. R. 113; Prest. Est. 387; 1 Sand. Uses, 310; 1 Foubl. Eq. 407, n.; Hayes's Inq. 264, where see strictures upon the

It is clear, that where a testator devises real estate to trustees upon trust, and then directs that, in certain events, they shall convey the estate in a prescribed manner, the fact that the will contains such a direction does not constitute a ground for regarding the whole series of trusts as executory, and for applying to the former that liberality of construction which is peculiar to trusts of this nature. (*a*)

III. It may be useful, as supplementary to the preceding discussion of the rule in Shelley's case, to state, for the use of the student, the practical bearings of the alternative whether the heir takes by descent or by purchase; which will be best shown by suggesting a case of each kind. Suppose, then, a devise *to A* for life, remainder to the heirs of his body; and suppose another devise to the use of *trustees for the life of B*, in trust for B, remainder to the use of the heirs of his body. In the former case, the ancestor being tenant in tail, the heirs of his [267] body can *claim only derivatively through him by descent per formam doni, and, therefore, if A die in the lifetime of the testator, the heir (unless the will were made or republished subsequently to 1837) takes nothing, the devise to his ancestor having lapsed. (*b*)

On the other hand, in the latter supposed case, if B should die in the testator's lifetime, it would not affect his heir, who claims, not derivatively through his ancestor, but originally in his own right by purchase; and who would, therefore, be entitled under the devise, notwithstanding his ancestor's death in the lifetime of the testator. The estate tail would go by a sort of quasi descent (*c*) through *all* the heirs of the body of the ancestor, first exhausting the inheritable issue of the first taker, (and which issue would claim by descent,) and then devolving upon the collateral lines; the head of each stock or line of issue claiming as heir of the body of the ancestor by purchase, but taking in the same manner as such heir would have done under an estate tail vested in the ancestor.

Another difference to be observed is, that where the heir takes *by descent*, the property, if in possession, devolves upon him, subject to the dower of the widow of his ancestor, if he were married at his death, (provided, in regard to the dower of a

observations of the other writers referred to. Lord Eldon, in Jervoise *v.* Duke of Northumberland, intimated his assent to the conclusions of Mr. Fearne on the subject of executory trusts, which is one of the many tributes of respect paid to the labors of this very eminent writer, by those whose profound knowledge of the laws of real property enabled them to appreciate those labors.

(*a*) Franks *v.* Price, 3 Beav. 182.

(*b*) Brett *v.* Rigdon, Plow. 340; Hartop's case, Cro. El. 242; Hutton *v.* Simpson, 2 Vern. 722; Hodgson *v.* Ambrose, Dougl. 337; 3 B. P. C. (Toml. ed.) 416; Wynn *v.* Wynn, Id. 95; Warner *v.* White, Id. 435. The abstract prefixed to the last case is singularly inaccurate.

(*c*) Mandeville's case, Co. Litt. 26 *b*. See Fea. C. R. 80.

widow, whose marriage was prior to or on the first of January, 1834, (*a*) his estate were *legal*, and not equitable only,) or subject to curtesy, if the ancestor were a married woman, who left a husband by *whom she had had issue born [268] alive *capable of inheriting*, and which attaches whether the estate be legal *or* equitable. On the other hand, where the heir takes by purchase, of course none of these rights, which are incident to estates of inheritance, attach, the ancestor being merely tenant *for life*.

And, lastly, if the heir of the body take by descent, his claim may be defeated by the alienation of his ancestor by means of a conveyance enrolled, now substituted for a common recovery, the right to make which is, we have seen, an inseparable incident to an estate tail. (*b*). On the other hand, the heir claiming by purchase is unaffected by the acts of his ancestor, except so far as those acts may have happened to destroy the contingent remainder of such heir, if not supported (as it always should be) by a preceding vested estate of freehold. The conveyance, it should be observed, of a person becoming tenant in tail by force of the rule in Shelley's case, under a limitation to the heirs of his body, not *immediately* expectant on his estate for life, has no effect upon the mesne estates, unless they happen to be legal remainders, contingent and unsupported. Thus, in the case of a limitation to A for life, remainder to his first and other sons in tail male, remainder to the heirs of the body of A, with remainders over; A, being tenant in tail by the operation of the rule, may make a disentailing assurance; but though such assurance will bar the remainders ulterior to the limitation to the heirs of his body, it will not affect the intervening estate of the first and other sons, unless there were no son born at the time, and no estate interposed to preserve the remainders of the sons; in which case, such remainders being contingent, would clearly be destroyed.

*It may be useful to illustrate the practical conse- [269] quences of a limitation of another description. Suppose a devise to A and B *jointly* for their lives, remainder to the heirs of their bodies; if they were *not* husband and wife, (or, it would seem, persons who may lawfully marry,) they would be *joint* tenants for life, with *several* inheritances in tail. An enrolled conveyance by either would acquire the fee simple in an undivided moiety, and they would thenceforward be tenants in common: by parity of reason, a similar conveyance by both would comprise the entirety. If the limitation were to them *successively* for life, A would be tenant for life of the entirety, with the inheritance in tail in one moiety, subject, as to the latter, to B's estate for life, and B would be tenant for life in remainder of

(*a*) Stat. 3 & 4 Will. IV. c. 105. (*b*) Ante, vol. 1, p. 813.

one moiety, and tenant in tail in remainder of the other moiety. A being tenant in tail in possession, might make a disentailing assurance, which would give him the fee simple in a moiety of the inheritance, but would not, as before shown, affect B's estate for life in remainder in that moiety. B, on the other hand, having no immediate estate of freehold, could not, during the life of A, and without his concurrence, acquire, by means of an enrolled conveyance, a larger estate than a base fee determinable on the failure of issue inheritable under the entail. A and B might conjointly convey the absolute fee simple in the entirety.

If, under a devise to A and B jointly for their lives, with remainder to the heirs of their bodies, A and B were persons who might lawfully marry, they would be joint tenants in tail; if they were actually husband and wife, they would be tenants in tail by entireties. In the former case, each might acquire the fee simple in his or her own moiety, by making a disentailing assurance thereof; but, in the latter case, the concurrence of both would be essential, on the ground of the unity of
[270] person * of husband and wife, and the deed of course must be acknowledged by the wife. In each of the suggested cases, if the estate remained unchanged at the decease of either of the two tenants in tail, it would devolve to the survivor, according to the well-known rule applicable as well to joint tenancies as tenancies by entireties.

CHAPTER XXXVIII.

WHAT WILL CONTROL THE WORDS "HEIRS OF THE BODY.

I. *Effect of superadded Words of Limitation.*
II. *Words of Modification inconsistent with the devolution of an estate tail.*
III. *Clear words of explanation.*

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I. It has been already shown, that a devise to A and to the heirs of his body, (*a*) or to A *for life*, and, after his death, to the heirs of his body, (*b*) vests in A an estate tail. On a devise couched in these simple terms, indeed, no question can arise; for wherever the contrary hypothesis has been contended for, the argument for changing the construction of the words has been founded on some expressions *in the context;* as where words of limitation are superadded to the devise to the heirs of the body; the effect of which has been often agitated, and will here properly form the first point for inquiry.

Where the superadded words amount to a mere repetition of *the preceding words of limitation*, they are of course inoperative to vary the construction. Expressio eorum quæ tacite insunt nihil operatur.

Thus, in Burnett *v.* Coby, (*c*) where a testator de-
[272] vised * lands to A for life, and, after his decease, to the heirs male of the body of A, *and the heirs male of such issue male*, it was held, that A had an estate tail.

It is also well established that a limitation to the *heirs general* of the heirs of the body, is equally ineffectual to turn the latter into words of purchase.[1]

Thus, in the case of Goodright d. Lisle *v.* Pullyn, (*d*) where a

(*a*) Ante, p. 232.
(*b*) Ante, p. 241.
(*c*) 1 Barn. B. R. 367. See also Shelley's case, 1 Rep. 93; Legatt *v.* Sewall, 2 Vern. 551; S. C. 1 Eq. Ca. 394, pl. 7; 1 P. W. 87. See 2 Ves. Sen. 657, where the trust was *executory*, and would, it is clear, according to the doctrine now established, be executed by a strict settlement. See ante, p. 252.
(*d*) Lord Raym. 1437; S. C. 2 Stra. 729.

[1] A testator devised one half of certain real estate to his "son John and the heirs lawfully begotten of his body, and their heirs and assigns;" and it was held, that the first words gave an estate tail to John, and that the words "their heirs and assigns" did not enlarge the devise to a fee simple, either to him or the heirs of his body. Buxton *v.* Uxbridge, 10 Metcalf, 87; Wight *v.* Thayer, 1 Gray, 284, 287. See Corbin *v.* Healey, 20 Pick. 514.

testator devised lands to N. for life, and, after his decease, then he devised the same unto *the heirs male of the body* of N., lawfully to be begotten, *and his heirs forever;* but if N. should happen to die without such heir male, then over; the Court was of opinion, that the devise vested an estate tail in N. A similar decision was made by the Privy Council on a similar devise. (*a*)

So, in Wright *v.* Pearson, (*b*) where the devise was to R. and his assigns for his life, remainder to trustees to support contingent remainders, remainder to the use of *the heirs male of the body* of R., lawfully to be begotten, *and their heirs;* provided that in case R. should die without leaving any issue male of his body living *at his death*, then the testator subjected the premises to certain charges, and, in default of such issue male of R., he devised the premises to certain grandchildren, or such of them as should be living at the time of the failure of issue of R.; Lord Keeper Henley held it to be an estate tail in R.

Again, in Denn d. Geering *v.* Shenton, (*c*) where the testator devised lands to S. to hold to him and *the heirs of his body* * lawfully to be begotten, *and their heirs forever*, [273] chargeable with an annuity to M. for life; but in case S. should die without leaving issue of his body, then the testator devised the lands to W. and his heirs, chargeable as aforesaid, and also subject to the payment of £100 to A. *within one year after W. or his heirs should become possessed of the premises.* It was contended, on the authority of Doe *v.* Laming (*d*) that the words *heirs of the body* might be words of purchase, with these superadded words of limitation, and that this construction was much strengthened by the circumstance of the legacy of £100, which must have referred to a dying without issue at the death, and not to an indefinite failure of issue, which might happen a hundred years thence. But Lord Mansfield, and the rest of the Court of King's Bench, held it to be a clear estate tail in S.

Even if the devise over had been made in express terms to depend on the prior devisee leaving no issue *at the time of his death*, this would not, according to the case of Wright *v.* Pearson, (*e*) have prevented the *prior* devisee taking an estate tail.

So, in Measure *v.* Gee, (*f*) where the devise was to J. for his life, remainder to trustees to preserve contingent remainders, and,

(*a*) Morris d. Andrews *v.* LeGay, noticed 2 Burr. 1103, and 2 Atk. 249, and more fully and somewhat differently stated under the name of Worris *v.* Ward, by Lord Kenyon, 8 Durn. & E. 518.

(*b*) 1 Ed. 119; S. C. Amb. 358; Fea. C. R. 126, where the case is very fully commented on. See also Alpass *v.* Watkins, 8 Durn. & E. 516.

(*c*) Cowp. 410. See also Alpass *v.* Watkins, 8 Durn. & E. 516.

(*d*) 2 Barr. 1100, as to which see post, 287.

(*e*) Ante, p. 272.

(*f*) 5 Barn. & Ald. 910. See also King *v.* Burchell, 1 Ed. 424; Denn *v.* Puckey, 5 Durn. & E. 299; Frank *v.* Stovin, 3 East, 548, where the word was *issue*, as to which see post.

after the decease of J., the testator devised the premises to *the heirs of the body* of J. lawfully to be begotten, *his, her, and their heirs and assigns forever;* but in case there should be a failure of issue of J. lawfully to be begotten, then over. It was contended, that the early cases on this subject had been
[274] shaken by *modern decisions; but the Court of King's Bench considered them to be irrelevant, (*a*) and held, that the devise vested an estate tail in J. This case, as well as Wright *v.* Pearson, shows that the interposition of trustees to preserve contingent remainders is inoperative to invest superadded words of limitation with any controlling efficacy.

The next case in order is Kinch *v.* Ward, (*b*) where a testator devised freehold and leasehold lands to trustees, in trust to permit his son T. to receive the rents for his life, and, after his decease, the testator devised the same to *the heirs of the body* of his said son lawfully begotten, *their heirs, executors, administrators and assigns forever;* but in case he should die without issue, then over. It was assumed, in the discussion of another question, that the devise of the freehold lands vested in T. an estate tail.

And it is clear, that the circumstance of the heirs of the body being directed to assume the testator's name, does not constitute a ground for varying the construction, although the effect is, by enabling the ancestor to acquire the fee simple, to place within his power the means of rendering the injunction nugatory; (*c*) this being, in fact, merely one of the consequences which a testator does not usually intend or foresee, when he employs words that, in legal construction, make the
[275] first taker tenant *in tail, and which consequences, whether apprehended or not, do not authorize the testator's judicial expositor to divert his bounty into another channel, by giving to his language a strained construction, which would make it apply to a different class of objects.

Thus, in the case of Nash *v.* Nash, (*d*) where a testator devised lands to trustees, and the survivor of them, and the heirs of such survivor, in trust for F. W., then an infant, till he should arrive at the age of twenty-one years, upon his legally taking and using the testator's surname; and then, upon his attaining such

(*a*) The only case cited in Measure *v.* Gee, which afforded a shadow of opposition to the principle of the cases in the text, was Doe *v.* Goff, 11 East, 668, which had other circumstances, and has been, as we shall presently see, itself overruled by the highest authority, post, p. 291.

(*b*) 2 Sim. & Stu. 411.

(*c*) Such a condition, too, if imposed on a person taking an estate tail by purchase, would (unless made a condition precedent) be liable to be defeated by an enrolled conveyance, which, like a common recovery, destroys all estates limited in defeasance of, as well as those which are made to take effect after the determination of the estate tail.

(*d*) 3 Barn. & Adol. 839.

age and taking that name, habendum to him for life; and *from and after his decease*, to hold to the trustees and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the *heirs male of F. W.*, taking the testator's name, *and the heirs and assigns of such male issue forever;* but in default of such male issue, then over. It was held, that the trustees did not take the legal estate in the lands devised, (*a*) but that F. W. had a legal estate tail in them on his coming of age, and adopting the testator's surname.

Down to the very latest period, then, we have a confirmation, if confirmation were wanted, of the inadequacy of words of limitation in fee annexed to *heirs of the body* to control their operation. The only remark suggested by the recent decisions is an expression of surprise that adjudication should be deemed necessary on a point so clearly settled by anterior decisions; and our surprise is greatly increased, when, in such a state of the authorities, we find a distinguished Judge attempting to found a distinction between the two cases, on the mere existence in one, * and the absence in the other, of superadded [276] words of limitation. (*b*)

But it seems, that if the superadded words of limitation *operate to change the course of descent*, they will convert the words on which they are engrafted into words of purchase; as in the case of a devise to a man for life, remainder to his *heirs* and the *heirs female* of their bodies. (*c*) And the same principle of course would apply where a limitation to the heirs *male* of the body is annexed to a limitation to the heirs *female*, and vice versa; but the books contain no such case, and the doctrine rests entirely on the position arguendo of Anderson, in Shelley's case, which, however, has been since much cited and recognized.

An eminent writer has laid it down, (*d*) "that as often as the superadded words are included in, and do *not* in their extent *exceed* the preceding words; but the words *heirs, &c.*, in the several parts of the gift are in terms, or at least in construction, of equal extent, the latter words are surplusage, and the preceding words, as connected with the limitation to the ancestor, will be taken to be words of limitation."

The position, that the preceding words are words of limitation where the superadded words do *not* exceed them, seems to be the reverse of the established rule; the very case put by Anderson, as an instance of their being words of purchase, is one in which the superadded words *narrowed* the preceding words; and, on the other hand, we have seen that, in all the cases in

(*a*) On this subject, see ante, p. 228.
(*b*) See judgment in Doe d. Bosnall *v.* Harvey, 4 Barn. & Cress. 623.
(*c*) Per Anderson, in Shelley's case, 1 Rep. 91.
(*d*) 1 Prest. on Estates, 353.

which the superadded words have been held to be
[277] inoperative, they * have been either equal to, or more extensive than, the words of limitation upon which they were engrafted. (*a*)

II. We next proceed to inquire as to the effect of coupling a limitation to *heirs of the body* with words of modification importing that they are to take concurrently or distributively, or in some other manner inconsistent with the course of devolution under an estate tail, as by the addition of the words "*share and share alike*," or "*as tenants in common*," or "*whether sons or daughters*," or "*without regard to seniority of age or priority of birth*." In such cases, the great struggle has been to determine, whether the superadded words are to be treated as explanatory of the testator's intention to use the term *heirs of the body* in some other sense, and as descriptive of another class of objects, or are to be rejected as repugnant to the estate which those words properly and technically create. It will be seen, by an examination of the following cases, that, after much conflicting decision and opinion, the latter doctrine has prevailed, and it seems to stand on the soundest principles of construction. Those principles were violated, it is conceived, in permitting words of a clear and ascertained signification to be cut down by expressions, from which an intention equally definite could not be collected. The inconsistent clause shows only that the testator intended the heirs of the body to take in a manner, in which, as such, they could not take; not that persons other than heirs were meant to be the objects. To make expressions of this nature the ground of such an interpretation, is to sacrifice the main scope of the devise to its details. The Courts have,
[278] therefore, wisely rejected the * construction which reads heirs of the body with such a context as meaning *children*, and thereby restricts the testator's bounty to a narrower range of objects; for, it will be observed, that although children are included in heirs of the body, yet the converse of the proposition does not hold, for an estate tail is capable of transmission through a long line of objects whom a gift to the children would never reach (as grandchildren and more remote descendants); to say nothing of the difference in the *order* of its devolution.

This rule of construction is supported by a series of decisions, commencing from an early period, and sufficiently numerous and authoritative to outweigh any opposing decisions and dicta which can be adduced.

Thus in the case of Doe d. Candler *v.* Smith, (*b*) where a tes-

(*a*) See ante, p. 272.

(*b*) 7 Durn. & E. 532. It should be stated, that the reader will not find in this and some of the other cases of the same class any distinct recognition of the princi-

tator devised his freehold lands to his daughter A, and *the heirs of her body* lawfully to be begotten, forever, *as tenants in common and not as joint tenants;* and in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then over; Lord Kenyon, and the other Judges of the Court of King's Bench, held, that the daughter took an estate tail.

So, in Pierson *v.* Vickers, (*a*) where a testator devised his estates at B unto his daughter A, and to the heirs of her body lawfully to be begotten, *whether sons or daughters, as tenants in common* **and not as joint tenants;* and in [279] default of such issue, over; Lord Ellenborough and the other Judges of the Court of King's Bench held, on the authority of the last case, and Doe *v.* Cooper, (*b*) that the daughter took an estate tail.

Again, in the case of Bennet *v.* Earl of Tankerville, (*c*) where the devise was to the use of A and his assigns for his life, without impeachment of waste, and after his decease, to *the heirs of his body, to take as tenants in common, and not as joint tenants;* and in case of his decease without issue of his body, then over; Sir W. Grant, M. R., held, that the devisee took an estate tail.

So, in Doe d. Cole *v.* Goldsmith, (*d*) where a testator devised his lands to his son F., to hold to him and his assigns for his natural life, and immediately after his decease the testator devised the same unto the heirs of his body lawfully to be begotten, in such *parts, shares, and proportions, manner and form, as F. should by will or deed devise or appoint,* and, in default of such heirs of his body lawfully to be begotten, then *immediately after his decease* the testator devised the premises over to another son, J., in fee. It was held, by the Court of Common Pleas, that F. took an estate tail. Gibbs, C. J., observed that it was the testator's evident intent that the estate should not go over to J. until all the "heirs of the body" of F. were extinct.

In this and several of the preceding cases, much stress was laid on the words "in default of issue," or "in default of heirs of the body," occurring in the devise over, or rather in the clause introducing such devise, as demonstrating "a general intent" that the estate was not to go over until *a [280] general failure of issue of the first taker; but it is diffi-

ple stated in the text; but as that principle is sanctioned by the later cases, and affords a more intelligible and definite guide than the doctrine of general and particular intention on which some of these decisions proceed, the writer has felt himself authorized to rest them on the former ground. An able and extended examination of most of the cases stated in this chapter, may be found in Mr. Hayes's "Inquiry."

(*a*) 5 East, 548.
(*b*) 1 East, 227, stated post.
(*c*) 19 Ves. 170.
(*d*) 7 Taunt. 209; S. C. 2 Marsh, 517.

cult to understand how this intention could be rendered more distinctly and unequivocally apparent by such referential language than by an *express* devise to these very objects.

We now proceed to the important case of Jesson *v.* Wright,[1] (*a*) which was as follows. A testator devised to W. certain real estate for the term of his natural life, he keeping the buildings in tenantable repair; and after W.'s decease devised the same to the *heirs of the body of W.* lawfully issuing, *in such shares* and proportions as W. by deed or will *should appoint*, and for want of such appointment, then to *the heirs of the body of W. lawfully issuing*, *share and share alike*, *as tenants in common*, and if but one *child*, the whole to such only *child;* and for want of *such* issue, then over. It was held by the Court of King's Bench that W. took an estate for life only, with remainder to his children for life as tenants in common. A writ of error was brought in the House of Lords, which Court, after a very full argument, *reversed* the decision. Lord Eldon observed: "It is definitively settled, as a rule of law, that where there is a particular and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent. (*b*) The decision of the Court below has proceeded upon the notion that no such paramount intent was to be found in the will."

[281] His Lordship then read the devise, observing that *if he stopped at the end of the first devise to W., it was clear that he was to take for life only: if at the end of the first following words, "lawfully issuing," he would, notwithstanding the express estate for life, be tenant in tail: "and in order to cut down this estate," continued his Lordship, "it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed. The words 'heirs of the body' will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator, *but that must be clearly intelligible and unequivocal.* The will then proceeds, 'in such shares and proportions as he the said W. shall by deed, &c., appoint." Heirs of the body mean one person at any given time, but they comprehend all the posterity of the donee in succession. W. there-

(*a*) 2 Bligh, 1; from which the statement of the will is here taken.

(*b*) By "general intent," his Lordship must be understood to mean an intent to include heirs of the body in the gift. It is submitted that those parts of the judgment in which Lord Eldon refers to the uncontrolled force of the words *heirs of the body*, contain a more satisfactory explanation of the principle, than these passages. Lord Redesdale, it will be seen, strenuously insists upon this being the true ground of the decision.

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[1] See Sisson *v.* Seabury, 1 Sumner, 251, *et seq.*

fore could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power—'and for want of such gift, &c., then to the heirs of the body, &c., share and share alike, as tenants in common.' It has been powerfully argued (and no case was ever better argued at this bar,) that the appointment could not be to all the heirs of the body in succession forever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that 'heirs of the body,' in this part of the will, must mean the same class of persons as the 'heirs of the body,' among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude that heirs of the body mean nothing but children. Against such a construction many difficulties * have been raised [282] on the other side; as, for instance, how the children should take in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The defendants in error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words 'heirs of the body' mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because in the concluding clause of the limitation in default of appointment the whole estate is given to one *child*, if there should be only one. Their construction is, that the testator gives the estate to W. for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body; but, *because children are included in the words 'heirs of the body,' it does not follow that heirs of the body must mean only children*, where you can find upon the will a more general intent comprehending more objects. Then the words, '*for want of such issue*,' which follow, it is said, mean for want of children; because the word *such* is referential, and the word *child* occurs in the limitation immediately preceding. On the other hand it is argued, that heirs of the body being the general description of those who are to take, and the words 'share and share alike as tenants in common,' being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation, 'if but one child, * then to such only child,' being, as they say, [283] the description of an individual who would be compre-

hended in the terms 'heirs of the body,' for 'want of such issue,' they conclude, *must mean for want of heirs of the body.* If the words 'children' and 'child' are so to be considered as merely within the meaning of the words *heirs of the body*, which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word *issue*,) (*a*) there is an end of the question."

Lord Redesdale said: "There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult for a professional adviser to say what is the estate of a person claiming under a will. It cannot at this day be argued, that because a testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In Colson *v.* Colson, (*b*) it is clear that the testator did not mean to give an estate tail to the parent. If he meant any thing by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous where words have a
[284] *fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication. In this case, it is argued that the testator did not mean to use the words 'heirs of the body' in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but Doe *v.* Goff (*c*) decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. *That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise.* In many cases,—in all, I believe, except Doe *v.* Goff, (*d*)—it has been held that the words '*tenants in common*' do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar

(*a*) But these words, it is submitted, derive all their force from the terms of the preceding devise, having in themselves no independent operation whatever, for it is settled that the words "in default of such issue," preceded by a gift to children, refer to those objects. See Rex *v.* Marquess of Stafford, 7 East, 521; Tooley *v.* Gunnis, 4 Taunt. 313; and other cases stated post.

(*b*) 2 Stra. 1125.

(*c*) Infra.

(*d*) But see cases, infra.

words. It has been argued that heirs of the body cannot take as tenants in common; *but it does not follow that the testator did not intend that heirs of the body should take because they cannot take in the mode prescribed.* This only follows, that having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and *the words of modification are to be rejected.* Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties; but look to the words used in the will. The words 'for want of *such* issue' are far from being sufficient to overrule the words 'heirs of the body.' (*a*)

* They have almost constantly been construed to mean [285]
an indefinite failure of issue, and of themselves have
frequently been held to give an estate tail. In this case, the words 'such issue' cannot be construed children, except by referring to the words 'heirs of the body,' and in referring to those words they show another intent. The defendants in error interpret 'heirs of the body' to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words 'heirs of the body' to mean children in this will."

So in Doe d. Bosnall *v.* Harvey, (*b*) where a testator devised his real *estate*, subject to his debts and legacies, to T. for the term of his natural life, and after the determination of that estate, to A and B and their heirs, during the life of T. to preserve contingent remainders; and after the decease of T. the testator devised the same to and among all and every *the heirs of the body of T. as well female as male, lawfully to be begotten, such heirs, as well female as male, to take as tenants in common, and not as joint tenants;* and for default of such issue, over. The lands were gavelkind. It was held that T. took an estate tail; Abbott, C. J., observing,—"that though the heirs could not take by descent *as tenants in common*, but would be coparceners, yet it was not to be inferred because they could not take in the particular mode prescribed by the testator, that therefore they were not to take at all."

Again, in the case of Doe d. Atkinson *v.* Featherstone, (*c*) where a testator devised to J., and E. his wife, for the term of their natural lives, and for the life of the longer liver of
them, and after the decease of the survivor, he * devised [286]
to *the heirs of the body of E.* by J., already begotten, or to be begotten, to *be equally divided among them, share and share alike.* It was held, on the authority of Jesson *v.* Wright,

(*a*) It could not for a moment be contended that these words *overruled heirs* of the body. The argument was, that if those words, as used in the preceding devise, meant *children*, (but which his Lordship shows incontrovertibly they did not,) then the words, "for want of such issue," meant for want of such *children*. See last note.

(*b*) 4 Barn. & Cress. 610.

(*c*) 1 Barn. & Adol. 944.

that J. and E. took estates tail, and not, as had been contended, estates for life, with remainder to their children.

The preceding cases present many shades of difference, but they *all* concur in establishing the principle that words of inconsistent modification engrafted on a limitation to heirs of the body are to be rejected. It follows, then, that every decision not strictly reconcilable with this principle may be regarded as overuled by them. How far the line of cases about to be stated falls under the remark, the reader will form his own opinion, keeping in view the general scope of the reasoning of Lord Eldon and Lord Redesdale in Jesson *v.* Wright, and their pointed reprobation of "petty distinctions."

In Doe d. Browne *v.* Holmes, (*a*) the devise was to L. for life, without impeachment of waste, remainder unto the *heirs male or female* lawfully to be begotten on the body of L. forever, they paying certain sums thereout. The Court *inclined* to the opinion that this was not an estate tail in L., but a contingent remainder in fee to the issue; but it was unnecessary to decide the question, as a recovery had been suffered, which had either barred the entail, or destroyed the contingent remainder.

This case seems to be destitute of even the slender grounds upon which the construction of an estate tail is commonly resisted in cases of this nature, nor did the Court, it will be perceived, assume to decide the point.

Another case which must be classed with this series, is Doe d. Long *v.* Laming,[1] (*b*) where a testator devised
[287] *gavelkind lands to his niece *A and the heirs of her body* lawfully begotten or to be begotten, *as well females as males, and to their heirs and assigns forever, to be divided equally, share and share alike, as tenants in common.* A died in the testator's lifetime. Lord Mansfield said the devise could not take effect at all, but must be absolutely void unless the heirs took as purchasers; that the term *heirs* in the plural, in the case of gavelkind lands, answered to the term heir in the singular in the common case of lands not being gavelkind; that the testator mentioned females, not only expressly and particularly, but even prior to males; and that it was clear that he did not mean that the lands should go in a course of descent in gavelkind. Influenced by these and other such considerations, the Court held the true construction of the devise to be, that the *children* of A took estates in fee.

Few cases have been more cited than this. There being both words of limitation and words of distribution annexed to "*heirs*

(*a*) 3 Wils. 237, 241; S. C. 2 Bl. 777. (*b*) 2 Burr. 1100.

[1] Sisson *v.* Seabury, 1 Sumner, 247.

of the body," it has been commonly relied upon as an authority for giving to both those circumstances occurring conjunctively or separately, the operation of changing heirs of the body into *children*. It is observable that the Court had to encounter, not only the difficulty of doing this violence to the words, but also that of reading the limitation to the heirs as a *remainder;* for the devise was to A and the heirs of her body in one entire unbroken clause, and not to A for life, *remainder* to the heirs; and, therefore, even if the devise had been *expressly* to children, they must have taken jointly with their parent, or not at all; indeed, so strongly is the impossibility of reading the devise to the children as a remainder felt in such cases, that where they cannot take *jointly with their parent, on [288] account of their non-existence when the devise takes effect, the word *children* is, we shall see in the next chapter, actually construed as a word of limitation, in order to give the parent an estate tail which *may* devolve upon the children, this being, it is considered, the *only* means of preventing the total failure of the testator's intention in their favor. Such cases form a singular contrast to the construction adopted in Doe *v.* Laming.

As to the circumstance of the land being *gavelkind*, this extraordinary ground of distinction is now overturned by the case of Doe d. Bosnall *v.* Harvey, (*a*) which, it is observable, has *all* the ingredients that have been relied upon by the Judges who decided, or who have since cited Doe *v.* Laming, viz: the land being gavelkind; there being words to carry the fee to the children, if the devise had been construed as designating them; (*b*) and lastly, there being a direction that *females* should take as well as *males*, and the whole as tenants in common. We may then reasonably hope never to hear the case of Doe *v.* Laming again cited as an authority in a court of law. The circumstance that the devise would have lapsed if the devisee had taken an estate tail, seems to have had an undue influence on Lord Mansfield's mind, and the case may be regarded as one of those in which this distinguished Judge suffered the established rules of construction to be violated in order to avoid hardship in the particular instance.

*The next case in chronological order is Doe d. [289] Hallen *v.* Ironmonger, (*c*) which arose on a devise to

(*a*) 4 Barn. & Cress. 616, stated ante, 285.

(*b*) In Doe *v.* Harvey, the word *estate* used in the description of the subject-matter of the preceding devise, would clearly have extended to the devise in question. This makes Mr. Justice Bayley's observation, in regard to Doe *v.* Laming, before adverted to, (ante,) the more extraordinary; for the alleged distinction with respect to the words of limitation occurring in that case, was not only altogether untenable according to the doctrine of the authorities, but was not presented by the actual circumstances of the case.

(*c*) 3 East, 533.

A. and his heirs, upon trust to receive the rents, and *apply the same* for the support of S., and the issue of her body lawfully begotten or to be begotten, *during the life of S.;* and after the decease of S., upon trust *for the use of the heirs of the body* of S. lawfully begotten or to be begotten, their heirs and assigns forever, *without any respect to be had or made in regard to seniority of age or priority of birth*, and in default of such issue over. S. had three children, one son, and two daughters. The son died in her lifetime, leaving several children, and his eldest son, on the death of S., claimed the property as the heir of her body at her death; but it was held that he was not entitled.

By the few observations which fell from the Court in the course of the argument, it appears that the Judges relied upon the words, "without respect, &c., to seniority of age and priority of birth," as plainly showing that the heirs should take "as *purchasers*," meaning, it should seem, as *children*, for even as heirs of the body they were clearly *purchasers*, inasmuch as the limitation to the heirs, and the limitation to the ancestor, were of a different quality. (*a*) Perhaps it will be said that this circumstance distinguishes the case from those under consideration; but it would be difficult to support such a distinction. The words "heirs of the body" are as clear and well ascertained in the one case as in the other, and therefore require a demonstration of intention equally clear and decisive to control them. The class of objects embraced by the two gifts is the same. Indeed, the question whether the rule in Shelley's case will or will not operate upon the two limitations seems to
[290] be quite irrespective of the construction; * though it cannot be denied that a regard to the effect of the application of that rule, in making the ancestor tenant in tail, and thereby enabling him to exclude all the ulterior objects by means of a disentailing assurance, has not unfrequently biassed the minds of Judges in determining the construction.

The next case is Doe d. Strong *v.* Goff, (*b*) where the devise was to the testator's daughter M. and *to the heirs of her body*, (*c*) lawfully begotten or to be begotten, *as tenants in common, and not as joint tenants;* but if such issue should depart this life *before he, she, or they should respectively attain their age or ages of twenty-one years*, then over to the testator's son. It was held by the Court of K. B. that the daughter took an estate for life only, with remainder to her children as tenants in common. Lord Ellenborough considered that the heirs of the body, being

(*a*) Ante, 244.
(*b*) 11 East, 668.
(*c*) This case is open to the same observations as Doe *v.* Laming, in regard to the circumstances of the limitation to the heirs not being by way of remainder.

to take as *tenants in common*, clearly demonstrated that children were meant by that description, as heirs of the body would take by succession, which he considered was rendered still more plain by the following words, "that if such issue should depart this life *before twenty-one;*" and he held that this was too plain to be defeated by a mere conjecture that the devisor might have a paramount intention inconsistent therewith; and, even admitting such intention, he thought it might afford a reason for implying cross remainders between the children, (*a*) *(which his Lordship observed it was not necessary to decide,) but not for making so important a difference [291] as converting into an estate in the mother what would otherwise be separate and distinct interests in the children. His Lordship ridiculed the idea that the eldest son and his issue should take, to the exclusion of the rest, lest the share of a child dying under twenty-one should go over to the testator's son (*b*) before all the issue of the daughter were extinct. He observed that the Court had looked through all the cases, and did not think they should break in upon any of them by this decision.

Of this case it is enough to say, that it has been distinctly overruled by the highest authority.

Thus in Jesson *v.* Wright, (*c*) Lord Redesdale said, "Doe *v.* Goff seems to be at variance with preceding cases. In several cases it had been clearly established, that a devise to A for life, with a subsequent limitation to the heirs of his body, created an estate tail, and that subsequent words such as those contained in this will," (his Lordship alluded, no doubt, to the words, "share and share alike, as tenants in common," occurring in that case,) "had no operation to prevent the devisee from taking an estate tail. In Doe *v.* Goff there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to be so far from amounting to a declaration that he did *not* mean heirs of the body in the technical sense of the words, that, I think, they peculiarly show that he *did* so mean. They would otherwise be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the *testator's conception, that at [292] twenty-one the children (*i. e.* the issue) should have the

(*a*) By cross remainders his Lordship must have meant cross executory limitations; for it is clear that the children, if they took at all, had *a fee* by implication from the gift over in the event of their dying under twenty-one, (ante, 175,) on which fee of course no remainder could be limited; but it seems to be the better opinion, that in such cases no cross executory limitation in fee would be implied. See post.

(*b*) But upon the terms of the devise, as settled by decision, it is clear that no share could go over to the son, unless *all* the issue of the daughter died under twenty-one.

(c) 2 Bligh, 58, stated ante, p. 280.

power of alienation. *It is impossible to decide this case without holding that Doe* v. *Goff is not law.*"

Lord Eldon expressed the same opinion, (*a*) tempered, however, with his characteristic caution. "Doe *v.* Goff (said his Lordship) is difficult to reconcile with this case, I do not say impossible; but that case is as difficult to be reconciled with other cases."

The deliberate denial by these eminent Judges of the case of Doe *v.* Goff, may be considered as equivalent to an affirmative decision, that under such a devise an estate tail is created; in other words, that a devise to A and the heirs of his body as tenants in common, with a limitation over in case the issue or the heirs of the body should die under twenty-one, gives A an estate tail. Indeed, such a devise over is not absolutely *inconsistent* with an estate tail, as the testator *may* intend (though the intention is rather improbable) that the remainder shall be contingent on the event of the *issue* of the tenant in tail (not the tenant in tail himself) dying under age. But Lord Redesdale went a great length in asserting that these words *assisted* the construction which gave the ancestor an estate tail, for the absurdity which his Lordship seemed to think attached to the supposition that they were applied to children, is quite removed by giving them, as the established rule does, the fee simple. Admitting, however, that the inference, so far as it goes, is the other way, it does not approach to that necessary irresistible kind of evidence, which alone should be allowed to vary the construction of words of an established signification.

[293] * Another case, which, perhaps, it may be difficult to rescue from a similar condemnation, is Crump d. Woolley *v.* Norwood, (*b*) where a testator devised to his three nephews W., J., and R., equally between them, during their respective lives as tenants in common; and after their respective decease he devised the share of him or them so dying *unto the heirs lawfully issuing of his and their body and bodies* respectively, and, if more than one, *equally to be divided*, and to take *as tenants in common;* and, if but one, to such only one, and to his, her, or their heir and assigns forever; and if any of the testator's said

(*a*) Ib. p. 55.

(*b*) 7 Taunt. 362; S. C. 2 Marsh, 161. In the recent case of Mosley *v.* Lees, 1 You. & Col. 595, however, one of the counsel who argued that case with great zeal and ability, (Mr. Duckworth,) contended that there was no sufficient reason for saying that the case of Crump *v.* Norwood was overruled by Jesson *v.* Wright, but upon what particular grounds he considered the two cases to be distinguishable does not appear. Indeed, the same learned counsel treated even Doe *v.* Goff with a degree of respect quite inconsistent with Lords Redesdale and Eldon's pointed condemnation, but the Court of Exchequer lent no countenance to the attempt to uphold these cases; and, as the Barons decided the case before them (Mosley *v.* Lees) mainly on the difference between the terms "heirs of the body" and "issue" in regard to the force of explanatory words, the case cannot be considered as bearing upon the subject of the present chapter.

nephews should die without such issue, *or, leaving any such, they should all die without attaining twenty-one*, then he devised the part of him and them so dying, unto the survivor and survivors, and the heirs of the body of such surviving and other nephew equally, as tenants in common, and to hold the same as he had thereinbefore directed as to the original share, and with the like contingency of survivorship on failure of issue; and in default of such issue of his said nephews, then over to the testator's own right heirs. It seems to have been rather taken for granted in this case, (for the contrary was scarcely contended for,)
*that the nephews took an estate for life only, with re- [294]
mainder in fee to their *children*. Gibbs, C. J., observed, that he would state the interest which W. and his *children* took in the premises. "The devise (he said) is to W. for life, and if he has children, (*for heirs here mean children*,[1]) then to them in fee: if he has no children, then the estate goes to the testator's nephews, J. and R. *It is admitted on all hands that this is the true construction.*" And the Court held that the contingent remainder in W.'s share was destroyed by the descent of the reversion in fee on him at the decease of his father, to whom it devolved immediately from the testator (*a*)

This case was not cited in Jesson *v.* Wright, which accounts for its not having fallen under the censure there applied to Doe *v.* Goff, which it closely resembles, and on the authority of which, probably, the translation of heirs into children was considered as almost too clear for argument.

The case of Gretton *v.* Haward (*b*) is another of the decisions which occurred during the time that Doe *v.* Goff was regarded as an authority. The devise was in these words: "I give, devise, and bequeath unto my loving wife A all my real and personal estate, she paying debts," &c., and after her decease *to the heirs of her body, share and share alike*, if more than one, "and in default of issue to be lawfully begotten *by me*, to be at her own disposal." The case of Doe *v.* Goff was cited in argument, and the now exploded doctrine of that case, that the testator, having given the estate to the heirs of the body, share and share alike, could not have intended an estate tail,
*under which the eldest son would take the whole, [295]
was much relied on. The Court certified (it being a case from Chancery) that the wife took an estate for life, with remainder to the *children*, as tenants in common, in fee; and this certificate was confirmed by Sir William Grant, M. R. (*c*)

(*a*) See Kent *v.* Harpool, T. Jones, 76; S. C. 1 Vent. 306; Hooker *v.* Hooker, Cas. Temp. Hardw. 13.
(*b*) 6 Taunt. 94; S. C. 2 Marsh, 9. (*c*) 1 Mer. 448.

[1] See Brailsford *v.* Heyward, 2 Desaus. 18; Bowers *v.* Porter, 4 Pick. 198; Richardson *v.* Wheatland, 7 Metcalf, 173, 174.

No remark fell from the Court during the argument, so that the precise grounds of the decision are not known; but it has been sometimes considered as distinguished from the other cases by the circumstance, that the limitation over was in default of issue begotten *by the testator*, which must, it is said, have referred exclusively *to children*. This, however, is a *non sequitur;* for, allowing to these words their utmost operation, they are only explanatory of the species of heirs of the body intended by the testator in the preceding devise, namely, heirs by himself; and the effect would then be to make the wife tenant in special tail, if she had issue by the testator, or while the possibility of her having issue continued; and in case she had no issue by him, she would, from the time that such possibility ceased, be tenant in tail after possibility of issue extinct. (*a*)

Such is the long line of cases which appear to have been overturned by Jesson *v.* Wright; a decision which will be appreciated when the state in which the subject had been left by the prior adjudications is contemplated. The frequent demand upon the Courts to pronounce on the construction of the words "heirs of the body," when associated with words of modification which did not exactly quadrate with an estate tail, evinces the uncertainty that prevailed in the profession in regard to the actual effect of such a devise. The slightest variation of phrase
[296] *was thought to render a case proper for judicial investigation, in order to try the experiment whether these words, or the inconsistent modifying expressions, would be held to preponderate. The mischief, however, did not altogether *originate* in the class of cases just stated, but may be traced to an earlier source. It seems to have been a consequence of the line of argument adopted by Lord Kenyon in Doe d. Candler *v.* Smith, (*b*) and other cases, where, though a devise of the nature of those under consideration was held, and properly held, to confer an estate tail, this construction was founded, not on the uncontrolled effect of the words limitation, but upon the *general intention* manifested by the words disposing of the property to the next taker, if the devisee in question died *without issue*, which, it was said, demonstrated that the estate was not to go over until a general failure of issue of such prior devisee. Having, therefore, first reasoned upon the devise to the heirs of the body or issue as a gift to *children* or to issue *of a particular class*, the Court sacrificed the intention in favor of these objects, which was denominated the *particular* intent, in order to give effect to the "*general* intent" which was discerned in the subsequent words. Lord Ellenborough, the successor of Lord Kenyon, acceded to the reasoning, or, at all events, to the

(*a*) See Platt *v.* Powles, 2 Man. & S. 65.
(*b*) 7 Durn. & E. 531; Ante, 278. See also Robinson *v.* Robinson, 1 Burr. 38, post.

authorities, which read the devise to the heirs of the body and issue as a gift to *children;* but, probably, seeing no reason why the devise so construed should be affected by the use of the same or nearly similar words in the clause introducing the devise over, (which clearly referred to the objects of the preceding devise, whatever those objects were,) held that the *children* were entitled, *notwithstanding the subsequent [297] words referring to the failure of issue. This appears to be the short history of the rise and progress of the doctrine which the case of Jesson *v.* Wright overturned.

But the uncertainty induced by a series of erroneous decisions is not easily removed; and we shall see that the effect of inconsistent words of modification, engrafted on a devise to the heirs of the body, has been since repeatedly agitated.

Thus, in the case of Wilcox *v.* Bellaers, (*a*) where the testator devised his lands to his son H. during his natural life, and after his decease to *such* of his said son's *children*, and in such shares and proportions as his said son should, by his last will and testament duly executed, limit, direct, and appoint, *and to their heirs*, and for want of such direction and appointment, and as to such part of the estate of which no such appointment should be made, *to the heirs of the body* of the said H., *their heirs and assigns forever;* and in case his said son should happen to die without issue, then *from and immediately after his decease* the testator devised the said estate unto his daughter E. for life, remainder to such of her children and in such shares as she should by deed or writing appoint, and to their heirs; and in default to the heirs of the body of the said E., their heirs and assigns forever; and in case his son should live, *and have children as aforesaid*, then he bequeathed unto his daughter E. a legacy of £500. H., before issue born, suffered a common recovery. To a title derived under this recovery, it was objected that H. was not tenant in tail, but that his children took by purchase. The vendor instituted a suit in equity to enforce the performance of the contract, and the Master reported in *favor of the title. [298] The purchaser excepted to the report, and the exception was argued at the Rolls (*b*) before Mr. Baron Graham and Master (afterwards Lord Chief Baron) Alexander, and Master Stratford, sitting for the then Master of the Rolls, who, after taking time to examine the authorities, differed in opinion; the two former thinking it very doubtful at least, whether H. took more than an estate for life, and Master Stratford being of a contrary opinion, so that no judgment was given. The exception was afterwards (*c*) argued before Sir T. Plumer, M. R., who upon looking into the cases, thought there was so much doubt whether H. took an estate tail, that the purchaser ought not to be compelled to

(*a*) Hayes's Inquiry, p. 2. (*b*) June, 1823. (*c*) 17 Dec. 1823.

take the title, and accordingly dismissed the bill; and the Lord Chancellor (Lyndhurst) on appeal affirmed the order. (*a*)

The only circumstances affording the slightest pretext for distinguishing this case from Jesson *v.* Wright are,—first, the power to appoint to the *children*, and, secondly, the legacy to the devisee in remainder, in case H. "should live and have children as aforesaid."

As to the first point, we learn from the case of Smith *v.* Death, (*b*) that there is no *necessary* implication, that the term "heirs of the body" in the limitation is used to describe the same objects as "children" in the power. 2dly. In reference to the other circumstance, perhaps it will be said that the testator evidently intended the devisee in remainder to have the legacy if the objects of the prior devise came into existence, and which therefore is explanatory of those objects being children. But this is merely conjectural; the testator might intend the legacy
[299] *to be a charge only as against the objects of the power as distinguished from the objects of the limitation, because the donee might have appointed to those objects in fee to the total exclusion of even a chance of succession by the devisee in remainder. However this may be, the circumstance is far too equivocal to be made a ground for departing from the construction of words of an established meaning.

Nor is the case of Wilcox *v.* Bellaers the only instance in which reluctance has been manifested to follow up the principle of Jesson *v.* Wright; for in other cases the term *heirs of the body*, has since been cut down to *children*, in subservience to expressions in the context which that case had appeared forever to have stripped of all controlling operation.

Thus, in Right d. Shortridge *v.* Creber, (*c*) where a testator devised a messuage to trustees and their heirs, in trust to permit his daughter J., and her assigns, to receive the rents for her life free from her husband, and after her death then the testator devised the same to *the heirs of the body of* J., share and share alike, their heirs and assigns forever, it was held, that the words "share and share alike," denoted that the testator meant by "heirs of the body," to designate children.

It is proper to observe, that the case of Jesson *v.* Wright, although decided several years before Right *v.* Creber, was not cited in the latter case, and the subsequent determination of the Court of Q. B. in Doe *v.* Featherstone, (*d*) already stated, shows that a similar decision would not now be made. It is surprising, however, that in Doe *v.* Featherstone, the case of Right *v.* Creber, was referred to by Mr. Justice Patteson as not inconsistent with what the Court was then about to decide; for the only distinction

(*a*) Turn. & R. 495.
(*b*) 5 Madd. 371; stated, ante, vol. 1, p. 486.
(*c*) 5 Barn. & Cress. 866.
(*d*) 1 Barn. & Adolph. 944; ante, 285.

is, that in one case there were, and in the other there were * not superadded words of limitation, which were, [300] we have seen, wholly immaterial, and on which indeed no stress was laid by the Judges who decided Right *v.* Creber.

So, in the case of North *v.* Martin, (*a*) where by a marriage settlement lands were conveyed to the use of A, the intended husband, for life, with remainder to trustees to preserve contingent remainders, with remainder to B, the intended wife, for life, and after the decease of the survivor, to the use *of the heirs of the body of A* on the body of B to be begotten, and their heirs, *and if more children than one equally to be divided among them, to take as tenants in common*, and in default of such issue, then over. It was contended, that according to the authorities, particularly Wright *v.* Jesson, A was tenant in tail by force of the limitation to the heirs of his body, but Sir L. Shadwell, V. C., held, that the words, "and if more children than one," were interpretative of those words, observing that no case had been cited, nor did he recollect any in which the words "heirs of the body" had been held to create an estate tail where those words of interpretation had been used; and his Honor added, (and the remark is deserving of attention,) that this did away the effect of the argument founded on the limitation over for default of such issue, which must be construed for default of such children.

3d. But it is not to be inferred from the preceding cases that the words, *heirs of the body*, are incapable of control or explanation by the effect of superadded expressions, clearly demonstrating that the testator used those words in some other than their ordinary acceptation, and as descriptive of another class of objects. The rule established by those cases only requires a clear indication of *intention to this effect. Where the [301] words in question are accompanied by such an explanatory context, the devise is to be read as if the terms which they are explained to mean were actually inserted in the will.

Accordingly, in the case of Lowe or Lawe *v.* Davies, (*b*) where a testator devised to B. and his heirs, lawfully to be begotten, "that is to say, to his first, second, third, and every other son and sons successively, lawfully to be begotten of the body of the said B., and the heirs of the body of such first, second," &c., it was held that B. took but an estate for life; for the subsequent clause was explanatory of what "heirs" meant.

So in the case of Lisle *v.* Gray, (*c*) where real estate was devised to the first son of the body of E. and the heirs male of the body of such first son, and for default of such issue, to the use of the second son of the body of E. and the heirs male of the body of such second son, (similar limitations were carried on to

(*a*) 6 Sim. 266. (*b*) 2 Lord Raym. 1561.
(*c*) 2 Lev. 223; T. Raym. 278; T. Jones, 114, S. C.; see Hayes's Inq. 81.

the fourth son,) "and *so* to all and every other the *heirs male of the body* of E. respectively and successively, and to the heirs male of their body, according to seniority of age." There was a power to raise portions out of the land if E. died without issue male. It was held that E. took only an estate for life; the words "and so," &c. showing that the word "heirs male" in the latter clause meant *sons*, by relation to the preceding devise.

Again in the case of Goodtitle d. Sweet *v.* Herring, (*a*) where the devise was to A for life, remainders to trustees to preserve contingent remainders, remainder to the *heirs*
[302] * *male* of the body of A to be begotten, severally, successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, *the elder of such sons*, and the heirs male of his body lawfully issuing, being always to be preferred to the *younger of such sons*, and the heirs male of his and their body and bodies; and for default of such issue to the *daughters*, as tenants in common, and the heirs of their bodies. The Court held that the testatrix had, by the words "the elder of *such sons*," &c., explained herself by "heirs of the body" to mean *sons*, so that A took only an estate for life.

In all the preceding cases it will be seen that the testator had annexed to the term "heirs of the body" words of explanation, which left no doubt of his having used the expression as synonymous with *sons*. These cases, therefore, may be supported without impugning the general principle, as stated by Lord Alvanley in the case of Poole *v.* Poole, (*b*) that the Courts will not deviate from the rule which gives an estate tail to the first taker, if the will contains a limitation to the heirs of his body, except where the intent of the testator *appears so plainly to the contrary that nobody can misunderstand it;* for the will in these cases seemed to supply the clear incontrovertible evidence of intention required by such a statement of the doctrine.

On the other hand, in the case of Jones *v.* Morgan, (*c*) it was decided, that in perfect consistency with the principle of the cases just stated, that a devise to W. for life, without impeachment of waste, and after his decease to the use of the heirs male of the body of W. lawfully begotten, *severally, respec-*
[303] *tively, and in remainder, the* * *one after the other as they and every of them shall be in seniority of age and priority of birth*, gave W. an estate tail. Lord Thurlow said,

(*a*) 1 East, 264; see also Mandeville *v.* Lackey, 3 Rigd. P. C. 352, post. As to the expression, heirs male *now living*, see Burchett *v.* Durdant, Raym. 330; S. C. 2 Vent. 311; ante, vol. I, p. 278. For some other instances of the same kind, ante, pp. 15, 16.

(*b*) 3 Bos. & Pul. 627. There is a striking similarity between the general scope of Lord Alvanley's reasoning here, and that of Lords Eldon and Redesdale, in Jesson *v.* Wright, ante, 290, 291.

(*c*) Jones *v.* Morgan, 1 B. C. C. 206.

"Where the estate is so given that it is to go to every person who can claim as heir to the first taker, the word *heirs* must be a word of limitation. All heirs taking as *heirs* must take by descent."

So in Poole *v.* Poole, (*a*) where a testator devised all his real estate to the use of trustees, in trust for his first son during his life, and also upon trust to preserve contingent remainders, and after his decease in trust for the several *heirs male of such sons lawfully issuing*, so that the elder of *such sons* and the heirs male of his body should always take before the younger and the heirs male of his body, remainder to the second, third, fourth, and other son and sons of the testator for their respective lives, and also upon trust to preserve, remainder in trust for the several heirs male of their bodies lawfully issuing, so as the elder of such sons and the heirs male of his body should take before the younger of such sons and the heirs male of his body, remainder to his first and every other daughter for their lives, and upon trust to preserve, remainder to the several heirs male of their respective bodies, so that the elder of such daughters and the heirs male of her body should always be preferred to the younger of such daughters and the heirs male of her and their body and bodies. The testator then charged the estates with certain portions, and devised them, in failure of such issue by him as aforesaid, but not otherwise, upon trust for his nephew A for life, and upon trust to preserve, remainder in trust for the first and other son and sons of A, as they should be in seniority of age and priority of birth, and the several heirs of their respective bodies lawfully issuing, so that * the eldest of such sons and the heirs of [304] his body should be preferred to the younger of the same sons and the heirs of his and their body and bodies. The question was, whether the eldest son of the testator took an estate for life or in tail; in other words, whether the testator had not explained himself by the words "heirs male of the body" in that devise to mean *sons*, by declaring that the elder of "*such sons*" should be preferred to the younger. Lord Alvanley, and the rest of the Court of Common Pleas, expressly avoiding an intimation of what their opinion would have been if that clause had stood alone in the will, held, that in connection with the devise to the other sons, the daughters, and the nephew, the son took an estate tail.

In this case the context certainly much assisted the construction adopted by the Court, for as the other sons of the testator as well as his daughters, took successive estates tail, it was scarcely supposable that he could intend the first son to have only an estate for life. To have made such a difference between the sons would have violated the general plan of the will. The

(*a*) 3 Bos. & Pul. 620.

clause which gave rise to the question, although applied properly enough in a subsequent part of the will to the devise to the other sons of the testator, was redundant in the position which it here occupied, where its insertion was evidently an error.

Again, in the case of Jack *v.* Fetherstone, (*a*) where the words of devise were: "I give, &c. to W., and to his heirs male, according to their seniority in age, on their respectively attaining the age of twenty-one years, all my estates real and personal, in lands, houses, and tenements, not hereinbefore dis-
[305] posed of, *the eldest son surviving of the * said W., and the heirs male of his body lawfully begotten, always to be preferred to the second or younger son;* and in case of the failure of issue male in the said W. surviving him, or their dying unmarried and without lawful issue male attaining the age of twenty-one years, then to T., (brother of the said W.,) and his heirs male lawfully begotten, or attaining the age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said T. lawfully begotten, and their not attaining the age of twenty-one years, then to my right heirs forever." The House of Lords held, that W. took an estate tail male. Lord C. J. Tindal declared the unanimous opinion of the Judges to be, that the present case was governed by the rule laid down by Lord Alvanley in Poole *v.* Poole, "that the first taker shall be held to have an estate tail where the devise to him is followed by a limitation to him and the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Here the subsequent words were not wholly incompatible with an estate tail. If W. took an estate tail, the elder son surviving, the heirs male of his body would be preferred to the second or the younger son, and any difficulty created by the words referring to the majority of the devisees occurred equally whether the estate tail was in W. or in his sons.

By contrasting Lowe *v.* Davies and Lisle *v.* Gray with Jones *v.* Morgan, and Goodtitle *v.* Herring with Poole *v.* Poole and Jack *v.* Fetherstone, the limits of the doctrine of the respective cases will be perceived.

In further confirmation of the doctrine that the words "heirs of the body," are not controlled by expressions of an equivocal import, may be cited the case of Douglas *v.* Congreve, (*b*)
[306] where * a testator devised real estate to A for life, and after his decease to the *heirs of his body*, and so on to several other persons by way of remainder in like manner, and then declared that all the aforesaid limitations were in-

(*a*) 9 Bligh, N S. 237. (*b*) 5 Scott, 223; S. C. 1 Beav. 59.

tended by him to be *in strict settlement*, with remainder to his own right heirs forever; and the Court of C. P. certified an opinion that these ambiguous words did not prevent the devisees from taking estates tail under the prior words of devise; which certificate was afterwards confirmed by Lord Langdale, M. R., who observed, "In the present case there is no executory trust. It is a case of direct devise of the legal estate, and in terms which, according to the rules of law, give an estate tail to the plaintiff; and it does not appear to me that the words, "in strict settlement," can have the legal effect of altering that estate. An executory trust would have admitted greater latitude of interpretation, and the effect of the words might have been different."

CHAPTER XXXIX.

"CHILDREN," "CHILD," "SON," "DAUGHTER," WHERE WORDS OF LIMITATION.

I. *Rule in Wild's case.*
II. *"Child," "Son," "Daughter," &c. where used as nomina collectiva.*

Children, where a word of limitation.
Rule in Wild's case.
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To A and her children, and their heirs, [p. 313.]
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Devise to "eldest son" held not to confer an estate tail male, [p. 327.]

I. The rule of construction commonly referred to as the doctrine of Wild's case (*a*) is this: that where lands are devised to

(*a*) 6 Rep. 17; S. C. Anon., Gouldsb. 139, pl. 47; S. C. nom. Richardson *v.* Yardley, Moore, 397, pl. 519.

a person *and his children, and he has no child at the time of the devise*, the parent takes an estate tail;[1] for it is said, "the intent of the devisor is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation." In support of this position, a case is referred to, as reported by Sergeant Bendloes, (*a*) in which the devise was to husband and wife, "and to the men children of their bodies begotten," and it did not appear that they had any issue male at the time of the devise, and therefore it was adjudged that they had an *estate tail* to them and the heirs male of their bodies. The principle has been followed in several subsequent cases.

*Thus, in Davie *v.* Stephens, (*b*) where a testator [308] devised to his son S., when he should accomplish the full age of twenty-one years, the fee simple and inheritance of Lower Shelstone, *to him and his child or children* forever, but if he should happen to die before twenty-one, then over to testator's wife forever. S. was unmarried at the death of the testator, and it was held that he took an estate tail, *there being no children to take an immediate estate by purchase.* The meaning, Lord Mansfield said, was the same as if the expression had been "to S. and his heirs, that is to say, his children or his issue." The words "forever" made no difference, for the heirs (of the body) of S. might last forever. (*c*)

So, in the case of Seale *v.* Barter, (*d*) where the devise

(*a*) 1 Bulstr. 219; Bendl. 30.

(*b*) Dougl. 321. The case of Wharton *v.* Gresham, 2 W. Blackst. Rep. 1083, is generally classed with these cases; but as the devise was to J. W. and his sons in *tail male*, it is clear that he took an estate tail without construing "sons" as a word of limitation; and the only consequence of the non-existence of a son was his exclusion from taking immediately under the devise.

(*c*) In Hodges *v.* Middleton, Doug. 431, Lord Mansfield and the Court of King's Bench inclined to think that, where a testator devised to A for life, and after her death to *her children*, upon condition that she or they constantly paid £30 a year for a clergyman to officiate in her chapel, and on failure thereof to testator's own next heirs, and in case of failure of children of A, then to her brother G., &c. A had an estate tail; or that, if she took an estate for life, the children took an estate tail; and as recoveries had been suffered by both, the alternative of these propositions was not material. As the limitation to the children in this case was by way of remainder, there seems to have been no ground, whether a child existed at the date of the will or not, for holding the parent to be tenant in tail. It is as difficult to perceive any satisfactory reason for giving the children estates tail. The direction to pay the £30 a year would have enlarged their devise to a fee simple. See sup. 173.

(*d*) 2 Bos. & Pull. 485; but see Doe d. Davy *v.* Burnsall, 6 Durn. & E. 30; S. C. nom. Burnsall *v.* Davy, 1 Bos. & Pull. 215; Doe d. Gilman *v.* Elvey, 4 East, 313, post, where it seems to have been taken for granted that, under a devise to A and his issue, the issue took by way of remainder; and it is observable that, in the case of Heron *v.* Stokes, 1 Dru. & Warren, 107, Sir Edward Sugden suggested that the

[1] Nightingale *v.* Burrell, 15 Pick. 104–114; Parkman *v.* Bowdoin, 1 Sumner, 359. But see Carr *v.* Estill, 16 B. Monroe, (Ky.) 309.

[309] *was in these words, "It is my will that all my lands and estates shall after my decease come to my son J., *and his children* lawfully to be begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them or any of them, as he shall think proper, and for default of such issue, then," over in like manner to a daughter. J. had no child at the date of the will, or at the death of the testator. The Court of Common Pleas, on the authority of Wild's case, Wharton *v.* Gresham, and several other cases, (which the writer has referred to other grounds, as they did not involve the inquiry whether the devisee had children or not at the time,) held, that J. took an estate tail, the Chief Justice (Lord Alvanley) expressly intimating that the Court gave no opinion as to what would have been the construction if there had been children born at the time of the devise.

Again, in the recent case of Broadhurst *v.* Morris, (*a*) where the testator devised all his share of his two estates in W. to his daughter E. for life, and at her decease to F., her husband, during his life; and at the decease of his said son-in-law, F., he directed that the whole legacy to him should go to his (testator's) grandson, B., *and to his children, lawfully begotten, forever;* but, in default of such issue *at his decease*, then over. B. was unmarried at the death of the testator. It was con-
[310] tended that the words * "at his decease," distinguished the present case from the previous authorities; and it was also suggested, that, by the effect of the words, "forever," the children might take the fee; but the Court of K. B. certified, (the case being from Chancery,) that the devise conferred an estate tail on B.

Thus, the cases have established, it should seem, that a devise to a man and his children, he having none at the time of the devise, gives him an estate tail.

The time of the devise appears to denote rather the period of the *making* of the will, than the time of its *taking effect*, and yet it is impossible not to see that the material period in regard to the evident design of the rule, is the death of the testator, when the will takes effect.

The object of the rule manifestly is, that the testator's intention in favor of children shall not *in any event* be frustrated; but

more natural construction of a gift to one and his children, *there being no children in esse at the time*, and that which he should have adopted in the absence of authority the other way, would be to hold it to be a gift to the parent for life, with remainder to the children. These remarks do not show that this eminent Judge considered that the authorities would have left him free to adopt such a construction, if the point had called for decision. He would doubtless have felt himself bound to follow, in regard to real estate, the often recognized rule in Wild's case, either with or without the modification suggested. With respect to personalty, perhaps, the authorities would not be found to present so formidable an obstacle to the adoption of the doctrine of the Irish Chancellor.

(*a*) 2 Barn. & Adolph. 1.

if it be applied only in case of there being no child living at the time of the making of the will, the accident intended to be so carefully guarded against may occur. For suppose there should happen to be a child or children at that time, who should subsequently die in the testator's lifetime, so that no child was living at his death; in this case, though there was no child to take jointly with the parent, yet the rule would not be applied in favor of after-born children. On the other hand, in the converse case, namely, that of there being a child at the death, but not at the date of the will, an estate tail would be created, though there was a child competent to take by purchase, so that the ground upon which that construction has been resorted to did not exist. Indeed, a still more absurd consequence may follow from an adherence to the literal terms of this rule of construction in the latter case; for suppose there is no child at the making of the will, but a child subsequently comes * into existence, who survives the testator, and the parent does not, the devise would fail altogether, notwithstanding the existence of a child at the death of the testator, if it were held that the parent would have been tenant in tail. (*a*) These circumstances actually occurred in Buffar *v.* Bradford,[1] (*b*) where a testator in a certain event gave real and personal estate to *A and the children born of her body.* (*c*) A having died in the testator's lifetime, leaving a child, who was born after the making of the will, *when A had no child*, it was contended, on the authority of Wild's case, that the devise had lapsed; but Lord Hardwicke held the child to be entitled. His Lordship said, "it must be allowed that children in their natural import are words of purchase, and not of limitation, unless it is to comply with the intention of the testator, *where the words cannot take effect in any other way.*"

[311]

If the literal terms of the rule in Wild's case can be departed from in the manner suggested, in order to give effect to *its spirit*, it would seem to follow that the parent would never be held to take an estate tail if there were a child, who, according to the established rules of construction, could have taken jointly with the parent. Consequently if the devise were future, so that all children coming *in esse* before the period of vesting in possession would be entitled, (*d*) the rule which makes the parent tenant in

(*a*) But now see 1 Vict. c. 26, § 32, ante, vol. 1, p. 311.
(*b*) 2 Atk. 220.
(*c*) In some of the early cases, an absurd distinction is taken between a gift to children and a gift to children *of the body*, as if the latter more strongly pointed to an estate tail. Even Lord Hale seriously advanced it in King *v.* Melling, 1 Vent. 230. This is indeed "spelling a will out by little hints." See same judgment, 230.
(*d*) Ante, 75.

[1] See Parkman *v.* Bowdoin, 1 Sumner, 366; Annable *v.* Patch, 3 Pick. 360.

tail would (if at all) only come into operation in the
[312] absence of any *such objects*. In the *case of Broadhurst *v.* Morris, (*a*) the rule seems to have been applied to a devise of this description, but this peculiarity in the case does not appear to have attracted attention, and it must be confessed, that, in reference to cases of every class, the modification of the doctrine suggested in the preceding remarks has to encounter the objection, that it makes the construction of the devise depend upon subsequent events, and therefore its adoption is not too hastily to be assumed.

It has been hitherto treated as an undeniable position, that in the devises under consideration, children, if there be any, will take jointly with their parent by purchase; and such certainly is the resolution in Wild's case, as reported in Coke, (*b*) who lays it down: "If a man devise land to *A and to his children or issue*, and *they* then have issue of *their* bodies, there his express intent may take effect according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary; and therefore, in such case, they shall have but a joint estate for life."[1]

And in conformity to this doctrine seems to be the case of Oates d. Hatterley *v.* Jackson;[2] (*c*) where a testator devised to his wife J. for her life, and after her decease to his daughter B. *and her children* on her body begotten or to be begotten by W. her husband, *and their heirs* forever. B. had one child at the date of the will, and afterwards others; and it was held that she took jointly with them an estate in fee, and consequently that on their deaths (which had happened) she became entitled to the entirety in fee. This, it will be observed, was the case of a devise *in fee*.

[313] *But in the more recent case of Jeffery *v.* Honywood, (*d*) where a testator gave certain estates, subject to charges, to A, and to all and every the *child and children*, whether male or female, of her body lawfully issuing, and *unto his, her, and their heirs or assigns forever, as tenants in common*. A died in

(*a*) Ante, p. 309.
(*b*) 6 Rep. 17. [The plural "they" and "their" appears to be used by mistake.]
(*c*) 2 Stra. 1172. See also Buffar *v.* Bradford, 2 Atk. 220.
(*d*) 4 Madd. 398. See also Newman *v.* Nightingale, 1 Cox, 341, elsewhere stated.

[1] But in a case where a testator devised as follows, "I give to my son R. the improvement of all my real estate, which is not otherwise disposed of, to him, his children or grandchildren; and if my said son R. should decease without children or grandchildren, the said real estate is to descend to heirs of my son J., deceased," and when the will was made, R. had children, but no grandchild, it was held, that R. took an estate tail under the will. Wheatland *v.* Dodge, 10 Metcalf, 502. Wilde, J., in this case said: "It is true that the defendant at the time of the devise, had children, but he had no grandchildren, and by the express words of the will, they were to take under it, which they could not do, unless the defendant took an estate tail."

[2] See Parkman *v.* Bowdoin, 1 Sumner, 365; Allen *v.* Hoyt, 5 Metcalf, 324.

the lifetime of the testator, leaving ten children. (It is not expressly stated whether any of the children were living at the date of the will, but it seems probable that this was the case.) The question was, whether A took an estate in fee in an eleventh share, the consequence of which would be that it lapsed by her death in the testator's lifetime. The affirmative was contended for on the authority of Oates *v.* Jackson; but Sir John Leach, V. C., held that A had a life estate only; he said, "There are two gifts, one to the mother, without words of limitation superadded, and another to her children, their heirs and assigns; and these two gifts can only be rendered sensible by construing, as the words import, a life estate to the mother, and a *remainder in fee* to the children. In Oates *v.* Jackson, the mother was, by the plain force of the expression, comprehended in the limitation in fee."

The difference of expression, however, in the two cases is extremely slight. In Jeffery *v.* Honywood, the gift is "to A and *to* all and every the child and children." In Oates *v.* Jackson, "to A. and her children." The only difference consists in the word "to," and, according to the report of the latter case in Modern Reports, (*a*) even this slight difference is extinguished, the expression there being "to B and *to* the children of her body." (*b*)

* Even supposing the words of the limitation not to [314] apply to the mother, (in which case, however, it might have been contended that she took the fee by force of the word "estates,") it is difficult to see upon what ground the devise to the children could be held to be *a remainder* expectant on the mother's estate, and not to be immediate or in possession as to all the objects. His Honor's objection to the latter construction is, that "after-born children would be included in this devise, and it is a singular intention to impute to a father, that he means his daughter's personal interest in an estate should continually diminish upon the birth of a new child." But, according to all the authorities, (*c*) including a decision of the Vice-Chancellor himself, (*d*) an *immediate* gift *to children vests exclusively in the objects living at the death of the testator.*

The case of Jeffery *v.* Honywood seems to be inconsistent with and must therefore be considered as overruled by the case

(*a*) 7 Mod. 459.

(*b*) It has been justly remarked, however, by a recent writer, that the substitution of the words "his, her, and their," for the simple "their" of Oates *v.* Jackson, showed the testator's idea that it was probable [qu. possible] that only one, and that either male or female, might become entitled to his bounty; whereas, if he had intended the mother to take as tenant in common in fee, in no case would the estate have gone to one male. Prior on Construction of Issue, &c. pl. 54.

(*c*) Heath *v.* Heath, 2 Atk. 121; Singleton *v.* Singleton, 1 B. C. C. 542, n., and other cases cited ante, p. 74.

(*d*) Scott *v.* Harwood, 5 Madd. 332.

of Broadhurst *v.* Morris, (*a*) already stated. It is true that the former case was cited with seeming approbation in the case of Bowen *v.* Scrowcroft, (*b*) by Mr. Baron Alderson, who founded the latter decision mainly on its authority; but the cases are, it is submitted, distinguishable, as will be seen by referring to the statement of Bowen *v.* Scrowcroft in a subsequent chapter.

In some instances the courts seem to have inclined to construe "*children*" a word of limitation, notwithstanding the existence of children.[1] Thus, in Wood *v.* Baron, (*c*) where a [315] testator devised to his daughter his whole *estate and effects, real and personal, *who should hold and enjoy the same as a place of inheritance to her and her children, or her issue, forever;* and if his daughter should die leaving no child or children, or if her children should die without issue, then over. It was held that the daughter took an estate tail, though she had issue at the time of the making of the will, and of the death of the testator.

In Seale *v.* Barter, (*d*) Lord Alvanley observed that according to the report of Wild's case in Moore, (*e*) two of the Judges thought it was an estate tail in him, though there were children at the time of the devise; but probably it did not occur to his Lordship that the devise in that case was to A and his wife, and *after their death* to their children, which it is now admitted on all hands gives an estate for life to the parents, with remainder to their children; so that the notion as to its being an estate tail was clearly untenable. (*f*) Had the observation been applied to a devise to A and his children simply, it might have had more weight.

The word "children" seems to have been construed as a word of limitation (in a very obscure will) in the case of Doe d. Gigg *v.* Bradley, (*g*) where a testator bequeathed a leasehold property to A and B for life, share and share alike, with survivorship for life to A, and after their decease to the children of A, "to be equally divided between them, share and share alike, and to the survivor of them *and their children;* it was held that these words were words of limitation, applicable to the gift to the children, (though there were children of such children living at the date of the will and at the death of the testator,) [316] and *accordingly it was to be construed as a gift to

(*a*) 2 Barn. & Adolph. 1.
(*b*) 2 You. & Coll. 640.
(*c*) 1 East, 259.
(*d*) 2 Boss. & Pull. 485, ante, 308.
(*e*) Pl. 519, 397, nom. Richardson *v.* Yardley.
(*f*) See also his Lordship's observations upon Hodges *v.* Middleton, stated ante, in Seale *v.* Barter, 2 Boss. & Pull. 494, which are susceptible of the same answer.
(*g*) 16 East, 399.

[1] See Stokes *v.* Tilly, 1 Stockt. (N. J.) 130.

the children absolutely, (*a*) with survivorship between them for *life*.

This case has too much of peculiarity to authorize any general conclusion. Lord Hardwicke, in Buffar *v.* Bradford, (*b*) seems to have been averse to the application of the rule in Wild's case to personal estate, where, he said, the effect of construing *children* to be a word of limitation must be, that the first taker would have all; and the same reluctance is perceptible in the more recent cases of Stone *v.* Maule, (*c*) elsewhere stated, and Heron *v.* Stokes. (*d*)

In such cases, however, the point seems to be immaterial; for as the rule only applies where there is no child to take jointly with the parent, and as the absolute interest in personalty passes without words of limitation, the result is, that the parent, as the only existing object at the time of distribution, would be solely entitled quacunque via. (*e*)

Indeed, with respect to personal estate, an attempt has often been made, and sometimes with success, to cut down the parent (according to Sir J. Leach's construction in Jeffery *v.* Honywood) to a life interest, the children taking the ulterior interest by way of remainder. Thus, in Crawford *v.* Trotter, (*f*) (a decision of the same learned Judge,) a bequest of £1000 three per cent. reduced annuities to A and to her heirs, (say children,) was held to give a life interest to A, and the capital to her children.

* So, in the case of Morse *v.* Morse, (*g*) where a [317] testator gave to his daughter *A and her children* £5000 for their sole use and benefit, £3000 to be paid in one year after his decease, and £2000 after the decease of his wife, and appointed A B *trustee of those sums for his daughter and her children;* Sir L. Shadwell, V. C., held the £5000 to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's lifetime or after his decease.

On the other hand in the case of Pyne *v.* Franklin, (*h*) where a testator gave £200 to each of his nieces and their children, to be paid within nine months after the death of his wife, amongst his nieces *and their children*, as his wife should, by will, appoint. The wife died without having made any appointment. The

(*a*) See rule discussed post.
(*b*) Ante, p. 311.
(*c*) 2 Sim. 490.
(*d*) 2 Drury & Warren's cases, Temp. Sugd. 89; S. C. 1 Connor & Lawson, 270.
(*e*) See Cape *v.* Cape, 2 You. & Coll. 543. And the result would be the same in reference even to real estate, under wills made or republished since 1837, as the fee would pass by such wills without words of limitation.
(*f*) 4 Madd. 361.
(*g*) 2 Sim. 485.
(*h*) 5 Sim. 458. See also De Witte *v.* De Witte, 11 Sim. 41; Sutton *v.* Torre, 6 Jurist. 234; Vaughan *v.* Marquess of Headfort, 10 Sim. 639.

executors, within nine months after her death, paid the legacies to the nieces, who afterwards died without having had any child. It was held, that the payment was properly made.

The same principle which regulates devises to children applies to devises to *sons*, the only difference being that the estate tail, which the latter term, where used as nomen collectivum, creates, will be an estate tail *male*. A devise to A for life, and after his decease to his sons, of course gives to A an estate for life, with remainder to his sons as joint tenants, which remainder will be either for life, or in fee, according to the fact, whether the will is regulated by the old or the new law.

II. We now proceed to consider a point which has often occupied the attention of the courts, and still more frequently that of the conveyancing practitioner—namely, [318] *whether the word "son" or "child" in the singular is a word of limitation; which, of course, is commonly its effect where used in a collective sense, *i. e.* as synonymous with issue male or issue general.[1]

One of the earliest cases of this kind is Byfield's case, (*a*) where, after a devise "to A, and, if he dies *not having a son*, then" over to the heirs of the testator, it was held that the word "son" was used as *nomen collectivum*, and the devise created an entail.

So in Milliner *v.* Robinson, (*b*) where a testator devised to his brother J., and if he should die *having no son*, that the land should remain over; it was held that J. had an estate tail.

Again, in the case of Robinson *v.* Robinson, (*c*) where the testator devised his real *estate* to L. for the term of his natural life, and no longer, provided he altered his name, and took that of R., and lived at the testator's house at B., and after his decease, *to such son as he should have lawfully to be begotten*, taking the name of R., and for default of *such* issue, then over to W. in fee; and the testator willed that L. might present whom he pleased to any vacancy in any of the testator's presentations during his (L.'s) life, and that bonds of resignation should be given in favor of L.'s children, who were designed for holy orders; and after the same should be disposed of as aforesaid, gave the *perpetuity* of the presentations to the said L. in the same manner and to the same uses as he had given his estates. On a bill to establish the will, Sir Joseph Jekyll, M. R., held, that L. was entitled for life, remainder to his eldest, and but one,

(*a*) Cited by Hale, C. J., in King *v.* Snelling, 1 Vent. 231.
(*b*) 1 Moore, 682, pl. 939.
(*c*) 1 Burr. 38; S. C. 2 Ves. Sen. 225; S. C. in Dom. Proc. nom. Robinson *v.* Hicks, 3 B. P. C. (Toml. ed.) 180. See also Hanmer's Cases Temp. Kenyon, 180.

[1] See East *v.* Twyford, 31 Eng. Law and Eq. 62.

son for life, remainder * in fee to W.; and Lord Talbot, [319] on appeal, affirmed the decree. But afterwards, a bill having been filed by the second son of L., (the first having died an infant,) the Judges of the Court of King's Bench, on a case sent to them by Lord Hardwicke, certified their opinion "that L. must by necessary implication, to effectuate the manifest general intention of the testator, be construed to take an estate in tail male." The Lords Commissioners, who succeeded Lord Hardwicke in the custody of the great seal, confirmed this certificate; and their decree was affirmed, after great consideration, and with the concurrence of all the Judges, by the House of Lords.

The authority of this case has long been beyond the reach of controversy, not only from its having been decided by the highest tribunal, but in consequence of its frequent recognition. Lord Kenyon founded a great number of decisions (*a*) upon it, and though his Lordship did not invariably advert to the true principle, (sometimes laying an undue stress on the words, "in default of *such* issue," which a long line of cases has established to be merely referential,) (*b*) yet, in Doe *v.* Mulgrave, (*c*) he distinctly treated the case as standing on the ground to which it has been here referred.

Again, in the case of Mellish *v.* Mellish, (*d*) where the devise was in these words, "Hamels to go to my daughter C. M. as follows; *in case * she marries, and has a son,* [320] *to go to that son;* in case she has more than one daughter at her death, or her husband's death, *and no son,* to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother W. M." In a subsequent part of his will the testator added, "Mrs. P. to receive £200 a year from C. M. during the life of Mrs. P." The question was, what estate C. M. took in Hamels. It was contended for her, on the authority of Wight *v.* Leigh, (*e*) Wharton *v.* Gresham, (*f*) Chorlton *v.* Craven, (*g*) Sonday's case, (*h*) and Wylde *v.* Lewis, (*i*) that she took an estate tail. On the other side it was insisted that C. M. took the fee, by the effect of the

(*a*) See Hay *v.* Coventry, 3 Durn. & E. 86; Doe *v.* Applin, 4 Id. 82; Denn d. Webb *v.* Puckey, 5 Id. 303; Doe d. Candler *v.* Smith, 7 Id. 533; Doe d. Bean *v.* Halley, 8 Id. 5; Doe d. Cock *v.* Cooper, 1 East, 235.

(*b*) See post. In this observation, which the writer has found it necessary often to make, he leaves out of view the well-known operation of the words, "in default of such issue," to create cross remainders among several tenants in tail, which turns on a different principle.

(*c*) 5 Durn. & E. 323.

(*d*) 2 Barn. & Cress. 520. Examine the case of Seward *v.* Willock, 5 East, 198, in reference to this doctrine.

(*e*) 15 Ves. 564, post.

(*f*) 2 Blackst. 1083; ante, 308, n.

(*g*) Cit. 2 Barn. & Cress. 524.

(*h*) 9 Rep. 127.

(*i*) 1 Atk. 432, post.

annuity made payable by her, (*a*) and which fee was defeasible on either of three events: first, if she married, and had a son, it was to go to that son; secondly, if she had more than one daughter, and no son, it was then to go to the eldest daughter; and, thirdly, if she had no child at all, (or it seems, if she had only one daughter,) it was to go to W. M. The Court, however, held that C. M. took an estate tail male. Bayley, J., said, "It may be collected from the authorities, that if the word *son* be used not as *designatio personæ*, but with a view to the whole class, or as comprising the whole of the male descendants, severally and successively, then it is the manifest intention of the testator to give an estate tail; and it is equally clear that words are not to operate as an executory devise, which are capable of operating in any other way. In this case the words are, 'Hamels to go to my daughter C. M. as follows, viz: in case she marry, and has a son, then it is to go to that son.' [321] Now, *if the word 'son' be used as nomen collectivum, it would give to C. M. an estate, to continue as long as there should be any male descendants of her, and that would be an estate in tail male. I cannot find in the subsequent part of this will any thing inconsistent with the construction that ought to be put upon it, if it had stopped here." Holroyd, J., said, the word "son" should be read *any son*. The Court afterwards certified, "that C. M. took an estate in tail male, with a reversion in fee, (*b*) subject to other estates created by this will."

It is evident from the concluding words of the certificate, that the Court considered the eldest daughter would take an estate in the event described. The intention expressed in favor of the *eldest* daughter, of course, would not operate to confer on the parent an estate tail, which would descend to daughters.

Again, in the case of Doe d. Garrod *v.* Garrod, (*c*) where a testator, by his will, devised thus: "As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have and to hold during his life, *and to his son, if he has one, if not*, to the eldest son of my nephew J. G., and to his son after him, if he has one, if not, to the regular male heir of the G. family. By codicil, stating that his nephew T. G. then had a son born, the testator gave all his lands to that son, after his father's decease; and to his "*eldest son if he has one;* but if he has no son, then to the next eldest regular male heir of the G. family." It was held, that, by the will and codicil, the son of T. G. took an estate tail. Lord Tenterden, C. J., considered that the testator did not intend the estate to go over to the G. family while any issue male of his great-nephew should remain,

(*a*) And other grounds which were clearly inadequate.
(*b*) She was heir at law.
(*c*) 2 Barn. & Adol. 87.

and that the giving an estate tail to the devisee was warranted by Sonday's case.

* So, in the case of Doe d. Jones *v.* Davies, (*a*) where [322] a testator, after premising that, should his daughter die unmarried, he would not have his estate sold or frittered away after her decease, but that it should be entailed, devised all his real estate to trustees, to permit his daughter, Susanna Maria Jones, not only to receive the rents and profits thereof, for her own use, or to sell or mortgage any part, if occasion required; but also to settle on any husband she might take, the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste, or non-residence, or neglecting repairs. He then added, that should "*my daughter have a child, I devise it to the use of* SUCH CHILD, from and after my daughter's decease, with a reasonable maintenance for the education, &c., of such child in the mean time. Should *none of these cases happen*," the testator devised the estate to a nephew, subject to a condition to reside, &c., and to his first and every other son, and in default he gave the estate to another person on a like condition, and his first and every other son. The will then proceeded as follows: "My will and meaning for having the house and farm occupied is for the sake of improving the neighborhood as far as my poor abilities extend, which would be otherwise proportionably impoverished, for protecting the parish and supporting its poor. This I am persuaded is my daughter's wish as well as my own, whom I by no means will to restrain as a tenant for life; but in case that either of the remainder-men should ill-treat her, or should be likely to turn out an immoral man, or a bad member of society, she may, by the advice or consent of the trustees, set aside such an one by her own will and testament, that my intention of doing good in *the neighborhood might not be de- [323] feated. I recommend it to my daughter, for *want of issue to herself*, not to leave in legacies above five or six hundred pounds, and that out of my charge on Nevern," (a distinct property of the testator,) "which I have also articled for, and entail the rest for the further support of this house." At the time of the making of the will, and at the death of the testator, the daughter had no child. It was held that the word "child," as here used, was nomen collectivum; it being evident from the whole tenor of the will, that the testator intended that the estate should not go over to the devisees in remainder until the failure of issue of his daughter. The Court considered that the case came within the principle of those in which the word *son* had been held to be nomen collectivum, particularly Byfield's case.

To this class of cases it is conceived also belongs the case of

(*a*) 4 Barn. & Adolph. 43.

Raggett *v.* Beaty, (*a*) where a testator devised a messuage to the use of G. (the second son of his nephew J.) to enter upon and possess the same after the decease of his father, and he directed the said J. and G. to pay the sum of £100 within one year after his decease to A and B upon certain trusts; but in case they did not pay the said sum, he ordered A and B to let the premises and receive the rents until the £100 should be paid, they keeping possession of the deeds and not allowing the said J. & G. either to sell or mortgage any part of the premises until the legacies were all paid, and G. was twenty-one years of age; *or, if in case the said G. should die and leave no child lawfully begotten of his own body*, it was his will that the said A and B, their heirs and assigns, should sell the premises and distribute the money arising therefrom amongst his (the testator's) brothers and sisters and C and D, or their heirs,
[324] in such shares as the trustees should think * proper. The question sent for the opinion of the Court of Common Pleas was, what estate G. had upon the death of his father. It was contended that G. took an estate tail as the result of the apparent intention, that the estate should not go over, unless there was an ultimate indefinite failure of issue of G.; and the cases relied upon for this construction were those in which words importing a failure of issue had been so construed. On the other side it was argued, that the intention to be collected from the whole will was, that G. should take an estate in fee, with an executory devise over in case of his not leaving issue at his death; and the argument for holding the devisee to take a fee was founded mainly on the testator's direction to the devisees to pay the £100; and no attempt seems to have been made to distinguish the word "child," as used in this devise, from the word "issue," which occurred in the cited cases. The Court, however, certified that G. took an estate tail.

This is the most signal instance in which an estate tail has been created by a devise over in case of the prior devisee leaving no child, though the tenor of the authorities discussed in the present chapter and some others, especially Doe *v.* Webber, (*b*) (in which Lord Ellenborough made very little difficulty of construing the word "children" in such a position as synonymous with *issue*,) had certainly paved the way to such a result. An example of this species of construction has since occurred, (though with an assisting context,) in the case of Doe d. Simpson *v.* Simpson, (*c*) where a testator gave certain lands to his son A, his heirs and assigns forever; but if it should happen that A should die

(*a*) 2 Moo. & Pay. 512.
(*b*) 1 Barn. & Ald. 713. See also Hughes *v.* Sayer, 1 P. W. 534, ante, p. 37; Wyld *v.* Lewis, 1 Atk. 432, post.
(*c*) 5 Scott, 770.

without leaving any child or children, he devised the estate to B, C, D, E, and F, their heirs and assigns forever *as tenants in common, with a limitation over to the survivors in case of any of them dying under age and without issue. And the testator in a certain event devised other property, subject to the same mode of distribution, among the five devisees over as the before-mentioned property given to A "in case he died *without issue*." It was considered by the Court that the testator had, by the latter clause, expressly declared the meaning of the prior devise to be if the first taker should die *without issue*. (*a*) [325]

An instance of the word "child" being construed as qualifying the word "heirs" in the preceding devise, is afforded by the case of Doe d. Jearrad *v.* Banister, (*b*) where a testator devised a certain property to A and her heirs, *if she has any child;* if not, after the decease of herself and her husband, then to B and her heirs. It was contended that it was a devise in fee upon the condition of A having a child; but the Court of Exchequer held that she was tenant in tail.

*But, it is not to be inferred from the preceding cases, that a devise, definitely pointing out the eldest, or any other individual son, will (unaided by the context) have the effect of conferring an *estate tail* on the parent; and this remark is advanced without losing sight of the case of Chorlton *v.* Craven, (*c*) where the devise was to Thomas Chorlton during his natural life, with remainder to the first son of the body of the said Thomas in tail male, lawfully begotten, severally and successively; and for want of such lawful issue, either of his son Thomas Chorlton and his son James Chorlton, then the testator devised the estate to his daughters and their children, share and share alike. The Court of King's Bench, on a case from Chancery, certified Thomas to be tenant *in tail male;* (*d*) which was [326]

(*a*) A strong instance of refusal to construe the word "issue" as synonymous with *children*, occurs in the case of Malcolm *v.* Taylor, 2 Russ. & Myl. 416, as the testator had, in reference to another subject-matter, clearly used the word issue in that sense.

A bequeathed the residue of her funded property and her plate to B and C for their lives, and after the decease of the survivor, to such of the children of C as she should by deed or will appoint,* and in default of appointment the residue of the money in the funds to be equally divided among the said children; *and in case C should die without issue as aforesaid*, the testatrix bequeathed her funded property and plate to certain persons. It was held that the words, "without issue as aforesaid," in reference to the funded property, meant without such issue as were objects of the prior gift, *i. e.* children, but that as to the plate, of which there was no gift to the children of C, the words were to be construed as importing a general failure of issue, and consequently that C was absolutely entitled.

(*b*) 7 Mees. & Welsby, 292. See Goodtitle d. Cross *v.* Woodhull, Willes, 592.

(*c*) 2 Barn. & Cress. 524; S. C. 3 Dowl. & Ryl. 808.

(*d*) The fact of the devise being held to confer an estate tail *male*, (which appears by the statement in one of the reports, Dowling & Ryland's, only) is important, as

* This power, it is observable, was not considered to raise an implied trust for the children as to the plate.

confirmed by the Chancellor, and in 1823 the Court of Exchequer came to the same decision upon the same devise.

In this case, probably, the words "severally and successively" may have assisted the conclusion at which the Court arrived, but these words would have more force if the devise were in the exact terms of the brief statement which has been handed down to us than if the estate tail were created in more formal language—*i. e.* by a devise to the eldest son, and to the heirs male of his body, in which case the words in question would seem to refer to the mode of taking by the heirs; otherwise they give rise to a strong suspicion that a devise to the second and other sons successively in tail was inadvertently omitted.

[327] The absence of all information as to the *precise grounds of the decision greatly detracts from its value as a general authority.

A question of this kind was much discussed in the recent case of Doe d. Burrin *v.* Chorlton; (*a*) where a testator devised a messuage to his kinsman S. C. for his life, and after his decease to the *eldest son* of S. C., but for want of such issue, then to his (S. C.'s) daughters or daughter, share and share alike, forever; but in case his said kinsman had no issue, then to hold to S. C., his heirs and assigns forever. It was contended, on the authority of the last case, that the word "son" was to be construed as *nomen collectivum;* and consequently that S. C. took an estate tail male, precedent to the general estate tail, which was assumed to arise by implication from the words referring to a failure of issue in the devise over. (*b*) But the Court decisively negatived this construction, being of opinion that neither the devise to the eldest son alone, nor the words "for want of such issue" following such devise, created an estate tail. In none of the cases had there been that strict reference to a single individual which occurred in the case before the Court, except in Chorlton *v.* Craven, where considerable weight was probably attached to the expressions "severally and successively."

showing that the devise to the son had some influence on the decision; as the subsequent words, if they had led to this result, would seem to have pointed to an estate tail general.

(*a*) 1 Scott's New Rep. 290; S. C. 1 Mann. & Grang. 429. And see Foord *v.* Foord, 3 B. P. C. (Toml. ed.) 124.

(*b*) Ante, vol. 1, p. 487.

CHAPTER XL.

"ISSUE," WHERE CONSTRUED AS A WORD OF LIMITATION.

I. *Devises to a Person and his Issue. Effect of Words creating a Tenancy in Common,—of Words of Limitation in Fee Simple, and other modifying Expressions.*

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Limitation over, if the devisee leave no issue at his death, [p. 359.]
Bequest over on failure of issue at the death, following bequest to A and B and their issue, [p. 360.]

I. "ISSUE" is nomen collectivum, and a word of very extensive import. The term embraces descendants of every degree whensoever existent, and, unless restricted by the context, cannot be satisfied by being applied to descendants at a given period. The only mode by which a devise to the issue can be made to run through the whole line of objects comprehended in the term, is by construing it as a word of limitation, synonymous with *heirs of the body*, by which means the ancestor takes an estate tail; an estate capable of comprising in its devolution, though not simultaneously, all the objects embraced by the word "issue" in its largest sense.[1]

Opinions certainly have differed as to the signification of the word *issue*. It has been denominated by some Judges and writers a word of limitation; and a devise to A and his
[329] issue has even been stated by an eminent *Judge as "the aptest way of describing an estate tail according to the statute;" (*a*) by others, "issue" has been called a word of purchase, or an ambiguous word. (*b*) However, it is not from such dicta that the true legal acceptation of the word is to be collected, but from the adjudication *fixing its operation*. Unhap-

(*a*) Per Lord Thurlow, in Hockley *v.* Mawbey, 1 Ves. Jun. 149.
(*b*) See judgment in Ginger d. White *v.* White, Willes, 348; Roe d. Dodson *v.* Grew, 2 Wills. 324; Doe d. Cooper *v.* Collis, 4 Durn. & E. 299; Earl of Orford *v.* Churchill, 2 Ves. & Bea. 67; Lyon *v.* Mitchell, 1 Madd. 473; Tate *v.* Clarke, 1 Beav. 105; Doe d. Gallini *v.* Gallini, 3 Adolph. & Ell. 340.

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[1] See Sibley *v.* Perry, 7 Ves. (Sumner's ed.) 522, Perkins's note (*a*), and cases cited. When the word "issue," or the words "heirs of the body," are used in a devise, they must have one of two meanings; either the indefinite lineal succession of heirs of the body, or the particular individuals who, at a given time, answer the description of issue. Ferrill *v.* Talbott, Ril. Ch. Ca. 247.

The words "lawful issue" have as extensive a signification as "heirs of the body," and embrace lineal descendants of every generation. And when used in a devise, by which the immediate devisee takes an unrestricted freehold, it is a word of limitation, and has the same effect as "heirs of the body." Kingsland *v.* Rapelye, 3 Edw. 1.

pily, some discordancy prevails even here, and an examination of the cases will serve to evince that, in the enunciation of any general proposition on the subject, the utmost caution is requisite.

With regard, however, to a devise simply to *a person and his issue*, no doubt can at this day be raised as to its conferring an estate tail; and it may be observed, that such a devise is not (like a devise to a person and his children) (*a*) dependent on, or, it seems, in the least degree, influenced by, the fact of their being or not being issue of the devisee living at the date of the will, or at any other period. (*b*) Upon the same principle as that on which, in the cases just referred to, the devisee is held to be tenant in tail, where the property can reach the children in no other way, he is here construed to take an estate tail *at all events*, namely, because there is no other mode by which the testator's bounty can be made to flow to and embrace the whole range of intended objects. (*c*)

* It has even been held, that a devise to A and his [330] issue *living at his death* creates an estate tail in A. (*d*) In such a case, it is clear, the issue cannot take as joint tenants with him, since the objects are not ascertainable until the death of the parent. It is only through him that they can become entitled, and the case falls, therefore, within the principle of the rule in Wild's case, namely, that the parent must take an estate tail, in order to let in the other objects. Had the devise been to A for life, *with remainder* to the issue living at his death, the case would have been different. (*e*) All the objects might then have taken by purchase. (*f*)

(*a*) Ante, 307.

(*b*) Lord C. J. Hale, in King *v.* Melling, 1 Vent. 231, says, "though the word *children* may *be made* nomen collectivum, the word *issue* is nomen collectivum *of itself*."

(*c*) It seems extremely probable that a devise to A and his *next* or *eldest* issue male, would now be held to give an estate tail male, though the contrary was decided in the early case of Lovelace *v.* Lovelace, Cro. El. 40, which cannot be reconciled with later cases, especially Doe *v.* Garrod, 2 Barn. & Ad. 87, ante, 321. That the word *next* or *eldest* prefixed to the words heir male in a devise to a person and his heir male, does not prevent the latter words from conferring an estate tail, has been long settled (ante, p. 234); but since the recent case of Lees *v.* Mosley, 1 Yon. & Coll. 589, post, establishing the greater inflexibility of limitations to heirs of the body than limitations to issue, this must not be considered conclusive.

(*d*) University of Oxford *v.* Clifton, 1 Ed. 473.

(*e*) See Lethieullier *v.* Tracy, 3 Atk. 774, 784; Amb. 204, 220; 1 Hanmer's Cases, 56, S. C.

(*f*) Considering the inclination manifested in some of the recent cases to construe a devise to a person and his children as amounting to a devise to A for life, with remainder to his children, (ante, 313, 317,) perhaps the reader will not be disposed to place implicit confidence in the adjudication that a devise to A and his issue, living at his decease, gives to A an estate tail. There would seem to be less difficulty, in such a case, in reading the gift to the issue as a remainder, than in that of a devise to A and his children, which remainder, however, being contingent, would be destructible during the life of A. At all events, there can scarcely be a doubt that the words in question applied to *personal* estate would be construed in the manner suggested, namely, as giving a life interest to A, with a contingent disposition of the ulterior interest to the issue living at his death.

So far the cases present little that can be the subject of controversy; but difficulty frequently arises from the introduction into the devise, of expressions inconsistent with the course of
[331] devolution or enjoyment under an estate * tail, as, that the issue shall take in equal shares or *as tenants in common*, or that the estate shall *go over in case they die under twenty-one*, which has been regarded as inapplicable to issue indefinitely. If the Courts had uniformly rejected these inconsistent provisions as repugnant, immense litigation and discordancy of decision would have been prevented. This has been shown to be now the established rule in regard to limitations to *heirs of the body;* (*a*) and there might seem, upon principle, to be strong ground to contend for the application of the same doctrine to the cases under consideration. The word *issue* is not less extensive in its import than heirs of the body: it embraces the whole line of lineal descendants; it is used in the statute *De Donis*, (*b*) in some instances at least, synonymously with heirs of the body, and the cases are very numerous in which it has been held to create an estate tail. It will be seen, however, that, in some instances, the word *issue* has been diverted from its general legal acceptation by the occurrence of words of distribution, or other expressions which point at a mode of devolution or enjoyment inconsistent with an estate tail, and have been decided to be insufficient to convert the term *heirs of the body* into children, or to prevent its conferring an estate tail.

Some confusion arises in the cases from the neglect to distinguish between a devise to A and his issue in one unbroken limitation, and a devise to A *for life*, and *after his death* to his issue. It is true they both converge to the same point, when *issue* is construed a word of limitation; but if, on the other hand, the issue are held to be purchasers, they must, it is conceived, take differently in the two cases; in the former, *jointly with the parent*, in the latter, *by way of remainder* after him;
[332] though certainly, * in some of the cases, this distinction has been overlooked, and the Courts have shown a readiness, even where the devise is to a person and his issue, not only to read "issue" as a word of purchase, on account of words of modification inconsistent with an estate tail being found in the devise, but to hold the issue to take by way of remainder expectant on the estate for life of the ancestor.

Thus, in the case of Doe d. Davy *v.* Burnsall, (*c*) where a testator devised freehold and leasehold *estates to M. and the issue of her body* lawfully to be begotten, *as tenants in common*, (if more than one,) but in default of such issue, or, living such, if they *should all die under the age of twenty-one years*, and without

(*a*) Ante, p. 277. (*b*) 13 Edw. I. c. 1.
(*c*) 6 Durn. & E. 30.

leaving lawful issue of any of their bodies, then over to A. M., before the birth of a child, suffered a recovery. It was held, by the Court of King's Bench, that M. took for life, with remainder in fee to her children, if she had any; but if she had none, or they died under twenty-one, and without leaving lawful issue, then over; and that this remainder, therefore, being contingent, was barred by the recovery of M. The same devise afterwards came before the Court of Common Pleas, (*a*) on a case from Chancery; and that Court certified that M. took only an estate for life, (*b*) with contingent remainders over. Eyre, C. J., said, "If it were not for the words, 'if they shall all die under the age of twenty-one years,' I should be of opinion that this must be construed to be an estate for life in M., remainder in tail to her issue as purchasers, with cross remainders to every one of that family, and then over; but I am at a loss to know what to do with these words. If I were * perfectly [333] satisfied with the rejection of the word 'amongst' in Doe *v.* Applin, (*c*) I would reject them, and consider this as a devise over in case the issue of M. should die without leaving lawful issue of their bodies." (*d*)

So, in Doe d. Gilman *v.* Elvey, (*e*) where a testator devised his real estate to his wife for life, and after her decease, to his son H., *and to the issue of his body* lawfully begotten or to be begotten, *his, her, or their heirs equally to be divided, if more than one;* and if H. should have no issue of his body lawfully begotten living at his decease, then to A. in fee. H. survived the testator's widow, and before he had any issue, suffered a common recovery. The Court considered the case as falling exactly within Doe *v.* Burnsall, the devise being in effect to the issue as tenants in common. It was held, however, that quacunque via data, *i. e.* whether H. took for life or in tail, the title under the recovery was good; the remainders in the former case being contingent, and consequently destroyed by it.

Of these two cases, it may be observed, that they *decided* nothing more than that A.'s estate was *either* a contingent remainder after an estate for life, *or* a vested remainder after an estate tail, either of which was defeated by the recovery. The opinion of the Court upon the alternative of these propositions

(*a*) Burnsall *v.* Davy, 1 Bos. & Pull. 215.

(*b*) This certificate does not state who were entitled under the contingent remainders, the case not embracing that point.

(*c*) 4 Durn. & E. 82, post, 344.

(*d*) It is evident that the word *issue* in this passage of the judgment is used in two senses, differing in comprehensiveness; for if used as nomen generalissimum, in regard to the issue of M., it is clear that such issue could never fail without involving the failure of the issue of such issue. To render the sentence intelligible, we must suppose the learned Judge to mean, in the first instance, either issue of a given class, or issue existent within a given period, *i. e.* either children, or all issue born in the lifetime of the tenant for life, probably the latter.

(*e*) 4 East, 313.

can hardly be considered as an *adjudication* on the point here discussed.

As there was no issue of the devisee at the time of the devise taking effect, the testator's bounty could only be made to reach the issue (assuming that word to be intended for a word of purchase) under the joint devise to them and their parent, by giving him an estate tail, unless the gift to the issue were construed as a remainder, which the Court undoubtedly seemed inclined to do; but it is difficult to reconcile such a construction with the principle of the cases establishing that even a devise *to* A *and his children* must, under such circumstances, be construed an estate tail, in order to let in the children. (*a*) If the children could be treated as taking by way of remainder, there is no necessity for having recourse to such a rule. If in such cases the Court is authorized to turn the devise to the issue into a remainder, the cases treated of in the present section cease to exist as a distinct class, and become blended with those which form the subject of the next section. At present, however, the authorities do not warrant any such conclusion, as the two preceding cases are, for the reason already stated, scarcely to be regarded as adjudications on the point, and are unsupported by any subsequent cases. Indeed, in the only case that has since occurred, in which the devise to the issue was concurrent with that to the ancestor, and not by way of remainder, the devisee was held to take an estate tail, although words of limitation in fee were superadded. The case here referred to is Franklin *v.* Lay, (*b*) where a testator devised to his grandson J., and to the issue of his body lawfully to be begotten, *and to the heirs of such issue forever*, chargeable with a mortgage; but, [335] if his said grandson J. should die without *leaving any issue of his body lawfully begotten, then over; Sir J. Leach, V. C., held it to be an estate tail in J., observing, that the words "dying without leaving issue" might of course be restrained by other expressions in the will to issue living at the death; as the general words "in default of issue" might also be, *but not by words of limitation superadded to the issue*.

Although there seems to be considerable difficulty in reading a devise to A and his issue, as a devise to A for life, with remainder to his issue, even when accompanied with expressions pointing at a mode of enjoyment inconsistent with an estate tail; yet it is not denied that a slight indication of intention in the context would be sufficient to induce such a construction, and the devise would then be brought within the scope of the authorities discussed under the next division.

(*a*) Wild's case, 6 Co. 17; Davie *v.* Stephens, Doug. 321; Seale *v.* Barter, 2 Bos. & Pull. 486, ante, pp. 307, 308.
(*b*) 6 Madd. 258; S. C. 2 Bligh, 59, n.

II. We come now to the consideration of those cases in which a devise to A *for life*, and after his death to his issue, becomes, by the operation of the well-known rule in Shelley's case, (*a*) an estate tail.

One of the earliest cases of this kind is King *v.* Melling, (*b*) where a testator devised lands to A *for life*, and after his decease he gave the same *to the issue of his body* lawfully begotten on a second wife; and for want of such issue, to B and his heirs forever, provided that A might make a jointure of the premises to such second wife, which she might enjoy for her life. Twisden and Rainsford, JJ., held it to be an estate for life in A in opposition to Hale, C. J., who delivered an elaborate and argumentative opinion in favor of an estate tail, *which construction was afterwards adopted by all the [336] Judges in the Exchequer Chamber, reversing the judgment of the King's Bench.

So in Shaw *v.* Weigh, (*c*) where the testator devised lands to his wife for life, and after her decease in trust for his sisters A. and D., equally betwixt them, *during their natural lives*, without committing any manner of waste, and if either of his sisters happen to die, *leaving issue or issues of her or their bodies* lawfully begotten, then in trust *for such issue or issues* of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it should happen that both of his said sisters died without issue as aforesaid, *and their issue or issues to die without issue lawfully to be begotten*, (*d*) then over. The chief question was whether this was an estate for life, or an estate tail in the sisters. It was adjudged in the House of Lords (affirming a judgment of the Court of Great Sessions for Flintshire, which had been reversed in B. R.) that the devise created an estate tail.

In Ginger *v.* White, (*e*) C. J. Willes questioned this decision, but subsequent cases have placed its authority beyond all doubt. (*f*)

2dly. It is clear, too, that *issue* is not converted into a word of purchase by the addition of words of limitation, descriptive of heirs of the same species as the issue described. (*g*)

Thus in Roe d. Dodson *v.* Grew, (*h*) where *a tes- [337]

(*a*) Ante, p. 241.

(*b*) 1 Vent. 225, 232; S. C. 2 Lev. 58, 61. See also Taylor *v.* Sayer, 1 Cro. El. 742.

(*c*) 2 Stra. 798; S. C. 1 Eq. Ca. Ab. 184, pl. 28.

(*d*) As these words would raise an implied gift in the issue of the issue, the case may be classed with those in which words of limitation in tail are superadded to the devise to the issue. See also Frank *v.* Price, 3 Beav. 182, post.

(*e*) Willes, 348, post.

(*f*) See cases passim in the sequel of this chapter.

(*g*) See same rule as to heirs of the body, ante, 271.

(*h*) 2 Wils. 322; better reported Wilm. 272. See also Shaw *v.* Weigh, in the text.

tator devised unto his nephew G. for his natural life, and after his decease to the use of the *male issue of his body* lawfully to be begotten, and the *heirs male of the body of such issue male*, and for want of such male issue, then over. The Court of Common Pleas held that G. took an estate tail: Wilmot, C. J., said, that the intention certainly was to give G. an estate for life only; but the intention also was, that as long as he had any issue male the estate should not go over, (*a*) and if we balance the two intentions, the weightier is, that all the sons of G. should take in succession. Clive, J., said, too great a regard had been paid to the superadded words, "heirs male of the body of such heirs male." Bathurst, J., laid it down as a rule, that where the ancestor takes an estate of freehold, if the word "issue" in a will comes after, it is a word of limitation. Gould, J., observed, that the word is used in the Statute *De Donis* promiscuously with the word "heirs;" *that the term "issue" comprehends the whole generation as well as the word "heirs,"* [of the body,] and in his judgment, the word "issue" was more properly a word of limitation than a word of purchase.

This case (which has always been regarded as a leading authority) seems to have overruled Backhouse *v.* Wells, (*b*) where the devise was to J. *for his life only*, without impeachment of waste, and after his decease then *to the issue male of his body* lawfully to be begotten, if God should bless him with any, *and to the heirs male of the body of such issue* lawfully begotten; and for default of such issue, over. It was adjudged that J. took an estate *for life*, and that the limitation to the issue was a description of the person who was to take the estate tail.

[338] * It would be idle to attempt to distinguish the last case from Roe *v.* Grew, on the ground of the words "only," and "without impeachment of waste," and "if God shall bless him with any." The two first expressions merely show that the testator intended to confer an estate for life, and nothing more, which sufficiently appeared by the express limitation for life, and the last words are obviously implied in every gift of this nature.

The authority of Roe *v.* Grew has been confirmed by the case of Hodgson *v.* Merest, (*c*) where the devise was to A for the term of his natural life only, and, after his decease, then to the issue of his body, and to the heirs of the body of such issue, with remainders over; and it was held that A took an estate tail.

It also established that the addition of a limitation to the heirs *general* of the issue, will not prevent the word "issue"

(*a*) Or rather that the issue should take it.
(*b*) 1 Eq. Ca. Ab. 184, pl. 27.
(*c*) 9 Price, 556.

from operating to give an estate tail as a word of limitation. (*a*) This position, indeed, may appear to be encountered by the well-known case of Loddington *v.* Kime, (*b*) where under a devise to A *for life*, without impeachment of waste, and in case he should have any issue male, then *to such issue male and his heirs forever*, it was held that A took an estate *for life only*, with a contingent fee to his issue male.

It will require some very fine-spun distinctions to reconcile this case with subsequent decisions. In King *v.* Burchell, (*c*) the testator devised to J. *for his life*, and after the determination of that estate unto *the issue male of the body of* J. lawfully to be begotten, *and to their heirs*, and for want of such issue, over; and if J. or his issue should alien the premises, they were charged with £2000; *Lord Keeper Henley held that J. was tenant in tail, and that the proviso was repugnant and void; his Lordship distinguished Loddington *v.* Kime, because there the remainder was expressly contingent. [339]

But is not, it may be asked, every remainder to a class contingent in this sense, namely, as respects the event of there being objects to claim under it? Upon this principle, Sir W. Grant, in Elton *v.* Eason, (*d*) held that the words "if any," annexed to a limitation to the heirs of the body, did not vary the construction. It is futile, therefore, to attempt to preserve Loddington *v.* Kime by any such distinction. The case is clearly overruled.

Another decision, which may seem to militate against the rule before laid down, is Doe d. Cooper *v.* Collis, (*e*) where a testator devised to his daughter E., and to S. the wife of W., to be equally divided between them, not as joint tenants, but as tenants in common, viz: the one moiety to E. and her heirs forever, and the other moiety to S., for the term of her *natural life*, and after her decease *to the issue of her body* lawfully begotten *and their heirs* forever. (There was no devise over.) The question was whether S. took an *estate tail* or an estate for *her life*, with remainder in fee to her children; and the Court decided in favor of the latter construction, Lord Kenyon observing that issue was either a word of purchase or of limitation, as would best answer the intent of the devisor; and his Lordship remarked, that the property was *to be equally divided*, which it would not be if S. were held to take an estate tail; for, in that case, the reversion in fee of that moiety would be again subdivided between the heirs of the two daughters.

(*a*) See same rule as to heirs of the body, ante, 272.
(*b*) 1 Salk. 224; S. C. Lord Raym. 203.
(*c*) 1 Ed. 424; S. C. Amb. 379.
(*d*) 19 Ves. 73.
(*e*) 4 Durn. & E. 294.

[340] * It is difficult to accede to the reasoning which ascribed to the words of division this influence on the construction, since they were merely applied to the *corpus* of the land, not to the inheritance. At all events, it is enough for our present purpose to show that the case was decided upon special grounds, and not in opposition to the doctrine that a limitation to the heirs of the issue, superadded to the devise to the "issue," is inoperative to vary the construction. As such, indeed, it would have been clearly overruled by subsequent cases.

Thus, in Denn d. Webb *v.* Puckey, (*a*) the testator devised to his grandson N. *for life*, without impeachment of waste, and after his decease *to the issue male of his body* lawfully begotten, and *to the heirs and assigns of such issue male forever;* and in default of *such* issue male, then over. N. suffered a recovery, and the question raised was whether, under the devise, he was tenant in tail or tenant for life only. The Court held that the general intention of the testator was that the male descendants of his grandson N. should take the estate, and that none of those to whom the subsequent limitations were given should take until all such male descendants were extinct; and, to effectuate this, it was necessary to give him an estate tail; for, if his issue took by purchase, Lord Kenyon thought it would be difficult to extend it to more than one, (*b*) and that even if the
[341] words comprehended all * the male issue as tenants in common in tail, yet that would not have answered the devisor's intention, because there were no words to create cross remainders between them. (*c*) But it was held it was, even if the issue would have taken by purchase; yet that, being a contingent remainder, it was destroyed by the recovery which was suffered before the birth of issue, so that the defendant, who claimed under the recovery, was entitled quacunque via data.

So in Frank *v.* Stovin, (*d*) where a testator devised to B. *for life*, without impeachment of waste, with power to make a jointure to any future wife, and after his decease then *to the use of the issue male of the body of B.* lawfully begotten and to be begotten, *and their heirs;* and in default of such issue, then

(*a*) 5 Durn. & E. 299.

(*b*) His Lordship is made to say, "It has been contended that N. took only an estate for life; if so, what estate was given by the words, 'to the issue male of his body lawfully begotten, and the heirs and assigns of such issue male?' Was it to extend to more than one son? It would be difficult to extend it to more than one, and I conceive that the eldest must have taken the *absolute interest in the estate.* But that would have defeated the devisor's intention, because if it had *descended* (Qu. devolved?) to that one son, and he had died without making any disposition of it, it would have gone over to the other sons of the devisor," *i. e.* by descent, for if it were a devise in fee to the son, of course no remainder could be limited on that estate.

(*c*) They would clearly have been implied, but there seem to have been insuperable obstacles to the suggested construction.

(*d*) 3 East, 544.

over. B. had issue, and afterwards suffered a recovery. (*a*) Lord Ellenborough was of opinion that the case was governed by Roe *v.* Grew, and accordingly that B. took an estate tail.

Again, in the case of Mogg *v.* Mogg, (*b*) where a testator devised the residue of his * messuages, &c., [342] equally among the child or children begotten and to be begotten of S. *during his, her, and their life and lives*, and after the decease of such child and children he gave the same *unto the lawful issue* of such child and children of S., to hold unto such issue, *his, her, and their heirs as tenants in common*, without survivorship, and in default of such issue, over; the Court of King's Bench, on a case from Chancery, certified (*c*) that the children of S. took *estates tail.*

It should be observed that in Frank *v.* Stovin, (*d*) a learned Judge attempted to distinguish that case and Denn *v.* Puckey, (*e*) from Doe *v.* Collis, (*f*) by reference to the limitation over "in default of *such* issue," which occurred in those cases, (and also, it will be seen, in Mogg *v.* Mogg.) In refutation of this alleged distinction, it will be sufficient to refer to the cases discussed in the next chapter, * establishing that this [343] expression, following a devise to any class of issue, refers to these objects. If in the case of a devise to sons or children, and in default of such issue, over, the clause intro-

(*a*) Where the disentailing assurance in these cases is not executed until after the birth of issue, it is necessary to decide whether the devisee had an estate tail or not; for, if not, the assurance is ineffectual to defeat the claims of the issue, as on the birth of issue, if they took by purchase, the estate having already vested in such issue, was unaffected by the act of the tenant for life; but it is otherwise, if the assurance be executed *before* the birth of issue, when the remainder is contingent and consequently destructible, by whatever determines the estate for life. See some remarks on the destruction of contingent remainders, ante, vol. 1, p. 786, n.

(*b*) 1 Mer. 654. I cite this case with diffidence, on account of the impossibility of ascertaining the precise ground on which it was decided; for, as the limitation to the issue, as purchasers, of children born and to be born, would have transgressed the rule against perpetuities, possibly this circumstance may have induced the Court to apply the doctrine of *cy pres*, but to which there seems to be this objection, that it would extend the doctrine, (which all agree has already been carried quite far enough,) to cases in which an estate *in fee simple* is given to the issue, in opposition to the rule considered to have been established by the authorities (ante, vol. 1, p. 260); besides which, if the Court saw a very decided reason for holding issue to be a word of purchase, why was not the devise restricted to the children (and the issue of children) who were born in the lifetime of the testator, as was done (though perhaps unwarrantably) in certain other devises in the same will, under which the ancestor took an equitable interest only, and the issue a legal remainder, (ante, p. 35,) which two limitations being of different quality, could not unite by force of the rule in Shelley's case? For these reasons I have continued to treat the case of Mogg *v.* Mogg as an authority for reading "issue" as a word of limitation, this being, as I conceive, the least exceptionable ground to which it can be referred, though it is admitted that, in applying this construction to a case in which words of distribution, as well as words of limitation, were introduced into the devise to the issue, it goes a step beyond any other of the modern cases, and as to this ultra point, therefore, is not to be relied on.

(*c*) 1 Mer. 688.

(*d*) 3 East, 551.

(*e*) Ante, 340.

(*f*) Ante, 339.

ducing the devise over is inoperative to vary the construction of the prior devise, can it have more power where following an express devise to issue, explained by the context to mean sons or children? The two cases seem to be identical in principle. (*a*) If, therefore, in Doe *v.* Collis, "issue" was properly construed to mean children, the words "in default of *such* issue," in Denn *v.* Puckey and Frank *v.* Stovin, (and we may add, in Mogg *v.* Mogg,) ought, according to the class of cases just mentioned, to have been read "in default of such *children*." But, as they were not so construed, the inevitable conclusion is that Doe *v.* Collis, so far as it rests on this distinction, is overruled; and that a devise to A for life, remainder to his issue and the heirs of such issue, *with or without a limitation over*, confers an estate tail on A. (*b*)

3. It might seem upon principle to follow that words of distribution annexed to the devise to the issue, or any other expressions prescribing a mode of enjoyment inconsistent with the course of descent under an estate tail, would be no less inoperative than superadded words of limitation, to turn "issue" into a word of designation; and such undoubtedly is the doctrine of *some* at least of the cases.

[344] * Thus, in Doe d. Blandford *v.* Applin, (*c*) where a testator devised an estate at A. to W. for life, and after his decease *to and amongst his issue*, and in default of issue, then over; it was held that W. took an *estate tail;* Lord Kenyon and Mr. Justice Buller reasoned much on the words limiting over the property, and the latter admitted that in rejecting the words "and amongst," they went beyond any of the preceding cases. Mr. Justice Grose referred the decision to the broad (and, it is conceived, the true) ground, that the word *issue* was a word of limitation, and differed from *children*, the learned Judge citing the declaration of Rainsford, J., (*d*) "that the word issue is ex vi termini nomen collectivum, and takes in all issues to the utmost extent of the family, *as far as the words heirs of the body would do.*

The authority of Doe *v.* Applin was denied by Eyre, C. J., in Burnsall *v.* Davy, (*e*) and by Lord Thurlow, in Jacobs *v.* Amyatt, (*f*) but it is now indisputable. The fact that Lord Thurlow, in deciding Jacobs *v.* Amyatt, found it necessary to question

(*a*) Two recent cases, subsequently stated, namly, Ryan *v.* Cowley, 1 Lloyd & Goold, 10, and Carter *v.* Bentall, 2 Beav. 551, may be, mentioned among many as bearing out this remark. To say that the words "in default of such issue," refer to the objects of the prior devise, whoever they may be, and that those objects mean issue indefinitely, by the effect of the words in question, seems very much like reasoning in a circle.

(*b*) See Hayes's Inq. 302.

(*c*) 6 Durn. & E. 82; and see 8 Id. 7, n.

(*d*) Finch, 282.

(*e*) 1 Bos. & Pull. 215, ante, 332.

(*f*) 4 B. C. C. 542, post [Perkins's ed. 543, note (*b*)].

Doe *v.* Applin, shows that his Lordship saw no distinction between devises to *heirs of the body* and *issue* in regard to the effect of superadded expressions.

So, in Doe d. Cock *v.* Cooper, (*a*) where a testator devised lands to his nephew R. for the term only of his natural life, and after his decease he devised the same to the *lawful issue* of R. *as tenants in common;* but in case R. should die without leaving lawful issue, then after his decease the testator devised the lands to G. in fee. It was held that R. took an estate tail, to accomplish the general *intention, and by implica- [345] tion from the words devising over the property in case R. should die without issue. (*b*)

In this case, even if the issue took as purchasers, the contingent remainder to them had been destroyed by a recovery suffered by R.; but the Court decided the case unreservedly on the other point.

With the two preceding cases may, it is conceived, be classed the case of Ward *v.* Bevil, (*c*) where a testator devised a messuage, &c., called B. to his son W. during his life, adding, "in case he has issues, then it is my will that they should jointly inherit the same after his decease." After other bequests, the testator devised over the whole of his property upon W.'s dying without issue. It was held by Lord Alexander, C. B., that W. took an estate tail in B.

It must be admitted, that in Doe *v.* Applin and Doe *v.* Cooper, Lord Kenyon and most of the other learned Judges distinctly grounded their judgment on the intention appearing by the words devising the property over, that the estate should not pass to the ulterior devisee until a failure of the descendants of the first taker. But, it may be asked, is not this intention equally manifest in the gift to the issue in the devise itself? If the word *issue* in the clause introducing the devise over, cannot be satisfied without letting in *all* the descendants, how, *pari ratione*, can it be satisfied in the prior devise by a narrower construction? Supposing that the testator, by evincing an intention that the issue shall take in a manner inconsistent with the devolution of the property under an estate tail, restrained the generality of that term, it seems to be a necessary corollary to this proposition, that the subsequent words *devising the property over [346] in case of the failure of issue of the first taker, are referable to the same objects; for, if these words, following a devise to *children* in fee, be, as we shall presently see they clearly are, merely referential, (*d*) then *à fortiori* they must receive the

(*a*) 1 East, 229.

(*b*) Notwithstanding that Mr. Justice Grose, in Doe *v.* Applin, (ante, 334,) argued so clearly upon "issue" being a word of limitation, he here assumed it to mean *children*.

(*c*) 1 Yon. & Jerv. 512.

(*d*) Goodright *v.* Dunham, Doug. 264; Ginger d. White *v.* White, Willis, 348, post.

same construction when the testator has immediately before, and in devising this very property, used *the same word* "issue." In truth, the reliance which has been placed upon the words introducing the devise over is quite as indefensible in these cases as where the preceding devise is to *heirs of the body;* (*a*) and it appears to have been productive of the same kind of mischief; for *here* as *there*, the consequence is that in several subsequent cases the word *issue* has been cut down to a word of designation upon grounds such as those, or even feebler than those, adopted by Lord Kenyon, in the cases under consideration, *notwithstanding there were words introducing the devise over, which always served to conduct his Lordship to the sound conclusion that the testator meant an estate tail.*

Passing by the cases of Doe d. Burnsall *v.* Davy (*b*) and Doe *v.* Elvey, (*c*) already discussed, which fully illustrate this observation, we come to the more recent case of Merest *v.* James, (*d*) where the devise was to the use of the testator's daughter, *for her natural life*, and after her decease then to the use of the *issue of her body* lawfully begotten; and in default of issue, *or in case none of such issue lived to attain the age of twenty-one years*, then over. On a case from Chancery, the Court of Common Pleas certified that the daughter took an estate *for life only.*

[347] According to the present practice, the reasons on which *the certified opinion was founded do not appear; but the case of Crump *v.* Norwood, (*e*) and also Doe *v.* Burnsall, were much relied upon as authorities for the construction adopted by the Court.

The solitary ground in this case for diverting the word "issue" from its more extensive signification, seems to have been the devise over in case of the issue dying under twenty-one, which, it will be remembered, is precisely the circumstance that both Lord Eldon and Lord Redesdale, in Jesson *v.* Wright, considered to have been improperly allowed to control the construction of "heirs of the body" in Doe *v.* Goff; (*f*) and Lord Redesdale strongly denied that such a limitation over was inconsistent with giving an estate tail to the prior devisee. (*g*) The case of Merest *v.* James, therefore, goes to establish a distinction between the words *heirs of the body* and *issue* in reference to the force of expression, or the degree of explicitness or clearness requisite to restrict or cut down the term to a different and narrower range of objects. The case was decided between the period of the determination of Doe *v.* Goff in the Court of King's Bench, and that of its being overruled in the House of Lords; and this, if subsequent authority were wanting, would be sufficient to cast

(*a*) Ante, p. 291. (*b*) Ante, p. 332. (*c*) Ante, p. 333.
(*d*) 4 Moore, 327; S. C. 1 Brod. & Bing. 127.
(*e*) See ante, p. 293. (*f*) Ante, p. 290.
(*g*) See Grimshawe *v.* Pickup, 9 Sim. 591.

a shade of doubt upon the decision; but we shall find in the case next stated a doctrine propounded, which tends to place devises to heirs of the body and devises to issue on a widely different footing, in regard to the effect of superadded words of modification inconsistent with an estate tail.

The case here referred to is Lees *v.* Mosley, (*a*) where a testator devised certain lands unto his two sons, Henry
*James and Oswald Fielden, in moieties as tenants in [348]
common, in such manner and subject to such charges as thereinafter mentioned, that is to say, as to one moiety thereof, to his son Henry James for life, *with remainder to his lawful issue and their respective heirs, in such shares and proportions and subject to such charges as he (H. J.) should by deed or will appoint; but in case his son Henry James should not marry and have issue, who should attain the age of twenty-one years*, then he devised the said moiety to his son Oswald and his heirs forever. And, as to the other moiety of the property, the testator devised the same to his son Oswald and his heirs absolutely forever. At the date of the will, and at the death of the testator, Henry James Fielden was a bachelor. He suffered a recovery of his moiety, and the question (raised in an action between vendor and purchaser) was as to the validity of the title derived under such recovery. The case was elaborately argued, the plaintiff contending that, according to the true construction of the will, there was a gift to the parent for life, with remainder to the children in fee; and the defendants insisting that Henry James Fielden took an estate tail. The Court decided that he was tenant for life only. Mr. Baron Anderson (who delivered the judgment of the Court) drew a distinction between a devise to *heirs of the body*, which he considered were technical words, admitting but of one meaning, and a devise to *issue*, which he characterized as a word in ordinary use, not of a technical nature, and capable of more meanings than one; observing that it was used in the Statute De Donis, both as synonymous with children and as descriptive of descendants of every degree, and though the latter might be its prima facie meaning, yet the authorities showed that it would yield to the intention of the testator to be collected from the will, **and that it requires a less demon- [349]
strative context to show such intention than the technical expression "heirs of the body," would do.* The learned Judge then proceeded as follows: "The Court in the present case have to look to the terms in this will, in order to ascertain whether by construing the word 'issue' here as a word of purchase or of limitation, they best effectuate the intention of the devisor. The testator begins by devising an express estate for life to his son Henry James. He then devises in remainder to his lawful issue.

(*a*) 1 You. & Coll. 589.

If it stopped there, it would be an estate tail. For the word 'issue' might include all descendants; and here all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in Shelley's case would apply, and would convert the estate for life, previously given, into an estate tail. But the testator then adds, 'and their respective heirs in such shares and proportions and subject to such charges as he the said Henry James should by will or deed appoint.' Now, according to the case of Hockley *v.* Mawbey, (*a*) the effect of this clause would be to give the objects of the power an interest in an equal distributive share, in case the power were not executed. The clause, therefore, is equivalent to a declaration by the testator, that the issue and their respective heirs should take equal shares, but that Henry James should have a power of distributing amongst them the estate, in unequal shares, if he thought fit. Now, if issue be taken as a word of limitation, the word 'heirs' would be first restrained to 'heirs of the body,' and then altogether rejected as unnecessary. The word 'respective' could have no particular meaning annexed to it; and the apparent intention of the testator to give to Henry James for life,
[350] and afterwards to distribute his property *in shares amongst the issue, would be frustrated. On the other hand, if issue be taken as a word of purchase, designating either the immediate issue or those living at the death of Henry James, the apparent intention will be effectuated, and all these words will have their peculiar and ordinary acceptation. If, then, the will stopped here, it would seem clear that the Court ought to read 'issue' as a word of purchase. Then comes the devise over. 'But in case my son Henry James shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son Oswald in fee.' Now, the effect of such a clause, if superadded to a remainder to children, would be to show an intention to give a fee to the children on their attaining twenty-one. And if by the former part of the will the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert the estate previously given into an estate tail. In fact, the case of Doe *v.* Burnsall (*b*) is a distinct authority on this part of the case. Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail, and we think that we best effectuate that intention by construing the words 'lawful issue' in this will, accompanied by their context, as words of purchase; and, in so doing, we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words, with such a context as in this will, have ever been held to be words of limitation."

(*a*) 3 Bro. C. C. 82, post [Perkins's ed. 85, note (*a*)].
(*b*) 6 Durn. & E. 30, ante, 332.

The case of Lees *v.* Mosley may be considered as deciding that under a devise to A for life, with remainder to his respective issue in fee, in such shares as he shall appoint, with a limitation over in case of his dying * without [351] issue who should attain majority, the issue take estates in fee, as tenants in common, and A is not tenant in tail. It may be also collected from the judgment, that the Court (or at least the very learned Judge who delivered it) would have arrived at the same conclusion if the devise to the issue had been simply to them as tenants in common in fee, without any devise over; in other words, that if a testator devises lands to A for life, with remainder to his issue and their heirs in equal shares, or as tenants in common, the effect is to give to A an estate for life with remainder to the issue in fee. If, however, the devise was so framed as that the issue, if they took as purchasers, would have an estate for life only, (a circumstance which is less likely to occur under a will made or republished since 1837 than any other,) it is conceded that the leaning to the construction which makes "issue" a word of purchase would be less strong, and the fate of the devise is still uncertain.

The recent case of Tate *v.* Clarke (*a*) shows the opinion of Lord Langdale on this much-controverted point, though as his Lordship decided that, in the events which had happened, the devise to the issue did not extend to the issue claiming, (because their parent was not one of the designated sisters of the testator,) the case cannot be considered as an actual adjudication on the subject.

The devise was to the testator's widow for life, with remainder to trustees and their executors, to pay costs, &c., and to divide the residue of the rents amongst all the testator's brothers and sisters "who should be living at the time of the decease of his (the testator's) wife, *and to their issue male and female*, after the respective deceases of his said brothers and sisters, *forever; to be equally divided between and among them.*" Lord Langdale, M. R., * held that the words "issue [352] male and female" were to be construed as words of limitation and not of purchase; and that the children of a sister of the testator, who died in the lifetime of the widow, took no interest.

"The word 'issue,'" his Lordship observed, "is a word of limitation, if the context of the will does not afford sufficient reason to construe it otherwise. In the present will, I think that it cannot be construed in a sense different from 'heirs of the body;' and if the words 'heirs of the body' had been employed, I think that neither the superadded words *prima facie* denoting distribution, nor the want of a gift over, in default of issue, would have afforded sufficient reasons for construing the

(*a*) 1 Beav. 100.

words otherwise than as words of limitation. This case is not so strong as some others which have been decided; for the words of distribution may be applied to the brothers and sisters who were intended to be first takers, and the words 'their issue' must mean the issue of those who were to take, and they are expressly those who should be living at the death of the wife; at which time there was no brother or sister living."

It will be perceived that in this case the devise was to the issue *male and female*, which perhaps (where unaccompanied by expressions showing that the objects were to take concurrently) does not present so decided an inconsistency with an estate tail, as words of distribution, since the course of descent under an estate tail general does, in point of fact, embrace persons of each sex, although not in general simultaneously.

It is observable that, in Lees *v.* Mosley, (and the same remark applies to many other cases,) it does not distinctly appear whether, in pronouncing "issue" to be a word of purchase, the Court intended to construe it as synonymous with *chil-*
[353] *dren*, or as admitting descendants of every *degree. (*a*) The latter, it is presumed, would be its construction in the absence of a restraining context. (*b*) What amounts to such a context will be the subject of consideration in the next section, which this remark will serve to introduce.

4. If the testator annex to the gift to the issue words of explanation, indicating that he uses the term "issue" in a special and limited sense, it is of course restricted to that sense.

As in the case of Mandeville *v.* Lackey, (*c*) where a tes-

(*a*) The case of Dalzell *v.* Welch, 2 Sim. 319, seems to bear upon this point, and favors the more enlarged construction of the term "issue."

A moiety of certain real estate was devised to D. for life, remainder to and among his issue, as he should by will appoint, remainder to his issue living at his death, in fee. D. made an appointment in favor of his children, only, though he left also grandchildren and great-grandchildren. Sir. L. Shadwell, V. C., held the appointment to be invalid, on the ground of its excluding the donee's grandchildren and great-grandchildren, who were objects of the power, as being included under the denomination of issue. The chief argument for the contrary construction was founded on a previous part of the will, in which the testator had bequeathed personalty to A. for life, and, in case she should leave *issue* living, then to be paid and applied among *such child or children* in such proportions, &c., as A. should appoint; and, in default of appointment, among *such issue* in equal shares; and, if but one *child*, the whole to be paid to such one; and, in case there should be no issue of A. living at her decease, or if they should all die before attaining twenty-one, then over. The Vice-Chancellor thought, that the word "children" meant issue in this instance, for that the testator could not intend that, if A. left a grandchild, and no child, the property should go over.* *At all events, as a similar phraseology was not adopted in the latter part of the will, the word "issue" must be considered as used in the sense it generally bears.*

(*b*) As to the mode in which the several degrees of issue take in such cases, see ante, pp. 33, 34.

(*c*) 3 Ridg. P. C. 352; Hayes's Inq. 148, n. See same principle as to *heirs of the body*. Goodtitle d. Sweet *v.* Herring, 1 East, 264, and other cases stated ante, p. 300, *et seq.*

* Compare this with Ryan *v.* Cowley, post, 354, and Carter *v.* Bentall, post, p. 355.

tator * devised his real estate in certain counties to K. [354]
during his life only, subject to a certain condition,
and after the determination of that estate to M.'s *lawful issue male*, and the lawful issue male of such heirs, the eldest always of *such sons* of M. to be preferred before the youngest, according to their seniority in age and priority in birth, and for want of such lawful issue in M. over; the Court of King's Bench in Ireland held that M. took only an estate for life, which was affirmed in the House of Lords, with the unanimous concurrence of the Judges, on the ground that the word "issue" was explained to mean "sons." The Lord Chancellor said the subsequent words of explanation seemed to him to point out the *sons* of M. by name, as the persons whom the testator meant by issue male.

So in the case of Ryan *v.* Cowley, (*a*) where a testator devised and bequeathed to trustees freehold and leasehold and other personal property, upon trust for his daughter for life; and after her decease the rents and profits, and interest of money, he gave, devised, and bequeathed to and amongst the *issue* of his said daughter lawfully to be begotten, in such shares and proportions as she should by her last will and testament appoint, provided such *child or children* should arrive at the age of twenty-one years; and for want of such issue of his daughter, or in case of the death of such issue, and of the death of his wife, the testator devised all his property to other persons. It was contended on behalf of the daughter that the word "issue" was to be construed as a word of limitation, and consequently that she took an estate tail in the freehold, and an absolute interest in the
chattel property. But the Lord * Chancellor (Sugden) [355]
held that the daughter took a life interest only. "The term 'issue,'" he observed, "may be employed either as a word of purchase or of limitation; but when the testator adds, 'provided such child or children shall attain twenty-one, and for want of such issue, then over,' he translates his own language; and clearly shows that he uses the word 'issue' as synonymous with child or children."

Again, in the case of Carter *v.* Bentall, (*b*) where a testator, after creating certain life interests, gave the produce of his real and personal estate to trustees upon trust to transfer one moiety thereof to the issue of his daughter S., to be paid to them at their respective ages of twenty-one; and if only one *child*, then to such one child, for his, her, or their benefit. And the testator ordered the trustees to lay out the dividends in the maintenance of such "issue;" and in default of such issue, over: (*c*) Lord

(*a*) Lloyd & Goold, 10. See also Machell *v.* Weeding, 8 Sim. 4, ante, vol. 1, p. 489; Pruen *v.* Osborne, 11 Sim. 142.

(*b*) 2 Beav. 551.

(*c*) The chief discussion was, whether, in respect to the *other* moiety, a gift over on failure of issue of the testator's mother and daughter, (to whose children no gift was made,) the word "issue" was to be read "children," and it was held not.

Langdale, M. R., held that the word "issue" was here explained to mean *children*. (*a*)

And of course it is a circumstance favorable to the construction in question, that the testator has in other parts of his will used the words "children" and "issue" indifferently. (*b*)

[356] * Indeed, in a very recent case, it was considered to be a conclusive ground for construing the word "issue" to mean *children*, that the testator had elsewhere employed it in this limited sense. (*c*)

But of course the word "issue" will not be cut down to *children* by the mere circumstance of the words "children" and "issue" being previously used synonymously, if in those prior instances there was fair ground to conclude that both terms were used in the sense of issue. (*d*)

A leading and often-cited example of the word "children" being used in the sense of *issue*, is Gale *v.* Bennett, (*e*)

[357] where a testator gave real and personal estate to * his daughter H. for life, and remainder to her children at twenty-one; and, in default of such issue, then to his other daughters that should be living at the time of the death and failure of issue of H., and the *child* or *children* of such of his other daughters as should be dead, as tenants in common in fee; but such children to take only their parent's share; but in case there should be none of his other daughters, nor any *issue*

(*a*) See a similar construction applied to a deed, Campbell *v.* Sandys, 1 Sch. & Lef. 281; Swift *v.* Swift, 8 Sim. 168. In the case of Stonor *v.* Curwen, 5 Sim. 264, a testator directed personalty to be settled in trust for his niece A for life, but to devolve *to her issue at her death*, and, failing issue, to his nephew B. It was held, that the trust embraced the children living at the death of A, and the issue then living of any deceased child or children. It will be observed that this was the case of an executory trust.

(*b*) Newland *v.* Cursham, 2 Moore & Scott, 105.

(*c*) Ridgeway *v.* Munkettrick, Dru. & War. 84. In this case, Lord Chancellor Sugden said, "It is a well-settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." To this proposition no objection can be advanced; but it seems not entirely to dispose of the difficulties attending these cases, for the question still is, what amounts to such "a clear intention to the contrary" as will take any given case out of the rule. Different minds may (as the reports abundantly testify) estimate variously the force of context requisite to ontweigh the presumption of similarity of intention from the recurrence of the same expression. Where a term is in some instances accompanied by an explanatory context, and in other instances not, a Judge may see, in the occasional omission of the explanatory phrase, sufficient ground to infer a difference of intention in the respective instances, of which the case of Dalzell *v.* Welch, 2 Sim. 320, ante, p. 353, n., affords an example. In such cases, the general plan of the will must he regarded; and if we find that the testator's dispositive scheme would be violated by not giving to any term a uniform construction throughout the will, the argument for its adoption is very strong. Where the dispositions of the will are of a nature not to afford any such light, the task of its expounder becomes very embarrassing.

(*d*) Dalzell *v.* Welch, 2 Sim. 319, ante, p. 353, n.; and see further on this point, ante, p. 356.

(*e*) Amb. 681. See also Wyth *v.* Blackman, 1 Ves. Sen. 191, ante, p. 37; S. C. nom. Wythe *v.* Thurston, Amb. 555.

of his other daughters then living, the testator bequeathed over the property. H. died childless; and it was held, that the grandchild of another daughter, who died in the lifetime of the testator, was entitled, the word child and children being here used as synonymous with *issue*. (*a*)

The present section will be concluded by the statement of two recent cases of the converse kind, namely, in which the word "issue" has been used in the restricted sense of *children*. In one of these, Ellis *v.* Selby, (*b*) a testator bequeathed his funded property upon trust for A for life, and after his decease, should he have *issue* lawfully begotten, whether male or female, to pay the interest for the maintenance and education of such *issue*, if more than one, share and share alike, and, if only one, for the maintenance of such one during his, her, or their nonage; and, on their attaining the age of twenty-one years, to transfer the same to them, if more than one, and, if only one, then to such one; and, after the decease of B (to whom the testator had given the dividends on his bank stock for life,) he gave the dividends thereof to A for the term of his life, and, after his decease, upon trust for *the lawful *children or child*, if only one, of A, *in such manner as he* (the testator) *had thereinbefore willed and directed respecting his funded property;* and, if A should happen to die without *issue male or female* of his body lawfully begotten, then over: Sir L. Shadwell, V. C., was of opinion, that the words "die without issue male or female" in the bequest over, referred to *children*, the testator having clearly explained himself to mean children in the prior gift to the issue male and female. [358]

The other case referred to is Peel *v.* Catlow, (*c*) where a testator bequeathed one sixth part of his residuary estate amongst the *children* of his late sister, Jane T., to be paid at twenty-one, and, in case any such *child* or *children* should die under age leaving *issue* living at his, her, or their decease, their shares to be paid to the issue of such child or children respectively, with a bequest over of the shares of any child or children dying in minority without leaving issue, to the survivors and the issue of any who should have died leaving issue as aforesaid, (such issue to take no greater share than their respective parents would have been entitled to if living.) And, as to one other sixth part, upon trust to pay the interest to the testator's sister Mary C.; and, after her decease, to pay and apply the said share unto and amongst her *issue*, and to be payable at the like times, and with the like benefit of survivorship and accruer,

(*a*) Much stress in the arguments at the bar was laid on the fact of there being no child; but the inadmissibility of such a principle of construction has been elsewhere shown, ante, p. 69.

(*b*) 7 Sim. 352.

(*c*) 9 Sim. 372.

and in like manner as is thereinbefore expressed concerning the sixth part given to the children of his (the testator's) *late sister Jane T.;* and, in case the testator's sister Mary should die without leaving issue living at her decease, or, leaving any, they should die under twenty-one, and should leave no issue living at his, her, or their decease, then over: Sir L. Shad-
[359] well, V. C., was of opinion, that the *bequest to the "issue" of the testator's sister Mary must of necessity be taken to mean *children* by force of the terms of reference to the prior bequest to the children of Jane.

It may be observed, in support of the construction adopted by the Court, that the testator had used the word "issue" in the sense of *children*, in reference to both the share of the children of Jane and the share of Mary, namely, in the clauses which provided for the event of their respectively dying *under age* without issue living at their decease, where it is obvious the word "*issue*" necessarily meant *children*, as a minor could not leave issue of a remoter degree.

5. It remains to be observed, that, where a devise to a person and his issue (or to him and the heirs of his body) (*a*) is followed by a limitation over in case of his dying without leaving issue *living at his death*, the only effect of these special words is to make the remainder contingent on the described event. They are not considered as explanatory of the species of issue included in the prior devise, (*b*) and, therefore, do not prevent the prior devisee taking an estate tail under it. (*c*) The result simply is, that if the tenant in tail has no issue at his death, the devise over takes effect; if otherwise, the devise over is defeated, notwithstanding a *subsequent* failure of issue.

In Doe d. Gilman *v.* Elvey, (*d*) the circumstance of there being a limitation over on failure of issue at the death of the prior devisee does not appear to have given *rise [360] to an argument against an estate tail. The only doubt it is conceived, could possibly be, whether it would have the effect of rendering the remainder expectant on the estate tail, contingent on the event of the devisee in tail leaving no issue *at his death.* (*e*) The affirmative, however, seems to be the

(*a*) Wright *v.* Pearson, 1 Ed. 119, ante, p. 272; but where it was not necessary to decide its effect upon the remainder.

(*b*) See Hutchinson *v.* Stephens, 1 Keen, 240, post.

(*c*) Indeed, in one instance, we have seen (ante, p. 330) even an express devise to A and the issue living at his death was held to confer an estate tail; but this is a construction which probably would not be universally acquiesced in.

(*d*) 4 East, 313, ante, p. 333.

(*e*) See an instance of such construction applied to personalty in Lyon *v.* Mitchell, 1 Madd. 467, where personal estate was bequeathed to A, B, C, and D, as tenants in common, and to the issue of their respective bodies; but in case of the death of any or either of them without issue living at the time of his or their respective deaths, then over to the survivors, and to the issue of their respective bodies. It was held, that the bequest passed absolute interests to A, B, C, and D, subject to an executory bequest in case of their respectively dying without leaving issue at their decease.

better opinion, as the Courts would hardly feel themselves authorized, without a context, to reject the clause "living at his decease." But words of an equivocal import would certainly not have the effect of subjecting the remainder to such a contingency. (*a*)

(*a*) See Broadhurst *v.* Morris, 2 Barn. & Adol. 1, ante, p. 309.

CHAPTER XLI.

WORDS "IN DEFAULT OF ISSUE," ETC., WHEN REFERABLE TO THE OBJECTS OF A PRIOR DEVISE.

I. *Preliminary Remarks.*
II. *Construction in regard to Personalty.*
III. *In relation to Real Estate.* 1. *Where the expression is "such issue."* 2. *Where the reference is to "Issue" simply.* 3. *Conclusions from the Cases.* 4. *Doctrine of general and particular Intention.* 5. *Devises of Reversion.*
IV. *Effect of recent Enactment.*

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I. The expression which forms the subject of consideration in this chapter stands preëminent for the number and variety of the questions of construction to which it has given rise. The offices assigned to it are very numerous, and vary of course with the context. Following a devise to heirs *general*, a clause of this nature, we have seen frequently explains the word "heirs" to mean heirs *special*, *i. e.* heirs of the body, and cuts down the estate comprised in the prior devise to an estate tail,[1] (*a*) unless there is ground for restraining the term "issue" to issue living *at the death*. Preceded by a devise indefinitely or expressly for life to the person whose issue is referred to, the words in ques-

(*a*) Ante, vol. 1, p. 488.

[1] 4 Kent, (5th ed.) 276, and notes.

tion (occurring in a will which is subject to the old law) have the effect of enlarging such prior devise to an estate tail, (*a*) unless they are restrained, as before suggested, or *unless there is an intermediate devise to some class or denomination of issue to which they can be referred.* To determine in what
[362] cases the latter construction *prevails, is the present object of inquiry. The distinctions which the authorities present require particular attention, and they will be found upon the whole to be more easily reducible to a few general propositions than is commonly supposed. It will be proper to separate gifts of real and personal estate; for as the construing of the words in question to import a general failure of issue in regard to *personalty*, necessarily renders void the gift over which is to take effect on such contingency, (*b*) the disinclination of the Courts to that construction is evidently stronger than where (as in reference to *real* estate) they have the effect of creating an estate tail, on which a remainder can be limited.

II. *In regard to personal estate*, it seems to be clear that words denoting a failure of issue, following a bequest to *children*, refer to the objects of that gift.

As in Doe d. Lyde *v.* Lyde, (*c*) where a term of years was bequeathed to G. for life, and after his decease to M. for life, and after the decease of the survivor to *the children of G.*, share and share alike, and *if G. died without issue* of his body, then over; it was held that there being no child of G. the ulterior gift took effect.

So, in the case of Salkeld *v.* Vernon, (*d*) where a testator bequeathed £1000 to his daughter R.'s child or children, to the number of *four;* and if she should have a greater number than four living at his decease, then he bequeathed £4000 to be divided among the said children *who should be so living at his decease*, to be paid at twenty-one; *but if his daughter*
[363] *should happen to die "without *issue,"* then he bequeathed the said legacy over. It was contended, that the ulterior bequest was void, being after a general failure of issue; but Lord Northington held, that it was a legacy to the children, if there were any, and, if not, to the substituted legatees.

And a similar doctrine prevailed in the case of Malcolm *v.* Taylor, (*e*) though the trust for children was confined to those who attained a prescribed age; but the construction was considered to be aided by an expression in the context.

(*a*) Ibid.
(*b*) Ante, vol. 1, p. 223.
(*c*) 1 Durn. & E. 596. See also Vandergnght *v.* Blake, 2 Ves. Jun. 534, and Farthing *v.* Allen, 2 Madd. 310; but as to which see post.
(*d*) 1 Ed. 64.
(*e*) 2 Russ. & Myl. 416.

The testator here gave certain lands and all the residue of his money in the funds to his mother and his sister M., for their lives and the life of the survivor, and after the decease of the survivor, to such of the children of M. as she by deed or will should appoint; and, in default of appointment, to be equally divided among the said children, their heirs and assigns; the funded property to be an interest vested in and paid to them or the survivors or survivor, being sons, at twenty-one; or, being daughters, at twenty-one or marriage. And *in case M. should die without issue of her body lawfully begotten*, then the testator devised the estate to the children of A. in fee; and in case M. should *die without issue as aforesaid*, the testator gave the residue of his money in the funds to J., and after his decease to his (testator's) eldest son. M. died unmarried; whereupon a doubt arose as to the validity of the bequest over to J., which of course failed if the words referred to an extinction of issue at any time. It was held by Sir J. Leach, M. R., and afterwards by Lord Brougham, that the words "without issue as aforesaid" meant without such issue of M. as were objects of the preceding gift of the funded property, *i. e.* the children; his Honor observing, that it was a reasonable *intendment that a subse- [364]
quent limitation is meant to take effect upon failure of the prior gift, and is a substitution in that event. This was the plain intention of the testator with respect to the real estate; and it was to be supposed, when real and personal estate was given together, that the testator had the same intention with respect to the funded property and the real estate. In Lord Brougham's judgment there is much criticism on the words "as aforesaid," which his Lordship considered to refer, not to the objects of the immediately preceding devise, but to the more remote antecedent, the legatees of the stock, which seems to have been rather a nice question.

Where the prior gift is expressly to "issue," though restricted by the context to issue of a particular class, or existing at a prescribed period, it seems more obvious to apply to the objects of such prior gift, the words importing a failure of issue, (the term being identical in both clauses,) than where the prior gift is in favor of *children*.

Thus in the case of Leeming *v.* Sherrat, (*a*) where a testator bequeathed to each of his children £1000, to be paid at twenty-one; but as to the girls, one half to be placed out at interest, to be secured from the control of any husband, the interest in the mean time to be paid to them, and the principal to be disposed of, in such manner as they might direct, to their *issue; but in case they should die without issue*, the testator gave the principal among the survivors of his children; Sir J. Wigram, V. C., was

(*a*) 18th April, 1842; 6 Jur. 663.

of opinion that the original bequest applied to issue living at the death of the children, and that the gift over, on the failure of "issue," referred to the same objects.

In two earlier cases, however, a different construction seems to have prevailed. Thus, in Andrew *v.* Ward, (*a*) where a sum of £5000 stock was bequeathed to A for life, and in case he should marry any woman with £1000 fortune, then the testator's will was, that the £5000 should be settled on his wife, and the *issue of such marriage;* but in case A died *leaving* no issue of his body lawfully begotten, then over: Sir T. Plumer, M. R., was of opinion, that "issue" in the ulterior gift could not be confined to issue of such marriage as before mentioned, and that therefore, A having left issue not of such a marriage, the gift over failed.

The strong tendency of the recent cases towards the referential construction, suggests a doubt whether the doctrine of this case would now be followed.

So, in the case of Campbell *v.* Harding, (*b*) where a testator bequeathed to his adopted daughter, Caroline Harding, £20,000 three per cent. consols, and his house and landed property at Culworth; *but in case of her death without lawful issue*, then the testator willed the money so left to her to be equally divided betwixt his nephews and nieces who might be living *at the time*, (*c*) and the land, &c. at Culworth to his nephew J. H.; and the testator requested his friends C. and S. to be guardians for Caroline Harding, and if she married, it must be with their consent, and "the property to be solely settled *upon herself and her children*, and in no way charged or alienated." It was contended, that the words "death without lawful issue" in this case meant death without having had any such issue as would have taken under the settlement subsequently directed by the testator, and not death without issue indefinitely; but it was held by Sir L. Shadwell, V. C., and afterwards by Lord Brougham in af-
[366] firmance * of his decree, and ultimately by the House of Lords, (where the case was very elaborately argued,) that the words could not be restricted, and consequently that Caroline Harding (who had died unmarried) became absolutely entitled to the stock. Lord Brougham considered that the introduction of the direction to settle the stock on the marriage of the legatee, did not vary or affect the construction which was to obtain in the alternative event of her not marrying at all. (*d*)

The frame and language of the will in this case were peculiar,

(*a*) 1 Russ. 260.

(*b*) 2 Russ. & Myl. 390; S. C. in Dom. Proc. nom. Candy *v.* Campbell, 8 Bligh, N. S. 469.

(*c*) Vide ante, vol. 1, p. 256, n.

(*d*) This case was cited as a leading authority, by Sir Knight Bruce, V. C., in the case of Pye *v.* Linwood (June 29, 1842, reported 6 Jur. 618); but as in the events which had happened it was unnecessary for his Honor to decide whether the words

and it must not be considered as intrenching on the general principle of construction exemplified in the preceding cases. That principle was recognized, and forcibly stated by Lord Cottenham, in the case of Ellicombe *v.* Gompertz, (*a*) where his Lordship held, that the words "from and immediately after the decease of all the sons and grandsons of my said son J. J." were confined to such sons and grandsons as were embraced by the preceding gifts, a construction which supported the validity of the ulterior gift. (*b*) His Lordship thus stated the general doctrine: "Provision is made for certain members of a class answering a particular description, and then a gift over is made on failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend on the failure of the whole class, will be construed to take place upon *the [367] failure of that description of the class who were to take; and, on the other hand, if it appear that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the Court will adopt such a construction as will extend the benefit, in the best way the law will admit, to the whole class."

So, in the case of Trickey *v.* Trickey, (*c*) where a testator bequeathed the residue of his personal estate to his daughter A, for life, and after her decease to her children at twenty-one; and in case any of such children should die under twenty-one, and have one or more children *who should survive A*, and live to attain the said age, the last-mentioned children should be entitled to their parents' share; provided that, in case any child of A should die under twenty-one, his, her, or their share or shares, should go to the survivors of the said children, and the issue of any deceased child or children who should marry, and die under the said age; provided further, that *if there should be no child of A, or there being any such, no one child living to attain the age of twenty-one years, nor leave any issue who should attain thereto, then over;* Sir J. Leach, M. R., held, that the gift over must be intended to take effect on failure of the former gifts; and as such former gifts were confined to those grandchildren who should survive (and who should therefore necessarily have been born in the lifetime of) the daughter, the ulterior bequest was valid. (*d*)

importing a failure of issue applied to the objects of the preceding bequest to "children," or extended to issue indefinitely, the case of Pye *v.* Linwood has really no connection with the present subject of discussion. The material question was, whether the words referred to issue living at the death, (vide next chapter,) which construction the Court (it is considered most properly) negatived.

(*a*) 3 Myl. & Craig, 127.

(*b*) The will was found too long and special for insertion.

(*c*) 3 My. & Keen, 560.

(*d*) Although in the cases of Ellicombe *v.* Gompertz, and Trickey *v.* Trickey, above stated, the expression which connected the prior and ulterior gifts did not correspond with that which is the subject of the present chapter, yet, as the general principle was

Where the words are not "in default of issue" simply, but in default of *such* issue, it *is clear that whatever be the class of issue included in the preceding gift, whether children, sons, or daughters, and whatever the extent of interest given to those objects, the bequest over *in default of such issue*, is construed to mean in default of such *children, sons, or daughters*. (*a*)

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III. With regard to *real estate* also, it is clear that the words "in default of *such* issue," following an express devise to any particular branch of issue, as *children, sons, or daughters*, will be construed to refer to the issue before described; that is, as meaning in default of "*such*" *children, sons*, &c. (*b*) And in cases of *this* class, (as distinguished from those which form the subject of the next section,) this rule prevails, whether the objects of such preceding devise take *estates* of inheritance, or *only* estates *for life*.

The reported cases supply numerous examples of each kind.

In Doe d. Comberbach *v.* Perryn, (*c*) and Rex *v.* Marquis of Stafford, (*d*) the words "in default of *such* issue" following a devise to *children in fee*, were held to refer to such children.

In Doe d. Tooley *v.* Gunnis, (*e*) and Doe d. Liversage *v.* Vaughan, (*f*) the same *construction was given to a devise to children, (without words of limitation,) with a devise over, "on *failure of such issue;*" and also in Ashley *v.* Ashley, (*g*) where a similar devise was followed by the words, for "want of such issue."

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In Denn d. Briddon *v.* Page (*h*) the limitations of the will were to the first and other sons in tail male in strict settlement, and in default of such issue, to all and every *the daughters*, (without words of limitation, *and in default of such issue*, over; Lord Mansfield held that the daughters took estates for life only; but his Lordship said, "If after the limitation to the daughters the words had been, 'and if they die *without issue*,' we would

much discussed, and as these cases exemplify the application of the doctrine to bequests of personalty, they appeared to call for insertion in this place. Ellicombe *v.* Gompertz was cited as a leading authority by Sir James Wigram in Leeming *v.* Sherrat, 6 Jurist, 663, ante, p. 364.

(*a*) Maddox *v.* Staines, 2 P. W. 421; S. C. in Dom. Proc. 3 B. P. C. (Toml. ed.) 108; Stanley *v.* Leigh, 2 P. W. 685; and see 3 Myl. & Craig, 153.

(*b*) Lethieullier *v.* Tracy, Amb. 204, 220; Denn d. Briddon *v.* Page, 11 East, 603, n.; 3 Durn. & East, 87, n.; Hay *v.* Lord Coventry, 3 Durn. & East, 83; Doe d. Comberbach *v.* Perryn, Id. 384; Goodtitle d. Sweet *v.* Herring, 1 East, 264, and other cases, ante, p. 300.

(*c*) 3 Durn. & East, 484.

(*d*) 7 East, 521.

(*e*) 4 Taunt. 313.

(*f*) 6 Sim. 358.

(*g*) 1 Dowl. & Ryl. 52; S. C. 5 B. & Ald. 464.

(*h*) 3 Durn. & E. 87, n.; 11 East, 603, n.

have implied an estate tail; (*a*) but here the words are '*such* issue,' *which can only mean the issue before mentioned.*" The case of Hay *v.* Earl of Coventry (*b*) was precisely similar.

So in Doe d. Phipps *v.* Lord Mulgrave, (*c*) where the devise being to the first and every other son in tail male, "*failure of such issue*" over, the latter words were treated as merely referring to the preceding devise.

Again, in Foster *v.* Romney, (*d*) where the devise was to A for life, and after his decease to *his sons* successively, (without words of limitation,) and *in default of such issue* over, it was held that A and his sons took for life only, the words "*such* issue" meaning such *sons.*

This decision must be considered as overruling Lomax *v.* Holmden, (*e*) and Evans d. Brook *v.* Astley, (*f*) unless these cases can be referred to their special circumstances.

*Lord Kenyon (*g*) certainly so treated the latter. The [370] case of Robinson *v.* Robinson (*h*) would be in the same predicament, were it not that the word "*son,*" in the devise in that case, appears to have been regarded as a word of limitation, (*i*) and consequently the first taker was properly held to be tenant in tail, without imposing on the subsequent words, "in default of *such* issue," the office of conferring that estate, to which, indeed, upon every sound principle of construction, they appear to be inadequate. The cases just stated, establishing that expression to be purely referential, are decisive authorities against the stress which in some parts of the discussion of Robinson *v.* Robinson was laid on these words.

The same observation applies to Roe *v.* Grew (*j*) and Frank *v.* Stovin, (*k*) in both which, unless the construction of an estate tail were warranted by the word "issue" in the devise, (as it clearly was,) such estate could not have been raised by the words "in default of such issue" following it. Much reliance, however, was placed on these words, in the former case, by the Chief Justice, and in the latter, at the bar.

Of course where the word "issue" occurring in an express devise to issue, is therein explained to mean *children,* the words *in default, or for want of such issue,* immediately following, are construed in default of such *children.* (*l*)

(*a*) See post.
(*b*) 3 Durn. & E. 83.
(*c*) 5 Durn. & E. 320.
(*d*) 11 East, 594. See also Goodright d. Lloyd *v.* Jones, 4 Mau. & S. 88. Purcell *v.* Purcell, 2 Drury & Warren, 219, n.
(*e*) 1 Ves. Sen. 296.
(*f*) 3 Bur. 1570, stated ante.
(*g*) 3 Durn. & E. 87.
(*h*) 1 Burr. 38; S. C. in Dom. Proc. 3 B. P. C. (Toml. ed.) 108.
(*i*) See Lord Kenyon's judgment in Doe *v.* Mulgrave, 5 Durn. & E. 323.
(*j*) 2 Wils. 322.
(*k*) 3 East, 548.
(*l*) Ryan *v.* Cowley, Lloyd & Gould, Cas. Temp. Sugd. 7.

But in one instance the words "such issue," preceded by a devise to first and other *sons* and *their heirs*, were
[371] held to refer to *the heirs* of the sons. * Thus in Lewis d. Ormond *v.* Waters, (*a*) where the devise was to the testator's eldest son for life, remainder to a trustee to preserve contingent remainders, remainder to *the first and other sons of the testator's eldest son and their heirs*, and *for want of such issue*, to his second son B for life, with similar remainders; it was held that the word "issue" in the limitation over referred to the *heirs of the sons*, and consequently that they took successive *estates tail*, which would effectuate the apparent intention of the testator to continue the estates in his family.

This is a strong case, inasmuch as there was an antecedent class of issue to which the clause might have been applied; but as the words "first and other" evidently imported that the sons were to take *successively*, (*b*) there was no mode of giving effect to that intention except to cut down the fee simple of the sons to an estate tail.

In Ginger d. White *v.* White, (*c*) C. J. Willes read a devise to children and their heirs *successively* as conferring an estate tail only, though he distinctly held, as we shall presently see, that the subsequent words importing a failure of issue referred to the children themselves. (*d*) The learned judge seems even to have thought that a gift over in default of *male* children to *female* children, and in default of female children to a person who was their cousin, explained heirs to mean heirs *of the body*, "because the male children could not die without heirs if any of their sisters were living, and the female children could not die without heirs if the cousin were living;" (*e*) but he evidently confounded *a remainder* with an *alternative limitation*, in other words, he failed to distinguish between a devise over
[372] if the children should die without heirs, and * a devise over if there should be *no* children. With the latter the doctrine to which he refers has no connection.

It remains only to mention, as a recent case authorizes, (*f*) that even where the prior devise embraces a single child only, the words "for want of such issue" are construed for want of such *child*, and not to have the effect of conferring an estate tail on the parent of that child.

In this state of the authorities, then, the proposition seems undeniable, that the phrase "in default of such issue," "for want of such issue," or "on failure of such issue," following a devise to any class of issue, or even to any individual child

(*a*) 6 East, 237.
(*b*) See ante, vol. 1, p. 32.
(*c*) Willes, 352, stated post.
(*d*) See post, 372.
(*e*) See as to this doctrine, ante, p. 238.
(*f*) Doe *v.* Charlton, 1 Scott, N. R. 290, ante, p. 327.

or other descendant, is simply and exclusively referential, and does not enlarge, or in any manner affect any of the prior estates.

It is well settled also, that words importing a failure of issue, (without the word *such*,) following a devise to *children* in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large.

Thus, in Ginger d. White *v.* White, (*a*) where a testator devised a house to his son J., (subject to an undivided interest given to a daughter during widowhood,) and after the determination of that estate, to the *male children of J.* successively, one after another, as they should be in priority of age, *and to their heirs;* and in default of such male children, to the *female children of J. and their heirs;* and *in case J. should die without issue*, then over to the testator's grandson W. and his heirs. One question was, whether the last words in italics did not give an estate tail by implication; and it was held that they did not. Willes, C. J., said that the word "issue" meant *such* **issue as the testator had mentioned before*, and he [373] could mean no other, for he had devised the estate before to all J.'s sons and daughters.

It seems that the learned Judge considered that the children took estates *tail*, on a ground which has been already alluded to. (*b*)

So, in the case of Goodright d. Docking *v.* Dunham, (*c*) where a testator devised to his son J. for life, and after his death to all and every his *children* equally, *and their heirs;* and in case his son died *without issue*, then unto his (the testator's) two daughters, and their heirs; Lord Mansfield, without hesitation, held, that the limitation over was the same as if it had been "in case the son had died without *children*."

Again, in the case of Malcolm *v.* Taylor, (*d*) where a testatrix devised (among other things) the moiety of an estate in Jamaica to her mother, and her sister Maria Taylor, for their lives, and the life of the survivor, and after the decease of the survivor, to such of the children of Maria Taylor as she by deed or will should appoint; and in default of appointment, then the said moiety to be divided equally between the said children, their heirs and assigns forever; and if but one, then to such one child, his or her heirs and assigns forever; *and in case the said Maria Taylor should die without issue of her body lawfully begotten*, then the testatrix devised the moiety in question over to other persons; and it was considered as clear, that these words referred to the children who were the objects of the prior devise.

(*a*) Willes, 348.
(*b*) Ante, 371.
(*c*) Doug. 264.
(*d*) 2 Russ. & Myln. 416. See also Doe *v.* Selby, 2 Barn. & Cress. 926, ante, vol. 1, p. 790; and Tarbuck *v.* Tarbuck, post, 375.

A different construction, however, seems to have prevailed in the unreported case of Clonmert *v.* Whitaker, with a
[374] *note of which the author has been favored. A testator devised unto his three sons, Thomas Emmett, George Emmett, and John Emmett, share and share alike, all his freehold, leasehold, and personal estate and effects. And he also further bequeathed, that, in case of the demise of either of his said sons, the said estate should be equally divided between his surviving sons; and if his sons had issue, *his* (the son's) *child or children should be entitled to the father's share. And in case they all died without issue,* then his freehold estate or estates situated in South Street, Peckham, should devolve to the heirs of his late brother Thomas Emmett, to be equally divided. The three sons suffered a common recovery, and the question, on a bill for specific performance filed by a person who claimed under the recovery, and had contracted for the sale of the estate, was, whether the fee simple was acquired by their recovery. The Judges of the Common Pleas (to whom a case had been sent from the Court of Chancery) certified, that Thomas Emmett, George Emmett, and John Emmett, who suffered the recovery, took such an estate as would have enabled them to make a good title, whereupon Lord Eldon decreed the specific performance of the contract. (*a*) Here, it will be observed, the devise was sufficient to carry the fee to the children by the force of the word "estate," and yet the parent was held to be tenant in tail. In the absence of any intimation as to the precise ground of the decision, it would be too much to consider this case as shaking the rule of construction deducible from the three last cases.

It will be observed, that in all the preceding cases, the devise over was on the devisee for life dying without issue,
[375] (not without *leaving* issue.) *It should seem, however, that the introduction of the word "leaving" would not vary the construction, inasmuch as the phrases "without issue," and "without leaving issue," have (we shall hereafter find) been held to be undistinguishable, in regard to their importing an indefinite failure of issue in reference to real estate. This remark, however, is made with great diffidence, as it may seem to clash with an opinion expressed by Lord Cottenham (when Master of the Rolls); in the case of Tarbuck *v.* Tarbuck, (*b*) where James Tarbuck, by a will dated the 17th of June, 1805, devised his lands at Barnhill to his son James for his life, and after his decease to all the children of James, lawfully to be begotten, and to their heirs and assigns forever, as tenants in common; and if but one child, then to such only child, his or her heirs and assigns forever. And the

(*a*) 8th August, 1807, MS. (*b*) At the Rolls, 2d Feb. 1835, MS.

testator charged the lands with the payment of an annuity. The testator then gave all his other lands to his son Jonathan and his children, in similar terms, also charged with an annuity. *And in case the testator's son James should happen to die without leaving lawful issue* then the testator gave the lands devised to him to his (testator's) son Jonathan, his heirs and assigns; *and in case the testator's son Jonathan should happen to die without leaving lawful issue*, then the testator gave the lands devised to his (testator's) son James, his heirs and assigns forever. *But if both the testator's said sons should happen to die without leaving lawful issue*, then he gave the whole of the said hereditaments to his nephews and nieces in fee. The testator's sons James and Jonathan both died in the testator's lifetime, James leaving a son, who also died in the testator's lifetime. Jonathan died a bachelor. * Sir C. C. Pepys, M. R., held, [376] that in these events the devise over failed, on the ground that the son of James would, if he had survived the testator, have taken an estate in fee, and therefore the lapse of such devise, instead of letting in the ulterior devisee, occasioned intestacy. (*a*)

"The first question," said his Honor, "to be considered is, what estates would James and Jonathan have taken had they survived the testator? On the part of the nephews and nieces it was contended that they had estates tail, upon the ground that the gift over, being to take effect in case either died without leaving lawful issue, is postponed until an indefinite failure of issue, and therefore creates an estate tail. This rule has been adopted for the purpose of giving effect to the general intent of the testator, manifested in his devises over depending on a failure of issue generally, in order to give a chance at least of succession to persons who, though they cannot claim under a particular gift, are included in the general description of issue. That rule does not apply where this object is not to be attained, and amongst the exceptions is the very case which occurs here; namely, a gift to A for life, with remainder to the children of A in fee; that is, the children of A in fee generally, and a gift over on the death of A without issue, which means *such* issue, that is, children.[1] This was the case of Goodright *v.* Dunham, (*b*) which is precisely in point on this subject. In such cases the general term 'issue' is construed to mean that particular description of issue before specified, namely, children. It was indeed in this case, as it has been in former cases, contended, that such construction is a restricting of the meaning of the term issue, because *thereby children's children would be excluded in [377] the event of their parent's death before the testator's

(*a*) As to this doctrine, vide post. (*b*) Ante, p. 373.

[1] See Wight *v.* Baury, 7 Cushing, 105.

death; (*a*) but this argument has not prevailed against the rational construction of making the gift over depend on the failure of the object before distinctly specified. Such were the cases of Blackburn *v.* Edgley, (*b*) and Morse *v.* Marquess of Ormonde. (*c*) I am therefore of opinion that if James and Jonathan had survived the testator, they would have taken estates for life, with remainder to their children in fee, with gifts over, in the event of there being no children at the respective times of the death of the tenants for life. If they had so survived the testator, it is clear the gift to the nephews and nieces could not have taken effect, for that gift is only to take effect in the event of James and Jonathan not having lawful issue, that is, children according to the above construction; and James, at the time of his death, had a son James, who survived both his father and uncle Jonathan."

As in this case the child, whose existence was held to have defeated the devise over, survived the parent, the devisee for life, it was not necessary to consider whether the words in question meant without *having had* a child, or without *leaving* a child living at his decease, and therefore the opinion of the M. R. on this point must be regarded as extra-judicial: and though even then that opinion is entitled to great weight, yet it
[378] seems to present a more legitimate * subject for critical examination. The construction, it is conceived, is not only unsupported by analogy, but is most inconvenient, as it divests the interest of a child, in the event of his dying before his parent, though he might leave twenty descendants of various degrees. Indeed, if the words in question are not held to be simply referable to the objects of the preceding devise, (as in Goodright *v.* Dunham, and that class of cases,) it would seem to be even better to construe them as denoting a failure of issue *of every degree* living at the decease, than the failure of surviving *children*. An example of the former of these two species of construction is afforded by the case of Hutchinson *v.* Stephens, (*d*) where the devise was to H. for his life, and after his decease to the child and children of H. lawfully to be begotten, at his, her, or their respective ages of twenty-one years, if more than one, as tenants in common; and if there should be but one child living at his decease, then in trust for such only child at twenty-one: *but in case H. should die without leaving any issue*

(*a*) But according to Goodright *v.* Dunham, and Malcolm *v.* Taylor, a child on its birth, or at the death of the testator, takes a vested fee, which, of course, in the event of that child subsequently dying in the lifetime of the tenant for life, leaving issue, would descend to such issue, if not otherwise disposed of.

(*b*) 1 P. W. 600, ante.

(*c*) 5 Madd. 99, ante. The M. R. also, it seems, adverted to the fact of the children of James and Jonathan taking as tenants in common; and on this point cited the cases of Doe *v.* Elvey, 4 East, 313; Gretton *v.* Haward, 6 Taunt. 94.

(*d*) 1 Keen, 240.

of his body living at the time of his decease, then over. H. had two children, both of whom died in his lifetime, one of them leaving children who survived H. Lord Langdale, M. R., held, that, in the event which had happened, the children took estates in fee simple as tenants in common.

In this case the words, "if there shall be but one child *living at his decease*," appeared to supply a plausible argument for reading the word "issue," subsequently occurring in juxtaposition with the same words, in the sense of *children*, and its rejection serves to show the strong disinclination of the Courts to adopt a construction which exposes the vested interest of a child to be divested on decease within a given period, although leaving issue who survive that * period; and [379] hence the case tends to confirm the remarks made on Lord Cottenham's construction in Tarbuck *v.* Tarbuck.

It seems, that where the testator not merely devises over the property in the event of the parent dying without issue, but goes on to provide for the contingency of the *issue* also dying without issue, the effect is to cut down the fee simple of the children to an estate tail; (*a*) although, it will be observed, by this construction two different meanings are given to the word "issue" in the same sentence. (*b*)

In the case of Ives *v.* Legge, (*c*) this construction was given to the phrase "in default thereof," following a devise to the parent for life, with remainder to the children in fee. It was held to refer to both the children and the heirs of the children; and, as the devisee over stood in the relation of uncle to the children, (so that * there could not be a failure [380] of their heirs while he lived,) the word "heirs" was read heirs *of the body*. (*d*)

It may be observed, that whatever tends to narrow the range of objects comprised in the express devise to issue of a certain class or denomination, tends, in the same degree, to weaken the ground for construing subsequent words importing a failure of

(*a*) Doe d. Barnard *v.* Reason, cit. 3 Wils. 223; but as the words were, "in default of such issue," the case hardly seems to fall within the present section. The devise was to E. for life, and after her decease to such issue of the body of E. as should be then living, and to the heirs of such issue; and if there should be only such issue one child, then the whole to that one child and its heirs; and if two or more children, then to such two or more and their heirs, as tenants in common; and in case E. should die without issue then living, *or in case all such issue should die without issue*, so that the descendants of her body should be dead without issue, then to B. and F. in fee. It was held, that E. took an estate for life only, with remainder to her issue [quære children] in tail, with a vested remainder to B. and F. See also Sonthby *v.* Stonehouse, 2 Ves. Jun. 611; Smith *v.* Horlock, 7 Taunt. 129.

(*b*) But the force of this objection is somewhat weakened by the fact that the word "issue" in this position must be used, in the first instance, in a restricted sense, since the failure of such first mentioned issue is treated as an event distinct from the failure of the issue subsequently mentioned, which of course would be involved therein if the word "issue" denoted issue indefinitely.

(*c*) 3 Durn. & E. 488, n.

(*d*) Ante, p. 238.

issue, to refer exclusively to those objects. Thus, the circumstance of the prior gift to children being restricted to such as should attain a particular age, was considered to exert this kind of influence upon the construction in the case of Doe d. Rew *v.* Lucraft, (*a*) where a testator devised certain hereditaments to A and B and their heirs, in trust, nevertheless, as to one undivided moiety for N., his heirs and assigns, forever; and, as to the other moiety, in trust for such *son* of his (testator's) by his then wife *as should first attain the age of twenty-one years*, as and when such son should attain such age, and for his heirs and assigns forever; but in case he (testator) should depart this life without leaving a son, or, leaving such, none should live to attain the age of twenty-one years, then, as to the last-mentioned moiety, in trust for his (the testator's) *daughter J., if she should live to attain the said age of twenty-one years*, and for her heirs and assigns forever; but, in case J. should depart this life under that age, then unto A and B and their heirs, in trust for such *other his* (*testator's*) *daughter* by his then wife *as should first live to attain the age of twenty-one years*, and for her heirs and assigns forever; *but should he* (*testator*) *depart this life without leaving issue*, then he gave the entirety of the said hereditaments unto A and B and their heirs, in trust for N. in fee.

[381] * The testator died, leaving issue his daughter J., who died at the age of four years. The point of construction related to the words in italics, as affecting the devise over. Lord C. J. Tindall said—"The natural meaning of the words is, either a general failure of issue, in which case the devise over would be too remote, and, consequently, would be void; or they may be taken to contemplate the case of the testator dying, leaving no child or children, in which case the event upon which the devise over was to depend never happened; for the testator left a daughter living at the time of his death. But it is contended, that these words will also admit of a third interpretation; thus, 'should I depart this life without leaving *such* issue *as before mentioned;*' that is, not only without leaving a son or a daughter, but accompanied by the restriction before recited in the will, viz: a son or a daughter who shall live to attain the age of twenty-one years. Cases have been cited to show that the word 'issue' may be construed to mean such issue as the testator had before referred to: but no case can be found wherein the principle has been carried further. It has never been held, that the term may also include any restrictions which may have accompanied it in any former part of the will. Admitting that we may read the clause thus—'without leaving a son or daughter,'—what authority have we to insert a restriction—'who shall live to attain the age of twenty-one years?' We clearly are not at liberty to insert any such restriction."

(*a*) 1 Moore & Scott, 573.

So, in the case of Franks *v.* Price, (*a*) where there being in a will (among numerous limitations) a devise *in certain contingent events* of the respective moieties to A * and [382] B for life, with remainder to their respective first and other sons in tail male, which were followed by a devise over, *in case A and B should both die without leaving issue male, or such issue male should die without leaving issue male;* it was held, after much argument, that, as the preceding devises did not carry the property to the issue male of A and B in every possible event, the words introducing the devise over had the effect of creating an implied estate tail in remainder expectant on the estates conferred by those devises. (*b*)

By keeping steadily in view the principle above suggested, namely, that the argument in favor of applying to the objects of a prior express devise words denoting a failure of issue, gains or loses force in proportion as such prior devise is more or less comprehensive in its range of objects, we shall be able to reconcile the preceding cases, (in which a clause of this nature following a devise to the whole line of children or sons, has been held to refer to the objects of such prior devise,) with those that remain to be stated, in which similar words preceded by a devise to one or more son or sons only, have been decided not to be simply referential, but to import a general failure of issue, and, therefore, to confer an estate tail on the parent; such implied estate tail being (as we shall presently see) either an estate in possession or in remainder, expectant * on [383] the determination of the estates comprised in the prior express devise.

Thus, in the case of Langley *v.* Baldwin, (*c*) where a testator devised certain lands to A for life, with power to jointure, and, after his death, to the first son of A in tail, *and so on to the sixth son only;* and then devised that if A *should die without issue male*, the lands should remain to B. It was held, that A took an estate tail in remainder expectant on the estates comprised in the prior devises, there being no limitation beyond the *sixth* son, and there might be a seventh, who was not intended to be excluded; therefore, to let in the seventh and subsequent sons, these words created an estate tail.

(*a*) 6 Scott, 710; 5 Bing. N. R. 37; 3 Beav. 182. This case should be consulted, the special nature of the limitations in the will precluding particular statement here.

(*b*) It is observable, that, A having died without issue male, B was held to be tenant in tail *of the entirety;* so that it should seem that the M. R. (Lord Langdale) considered that the words (in the text distinguished by *italics*) had the effect of giving to A and B either successive estates tail male by implication in the entirety, (as in Tenny *v.* Agar, and Romilly *v.* James, ante, vol. 1, pp. 492, 493,) or (as seems more probable) estates male in the respective moieties, *with cross remainders in tail male.* His Lordship did not advert to this point, (which is one of considerable nicety, conceiving, probably, that B was entitled in either case.

(c) 1 Eq. Ca. Ab. 185, pl. 29; 1 Ves. Sen. 759; S. C. cit. P. W. 759.

So, in Attorney-General *v.* Sutton, (*a*) where the testator devised to his nephew A for life, and after his decease, to the *first* son or issue male of his body lawfully begotten, and to the heirs male of the body of such first son, and for default of such issue, to the *second* son or issue male of the body of A lawfully to be begotten, and to the heirs male of such second son lawfully to be begotten forever; subject to a proviso that A or his assigns, *and the heirs male of his body*, should not commit any waste, and should not impeach the payment of the annuities in the said will; and from and immediately after the death of A *without issue male of his body*, or after the death of such issue male, then over. A suffered a recovery, and died without issue. It was held, that he took an estate tail; for, as all the issue male which he might possibly have, viz. his third, fourth, and every
[384] other son, were not *expressly provided for by the will, the limitation, after his death, "without issue male," raised the same estate in him by implication, as if the devise had been in terms to him and his issue male.

In these two cases, though the express devise embraced only a certain number of his sons, yet it was considered to be evident that the testator did not intend to exclude the others, which, indeed, in Attorney-General *v.* Sutton, was clearly manifested by the reference in the proviso to *A and the heirs male of his body;* and the only mode in which this could be effected was to give the parent an estate tail.

On the same principle, where there is a devise to the parent for life, with remainder to *an eldest son only* in tail male, a limitation over in case the parent die *without issue*, will raise in him an estate tail, and not merely refer to the single object of the preceding devise.

Thus, in Stanley *v.* Lennard, (*b*) where lands were devised to trustees in fee, upon trust to permit A, the eldest of the testator's two natural children, to receive the rents for his life; and after his decease, to permit *the eldest son* of A, and the issue male of *such eldest son*, to receive the same; *and for want of issue of the said* A, to permit testator's second son, &c.; and he directed that his son A should have the use of his (testator's) pictures for his (A's) life, and after his decease to his issue, and the issue of his issue: *and for default of such issue of A., then* to T., &c. A. died, leaving one child, (a daughter,) who claimed an estate tail under the will. Lord Northington stated the general rule to be, that where a testator makes a man tenant for life, with remainder to one, two, three, &c. of the issue of the tenant for life, and then, for want of issue of the tenant for

(*a*) 1 P. W. 754; 3 B. P. C. (Toml. ed.) 75. See also Stanley *v.* Lennard, 1 Ed. 87; Doe d. Bean *v.* Halley, 8 Durn. & E. 5, post. Also Evans d. Brook *v.* Astley, 3 Burr. 1570, ante.

(*b*) 1 Eden, 87.

life, limits the estate over, this will be an estate tail
*in the first taker for life by necessary implication; [385]
and this, because of the word "then" before the limitation over, which, though sometimes an adverb of time, is sometimes a word of relation, and signifies as much as "in such case," and must have this effect, that upon the first, second, third, &c. limitations failing, the remainder-men could not take it, because of the words "for want of issue;" and therefore, unless the tenant for life was construed to have an estate tail, it would descend in the mean time to the heir at law, because the contingency on which the remainder-man was to take had not happened. Then, as to the will before the Court, how could he say that he must not give an estate to A.? The words said so: the clause relating to the pictures confirmed it. It was argued that all the sons of A. should take an estate in tail male, and then the words would stop; but that he could not do.

In this case, it will be perceived the words on which the question arose referred to issue of either sex, and not, as in the two preceding cases, to issue of the same species as the individuals to whom express estates were devised, namely, issue male. The construction adopted by the Court seems to have been somewhat aided by the gift of the pictures.

It is also observable, that in the events which had happened, it was not necessary to decide whether the parent took an estate tail in the first instance, or (which seems a better construction) an estate tail in remainder expectant on the estate tail of the son. A point of this nature, however, arose in the next case, (Doe d. Bean *v.* Halley,) (*a*) which deserves particular attention. The testator devised to his nephew A, and his assigns,
for *his life, without impeachment of waste, and after [386]
his decease to the *eldest son* of his said nephew A lawfully to be begotten, and the heirs of such eldest son, upon condition that such eldest son were christened and called by the name of F.; *and in default of issue male of* A, then over to his (the testator's) nephew B and his son in like manner. (*b*) It was held, that the evident intention being that B and his issue should not become entitled until the male issue of A should have become extinct, A took an estate tail by implication, and then the limitations were to be read to A for life, remainder to the eldest son in tail male, (not in fee simple, as had been contended,) with remainder to A in tail male, with remainder over. Lawrence, J., referred to the cases of Attorney-General *v.* Sut-

(*a*) 8 Durn. & E. 5. See also Parr *v.* Swindels, post, 389.

(*b*) A bequest much resembling this occurred in Marsh *v.* Marsh, 1 B. C. C. 294, where a testator bequeathed personalty in trust for W. for life, and after his decease to his eldest son and his heirs forever; and in case of their death without issue, then over to A.; and it was held, that the two gifts to the son and A. were alternative. The word "their" was assumed to mean *his*, and the word "issue" to denote *son*.

ton, and Langley *v.* Baldwin, as warranting this construction. (*a*)

And even where the prior devise runs through the whole class of sons or children in succession, yet, if they take life estates only, there is, on the principle already adverted to, less disposition to hold subsequent words importing a *failure of issue to refer exclusively to the objects of such devise, than where (as in the preceding cases) the prior devise confers estates of inheritance; and accordingly we find in several instances of this nature the words in question have been held to create an estate tail in the prior devisee.

[387]

Thus, in Wight *v.* Leigh (*b*) where A devised all her real estates in Surrey to her husband B, in case he survived her, during his life; and after B's decease she gave the said Surrey estates to C, and after his death to his first and other sons; *and in default of male issue*, then she gave the said estates unto the eldest and other daughters of C, and to their heirs male forever, on condition that they should take the name of W., and no other. C (who had a son and three daughters) claimed an immediate estate tail; against which, however, it was contended, that, by giving the father an estate tail, the Court would expunge the limitation to the first and other sons, which was a descriptio personæ as much as a limitation to an existing son by name, pointing also to that order in which estates are usually limited, with a view to succession according to priority of birth; and that the words, "in default of issue male," might be applied, not to C, but to the immediate antecedent, the first and other sons; a construction more grammatical, more consistent with the general plan of the devise, and approaching as near as could be to the ordinary language and course of settlement: but Sir W. Grant, M. R., decided that C took an immediate estate tail.

He said that the evident intention of the testatrix was to prefer all the male issue of *somebody*, either of the plaintiff, or his first and other sons, to the daughters; *but she had not given such an interest to any one as would enable male issue generally to take, for all that was given to the plaintiff was what amounted in law to an estate for life, and *so it was with regard to the estates given to his first and other sons.*

[388]

(*a*) It is to be observed, that in the case of Langston *v.* Pole, 2 M. & P. 490, where the devise was nearly the converse of that in the two cases in the text (the testator having passed by the first son of the devisee for life, and then proceeded to devise the property to his second and other sons in tail); the first son was held to take an estate tail by force of the intention collected from the subsequent part of the will, which reserved to the devisee for life a power of appointing portions to his daughters, *in case of there being no son*, (combined with another event,) and also limited portions to the *testator's own* daughters, in similar terms; but as the first son was considered upon the whole will to be tenant in tail by implication, the case has been stated, in a former chapter, as exemplifying this doctrine. Vide ante, vol. 1, p. 431.

(*b*) 15 Ves. 564.

It was necessary, therefore, in order to effectuate the general intention in favor of issue male, to consider some of the antecedent takers as having by implication such an estate as would enable all the issue male to take, which could only be by giving an estate tail either to the father or to his first and other sons. The male issue intended must, his Honor thought, be the male issue of the father, not of the sons. Nothing was before mentioned of any issue male of the sons, whereas there was a certain description of male issue of the father before spoken of, viz: his first and other sons.

In this case the word "estate" was sufficient to vest the fee in the sons; (*a*) which circumstance, however, escaped attention, though it would undoubtedly have influenced the construction; for if it had been perceived that the sons under the prior expressions would, but for the intention of succession, have taken the fee simple, the words, "in default of male issue," would in all probability have been applied *to them*, in order to cut down that fee to an estate tail, which was necessary to give effect to the intention that the sons should take *successively;* that being established to be the mode of construing such a devise. (*b*) It will be observed that the fact of the sons taking only an estate for life under the devise, was much relied upon, [389] both at the bar and on the bench, in support of the construction adopted.

But even supposing that the devise to the sons was (as assumed by Sir W. Grant) capable of conferring estates for life only, there was no apparent reason why such devise should be sacrificed, in order that the parent might take an estate tail. What prevented the following construction of the limitations? To the parent for life, with the remainder to the first and other sons for life, *with remainder* to the parent in tail. For such a construction, the case of Doe *v.* Halley would even then have afforded ample authority; but the attention of the Master of the Rolls does not appear to have been called to this case, or indeed to the suggested mode of construing the will, which, however, is now exemplified in two more recent cases. One of these is Parr *v.* Swindels, (*c*) where a testator devised certain messuages to his daughter, Mary Parr, for life, and after her decease, unto and equally between the children of his said daughter, to take as tenants in common; *and in case she should die without leaving any lawful issue*, then the testator devised the premises among the children of his daughters, Charlotte and Hannah. Sir J. Leach, M. R.: "The plain

(*a*) See ante, 181. Sir W. Grant was certainly much disinclined to the rule since established, that the word *estate*, accompanied with a local designation, carries a fee; and one of his decisions on this point, Pettiward *v.* Prescott, has been clearly overruled. See ante, p. 182. But now see Doe *v.* Lean, 1 Adol. & Ell. 229, New Series.

(*b*) Lewis d. Ormond *v.* Waters, 6 East, 336; supra, vol. 1, p. 370.

(*c*) 4 Russ. 283.

intention of the testator was, that this property should not go over until the failure of the issue of Mary Parr; and to effectuate this intention an estate tail in her must be implied. It is to be considered, whether that estate is to be immediate in her, or in remainder after estates for life to her children. If the intention, that the property should not go over to the children of Charlotte and Hannah until there was a failure of issue of Mary, could not be effectuated without giving an im-
[390] mediate estate tail to Mary, there is in the *books sufficient authority to warrant that construction. But as that purpose will, in this case, be equally accomplished by an estate tail in remainder to Mary, after the life estates given to the children, I am of opinion that the better construction is, that Mary takes an interest for life, with remainder to her children as tenants in common for life, remainder to Mary in tail. This construction will give effect to all the words of the will." (*a*)

But this construction, however strongly recommended by its convenience as letting in the whole line of issue, by giving an estate tail to the parent, without sacrificing the preceding express gift to sons, daughters, or children, did not prevail in the case of Bennet *v.* Lowe, (*b*) where a testatrix devised certain freehold messuages to A and his heirs, in trust to pay certain life annuities, and after the decease of the annuitants, upon trust to pay the rents of four females, for their separate use; and, in case any of the said four persons should happen to depart this life, leaving a daughter or daughters, it was declared that the share or interest of her or them so dying should go to such daughters as they should be in seniority of age and priority of birth: Provided always, *that in case any of them should happen to depart this life without issue in the lifetime of the annuitants*, then the testator ordered that the share or interest of her or them so dying be paid, applied, and disposed of to certain other persons in succession, as they the said devisees (naming them) should depart this life. On a case from Chancery, the questions for the opinion of the Court were, first, what estates the four female devisees took; and, secondly, what estates passed to their daughters. It was contended, that the word "issue,"
[391] occurring in the devise over, meant the issue *before referred to, namely, the daughters, and might be read as if the word *such* had been introduced; and that, to hold the words to refer to an indefinite failure of issue, would defeat the testatrix's intention, which evidently was, that female issue should be preferred to male issue, and that they should take in succession, objects which were quite incompatible with giving the first four takers an estate tail, as then the male issue would take in preference to the females, and the latter would take (if

(*a*) 8 Durn. & E. 10. (*b*) 5 Moo. & Pay. 485.

at all) concurrently. It was observed, that the limitation over was not to take effect on a dying without issue generally, but only in a particular event; *i. e.* on the death of any of the females without daughters in the lifetime of the annuitants. The Court certified an opinion, that the four devisees took estates for life only, and that their daughters took estates for life on the decease of their parents respectively. The four devisees survived the annuitants; and it was held, that, subject to the estates for life, the fee passed by the residuary clause.

The precise grounds on which the Court arrived at this conclusion do not distinctly appear; but we may infer, from the tenor of the arguments at the bar, and the few remarks which fell from the Bench, that it was thought that the issue referred to in the clause in italics were the daughters who were the objects of the preceding devise. The case of Parr *v.* Swindles was not cited, and probably was then not in print. Had any construction, supported by authority, been suggested, by which the words in question might have received their ordinary and established signification, without interfering with the intention to prefer the daughters, and give them estates in succession, the Court would, in all probability, gladly have adopted it. One peculiarity in this case deserves notice, namely, that the devise was over, on the failure of the issue *within a [392] definite time, namely, the death of the annuitants; but this was very faintly adverted to, and would, it should seem, have no other effect upon the construction than to render the devise over contingent on the failure of the issue of the prior devisee (*i. e.*, the determination of the estate tail) within the prescribed period; it would not, it is conceived, prevent such prior devisee from taking an estate tail.

The other of the two cases before alluded to, is the much discussed case of Doe d. Gallini *v.* Gallini, (*a*) which was as follows:—A testator devised certain lands of which he was seised in fee, to trustees and their heirs, upon trust, as to part, to permit his son A to receive the profits for life, and as to other parts, to permit his two daughters and his son B to receive the profits for life, and also upon trust, during the lives of his said children, to preserve contingent remainders; and, after the decease of any or either of his said children, he devised the estate to him or them, limited for life as aforesaid, unto all and every his, her, or their child or children living at the time of his, her, or their decease, or born in due time afterwards, for their lives as tenants in common; but, nevertheless, with an equal benefit of survivorship among the rest of the said children, if more than one; and if any of them should die without leaving issue, the child or children of each of his said sons and daughters taking

(*a*) 5 Barn. & Adol. 621; S. C. 3 Adol. & Ellis, 340.

the rents and profits of his, her, or their parent's estate only; and from and after the decease of all the children of each (*a*) of his said sons and daughters *without* (*b*) *issue*, the testator devised the estates to them respectively limited as aforesaid, *unto and among all and every the lawful issue of such child or children* (during their lives) as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining; *and for default or in failure of issue of any of his said sons and daughters*, the testator devised the estates so limited to him, her, or them dying without issue, unto the survivors of his said sons and daughters during their respective lives, in equal shares as tenants in common; and after their respective deaths, he devised the same to the children of the survivors of his said sons and daughters during their respective lives as tenants in common, with such benefit of survivorship as aforesaid, and, after the decease of all of them, to the issue of such children, in like manner as he had before devised the original estate of each of his said sons and daughters; *and for default or in failure of issue of all his said sons and daughters*, except one, the testator devised all his said estates unto his only surviving son or daughter in fee. It was contended, that the testator's children took immediate estates tail by force of the words showing that the property was not to go over to the surviving children until a total failure of issue of any deceased child or children; and to this general intention any particular inconsistent intention ought to bend. The construction decided upon by the Court, after much consideration, was, that the testator's children took estates for life, with remainder to their respective children in tail, with cross remainders in tail between the grandchildren, *with remainder in tail to the parent*, (*i. e.* the testator's children.) Lord Denman, C. J., after some prefatory remarks, said: "The argument founded upon the whole will is, that the testator means
[394] the estate left to each of his *sons and daughters to go to the whole line of issue of those sons and daughters respectively, and only on failure of the whole line of issue to go over, and this on account of the use of the term 'issue' of the sons and daughters, which word, 'issue,' is here to be construed (as it generally is) a word of limitation, and equivalent to the term 'heirs of the body,' and as embracing the whole line of lineal descendants; and, therefore, it is contended, that each son and daughter took an estate tail in the portion left to him. *But if the term 'issue' is here a word of limitation, why is it not equally so in the part in which the estate is given over to the surviving children of the sons and daughters, if any of them*

(*a*) "Each," was apparently inserted by mistake for "any," or "either."
(*b*) The word "without" was evidently written by mistake for "leaving."

shall die without leaving issue? From which it is clear, that the testator does not mean the survivors to take till failure of all the issue of the deceased living children.

If the term 'issue' has here the same meaning, then the children living at the time of the death of the sons and daughters respectively must take estates tail as tenants in common in their respective shares, with cross remainders either for life or in tail, (which, it is unnecessary to decide,) with remainder to the sons and daughters in tail in their respective shares, and remainders over; and this construction makes the least sacrifice of the testator's declared intention; it preserves estates to all his grandchildren living at the death of his sons and daughters as tenants in common, which, it is clear, the testator intended to give; and it also includes the descendants of a grandchild dying in the son's or daughter's lifetime, though the estate to them is postponed to that of the children; and it includes all the issue of each son and daughter before the estate goes over. The estate tail in the sons and daughters takes effect not in derogation of, but by way of remainder on, *the express [395] estates given to the children of the sons and daughters, in which respect it resembles the case of Doe d. Bean *v.* Halley. (*a*) It is true, that these grandchildren cannot take estates for life as the testator intended, for the rule in Shelley's case prevents it; (*b*) nor the children of those children estates for life as tenants in common, for the rule of the law against perpetuities prevents that; but this is unavoidable, and no construction can carry into effect all the testator wished."

A writ of error was brought in the Exchequer Chamber, and the decision of the Court of King's Bench was there unanimously affirmed. The reasoning of Lord Chief Justice Tindal, (who delivered the affirming judgment) bears a close resemblance to that of Lord Denman in the Court below. After reading the concluding passage in the will above stated, the Lord Chief Justice said: "The words, undoubtedly, if they had occurred without any intervening devise to the grandchildren, would have been sufficient to have created immediate estates tail. But there has been in the foregoing part of the will not only an express devise to the grandchildren for life, but also words sufficient to enlarge such estates for life in the grandchildren into estates tail. Admitting, therefore, the argument of the plaintiff's counsel to be just, that, if we give to the words 'failure of issue, when applied to the grandchildren surviving, the force of enlarging their estates for life into an estate tail, we ought to give the same effect to the same words at the end of the devise, when

(*a*) 8 Durn. & E. 5.

(*b*) *i. e.* The grandchildren could not take a life estate only, consistently with the intention that the estate should devolve to the issue or heirs of the body of such grandchildren.

[396] applied to the children of the testator, and, *consequently, their estates for life must be similarly enlarged; still, the question arises, whether such estate tail in the sons and daughters of the testator is immediate, or whether it is not to be postponed until after the estate tail in the children of such sons and daughters has taken effect. If we consider the clause of the will last referred to as giving an immediate estate tail to the children, the previous devise to the grandchildren as tenants in common in tail is defeated; whereas, if we hold the devise to the children of the testator to be an estate in tail, but to be a devise in remainder only, in that case the limitation for life to the children will take effect, and the devise to the grandchildren as tenants in common in tail, in remainder; and the general remainder over, to the children of the testator in tail, will also take effect, and will effectually secure the descent of the property in the line of the testator's family, as long (to use the testator's own expression in his will) as 'there shall be any stock or offspring of the testator remaining.'"

It seems, then, that we have at length arrived at the sound and reasonable rule, that where an estate is devised to a person for life, with remainder to his children, or to his sons or daughters, with a devise over on the failure of the issue of the devisee for life, and the latter words are held to create an estate tail in the parent, (but which they will do only under a will which is subject to the old law,) the devise to the children, sons or daughters, is not unnecessarily and wantonly sacrificed to this object; but the parent, *i. e.* the devisee for life, takes an estate tail in remainder, expectant on the determination of the prior estates of his children, sons or daughters, (as the case may be.) And there seems to be no reason why this construction [397] should not prevail as well where the prior *devise to the children's sons or daughters confers estates tail in remainder, expectant on the parent's life estate, as where those devisees take estates for life, unless the cases of Banfield *v.* Popham, and Blackborn *v.* Edgley, should be considered as conclusive authorities against such a construction. Indeed, in the case of Doe *v.* Gallini, the children of the testator's sons and daughters were held to take estates tail in the first instance, with remainder in tail to the sons and daughters; as notwithstanding the apparent restriction of the estates of such issue to life estates, they were held to take estates tail by force of the word "issue," as a word of limitation, strongly aided by the context.

3. An examination of the preceding cases will suffice to show how numerous, and, in some instances, how refined, are the distinctions upon which the construction of words importing a failure of issue depends. They cannot, it is conceived, but suggest the wish that these words had been more strictly confined to the office of merely connecting the two limitations between which

they are interposed; and that whenever the preceding devise embraced *any* class of issue, they had been considered as referential to those objects, which is the established rule in regard to the expression *such* issue. The application of this rule to the cases under consideration would have required only the implication of the word "such." Though in the state of the authorities, it may seem dangerous to advance any general conclusions upon the subject, the writer ventures to submit the following propositions, as deducible from the cases; in framing which, to avoid the risk of misleading the reader, he has cautiously adhered to the circumstances of the several cases, without extending his positions to others apparently within the scope of the principle.

* 1st. That the words, *in default of issue*, or expressions of a similar import, following a devise to *children in tail* or *in fee simple*, mean in default of *children*. (*a*) This is free from all doubt. [398]

2d. That these words following a devise to *all* the sons successively in tail male, and daughters concurrently in tail general, are also to be construed as signifying *such issue* even in the case of an executory trust. (*b*)

3d. That words devising over the property on failure of issue *male*, following a devise to the whole line of sons successively in tail male, are also referential to those objects, (*c*) but not, it seems, where such sons take for life only, in which case the words in question raise an implied estate tail in the parent. (*d*)

4th. That where there is a prior devise to a *definite number of sons only* in tail male, with a limitation over in case of default of issue or issue male of the parent, an estate tail will be implied in the parent, in order to give a chance of succession to the other sons. (*e*)

5th. That, in the case of executory trusts, words importing a dying without issue, following a devise to the first and other sons of a particular marriage in tail male, authorize the insertion of a limitation to the parent *in tail general in remainder expectant on those estates. (*f*) [399]

6th. That such words (whether they refer to issue or issue male) succeeding a devise to the eldest son in tail, are not referable to such son exclusively, but create in the parent an implied

(*a*) Goodright *v.* Dunham, Dong. 764, ante, 373. See also Ginger d. White *v.* White, Willes, 348, ante, 372; Wight *v.* Baury, 7 Cushing, 105, 107, 108.

(*b*) Blackborn *v.* Edgley, 1 P. W. 600, ante; Morse *v.* Marquess of Ormonde, 5 Madd. 99, ante.

(*c*) Bamfield *v.* Popham, 1 P. W. 54, 760; 1 Eq. Ca. Ab. 183; 2 Vern. 427, 449, S. C. ante.

(*d*) Wight *v.* Leigh, 15 Ves. 464; but as to which, see ante, 387.

(*e*) Langley *v.* Baldwin, 1 P. W. 759; 1 Eq. Ca. Ab. 185, pl. 29; 1 Ves. Sen. 26; S. C. Attorney-General *v.* Sutton, 1 P. W. 754; S. C. in Dom. Proc. 3 B. P. C. (Toml. ed.) 75, ante, p. 383.

(*f*) Allanson *v.* Clitherow, 1 Ves. Sen. 24, ante.

estate tail, (*a*) in remainder expectant on the estate tail of the son; (*b*) and which rule also, it seems, applies where the children take estates tail. (*c*)

7th. That the circumstance of the preceding devise to children, &c., being subject to a contingency, is rather unfavorable to the construction which reads words importing a failure of issue to refer to a failure of the objects of such preceding devise. (*d*)

The statement of the result of the cases may somewhat assist in the consideration of the subject, though cases are incessantly occurring which present new circumstanees, and give rise to nice questions on the application of the rules furnished by the preceding authorities, even admitting those rules to be free from doubt. The reader is recommended, before he unreservedly accedes to the foregoing propositions, to consult the cases themselves, in order that he may see how far the construction may have been aided by the circumstances of the particular case.

[400] 4. It may be useful, in this place, to advert to the doctrine of *general* and *particular intention*, (*e*) * or, to speak more explicitly, that supposed rule of construction by which the particular intent expressed in a will is sacrificed to the general and paramount intention that the estate shall not go over to the next devisee until the issue of the preceding devisee shall have become extinct, and which has been considered to authorize the giving to such prior devisee an estate tail. The doctrine occupies so conspicuous a place in the will-cases of one period, that it must not be dismissed without a few remarks.

The phrase "general intention," in the above sense, was first adopted in the case of Robinson *v.* Robinson, (*f*) where, we have seen, the Court of of King's Bench held the devisee to take an estate tail male; and their reason for this construction was expressed to be, not that "son" was here a word of limitation, (which has been shown to be, and which Sir Dudley Ryder, (*g*) before whom the case was first argued, treated as the ground of the decision,) but to "effectuate the manifest general intention of the testator." Expressions of a similar nature fell from Lord Wilmot, C. J., in Roe *v.* Grew, (*h*) where his Lordship is made to refer the determination, that the devisee was tenant in tail, to the "weightier" intention that the estate was not to go over

(*a*) Stanley *v.* Lennard, 1 Ed. 87, ante, p. 384.
(*b*) Doe d. Bean *v.* Halley, 8 Durn. & E. 5, ante, p. 385.
(*c*) Doe *v.* Gallini, 5 Barn. & Adol. 621; 3 Add. & Ell. 340; ante, 392.
(*d*) Doe *v.* Lucraft, 1 Moore & Scott, 573; Franks *v.* Price, 6 Scott, 710; 5 Bing. N. C. 37; 3 Beav. 182, S. C.
(*e*) See a masterly and extended dissertation on this doctrine in Mr. Hayes's Inquiry, 284 to 365.
(*f*) Ante, 318.
(*g*) He died pending the cause, and was suceeeded by Lord Mansfield, in 1756.
(*h*) Ante, 336.

until failure of his male issue, and not to the more simple and obvious ground of "issue" being a word of limitation in the devise itself, which was the reason distinctly advanced by two of the other learned Judges.

The next mention of this doctrine is by Lord Kenyon, under whose auspices it seems to have first grown into importance; for in scarcely a single instance did this eminent Judge come to the conclusion, that a person took an *estate [401] tail under a devise to him and his issue, or to him and the heirs of the body (*a*) without adducing as a reason, that the general intention, to which the particular intent must give way, required such a construction, generally referring to Robinson *v.* Robinson and Roe *v.* Grew; though his Lordship was not always consistent in his mode of treating the former case. (*b*)

But, it will be asked, what is the "particular intent" which is thus to be sacrificed? In the certificate of the Court of King's Bench, in Robinson *v.* Robinson, no *particular* intent is referred to; but Wilmot, C. J., who first introduced the expression in Roe *v.* Grew, appears to have meant by it simply the estate for life; and so, it would seem from his language, did Lord Kenyon, in Doe *v.* Applin, (*c*) and Denn *v.* Puckey. (*d*) In this sense, however, it is merely descriptive of the operation of the rule in Shelley's case (*e*) for the sole reason why the intention to give an estate for life cannot consist with, but must be sacrificed to the design of letting in a line of issue, is, that *that* rule will not permit a person to be tenant for life, and his heirs or the heirs of his body (which is the construction of "issue" when used as a word of limitation) to be purchasers in the same will. But if this be all that is meant by the expression "particular intention," for what reason is this ambiguous and not very accurate phraseology employed in referring to the operation of such a well-known and familiar rule of law? *And why is [402] the case of Robinson *v.* Robinson to be exclusively cited for the purpose, when any one of the multitude of decisions illustrating the rule would have been equally in point? It is manifest, indeed, from the use which Lord Kenyon made of this case, that he sometimes, at least, included in the phrase "particular intent," an express gift to a particular degree of issue; and this is the more evident from his observations in Doe d. Candler *v.* Smith, (*f*) where, after reading the devise to "heirs of the body" as a gift to *children*, he sacrificed this intent to the "general intention" that "all the progeny of those children

(*a*) See Doe d. Blandford *v.* Applin, 4 Durn. & E. 87, ante, 344; Denn d. Webb *v.* Puckey, 5 Id. 303, 340; Doe d. Candler *v.* Smith, 7 Id. 531.
(*b*) Ante, p. 319.
(*c*) 4 Durn. & E. 87.
(*d*) 5 Durn. & E. 303.
(*e*) As to which, see ante.
(*f*) 7 Durn. & E. 532, ante.

should take before any interest should vest in the devisees over," and accordingly held the parent to be tenant in tail. (*a*) Now, if his Lordship were authorized to construe "heirs of the body" as designating *children*, (*b*) on what sound principle, or even plausible pretence, was the express devise to the children to be sacrificed to the intention inferred from the words introducing the devise over? To assign to these words such an operation, is to set up an intention collected merely by inference from phrases of an ambiguous character, against an intention clear, express, and unequivocal; and when, too, (which constitutes the great force of the absurdity,) *there is no incompatibility or incongruity in the two limitations.* That an implied estate tail in the parent *in remainder after an estate tail in the children* is perfectly consistent with such an estate in them, and would attain the object of letting in all the descendants of
[403] the first taker equally well with an immediate * estate tail, is too palpable for serious argument. The one undoubtedly is distinct from, but not in the least repugnant to, the other. It is evident, therefore, that to have struck out one of these limitations would have been an unwarrantable interference with the express language of the testator, not called for by the necessity of the case, and in direct contravention of the rule which requires that effect should be given, if possible, to *every* part of a will. It is satisfactory that the case of Doe d. Candler *v.* Smith may be supported on irrefragable grounds, independently of any such doctrine; for, as it is now established that the words "heirs of the body," in such a context, cannot be read *children*, (*c*) the whole assumption upon which the Court proceeded fails, and the case is clearly right upon the uncontrolled operation of "heirs of the body" as words of limitation; but this, while it sustains the authority of *the case*, deprives *the doctrine* of all the sanction which that authority would have communicated. Nor is this all: many of the cases antecedently stated afford negative authority against it; for it is observable that in Langley *v.* Baldwin, (*d*) Attorney-General *v.* Sutton, (*e*) and Stanley *v.* Lennard, (*f*) where estates tail were raised in the parent by the effect of the words introducing the devise over, not a word is said of sacrificing the devise to the sons to this object. On the contrary, in Attorney-General *v.* Sutton, those who argued for this construction evidently considered that the ulterior estate of the parent was to take effect as a remainder

(*a*) Mr. Justice Grose, too, in Doe *v.* Cooper, 1 East, 229, ante, assumed the word "issue" in the devise to mean *children*, and then that it was to give way to the intent, appearing by the words introducing the devise over, to let in all the deseendants. Both branches of this hypothesis are equally untenable.

(*b*) But, as to which, see ante.

(*c*) Ante, Chap. 38.

(*d*) 1 P. W. 759, ante.

(*e*) Id. 754; 3 B. P. C. (Toml. ed.) 75, anté.

(*f*) 1 Ed. 87, ante.

expectant on the estate tail of the sons. In Allanson *v.* Clitherow, (*a*) too, (where, however, the trust was *executory,) this construction was *expressly* adopted. But [404] the most conclusive authority against the doctrine in question is Doe d. Bean *v.* Halley, (*b*) where even Lord Kenyon, its most strenuous champion, held, that the estate tail raised by implication in the parent took effect by way of remainder after, *and not in derogation of*, the express devise to the eldest son.

In this case, indeed, his Lordship seemed to be on the point of applying to practice the doctrine which he had been so long maintaining in theory; for he said, "We have our choice of two constructions to effectuate the testator's general intent, *either to give an immediate estate tail to A, which would violate the particular intent of the devisor*, or (and to which construction I incline) to say that he took an estate for life, remainder in tail to his eldest son, remainder in tail to the father, in order to let in all his issue male." To have expunged the devise to the eldest son in this case would have been a practical illustration of the doctrine in question; and his Lordship, in refusing to do so, virtually negatived its existence, and thereby established, not the prevalence of the general over the particular intent, but the triumph of sound sense and legal principles over one of the absurdest doctrines that was ever advanced. His Lordship, however, added, "In deciding this case, I will not abandon the general rule recognized and acted upon in Robinson *v.* Robinson."

This observation shows, first, that Lord Kenyon suspected that his decision might be considered to encroach upon the doctrine which he had taken such pains to rear upon the authority of this case; and, secondly, that he regarded Robinson *v.* Robinson as a case in which, by holding the parent to be immediate *tenant in tail, the devise to the son *as a* [405] *designated object* was *sacrificed* to the "general intent," appearing by the subsequent words, (*c*) which is the only view in which it can possibly be considered as coming into collision with Doe *v.* Halley, where the devise to the eldest son was *preserved*. If that case supported any such doctrine, (but which the writer trusts he has satisfactorily shown it does not,) it is clearly overruled by Doe *v.* Halley; and Lord Kenyon's express reservation can avail but little in preserving the doctrine from the effect of his own decision, rejecting it in the very case for which, if applicable at all, it appeared to have been designed.

(*a*) 1 Ves. Sen. 24, ante.
(*b*) 8 Durn. & E. 5, ante.
(*c*) See an observation upon this, ante, p. 369; and see his Lordship's own allusion to the case, ante, p. 319.

So far, therefore, it is clear that the doctrine of *general* and *particular* intention had existed only in name; the cases in which it was professed to be applied being clearly referable to other grounds, and in those which seemed to call for its application, the doctrine being rejected. In the case of Wight *v.* Leigh, (*a*) already stated, however, we have an instance nearly the converse of the former class; for, without a distinct recognition of the doctrine, a construction, amounting in effect to an application of it, seems to have been adopted.

The confusion temporarily introduced by this case, however, has been completely dissipated by the two more recent cases, (Parr *v.* Swindels, and Doe *v.* Gallini,) in both which we have seen it was held, upon the authority of Doe *v.* Halley, that words importing a failure of issue of the devisee for life con-
[406] ferred *on him an estate tail; not in derogation of, but in remainder expectant on the estates devised to the children. In Doe *v.* Gallini, the doctrine of general and particular intention underwent much discussion, and Lord Denman was pleased to express his concurrence in the views of the writer of these pages. His Lordship observed, (*b*)—"The doctrine that the general intent must overrule the particular intent has been much, and, we conceive, justly objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the operation of the rule in Shelley's case, and it has since been laid down in others where technical words of limitation have been used, and other words, showing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale in Jesson *v.* Wright. (*c*) This doctrine of general and particular intent ought to be carried no further than this, and thus explained, it should be applied to this and all other wills."

5. Devises of reversions sometimes give rise to a question which bears a strong analogy to that discussed in the present chapter. This occurs where a testator, having a rever-
[407] sion in *fee, subject to estates tail belonging to the sons or other partial issue of a person, (*d*) devises the

(*a*) 15 Ves. 564, ante, 387.
(*b*) 5 Barn. & Adol. 640.
(*c*) 2 Bligh, 57.
(*d*) The writer has avoided suggesting the case of the limitations being to the testator's *own* sons, because such cases may perhaps be considered as falling within

reversion as property in the event of that person *dying without issue*, which necessarily raises the question whether these words refer to the determination of the subsisting estates, or to a general failure of issue, or, in other words, whether they are words of description or donation: in the former case, the devise operates as an immediate disposition of the reversion; (*a*) in the latter, it is an executory devise, and, as such, is void for remoteness.

A point of this nature occurred in the case of Lady Lanesborough *v.* Fox, (*b*) where A, having settled the lands in question on the marriage of his son B to the use of himself (A) for life, remainder to his son B for ninety-nine years, if he so long lived, remainder to the use of the first and other sons of B *on his intended wife to be begotten*, successively in tail male, remainder to the heirs *male* of the body of B, with reversion to the right heirs of himself, (A,) by his will devised the lands contained in the settlement *on failure of issue of the body of* B, *and for want of heirs male of his* (A's) *body, to his daughter* F. *in tail;* and the House of Lords adjudged, in concurrence with the unanimous opinion of the Judges, that the will did not give an estate tail by implication to B, and that therefore the devise over to F. was executory, and void, as being on too remote a contingency.

If this case had rested solely on the circumstances that * the subsisting estate tail in B embraced the heirs [408] *male* only, and the devise in the will referred to his (B's) issue *generally*, (which certainly was argued as the chief point in the case,) the decision, it is conceived, could hardly have been sustained, consistently with the rules of construction deducible from the cases discussed in the present chapter, in many of which we have seen, that words referring in terms to issue or issue male have been held to apply to *children* or *sons*, being the objects of the antecedent limitations. (*c*) *A fortiori*, therefore, in the present instance would they have been construed to be referential, where the approximation to a correct reference to the subsisting estates was such as to require only the word "male" to be supplied; and the case of Tuck *v.* Frencham, (*d*) affords an instance (if authority were requisite) of this word being supplied to make words referring to issue generally correspond with the antecedent limitations in favor of issue male created by the same will.

These remarks assume that the principle which governs the

another principle, discussed in the next chapter. See Sandford *v.* Irby, 3 Barn. & Ald. 634, and other cases there discussed.

(*a*) See ante, vol. 1, pp. 728, 730.
(*b*) Cas. Temp. Talb. 262.
(*c*) Ante, 398.
(*d*) 1 And. 8. S. C. Moore, 13, pl. 50; ante, vol. 1, p. 426.

application of phrases of this nature to limitations created by the same will, and to estates antecedently created, is identical. It seems difficult to find a solid distinction between the cases, especially where, as in Lanesborough *v.* Fox, the testator refers to the settlement in describing the subject of disposition; the difference between the two cases, indeed, if any, would seem to be, that the Courts would incline more strongly to the referential construction in the latter case, where the effect is to support a devise otherwise void, (*a*) than in the former,

[409] * where, as an estate tail can generally be implied, the devise is valid *quacunque via.* The preferable ground, however, upon which the case of Lady Lanesborough *v.* Fox appears to stand, is afforded by the other words, "and for want of heirs male of my own body;" for, as the testator had no estate tail, and none could be implied, it is clear that, unless the words could be held to refer to issue *living at the decease of the testator*, according to the rule discussed in the next chapter, (*b*) (in which it will be seen there was considerable difficulty, inasmuch as the testator had a son living,) the devise was void. (*c*)

The principle was again agitated in the case of Jones *v.* Morgan; (*d*) where A, having, on his marriage with B, settled certain estates upon himself and the sons of the marriage in tail male, with reversion in fee to himself, and having two sons of the marriage, devised the estates, in case his said sons, *or any other son or sons of his thereafter to be born, should die without issue male of their bodies*, to his brother T. The question was, whether the testator, by the mention of "sons to be born," was to be understood as meaning after-born sons by his wife B, (who was living,) or as having in his contemplation the sons of a future marriage. If confined to sons of A's present marriage, it was a good devise of the reversion, as the contingency expressed by him (on which the devise over was to take effect) em-

[410] braced precisely the estates * under the settlement, on the determination of which his own reversion would fall into possession, it being the same as if he had said, "Whereas my estate is settled upon my first and every other son in tail male by my marriage settlement; therefore, in case they all die without issue male of their body, I give it to my brother," which would clearly have been good as a devise of the reversion; and a circumstance much relied upon for this construction was,

(*a*) It will be remembered that we are here speaking of the *old* law.

(*b*) Post.

(*c*) It is remarkable that Mr. Fearne, in his strictures on this case, Cont. Rem. 447, while he treats of the want of the word "male" as a fatal omission in referring to the estate tail of the testator's son, seems to consider it not impossible that the words *for want of the testator's own heirs male*, should be held to be referential to the son, though this hypothesis takes so much greater liberty with the testator's language.

(*d*) Butl. Fea. App. 578; S. C. 3 B. P. C. (Toml. ed.) 322.

that the testator appointed B a guardian of his children, and executrix of his will, which negatived the supposition of his contemplating a future marriage. (*a*) On the other hand, it was contended that the expressions used by the testator included the sons of an after-taken wife, and, as such sons could not take an estate by implication, the limitation over to the testator's brother was an executory devise void for remoteness. Lord Chancellor Camden sent a case to B. R., the Judges of which certified their opinion that the event of a second marriage was not in the testator's contemplation, but that, if it were, the sons of that marriage took an estate tail. Lord Bathurst, who, in the mean time, had succeeded to the seals, concurred in the former branch of this certificate, and decreed accordingly; but he dissented from the opinion that an estate tail was raised by implication, conceiving Lanesborough *v.* Fox to be a direct authority against it. The decree was affirmed in the House of Lords, on the ground that a future marriage was not in the contemplation of the testator, and that the devise to his brother was therefore good. (*b*)

* But in Bankes *v.* Holme, (*c*) where lands having [411] been limited upon the marriage of A with B, to the use of A for life, with remainder to trustees to preserve, with remainders to trustees for certain terms of years, with remainder to B for life, remainder to trustees to preserve, remainder to the first and other sons of the marriage in tail male, with remainder to the daughters as tenants in common in tail, with cross remainders, with reversion to A the settlor, in fee; A made his will, by which he recited, that, by the settlement in question, he was seised of, or entitled to, the reversion in fee simple expectant on the decease of his wife B, in case there should be no child or children of his said wife by him begotten, or, there being such, all of them should happen to depart this life *without issue*. The testator then, in case he should die without leaving any children or child, or, there being such, "all of them should happen to depart this life *without issue* lawfully begotten," devised the premises upon certain trusts. Sir J. Leach, V. C., held, that this devise, being after a general failure of issue of the children, was too remote and void; and this decree was affirmed in the House of Lords.

Lord Eldon observed, in Morse *v.* Lord Ormonde, (*d*) that

(*a*) See this principle applied to a different species of case, Wilkinson *v.* Adams, 1 Ves. & Bea. 422, ante.

(*b*) In Trafford *v.* Boehm, 3 Atk. 442, a devise, "after failure of issue" of the testator's wife by him, was construed as an immediate gift of the reversion, the words in question being referential to the subsisting limitations of their marriage settlement; but the will contained an express reference to the settlement (the particular limitations of which do not appear) for another purpose.

(*c*) 1 Russ. 394, n. See also Bristow *v.* Boothby, 2 Sim. & Stu. 465.

(*d*) 1 Russ. 406.

this was a "very strong decision," (an expression which, in the mouth of this venerable Judge, always means a *wrong* decision;) and it seems, indeed, to be very difficult to reconcile it with the principles of the line of cases just stated. It was
[412] manifest, from the recital of *the settlement, that the testator had in view reversionary estate expectant on the limitations of the settlement, whatever that reversion was; and the terms used were merely an erroneous and mistaken reference to the events on which such reversion would fall into possession. The case seems irreconcilable with Jones *v.* Morgan, which it closely resembles. It is not likely that the decision will be followed.

And this conclusion is fortified by the case of Egerton *v.* Jones, (*a*) where, in pursuance of marriage articles, an estate at C had been conveyed to the use of A for life, with remainder to B, his wife, for life, with remainder (subject to a term of 500 years for raising portions for younger children) to the use of the first and other sons of A and B successively in tail male, with remainder to the use of trustees for 600 years upon certain trusts in the event of there being no male issue of A and B, who should live to attain the age of twenty-one years, with remainder to the use of A, his heirs and assigns,—A, by his will, devised as follows: "And as to the reversion and inheritance of the freehold estate by me already purchased at C. aforesaid, and such other estate or estates as I shall hereafter purchase in pursuance of my marriage articles, *in case of failure of issue of my body by my said wife*, I give," &c. Sir L. Shadwell, V. C., expressed a strong opinion that this devise operated as a valid immediate gift of the reversion; but it was not necessary for him to go further than to declare that the title depending on the opposite construction was too doubtful to be forced on a purchaser.

If the Vice-Chancellor had been called upon to adjudicate on this point of construction, it is conceived his
[413] *decision must have been in accordance with his expressed opinion. The case of Jones *v.* Morgan would have more than warranted, and even Bankes *v.* Holme would not have opposed, such a conclusion; for the Court had not here (as in those cases) to supply words in order to restrict the issue spoken of in the will to the issue of a particular marriage, (who were the tenants in tail under the settlement,) the testator having in the will distinctly referred to the issue of that marriage. The sound rule would seem to be, that, wherever it may be collected from the general context of the will, that it is the testator's intention to dispose of his reversionary interest expectant on the subsisting estates tail, such intended disposi-

(*a*) 3 Sim. 409.

tion will not be defeated by the neglect of the testator to adapt his language with precision to the events on which the reversion will fall into possession. The consequence of rejecting this construction commonly has been (we have seen) to invalidate the intended devise of the reversion for remoteness (as depending upon a general failure of issue); but in this respect the recent act has made an alteration, which is pointed out in the next section.

IV. It remains only to consider how far the doctrines discussed in the present chapter are applicable to wills, which are regulated by the new law.

The statute of 1 Vict. c. 26, § 29, provides, "that in any devise or bequest of real or personal estate, the words, 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want of failure of issue in the *lifetime or at the time [414] of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, *by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise;* provided that this act shall not extend to cases where such words as aforesaid import *if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.*"

It is evident, therefore, that the question, whether words importing a failure of issue refer to the objects of the preceding devise (which form the main topic of the present chapter) may still arise under wills that are within the recent enactment; and if this question be decided in the affirmative, the construction will not be in the least affected by the change in the law; but if it be adjudged that the words under discussion do not refer to the objects of the prior devise, the result now will be widely different; for, instead of being construed (as formerly) to import an indefinite failure of issue, they must (unless the context forbids) be held to point exclusively to issue living at the death, and, consequently, can never, under any circumstances, by their own intrinsic force, have the effect of creating an estate tail by implication; so that to wills made, or republished since the year 1837, no scope will be afforded for the application of the doctrine of the cases of Doe *v.* Halley, Parr *v.* Swindels, and Doe *v.* Gallini, to the discussion of which so large a space has been devoted.

The effect of holding the words in question *not* to refer to the issue, who are the objects of a preceding devise, will be
[415] to render the estate of the children, conferred by * such devise, determinable on the event of the parent dying without leaving issue living at his death, as in the case of Hutchinson *v.* Stephens, (*a*) which is a result that ill accords with probable intention. Such a case, however, can only occur where the devise to the children, or any other class of issue, gives estates in fee, as it would under wills which are subject to the new law, even without words of limitation; for if the devise in question confers estates for life only, the determination of such estates is involved in the failure of the issue whose extinction is the contingency on which the ulterior devise depends. We see, therefore, in the effect of the new law, increased motive for adhering to the principle of the cases of Goodright *v.* Dunham and Malcolm *v.* Taylor, which it will be remembered authorize the proposition, that, where a devise to children in fee is followed by a devise over, to take effect on the failure of the issue of the parent of such children, the words importing a failure of issue refer to the children or other issue, who are the objects of the prior devise, which principle would, it is conceived, apply to devises embracing any other class of children, as sons or daughters.

For instance, if lands are devised to A for life, with remainder to his sons, and if A should die without issue, then to B, each son of A, under the original devise, would, immediately on his birth, take a vested remainder in fee simple in his own aliquot share; and if the subsequent words were held merely to refer to the objects of the prior devise, the ulterior limitation of course would not disturb or affect such vested remainder; but if the words in question were adjudged not to bear this construction, but to point to issue of every degree living at the death
[416] * of A, they would subject the vested estate of the sons of A to an executory devise, to take effect in the event of A dying without leaving issue *surviving him*, a result which it is conceived the Courts, when applying the new rules of construction, will not hesitate to reject, in deference to the authority of the cases just referred to. The enactment which makes a devise pass the fee simple without words of limitation will, it is obvious, greatly extend the application of the doctrine of Goodright *v.* Dunham, and Malcolm *v.* Taylor; and in this respect seems to operate very beneficially, in concurrence with that which reads words importing a failure of issue as denoting issue living at the death, when not simply referential to the issue described in the prior devise.

In the preceding remarks, the new enactment has been re-

(*a*) 1 Keen, 240; ante, p. 378.

garded in its effect only upon the *prior* estates. With respect to the *ulterior* estate, *i. e.* the estate which is to take effect on the failure of issue, its operation is more decidedly beneficial, for it prevents such ulterior devise from being rendered void for remoteness, where the words denoting the failure of issue would have the effect neither of referring to the objects of the prior devises, nor of creating an estate tail by implication.

CHAPTER XLII.

WORDS "IN DEFAULT OF ISSUE," ETC., WHETHER THEY REFER TO FAILURE INDEFINITELY, OR FAILURE AT THE DEATH[1]

I. *General Rule. Exceptions.*
II. *Circumstances and Expressions adequate to warrant the restricted Construction in regard to Real Estate.*
III. —— *in regard to Personalty.*
IV. *Remarks on* 1 *Vict. c.* 26, § 29.

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[1] See 4 Kent, (5th ed.) 273, *et seq.*; Bells *v.* Gillespie, 5 Rand. 273; Caskey *v.* Brewer, 17 Serg. & R. 441; Ide *v.* Ide, 5 Mass. 500; Dallam *v.* Dallam, 7 Harr. & Johns. 220; Adams *v.* Chaplin, 1 Hill, Ch. 268; Newton *v.* Griffith, 1 Harr. & Gill, 111; Sydnor *v.* Sydnor, 2 Munf. 269; Carter *v.* Tyler, 1 Call, 143; Hill *v.* Burrow, 3 Call, 342; Denn *v.* Wood, Cam. & Nor. 202; Cruger *v.* Hayward, 2 Desaus. 94; Irwin *v.* Dunwoody, 17 Serg. & R. 61; Heffner *v.* Knapper, 6 Watts, 18; Patterson *v.* Ellis, 11 Wendell, 259; Moody *v.* Walker, 3 Arkansas, 198; Rice *v.* Satterwhite, 1 Dev. & Bat. Eq. 69; Mazyck *v.* Vanderhorst, 1 Bailey, Eq. 48.

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I. ANOTHER question, which often occurs in the construction of words importing a failure of issue, is, whether they refer to issue indefinitely, (*i. e.* to a failure of issue at any time,) or to a failure of issue at the death. Upon this depends their operation to confer an estate tail; for it is only when the words denote an extinction of the specified issue, irrespective of time or any collateral circumstance, that they create such an estate.

Few points of testamentary construction have come more frequently under discussion than this; which has arisen, in a great degree, from the discrepancy between the popular acceptation and the legal sense of the phrase in question, and the consequent willingness to admit grounds for departing from the technical doctrine. In ordinary language, when a testator gives an estate to a person and his heirs, with a limitation over, in case of his dying without issue, he means that the devisee shall retain the estate, if he leaves issue surviving him, and not otherwise; * and where the phrase is, in case the first taker [418] die *before he has any issue*, or *if he have no issue*, the intention probably is, that the estate shall belong absolutely to the devisee, on his having issue born. But the established *legal* interpretation of these several expressions is different; for it has been long settled, (though the rule, it will be remembered, now applies only to wills made before the year 1838,) that words referring to the death of a person without issue, whether the terms be, "*if he die without issue*," "*if he have no issue*," or "*if*

he die before he has any issue," (*a*) or "*for want or in default of issue*," unexplained by the context, and whether applied to *real* or to *personal* estate, (notwithstanding the distinction taken between these two species of property in some of the early cases,) (*b*) are construed to import a *general indefinite failure of issue*, i. e. a failure or extinction of issue *at any period*.[1] (*c*)

This rule, however, admits of two exceptions; the first is, where the phrase is *leaving* no issue; with respect to which the settled distinction is, that applied to *real* estate it means an indefinite failure of issue, but in reference to *personal* estate (and real estate directed to be converted (*d*) is for this [419] purpose regarded as personalty,) (*e*) it * imports a failure of issue *at the death*. Under a devise, therefore, to A or to A and his heirs, and if he shall die *and leave no issue* or *without leaving issue*, then over, A would take an estate tail;[2] but under a bequest of a term of years, or other personal estate, in the same language, A would take, not the absolute interest, (as he would if the indefinite construction prevailed,) but the entire interest of the testator defeasible on his (A's) leaving no issue at his death. Forth *v.* Chapman (*f*) is the leading authority for this distinction, but it has been confirmed by a long train of subsequent decisions (*g*) extending down to the present period, which show that it applies even where the real and personal estate is comprised in the same gift.[3] Lord Kenyon,

(*a*) Newton *v.* Barnardine, Moore, 127, pl. 275. As to this expression, applied to *children*, see ante, 325.

(*b*) See Target *v.* Gaunt, 1 P. W. 748; S. C. 10 Mod. 403; Pleydell *v.* Pleydell, 1 P. W. 748; Nichols *v.* Hooper, Ib. 198.

(*c*) Fitz. 68; 2 Atk. 308, 376; Amb. 398, 478; 2 Ed. 205; 3 B. P. C. (Toml. ed.) 314; 1 B. C. C. 170, 188; 2 B. C. C. 33; 1 Ves. Jun. 286 [Sumner's ed. note (*a*)]; 3 Ves. 99; 5 Ves. 444; 9 Ves. 197, 580; 17 Ves. 479; 1 Mer. 20; 1 Barn. & Adol. 318; 7 Bing. 226.

(*d*) As to the doctrine of conversion, see ante, vol. 1, p. 523.

(*e*) Farthing *v.* Allen, 2 Madd. 310; but there was ground to contend that "issue" was here synonymous with *children*, who were the objects of the preceding bequest. The judgment, however, is not reported, and the decree is silent as to the limitation over. The marginal note of the case omits the material word "leaving."

(*f*) 1 P. W. 663.

(*g*) Atkinson *v.* Hutchinson, 3 P. W. 256; Sabbarton *v.* Sabbarton, Cas. Temp. Talb. 55, 245; Sheffield *v.* Orrery, 3 Atk. 282, (where the additional words "behind him"—as to which see post—were used; Lampley *v.* Blower, Id. 396; Sheppard *v.* Lessingham, Amb. 122; Gordon *v.* Adolphus, 3 B. P. C. (Toml. ed.) 306; Denn *v.* Shenton, Cowp. 410; Goodtitle *v.* Pegden, 2 Durn. & E. 720; Daintry *v.* Daintry, 6 Durn. & E. 307; Radford *v.* Radford, 1 Kee. 486; Doe d. Cadogan *v.* Ewart, 7 Adol. & Ellis, 636, the judgment in which contains an elaborate statement of the authorities, where the subject was personal estate; and Walter *v.* Drew, Com. Rep. 372; Doe d. Ellis *v.* Ellis, 9 East, 382; Tenny *v.* Agar, 12 East, 253; Dansey *v.* Griffiths, 4 Man. & S. 61; Woollen *v.* Andrewes, 2 Bing. 176, where it was real estate.

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[1] See Hallett *v.* Pope, 3 Harring. 542; Moore *v.* Howe, 4 Monroe, 199; M'Graw *v.* Davenport, 6 Porter, 319; Downing *v.* Wherrin, 19 N. Hamp. 9.

[2] See Carr *v.* Porter, 2 M'Cord, Ch. 60; Newton *v.* Griffith, 1 Har. & Gill. 111; Carr *v.* Jearmerett, and Same *v.* Green, 2 M'Cord, 66–75; 4 Kent, (5th ed.) 276, 277.

[3] There was a devise of real and personal estate to the testator's daughter, and

indeed, in Porter *v.* Bradley, (*a*) questioned the soundness of the doctrine; but his *dictum* is inconsistent with a multitude of authorities, and has received the pointed reprobation of both Lord Eldon (*b*) and Sir W. Grant; (*c*) his Lordship * emphatically declaring, that it went "to shake settled [420] rules to their very foundation." (*d*)

The circumstance that the prior gift is expressly for the life of the first taker, so that the effect of construing the word "leaving" to refer to issue *at the death*, is, * that [421] in the event of there being such issue, the subject of disposition belongs to neither the prior nor the subsequent legatee, affords no ground for departing from this doctrine. (*e*) Nor, on the other hand, is the restricted construction of the words in

(*a*) 3 Durn. & E. 146.

(*b*) 19 Ves. 77.

(*c*) 9 Ves. 203. Lord Thurlow appears to have entertained the same opinion of this distinction as Lord Kenyon; for, in Biggs *v.* Bensley, he observed, that the words *leaving* and *after* went far towards overturning the rule. Probably this expression tended to encourage Lord Kenyon (who was counsel in Biggs *v.* Bensley) in afterwards making his bold denial, in Porter *v.* Bradley, of the distinction, which, however, his Lordship expressly recognized in Daintry *v.* Daintry, 6 Durn. & E. 214, though his decision is hardly consistent with that recognition.

(*d*) The introduction of the word "leaving" being so important in reference to personalty, the question often arises, in such cases, whether the word may be supplied; as where the testator, in one part of his will, uses the phrase "without leaving issue," and, in another, the words "without issue." In such case, the latter expression has been made by construction to correspond with the former in several instances, where the general plan of the will seemed to authorize it: Sheppard *v.* Lessingham, Amb. 122, ante, vol. 1, p. 428; Radford *v.* Radford, 1 Kee. 468; ante, vol. 1, p. 429. Each of these respective phrases, however, seems to have been allowed to retain its own peculiar force, in the recent case of Pye *v.* Linwood, June 29, 1842, (reported 6 Jurist, 618,) where a testator gave the residue of his property to his two children, John and Elizabeth, in manner following: one moiety to John, his heirs, executors, administrators, and assigns, and, in case of his decease, without *leaving* lawful issue, then to Elizabeth, and her heirs, executors, administrators, and assigns; and the other moiety, together with the reversion of the former moiety, the executors were directed to invest, in trust for Elizabeth for life, for her separate use, and, at her decease, to go and be equally divided among all her children lawfully begotten, and, in case of her decease *without lawful issue*, then to John: Elizabeth had only one child, who died in her lifetime. It was contended, that the words "without lawful issue," in reference to the personalty, applied to issue living at the death, and that, consequently, the bequest over had taken effect: But Sir K. Bruce, V. C., held, that the deceased child acquired an absolute interest.

Here, it will be observed, that there was sufficient difference in the mode of disposing of the several moieties to afford a strong suspicion that the testator might really not have had the same intention in each instance, and, therefore, the Court seems to have been fully justified in adhering to the literal terms of the will. To divest the interest of a child, who happened not to survive its parent, was a result which the expounder of a will would not be disposed to strain the testator's langnage for the purpose of accomplishing. It does not appear whether the particular point for which the case is here cited was presented to the V. C.

(*e*) Andree *v.* Ward, 1 Russ. 260.

"the heirs of her body forever;" but if she should "depart this life leaving no lawful heir, or heirs of her body," then over, and it was held, that the limitation over was good as to the personal estate, but too remote, and therefore void, as to the real estate. Mazyck *v.* Vanderhorst, 1 Bailey, Eq. 48. See Downing *v.* Wherrin, 19 N. Hamp. 89, 90.

question extended to *real* estate, merely because the subject of devise is a copyhold estate held of a manor, the custom of which forbids the creation of entails, so that the effect of the contrary (*i. e.* the indefinite) construction is, that the first devisee takes a conditional fee on which no remainder can be engrafted, and the testator's intention, therefore, in favor of the ulterior devisee, is defeated. (*a*)

The other exception to be noticed to the general rule is, where a testator *having no issue*, devises property in default or on failure of issue *of himself;* in which case it is considered that the evident object of the testator is simply to make the devise contingent on the event of his leaving no issue *surviving him*, (*b*) and that he does not refer to an extinction of issue at *any* time.

Thus in French *v.* Caddell, (*c*) where A being married, and having *no* issue, made his will, devising the land in question, "*in default of issue male and female of his own body*," upon trust to pay his debts, legacies, and an annuity to his wife, and then to B and his issue in strict settlement. It was contended, that this devise was void, as being to take place after an indefinite failure of issue, there being nothing to restrain it to the death of the testator. It was insisted, on the other side, that he
[422] plainly meant a failure of issue * living at the death, and that the contingency was determined the instant the will took place, *i. e.* his death; and much stress was laid on the circumstance, that the trust was to pay debts, legacies, and annuities, which he could not intend should take place 100 or 200 years after his death. The House of Lords, on an appeal from the Irish Court of Chancery, decided in favor of the latter construction, giving validity to the devise.

So, in Wellington *v.* Wellington, (*d*) where a testator (who was *a bachelor*) devised, *in default of issue of his own body*, to trustees and their heirs, in trust to pay certain annuities, until his debts and legacies should be paid, and, subject to the annuities, debts, and legacies, he devised the estate in question to uses in strict settlement. Lord Mansfield held it to be a conditional devise, to take effect *at the death of the testator*, if he left no issue, and therefore not to be an executory devise, which was a devise, he said, to take place in futuro.

It is observable, that, if the event, which the testator provided against, had happened, namely, his leaving issue, the devise itself would have been revoked, marriage (which was necessarily

(*a*) Doe d. Simpson *v.* Simpson, 5 Scott, 770; S. C. 4 Bing. N. C. 333.
(*b*) This is a very reasonable precaution, and should never be omitted, where a testator is married, as his having and leaving issue would not revoke the will. See ante, vol. 1, p. 107.
(*c*) 3 B. P. C. (Toml. ed.) 257.
(*d*) 4 Burr. 2165; S. C. 1 Blackst. 645.

involved) and the birth of a child being, even under the old law, prima facie a revocation. (*a*)

Again, in the case of Lytton *v.* Lytton, (*b*) where A being seised in fee, subject to the limitations of marriage articles, whereby the lands were agreed to be settled on himself for life, with remainder to the first and other sons of the marriage in tail male, with reversion to himself in fee, and not having any issue, (his only child being just dead,) made his will, whereby he devised, *in failure of issue male of his body*, the lands in question, upon * trusts to raise money for paying debts [423] and legacies, (which included annuities,) and subject thereto, to L. and his children to uses in strict settlement. Lord Northington (upon the authority of the case of Lady Lanesborough *v.* Fox) (*c*) held, that the devise to L., being after a general failure of issue, was void, as being too remote. At a subsequent period, the question was brought by an amended bill before Lord Loughborough, who reversed his predecessor's decree, considering the case of Lanesborough *v.* Fox to be inapplicable. "Compare (said his Lordship) the circumstances of the present case with that, under the circumstances of the family: here the testator had had no child for several years: his only child was just dead. The devisee was his next and immediate heir, but he introduced the devise by the words 'in failure of issue male.' Could this mean more than to take in the event which alone prevented the estate from being the subject of an immediate devise? *He certainly had the articles in his contemplation at the time.* There was no prospect of issue at the time. It was not like Lord Lanesborough's case, *who had issue*, and might have many more. It would be a harsh construction that the testator had here the idea of future issue in contemplation, and an indefinite failure of that issue: *he meant to give an immediate estate in possession at his decease.* Every clause in the will shows this intention. The other cases (Jones *v.* Morgan, (*d*) Wellington *v.* Wellington, (*e*) and French *v.* Caddell,) (*f*) were all cases where, taking the words strictly, and construing them blindly, without considering the circumstances, the devise would have been upon a general failure of issue, and therefore void. It is manifest * here he had no intention of [424] giving an estate on a general failure of issue. *The circumstances of the testator and his family have always been taken into consideration in these cases.*

So, in the case of Sanford *v.* Irby, (*g*) where Sir W. Langham,

(*a*) Ante, vol. 1, p. 107.
(*b*) 4 B. C. C. 441.
(*c*) Ante, 407.
(*d*) Ante, 409.
(*e*) Ante, 422.
(*f*) Ante, 421.
(*g*) 3 Barn. & Ald. 654. See also Doe *v.* Lucraft, 1 Moore & Scott, 573, where

the testator, having by his marriage settlement limited lands to the first and other sons of the marriage in tail in strict settlement, with reversion to himself in fee, and having a son and two daughters of the marriage, made his will, whereby he devised all his land and real estate to his son and his heirs, subject to debts and legacies; but in case his son should depart this life without issue male, *or in case of failure of issue male of his* (the testator's) *body*, then he gave to his daughters certain legacies, which he charged upon his estates, and devised those estates to trustees, for the purpose of raising the "legacies by sale or mortgage;" and he then devised such parts of his real estate as should not be sold or mortgaged, *for want or in failure of issue of his body as aforesaid*, to his brother J. for life, remainder to his issue in strict settlement. And there was also a bequest of his personal estate, in case he should leave no son, or, leaving one son, he should afterwards die without issue before twenty-one, to his brother as therein mentioned. The Court of King's Bench (on a case from Chancery) certified an opinion that the devise of the real estate to testator's brother J. L. and his issue was valid.

According to the practice of courts of law, (so often regretted,) the reasons on which the certified opinion was founded
[425] *are not stated. The case was argued, however, as falling within the principle of the class of cases just stated; or, if not, it was contended, that the words referring to the failure of the testator's own issue created an estate tail by implication in such issue; but, as the latter ground is clearly untenable, we are, it is conceived, warranted in referring the decision to the former.

It is observable, however, that in both Sanford *v.* Irby and Lytton *v.* Lytton, (*a*) there was some reason to contend that the words under consideration referred to the existing limitations of the settlement and articles, and therefore that the devise operated as an immediate gift of the reversion, (*b*) and some of Lord Loughborough's reasoning in Lytton *v.* Lytton seems to be directed to this point; (*c*) but, as the general scope of his Lordship's arguments is different, and no such ground was taken in Sanford *v.* Irby, and more especially as such a construction is opposed to the principle upon which the case of Lady Lanesborough *v.* Fox was professedly decided, (*d*) (which has been the

however it was not necessary to determine whether the words referred to a failure of issue at the death of the testator, or indefinitely; the devise over being, in the events which had happened, void quacunque via.

(*a*) Ante, 422.

(*b*) As to this, see ante, 407.

(*c*) See the words of the judgment, ante, in italics.

(*d*) In Lanesborough *v.* Fox, the Court was disinclined to supply even the word "male;" but here the words *issue* or *issue male* must have been held to refer to sons *of a particular marriage*. See Allanson *v.* Clitherow, 1 Ves. Sen. 24, ante.

subject of comment in the preceding chapter,) it is submitted that the safer, and, indeed, the inevitable course, is to treat the cases of Lytton *v.* Lytton and Sanford *v.* Irby as referable to, and confirmatory of, the rule of construction established by the anterior cases of French *v.* Caddell, (*a*) and Wellington *v.* Wellington. (*b*)

It is observed that in Sanford *v.* Irby, the testator *had a son and two daughters living;* but as the death * of [426] the son formed one of the events upon which the estate was given over, and as the words under consideration referred to issue *male* which excluded the daughters and their issue, it seems not to be distinguishable in principle from those cases in which the testator had no issue. It is also observable that the case of Sanford *v.* Irby has been characterized by Sir Launcelot Shadwell as a strong decision; (*c*) but it seems uncertain whether, in making this remark, his Honor had in view the doctrine under discussion, or looked merely at the question, whether the devise operated as an immediate gift of the reversion, which was the nature of the point then before him. It is also worthy of notice, that, in every case in which the construction in question has prevailed, the devise over was for the purpose of paying debts and legacies, and this possibly may have had some influence in restricting the application of the words referring to the failure of the testator's own issue to the period of his death. Indeed, it has been contended, by a recent able writer, to form the distinguishing feature of this class of cases, (*d*) a conclusion, however, which is not sanctioned by the general reasonings of the Judges who decided them. (*e*)

But to return to the general rule. Though it is clear that, with the exceptions before noticed, the expressions to which it relates, applied to either real or personal estate, import an indefinite failure of issue, it * is equally clear that in [427] regard to either they will yield to a *clear* manifestation of intention in the context to use them in the restricted sense of issue *living at the death;* but as to personalty, it seems they yield more readily to expressions and circumstances in the will tending so to confine them, than when applied to real estate. Such, it is well known, is the conclusion of Mr. Fearne (*f*) on

(*a*) Ante, 421.
(*b*) Ante, 422.
(*c*) See Egerton *v.* Jones, 3 Sim. 417.
(*d*) 1 Prior, 93. Neither in Wellington *v.* Wellington, nor in Lytton *v.* Lytton, was the fact of the property being subjected to debts and legacies adverted to by Lord Mansfield or Lord Loughborough; and in French *v.* Caddell, and Sanford *v.* Irby, the grounds of the determination do not appear.
(*e*) This point is now of less importance, as it cannot arise under a will made or republished since the year 1837, and may, therefore, be classed among the topics of controversy excluded by the enactment, presently considered, which makes words importing a failure of issue refer to issue at the death.
(*f*) Cont. Rem. 471.

this subject, though it cannot be denied, that since the period in which that gentleman wrote, this difference has been much narrowed; the latter decisions having, on the one hand, overruled some of the grounds upon which words importing a failure of issue were formerly held, in reference to personalty, to receive a restricted construction, and having, on the other hand, given a restricted construction to the words in relation to *real* estate, by force of a context which, in Mr. Fearne's period would not have been considered as authorizing it. Notwithstanding, however, this approximation of two classes of cases, there is still sufficient distinction between them to render it proper to treat of each class separately, and to suggest the remark, that the expressions which will cut down the established signification of the words, as applied to personalty, will not necessarily have that effect in reference to real estate; and, by parity of reason, where the restricted construction is adopted in relation to the latter, it applies, a fortiori, to the former. This diversity of construction in regard to real and personal estate appears to have originated in an anxiety to avoid an interpretation which would render any part of the will inoperative; for as a gift of *personalty*, to arise on a general failure of issue, is void for
[428] remoteness, (*a*) it follows that the construing * of the words under consideration in their unrestricted sense, is fatal to the bequest over depending on them; whereas, in their application to *real* estate, they have, when so construed, the effect of creating in the prior devisee an estate tail, and the limitation, which it is their office to introduce, is then a remainder expectant on that estate.

II. We now proceed to inquire into the grounds upon which words importing a failure of issue are restrained to such failure *at the death*, in regard to *real* estate.[1]

1st. It is clear that they receive this construction where the event of dying is confined to *a definite age*.

Thus a devise to a person and his heirs, with a limitation over if he shall die *under the age of twenty-one, and without issue*, is construed, not as creating an estate tail, with a contingent remainder dependent on the event of the first taker dying under the specified age, (as would be the effect, if the words were considered to import an indefinite failure of issue,) (*b*) but as a devise *in fee simple*, subject to an executory limitation over in

(*a*) See Rule against perpetuities discussed, vol. 1, p. 219.

(*b*) Such was the doctrine of the early authorities: and it seems to be more consistent with principle than that which subsequently obtained. See Soule *v.* Gerrard, Cro. El. 525. Also Hinde *v.* Lyon, 3 Leon. 64.

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[1] 4 Kent, (5th ed.) 277, 278; Downing *v.* Wherrin, 19 N. Hamp. 9; Armstrong *v.* Armstrong, 14 B. Monroe (Ky.) 333; Griswold *v.* Greer, 18 Georgia, 545.

the event of the prior devisee's death under the given age, and leaving no issue *surviving him.* (*a*)

That the principle of the preceding cases applies wherever the dying without issue is restricted to (whether it be *above* or *under*) a particular age, may be inferred from the case of Glover *v.* Monckton, (*b*) where real estate was * devised to trustees, upon certain trusts, until the testator's son should attain twenty-one, and, when he should arrive at that age, in trust for him, his heirs, &c.; but in case his son should not live to attain such age of twenty-one years, and the testator's daughter should be living at the time of the decease of his son, *or in case his son should live to attain such age, but should afterwards die without lawful issue*, then in trust for the daughter for life, with remainders over. The son attained twenty-one; and the Court of Common Pleas, on a case from Chancery, certified that he took an estate in fee *with an executory devise over* in the event of his dying without having issue *living at his death.* [429]

The same principle probably would be considered as extending to every case in which a dying without issue is combined with *an event personal to the individual*, as the event of his dying without issue, and unmarried, or without leaving a husband or wife, (which is the meaning of "unmarried" in this situation.) (1)

But it seems that the words referring to a failure of issue are not restricted to such failure at the death by the mere insertion of the contingency of the issue dying under age. Thus, if real estate be devised to A and his heirs, with a devise over, in case A should die without issue, or such issue should die under the age of twenty-one years, A would be tenant in tail; for it is said, that does not necessarily show that the testator is speaking of a failure of issue at the death of A. He is speaking of a general failure of issue, and then he alludes to the case of there being issue, and their dying under the age of twenty-one, *which is a limited portion of the contingency which is expressed by the preceding words.* (*c*) But it is not by any means necessary that, because he has used words which * have very little meaning, therefore the words "dying without leaving lawful issue," which signify a general failure of issue, must signify a leaving of lawful issue living at his death. (*d*) [430]

(*a*) Price *v.* Hunt, Pollex. 645; Eastman *v.* Baker, 1 Taunt. 174. And in Hall *v.* Deering, 1 Sid. 148, the point was much discussed, but no opinion was given by the Court.

(*b*) 3 Bing. 15.

(*c*) *i. e.* It is a contingency compounded of two events, one of such events being comprised in the other, and therefore superfluous.

(*d*) Per Sir L. Shadwell, in Grimshaw *v.* Pickup, 9 Sim. 596.

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1 Downing *v.* Wherrin, 19 N. Hamp. 9.

What is the construction of the words where the dying without issue is restricted *to some definite period collateral to the devisee*, (as in the case of a devise to A and his heirs, with a devise over in case he should die without issue *in the lifetime of B*,) is a point which is involved in uncertainty. Three constructions present themselves: 1st, To read the words as applying to the contingency of A dying in the lifetime of B without leaving issue living at his (A's) death; 2dly, To construe them as pointing to the event of A dying in the lifetime of B, and of there being a failure of issue at *any* time, *i. e.* during the life of B, or afterwards; 3dly, To read the phrase as denoting the event of A dying, and of there being an extinction of his issue (*i. e.* both events happening) in the lifetime of B. The second construction would seem to be the most consistent with the general rule, which reads these words as importing a general failure of issue where the context does not demand a different construction; for the fact, that the words are associated with a collateral event, seems not to afford a valid ground for departing from the ordinary construction; and if so, the devisee would be tenant in tail, with a contingent remainder to take effect in the event of his dying in the lifetime of B. In the well-known case of Pells *v.* Brown, (*a*) however, the Court seemed to
[431] incline to the *first construction; but the case did not raise the point. A solitary example of the third construction applied to a bequest of personalty, occurs in the case of Crowder *v.* Stone, (*b*) where a testator bequeathed stock to his executors in trust for A for life, and after her decease, to B for life; and, after the decease of the survivor, the stock was to be sold, and the produce divided between the testator's nephew and four nieces; and in case of the decease of any of them *without lawful issue before their respective shares should become due and payable*, then the part or share of him, her, or them so dying without issue as aforesaid, to go to the survivor: Lord Lyndhurst held, that the share of a niece, who died before the period of distribution, leaving a son, who afterwards also died before that period, passed under the executory gift to the survivor.

The reports do not present many instances of devises to take

(*a*) Cro. Jac. 590. The devise was to the testator's son Thomas and his heirs forever, and, if he died without issue living William, his brother, then William to have those lands to him and his heirs and assigns forever; Thomas suffered a recovery, and died without issue leaving William; and it was held, that this was not an estate tail in Thomas, but an estate in fee, subject to an executory devise; for it was said, the clause *if he had died without issue*, was not absolute and indefinite, whensoever he died without issue, but it was with a contingency, if he died without issue *living William*, for he might survive William, *or have issue alive at the time of his death*, living William, in which case William should never have it.

As Thomas seems not to have left issue surviving him, it was not necessary to determine whether, if he had left issue, and such issue had afterwards died in the lifetime of William, the executory devise would have taken effect.

(*b*) 3 Russell, 217.

effect on the death of a preceding devisee without issue within a definite period. Among the few cases of this nature is Bennett *v.* Lowe, (*a*) where the devise over was to take effect on the decease and failure of issue of the prior devisees *before the death of the annuitants*, but this peculiarity in the case does not appear to have attracted much attention, and the construction adopted by the Court rendered it immaterial, so that the case really *throws very little light on the point under consideration. [432]

2d. The next species of case to be noticed is, where expressions are added to the words importing a failure of issue, showing that the testator used those words in a restricted sense.[1]

Where the testator expressly devises over the estate in the event of the preceding devisee dying without leaving issue *living at the time of his death*, the language of the will seems to exclude all controversy; and yet we have an instance of an adjudication on this simple point in the case of Doe d. Barnfield *v.* Wetton. (*b*)

The restricted construction, however, has been sometimes adopted, where the intention was much less unequivocally expressed.

Thus, in the case of Porter *v.* Bradley, (*c*) where the testator devised certain lands to his son P., his heirs and assigns forever; but his will was, that in case he (P.) should happen to die *leaving no issue* BEHIND HIM, then that his (testator's) wife should take the rents, and have his in-door goods, as long as she should continue his widow, and no longer; and, after her decease or marriage, then the lands so devised to P. as aforesaid, the testator gave, *for want of issue by him as aforesaid*, unto his son J. and his heirs, chargeable with £50 a-piece to the testator's daughters and their issue within a twelvemonth after he (J.) should enjoy the same; but in case J. should die before P., and P. *should not leave any issue of his body begotten*, then the testator directed the lands to be sold, and the money paid to the daughters. The Court of King's Bench held, upon the authority of Pells *v.* Brown, that the words imported a dying without *issue living at the death, considering the [433] words "leaving no issue behind him" as equivalent in point of effect to the words "living William" in that case; and

(*a*) 5 Moore & Pay. 485, note. (*b*) 2 Bos. & Pull. 324. (*c*) 3 Durn. & E. 143.

[1] See Atwell *v.* Barney, Dudley (Geo.) 207. A devise, "if either of my sons, John and Jacob, should happen to die without any lawful heirs of their own, then the share of him who may first decease, shall accrue to the other survivor and his heirs," provides for a definite failure of issue, and each son takes an estate in fee simple conditional, and not an estate tail—the share of one dying without issue in the lifetime of the other, passes to the latter by way of executory devise. Abbott *v.* Essex Company, 2 Curtis, C. C. 126; S. C. 18 Howard, (U. S.) 202. See Smith's Appeal, 23 Penn. State Rep. 9.

Lord Kenyon considered the subsequent parts of the will to convey the same idea; for the devisor had mentioned (*quære*, treated?) this event as likely to happen in the lifetime of his widow, or of his younger son or daughters.

This case has been considered as standing upon the effect of the words "*behind him.*" (*a*)

3d. Another class of cases, in which the restricted construction of the words under consideration has been adopted, consists of those in which the arguments for that construction have been derived from the nature of the subject-matter and terms of the ulterior devise.

Thus, in Nichols *v.* Hooper, (*b*) which seems to be the first case of this kind, the circumstance of the lands being chargeable with moneys to be paid within a definite period after the decease of the first taker, was held to cut down the words in question to a dying without issue *at the death.* The devise was to M. for life, remainder to her son T. and his heirs, provided that if T. should die *without issue of his body*, then the testator gave £100 a-piece to A and B, *to be paid within six months after the decease of the survivor of the said mother and son, by the person who should inherit the premises;* and, in default of payment, the testator gave the land to the legatees for payment. It was held, that the words here referred to a dying without
[434] issue at *the death, and that the issue having survived the son, though they failed within the six months, the legacies did not arise.

The Lord Keeper laid much stress upon the circumstance of the subject of the ulterior gift being *legacies*, which shows that he regarded it as a bequest of personalty; but the case clearly did not fall within the principle of cases of this description; for even if the words had been held to import a general failure of issue, inasmuch as T. would in that case have been tenant in tail, the legacies payable on the determination of T.'s estate (being barrable by a recovery) would have been good. (*c*) The case, therefore, wanted the great influencing motive to the restricted construction in reference to bequests of personal estate, namely, that the contrary interpretation would have invalidated the bequest over.

It seems, however, to have been regarded in the profession as a case of this nature; (*d*) to which probably may be ascribed the fact, that, for nearly a century, (*e*) no other instance occurred in

(*a*) Many cases, regarding the restrictive operation of particular expressions, will be found under the section applicable to bequests of personal estates. As to the phrase *on the decease*, in reference to realty, see Doe d. King *v.* Frost, 3 Barn. & Ald. 540, post, 439.

(*b*) 1 P. W. 198; 2 Vern. 606; 1 Eq. Ca. Ab. 202, pl. 22; 2 Ib. 552, pl. 11, S. C.

(*c*) Goodin *v.* Clark, 1 Lev. 35. See ante, vol. 1, ante, 223.

(*d*) See Mr. Fearne's Treatise, 471.

(*e*) The next case was Porter *v.* Bradley, 3 Durn. & E. 143.

which the restricted construction was attempted to be supported, *in regard to real estate*, on any such grounds; the general impression being, it should seem, that the words in question applied to realty, were not susceptible of restriction from circumstances or expressions affording inference merely.

Another ground upon which the restricted construction has been adopted is, that the ulterior devises confer estates *for life* only.

Thus, in Roe d. Sheers *v.* Jeffery, (*a*) where a testator devised to his daughter A for life, and, after her death, *to his grandson B and to his heirs forever; but in [435] case B should depart this life, *and leave no issue*, then his will was, that the said premises should be and return *unto E., M., and S., or the survivors or survivor of them, equally to be divided between them;* Lord Kenyon, after citing Pells *v.* Browne (*b*) as a leading authority, said: "On looking through the whole of this will, we have no doubt that the testator meant that the dying without issue was confined to a failure of issue at the death of the first taker; for the persons to whom it is given over were then in existence, *and life estates are only given to them.*"

Lord Hardwicke, in Trafford *v.* Boehm, (*c*) seems also to have entertained an opinion that words referring to a dying without issue, followed by limitations for life, were "confined to a failure of issue during the lives in being;" but the case before his Lordship did not raise the question, as the devise (which was of money, to be laid out in land) operated as an immediate disposition of the reversion.

That the mere circumstance of the subsequent estates being for life only, should be made a ground for varying the construction, is extraordinary, since it is every day's practice to limit an estate for life in remainder after an estate tail, which involves precisely the absurdity which is here supposed to flow from holding the words to import an indefinite failure of issue. Indeed, this view of the case appears to have been a surprise to the parties; for in the opinions of counsel taken on behalf of the ulterior devisee, (with a perusal of which the writer has been favored,) the only ground upon which his claim was considered to be tenable (if at all) was, that the case of Porter *v.* Bradley (*d*) had decided, in opposition to former *author- [436] ities, that the words *leaving* no issue per se, and *without any aid from the context*, were to be construed *leaving no issue living at the death.* As this hypothesis, however, is clearly overthrown by the long line of authorities before referred to, (*e*) the cases of Porter *v.* Bradley and Roe *v.* Jeffery must rest on their peculiar circumstances, *i. e.* the former on the explanatory force

(*a*) 7 Durn. & E. 589. (*b*) Ante, 430. (*c*) 3 Atk. 449.
(*d*) Ante, 432. (*e*) Ante, 418.

of the superadded words "behind him," and the latter on the circumstance of the devises over being exclusively for life.

At all events, it is clear that the doctrine of the case of Roe *v.* Jeffery applies only where *all* the ulterior estates are merely for life; for in Barlow *v.* Salter, (*a*) Sir W. Grant refused to extend it, even to a bequest of personal estate, where *one* of several ulterior legatees took a *life* interest, and the others *absolutely*. "It appears, in some of the early cases, (said his Honor,) that the Judges inclined to hold these words to mean without issue at the death of the person named; but ever since the case of Beauclerk *v.* Dormer, (*b*) I think a different rule has prevailed; and it is now settled, that, *unless there are expressions or circumstances from which it can be collected that these words are used in a more confined sense, they are to have their legal signification, viz: death without issue generally.* The Court ought not certainly to profess to adopt one of these rules, and yet to proceed as if the other was the right one, which, however, is done when the meaning of the words is held to be narrowed by expressions or circumstances that do not raise any fair inference of a restricted intention.

[437] The single circumstance in this case relied upon in favor of the restricted * construction is, that one of the four persons to whom the bequest over is made is to take only a life interest in his part, which is to be divided among the survivors." "If there is any case which has ascribed to the circumstance of a devise over for life the effect here contended for, I beg leave to doubt the soundness of the decision. *The case of* Roe d. Sheers *v.* Jeffery *certainly gives no countenance to that doctrine*, as the devise over was *only* of life estates, and, on that ground, Lord Kenyon compared it to Pells *v.* Brown. (*c*) So, in Trafford *v.* Boehm, the ground was, that *all* the estates were for lives, and for lives only."

In two more modern cases, the circumstance of the property being in the devise over charged with sums of money, to be disposed of by the will of the first devisee, (though not made payable within a definite period after his death, as in Nichols *v.* Hooper, (*d*) seems to have formed the principal ground for holding the words under consideration to import a dying without issue at the death.

Thus, in Doe d. Smith *v.* Webber, (*e*) a testator devised and bequeathed real and personal estate to his niece H., her heirs, executors, administrators, and assigns, forever, and provided that in case she should happen to die and leave no child or children, then he devised unto his niece B. his freehold lands called W.

(*a*) 17 Ves. 479. See also Doe d. Jones *v.* Owen, 1 Barn. & Adol. 318.
(*b*) 2 Atk. 308.
(*c*) Cro. Jac. 590.
(*d*) Ante, 433.
(*e*) 1 Barn. & Ald. 713.

to her and her heirs forever, *paying £1000 unto the executor or executors of his said niece H., or to such person as she by her last will and testament should direct.* It was held, that H. took an estate in fee, subject to an executory devise on her leaving no issue *at her death.* Lord Ellenborough disclaimed any stress on the word "children" as *distinguished from [438] *issue*, as where the intent required it, it had been held to include all descendants, mediate and immediate; (*a*) and the present case, he observed, called for such a construction; otherwise, in the event of H. dying without leaving any child surviving her, but leaving grandchildren, B., the devisee over, would take, in exclusion of such grandchildren, (*b*) which would be contrary to the manifest intention of the testatrix. But the circumstance upon which his Lordship mainly relied was, that of the £1000 being payable to the executors or nominee of H. in the event of her leaving no issue, which, he said, was equally strong with the circumstance in Roe *v.* Jeffery, of the devises over being for life only, it being a personal provision, and to be made to a person or persons to be appointed by H. in her will. The event contemplated by the testatrix seemed to have been a proximate, and not a remote event, namely, a failure of issue at H.'s death, and not an indefinite failure of issue which might happen at any remote period. Lord Ellenborough also observed, that as two tenements *only* were given over on that event, that was an additional reason to show that the devise over could not be considered as converting the prior devise into an estate tail; as that would make the same words of devise operate to give two different estates, an estate tail in part, and an estate in fee in the reversion. (*c*)

*So, in Doe d. King *v.* Frost, (*d*) where a testator [439] devised to his son W. and his heirs certain real estate, and after giving to his wife an annuity thereout, to be paid by W., provided that if W. should have no children, child, or issue, the estate was, *on the decease of W.*, to become the property of the heir at law, *subject to such legacies as he (W.) might leave by will to any of the younger branches of the family;* it was held, that W. took an estate in fee, with an executory devise over, in the event of his dying leaving no issue at his death, to such per-

(*a*) See ante 33.

(*b*) As "grandchildren" they took nothing. His Lordship must here be understood as referring to the possible benefit they might take by gift or descent from their ancestor, and which is considered to be in the testator's contemplation in making the devisee's estate indefeasible on his leaving such objects.

(*c*) An observation somewhat similar was made in Goodright *v.* Dunham, Doug. 251; but the obvious answer to such reasoning is, that the construction turned, not on the first words limiting the property to the devisee and his heirs (which were common to *both* devises,) but on the subsequent qualifying words, which applied to the two tenements *exclusively.* This remark (it will be perceived) does not affect the general grounds of the decision.

(*d*) 3 Barn. & Ald. 546.

son as should be then and in that event heir at law; Lord C. J. Abbott observing, that it was the plain intention of the testator that, at the period of the decease of his son W., it should be ascertained whether the estates devised to him by the will should then vest in him in fee absolutely, or pass over to some other person, subject to any such legacies as the son might by his will devise to any of the younger branches of the family.

In this case, Mr. J. Holroyd adverted to the words "on the decease of the said W.;" but which would seem to be unimportant according to the earlier case of Walter *v.* Drew, (*a*) where a testator directed, that if W. (his eldest son) should happen to die, and leave no issue of his body lawfully begotten, that then in that case, and not otherwise, *after the death* (*b*) of W., he gave and bequeathed all his lands of inheritance to R. in fee; Comyn, C. B., held it to be an estate tail in W. (*c*)

[440] * And, in Doe d. Cook *v.* Cooper, (*d*) no notice was taken of a similar expression, notwithstanding the stress laid on the words introducing the devise over as conferring an estate tail.

It will be observed, that, in all the preceding cases, the prior limitation on which the words under consideration were engrafted would, standing alone, have given the fee to the devisee. It is proper to notice this fact, as between such cases and those in which the preceding devise would confer a *life estate* only, some distinction, it is conceived, will be found to exist. Undoubtedly, the two cases are parallel in regard to the effect of words importing an indefinite failure of issue of the first taker, which, in both instances, create in him an estate tail; yet it is by no means clear that they concur as to the force of expressions or circumstances requisite to confine those words to a dying without issue at the death; since that construction is attended with very different degrees of convenience in the respective cases. Where the preceding devisee would take the fee, the convenience is all on the side of the restricted construction, which renders such fee defeasible on his not leaving issue at his death, and places the estate out of the power of the first taker, who might, if he were tenant in tail, (as he would be if the words were construed to mean an indefinite failure of issue,) defeat the ulterior estate by means of an enrolled conveyance, now substituted for a common recovery. To prevent this consequence, the Courts have generally, in such cases, lent a willing ear to the argu-

(*a*) Com. 373.

(*b*) See this expression in regard to personalty, Pinbury *v.* Elkin, 1 P. W. 563, post, 443, and other cases.

(*c*) As to estates tail by implication, see ante, vol. 1, p. 487, vol. 2, p. 414.

(*d*) 1 East, 229, ante, 344. Where, as in this case, the prior devise confers an estate tail, it could hardly be contended, that such words rendered the remainder over contingent on his leaving no issue at his death; as to which, see some observations, ante, p. 360.

ments in favor of the restricted * (and which we have [441] seen to be the popular) interpretation of these words.

On the other hand, where the first devise would confer an estate for life only, the restricted construction imputes a very improbable intention to the testator; for, as it raises no estate tail in the first devisee, nor (it should seem) an implied estate by purchase in the issue, the land goes absolutely from the devisee at his death, whether he leave issue or not; and that event is material only as bearing on the right of the ulterior devisee; for, although the property ceases to belong to the prior devisee, whether he leave issue surviving him or not, yet it is to pass over to the remainder-man only in case the prior devisee do *not* leave issue, which it is hard to suppose could have been really meant. And, if the distinction suggested by these observations has not been a recognized principle of construction in any of the cases, yet its influence may be traced in some of them.

Thus, in Wyld *v.* Lewis, (*a*) where a testator devised to his wife E. without any words of limitation, and then proceeded to declare, that "if it shall happen that my said wife E. *shall have no son or daughter* (*b*) by me begotten on the body of the said E., and for want of such issue, then the said premises to return to my brother J., if he shall be then living, and his heirs forever, only paying to his two brothers (A and B) the sum of £150 within one year after the decease of the said E.;" Lord Hardwicke held, that E. took an estate tail; observing that the objection, that by the opposite construction the grandchildren would be excluded, was a strong argument for this.

But his Lordship might have included in this observation * the *children* of E. none of whom could have [442] taken unless she had an estate tail.

This case had two circumstances, either of which, according to the doctrine of the preceding cases, would have restrained the words to issue living at the death: 1st, That of the ulterior devisee being to take only if he should be then living, which would seem to bring it within the principle of Roe *v.* Jeffery, (*c*) (assuming that case to be rightly decided,) to say nothing of the argument which might be founded on the reasoning of the Court in Pells *v.* Brown; (*d*) 2dly, The charge imposed on the devisee over, which, it will be remembered, was the ground of the restricted construction in Nichols *v.* Hooper, (*e*) Doe *v.* Webber, (*f*) and Doe *v.* Frost; (*g*) and has greater force in Wyld *v.* Lewis than in the two latter cases, on account of the direction to pay

(*a*) 1 Atk. 432.
(*b*) "Son" and "daughter" seem to have been used here as words of limitation, as to which, see ante, 325.
(*c*) Ante, 434.
(*d*) See ante, 430.
(*e*) Ante, 433.
(*f*) Ante, 457.
(*g*) Ante, 439.

within a definite period after the death. Lord Hardwicke, indeed, admitted that in general this was a very proper circumstance to induce that construction.

It is evident, therefore, that the case of Wyld *v.* Lewis can only be reconciled with the line of decisions just referred to on the hypothesis before suggested; and hence we are conducted to the conclusion, that the cases in which a limitation over in default of issue, succeeding a gift to a person and his heirs, has been confined to a failure of issue at the death, do not necessarily apply to cases in which they are preceded by a gift expressly or constructively for life only.

III. Our next inquiry is, what expressions or circum-
[443] stances *in the context will cut down the words under consideration to issue living at the death, in regard to *personal* estate.

1st. As to the *expressions* which have been held to have this effect.

In Pinbury *v.* Elkin, (*a*) a testator having made his wife executrix, and given her all his goods and chattels, provided that if she should die without issue by him, (*b*) then, *after her decease*, (*c*) £80 should remain to his brother J. Lord Parker, C., held, that the words imported a dying without issue at the death, for that a contrary construction would be repugnant to the words "after (i. e. *immediately* after) her decease," which would be carrying the payment beyond the day, and would, his Lordship said, be as absurd as to appoint the day of payment to be to-morrow, if it shall rain this day twelvemonth.

Sir W. Grant has (*d*) intimated a doubt whether the word "after" was properly construed *immediately after* in the last case. But, of course, there can be no difficulty (as this dictum impliedly admits) where such is the *expression*.

Accordingly, in Stratton *v.* Payne, (*e*) it was held that in the case of a bequest to A and the heirs of her body, and for want of such issue to the children of B, *immediately after the decease of A*, the latter gift was good by reason of these words.

The case of Pinbury *v.* Elkin seems to have been followed in several subsequent instances. Thus, in Wilkinson *v.*
[444] South, (*f*) *where a term of years was bequeathed to A, and to the heirs of his body, and to their heirs and assigns forever, (*g*) and, in default of such issue, then *after his*

(*a*) 1 P. W. 563; 2 Vern. 758, 766; Pre. Ch. 483; 2 Eq. Ca. Ab. 346, pl. 9, S. C.
(*b*) See ante, 295.
(*c*) As to this expression applied to *devises*, see ante, 439.
(*d*) See Donn *v.* Penny, 19 Ves. 548.
(*e*) 3 B. P. C. (Toml. ed.) 99; S. C. cit. in Read *v.* Snell, 2 Atk. 647.
(*f*) 7 Durn. & E. 553.
(*g*) The circumstance of the limitation being in these special terms is not material. They amount simply to an absolute gift; see post.

decease to B and his heirs; this was held to be an executory bequest to B, in case of A dying without having issue *at his death.*

So, in Trotter *v.* Oswald, (*a*) where a testator gave the residue of his real and personal property to the use of B during his life, and to the lawful heirs of his body after his demise; but in case of his dying without issue of his body, *after his decease* he gave all such residue to O.; the question was, whether the bequest over of the personalty was good. Sir Lloyd Kenyon, M. R., said, that, if the will had stopped at the bequest to B and the lawful heirs of his body, it would clearly have given him the absolute property [in the personal estate], and so if it had rested at the words "if he die without issue;" but the important words follow, "after his decease I give," &c. These, he said, made it a contingency with a double aspect; if he had had a child at his death, then the limitation over would have been at an end; but, if not, it was within legal limits.

So, in the case of Rackstraw *v.* Vile, (*b*) where a testator having by his will given his son one fourth share in his personal estate, by a codicil declared that his son's share should be only for the natural life of himself and his wife, *provided they had no issue, and at their death* should become a part of the residue; Sir J. Leach, V. C., held, that the failure of issue was plainly confined to the death *of the survivor, by the direction that the share was to become part of the residue *at their death.* [445]

But, in the case of Donn *v.* Penny, (*c*) the words "after him" were held not to vary the construction. The devise was in the following words: "I give my dearly beloved wife all the real and personal estates for her life, and, after her, I give the same to my cousin R., all my real and personal estates to him and his male issue; for want of issue male *after him*, I give the same to W. and his male issue; for want of issue male, I give the same to W. and S., taking the name of D., and their male issue." R. having died without leaving issue, the personal estate was claimed by W., the next legatee; and it was contended for him, that the words "after her," following the gift to the widow, meant immediately after her decease, and that the words "after him," in the gift in question, might receive the same construction. But Sir W. Grant held, that the expression was too ambiguous to divert the words of the devise from their legal construction. He considered the testator could not have had a different intention with respect to this legatee, and the several legatees whose bequests were in the same words, with-

(*a*) 1 Cox, 317.
(*b*) 1 Sim. & Stu. 604. See also Doe d. King *v.* Frost, 3 B. & Ald. 541, stated ante, 439.
(*c*) 19 Ves. 545; S. C. 1 Mer. 20, with which compare Porter *v.* Bradley, 3 Durn. & E. 143, ante, 432.

out this expression, and who were postponed to him; and his Honor, as already noticed, questioned the soundness of Pinbury *v.* Elkin. (*a*)

The observations just quoted, and those which occur in Barlow *v.* Salter, (*b*) evince the extreme reluctance of this distinguished Judge to permit words importing a failure of issue to be cut down by an equivocal context. That no Judge of later times would have departed from the legal sense of the
[446] words upon such an expression as that * in Pinbury *v.* Elkin, admits of little doubt; but with great deference it is submitted, that, followed as that case has since been, and particularly in Trotter *v.* Oswald, and Wilkinson *v.* South, (neither of which was cited in Donn *v.* Penny,) it is too late to question its authority. We are taught, however, by Sir W. Grant's decision in Donn *v.* Penny, that the doctrine of the case of Pinbury *v.* Elkin will not be applied to any case in which the variation of phrase is such as fairly to take it out of the reach of its authority. Where the words are "*immediately* after," or, "at the decease" of the first taker, as in Stratton *v.* Payne, and Rackstraw *v.* Vile, the applicability of the doctrine of Pinbury *v.* Elkin seems to be still more conclusive, on account of the greater definiteness of the expression.

Of course the word "then," as commonly interposed between two limitations, has no effect in restricting words importing a failure of issue to issue living at the death. Used in this way, "then" is a particle of inference, connecting the consequence with the premises, and meaning "in that event," or "if that happens." It is, therefore, a word of reasoning rather than of time. (*c*)

2dly. Another ground upon which the words in question have received a restricted construction is, that the bequest over involves a *personal* trust and confidence. To this principle Mr. Fearne (*d*) refers the case of Keily *v.* Fowler, (*e*) where a testator bequeathed his worldly substance unto his daugh-
[447] ter, in case she married with * consent; in case she married without consent, she was to have only twenty cows and a horse; and, after appointing executors, he provided that in case his daughter should die without issue, his substance should return back to his executor, to be distributed as he should thereafter direct; and, lastly, *in case his said daughter should*

(*a*) Ante, 443.
(*b*) Ante, vol. 1, p. 256.
(*c*) Per Lord Brougham, in Candy *v.* Campbell, 8 Bligh, N. S. 469. See also Stanley *v.* Lennard, 1 Ed. 87, ante; Beauclerk *v.* Dormer, 2 Atk. 308. The above-quoted passage in Lord Brougham's judgment was cited with commendation by Sir Knight Bruce in the case of Pye *v.* Linwood, 6 Jurist, 619, where an attempt was again made, and with no better success, to found an argument for the restrictive construction on the word "then."
(*d*) Fea. 482.
(*e*) 3 B. P. C. (Toml. ed.) 299.

marry without consent or *die without issue, his substance should return back to his executors, to be by them distributed in manner following*, viz: to J. D. £100 and several other pecuniary legacies, and to his daughter twenty cows and a horse. It was held, that the bequest over was to take effect on the death of the daughter without issue living at the death.

This case, and the ground for it above suggested, were disapproved of by Lord Thurlow in Biggs *v.* Bensley, (*a*) who observed "that it would be better to say that in Keily *v.* Fowler, there was no rule of construction than Mr. Fearne's." The fact probably was, that this very learned writer, finding the case so decided, put it upon the best ground he could discover. The ground, however, to which he has referred it, does not exist; for the trust was not necessarily personal to the executors named, but might have been executed by the representatives of the survivor; and as it is clear that a transmissible *trust* raises no stronger argument against the ordinary construction than a transmissible *interest;* e consequentia, a personal trust (*i. e.* exclusively personal) *does* raise as strong an argument as a personal interest. (*b*) The argument founded on the nature of the property given over to the daughter, namely, cows and horses, to which Mr. Fearne also alludes, appears to be not more conclusive.

It was formerly thought that a limitation to the *survivor* * of several persons in default of issue of either, [448] formed another exception to the rule which construed these words to import an indefinite failure of issue,—a distinction which, however questionable in principle, seemed to be authorized by the case of Nichols *v.* Skinner; (*c*) but that decision has been found not only not to support such a distinction, but to be an authority against it; (*d*) the effect of the decree being to establish the title of one of the children, whose shares were so limited, notwithstanding the bequest over.[1]

But Sir W. Grant, who made this discovery, seemed to think that if the gift to the survivor was so framed as to be personal to him, and not transmissible to his representative, in case of his death before the happening of the contingency, the effect might be different. And with this agrees the recent case of Ranelagh *v.* Ranelagh, (*e*) where one of several grounds, upon which words referring to a failure of the issue of certain pecuniary legatees

(*a*) 1 B. C. C. 187.
(*b*) As to which, see ante, 435.
(*c*) Pre. Ch. 528. See also Hughes *v.* Sayer, 1 P. W. 534.
(*d*) See Massy *v.* Hudson, 2 Mer. 135.
(*e*) 2 Myl. & Keen. 441.

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[1] See Cutter *v.* Doughty, 23 Wendell, 513; Hamilton *v.* Boyles, 1 Brevard, 414; Zollicoffer *v.* Zollicoffer, 4 Dev. & Batt. 438.

were held not to import an indefinite failure of issue, (so as to turn express life interests previously given to the legatees into absolute interests,) was, that the ulterior gift, which the words in question served to introduce, was in favor of the "survivors" of the legatees; which term, it was considered, meant, according to its more obvious sense, persons living, and was not used synonymously with *others*, so as to confer interest transmissible to the representatives of pre-deceased legatees.

So, if the ulterior bequest, which is to take effect on the failure of issue, be to persons who shall be living *at the time*, the same reasoning seems to apply; but, in order to let in the
[449] force of this argument, the ulterior bequest *must be so framed as to be confined to persons living at the death of the testator, and must not embrace an indefinite range of unborn persons. (*a*) And, of course, if the event, which is made the condition precedent of the ulterior gift, is not the fact of the legatee surviving the extinction of issue, but merely that of his surviving the person whose failure of issue is referred to, no ground is thereby laid for the restricted construction, as the ulterior gift might be intended to confer a *vested interest* on the death of such person, to take effect *in possession* in favor of the representatives of the legatee on the failure of issue at any remote period.

Thus, in the case of Garratt *v.* Cockerell, (*b*) where a testator, after bequeathing his personal estate to his children, added, "should all my children die without *heirs*, my property in that case to be divided equally between the children of my brothers and sisters *alive at the death of my last child*." The question was, whether the word "heirs" (which, it was admitted, was synonymous with *issue*) imported an indefinite failure of issue, in which case the gift over was void for remoteness. Lord Langdale, M. R., and Sir Knight Bruce, V. C., successively decided in the affirmative, being of opinion, that the terms of the gift over did not (as contended) restrict the contingency to the failure of issue at the decease of the last child. "Can the words 'at the death of my last child' (said his Honor) be applicable to the actual division of the property as well as to the period at which the collateral relatives intended to be benefited were to be ascertained? Are they sufficient, in a case of this kind, to show, that he meant the selected collateral relatives to become entitled in possession 'at the death
[450] of *his last child,' if at all? Do they, in short, furnish grounds solid enough to support the restrictive construction of the phrase 'die without heirs?' Here, as it seems to me, lies the difficulty of the case. It is true, as Sir W. Grant

(*a*) See Campbell *v.* Harding, 2 Russ. & Myl. 390.
(*b*) May 24, 1842, 6 Jur. 909.

said, in Massey *v.* Hudson, (*a*) 'a bequest to A after the death of B does not import that A must himself live to receive the legacy. The interest vests at the death of the testator, and is transmissible to representatives, who will take whenever the event of B's death may happen. So, if the bequest be to A in case B shall die without issue. If that were allowed to be a good bequest, A's representatives would be entitled to take at whatever time the issue might fail. It is for that reason, that it is held too remote.'"

3dly. Another class of cases remaining to be noticed is, where the words importing a failure of issue are preceded by a power implying, in default of appointment, a gift to the issue of the donee living at his decease. In this situation, the words in question are evidently referential, and, as such, may seem to belong to the preceding chapter, where, indeed, the cases have been briefly noticed; but they suggest a few observations which will more properly find a place here.

The authorities for this exception to the indefinite construction are Target *v.* Gaunt, (*b*) and Hockley *v.* Mawbey. (*c*) In Target *v.* Gaunt, a term of years was bequeathed to H. for life, and no longer; and, after his decease, *to such of the issue of H. as he should by will appoint, and, in case H. should die without issue*, then over. The *question was, whether the [451] bequest over was good; and Parker, L. C., decided in the affirmative, observing that it must be intended such issue as H. should, or at least might, appoint the term to, which must be intended *issue then living;* and that this construction should be the more favored, in regard it supported the will, whereas the other (*i. e.*) that the testator meant whenever there was a failure of issue) destroyed it.

In Hockley *v.* Mawbey, a testator devised freehold and leasehold estates to A. for life, and, after her decease, to his son *R. and his issue lawfully begotten or to be begotten, to be divided among them as he.* (*R.*) *should think fit, and in case he should die without issue*, over. One question was, whether R. took an estate tail in the realty, and an absolute interest in the personalty, or a life interest only in both. Lord Thurlow was of opinion, that he had only an estate *for life*. It was evident, he said, that the testator did not intend the property to go to the issue as heirs in tail; for he meant that they should take distributively, (*d*) and according to the proportions to be fixed by the son, and that it had often been decided, that where the gift

(*a*) 2 Meriv. 130.
(*b*) 1 P. W. 432; 1 Eq. Ca. Ab. 198, pl. 11; 10 Mod. 402; Gilb. Eq. Ca. 149, S. C.
(*c*) 1 Ves. Jun. 143; S. C. 3 B. C. C. 82; but see Simmons *v.* Simmons, 8 Sim. 22, post; and see Martin *v.* Swannell, 2 Beav. 249; Crozier *v.* Crozier, 2 Conn. & Law. 294.
(*d*) As to this, see ante, 343.

was in that way, the parties must take as purchasers. After some further remarks, his Lordship intimated an opinion that the children took an interest independently of the power, which only authorized the son to fix the proportions, and not to choose whether they were to take at all; and that the objects, whosoever they were, *must be in existence during the life of the son.*

It will be observed, that, in the preceding cases, there was no express gift to the issue, except as objects of the power. It is now clear, however, (though doubted in Target *v.* [452] Gaunt,) that an implied gift would be raised in them *in default of the exercise of the power; (*a*) and if the power extended only to issue living at the death, the trust was likewise so confined, as were, pari ratione, the words referring to the failure of issue.

But the case of Hockley *v.* Mawbey has sometimes been cited (*b*) as if the power had embraced issue generally, subject only to the restriction on its exercise, imposed by the rule against perpetuities; but this supposition not only imputes to Lord Thurlow an inaccuracy of statement in regard to the limits of the rule, (which allows a term of twenty-one years, in addition to a life,) (*c*) but is entirely inconsistent with his Lordship's restriction of the implied gift, and the words introducing the limitation over, to issue living at the death, for which there was no pretext, unless the power was confined to such issue; and the effect of the words in question, if not restricted, must inevitably have been to make the devisee tenant in tail, which is the conclusion against which all his Lordship's reasoning is directed.

Without entering into a discussion of the doctrine, which restricts the word "issue," in such cases, to objects living at the death, on the reasoning derived from the power, it is sufficient, for the present purpose, to show, that, where the term is so restricted, the words under consideration (*i. e.* the words introducing the devise over on failure of issue) receive the same construction.

It may be remarked, however, that, if, in Target *v.* Gaunt, and Hockley *v.* Mawbey, there had been an *express* limitation to the issue in default of appointment, it seems that such [453] *limitation* could not, by implication, have been *confined to issue living at the death, because the power embraced such objects only. (*d*)

The reader will have perceived, in this view of the cases regarding personal estate, how readily the courts from an early

(*a*) See Brown *v.* Higgs, 4 Ves. 708; 5 Id. 495; 8 Id. 561; and other cases cited ante, vol. 1, p. 485.
(*b*) See 1 Sug. Pow. (6th ed.) 499.
(*c*) See ante vol. 1, 219.
(*d*) See Smith *v.* Death, 5 Madd. 373, ante, vo' 1 p. 486. See also Jesson *v.* Wright, 2 Bligh, 1, ante, 280.

period laid hold of expressions of an ambiguous character, in order to confine words denoting a failure of issue to a dying without issue at the death, and thereby avoid the giving to the first taker the absolute interest, to the exclusion of the legatee over. It is clear, that, in some of these cases, such an effort has been attributed to expressions which would not, at this day, if the question were res integra, be held to warrant a departure from the ordinary legal signification; and they were decided, too, at a time when it was not so well settled, as it now is, that the restricted construction did involve a departure from that signification, as to personal estate. (*a*)

It is not surprising, therefore, that some cases should have occurred in which the limited construction has prevailed, even where such slight grounds as these have been wanting; (*b*) but, as to which, it scarcely need be observed, that they possess no authority whatever.

And even where the restricted construction is apparently well sustained by the early authorities, the practitioner should act upon the doctrine with caution, seeing that in some recent cases, the Courts have evinced a disposition not to pay a very strict regard *to the distinctions (unsubstantial as they certainly are) presented by those authorities. This [454] remark is forcibly suggested by the case of Simmons *v.* Simmons, (*c*) where the testator gave all his real and personal estate to a trustee, in trust for his daughter for her life for her separate use, adding, "*at her decease she shall be at liberty to will the same to her issue*, as she may think fit; but in case of her *dying without issue*," the testator gave the property to his brother and sister, for their lives, and, in the event of his brother's death prior to the death of his daughter, then to the children of his brother. It was contended, on the authority of the cases of Roe *v.* Jeffery and Target *v.* Gaunt, that the gift over was to take effect in the event of the daughter dying without leaving issue living at her death, *i. e.* issue to whom she might "will" the property; but Sir L. Shadwell, V. C., held, that the daughter took an estate tail in the lands of inheritance, and the absolute interest in the personalty.

It does not appear whether his Honor, by this decision, meant to deny the authority or the applicability of the cited cases.

IV. The rule of construction which has been the subject of

(*a*) The contrary was maintained in most of the cases on the subject in Peere Williams, and the circumstance upon which reliance is now placed, as taking the case out of the rule was merely thrown in as an auxiliary argument in favor of the limited construction.

(*b*) Chamberlain *v.* Jacob, Amb. 72. See also Donne *v.* Merefield, cit. Cas. Temp. Talb. 56. In Atkinson *v.* Hutchinson, 3 P. W. 258, cited in the same place, the material word *leaving* is omitted.

(c) 8 Sim. 22.

discussion in the present chapter, is abrogated in regard to wills made or republished since the year 1837 by the recent act; the 29th section of which we have seen, (*a*) provides that words which may import a want or failure of a person in his lifetime or at his death, or an indefinite failure of issue, shall be construed to import a want of failure of issue in the life-
[455] time or at *the death;[1] but on this enactment are engrafted an exception and proviso, which seem to have the effect of excluding the operation of the statute, in cases where the words in question are simply referential to the objects of a subsisting estate tail, or a prior gift. The result, then, of the new doctrine appears to be, that the words denoting a failure of issue refer to a failure at the death in every case, unless one of two points can be established. First, that the words are referential to the objects of a prior estate or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity, *i. e.* where the words *may* import *either* a failure of issue at the death, *or* an indefinite failure of issue. If, therefore, a testator by a will made or republished since 1837, devise real estate to A, or to A and his heirs, and if A shall die and his issue shall fail *at any time*, then to B, A will take an estate tail, as he formerly would have done without these special amplifying words, which exclude, beyond all question, the application of the enacted doctrine. Cases, however, may be suggested, in which the ground afforded by the context for excluding that doctrine might be less distinct and unequivocal. But such cases will, probably, be of rare occurrence; for, as the legal and the popular signification will now coincide, it cannot be supposed that the context of the will will often furnish grounds for negativing the restrictive interpretation; and, for the same reason, there will be less anxiety on the part of the judicial expounders of wills than formerly to discover grounds for departing from the general rule; an anxiety which contributed not a little to encumber that rule with its
[456] numerous distinctions and exceptions. Where, *however, the context does require that the words should be read as importing a general failure of issue, this construction must be attended with the same consequence as under wills not within the statute, whether that consequence be the raising of an estate tail by implication in the person whose issue is re-

(*a*) Ante, p. 413.

[1] A similar rule of construction was declared by statute, in Virginia, in 1819, in Mississippi, 1824, in North Carolina, 1827. So in New York, by Revised Statutes. The provisions of these statutes sweep away, at once, the whole mass of English and American adjudications on the meaning, force, and effect of such limitations. 4 Kent, (5th ed.) 279, 280.

ferred to, as in the case already suggested, or the invalidating of the gift over, which is dependent on the failure of issue. Hence, it is not strictly true (as some have supposed) that the recent act absolutely excludes the implication of an estate tail from words denoting a failure of issue; it merely requires that the construction on which such implication is grounded be sustained by *other* expressions found in the will; and, as we may confidently assume, for the reason already suggested, that such cases will be very infrequent, the act will eventually (though it may not be very speedily) reduce to insignificance the doctrine respecting the implication of estates tail from the words in question, as well as the numerous points of construction incidentally treated of in the present chapter. The fact, that nearly six years have elapsed since the enactment came into operation, without producing a single case involving the application of the new rule of construction propounded in the 29th section, strongly confirms the expectation of the gradual extinction of the prolific source of litigation, arising out of the words in question as formerly construed.

CHAPTER XLIII.

WHAT WORDS RAISE CROSS REMAINDERS BY IMPLICATION AMONG DEVISEES IN TAIL.[1]

Words "in Default of such Issue," &c., raise Cross Remainders, when. Alleged Exceptions;—where the Devise is to more than two;—where there is an express Cross Limitation;—where the Devise in Tail is limited to the Devisees respectively. *Words "Remainder," "Reversion," raise Cross Remainders, when.*
As to Executory Trusts. General Conclusions.

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WHERE lands are devised to several persons as tenants in common in tail, with remainder over, the question arises, whether, upon the determination of the entail in each share, such share

[1] See 4 Kent, (5th ed.) 201, 202; Baldrick *v.* White, 2 Bailey, 442.

devolves upon the other co-devisees in tail, or immediately goes over to the remainder-man of the entirety. Such reciprocal limitations to the tenants in common in tail, inter se, are, in professional language, denominated cross remainders. It is settled that in wills, as distinguished from deeds, (*a*) they need not be limited expressly, (though in correctly drawn wills they are never omitted,) but may be implied from the context. To show what expressions have been held, in judicial construction, sufficient to raise such implication, is the object of the present chapter.[1]

*The principle has been long admitted, that wher- [458] ever real estate is devised to several persons in tail as tenants in common, and it appears to be the testator's intention that not any part is to go over until the failure of the issue of all the tenants in common, they take cross remainders in tail among themselves. The great struggle has been to determine when the words *in default of such issue*, or other expression used to connect the devise in tail with the succeeding limitation, may be construed to demonstrate such an intention. In order to place this subject fully before the reader, it will be convenient briefly to trace the steps by which the rule has been gradually placed on, or rather restored to, its present enlarged and liberal footing; and then, to state the general conclusions which the cases warrant.

One of the earliest leading authorities is an anonymous case in Dyer, (*b*) (sometimes erroneously referred to as Clache's case,) (*c*) where a man, having five sons, and his wife enceinte, devised two thirds of his lands to his four younger sons and the child en ventre sa mere, if it was a son, and to the heirs male of their bodies begotten, *and if they all five should happen to die without issue male of their bodies, or any of their bodies lawfully begotten*, then the testator willed that the said two parts should revert to his right heirs. It was held, that four of the devisees having died without issue male, the survivor was entitled *to the whole;* it being evidently the true intent of the devisor, that, *so long as there was any issue male of his body*, [qu. of the bodies of any of the five devisees?] no part should revert to the heirs.

So, in Holmes *v.* Meynell, (*d*) where a testator devised certain lands to his *two* daughters and their heirs, equally to be *divided between them; *and in case they happened to* [459] *die without issue*, then over; the daughters were held to be tenants in tail in common, *with cross remainders in tail.*

These early cases accurately represent the state of the law at

(*a*) Edwards *v.* Alliston, 4 Russ. 78.
(*b*) 303 *b.* 13 Eliz.
(*c*) Dy. 330 *b.* post.
(*d*) Raym. 452; S. C. 2 Show. 135.

[1] See Parker *v.* Parker, 5 Metcalf, 134.

this day; but it should be observed that at one period a notion appears to have obtained that cross remainders could not be implied between more than two persons.

Thus, in Gilbert *v.* Witty, (*a*) a testator having three sons, and being seised of three houses, devised one of the houses to each son and his heirs, providing that *if all his said children should depart this life without issue of their bodies lawfully begotten*, then all his said messuages should remain and be to his wife and her heirs forever; it was held by Doddridge, Houghton and Chamberlain, Justices, (Lea, C. J., doubting,) that these words did *not* create cross remainders between the sons, but that, on the death of any one of them without issue, his house should go over to his mother. Doddridge said that cross remainders might be implied between two, but not in a devise *of several houses* to *three or more* persons, on account of the uncertainty and inconvenience.

Here the objects were not devisees in common of undivided shares in the same land, but were respectively devisees of separate tenements; and it is also observable, that Lord Hale, in Cole *v.* Livingston, (*b*) in stating the inadmissibility of the implication among more than two devisees, illustrated it by a similar species of case.

The alleged ground for the distinction between the favored number of two and a larger body of devisees seems to be altogether futile, (*c*) for it is obvious that the uncertainty
[460] and confusion would not be greater in the * case of implied than in that of express remainders; and its origin can hardly be otherwise accounted for than by attributing it to the general indisposition of our Courts in early times to adopt modes of construction which were considered (though, in this instance, erroneously) to have a tendency to create questions of a complex or subtle character. The doctrine, indeed, which rejected the implication between more than two devisees did not long (if *in effect* it ever did) exist, but for a considerable period after it was virtually exploded, it was permitted to preserve a *semblance* of authority; for the Judges, not venturing altogether to discard the distinction in regard to the number of devisees, said, that the presumption was in favor of cross remainders between two, but between more than two they were rather to be presumed against, though such presumption against them might be repelled by a plain indication of intention. (*d*)

Such has been the language held upon this subject down to

(*a*) Cro. Jac. 655.

(*b*) 1 Vent. 224.

(*c*) Indeed the implication of cross remainders is *convenient*, as preventing the subdivision of shares. In one case, the rejection of the implication doctrine would have entitled the lessor of the plaintiff to recover twenty-five undivided three hundred and sixtieth parts! Doe d. Gorges *v.* Webb, 1 Taunt, 234.

(*d*) See Lord Hardwicke's judgment in Marryatt *v.* Townly, 1 Ves. Sen. 104.

nearly the present time; but an attentive consideration of the cases will show, that at this day at least there is no real difference with respect to the number of persons between whom cross remainders can be implied. They will *not* be raised between two unless an intention to this effect can be collected; and, if such intention appear, they *will* be raised among a larger number.

Not the least of the absurdities flowing from the *distinction in question was the impossibility of applying it to a devise *to a class* of unascertained objects, who might consist of any number of persons in esse at the testator's death, or at some subsequent period; a difficulty which was noticed by Lord Eldon in the case of Green *v.* Stephens. (*a*) [461]

It was held, in Clache's case, (*b*) that cross remainders could not be *implied* where there were *express* cross limitations among the devisees in tail in certain events.

A testator devised a messuage to his daughter A. and her heirs forever, and his principal messuage he gave to T. his youngest daughter and her heirs, *and if she died before the age of sixteen, A. then living*, he willed that A. should enjoy the principal messuage to her and her heirs forever; *and, if A. should die having no issue, T. living*, then he willed that T. should enjoy the share of A. to her and her heirs forever; *and, if both his daughters should die having no issue*, then the testator devised *all* his said messuages over. T. died, *having attained sixteen*, without issue, which raised the question whether cross remainders could be implied between the daughters; and the Court held, that they could not; for the testator never intended that the principal house should go to A., unless T. had died within the age of sixteen years; and *no implication of cross remainders could arise when an express and special gift and limitation were made by the devisor himself.* Dyer thought there *was* no entail, but a fee simple conditional; but the other three Judges were of a contrary opinion.

The doctrine of Clache's case was much canvassed in the recent case of Vanderplank *v.* King, (*c*) in which Sir J. Wigram, V. C., decided, after much consideration, that the *introduction of an express limitation of cross remainders among *another* class of devisees in the same will did not repel the implication; his Honor observing, that an express gift of cross remainders in one event did not preclude the Court from giving cross remainders by implication in an- [462]

Lord Mansfield's judgments in Doe d. Burden *v.* Burville, 2 East, 48, n; Perry *v.* White, Cowp. 780; and Phipard *v.* Mansfield, Id. 800; and Sir L. Kenyon's in Staunton *v.* Peck, 2 Cox, 8; Atherton *v.* Pye, 4 Durn. & E. 713; Doe *v.* Cooper, 1 East, 236; and Watson *v.* Foxon, 2 East, 40.

(*a*) 17 Ves. 74.

(*b*) Dy. 330 *b.*

(*c*) 7 Jur. 548; 11th May, 1843.

other, where either case was clearly within the scope of all the reasoning upon which Courts have proceeded in implying cross remainders.

It has been long settled, that in regard to *executory trusts*, (*a*) an express direction to insert cross remainders among another class of objects, or even an express cross limitation among the same objects, does not exclude the implication.

Thus, in Burnaby *v.* Griffin, (*b*) where a testatrix devised her real estate to trustees, upon trust to pay one moiety of the rents to her sister E. for life, and, after her decease, the testatrix directed the trustees to *convey* and *settle* the said moiety unto and upon the daughters of E. as tenants in common in tail general, *with cross remainders* for the benefit of such daughters, remainder to the younger sons of E. successively in tail male, remainder to the eldest son in tail general; and as to the other moiety, upon trust for the testatrix's niece C. for life, with the same limitations to her daughters and sons as to the children of E.; and, if C. should depart this life without leaving any issue of her body living at her decease, the testatrix directed that *her sister E. should receive all the rents for life; and in case E. and C. should die without issue of their respective bodies, or all such issue should die without issue*, she then gave her real estate to four cousins. Lord Hardwicke decreed, that, in the
[463] settlement to be * executed under this trust, cross remainders were to be inserted not only between the children of E. and C. inter se, *but between the two families.*

Another ground upon which, at one period, it was held that the words in "default of such issue," following a devise to several persons in tail, did *not* create cross remainders, was, that such devise was limited to the objects "*respectively;*" and it was even so determined where the devisees consisted of the favored number of two.

Thus, in Comber *v.* Hill, (*c*) where the devise was to the testator's grandson and granddaughter, R. and A., equally to be divided, and the heirs of their *respective* bodies, *and for default of such issue*, then over; it was held that there were no cross remainders by implication; for it was said the mere words, "and for default of such issue," being relative to what went before, only meant "and for default of heirs of their *respective* bodies;" and then it was no more than if it had been a devise of one moiety to R. and the heirs of his body, and of the other moiety to A. and the heirs of her body, and for default of heirs of their respective bodies, then over; in which case there could be no doubt.

In the case of Williams *v.* Brown, (*d*) the devise was in nearly similar words, and received the same construction.

(*a*) As to such trusts, see ante, 252.
(*b*) 3 Ves. 266.
(*c*) 2 Stra. 969.
(*d*) 2 Stra. 996.

Again, in Davenport *v.* Oldis, (*a*) where a testator devised to his son and daughter, to be equally divided between them, and the *several and respective* issues of their bodies, *and for want of such issue*, to his wife in fee; Lord Hardwicke held that there were not cross remainders, which, not being favored by the law, could only be raised by an implication absolutely necessary; and that * was not the case here, for the words, [464] "*several and respective*," effectually disjoined the title.

Lord Mansfield, too, on several occasions, (though Lord Kenyon, in Watson *v.* Foxon, (*b*) treated his opinion as being the other way,) recognized the distinction founded on the word "respective," particularly in the opinion certified by the Court in Wright *v.* Holford, (*c*) and in its determination in Perry *v.* White. (*d*)

But the stress laid upon expressions of this nature has been disapproved of by the most distinguished modern Judges, and the cases which were founded on the doctrine are now clearly overruled. (*e*)

It is observable, indeed, that both in Comber *v.* Hill and Davenport *v.* Oldis, the word "respective" was wholly inoperative upon the construction, since not only were there other expressions sufficient to create a tenancy in common, but the limitations in tail being to persons who could have no common heirs of their bodies, they of necessity took several, and not joint, estates of inheritance, without any words of severance. (*f*)

Before we proceed to consider the cases by which the distinction in question has been overruled, it will be proper to state two or three anterior leading authorities for the general position, that the words *in default of issue* or *in default of such issue*, following a devise to several persons in tail, raise cross remainders between them.

Thus, in Wright *v.* Holford, (*g*) where the testatrix devised * to her sons, and in default of such issue to all [465] and every the daughter and daughters of herself and P., and to the heirs of their body and bodies, such daughters, if more than one, to take as tenants in common, and not as joint tenants; *and for default of such issue*, to the use of her (testatrix's) right heir; Lord Mansfield, and the other Judges of B. R. on a case from Chancery, certified, that as there were no words intimat-

(*a*) 1 Atk. 579.
(*b*) 2 East, 42, post.
(*c*) Cowp. 34, post. See also Doe d. Burden *v.* Burville, 2 East, 48, n. post; Phipard *v.* Mansfield, Cowp. 797, post.
(*d*) Cowp. 777, post.
(*e*) Atherton *v.* Pye, 4 Durn. & E. 710, post; Watson *v.* Foxon, 2 East, 36; Doe d. Gorges *v.* Webb, 1 Taunt. 238, post; Green *v.* Stephens, 17 Ves. 64, post. See also Staunton *v.* Peck, 2 Cox, 8.
(*f*) See ante, 158.
(*g*) Cowp. 31; S. C. in equity, nom. Wright *v.* Lord Cadogan, 2 Ed. 239; S. C. nom. Wright *v.* Englefield, Amb. 468.

ing any intention to limit over the *respective* shares of the two daughters dying without issue, (*a*) and as nothing was given to the heir at law whilst any of the daughters or their issue continued, they must among themselves take cross remainders.

Here the devise was to daughters as a class, a species of case of which Lord Eldon has observed, (*b*) that as if there are no objects at the death of the testator, (and, if the devise be future, whether there are or not,) (*c*) the shares of subsequently existing objects are liable to be diminished by the birth of additional children, the consequence of not implying cross remainders would be, that the shares of such after-born children, which had been so taken from the existing children, would, upon their death, without issue, (perhaps the day after birth,) go *instanter* to the remainder-man, which could never be the intention. (*d*)

In the next case, of Phipard *v.* Mansfield, (*e*) we find the implication of cross remainders applied in the case of a devise to *three* persons nominatim.

The testator devised to his brothers W. and J., and
[466] his *sister E., and the heirs of their bodies lawfully begotten and to be begotten, as tenants in common, and not as joint tenants; *and for want of such issue*, to his own right heirs forever. On a question whether there were cross remainders, Lord Mansfield, after stating the rule of presumption to be in favor of cross remainders between two, and against them between more than two, (*f*) and reasoning at length upon the cases, and the terms of the will, decided in the affirmative. Want of issue (he said) meant issue all of them. The rest of the Court concurred.

In Atherton *v.* Pye, (*g*) a testator devised (in remainder) to all and every the daughter and daughters of his daughter, and the heirs male of the body of such daughter or daughters, equally between them if more than one, as tenants in common, and not as joint tenants; *and for and in default of such issue*, the testator gave and devised *all* his said premises unto his own right heirs forever. The daughter had four daughters. Lord Kenyon, though he adverted to the distinction between two and more, said, that there was no doubt from the words of the limitation over, that the devisor intended to raise cross remainders between

(*a*) See ante, 464.
(*b*) See judgment in Green *v.* Stephens, 17 Ves. 75.
(*c*) See ante, 75.
(*d*) This is the substance, though not the precise terms, of his Lordship's observations.
(*e*) Cowp. 797.
(*f*) It is certainly very extraordinary that his Lordship should have continued to propound this doctrine, when in Comber *v.* Hill, (ante, 463,) and Davenport *v.* Oldis, (ante, ib.) the implication had been rejected, between *two* devisees on the mere force of the word "respective:" and when, with those cases before him, his Lordship was himself in this very case determining that the same words *did* raise cross remainders among three devisees.
(*g*) 4 Durn. & E. 710.

the granddaughters. Mr. Justice Buller observed, that the devise over was of *all* the devisor's estates, and they could not all go together, but by making cross remainders.

In the next case of Watson *v.* Foxon, (*a*) the effect of * the word "*respective*" came under consideration. [467] The testator devised all that his farm, &c., situate at W. and H., to all and every the younger children of M. begotten or to be begotten, if more than one, equally to be divided between them, and to the heirs of their *respective* bodies, to hold as tenants in common; and if M. should have only one child, then to such only child and to the heirs of his or her body issuing: *and for default of such issue*, the testator gave *the said premises to* C. M. had four children. On the question whether cross remainders could be implied, Lord Kenyon recurred to Lord Mansfield's statement of the rule of presumption, observing, however, that such presumption might be overruled by plain intention. His Lordship strongly disapproved of Lord Hardwicke's reasoning in Davenport *v.* Oldis, (*b*) on the word "respective," which he characterized as unworthy of his great learning and ability. Lord Kenyon observed, that in Atherton *v.* Pye, (*c*) the devise over "in default of such issue," was of all the testator's said lands, and stress was laid by some of the Judges on the word *all* for raising cross remainders, he would not say by implication, but by what the Judges collected to be the intention of the testator. But the word *all* was not decisive of that case, and in truth made no difference in the sense; for a devise over of "the said premises," or "the premises," or "*all* the said premises," meant exactly the same thing. Admitting, therefore, the general rule, that the presumption was not in favor of cross remainders by implication between more than two, still *that* was upon the supposition that nothing appeared to the contrary * from the apparent intention [468] of the testator. He had no doubt that the testator intended to give cross remainders among the issue of M., and that all the estate should go over at the same time. His Lordship thought that Lord Mansfield's quarrel with Davenport *v.* Oldis (*d*) was well founded, and he agreed with Wright *v.* Holford, (*e*) and Phipard *v.* Mansfield, from which he could not distinguish this case.

With Watson *v.* Foxon, we take leave of all direct judicial recognition of the distinction as to implying cross remainders between two and a larger number, which subsequent Judges,

(*a*) 2 East, 36. See also Staunton *v.* Peck, 2 Cox, 8, where Lord Kenyon, then at the Rolls, had made a similar decision in regard to the word "respective," but without the same explicit denial of the doctrine respecting it.

(*b*) Ante, 463.

(*c*) Ante, 466.

(*d*) But when did his Lordship quarrel with it? See ante, 464.

(*e*) Ante, 464.

except in one remarkable instance presently commented on, (*a*) have rejected in expression, as well as in fact.

In the next case (Roe d. Ren *v.* Clayton), (*b*) cross remainders were implied among several *branches* of issue, by the force of expressions referring to a preceding devise to daughters in tail, among whom cross remainders were held to be implied.

The testator devised all his real estate to his niece F. for life, remainder to her first and other sons in tail successively, and, in default of such issue, to all and every the daughters of his niece and the heirs of their bodies, to take as tenants in common; *and for default of such issue*, then to the issue of his sisters S., J., W., and B., in tail, *in such manner as he had limited the same to his said niece F.'s issue, and for default of such issue*, to testator's right heirs. One question was, whether, supposing the several stocks of issue of S., J., W., and B., to take the estate in equal fourths per stirpes, (and not the whole per capita,
[469] as was also contended,) there were * cross remainders between such stocks. This rendered it necessary to consider whether cross remainders would have been created between the daughters of the niece; though it was contended, that, even admitting the implication in regard to *them*, it did not follow that the words, "in like manner," &c., should be construed to do more than raise cross remainders between the issue of each sister inter se. Lord Ellenborough, and the other Judges, thought the implication of cross remainders among the daughters of the niece was perfectly clear, inasmuch as it was the plain intent of the testator that no part of his estate should go over to the issue of his sisters till default of issue of his niece; and they were further of opinion, that cross remainders were to be implied among the several *classes* of the issue of the sisters, the testator's devise being tantamount to his saying, "I mean that all my estate shall be enjoyed by the issue of my four sisters, so long as there are any such, and in default of such issue, all to go together to my own right heirs." Lord Ellenborough laid some stress upon the word *all*, used in the devise.

The next case, of Doe d. Gorges *v.* Webb, (*c*) again elicited from the bar *both* the old arguments founded on the number of the devisees and the word "respective," and from the bench, a more distinct denial of their force and authority. A testatrix devised a moiety of certain lands to particular limitations, with remainder to her three daughters F., M., and A., and the heirs of their bodies *respectively*, as tenants in common; *and, in default of such issue*, she gave the same to her own right heirs; and it was held, that cross remainders were raised between the daughters by implication. Sir James Mansfield, C. J., adverting to the distinction between two and more, observed,

(*a*) Vide post, 474. (*b*) 6 East, 620. (*c*) 1 Taunt. 237.

*that it was wonderful how it ever became established; [470]
and, in regard to the word "respective," the learned Chief Justice remarked, that it could make no difference; a devise to two as tenants in common, and the heirs of their bodies, must necessarily mean to the heirs of their *respective* bodies. (*a*) Mr. Justice Lawrence said, that the cases which *had founded themselves on the distinction of that expression must now be considered as overruled.*

The implication doctrine was again discussed in Green *v.* Stephens, (*b*) where the testator (after certain limitations) devised to the use of all and every the daughter and daughters of his nephew A lawfully to be begotten, and to her and their heirs forever, as tenants in common; *and for want of such issue*, to the use of his (the testator's) three nieces, B, C, and D, and their *several and respective* (the exact words which occurred in Davenport *v.* Oldis) (*c*) heirs forever, as tenants in common; *and, for want of such issue*, to his own right heirs; and the testator bequeathed his personal estate to be invested in the purchase of land, which he directed to be *conveyed* and *settled* to the same uses. The question was, whether a sum of money which had not been laid out, belonged wholly to the heir in tail of the surviving niece, (the other two nieces having died without issue,) or one third only to him, and the other two thirds to the devisee of the remainder-man; and this depended upon the question, whether the Court, in executing the trust, would have inserted cross remainders between the nieces. Lord Eldon, after referring to the authorities, and reprobating the distinctions which had been taken in some cases, in *re- [471]
gard to the expressions "*all* the premises," "the same," &c., decided in the affirmative. He said, that, conceiving it to be the intention of the will before him to raise cross remainders among the daughters of the nephew, (respecting whom he made some observations, which have been before referred to,) (*d*) he could not think that the testator had not the same intention in regard to his nieces; there was nothing to distinguish them except the word "respective" which, upon the authority of Doe d. Gorges *v.* Webb, (*e*) did not make a distinction upon which judicial construction should turn.

As the implication of the cross remainders in this case was so clear upon the direct devises, it was not necessary to found the decision on the circumstance of the trust being *executory*, though it is well known that the Courts, in executing such trusts, are in the habit of dealing with them for this and other

(*a*) Assuming that they could not have common heirs of their bodies, as to which, vide ante, 158.
(*b*) 12 Ves. 419; S. C. 17 Ves. 64.
(*c*) Ante, 463.
(*d*) Ante, 465.
(*e*) Ante, 469.

purposes with a freedom peculiar to, and derived from, the nature of such trusts. (*a*) Lord Eldon, however, chose to decide the case upon the construction of the anterior devises, in reference to which it seems to be open to some observation. Much of his Lordship's reasoning, it will be perceived, proceeds upon the assumption that cross remainders would have arisen by implication between the *daughters* of the testator's nephew; but it is submitted, with deference to such authority, that if the devise be accurately stated in the report, (of which there can be little doubt, as Lord Eldon twice refers to the devise in the very terms of it,) *the daughters would have taken estates as tenants* IN FEE SIMPLE, on which, of course, no remainders, either
[472] express or *implied, could have been engrafted. The limitation was to the daughters as a *class*, and their *heirs*, and, in default of *such* issue, over to the nieces, nominatim, and their heirs, and in default of such issue, over. Now, the authorities have clearly established, that the words "such issue" in the limitation over after the limitation to the *daughters*, are referable to the *daughters*, (*b*) and not to their *heirs*, so as to give to the word "heirs" the sense of "heirs of the body;" but as to *the nieces*, who were to take as individuals named, *and who were not a class of "issue,"* the words "in default of such issue" necessarily referred to their *heirs*, and, consequently, reduced *their* estates to estates tail. The words "such issue" may be variously construed with reference to devises differently constituted. The case underwent considerable discussion, but the difficulty of raising estates *tail* in the daughters (which was a necessary preliminary to the admission of cross remainders) does not appear to have attracted the attention of either the bar or the bench.

The point is principally important, (since no daughter of A appears ever to have come in esse,) as it would have induced the necessity of construing the devise to the nieces, in regard to the implication of cross remainders, per se, detached from the devise to the daughters; and, even in this point of view, it would not be material, if there was sufficient upon that devise alone (as it is conceived there was) to raise the implication; for the circumstance, that the words "in default of such issue," had already been operative to cut down the estate of the prior devisees to an estate tail, which is the only novel feature in the case, seems to form no valid
[473] reason for denying to them the additional *effect of raising cross remainders between those devisees. We now return to the general subject.

(*a*) See Marryatt *v.* Townley, 1 Ves. Sen. 102, and other cases cited 17 Ves. 67. As to the implication of cross remainders in marriage articles, see Duke of Richmond's case, 2 Coll. Jur. 347.

(*b*) See Hay *v.* Earl of Coventry, 3 Durn. & E., and other cases cited ante, 368.

The next case of this class is Doe d. Southhouse *v.* Jenkins, (*a*) where a testator, after the failure of some estates previously given, devised certain farms to his four grandsons, (naming them,) subject to certain annuities; adding, "they to have share and share all alike of all the aforesaid premises, and then I give to the heir male of all my said grandsons, and then to go to my grandson's heirs male, that part that belonged to their father, and then to them, and then to the last liver, to their heirs male of my said grandsons, *and, for want of issue males of my grandsons*, I give," &c. One question was, whether cross remainders among the four grandsons could be implied. It was contended, that the implication was here controlled by the testator's declaration, that he gave to the heirs male "that part which belonged to their father," by which it must be inferred that he meant to exclude the part that belonged to an uncle. The Court, however, considered that the case fell within the general rule. Lord C. J. Best observed, that, although the words, "to them, and then to the last liver," were unintelligible, it was evident that the testator meant that the estate should not go over to the ulterior devisee until the failure of issue of all the grandchildren, and, therefore, cross remainders were to be implied.

So, in the case of Livesey *v.* Harding, (*b*) where a testator, upon the failure of issue of his eldest or only son, limited his estate in the words following: "To the use of all and every the daughter and daughters of me the said Edmund Livesey, and the heirs of their bodies, to take as tenants in common, if more than one, equally; *and if but one, to the use of such only daughter of me the said Edmund Livesey, and the heirs of her body, forever; *and, for default of such issue*, to the use of my own right heirs forever." [474] One question was, whether the daughters took cross remainders in tail. Sir J. Leach, M. R., decided in the affirmative, on the ground that no part of the estate was to go over, unless there were a failure of issue of all the testator's daughters. "Where (he said) there is a gift to two persons only, and the heirs of their bodies, cross remainders will be implied, although there is no expressed intention that no part of the estate shall go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively, and then the remainders over will be several and respective."

It could scarcely be meant that cross remainders will arise between two devisees *without subsequent words*,—a proposition which would have the effect of reviving the exploded distinction in regard to the number of the objects, and to found on it a construction untenable, it is submitted, both on principle and authority; for the argument in favor of the implication of cross remainders among *any* number of devisees, rests wholly on the

(*a*) 3 Moore & Pay. 59. (*b*) 1 Russ. & Myl. 636.

words introducing the devise over; and, if there is no such devise, the ground for the implication is wanting. No case can be adduced, in which the doctrine here propounded (and extrajudicially, for the case suggested by Sir John Leach was purely hypothetical) has been even contended for. Possibly the observations of the learned Judge were misunderstood.

Here closes the long line of cases establishing the operation of the words "in default of such issue," and other similar expressions, to raise cross remainders among devisees in tail.

[475] It may seem to be extraordinary that so *large an assemblage of decisions should have grown up in relation to a point which appeared to have been determined more than two centuries ago; (*a*) but the reluctance evinced by some of the Judges of an early day to admit the implication between more devisees than *two*, the pertinacious retention, in terms at least, of the distinction in regard to that number, by several of their successors, until a much later period, and more particularly the exception to the implication doctrine, founded on the words "several" and "respective," introduced by the cases of Comber *v.* Hill, Williams *v.* Brown, and Davenport *v.* Oldis, (which was too absurd to be submitted to, even with such reiterated adjudication in its favor,) are the sources from which the controversies have sprung, that have rendered one of the simplest doctrines of testamentary construction in our books one of the most voluminous.

Lord Kenyon's attack upon Comber *v.* Hill, and that line of cases, in Watson *v.* Foxon, was certainly bold, recognized as they had repeatedly been by his immediate predecessor; (*b*) but as his Lordship's decision has been since, after much consideration, confirmed in the cases of Doe *v.* Webb, (*c*) and Green *v.* Stephens, (*d*) we may confidently hope that the argument founded on the words "several" or "respective," or the exploded distinction in regard to the number of the devisees, (which is equally untenable upon principle and authority,) will never more be seriously advanced in a court of justice.

Cross remainders have also been implied from the word "*remainder*."

[476] Thus, in Doe d. Burden *v.* Burville, (*e*) where a testator *(after limitations to his sons successively in tail) devised to the use of all and every his daughter and daughters as tenants in common, and to the heirs of her and their body and bodies, *with remainder* to the heirs of his (testator's) brother A forever: Lord Mansfield was of opinion that

(*a*) See Anon. Case in Dyer, and Holmes *v.* Meynell, ante, 458.
(*b*) See ante, 466.
(*c*) Ante, 469.
(*d*) Ante, 470.
(*e*) 2 East, 47, n.; 13 Geo. III.

cross remainders were to be implied between the daughters. He observed, that, in limiting the remainder in the singular number, the testator conceived that it could not take effect until the death of the last daughter without issue; and that, under the preceding limitations, all the female line of each son must fail before the male line of the other could take, and all must fail before the daughters could take. It would be absurd to suppose that he had a different intention as to his own daughter.

In another case, however, the same eminent Judge held cross remainders *not* to be raised by a limitation of "*the reversion*," after devises somewhat differently constituted.

Thus, in Perry *v.* White, (*a*) where the testator devised (in remainder) to his four sisters and a niece, for their lives, as tenants in common, remainder to their sons successively in tail male, remainder to their daughters in tail, *the reversion* to his own right heirs: Lord Mansfield held, that there were no cross remainders. His Lordship relied much upon the devise being in effect to the sisters and niece and their sons *respectively*. "During their lives (he observed,) there is a division: each is to have a fifth for life, to enjoy in severalty. Then follows, 'the remainder to their sons successively in tail.' What is the meaning of the expression, 'their sons?' It is impossible to construe it otherwise than 'respectively;' that is, remainder of the share of the sister dying to her sons successively; remainder *to her daughters as coparceners, and then [477] the *reversion* to the right heirs, that is, the reversion of the share of the several tenants for life and their issue *respectively*. It is absurd to say that the children of the other sisters should take the share of a deceased sister as purchasers in the lifetime of their mother."

His Lordship seems, therefore, to have thought that if cross remainders were raised, it must have been among *the children* only. His reasoning, it will be observed, proceeds upon the hypothesis now exploded, (*b*) that by a devise to persons *respectively* the implication is excluded, and not upon any distinction between the words "reversion" and "remainder," the expression in the last case, which must have been in his Lordship's recollection, having been decided by him only three years before. It would certainly not be impossible to construct a plausible defence of such a distinction; but it is probable that the Courts, instead of reconciling the two cases in this manner, would be inclined to go the length of saying that *any* words carrying on the limitations would raise cross remainders between anterior devisees in tail. So far as the case of Perry *v.* White rests upon the force of the word *respective*, it is now clearly overruled. (*c*)

(*a*) Cowp. 777; 18 Geo. III. (*b*) Ante, 464.
(*c*) Ante, 464.

Allusion has been made to the more ready implication of cross remainders in executory trusts (*a*) than in direct devises. It may be further remarked, in regard to such trusts, that in the case of Horne *v.* Barton, (*b*) where a testator devised his real estate to trustees and their heirs, upon trust for the use and benefit of all and every his children who should live to attain the age
[478] of twenty-one years or be married, * which should first happen, in equal shares or proportions undivided, for their respective lives, with remainder to their issue severally and respectively in tail generally, *with cross remainders*, and the testator directed his trustees to execute a settlement accordingly; Sir W. Grant, M. R., held, that cross remainders were to be inserted, not only as between the children respectively, but also as between the families.

In a former work (*c*) the writer suggested the probability that the principles of construction upon which cross remainders have been implied among devisees in tail would be held to apply to estates for life; and, consequently, that if a testator manifested an intention that property previously devised to several persons for life, as tenants in common, should not go over to the ulterior devisee until the decease of all the devisees for life, it would be concluded, by the same process of reasoning as had conducted to a similar conclusion in regard to devisees in tail, that the testator meant the surviving devisees or devisee for the time being to take the shares of deceased objects. Such a devise recently occurred in the case of Ashley *v.* Ashley, (*d*) where a testator devised real estate to the use of his daughter A for her life, and after the determination of that estate, to the use of trustees to preserve, and after her decease, to the use of all and every the child or children lawfully begotten and to be begotten on the body of A, to take as tenants in common, and not as joint tenants; *and for want of such issue* of A, then to the use of another daughter and her children in like manner. The Master reported, that the children of A took life estates only, without
[479] cross remainders between them; * but Sir L. Shadwell, V. C., expressed a strong opinion against the finding of the Master. He observed, that but one subject was given throughout; the expression, "for want of such issue," meant want of issue whenever that event might happen, either by there being no children originally, or by the children ceasing to exist. His Honor accordingly declared that the children of A took estates for life as tenants in common, with cross remainders between them for life.

The conclusions from the authorities on the subject are, —

(*a*) Ante, 471.
(*b*) Geo. Coop. 257.
(*c*) 2 Powell on Dev. 623, n.
(*d*) 6 Sim. 358. See also Pearce *v.* Edmeades, 3 You. & Coll. 246.

1st. That under a devise to several persons in tail, being tenants in common, with a limitation over for want or *in default of such issue*, cross remainders are to be implied among the devisees in tail.

2dly. That this rule applies whether the devise be to two persons or a larger number, though it be made to them "*respectively*," and though in the devise over the testator have not used the words, "the said premises," or "all the premises," or "the same," or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares.

3dly. That the rule applies, in regard to executory trusts at least, though there be an *express* direction to insert cross remainders among *another* class of objects, or a limitation over among some of the *same* objects; and even in direct devises an express limitation of cross remainders among *another* class of objects has been held not to repel the implication.

4thly. That the word "remainder," following a devise to several in tail, will raise cross remainders among them. (*a*)

5thly. * That it is no objection to the implication of [480] cross remainders that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail, and others tenants for life, with remainder to their issue in tail. (*b*)

6thly. That a devise to the children of A for life, and *for want and in default of such issue* then over, creates cross remainders by implication for life among such devisees. (*c*)

(*a*) As to "reversion," see ante, 477.

(*b*) Vanderplank *v.* King, 1843, cor. Sir J. Wigram, V. C., 7 Jurist, 548. In this case the inequality was produced by the application of the cy pres doctrine in regard to the member of a class who was born after the death of the testator, and is therefore an important case in reference to that doctrine, as to which, vide ante, vol. 1, p. 260. See also Lewis on the Law of Perpetuity, 426.

(*c*) The reader will probably have inferred, from the absence throughout the present chapter of any allusion to the failure of issue clause in the recent Statute of Wills, that the writer conceives that the enactment does not affect the implication of cross remainders from expressions of this nature. Such, undoubtedly, is his opinion; in support of which it will be sufficient to observe, that the 29th section expressly excepts out of the statutory rule of construction, cases in which a contrary intention appears by the will, by reason of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. Here an express estate tail is, by the prior devise, given to the person whose issue is referred to by the words "in default of such issue," &c., from which the cross remainders are implied; and hence it is clear that this point of construction remains wholly untouched by the enacted doctrine.

CHAPTER XLIV.

WHETHER CROSS EXECUTORY LIMITATIONS CAN BE IMPLIED AMONG DEVISEES IN FEE OR LEGATEES.[1]

Cross executory limitations not to be implied.
Cross executory trusts implied among legatees, [p. 482.]
Observations upon Scott *v.* Bargeman, [p. 483.]
Bequest to A, B, and C, with bequest over if *one* only, or certain two, or *all* died, but not providing for the death of the other *two*, [p. 483.]
Implication of cross executory bequest rejected by Sir R. P. Arden, but his decree overruled by Lord Loughborough, [p. 484.]
Remarks upon Machell *v.* Winter, [p. 485.]
Gift to children of A, payable at twenty-one, and in case *all* should die, &c., [p. 486.]
Cross bequest *not* implied, [p. 487.]
Remark on Currie *v.* Gould, [p. 487.]

The question whether cross executory limitations can be implied among devisees *in fee*, arises when real estate is devised to several persons in fee, with a limitation over in case they all die under a given age, or under any other prescribed circumstances; in which case it is by no means to be taken as a necessary consequence of the doctrine respecting the implication of cross remainders among devisees *in tail*, discussed in the last chapter, that reciprocal executory limitations will be implied among such devisees in fee. The principal difference between the two cases seems to be this: — In the case of a devise to several persons in tail, assuming the intention to be clear that the estate is not to go over to the remainder-man until *all* the devisees shall have died without issue, the effect of not implying cross remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of *all*. (*a*) On the other hand, in the case of limitations in fee of the realty, and of absolute interests in personalty, (both
[482] which are clearly governed * by the same principle,) as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event upon which it is not divested, a partial intestacy can never arise for want of a limitation over.

To introduce cross limitations among the devisees in such a

(*a*) Indeed, it should seem that the doctrine against perpetuities would have presented an obstacle to its taking effect at all.

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[1] 4 Kent, (5th ed.) 201, 202; Baldrick *v.* White, 2 Bailey, 442.

case would be to divest a clear absolute gift upon reasoning merely conjectural; for the argument, that the testator could not intend the retention of the property by the respective devisees to depend upon the prescribed event not happening to the whole, however plausible, scarcely amounts to more than conjecture. He *may* have such an intention; and, if not, the answer is, voluit sed non dixit.

If, therefore, a gift is made to several persons in fee simple as tenants in common, with a limitation over in case they *all* die under age, the share of one of the devisees dying during minority will devolve upon his representatives, unless and until the whole die under age.

Among the early cases, indeed, examples may be found of a different rule being applied to bequests of personalty, between which and devises in fee there seems, as before suggested, to be an intimate analogy.

Thus, in Scott *v.* Bargeman, (*a*) one bequeathed personalty to his wife, upon condition that she would pay £900 into the hands of S., in trust to lay out the same, and pay the interest to the wife for life, if she should so long continue a widow, and, after her death or marriage, in trust that S. should divide the £900 among his (the testator's) three daughters at their respective ages of twenty-one or marriage, provided that *if all his three daughters should die before their legacies should become payable*, then the wife should have the whole £900 paid to her. Two of the daughters died under age and unmarried,
* and the question was, whether the other was entitled [483]
to her sisters' shares. Lord Macclesfield decided in the affirmative, inasmuch as the mother was plainly excluded unless all the daughters died under twenty-one or marriage, and their shares did not vest absolutely in any of the three daughters under age, in regard that they might all die before twenty-one or marriage, in which case the whole was devised to the mother.

This decision must be supported, if at all, on the ground that the Court was authorized to insert cross limitations among the daughters, by necessary inference from the terms of the gift over, a conclusion which it will be found very difficult to reconcile with subsequent decisions. (*b*)

In the case of Machell *v.* Winter, (*c*) the next on this subject, personal property was bequeathed to three persons, with an express bequest over to the other or others in case of the death of *one* particularly named, or of either of two couples of the three individuals named, under age, (but not of the other couple,) and a

(*a*) 2 P. W. 68.
(*b*) See Schenck *v.* Legh, 5 Ves. 452; S. C. 9 Id. 300; Bayard *v.* Smith, 14 Id. 470. And more particularly Skey *v.* Barnes, 3 Mer. 334, post.
(*c*) 3 Ves. 236, 536.

bequest over of the entirety on the death of *all* three. Two eminent Judges differed in opinion whether a cross executory trust providing for the death of such other couple could be implied. The case was this: "A testatrix directed her household goods, &c. to be sold, and the money arising from the sale, together with the residue of her personal estate, she bequeathed to her grandsons G. and J., and to her granddaughter C., to be equally divided between them, share and share alike; the shares of her grandsons, with the interest or accumulation
[484] thereof, after a deduction for their * maintenance and preferment, to be paid to them respectively on their attaining the age of twenty-one years, and the share of her granddaughter with the interest and accumulation, at twenty-one or marriage. Then, after a direction for maintenance and preferment out of the interest, the testatrix declared, that in case her granddaughter C. should happen to die under the age of twenty-one years and unmarried, the share of the residue of her personal estate so given to her, with the accumulated interest thereon, should go and be equally divided between her two grandsons; and in case of the death of either of them, the whole should be paid to the survivor; and that in case either of her grandsons should die under the age of twenty-one, the share of her grandson so dying should go to the survivor of her two grandsons; *and in case her two grandsons should die under the age of twenty-one, and her granddaughter under twenty-one and unmarried*, the whole of their respective shares of the residue of her personal estate, with the accumulation thereon as aforesaid, should go and be paid to her nephew B. (It will be observed that the event, which happened, of the death of both the grandsons under twenty-one, and of them *only*, was not provided for.) Sir R. P. Arden, M. R., considered that there was no doubt that the grandchildren took a vested interest; *and as it was not taken out of them in the event that had happened, he conceived himself not authorized to supply the defect* in favor of the granddaughter; though he had no doubt as to the intention. But Lord Loughborough, on appeal, reversed this decree; his Lordship thinking, on the one hand, that the shares did not vest in the grandsons until twenty-one, and, on the other, that there was a necessary implication in favor of the granddaughter, it being clear that what defeated (quære, *would precede?*) the gift over to
[485] the nephew, * who could only take the entirety of the fund, and that on the death of *all* the grandchildren, must be a disposition of the whole in favor of the grandchildren, the preferable objects of the testator's bounty, *and to avoid a partial intestacy.*

The views taken of this case by the Master of the Rolls and the Lord Chancellor, it will be seen, were wholly different; the former considering the gift as vested in the grandchildren, to be

divested only in the event expressly provided for; and the latter as a *contingent* bequest to them, with an express cross executory contingent bequest in a certain event, and an *implied* cross bequest in another event. There is certainly great difficulty in both branches of Lord Loughborough's hypothesis. According to the doctrine of all the authorities, the bequest clearly conferred a vested interest; (*a*) and, if vested, it was impossible, consistently with sound principles of construction, to divest it except on the happening of the prescribed event; and the obstacle to this was the more insuperable, from the circumstance, that the express cross limitations, so far as they went, did not establish a complete reciprocity between the legatees; for the share of the granddaughter at her death, under age, was to go to both the grandsons, but the share of one of the grandsons so dying was to belong exclusively to the other grandson. But, independently of this very material circumstance, there seems to have been no valid ground for divesting the shares in the event which had happened; nor, it is important to observe, does Lord Loughborough * advance any such [486] doctrine, for he evidently considered the holding the granddaughter to be entitled to be consequential on his holding the bequest to the whole to be *contingent*, his object being to "avoid a partial intestacy;" and it by no means follows, that if he had considered the interest as vested, he would have felt himself authorized to imply another gift in derogation of it. His Lordship's reasoning does not appear to have satisfied the Master of the Rolls, who, in a subsequent case, (*b*) expressed his conviction that his own determination was right. In that conviction probably the reader will be disposed to join, on his perusing the case of Skey *v.* Barnes, (*c*) which is a leading authority on this subject, and was as follows: —

A testator bequeathed his personal estate to trustees for his daughter for life, and after her decease to and among all and every the child or children of his daughter and the lawful issue of a deceased child, in such proportions as his daughter should appoint, and in default of appointment, then the same to go to and be equally divided between them, share and share alike, and if there should be but one child, then to such only child; the portion or portions of such of them as should be a son or sons, to be paid at his or their respective ages of twenty-one and the portion or portions of such of them as should be a daughter or daughters to be paid at her or their respective ages of twenty-one or days of marriage; *but in case there should be no such issue*

(*a*) See cases passim, chap. xxvi. vol. 1, p. 726. Lord Loughborough certainly appears to have been greatly inclined to hold gifts to be contingent upon very slight grounds, as will appear by several of his Lordship's decisions in the chapter just referred to.

(*b*) Booth *v.* Booth, 4 Ves. 402.

(*c*) 3 Mer. 334. See also Turner *v.* Frederick, 5 Sim. 466.

of the body of his daughter, or ALL *such issue should die without issue before his or their respective portions should become payable as aforesaid*, then £1000 for his sister M. and her
[487] family, * and £1500 for his niece A and her family; and in case there should be no issue of either, for his nephew T., whom he also made his residuary legatee. The will contained a proviso, authorizing the trustees to apply the interest of the children's portions for their maintenance until they became payable. One of the children having survived her mother, and died under twenty-one and unmarried, her share was claimed by the survivors and the representatives of those who had attained their majority and died, principally on the authority of Scott *v.* Bargeman. (*a*) Sir W. Grant, though he thought that case to be right in its result, held that the bequests vested immediately, *and that the contingency had not happened on which they were to be divested;* consequently the share of the deceased child belonged to her representative.

It is not very easy to reconcile with his Honor's decision his approval of Scott *v.* Bargeman, of whose authority that decision seems to be wholly subversive.

The case of Skey *v.* Barnes may, it is conceived, be considered to have fixed the rule of law on this important doctrine of testamentary construction.

A recent case which may *possibly* have been decided in reference to the doctrine discussed in the present chapter, is Currie *v.* Gould, (*b*) where a testator bequeathed to A the sum of £500, and in case of her death, either before or after the testator, to devolve to her child or children; or, in the event of their being also dead at her decease, to B. There were three children, one of whom only survived A; Lord Langdale, M. R., held, that the surviving child was entitled to the whole fund. It does not appear from the judgment of the M. R. whether he
[488] considered * the gift to the children to be contingent, as being confined to those who should be living at A's decease, or that the children took vested interests, with an implied gift over of the shares of any who should die in the lifetime of A, to the survivors or survivor. (*c*) In the latter point of view the case would deserve peculiar attention; but, as the former seems to be the more simple and unexceptionable ground, we cannot confidently claim this case as an authority on the present subject.

(*a*) Ante, 482.
(*b*) 4 Beav. 117.
(*c*) Or the M. R. might have considered that the gift was joint, and consequently devolved to survivors, to which, however, the doctrine of Woodgate *v.* Unwin, 4 Sim. 129, discussed ante, 160, would seem to stand opposed.

CHAPTER XLV.

RULE THAT WORDS WHICH CREATE AN ESTATE TAIL IN REAL ESTATE CONFER THE ABSOLUTE INTEREST IN PERSONALTY.

I. *Rule considered in relation to various words by which an Estate Tail may be created.*
II. *Bequest over after such Gifts.*
III. *Effect of Limitations in strict settlement upon Personal Property, &c.*

WORDS which create an estate tail in realty confer the absolute interest in personalty.
Rule applies to estates tail *by implication;* to cases falling within the rule in Shelley's case.
Though the bequest be referential to the devise, [p. 490.]
Words of distribution, &c. annexed to the limitation to the heirs of the body, &c. [p. 491.]
Observations upon Jacobs *v.* Amyatt, [p. 491.]
Remark on Wilson *v.* Vansittart, [p. 492.]
Where the bequest is to a person and his *issue* simply, [p. 493.]
Whether "issue" explained to mean issue *at the death*, [p. 493.]
To four persons and the issue of their respective bodies, [p. 493.]
Bequest to A. *for life*, and after his death to his issue, [p. 494.]
Lord Thurlow's construction in Knight *v.* Ellis, [p. 494.]
Remarks upon Knight *v.* Ellis, [p. 496.]
Remark on Attorney-General *v.* Bright, [p. 496.]
Gift to the issue as tenants in common, [p. 497.]
General conclusion, [p. 498.]
Bequest to A. and her children, [p. 499.]
Bequest over in case of death, without having any child or children, [p. 499.]
Gift to issue by way of substitution, [p. 500.]
To five persons and their respective issue per stirpes, [p. 500.]
Remarks on Pearson *v.* Stephen, [p. 501.]
To the daughters of T. and their issue, with benefit of survivorship, [p. 502.]
Remark on Gibbs *v.* Tait, [p. 502.]
Issue not entitled concurrently with ancestor, [p. 502.]
Issue held entitled concurrently with ancestor, [p. 503.]
Bequests over after gifts in question, when void, [p. 504.]
Brett *v.* Sawbridge, overruled by Pelham *v.* Gregory, [p. 505.]
Such gifts may be made defeasible on a collateral event, [p. 506.]
Effect of act 1 Vict. c. 26, § 29, on this rule of construction, [p. 506.]
As to annexing personal to real estate, devised in strict settlement, [p. 507.]

I. It has been established by a long series of cases, (*a*) that where personal estate (including, of course, terms of years of whatever duration,) is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in

(*a*) Roll. Rep. 356; Bunb. 38; 2 Ch. Rep. 14; 1 Lev. 290; 2 Vern. 324; 1 P. W. 290; Pre. Ch. 421; 8 Vin. Ab. 451, pl. 25; 2 Eq. Ca. Ab. 325; 3 B. P. C. (Toml. ed.) 99, 204, 277; 7 Id. 453; 1 Ves. Sen. 133, 154; 2 B. C. C. 33, 127; 11 Ves. 257; 2 Ves. & Bea. 63; 1 Mer. 20, 271; 19 Ves. 73, 170, 574; 3 Mer 176; 4 Madd. 360; 8 Sim. 22.

the person who would be the immediate donee in tail, and consequently devolves at his death to his personal representative, (whether he leaves issue or not,) and not to his heir in tail.[1]

This rule is not confined, as has been sometimes affirmed, (*a*) to cases in which the words, if used in reference to realty, would create an *express* estate tail; for it applies also to those in which an estate tail would arise *by implication*, except in the particular case in which words expressive of a failure of issue re-
[490] ceive a different *construction in reference to real and personal estate. (*b*) Thus, where, by a will, which is regulated by the old law, personalty is bequeathed to A, or to A and his heirs, and if he shall die without issue, to B, (which would clearly make A tenant in tail of real estate,) he will take the absolute interest. (*c*)

The rule under consideration also applies to those cases in which, by the operation of the rule in Shelley's case, (*d*) the terms of the bequest would, in reference to real estate, create an estate tail.

Thus, in Garth *v.* Baldwin, (*e*) where a testator devised real

(*a*) Atkinson *v.* Hutchinson, 3 P. W. 259.

(*b*) See ante, 418.

(*c*) Love *v.* Windham, 2 Ch. Rep. 14; S. C. 1 Lev. 290; Greene *v.* Ward, 1 Russ. 262; Campbell *v.* Harding, 2 Russ. & Myl. 390; Dunk *v.* Fenner, 2 Russ. & M. 557; Simmons *v.* Simmons, 8 Sim. 22.

(*d*) As to which see ante, 271.

(*e*) 2 Ves. Sen. 646; see also Butterfield *v.* Butterfield, 1 Ves. Sen. 133, 153; Tothill *v.* Earl of Chatham, 7 B. P. C. (Toml. ed.) 453; S. C. at the Rolls, nom. Tothill *v.* Pitt, stated 1 Madd. 488; Earl of Verulam *v.* Bathurst, cor. Sir L. Shadwell, V. C., 1843, 7 Jurist, 295.

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[1] See to the same effect, 2 Kent, (5th ed.) 353, 354; 4 Ib. 283; Attorney-General *v.* Bayley, 2 Bro. C. C. (Perkins's ed.) 553; Knight *v.* Ellis, 2 Ib. 570; Foley *v.* Burnell, 1 Ib. 285; Attorney-General *v.* Hird, 1 Ib. 173, and notes; Chatham *v.* Tothill, 6 Bro. P. C. 450; Britton *v.* Twining, 3 Meriv. 176; Paterson *v.* Ellis, 11 Wendell, 259; Tothill *v.* Pitt, 1 Madd. 488; Jackson *v.* Bull, 10 Johns. 19; Henry *v.* Felder, 2 M'Cord, 323; Mathews *v.* Daniel, 2 Hayw. 346; Moody *v.* Walker, 3 Arkansas, 147; Phillips *v.* Eastwood, Lloyd & Goold, Temp. Sugd. 270; Lepine *v.* Ferard, 2 Russ. & My. 378; 2 Story, Eq. Jur. § 990; Smith's Appeal, 23 Penn. State, Rep. 9.

See 2 Story, Eq. Jur. § 988, where it is said, that in regard to terms for years and personal chattels, it may be observed, that they are capable of being limited in equity in strict settlement, in the same way and to the same extent, as real estates of inheritance may be; so as to be transmissible, like heir-looms. See also Fordyce *v.* Ford, 2 Ves. (Sumner's ed.) 536, note (*a*); Chitty, Gen. Prac. 101, c. 3, § 1.

Courts seem very much inclined to support limitations even of personal estate. Fearne on Executory Dev. by Powell, 186, 239, 259; Dashiell *v.* Dashiell, 2 Harr. & Gill, 127; Eichelberger *v.* Bernetz, 17 Serg. & R. 293; Moffat *v.* Strong, 10 Johns. 12; Newton *v.* Griffith, 1 Harr. & Gill, 111; Royall *v.* Eppes, 2 Munf. 479; Hannan *v.* Osborne, 4 Paige, 336; Cudworth *v.* Hall, 3 Desaus. 258; Clifton *v.* Haig, 4 Desaus. 330; Lord Douglas *v.* Chalmer, 2 Ves. (Sumner's ed.) 501, note (*a*.)

For a further consideration of this subject, see 2 Williams, Ex. (2d. Am. ed.) 507, *et seq*; 2 Story, Eq. Jur. §§ 988, 989, 990; Vaughan *v.* Burslem, 3 Bro. C. C. 101; Rice *v.* Satterwhite, 1 Dev. & Bat. Eq. 69; Mazyck *v.* Vanderhorst, 1 Bailey, Eq. 48; Ante, vol. 1, p. 793, and notes.

A limitation over of personal estate, after A dying under age, and without issue, was held good, the contingency not being too remote. Jones *v.* Sothoron, 10 Gill. & Johns. 187.

and personal estate to A., in trust to pay the rents and profits to S. for life, and after her death to pay the same to E. *for life*, and afterwards to pay the same to *the heirs of his body*, and for want of such issue, over; Lord Hardwicke held that E. was tenant in tail of the real estate, and entitled absolutely to the personalty.

And of course it is immaterial in such a case whether the bequest itself contain the words of limitation, or refer to a devise of realty, creating an estate tail.

As in the case of Brouncker *v.* Bagot, (*a*) where a testator devised his real estate to B. for life, without impeachment of waste, remainder to trustees to preserve contingent remainder to the heirs of the body of B.; and by a codicil he bequeathed his personal estate under the same persons, and in the same manner, as he had * by his will devised his real estate. [491] It was contended, that although, as to real estate, this rule of law was too strong for the intention of the testator, yet that a different construction might be put upon the words as applied to personalty, to prevent the application of the rule where it went to defeat the obvious intention, as in this case; but Sir W. Grant, M. R., held, that the testator having declared his intention respecting his personal estate, only by referring to the terms of the devise of the real estate, and as the law had ascertained those terms to give an estate tail in the realty, they would give the absolute interest in personalty.

The next question is, whether words of distribution or other expressions marking a course of enjoyment inconsistent with the devolution of an estate tail, annexed to the limitation to the heirs of the body, are in *these* cases inoperative to vary the construction, as we have seen they are now held to be in devises of real estate. (*b*) The affirmative would seem to follow from the principle of the preceding cases, though such a conclusion involves a direct contradiction of the case of Jacobs *v.* Amyatt, (*c*) where personalty was bequeathed to A for life, and after her decease unto the heirs of her body lawfully begotten, equally to be divided between them, share and share alike; and in default of such issue, over; and it was held by Lord Thurlow, confirming a decree of Sir R. P. Arden, M. R., that A took a life interest only.

Lord Thurlow seems to have decided this case, not upon any distinction between gifts of real and personal estate, in regard to the rejection of the words of distribution, but upon the ground that a similar construction would have been adopted of a devise of real estate * in the same terms; since he [492] found it necessary, in order to arrive at this conclusion,

(*a*) 2 Mer. 271; S. C. 19 Ves. 574; see also Douglas *v.* Congreve, 1 Beav. 159.
(*b*) See ante, 277.
(*c*) 4 B. C. C. 542.

to deny the authority of King *v.* Burchell, (*a*) and Doe *v.* Applin, (*b*) in both which the devises were of real estate. As these cases have been since fully confirmed, (*c*) and as it is now clear that a devise such as that in Jacobs *v.* Amyatt *would* create an estate tail in realty, (*d*) the latter case, it is conceived, may be classed among those which have been overruled by the decisions establishing that the words "heirs of the body" are not to be controlled by expressions pointing to a different mode of devolution or enjoyment.

In some earlier cases, too, words which would unquestionably have created an estate tail in reference to real estate, have been held not to confer the absolute interest in personalty. As in Wilson *v.* Vansittart, (*e*) where the bequest was to W. and his heirs male, *equally to be divided among them*, share and share alike; and it was held by Lords Commissioners Smith and Bathurst, that W. took an estate for life, with remainder to his sons.

This is an extraordinary decision. Not only was there no gift to *sons*, but no gift even to *heirs* by way of remainder. The authority of the reporter is not very high, and in this instance his statement is remarkably jejune.

The principle, that where an estate tail is created by the effect of the words "heirs of the body," and by reason of the inadequacy of certain superadded expressions to control them, the same words applied to personalty would confer the absolute interest, was, in the recent case of Congreve *v.* Doug-
[493] las, (*f*) considered as so clear and indisputable, *that the question was argued as being identical in the respective cases, the only subject of contention being whether there was or was not an estate tail in the realty.

A point of still greater difficulty arises in determining to what extent the rule under consideration applies to cases in which the word *issue*, occurring in devises of real estate, is a word of limitation.

This, at least, is clear, that a simple bequest to A and his issue, which, if the subject of disposition were real estate, would indisputably make A tenant in tail, (*g*) confers on him the absolute ownership in personalty.

Lord Hardwicke, in Lampley *v.* Blower, (*h*) admitted this proposition, though he held that a bequest over to the survivor, in case either of the legatees died without *leaving* issue, (which

(*a*) Amb. 574, since better reported, 1 Ed. 424, ante, 273, 338.
(*b*) 4 Durn. & E. 82, ante, 344, 401.
(*c*) See ante, 286.
(*d*) See Jesson *v.* Wright, 2 Bli. 1, and other cases ante, 280, *et seq.*
(*e*) Amb. 562.
(*f*) 1 Beav. 159; see also Tate *v.* Clarke, id. 100, ante, 351.
(*g*) See ante, 329.
(*h*) 3 Atk. 397.

in legal construction means, in regard to *personalty*, (*a*) issue living *at the death*,) explained "issue" in the body of the devise to be used in the same sense.

This seems to be rather a strained construction, and is inconsistent with the subsequent case of Lyon *v.* Mitchell, (*b*) which is a direct authority as to the effect of a bequest simply to A and his issue. A testator bequeathed personalty to his four sons, share and share alike, as tenants in common, *and to the issue of their several and respective bodies lawfully begotten;* but in case of the death of any or either of them without issue lawfully begotten *living at the time of his or their respective deaths*, then the part or share of him or them so dying should go to the survivors or survivor equally, and to the issue of their several and respective bodies lawfully begotten. * Sir T. Plumer, [494] V. C., after reviewing the authorities, held, upon the general rule, that as the words of the bequest would have made the sons tenants in tail of real estate, they *took absolute interests* in the personalty, with benefit of survivorship in case any or either of them died without issue living at their death respectively.

Our next inquiry is, whether a bequest to A *for life*, and after his death to his issue, operates, by force of the same rule of construction, to vest the absolute interest in A.

Now, as such a *devise* would clearly create an estate tail in A, and as it has been shown that the rule which makes the legatee absolute owner of personalty where he would be tenant in tail of real estate, applies to gifts falling within the rule in Shelley's case, (*c*) where *heirs of the body* are the words of limitation, as well as to those in which an *implied* gift is raised in the *issue;* and, as lastly, as we have just seen, the rule applies where the gift to the ancestor and issue is in one clause (the issue being to take *concurrently with*, and not by way of remainder *after*, the ancestor,) (*d*) the inevitable conclusion would seem to be, that in the case suggested, A would be absolutely entitled.

This conclusion, however, is encountered by the case of Knight *v.* Ellis, (*e*) where the testator gave certain moneys to trustees, upon trust, to permit his nephew T. to receive the interest *during his natural life*, and after his decease he gave the said moneys to the *issue male* of his nephew, and in default of such issue he gave the same over. The question was, whether T. was entitled for life, or absolutely. * Lord [495] Thurlow decided that he had a life interest *only*.

In reference to the cases establishing the rule, that words

(*a*) See ante, 418.
(*b*) 1 Madd. 467.
(*c*) That the rule in Shelley's case applies, whatever be the word of limitation used, see ante, 246.
(*d*) As to such cases of *devises*, see ante, 493.
(*e*) 2 B. C. C. 570.

which would create an estate tail in real estate confer an absolute interest in personalty, his Lordship said, "It must have occurred to the Judges who decided those cases, that under the idea of making the rules of decision as to leasehold estates analogous to those which are applied to estates of inheritance, the intention of the testator must be much oftener disappointed than carried into effect, and then there is no wonder that the Court should try to get out of the technical rule by any means that it can. Now what do the cases come to? A man by his will devises to A for life, there being plainly an interest only for life given; if that were all, the disposition would end there as to A, and any other gift would be effectual after his death. The testator then gives the same fund (quære, *land*) over to B after failure of issue of A. What is the Court to do? It is clear that a life interest only is given to A. It is clear that no benefit is given to B, while there is any issue of A. The consequence is, that as no interest springs to B, and no express estate is given after the death of A, the intermediate interest would be undisposed of, unless A was considered as taking for the benefit of his issue, as well as of himself; and as the words in this case are capable of such amplification, the Court naturally implies an intention in the testator that A should so take that the property might be transmissible through him to his issue, and he was therefore considered as taking an estate tail, which would descend on his issue. Now, an estate in chattels is not transmissible to the issue in the same manner as real estate, nor capable of any kind of descent, and therefore an estate in chattels so given, from the necessity of the thing, gives the whole interest to the first taker; but if the testator,
[496] *without leaving it to the necessary implication, gives the fund expressly to the issue, they are not driven to the former rule; but the issue may take as purchasers, and then there is an end of the enlargement of any kind, of the estate of the tenant for life; for another estate is given after his death to other persons, who are to take by purchase. It no longer rests on conjecture."

It is difficult to accede to the reasoning which makes an implied bequest to the issue vest in the legatee an absolute interest, and denies the same effect to an express limitation. The Court, in these cases, merely supplies the word *issue;* and this being done, it is, according to Lord Thurlow's hypothesis, to have a more extensive operation than if the word had been placed in the will by the testator. The case of Knight *v.* Ellis seems to be directly opposed to, and must therefore be considered as overruled by, the recent case of Attorney-General *v.* Bright, (*a*) where a testator, after bequeathing to two persons the interest of the

(*a*) 2 Keen, 57.

sum of £500, four per cent. stock, gave the fund, after the decease of the survivor, to A, to receive the interest during her life, and then *to her issue;* but, in case of her death without issue, the £500 stock to be divided between her father's children by his second wife; and, in default of any children by his second wife living at the testator's decease, he gave the same to such second wife. It was contended, on the authority of Knight *v.* Ellis, and some earlier cases, that A had a life interest only. But Lord Langdale, M. R., held, that the effect of giving the interest of the £500 stock to the legatee for her life, and then the principal to her issue, was to give her an absolute interest in that sum.

This is a useful case, as it embraces a point of construction, on *which, however clear it might seem to [497] be upon principle, authority was wanting. It still leaves undecided what would be the effect of a gift of personalty to A for life, and, after his decease, to his issue, equally to be divided between them, or as tenants in common, or accompanied by other such expressions. Even if it could be successfully maintained, that such a gift, applied to real estate, would confer an estate tail on A (but which, we have seen, (*a*) is extremely doubtful,) it must not be too hastily assumed that A would take the absolute interest in personalty by force of the rule under consideration. The Courts would, probably, struggle against such a construction, violating as it does, the manifest intention of the testator, and would read the bequest as a gift to the ancestor for life, with remainder to his issue as purchasers, letting in, as under gifts to children, (*b*) all the objects living at the death of the testator, and who come in esse during the life interest. And this conclusion seems to be somewhat fortified by the difference of construction which has obtained in regard to real and personal estate, where "issue" is used clearly as a word of purchase, no interest being given to the ancestor, (*c*) and derives further confirmation from the case of Fonnereau *v.* Fonnereau, (*d*) which was, in substance, as follows: The testator gave a sum of money to trustees, in trust to pay the interest to his children *for life*, the shares of such of them as should be daughters to their separate use, and, after their respective deceases, in trust to divide their respective shares *among the issue* of such of them so dying as they should by will appoint; and, in default, among the issue equally at twenty-one, with benefit of survivorship among the issue, in case of death under twenty-one, and among the stocks in case of the *death of any without issue, [498] or of the issue under twenty-one: (*e*) Lord Hardwicke held that the share of a child of a testator dying without issue

(*a*) Ante, 351.
(*b*) Ante, 75.
(*c*) See ante, 35.
(*d*) 3 Atk. 315.
(*e*) This is a very brief abstract of the case.

did not belong to him absolutely, but went over, *the interest only being given to him.*

The distinction in regard to the interest only being given, which is taken in this and some other early cases, (*a*) is not very substantial. Interest is the usufruct of money, as rents are of land, and to give it is the ordinary mode of creating a life interest. An unlimited gift of such produce has been held to be equivalent to a bequest of the principal. It is observable, that no such distinction was adverted to by Lord Thurlow, in Knight *v.* Ellis; (*b*) and the case of Attorney-General *v.* Bright is an authority against it.

Upon the whole, the result is, that, though it is clear that, by the rule of construction under consideration, a bequest to a person and his *issue* simply, confers the absolute interest, and though the unqualified terms in which such rule has been often laid down would seem to impel the Courts to the same conclusion, wherever the language of the will is such as would create an estate tail of land, yet it is extremely improbable that, in the absence of direct authority, they would carry it to the extreme point to which the cases have gone in adjudging "issue" to be a word of limitation as to real estate; (*c*) the effect of such construction, by entitling the first taker absolutely, being in general to defeat the intention of the testator. Hence
[499] *(as elsewhere hinted,) (*d*) the inclination to adopt the construction, which reads the word "child," "son," or any other such informal expression, as a word of limitation, is much less strong in reference to personal than real estate. Thus, in the case of Gawler *v.* Cadby, (*e*) where a bequest of leasehold houses to the testator's daughter *and her children* lawfully begotten, and, in default of issue, then, after her death, over, was considered as not conferring on her the absolute interest, though she had no child, and would, therefore, if the subject of gift had been real estate, have taken an estate tail.

So, (*f*) where a testator bequeathed the residue of his personal estate to A; and, in case A should die in his lifetime or afterwards, *without having any child or children*, then gave the residue over. A having died without having had a child, it was contended, on the authority of Chandless *v.* Price, (*g*) that there was no distinction between dying without children, and without having children; and, as the former expression would raise an estate tail in real estate, (*h*) it would have the effect of conferring

(*a*) Smith *v.* Cleaver, 2 Vern. 38, 59; S. C. 1 Eq. Ca. Ab. 362, pl. 13.
(*b*) See ante, 494.
(*c*) Ante, 328.
(*d*) Ante, 316.
(*e*) Jacob, 346.
(*f*) Stone *v.* Maule, 2 Simons, 490. See also Malcolm *v.* Taylor. 2 Russ. & Myl. 416.
(*g*) 3 Ves. 99.
(*h*) See ante, 323.

the absolute interest in personalty. But Sir L. Shadwell, V. C., held, that the legatees over were entitled, conceiving that he ought not to put upon the words in question a construction which they did not strictly bear, for the purpose of defeating the intention of the testator.

In not a few cases, too, bequests to a person and his children have been read as conferring on the original legatee a life interest only, with an ulterior gift of the absolute interest in favor of the children, (*a*) — a species of construction which farther illustrates the disinclination * of the Courts to hold [500] ambiguous terms of this description to operate as words of limitation in reference to personal estate.

The word "issue," under a joint gift to the ancestor and issue, has also been sometimes construed as introducing a substituted gift in favor of these objects, in the event of the failure of the original gift to the ancestor, who, if such gift takes effect, becomes solely and absolutely entitled.

Thus, in the case of Pearson *v.* Stephen, (*b*) where the testator, John Pearson, bequeathed to trustees so much stock as should be sufficient to pay thereout the yearly sum of £1000 to his wife for her widowhood; and, after her decease or marriage, in trust for his five sons (naming them) *and their respective issue*, if any to be divided among them in equal shares; such issue to take per stirpes, and not per capita. He also gave £4000 to be invested in stock, in trust to pay the dividends to his daughter S. during her overture, and, upon the death of G., her husband, to transfer the capital to her for her sole use; but in case G. should survive testator's daughter, then in trust for his said five sons *and their respective issue*, (if any,) to be divided among them in equal shares and proportions, such issue to take per stirpes, and not per capita. The testator also gave the residue of his personal estate to his said five sons "*and their respective issue, (if any;*") such issue to take per stirpes and not per capita, to be divided among them in equal shares and proportions; the shares of such of them as should have attained the age of twenty-one years, to be paid to them respectively * forthwith after the testa- [501] tor's decease; the shares of such of them as should be under that age, to be paid to them when and as they should respectively attain such age. The question was, what interests the five sons (all of whom survived the testator) took under these bequests. Sir J. Leach, M. R., held, that the sons took life interests only, (subject, as to the £4000, to the contingency mentioned in the will,) with the ulterior interest for their children. But this decree was reversed in the House of Lords; where it

(*a*) Vide case stated ante, 316.

(*b*) 5 Bligh, N. S. 204. Of course there is less difficulty in the adoption of this construction where the gift is to a person *or* his issue, vide ante, vol. 1, p. 453; also Price *v.* Lockley, Rolls, 16 Feb. 1843; 7 Jur. 143.

was decided that, under the first bequest, the sons became absolutely entitled; and that, with respect to the £4000, in the event of S. dying in the lifetime of G., the sons of the testator *living at such event* would be absolutely entitled to the stock in equal shares; but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S., would be entitled to the share or shares of the fund, which their parents would have been entitled to, if living, such issue to take the shares in question equally among them; and it was also adjudged that the sons, at the death of the testator, took an absolute interest in the residue. And an opinion was expressed by the Lord Chancellor (Brougham), that, if any of the sons had died in the lifetime of the testator, his children, living at his (the testator's) death, would have taken, by substitution, the share of the parent.

Here, it will be observed, the words "and their respective issue," were considered to raise a gift by substitution, to take effect, as to all the bequests, in the event of any of the legatees dying in the testator's lifetime leaving issue, and as to the £4000 stock, in the farther event of their dying during the suspense of the contingency leaving issue. The clause [502] directing that the issue should *take per stirpes, seems to be decisive against the word being construed as a word of limitation.

The case of Pearson *v.* Stephen was referred to in Gibbs *v.* Tait, (*a*) where a testator bequeathed the residue of his personal estate to his wife during her widowhood, and, after her decease or marriage, he gave what should be remaining one moiety to J., the son of T., his executors and administrators, and the other moiety equally among all the daughters of T., *and their issue*, with benefit of survivorship and accrüer; Sir L. Shadwell, V. C., held, that the daughters, living at the distribution of the fund were absolutely entitled, and not (as had been contended) concurrently with their issue which, his Honor observed, was a most inconvenient construction. He observed, that the case was weaker than Pearson *v.* Stephen.

This remark shows that the Vice-Chancellor considered the case before him to belong to the same class as the cited authority; perhaps the clauses of accruer (which are not stated) may have aided this interpretation.

Sometimes a testator having, in one instance, made an express and particular substitution of issue, thereby affords a ground for applying a similar construction to a bequest in the same will to a person and his issue simply; the inference being, on a view of the entire will, that the intention is the same in the respective cases.

Thus, in the case of Butter *v.* Ommaney, (*b*) where a testator

(*a*) 8 Simons, 132. (*b*) 4 Russ. 70.

bequeathed £2000 to the children of his late sister B. and their lawful issue, in case any of them should die leaving lawful issue. He also gave unto and among all and every the child and children of his late brother Jacob *and their issue* (except his nephew A.), the *sum of £2000, to be [503] equally divided among them, share and share alike, to be paid within twelve months next after his (the testator's) decease. At the date of the will, there were three children of the testator's brother, who had children, and other children were dead leaving issue. It was contended, that the words "and their issue" were words of purchase, and let in the issue of the deceased children; but Sir J. Leach, M. R., held that the three children of Jacob living at the date of the will were absolutely entitled to the legacy.

And here it may be observed, that, where (as in the two preceding cases) the original legatees are living at the death of the testator or the period of distribution, (whichever may happen to be the period of ascertaining the objects,) it becomes unnecessary to determine whether "issue" is a word of limitation or of substitution; the original legatees being entitled to the whole, according to either construction. Hence the only really adjudged point in the last two cases was the rejection of the claim of the issue to participate concurrently with the original legatees.

An instance of the admission of such concurrent claim occurs in the case of Clay *v.* Pennington, (*a*) where a testator in a certain event, bequeathed a residuary fund unto the children of his brother B. *and their lawful issue*, in equal shares, or unto such of them as should prove their right, within two years after notice, in the London Gazette; Sir L. Shadwell, V. C., decided that all the descendants of B., who were living at the period in question, were entitled to participate, and which of course involved a denial of the proposition that "issue" was here used as a word of limitation.

*II. A necessary consequence of the rule that words [504] which create an estate tail in realty confer the absolute interest in personalty, is, that all bequests ulterior to such a gift are void; but this principle does not apply to cases in which personal estate is limited in such terms to several persons not in esse successively; in which case the successive limitations, though having the form of remainders, operate simply as substitutional or *alternative* bequests, each gift in the series being dependent upon the event of the preceding gift or gifts not taking effect.

Thus where a term of years is limited to A for life, with remainder to his first and other sons successively in tail male, with

(*a*) 7 Sim. 370.

remainder to the first and other sons of B in tail. If A die without having had a son, it is clear that the bequest to the *first* son of B (for no son after the first could ever take) is good; but if A have a son, that son becomes entitled absolutely, to the exclusion of the ulterior legatees; so that the limitation is *in effect* a bequest to A for life, and after his death to his first son absolutely, and, if he have no son, to the first son of B; and being necessarily to take effect within the period of a life in being, is free from objection on the ground of remoteness.

To illustrate in detail a point apparently so clear upon principle might seem to be gratuitous labor, were it not that at one period the authorities (including a decision of the Supreme Court of Judicature) sanctioned a contrary doctrine.

In Brett *v.* Sawbridge, (*a*) a testator who was a mortgagee in possession of a term of years, devised it (supposing himself to be seised of an estate of inheritance) * to J., son of H., for life, remainder to his first and other sons in tail male, remainder to two other sons of H., and their sons successively in tail in like manner, remainder to all other the sons of J. successively in tail, with remainder to the right heirs of B. and W. Though it appeared that none of the tenants in tail had come in esse, Sir J. Jekyll, M. R., held, that the limitation over was void; and his decree was affirmed in the House of Lords. The reasons urged in its support were, first, that as the testator intended to dispose of the inheritance, the term did not pass; and secondly, that the limitation over being after an indefinite failure of issue, was void for remoteness. It is not stated upon which ground the House proceeded, but, most probably, as the reporter assumes, upon the latter, as the objection that the testator intended to dispose of the inheritance could not be sustained for an instant as a reason against the devise operating upon the term.

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In regard to the alleged remoteness of the limitation to the heirs of B. and W., however, the case is completely overruled by the determination of the House of Lords in Pelham *v.* Gregory, (*b*) which arose on the will of the Duke of Newcastle, who devised all his freehold and leasehold estates to T. for life, with remainder to his first and other sons in tail male, with remainder to H. for life, with remainder to *his* first and other sons in tail male, with remainder over: T. was living, but had no son; H. had a son, who during the life of T. died, and it was held that the administrator * of such son was

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(*a*) 3 B. P. C. (Toml. ed.) 141, 1736. This case seems to have escaped the research of Mr. Fearne. See also Backhouse *v.* Bellingham, Pollex, 33; Burgis *v.* Burgis, 1 Mod. 115.

(*b*) 3 B. P. C. (Toml. ed.) 204. See also Stanley *v.* Leigh, 2 P. W. 686; Sabbarton *v.* Sabbarton, Cas. Temp. Talb. 55, 245; Gower *v.* Grosvenor, 3 Barn. 54; S. C. cit. in Daw *v.* Pitt, stated 1 Madd. 503; Phipps *v.* Lord Mulgrave, 3 Ves. 613.

absolutely entitled to the leasehold estates, subject only to be defeated by the birth of a son of T., the prior tenant for life.

It is scarcely necessary to observe, that a bequest of a term for years or other personal property in the language of an estate tail, may be made defeasible on a collateral event, in the same manner as any other bequest carrying the whole interest. Thus a legacy to A and the heirs of his body, and if he die without issue, *living B*, to C, is clearly a good executory gift to C. (*a*)

And here it occurs to remark, that the recent enactment (*b*) restricting words denoting a failure of issue to a failure at the death (which we have seen prevents them having the effect of creating an estate tail by implication) will, when applied to personalty, operate to restrain such words from passing the absolute interest, and also to bring within the compass of the rule against perpetuities the ulterior bequest depending on such contingency. If, therefore, a testator, by a will made or republished since 1837, bequeathes personal estate to A, and in case he shall die without issue then to B, A will not take the absolute interest (as formerly) from the ulterior gift being void; but A will take a vested interest in the personalty so bequeathed, defeasible in favor of B, on his (A's) leaving no issue at his death.

Where the bequest is to A expressly for life, and in case of his dying without issue to B, the construction seems also free from doubt. A will, according to the newly-enacted doctrine, take a life interest in *any* event, and B will take the ulterior interest, only in the event of * A's leaving no [507] issue; in the converse event of A leaving issue, the ulterior interest will be undisposed of.

III. When it is intended that leasehold estates or personal chattels, in the nature of heir-looms, shall go with lands devised in strict settlement, they should not be simply subjected to the same limitations;[1] 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 remainder-man, 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

(*a*) Lamb *v.* Archer, Salk. 225. (*b*) Ante, 413.

[1] Ante, 349, note (1.)

shall not vest absolutely in the tenant in tail until twenty-one, or death under that age, leaving issue inheritable under the entail. Whether the Courts are authorized to put this construction upon a direction that the chattels shall go with the lands so long as may be, or so long as the rules of law will permit, has been vexata quæstio. Lord Hardwicke, in Gower *v.* Grosvenor, (*a*) expressed an opinion in the affirmative; but this has been considered as overruled by Foley *v.* Burnell, (*b*) and Vaughan *v.* Burslem, (*c*) where Lord Thurlow held that the property vested absolutely in the tenant in tail on his
[508] birth. The doctrine was much canvassed in the * House of Lords in the case of the Duke of Newcastle *v.* Countess of Lincoln, (*d*) which arose on marriage articles; but the Duke having attained his majority before the case arrived at a hearing, was entitled quacunque via. Lord Eldon, however, entered into a full examination of the authorities; his own opinion being, that the question was concluded by Lord Thurlow's decision, on which point he appears to have differed from Lord Erskine, the then Chancellor.

(*a*) 3 Barnard, 54. See also Trafford *v.* Trafford, 3 Atk. 347.
(*b*) 1 B. C. C. 274.
(*c*) 3 B. C. C. 101.
(*d*) 3 Ves. 387; S. C. in Dom. Proc. 11 Ves. 218.

CHAPTER XLVI.

WHAT WORDS WILL CHARGE REAL ESTATE WITH DEBTS AND LEGACIES.[1]

I. *Liability of Real Estate to simple contract Debts. Whether charged by a general direction in a will that Debts shall be paid. Distinction where a specific fund is appropriated;—where the direction is to Executors, being or not being Devisees. Whether legacies chargeable by same words as Debts, &c.*

II. *Whether direction to raise money out of rents and profits authorizes a sale.*

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[1] See 2 Story, Eq. Jur. § 1246; Ram on Assets, c. 4, § 2, p. 57, *et seq.* In the United States it is the general, if not the universal policy of the law, to make the whole of a man's property liable for the payment of all his *debts*, both during his life and after his death. See 2 Hilliard, Abr. 554.

It has been declared in many cases in this country, that the real estate is never to be charged with the payment of *legacies*, unless the *intention* of the testator so to charge it, is either expressly declared, or fairly and satisfactorily to be inferred from the language of the will. See Stephens *v.* Gregg, 10 Gill & John. 143; Tessier *v.* Wyse, 3 Bland, 28; Garnett *v.* Macon, 2 Brock. 185; Foster *v.* Crenshaw, 3 Munf. 514; Lewis *v.* Thornton, 6 Munf. 87; M'Campbell *v.* M'Campbell, 5 Litt. 97; Harris *v.* Fly, 7 Paige, 421; Luckett *v.* White, 10 Gill & John. 480; Bugbee *v.* Sargent, 23 Maine, 270, 271.

The authorities are very numerous which illustrate the subject, and the distinctions are often extremely nice. See 2 Story, Eq. Jur. § 245, § 1246; Dover *v.* Gregory, 10 Sim. 393; Parker *v.* Marchant, 1 Younge & Coll. (N. S.) 290; Lupton *v.* Lupton, 2 John. Ch. 623; Graves *v.* Graves, 8 Sim. 43, 54–56; Clanmorris *v.* Bingham, 1 Moll. 514; Morancey *v.* Quarles, 1 McLean, 194; Hines *v.* Spruill, 2 Dev. & Bat. Eq. 101; Caldwell *v.* Kinkead, 1 B. Monroe, Eq. 229; Andrews *v.* Sparhawk, 13 Pick. 397; Lewis *v.* Thornton, 6 Munf. 87; West *v.* Biscoe, 6 Harr. & Johns. 460; Copp *v.* Hersey, 11 Foster, (N. H.) 317.

Where a will gave legacies and bequests to A and also devised real estate to him, annexing a "condition" thereto, and made bequests and legacies to B directing A in a subsequent clause, to pay all the just debts of the testator, it was held to be a charge on the real estate. Sands *v.* Champlin, 1 Story C. C. 376.

A devise by the testator to one of his sons in fee, of part of a certain farm, "he paying all my just debts out of said estate," creates not merely a charge as to such debts on the devisee, but a charge on the land devised also. Gardner *v.* Gardner, 3 Mason, 178; Tower's Appropriation, 9 Watts & Serg. 103; Taft *v.* Morse, 4 Metcalf, 523; Veazey *v.* Whitehouse, 10 N. Hamp. 409.

Doubtful words in a will are not to operate the exemption of the testator's personal property from the payment of debts, and the charging them on real estate. Seaver *v.* Lewis, 14 Mass. 83.

Where the two estates are blended, the real estate is equally chargeable with the personal. Adams *v.* Brackett, 5 Metcalf, 280; Bench *v.* Miles, 4 Madd. 187; Hassanclever *v.* Tucker, 2 Binn. 525; Whitman *v.* Norton, 6 Binn. 395. But where the devise was of a farm to the testator's son, "he paying there out" certain pecuniary legacies; it was held that such legacies were a charge on the land, notwithstanding any blending of personal property with real in the devise. Swoope's appeal, 27 Penn. State Rep. 58.

SKETCH of the law as to real estate being assets.
Stat. 47 Geo. III. c. 74.
3 & 4 Will. IV. c. 104, [p. 510.]
Real estates to be assets for payment of debts by simple contract, [p. 510.]
Priority reserved to specialty creditors, [p. 510.]
Difference of effect between enactment and actual charge, [p. 510.]
General direction that debts shall be paid, [p. 511.]
Cases in which lands held *not* to be charged, [p. 511.]
Expressions which have been held to charge, [p. 512.]
"*My debts being first deducted*, I devise all my estate," &c. [p. 512.]
"First, I will that all my debts be paid," "also I devise," &c. [p. 512.]
Similar expression, [p. 512.]
"As to my worldly estate, *my debts being first satisfied*," &c. [p. 513.]
Lands charged under general direction, though particular debts were to be paid out of the first "*money*" that was received, [p. 513.]
"In the first place I will that all my just debts," &c. "be paid," [p. 513.]
Debts to be paid "*out of my estate*," [p. 513.]
Simple direction that "debts be in the first place paid," [p. 514.]
Lord Alvanley's opinion of the effect of a general direction, [p. 514.]
"*After payment of my just debts*," &c. "I bequeath," &c. [p. 514.]
Mere direction that debts, &c. should be paid, [p. 515.]
"I will that my just debts," &c. "be paid," [p. 515.]
Remarks upon Clifford *v.* Lewis, [p. 516.]
Circumstance of devisee being appointed executrix, [p. 516, note.]
As to debts being directed to be paid "first," or in the first place, [p. 517.]
Real estate held not to be charged by general introductory words, [p. 518.]
Sir L. Shadwell's condemnation of Douce *v.* Lady Torrington, [p. 518.]
Recent cases in which real estate held to be charged by general words, [p. 519.]
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Exceptions to the general rule, [p. 520.]
Where testator has appropriated a specific fund to pay the debts, &c. [p. 521.]
Not affected by express charge on residuary personal estate, [p. 522.]
Where the payment is to be made by the executors, [p. 523.]
Direction to *executors* to pay debts held not to charge real estate, [p. 524.]
Distinction where *executor is devisee of real estate*, [p. 525.]
Direction to trustees for sale (also executors) to pay what testator should appoint, held to extend to debts directed to be paid *by his executors*, [p. 526.]
Remark on Parker *v.* Fearnley, [p. 527.]
Effect where debts are to be paid by tenant in tail, &c. [p. 527.]
Where by tenant for life, [p. 527.]
Effect where devisee is *one* of several executors, [p. 528.]
Whether charge extends to several preceding subjects of disposition, [p. 529.]
Whether general charge extends to lands specifically devised, [p. 530.]
Charge of debts "I *have* contracted," [p. 530.]
Whether same words will charge legacies as debts, [p. 530.]
"As to my worldly estate, *after my debts and legacies paid*," [p. 531.]
As to distinction between debts and legacies, [p. 531.]
Whether giving legacies, and then *the rest* of the real and personal estate, charges the legacies, [p. 532.]
Blending real and personal estate together, [p. 532.]
Remarks upon Bench *v.* Biles, [p. 533.]
Case of Hassell *v.* Hassell, [p. 533.]
Whether the giving the "residue" after bequeathing, charges lands, [p. 533.]
Annuities usually included in a charge of *legacies*, [p. 534.]
Direction to raise moneys out of the rents and profits, [p. 534.]
Where it authorizes a sale, [p. 535.]
Doctrine of early cases, [p. 535.]
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Position of text writers, [p. 537.]
General doctrine of the authorities, [p. 537.]
Lord Hardwicke's inclination to hold a direction to pay out of rents and profits to authorize a sale, [p. 537, note.]

Exception, where estate is treated as existing entire after raising of debts, [p. 538.]
Rents and profits confined to annual profits by the effect of particular expressions, [p. 538.]
Effect where "residue" of rents and profits is given, [p. 539.]
Rule where some of the prescribed purposes require a sale, and some not, [p. 540.]
Direction to raise out of the rents and profits, *or* by sale or mortgage, [p. 540.]
As to raising fines for renewal of leases, [p. 541.]
Expenses of renewed lease to be paid out of rents and profits, [p. 541.]
Sale decreed, [p. 541.]

By the common law of England, the real estate of a deceased person was not liable to answer his simple contract debts, no action being maintainable against the heir in respect of descended assets, except by creditors whose debts were constituted by an instrument under seal, *i. e.* a specialty obligation; and not even then, unless an intention to charge the heir of the debtor were distinctly indicated; and the claim of a specialty creditor did not extend to copyholds; (*a*) nor did it extend to devised freeholds, until the act of 3 & 4 William and Mary, c. 14, gave a right of action against the devisee of the debtor, concurrently with the heir, to a certain class of specialty creditors, namely, those whose demands were recoverable by an action of debt.

The first relaxation of this rigid doctrine (so adverse to the policy of a great commercial country) was the act of 47 Geo. III. c. 74, which let in the claims of the simple contract *creditors of a deceased person upon the real [510] assets, *i. e.* the freehold estates, if the debtor was at the time of his decease (*b*) subject to the bankrupt laws. This act was the fruit of the persevering exertions of Sir Samuel Romilly, whose labors in this righteous cause are well known, and was all that those exertions were able to wring from the legislature of that day. But what was denied to the zealous advocacy of this able and upright lawyer, was conceded, without, it is believed, a dissentient voice, by the parliament of William the Fourth,—a striking illustration of the change which public opinion had undergone on this subject. The act of 3 & 4 Will. IV. c. 104, provided, that after the 29th of August, 1833, when any person should die seised of or entitled to any real estate which he should not by his last will have charged with or devised subject to the payment of his debts, the same should be assets, to be administered in courts of equity, for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir at law, customary heir, and devisees of such debtor, should be liable to all the same suits in equity at the suit of any of the creditors, whether by simple contract or by specialty, as the heir at law or devisees were theretofore liable to in respect of freehold estates at the suit of creditors by specialty in which the

(*a*) Parker *v.* Dee, 2 Ch. Cas. 201. (*b*) Hitchen *v.* Bennett, 4 Madd. 180.

heirs were bound; but the creditors by specialty in which the heirs were bound were to be paid before creditors by simple contract or by specialty, in which the heirs were not bound.

During the period when real estate was not liable, unless charged by its deceased owner, to pay his simple contract debts, of course it was a question of importance (and
[511] *sometimes too of no small difficulty) to determine whether such charge were in point of fact created by the will of the debtor; and this question is not wholly precluded by the recent enactment; for it will be observed that the statute does not interfere with the general rule regulating the priority between creditors by specialty binding the heirs and other creditors; a specialty creditor, whose security binds the heirs, having precedence over a creditor by simple contract or by specialty not binding the heirs, in the administration of assets under the act; while, on the other hand, under a general charge both classes of creditors come in pari passu. Another difference is, that under the statute the creditors have not (as in the case of an actual charge) any lien on the estate. (*a*) If, therefore, it is parted with by the heir or devisee before the creditor has pursued his remedy, the estate cannot be followed; though the creditor's lien under an actual charge is of no great value to him, since it does not prevail against a bona fide purchaser for a pecuniary consideration; the well-known rule being that such purchasers are not bound to see their money applied in payment of debts under a general charge. (*b*) Hence it is obvious that the inquiry whether real estate is or is not charged with debts by certain expressions in a will, is still important, even in regard to the wills of testators dying since the 29th of August, 1833.

Whether a general direction by a testator that his debts shall be paid, charges the real estate with the payment, is a point which has been much agitated from an early period.[1]

In an anonymous case in Freeman (*c*) it was held
[512] that the land was *not* *charged in such cases; "for, if that should be so, the debts of every testator would be charged upon his land, for there are but few wills but have some such expressions, whereby the testator desires his debts to be paid."

A similar doctrine was propounded in Eyles *v.* Cary; (*d*) but it seems to be irreconcilable with that of numerous other early

(*a*) 4 My. & Cra. 268.
(*b*) 3 Sug. Vend. & P. (10th ed.) 154. And where debts and legacies are charged, the exemption extends to both, and even, it seems, to annuities.
(*c*) Freem. Ch. Ca. 192.
(*d*) 1 Vern. 457; S. C. 1 Eq. Ca. Ab. 198, pl. 3.

[1] A mere direction to pay debts and legacies, does not create a charge on real estate. Lupton *v.* Lupton, 2 Johns. Ch. 624.

authorities, in which a direction for the payments of debts generally, or (though this is certainly stronger) for the payment of them *out of the testator's estate*, has been held to onerate the real estate devised by the will.

Thus, in Newman *v.* Johnson, (*a*) where the testator said, "*My debts and legacies being first deducted*, I devise all my estate, both real and personal, to J. S.;" Lord Nottingham held, that it amounted to a devise to sell for payment of debts.[1]

So, in Bowdler *v.* Smith, (*b*) where a testator devised as follows: "*As to my temporal estate wherewith God hath blessed me, I give and dispose thereof as followeth: First, I will that all my debts be justly paid which I shall at my decease owe;* also I devise all my estate in G. to A." This was all the real estate the testator had; and it was held that the will charged it with the debts.

And in Trot *v.* Vernon, (*c*) where a testator devised in these words: "*Imprimis, I will and devise that all my debts, legacies, and funeral expenses, shall be paid and satisfied in the first place:* Item, I give and devise;" and then proceeded to dispose of his real and personal estate: Lord Chancellor Cowper held, that the testator having *willed his debts, &c. to [513] be satisfied in the first place, these words must be intended to give a preference to those purposes to any other whatever; and he held the real estate to be charged.

Again, in Harris *v.* Ingledew, (*d*) where the testator said, "As to my worldly estate, *my debts being first satisfied*, I devise the same as follows," and then proceeded to devise certain freehold and leasehold lands; Sir J. Jekyll, M. R., held, that nothing was devised until the debts were paid. He thought it would have been sufficient, though the word "first" had been omitted.

So, in Hatton *v.* Nichol, (*e*) where the testator commenced his will thus: "As to the worldly estate with which it hath pleased God, in his abundant goodness, to bless me, I give, devise, and dispose thereof, as followeth: *Imprimis, I will that the charges of my funeral and all debts which shall be owing by me at the time of my death, be justly paid and satisfied*, especially that due to my poor carriers, which I will shall be discharged

(*a*) 1 Vern. 45; S. C. 1 Eq. Ca. Ab. 197, pl. 1. And see Harris *v.* Ingledew, 3 P. W. 91; Davis *v.* Gardiner, 2 P. W. 187.
(*b*) Pre. Ch. 264. See also Coombes *v.* Gibson, 1 B. C. C. 273.
(*c*) Pre. Ch. 430; 1 Vern. 708; 1 Eq. Ca. Ab. 198, pl. 6, S. C. See also Beachcroft *v.* Beachcroft, cited ante, 140, 141.
(*d*) 3 P. W. 91.
(*e*) Cases Temp. Talb. 110.

[1] Where there is a devise of real estate *after payment of debts and legacies*, or after a direction that all debts and legacies be *first* paid, the real estate is charged. Lupton *v.* Lupton, 2 Johns. Ch. 614, 624. See 2 Story, Eq. Jur. § 1246.

out of the first *money* of mine that shall be received;" and then he proceeded to devise his real estate to certain uses. Lord Talbot held, that the debts were well charged upon the real estate.

Again, in Stangor *v.* Tryon, (*a*) where the words were, "*In the first place, I will that all my just debts and funeral expenses be fully paid and satisfied;*" and the testator then devised copyhold lands; Sir T. Sewell, M. R., held the copyholds liable to the debts. The case of Kay *v.* Townsend, (*b*) decided about the same period, is to the same effect.

In Legh *v.* Earl of Warrington, (*c*) a testator thus commenced his will: "As to my worldly estate which it
[514] hath *pleased God to bestow upon me, I give and dispose thereof in manner following; that is to say, *Imprimis*, I will that all my debts, which I shall owe at the time of my decease, be discharged and paid *out of my estate;*"[1] (*d*) and he then proceeded to dispose of his real and personal estate, expressly charging the former with an annuity. It was contended, that these were merely the usual introductory words, and did not indicate an intention to charge the real estate; but the House of Lords, affirming a decree of Lord King, held the real estate to be charged.

This case has always been regarded as a leading authority. It was recognized by Lord Hardwicke in the case of the Earl of Godolphin *v.* Pennick, (*e*) and by Lord Loughborough in Williams *v.* Chitty. (*f*)

So, in Kentish *v.* Kentish, (*g*) where the testator said, "*First, I will that all my just debts shall in the first place be paid and satisfied.* Item—I give and bequeath;" and went on to devise his real estate; Buller, J., held it to be charged.

In Kightley *v.* Kightley, (*h*) too, Sir R. P. Arden, M. R., assumed that debts were charged on the real estate by the words, "First, I will and direct that all my legal debts, legacies, and funeral expenses shall be fully paid and satisfied;" which were followed by a direction to the testator's executors about his funeral, and a devise of his lands. But the legacies (*i*) he held were not charged by these words.

(*a*) See Mr. Raithby's note to Trott *v.* Vernon, 2 Vern. 709.
(*b*) Ibid.
(*c*) 1 B. P. C. (Toml. ed.) 511.
(*d*) These words are added from a manuscript report stated by Mr. Belt, in his Supplement to Ves. Sen. 341.
(*e*) 2 Ves. Sen. 271. As this case is rather loosely stated, and seemed very little to illustrate the general doctrine, it has been omitted.
(*f*) 3 Ves. 552 [Sumner's ed. note (*b*)].
(*g*) 3 B. C. C. 257 [Perkins's ed. note (*a*)].
(*h*) 2 Ves. Jun. 328. [See Mr. Hovenden's notes to this case in Sumner's ed.]
(*i*) As to the distinction between them, see post, p. 531.

[1] Gardner *v.* Gardner, 3 Mason, 178.

So in Shallcross *v.* Finden, (*a*) where a testator began his will thus; "*after payment of my just debts, funeral*
* *expenses, and the expenses of the probate hereof,* (*b*) as [515] likewise of my testamentary articles, I give and bequeath unto" H. £50, "and as to such expectancies in fee," &c.; and the testator then proceeded to devise his interest in certain lands; Sir R. P. Arden, M. R., held, that the real estate in question was charged with the debts. The words, "after payment of my debts," he said, meant that the testator would not give any thing until his debts were paid.

With singular inconsistency, however, the same learned Judge, in Hartley *v.* Hurle, (*c*) assumed, in the discussion of another question, that a general direction by a testator that his debts, funeral and testamentary expenses should be paid, was a direction *to his executors*, the persons who take the personal estate, to pay them.

In Williams *v.* Chitty, (*d*) a testator ordered and directed *all his just debts and funeral expenses to be first paid;* and then proceeded to devise his real estate. Lord Loughborough's first impression was, that the real estate was not charged; but he ultimately came to a different conclusion upon the authorities, which he considered had established the rule, "that wherever there is mention of debts in a will, and that will devises real estate, that shall throw the debts upon the real estate."

Next, in chronological order, is the case of Clifford *v.* Lewis, (*e*) where a testator commenced his will by saying, "I will and direct that my *just debts, funeral and testamentary expenses, be paid and satisfied.*" He then, after some recitals, bequeathed an annuity to his wife, charging his real estate in certain counties therewith; and went on to dispose of the rest of the real and personal estate. Sir J. Leach, V. C., said, "The
* question is, whether the expression with which he [516] has commenced his will, imports a general and primary purpose that the payment of his debts, funeral and testamentary expenses, should precede the subsequent dispositions which he has made of his property. In Finch *v.* Hattersley, (*f*) the will began thus: '*First*, I direct, that my debts, &c., &c., be paid.' In Legh *v.* Warrington, '*Imprimis*, I direct my debts to be paid.' Both these wills must be read thus: '*In the first place*, I direct

(*a*) 3 Ves. 739. [See Kidney *v.* Coussmaker, 1 Ves. (Sumner's ed.) 436, note (*a*)].
(*b*) For a similar expression, see Batson *v.* Lindegreen, 2 B. C. C. 94 [see Perkins's ed. note (*a*)]; Kidney *v.* Coussmaker, 12 Ves. 136, post.
(*c*) 5 Ves. 545. [See Sumner's ed. 540, Perkins's note (*a*)].
(*d*) 3 Ves. 545.
(*e*) 6 Madd. 313.
(*f*) Cit. 7 Ves. 211, stated 3 Russ. 345, n. The testator said, "First, I will that my debts and funeral expenses to the amount of £20 be paid," and then devised his real estate to his wife for life, *whom he appointed executrix.* The circumstance of the devisee being appointed executrix was, in Powell *v.* Robins, 7 Ves. 211, considered by Sir W. Grant as the ground of the decision.

my debts to be paid.' This testator has *in fact* first directed his debts to be paid; and I cannot attribute to him a different intention, because, in *the form of the expression*, he has not remarked that it was *in the first place*."

Sir John Leach here seems to have treated the question before him, as lying within a very narrow compass, namely, whether a direction inserted at the commencement of the will was equivalent to an express direction to pay "in the first place;" though it is not a little singular that, on a subsequent occasion, (*a*) the same learned Judge, when the Master of the Rolls, referred to the case of Clifford *v.* Lewis, as distinguished from the one before him by the circumstance, that the testator's debts were directed in the first place to be paid. In some of the early cases, undoubtedly, reliance was placed on expressions of this nature; but most of them proceeded upon the broad ground that a general direction that debts should be paid with or without such concomitant expressions, and whatever was
[517] its position *in the will, (*b*) charged the real estate. The words "in the first place," indeed, as here used, it is submitted, are merely introductory words of form, denoting the commencement of the testamentary act, (*c*) or, if they have any meaning, only denote the order of payment, not the fund out of which payment is to be made.

Some stress certainly was laid on a phrase of this nature in the subsequent case of Ronalds *v.* Feltham, (*d*) where a testator commenced his will in these words: "First, I direct all my just debts and funeral expenses to be fully paid and satisfied;" and then proceeded to dispose of all his copyhold, freehold, and leasehold estates, and all his other property, among his wife and children. Sir T. Plumer, M. R., held, that the real estate was charged, observing, in reference to the argument upon the word "first," in this will being nothing more than the ordinary technical form of introductory words, that here it was not followed by other words denoting succession, such as secondly, thirdly, &c.

But a more sensible view of this point was taken by Sir L. Shadwell, in the case of Graves *v.* Graves (*e*) where his Honor said, "I do not think that the charge is made to rest on the mere circumstance that the testator has used the words 'imprimis,' or 'in the first place;' for, if a testator directs his debts to be paid, is it not in effect, a direction that his debts shall be paid in the first instance?"

In the case of Irving *v.* Ironmonger, (*f*) we have another in-

(*a*) See Douce *v.* Lady Torrington, 2 Myl. & Keen, 600.
(*b*) That the position of such clauses is immaterial, see Rideout *v.* Dowding, 1 Atk. 419; Clark *v.* Sewell, 2 Atk. 96.
(*c*) See Beeston *v.* Booth, 4 Madd. 161.
(*d*) 1 Turn. & Russ. 418.
(*e*) 8 Sim. 55.
(*f*) 2 Russ. & Myl. 581.

stance of real estate being held to be charged by a general direction *at the commencement of the will [518] without the words "in the first place," and that too by Sir John Leach, whose reliance on such words has been already the subject of comment; though his Honor certainly does not appear to have uniformly maintained the efficacy of a general direction, as appears by the case of Douce *v.* Lady Torrington, (*a*) where the testator, after directing all his just debts, funeral and other incidental expenses, to be paid with all convenient speed after his decease, and, confirming his marriage settlement, devised all his real estate to trustees (whom he also appointed executors) and their heirs, upon trust to pay his wife an annuity, and upon the further trusts therein mentioned. By a codicil, the testator directed that his trustees should, out of the rents arising from one of his estates, pay his wife's annuity, and also an annuity to his son, and apply the surplus in discharge of the simple contract debts owing by him (the testator). One question was, whether the other estates were charged with the testator's debts by the effect of the general direction at the commencement of his will. Sir J. Leach, M. R., decided in the negative; he intimated the strong inclination of his opinion to be, that the introductory words had no such effect, but that it was unnecessary to decide the question upon that ground, as it was plain from the codicil that the testator did not intend a general charge upon his real estate, for by that codicil he directed the surplus only of a particular estate, after payment of the annuities, to be applied in payment of the simple contract debts.

Of this case, Sir L. Shadwell, in Graves *v.* Graves, (*b*) observed, that it seemed to have been an amicable decision, and to have been made without sufficient consideration. Indeed, so far as *it denied effect to general intro- [519] ductory words, the case directly clashes with the preceding authorities, to which may now be added several more recent cases, which preclude all hesitation in affirming the rule to be, that, subject to the question presently noticed, a general direction to pay debts, in whatever part of the will contained, operates to throw them on the testator's real estate.

Thus, in the case of Ball *v.* Harris, (*c*) a will which commenced with the following words: "First, I direct all my just debts, funeral and testamentary expenses, and the charges of the probate of this my will, to be paid;" and then contained pecuniary

(*a*) 2 Myl. & Keen, 600.

(*b*) 8 Sim. 56.

(*c*) 8 Sim. 485; S. C. 4 My. & Cra. 264. In this case, and in Shaw *v.* Borrer, 1 Keen, 559, the doctrine that a general direction to pay debts charged them on the real estate, was treated as too clear for discussion; the only contest being whether such a charge conferred an implied authority to sell on the person taking the legal estate subject to certain trusts, which was decided in the affirmative.

legacies and devises of real estate—was held by both Sir L. Shadwell and Lord Cottenham to charge the testator's real estate.

So, in the case of Harding *v.* Grady, (*a*) a similar construction was given by Sir Edward Sugden to the following concluding passage in a will: "I desire that all my just debts be paid as soon as conveniently after my decease." In this case there was the peculiarity that the will embraced real estate only, but the Chancellor's remarks render it probable that his adjudication would have been the same if the will had included personalty.

So, in Parker *v.* Marchant, (*b*) Sir K. Bruce, V. C., treated it as clear that real estate was charged by the following words: "I direct, in the first place, all my debts to be paid;" the will then proceeding to dispose of personal, and ultimately of real estate.

[520] * Such, then, is the long line of cases in which it has been held that a general direction by a testator that his debts shall be paid, charges them upon his real estate. Though certainly in some of the wills there were expressions which might fairly be considered to sustain the construction independently of any such doctrine, it seems to be generally admitted that the Courts have allowed their anxiety to prevent moral injustice, by the exclusion of creditors, "and that men should not sin in their graves," to carry them beyond the limits prescribed by established general principles of construction; though Lord Alvanley's observation in Shallcross *v.* Finden, (*c*) that the restricting the direction to pay to personalty renders it nugatory, that being before liable, is not without weight.

The only doubt which the preceding authorities admit of is, whether a general direction that debts shall be paid, will throw them on real estate when contained in a will, the dispositions of which are otherwise confined to personalty; for it is observable that in all the cases which have yet occurred the will appears to have embraced real estate. The total absence of any devise or mention of realty would certainly be a new feature; though, considering the strong tendency of the recent cases in favor of such charges, it seems unlikely that any distinction of this nature will be established. So long ago as the case of Shallcross *v.* Finden, (*d*) we have a dictum of Sir R. P. Arden which seems to bear upon the point under consideration: "I am very clearly of opinion," said this able Judge, "that whenever a testator says that his debts shall be paid, that will ride over every disposition, either against his *heir at law*, or devisee."

(*a*) 1 Drury & W. 430.
(*b*) 1 You. & Col. N C. 290; Shaw *v.* Borrer, 1 Keen, 559. See also Price *v.* North, 1 Turn. & Phill. 85.
(*c*) 3 Ves. 739.
(*d*) Ibid.

The rule, however, seems to be subject to two material exceptions. *First, where the testator, after generally directing his debts to be paid, has provided a specific fund for the purpose. [521]

Thus, in Thomas *v.* Britnell, (*a*) where the testator first ordered all his debts to be honorably paid immediately after his decease; and in a subsequent part of his will devised certain hereditaments, *excepting H. and R.*, to trustees, upon trust, out of the money arising by the sale, to pay and discharge his *debts*, funeral expenses, and all legacies given by that will or any other writing under his hand. He afterwards directed that H. and R. should be in the first place for payment of the *legacies* mentioned in his will. Sir J. Strange, M. R., held that H. and R. were not subject to the payment of debts. Though on the first part, he said, the Court might take the whole real estate to be charged with debts, yet as there was no *express* lien on the real by these general words, and afterwards the testator appropriated certain part of his real for debts (*and legacies*), and other part for legacies, it was too much to lay hold of the general words to say that the whole should be charged with payment of debts. It could be done only by implication on the general words, which might be explained afterwards, and that implication destroyed.

So, in the case of Palmer *v.* Graves, (*b*) where the testator commenced his will with the following words: "In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will to be duly paid;" and then proceeded to dispose specifically of certain freehold and leasehold property. The testator gave to his son A, his heirs, executors, administrators, and assigns, all the residue of his real and personal estate, with the rents and profits of his freehold and leasehold hereditaments *up to the quarter day next ensuing [522] after his decease, *which rents and profits he charged with the payment of his debts, funeral expenses, and the charges of proving his will;* and the testator appointed A executor. Lord Langdale, M. R., held, that the real estate was not charged by the introductory words, as the general charge by implication was controlled by the specific charge in the subsequent part of the will.

However, it is clear, that a charge created by general introductory words is not controlled by a subsequent passage furnishing conjecture only of a contrary intention, and not actually inconsistent with such charge. As where (*c*) a testator, after willing all his just debts, funeral expenses, and the charges of proving his will to be paid, devised real estate, and gave some legacies, and then proceeded to bequeath all the residue of the testator's

(*a*) 2 Ves. Sen. 313.
(*b*) 1 Kee. 545.
(*c*) Price *v.* North, 1 Turn. & Phill. 85.

personal estate, *after and subject to the payment of all his just debts, funeral and testamentary expenses, and the legacies thereinbefore bequeathed.* Lord Lyndhurst, C., held, that the latter words were not inconsistent with an intention to charge the real estate as an auxiliary fund; observing, that courts of equity had always been desirous of sustaining such charges for the benefit of creditors; and the presumption in favor of them was not to be repelled by any thing short of a clear and manifest evidence of a contrary intention.

And Sir L. Shadwell, V. C., came to a similar conclusion on a special and very inaccurately framed will in the case of Graves *v.* Graves. (*a*)

And here, it should be observed, that the doctrine of the preceding cases extends only to charges on real estate
[523] created by general and ambiguous expressions; for, * of course, a clear and explicit charge on real estate is not liable to be controlled by an express appropriation of particular lands to the purpose, (*b*) or a qualified charge of the real estate in the same will. (*c*)

The second exception to the general rule under discussion occurs where the debts are directed to be paid by *executors*, in which case, unless land be devised to them, it will be presumed that payment is to be made exclusively out of funds which, by law, devolve to the executors in their representative character.

Thus, in Brydges *v.* Landen, (*d*) where the testator commenced his will as follows: "Imprimis, that all my debts and funeral charges and expenses be, in the first place paid, *by my executrix*, hereinafter named; then, as to my real and personal estate, I dispose of as follows;" and, after making such disposition, he charged and made liable all his real and personal estate, with two sums of £150 to each of his daughters. All the cases were considered by Lord Thurlow, who was clearly of opinion that the real estate was not charged.

It is remarkable that this decision did not, in some degree, abate the confidence with which Sir R. P. Arden, and Lord Loughborough, the former in Kightley *v.* Kightley, (*e*) and Shallcross *v.* Finden, (*f*) and the latter in Williams *v.* Chitty, (*g*) insisted that a general direction that debts should be paid charged the real estate, inasmuch as it seems to have been decided by Lord Thurlow, without allusion to the circumstance, that the direction to pay was *to the executors.* The case

(*a*) 8 Sim. 43.
(*b*) Ellison *v.* Airey, 1 Ves. Sen. 568; Coxe *v.* Bassett, 3 Ves. 155.
(*c*) Crallan *v.* Oulton, 3 Beav. 1.
(*d*) Ch. 26 Jan. 1786, 31st Oct. 1788, cited 3 Ves. 550, stated from the Registrar's book, 3 Russ. 345, *a*.
(*e*) Ante, p. 514.
(*f*) Ante, p. 514.
(*g*) Ante, p. 515.

was *afterwards followed, however, (but with the same apparent disregard of this peculiarity,) by Sir R. P. Arden himself. [524]

Thus, in Keeling *v.* Brown, (*a*) the words were, "Imprimis, I will and direct that all my just debts and funeral expenses be paid and discharged as soon as conveniently may be after my decease, *by my executrix and executors hereinafter named.* Item, I give, devise, and bequeath unto J. all that my messuage," &c.; and, after other devises, and giving his wife an estate for life in part of the real estate, the testator appointed his wife and two other persons (who took *no* interest in the real estate) executrix and executors. Sir R. P. Arden, M. R., said he could not, with all the disposition he always felt to give such a construction to wills as should make testators honest, construe this into a charge upon the real estate; it would be a violence to all language, and making a will for the testator.

Again, in Powell *v.* Robbins, (*b*) where a testator first *devised* that all his just debts and funeral expenses might be satisfied and paid *by his executors therein named* as soon after his decease as might be, and then gave certain leasehold premises to his wife, and afterwards devised a freehold estate to his son D., and appointed W. and G. executors. Sir W. Grant, M. R., upon the authority of Brydges *v.* Landen, (*c*) Williams *v.* Chitty, (*d*) and Keeling *v.* Brown, (*e*) held that this estate was not charged, *inasmuch as no real estate passed *to the executors who were directed to pay.* [525]

Again, in the case of Willan *v.* Lancaster, (*f*) where a testator directed that his debts should be paid by his executors, and "*then*" devised his lands, it was contended that the word "then" was equivalent to *after payment of the debts;* (*g*) but Sir J. S. Copeley, M. R., held that it was merely used in the sense of *further*, and that the debts were not charges on the real estate.

Where, however, the executor is devisee of real estate, a direction even *to him* to pay debts or legacies will cast them upon the realty so devised.

(*a*) 5 Ves. 859, [Sumner's ed. Perkins's note (*a*) and cases cited.]
(*b*) 7 Ves. 209, [Sumner's ed. note (*a*) and cases cited.]
(*c*) Ante, p. 523.
(*d*) Supra. But this was a determination the other way, the direction being general, and not expressly to the executors. Lord Loughborough's arguments at the hearing, indeed, pointed to the conclusion that it was not a charge; but he afterwards decided the contrary, upon the authorities.
(*e*) Supra.
(*f*) At the Rolls, 14th Nov. 1826, MS.; S. C. 3 Russ. 108. See also Braithwaite *v.* Britain, 1 Kee. 206; but where it is observable that the direction *to the executors* to pay the debts, on which Lord Langdale relied in his judgment, does not occur in the will, as reported.
(*g*) As to this expression, see ante, 514; also vol. 1, p. 743. The argument founded on the word "then," in this case, very much resembles that which lays stress on the words "Imprimis," "in the first place," as to which, see ante, p. 517.

Thus, in the early case of Aubrey *v.* Middleton, (*a*) where a testator gave several legacies and annuities, to be paid *by his executor*, and then devised all the rest and residue of his goods and chattels *and estate* (*b*) to his nephew, (who was his heir at law,) *and appointed him executor of his will;* Lord Cowper held the real estate was chargeable with the legacies and annuities in aid of the personal estate.

So, in the case of Alcock *v.* Sparhawk, (*c*) the testator devised certain lands to A (his heir at law) and his heirs; he then gave a legacy to B to be paid *by his executor* within five
[526] *years after his decease; and appointed A sole *executor* of his will, desiring him to see the will performed; it was held that the legacy was charged upon the land devised to A.

So, in Barker *v.* Duke of Devonshire, (*d*) where a testator devised all his real and personal estate unto and to the use of several persons, their heirs, &c., in trust by sale or mortgage thereof to pay *whatsoever he should thereafter by will or codicil appoint.* He then appointed these persons his executors, and proceeded to direct that *his just debts, funeral expenses, &c., should be paid by his executors.* Sir W. Grant held that this authorized a sale for the payment of debts, though it was contended that the direction being *to the executors*, showed the intention of the testator to confine it to personal estate.

Again, in the case of Henvell *v.* Whitaker, (*e*) where a testator directed that all his just debts and funeral expenses should be paid by his executor thereinafter named, and then gave all his real and personal estate to his nephew A, his heirs, executors, administrators, and assigns, and appointed him executor; Sir J. S. Copley, M. R., decided that the direction to the nephew to pay the debts operated to charge all the property, both real and personal, which he derived under the will.

It is difficult to reconcile with this line of authorities the case of Parker *v.* Fearnley, (*f*) where a testatrix having directed legacies to be paid by her executor, to whom she devised all her real estates in fee, and also the residue of her personalty, after payment of her debts and funeral expenses, Sir J. Leach,
[527] V. C., held, that the *pecuniary legacies were not charged on the real estate devised to the executor.

As this case was prior to, it must be considered as overruled by, Henvell *v.* Whitaker, with which it is clearly inconsistent.

(*a*) 2 Eq. Ca. Ab. 479, pl. 16; Vin. Ab. Charge (D) pl. 15.

(*b*) As to the operation of this word to carry the real estate, see ante, vol. 1, p. 657.

(*c*) 2 Vern. 228; S. C. 1 Eq. Ca. Ab. 198, pl. 4. See also Goodright d. Phipps *v.* Allen, 2 W. Bl. 1041; Doe d. Pratt *v.* Pratt, 6 Adol. & Ellis, 180.

(*d*) 3 Mer. 310.

(*e*) 3 Russ. 343. See also Dover *v.* Gregory, V. C., Dec. 18, 1839, reported 9 Law Jour. N. S. Ch. 89.

(*f*) 2 Sim. & Stu. 592.

Neither Aubrey *v.* Middleton nor Alcock *v.* Sparhawk was cited to, or noticed by, the Vice-Chancellor.

And the circumstances that the estate given to the devisee is an *estate tail*, and the direction to pay the debts is connected by juxtaposition with the bequest of the personalty and the appointment of executor, and separated by several intervening sentences from the devise of the lands, are, it seems, immaterial.

Thus, in Clowdsley *v.* Pelham, (*a*) where a testator devised land to *A and the heirs of his body*, remainder over; and in another part of his will gave to A all the personal estate, and appointed him executor, *willing him to pay the testator's debts;* it was held that the real estate was charged.

It is not equally clear, however, that a direction to an executor to pay debts would have the effect of charging lands devised to him *for life* only. Undoubtedly, in Finch *v.* Hattersley, (*b*) the real estate was held to be charged under circumstances of this nature; but it does not appear that the fact of the executrix being a devisee for life of the real estate had any influence upon the Court; and as the case was decided when a general direction to an executor to pay debts might possibly have been considered sufficient to charge them upon real estate *not devised to the executor*, (the doctrine upon the subject being more lax and the distinctions less defined than at present,) the * case [528] cannot be relied on as an authority on the point above suggested.

It is quite clear, however, that a limited estate devised to *one* of several executors in the testator's lands will not be charged with debts, under a direction to the executors to pay them. (*c*) Indeed such is clearly the rule even where an estate *in fee* is devised to *one* of several executors.

Thus, in the case of Warren *v.* Davies, (*d*) where a testator directed that his debts and legacies, funeral expenses and testamentary charges, should be paid by his executors thereinafter named; and after directing certain real estates to be sold by his executors on the decease of his wife, he devised certain messuages and lands to his son Thomas Davies, in fee, and gave him the residue of his real and personal estate. The testator appointed Thomas Davies *and another* executors. Sir J. Leach, M. R., held that the estate devised to Thomas Davies was not to be considered as charged with the debts and legacies directed to be paid by the executors, merely because the devisee happened to be one of the executors. And the same rule seems to have been acted upon by the same learned Judge, though without any distinct recognition of this ground of decision, in the subsequent case of Wasse *v.* Heslington. (*e*)

(*a*) 1 Vern. 411; S. C. 1 Eq. Ca. Ab. 197, pl. 2.
(*b*) 3 Russ. 345, n.
(*c*) See Keeling *v.* Brown, 5 Ves. 359.
(*d*) 2 Myl. & Keen, 49.
(*e*) 3 Myl. & Keen, 495.

Where a testator gives his real and also his personal estate, after payment of debts, &c., it is sometimes a question whether these words extend to charge both the preceding objects of gift, or apply only to the immediate antecedent, namely, the personal estate.

Thus, in the case of Withers *v.* Kennedy, (*a*) where
[529] a * testator, after bequeathing to his wife certain effects, gave, devised, and bequeathed all his freehold, copyhold, and leasehold estates whatsoever and wheresoever, and all the residue of his personal estate and effects, *after payment of his just debts and his funeral expenses, and the charges of proving his will, and of carrying the trusts thereof into execution*, to trustees, their heirs, executors, and administrators, upon trust for his wife for life, with other limitations over; it was contended, that the personal estate being the natural fund for the payment of debts, it was a more obvious and natural construction to refer these words to the immediate rather than the more remote antecedent; that more remote antecedent being a species of property not legally liable to debts; but Sir J. Leach, M. R., though he admitted that the expression in the will afforded some color to this argument, considered that, in plain construction, the words in question were to be referred to the freehold, copyhold, and leasehold property, as well as to the personal estate. His Honor considered it to be an objection to the opposite construction, that it imputed to the testator the intention of exempting his leaseholds from the payment of his debts, &c., which species of property was by law subject to them.

In Kidney *v.* Coussmaker, (*b*) the question was much contested, whether, where a testator devises lands in trust to be sold, declaring that the produce shall go in the same manner as the personal estate, and then bequeathes the personalty, "after payment of his debts," the produce of the real estate was by these words (which were clearly inoperative in regard to the *personalty*) charged with the debts. It was not necessary to decide the point.

[530] * Where a testator has manifested an intention to charge his real estate with the payment of either debts or legacies, the question sometimes arises, whether such charge extends to the specific as well as the residuary lands, or is confined to the latter.

As, in Spong *v.* Spong, (*c*) where a testator, after specifically devising certain lands to A and other persons, and charging his real and personal estate with his legacies, and then bequeathing

(*a*) 2 Myl. & Keen, 607.
(*b*) 1 Ves. Jun. 436; S. C. in Dom. Proc. 7 B. P. C. (Toml. ed.) 573. See also 2 Ves. Jun. 263.
(*c*) 1 You. & Jerv. 300; S. C. 3 Bligh, N. S. 84.

some pecuniary legacies, gave the residue of his real and personal estate to A. The House of Lords, reversing a decree of the Exchequer, held the legacies not to be charged upon the lands specifically devised; for that, in construing charges of this nature, specific and residuary devises, though, for many purposes, governed by a common principle, were to be distinguished; especially as, in the case under consideration, the testator had shown such a distinction to be in his view by devising particular lands to the person whom he made residuary devisee.

Here it may be observed, that, in construing provisions for payment of debts, the Courts are averse to an interpretation which would restrict the provision to debts subsisting at a given period during the life of the testator; and therefore, although words in the present tense generally refer to the time of making the will, (*a*) yet it has been held, that a charge of all the debts "I *have* contracted since 1735," extended to future debts. (*b*)

It has sometimes been made a question, whether similar words which will charge real estate with *debts* will suffice to onerate it with legacies; or whether, in order to throw legacies upon the land, a clearer manifestation of *intention is [531] not requisite. Sir R. P. Arden, M. R., and Lord Loughborough, were long at issue upon the point; the former maintaining, and the latter denying, the distinction, (*c*) which, however, did not originate with Sir R. P. Arden; for it is to be traced in the early case of Davis *v.* Gardner, (*d*) where the testator commenced his will thus: "As to my worldly estate, I dispose of the same as follows, *after my debts and legacies paid;*" and then gave several legacies, adding, "After all my legacies paid, I give the residue of my *personal* estate to my son," and then devised his lands; and Lord Macclesfield held, that the legacies were not a charge upon the realty; his Lordship observing, that "as plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate of an heir, which is a disinherison pro tanto." In a note to this case, the reporter adds, that, if there had been a want of assets for the payment of debts, it seems that the land would have been charged therewith.

The distinction in question appears to have been a natural consequence of the extreme length which the Courts had gone in holding *debts* to be charged by loose and equivocal expressions, the unfairness of which, when applied to legacies, became

(*a*) Ante, vol. 1, p. 277.
(*b*) Bridgman *v.* Dove, 2 Atk. 201.
(*c*) Kightley *v.* Kightley, 2 Ves. Jun. 328; Chitty *v.* Williams, 3 Ves. 551; Keeling *v.* Brown, 5 Ves. 361.
(*d*) 2 P. W. 187.

apparent, "there being no reason (as Sir R. P. Arden has observed) why a specific devise should not take effect as much as a pecuniary one." (*a*)

In Trott *v.* Vernon, (*b*) however, and several of the other cases before stated, (*c*) in which debts and legacies were
[532] coupled in one clause, there is no mention of * any such distinction; and instances may certainly be adduced from the later cases, in which legacies have been held to be charged upon land, by expressions of a character scarcely more decisive than those which have this operation in regard to debts.

Thus, in Hassell *v.* Hassell, (*d*) where the testator devised and bequeathed certain legacies, and then gave, devised, and bequeathed all his real and personal estate *not thereinbefore disposed of;* Lord Bathurst held, that the legacies were charged upon the real estate.

And Lord Hardwicke, in Brudenell *v.* Boughton, (*e*) seems to have thought that where a testator gave certain legacies, and then the *rest* of his estate, *real* and personal, to A, whom he appointed executor, the legacies were charged upon the land; but the case was not decided on this point.

So, in the case of Bench *v.* Biles, (*f*) where the testator gave all his real and personal estate to his wife for life, and after her decease, gave various legacies, and all the *rest, residue, and remainder* of his *real and personal* estate, he gave, devised, and bequeathed to his nephews P. and W., share and share alike, their heirs, executors, administrators or assigns forever. The case of Aubrey *v.* Middleton (*g*) was cited as an authority that the legacies were charged, and Sir John Leach, V. C., decided accordingly, considering the intention in favor of the legatees to be clearer than in the cited case. "The testator (he said) here gives all his real and personal estate to his wife for life, blending them together as one fund for her use, and after her death, he gives several pecuniary legacies, and then the rest,
[533] residue, and remainder of his real and personal * estate to his nephew. He plainly continues after his death to treat them as one fund, 'the rest, residue, and remainder' of which, after payment of his legacies, is to go to his nephews."

It should be remarked, however, that in Aubrey *v.* Middleton, the executor, *being the devisee of the real estate,* was expressly directed to pay the legacies and annuities, which has always been held sufficient to charge the real estate.

(*a*) 3 Ves. 739.
(*b*) Ante, p. 512.
(*c*) Ante, p. 512.
(*d*) 2 Dick. 526.
(*e*) 2 Atk. 268, stated ante, vol. 1, p. 85.
(*f*) 4 Madd. 187.
(*g*) Ante, p. 525.

The case of Hassell *v.* Hassell,(*a*) though not cited, more closely resembles Bench *v.* Biles; but even that was rather stronger in favor of the charge, from the circumstance of there being no precedent gift affecting the real estate, (unless the legacies were so considered,) to which the words not "hereinbefore disposed of" could be referred, though this expression might have been taken to apply exclusively to the personalty, referendo singula singuli. In Bench *v.* Biles, on the other hand, the words "rest and residue" might have had reference to the precedent devise of the real estate to the wife for life.

That a bequest of legacies, followed by a gift of all the *residue* of the testator's real and personal estates, operates to charge the entire property with the legacies, was again decided by Sir J. Leach, in Cole *v.* Turner; (*b*) to which may now be added the case of Mirehouse *v.* Scaife, (*c*) where a testator, after bequeathing certain pecuniary legacies, declared his will to be, that all his debts and all the above legacies should be paid within six months after his decease; and all the *residue* of his estate, both real and personal, lands, messuages, and tenements, the * testator gave to A, by her to be freely [534] possessed at his decease. It was held by Sir L. Shadwell, V. C., and afterwards by Lord Cottenham on appeal, that by these words the real estate was charged, as well with the legacies as the debts.

It is worthy of remark, that neither in this case, nor in Cole *v.* Turner, was there any specific devise of real estate, to which the term "residue" might be referred.

It may here be observed, that under a charge of legacies, annuities will generally be included, unless the testator manifests an intention to distinguish them, (*d*) as by sometimes using both words. (*e*)

II. It is clear that a devise of the *rents and profits* of land is equivalent to a devise of the land itself, and will carry the legal as well as beneficial interest therein;[1] (*f*) but the question

(*a*) Ante, p. 532.
(*b*) 4 Russ. 376.
(*c*) 2 Myl. & Craig, 695.
(*d*) Shipperdson *v.* Tower, 1 You. & Coll. 441; S. C. 6 Jur. 658.
(*e*) See Nannock *v.* Horton, 7 Ves. 391.
(*f*) Johnson *v.* Arnold, 1 Ves. Sen. 171; Baines *v.* Dixon, Id. 42; Doe *v.* Lakeman, 2 Barn. & Adol. 42; Paramour *v.* Yardly, Plowd. 540; Parker *v.* Plummer, Cro. Eliz. 190; Earl *v.* Rowe, 35 Maine, 419, 420.

[1] Reed *v.* Reed, 9 Mass. 372; Anderson *v.* Greble, 1 Ashmead, 136; Den *v.* Manners, 1 Spencer, 142; Fox *v.* Phelps, 17 Wendell, 393; Earl *v.* Rowe, 35 Maine, 414; Andrews *v.* Boyd, 5 Greenl. 119. A devise of the *income* of land to the use of the devisee during his life, confers upon him a life-estate in the land. Butterfield *v.* Haskins, 33 Maine, 392; Andrews *v.* Boyd, 5 Greenl. 199. So the words "nse and improvement." Fay *v.* Fay, 1 Cushing, 93. A devise of the net profits of land is a devise of the land itself, by legal intendment. Earl *v.* Rowe, 35 Maine, 414. So a direction by the testator that A B *shall receive for his support the net profits of the land,*

which has chiefly given rise to perplexity in reference to these words is, whether a direction or power to raise money out of the *rents and profits* authorizes a sale;[1] the doubt being whether, in such cases, the testator or settlor, by the words "rents and profits," means the *annual* income only, according to their ordinary and popular signification, or uses the phrase in a more comprehensive sense, as designating the proceeds or "profits" of the inheritance, and, therefore, as impliedly conferring a power to dispose of such inheritance.

[535] The doctrine on this subject has fluctuated; * the early authorities leaning more to the restricted construction than the recent cases. But it seems that even those authorities admitted a sale, where the purpose was to pay debts and legacies, (*a*) or to raise a portion by a definite period, within which it could not be raised out of the annual rents; (*b*) and this rule was extended by Lord Hardwicke to a case in which the portions, being payable in such manner as a third person should appoint, *might* have become payable within a definite time. (*c*)

It was held, however, in the very early cases, that, if the portion were to be raised out of the rents and profits, without any specified time of payment, it could only be raised by a gradual accumulation of the annual profits as they arose. (*d*)

But, Judges, in latter times, looking at the inconvenience of raising a large sum of money in this manner, have inclined much to treat a trust to apply the rents and profits in raising a portion, even at an indefinite period, as authorizing a sale.

Thus, in Green *v.* Belcher, (*e*) Lord Hardwicke stated the rule to be, that "where money is directed to be raised by

[536] rents and profits, unless there are other words * to restrain the meaning, and to confine them to the receipt of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money,

(*a*) Lingen *v.* Foley, 2 Ch. Cas. 205; Anon. 1 Vern. 104; Perry *v.* Askham, 2 Vern. 26; Rawlins *v.* Brotherson, Exch. 1783, cit. 2 Ves. Jun. 480.

(*b*) Sheldon *v.* Dormer, 2 Vern. 310; Warburton *v.* Warburton, Id. 420; Jackson *v.* Farrand, Id. 424; Gibson *v.* Lord Montfort, 1 Ves. Sen. 491; Okeden *v.* Okeden, 1 Atk. 550. Some parts of Lord Hardwicke's judgment in this case are irreconcilable. He is made, in one place, to assume, that the portion was to be raised at the period of vesting, and, in another, to state the contrary. It seems difficult to support the latter hypothesis. And see Hall *v.* Carter, 2 Atk. 355.

(*c*) Green *v.* Beleher, 1 Atk. 505. See also Allen *v.* Backhouse, 2 Ves. & Bea. 65, stated post, p. 541.

(*d*) Trafford *v.* Ashton, 1 P. W. 415; Ivy *v.* Gilbert, Pre. Ch. 583; 2 P. W. 13; 2 Eq. Ca. Ab. 644, pl. 16; S. C. Evelyn *v.* Evelyn, 2 P. W. 659; Mills *v.* Banks, 3 P. W. 1.

(*e*) 1 Atk. 505.

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is a devise of the land itself. Earl *v.* Rowe, *supra*. But the rule stated in the text seems not to apply, where the rents and profits are given only for a limited period. Fox *v.* Phelps, 17 Wendell, 393, 402; Earl *v.* Grim, 1 John. Ch. 494.

[1] See Schermerhorne *v.* Schermerhorne, 6 John. Ch. 70.

has, by the liberal construction of these words, taken them to amount to a direction to sell; and, as a devise of the rents and profits will at law pass the lands, (*a*) the raising by rents and profits is the same as raising by sale."[1]

So, in Baines *v.* Dixon, (*b*) the same eminent Judge observed, that "the Court had gone by several gradations. When any particular time is mentioned, within which the estate would not afford the charge, the Court directed a sale, and then went farther, till a sale was directed, on the words 'rents and profits' alone, when there was nothing to exclude or express a sale;" though his Lordship admitted, that, in one case in ten, it had not been agreeable to the testator's intention. Lord Hardwicke held, however, that, in the case before him, where legacies were to be paid with all convenience, as the profits of the estate should advance the money, the word "advance" limited it to annual profits. (*c*)

The same opinion, too, seems to have been entertained by Lord Thurlow, who, in the case of the Countess of Shrewsbury *v.* Earl of Shrewsbury, (*d*) said: "If a term was created to raise by the rents and profits, I should say it might be done by sale or mortgage." Lord Eldon, also, in Booth *v.* Blundell, (*e*) observed that he had understood it to be a "settled rule, that, where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross *sum should be raised, the expression [537] 'rents and profits' will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage." These quotations controvert the position advanced by some respectable writers, that annual rents is the primary meaning of rents and profits; they show the rule of construction to be rather the reverse, (*f*) and

(*a*) See ante, p. 534.

(*b*) 1 Ves. Sen. 42.

(*c*) See also Okeden *v.* Okeden, 1 Atk. 550; Ridout *v.* Earl of Plymouth, 2 Atk. 104; and Gibson *v.* Lord Montfort, 1 Ves. Sen. 490.

(*d*) 1 Ves. Jun. 234. [See Lingard *v.* Earl of Derby, 1 Bro. C. C. (Perkins's ed.) 311, 312, and notes.]

(*e*) 1 Mer. 233.

(*f*) Vide Mr. Cox's note to Trafford *v.* Ashton, 1 P. W. 418; Mr. Raithby's note to an anonymous case, 1 Vern. 104; and Mr. Belt's supplement to Ves. Sen. 221. Mr. Belt's observation, that Lord Hardwicke, in Conyngham *v.* Conyngham, 1 Ves. Sen. 522, more fully stated by Mr. B., Suppl. 221, seems to have thought that his predecessors had gone too far in holding that money, to be raised out of the rents and profits, might be raised by a sale, is quite at variance with the general tenor of his Lordship's judgments, which carried the rule in favor of a sale much farther than any of his predecessors, and may be considered to have established the present doctrine upon the subject. In the particular case referred to, it is true, his Lordship held the charge to affect the annual income only; but the will was so clear on this point, that, with all his partiality to the opposite construction, it was impossible that he could come to any other conclusion. The testator devised his plantation and lands to trus-

[1] Schermerhorne *v.* Schermerhorne, 6 Johns. Ch. 70.

that these words are to be taken in their widest sense, namely, as authorizing a sale, unless restrained by the context; but, perhaps, it more accords with the principle of the authorities, to say, that the signification of the phrase is governed
[538] wholly by the nature of the *purpose for which the money is to be raised, and the general tenor of the will.

If the testator or settlor manifests, by the context of the instrument, that he contemplates the identical subject, out of whose "rents and profits" the money shall have been raised, being afterwards enjoyed by the devisees, or remaining otherwise available for the purposes of the will, it is evident that he intends the current annual income only to be applied; for by such means alone can the raising of the money be made consistent with the preservation of the entire subject of disposition. (*a*)

So, if the testator treats the raising of the money as a process requiring time, and defers a devisee's perception of the rents, or an annuitant's receipt of his annuity out of them, until such purpose shall have been accomplished, the irresistible inference is, that the testator intends the money to be raised by a gradual appropriation of the rents and profits as they arise, and not in a mass by sale or mortgage.

Thus, in the case of Small *v.* Wing, (*b*) where a testator devised to his eldest son certain premises, and directed him to pay his executors £250 per annum. The testator devised to his executors the rents, issues, and profits of his other lands, in trust that they should therewith, and with the annuity, raise and pay all the testator's debts; but if the trustees should neglect to receive the rents or apply them towards the payment of the testator's debts, then the power to cease; and then he appointed A, B, and C, to be his trustees to receive the annuity and the profits of the premises for the payment of his debts,
[539] until the same and certain legacies should *be raised and satisfied: and the testator devised all his lands in M. (subject to an annuity) to testator's wife during her life, to commence after the payment of the testator's debts. He gave other lands to his son John and his heirs, and declared it to be

tees and their heirs, in trust for payment of his funeral expenses, debts, and legacies, and to keep the plantation in good repair, and to keep the negroes, with their increase and the stock thereon, in as good a condition as they were in at his death, out of the rents and profits; and he directed that the produce of his estate should be shipped as C., one of his two trustees, should direct, until his (testator's) funeral charges, debts, and legacies should be paid; and he gave C. power out of the said produce, as the same should be remitted, to pay his debts and legacies. Lord Hardwicke thought himself not warranted to decree a sale. "It happened," he said, "to be sometimes attended with inconvenience, as in Ivy *v.* Gilbert, 2 P. W. 13; but he could not go farther, unless there was some other right of incumbrance."

(*a*) See Wilson *v.* Halliley, 1 Russ. & Myl. 590.

(*b*) 3 B. P. C. (Toml. ed.) 66.

his will, that neither of his sons should enter on or receive to his own use the rents of the premises to them respectively devised until all his (the testator's) debts should be paid. Lord Macclesfield held, that the debts should be raised out of the yearly rents without a sale; and the decree was affirmed in the House of Lords.

Such also is the effect when the testator proceeds to direct that the *residue* of the rents and profits (after answering the charge) shall be paid over to the devisee for life; especially if he has included annuities in the charge, these being, from their nature, evidently intended to come out of the annual income. (*a*) The latter circumstance, however, was, by Lord Hardwicke, considered to be inclusive in the case of Okeden *v.* Okeden, (*b*) where the trustee of a term for years was to receive the rents and profits, and apply part thereof for raising £5000 for A, if he should live to attain twenty-five, and to pay certain charges; and though the other charges were clearly of a nature which must have been intended to come out of the annual profits, (being for the maintenance of infants, and making repairs, and to pay an annuity,) yet his Lordship was of opinion, that a sale of the inheritance might be decreed for raising the portion, if the rents during the minority of the devisee of the land, during which the trustees took an estate, did not amount to the sum.

* Where some of the purposes for which the money is to be raised require a sale, and others do not, there might seem to be ground to contend, that, as the testator has not drawn any line of distinction between them in regard to the mode of raising the money, the whole is raisable in one manner. In the case of Wilson *v.* Halliley, (*c*) however, where debts and legacies were to be raised out of rents and profits, Sir J. Leach, M. R., treated it as clear, that, though a sale might have been effected, if necessary, for the purpose of liquidating the debts, the conclusion from the whole will (which was very long) was, that the legacies, though payable at definite periods, were raisable out of the annual rents only. His Honor relied much on the circumstance, that the estates (the rents and profits of which were made applicable to this purpose) were afterwards devised, "subject to the receipt of the rents and profits thereof by my said trustees and executors for the purposes aforesaid." [540]

Where the direction is to raise out of the rents and profits, or by sale or mortgage, it is obvious, that these words (being evidently used in contradistinction) cannot mean the same thing; rents and profits, therefore, must import annual rents and profits; and if, in such a case, the charges to be raised by these respec-

(*a*) Heneage *v.* Lord Andover, 3 You. & Jerv. 360.
(*b*) 1 Atk. 550.
(*c*) 1 Russ. & Myl. 590.

tive modes are of two kinds, one annual, and the other in gross, the words will be distributed, the annual charges being raisable out of the annual rents, and the sums in gross by sale or mortgage. (*a*)

[541] Of course, where the direction is to raise a sum of *money by leases for lives or years *at the old rent*, the intention to confine the charge to annual rents is beyond all doubt. (*b*)

Provisions for the renewal of leases out of the rents and profits often give rise to the point under consideration. In such cases, if the terms of renewal are such that the fine may be called for suddenly, so as to render the raising of it out of the annual rents impossible or inconvenient, a strong argument is afforded for holding the words to authorize a sale or mortgage. Indeed, this construction prevailed in a modern case, in spite of some expressions in the context rather strongly pointing the other way.

Thus, in the case of Allan *v.* Backhouse, (*c*) where the testator, after devising certain leasehold estates, *held upon bishop's leases for lives*, and all other his real estate, to certain uses, directed the renewal of the leaseholds, and that the expenses should be raised *out of the rents and profits* of the leasehold premises, or of any part of the freehold estates; and he declared that the renewed leases should be held upon the same trusts as were declared of the freehold and copyhold estates, *to the end that they might be enjoyed therewith so long as might be;* Sir Thomas Plumer, V. C., held, that, as the purpose for which the money was to be raised out of the rents and profits might require it suddenly, (for the lessor could not be expected to wait for the gradual payment out of the rents,) and as there was nothing in the will to give to these words the abridged sense of annual rents and profits, except the purpose to preserve

[542] the estate entire (which his *Honor thought warranted the sacrificing of part for the preservation of the remainder,) the money might be raised by sale or mortgage. (*d*)

(*a*) Playters *v.* Abbott, 2 Myl. & Keen, 97. See also Ridout *v.* Earl of Plymouth, 2 Atk. 104, where debts and legacies were to be raised "by perception of the rents, or by leasing or mortgaging."

(*b*) Ivy *v.* Gilbert, 2 P. W. 63; S. C. Pre. Ch. 583. See also Ridout *v.* Earl of Plymouth, 2 Atk. 104.

(*c*) 2 Ves. & Bea. 65.

(*d*) This is a very compressed statement of the grounds of his Honor's judgment, in which he reviewed the principal authorities.

As to the mode of contribution towards renewal-fines by tenant for life and remainder-man, see 9 Jarm. Convey. 347; and to the authorities there cited, add Shaftesbury *v.* Duke of Marlborough, 3 Law Journ., New Series, 30; Greenwood *v.* Evans, 3 Beav. 44. In the former case, the fact of a testator having made a provision for raising the fine was allowed an influence upon the question of contribution to which it has not commonly been considered as entitled.

CHAPTER XLVII.

ADMINISTRATION OF ASSETS, EXONERATION OF DEVISED LANDS, EXEMPTION OF PERSONALTY, MARSHALLING OF ASSETS, ETC.

I. *Several species of Property liable to Creditors. Order of their application. Contribution to Charges—where thrown on mixed Fund.*

II. *Mortgaged Estates, when to be exonerated out of other Funds. Distinction where the Mortgage is created by the Testator, or by a prior Owner.*

III. *What a sufficient indication of a Testator's intention to exempt the Personal Estate from its primary liability to Debts, &c.*

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I. Where a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, or not having made such disposition, it often becomes material to consider the order, and sometimes the proportions and mode, in which the several subjects of property are applicable to the liquidation of the debts; for every description of property is (we have seen) now constituted assets.[1] (*a*)

And the same question may arise in regard to pecuniary legacies, where the testator has thrown them upon the land or some specific fund, either of which would not be liable or not exclusively liable to them; for otherwise they are payable out of but one fund, namely, the general personal estate. (*b*)

Under a trust for the payment of debts they are paid, *not in the order of their legal priority, (*c*) but [544] according to the rule of a Court of equity, which, regarding "equality as equity," places the creditors of every class on an equal footing; and this rule is now established to apply, in opposition to the old doctrine, to mere charges, by which the descent is not broken, (*d*) and to devises in trust for the payment of debts, though made to the same persons as are constituted

(*a*) Vide ante, p. 510.

(*b*) Greaves *v.* Powell, 2 Vern. 248. The distinction taken in Walker *v.* Meager, 2 P. W. 550, has long been overruled.

(*c*) As to the legal order of paying debts, see Williams's Law of Executors, vol. 2, p. 719; Ram on Assets, 1.

(*d*) Burt *v.* Thomas, cit. 7 Ves. 323; Batson *v.* Lindegreen, 2 B. C. C. 94 [Perkins's ed. note (*a*), and cases cited]; Bailey *v.* Ekins, 7 Ves. 319, overruling Freemoult *v.* Dedire, 1 P. W. 430; Plunkett *v.* Penson, 2 Atk. 290.

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[1] By a reasonable construction of the Statutes of Massachusetts, a remainder or reversion expectant upon the determination of a life estate, or a term for years, though not within the strict letter of the Statutes, is assets for the payment of debts. Whitney *v.* Whitney, 14 Mass. 88; Leverett *v.* Armstrong, 15 Mass. 26.

Lands descended in another State cannot be regarded as assets, in Massachusetts. Austin *v.* Gage, 9 Mass. 395.

executors. (*a*) In all such cases, therefore, specialty and simple contract creditors come in pari passu; and it is held that specialty creditors, claiming the benefit of such a trust or charge, must admit the simple contract creditors to an equal participation even of the personal estate, (*b*) as equity will not allow a creditor to share in the equitable assets, or, in other words, in that portion of the property which is distributable according to the maxims of a Court of equity, without relinquishing his legal priority in regard to that portion of the property which constitutes legal assets. It is clear, however, that a trust to pay, or a charge of debts, does not make simple contract debts carry interest, (*c*) or revive a debt which has been barred by the
[545] Statute of Limitations;[1] (*d*) though *the contrary of both those propositions has been heretofore mentioned. (*e*)

And in Tait *v.* Lord Northwick, (*f*) Lord Loughborough held, that a direction to pay such debts as the testator should at the time of his death owe by mortgage, bond, or other specialty, or by simple contract or otherwise however, *and all interest thereof*, was confined, in respect of the interest, to debts which carried interest.[2]

But it should be observed, that property which the testator has not subjected to debts, is not distributable as equitable assets, merely because it is an object of equitable jurisdiction, as trust estates and equities of redemption, which can only be reached through the intervention of a Court of equity.[3] (*g*)

(*a*) Newton *v.* Bennet, 1 B. C. C. 135, and cases cited Id. 138, 140, n. [Perkins's ed. 140, notes.] See also Prowse *v.* Abingdon, 1 Atk. 484; Lewin *v.* Okeley, 2 Atk. 50, overruling Girling *v.* Lee, 1 Vern. 63, and several other early cases.

(*b*) Wride *v.* Clarke, 1 Dick. 382; Degg *v.* Degg, 2 P. W. 412; Haslewood *v.* Pope, 3 P. W. 323; Morrice *v.* Bank of England, Cas. Temp. Talb. 220; 2 B. P. C. (Toml. ed.) 465; 3 Swanst. 573, S. C. See also Sheppard *v.* Kent, 2 Vern. 435; S. C. 1 Eq. Ca. Ab. 142, pl. 6.

(*c*) Lloyd *v.* Williams, 2 Atk. 110; Barwell *v.* Barker, 2 Ves. Sen. 343; Earl of Bath *v.* Earl of Bradford, Id. 587; Shirley *v.* Earl Ferrers, 1 B. C. C. 41.

(*d*) See Burke *v.* Jones, 2 Ves. & Bea. 275.

(*e*) Carr *v.* Countess of Burlington, 1 P. W. 228; Blakeway *v.* Earl of Strafford, 2 P. W. 373; S. C. 6 B. P. C. (Toml. ed.) 630.

(*f*) 4 Ves. 816.

(*g*) Sharpe *v.* Earl of Scarborough, 4 Ves. 538, overruling case of Sir Charles Cox's creditors, 3 P. W. 342; Hartwell *v.* Chitters, Amb. 308.

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[1] See Stackhouse *v.* Barnston, 10 Ves. (Sumner's ed.) 453, note (*b*) and cases cited.

[2] As to the demands on which interest is allowed, see Chitty, Cont. (5th Am. ed.) 643–648, and cases cited in notes; Tait *v.* Lord Northwick, 4 Ves. (Sumner's ed.) 816, note (*a*) and cases cited.

[3] In the United States, the rule has very generally prevailed, that an equity of redemption may be taken and sold on an execution at law. See Van Ness *v.* Hyatt, 13 Peters, 294; 4 Kent, (5th ed.) 161, and cases cited; Waters *v.* Stewart, 1 Caines' Cases, 47; Hobart *v.* Frisbie, 5 Conn. 592; Ingersoll *v.* Sawyer, 2 Pick. 276; Ford *v.* Philpot, 5 Harr. & John. 312; Carpenter *v.* First Parish in Sutton, 7 Pick. 49; Collins *v.* Gibson, 5 Verm. 243; M'Worter *v.* Huling, 3 Dana, 349; Hunter *v.* Hunter, 1 Walker, (Miss.) 194; Garro *v.* Thompson, 7 Watts, 416.

So it is undoubtedly legal assets, in the administration of the effects of persons

It may be further premised, in stating the order in which the several funds liable to debts are to be applied, that this rule regulates the administration of the assets only among the testator's own representatives, devisees, and legatees, and does not affect the right of the creditors themselves to resort in the first instance to all or any of the funds to which their claim extends, though, as we shall presently see, equity takes effectual steps to prevent the established order of application from being eventually deranged by the capricious exercise of this right.

It should also be stated, that property over which the testator has a general power of appointment only, (and in which he takes no transmissible interest in default of appointment,) is assets for the payment of creditors, *provided the power [546] be exercised, (*a*) but not otherwise; (*b*) and it will be remembered, that as to wills made or republished since the year 1837, every general or residuary devise or bequest operates as a testamentary appointment, unless a contrary intention appear.

The order of the application of the several funds liable to the payment of debts, then, is as follows:[1]—

(*a*) Lascelles *v.* Lord Cornwallis, 2 Verm. 465; S. C. Pre. Ch. 432; Troughton *v.* Tronghton, 3 Atk. 656; Lord Townsend *v.* Windham, 2 Ves. Sen. 6.
(*b*) Holmes *v.* Coghill, 7 Ves. 499; S. C. 12 Ves. 206.

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deceased. Sharpe *v.* Earl of Scarborough, 4 Ves. (Sumner's ed.) 538, note (*a*); Roosevelt *v.* Fulton, 7 Cowen, 71.

Trusts devolving on an executor, and trust property in the hands of the deceased, kept separate, are not assets in the hands of executors and administrators. Trecothick *v.* Austin, 4 Mason, 16; Coverdale *v.* Aldrich, 19 Pick. 391; Johnson *v.* Ames, 11 Pick. 173.

But it is otherwise in case of personal property held in trust, having no ear-mark, and not distingnishable from the testator's own property. Johnson *v.* Ames, 11 Pick. 173.

[1] 1 Story, Eq. Jnr. § 558–577; Stuart *v.* Carson, 1 Desans. 500, 513; Hays *v.* Jackson, 6 Mass. 149; Sharpe *v.* Earl of Scarborough, 4 Ves. (Sumner's ed.) 538, note. (*a*)

It is a general rule of the English and American law, that the personal estate is to be first exhausted in the discharge of the debts, even to the payment of debts with which the real estate is charged by mortgage. M'Campbell *v.* M'Campbell, 5 Litt. 95; Wyse *v.* Smith, 4 Gill & John. 295; M'Dowell *v.* Lawless, 6 Monroe, 141; Haleyburtou *v.* Kershaw, 3 Desaus. 105, 115; Dunlap *v.* Dunlap, 4 Desaus. 305, 329; Stuart *v.* Carson, 1 Desaus. 500, 513; Garnet *v.* Macon, 6 Call, 608; S. C. 2 Brock. 185; Rogers *v.* Rogers, 1 Paige, 188; Livingston *v.* Livingston, 3 Johns. Ch. 148, 153; Hoye *v.* Brewer, 3 Gill & Johns. 153; 1 Story, Eq. Jur. § 571; Stevens *v.* Gregg, 10 Gill & Johns. 143; Tessier *v.* Wyse, 3 Bland, 185; Lewis *v.* Thornton, 6 Munf. 87; Hawley *v.* James, 5 Paige, 318; Ancaster *v.* Mayer, 1 Bro. C. C. (Perkins's ed.) 454; Ram on Assets, c. 3, § 5, pp. 41, 42; 2 Williams, Ex. (2d Am. ed.) 1215, *et seq.*; Mackay *v.* Green, 3 Johns. Ch. 56; Livingston *v.* Newkirk, 3 Johns. Ch. 312; Stroud *v.* Burnett, 3 Dana, 394; Schermerhorn *v.* Barhydt, 9 Paige, 29, 49; Chase *v.* Lockerman, 11 Gill & Johns. 185; Seaver *v.* Lewis, 14 Mass. 83; Adams *v.* Brackett, 5 Metcalf, 280; 4 Kent, (5th ed.) 420, 421.

What shall constitute proof of an intended exemption of the personal estate, by the testator, is not, in many cases, ascertainable on abstract principles, but must depend on circumstances. 1 Story, Eq. Jur. § 572–574; 2 Ib. § 1245, 1247 *a*. See Lupton *v.* Lupton, 2 Johns. Ch. 614; Livingston *v.* Newkirk, 3 Johns. Ch. 319; Graves *v.* Graves, 8 Sim. 43; Dover *v.* Gregory, 10 Sim. 393; Parker *v.* Marchant,

1st. The general personal estate (*a*) not expressly or by implication exempted. (*b*)

2dly. Lands expressly devised to pay debts, whether the inheritance, or a term carved out of it, be so limited. (*c*)

3dly. Estates which descend to the heir, (*d*) whether acquired before or after the making of the will. (*e*)

4thly. Devised or bequeathed property, real or personal, which is charged with debts, and then specifically disposed of, subject to such charge. (*f*)

5thly. General pecuniary legacies pro rata. (*g*)

(*a*) Sir Peter Soames's case, cit. 1 P. W. 694; Lord Gray *v.* Lady Gray, 1 Ch. Cas. 296; White *v.* White, 1 Vern. 43; Johnson *v.* Milksop, 2 Vern. 112; Evelyn *v.* Evelyn, 2 P. W. 694. See also Milnes *v.* Slater, 8 Ves. 304.

(*b*) See post, 564.

(*c*) Anon., 2 Vent. 349; Bateman *v.* Bateman, 1 Atk. 421; Lanoy *v.* Duke of Athol, 2 Atk. 444; Powis *v.* Corbett, 3 Atk. 556; S. C. stated 3 Ves. 116, n.; Ellison *v.* Airey, 2 Ves. Sen. 569; Tweedale *v.* Coventry, 1 B. C. C. 240; Coxe *v.* Bassett, 3 Ves. 155.

(*d*) Chaplin *v.* Chaplin, 3 P. W. 368; Galton *v.* Hancock, 2 Atk. 424, *et seq.*; Manning *v.* Spooner, 3 Ves. 117; Barnewall *v.* Lord Cawdor, 3 Madd. 453; Adams *v.* Brackett, 5 Metcalf, 280.

(*e*) See Milnes *v.* Slater, 8 Ves. 295. See Appt. 18 Pick. 293; Livingston *v.* Newkirk, 3 Johns. Ch. 319.

(*f*) Wride *v.* Clark, 2 B. C. C. 261, n.; Davies *v.* Topp, Id. 259, n.; Donne *v.* Lewis, Id. 263; Manning *v.* Spooner, 3 Ves. 117; Harmood *v.* Oglander, 8 Ves. 124 [Sumner's ed. 106, note (*b*)]; Milnes *v.* Slater, Id. 306; Watson *v.* Brickwood, 9 Ves. 447; Irvin *v.* Ironmonger, 2 Russ. & M. 531.

(*g*) Clifton *v.* Burt, 1 P. W. 680; Humes *v.* Wood, 8 Pick. 478. The devisee of lands which the testator had contracted to purchase, and which he directed his executors to pay for, was in Headley *v.* Readhead, Geo. Coop. 50, treated as a pecuniary legatee in respect of the purchase-money, and therefore the estate not being sufficient to pay the legacies, and complete the contract, the legatees and devisee were held to contribute ratably.

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1 Younge & Coll. 290; Kindey *v.* Coussmaker, 1 Ves. (Sumner's ed.) 436, note (*a*); Ancaster *v.* Mayer, 1 Bro. C. C. (Perkins's ed.) 467, note (*a*) and cases cited.

The order of marshalling assets in Equity towards the payment of debts, is to apply, 1. The general personal estate; 2. Estates specially devised for the payment of debts; 3. Estates descended; 4. Estates devised, though generally charged with the payment of debts. It requires express words, or the manifest intent of a testator, to disturb this order. 4 Kent, (5th ed.) 420, 421; Schermerhorn *v.* Barhydt, 9 Paige, 29, 49; Chase *v.* Lockerman, 11 Gill & Johns. 185; Livingston *v.* Newkirk, 3 Johns. Ch. 319; M'Campbell *v.* M'Campbell, 5 Litt. 95; McDowell *v.* Lawless, 6 Monroe, 141; Haleyburton *v.* Kershaw, 3 Desaus. 105, 115.

The equitable rule seems to have been generally adopted in the United States, that, on failure of personal assets, the real estate in the hands of heirs and devisees is liable for debts as extensively as the personal. The common-law rule has been altered by statute. 4 Kent, (5th ed.) 421, 422, and notes; Pratt *v.* St. Clair, 6 Ohio, 227.

In Massachusetts, the personal estate is to be first applied, and the land resorted to on a deficiency of personal assets. Gore *v.* Brazier, 3 Mass. 523, 536; Dean *v.* Dean, Ib. 258; Drinkwater *v.* Drinkwater, 4 Mass. 358.

Such is probably the rule in other States, where the real estate is placed under liability for the debts of the deceased. 4 Kent, (5th ed.) 422; Piatt *v.* M'Cullough, 1 M'Lean, 80. See remarks of Gibson, Ch. J., 13 Serg. & R. 14; Kerper *v.* Hoch, 1 Watts, 9; Quigley *v.* Beatty, 4 Watts, 13; Gadsden *v.* Lord, 1 Desaus. 208, 216; Mollan *v.* Griffith, 3 Paige, 402; Foster *v.* Crenshaw, 3 Munf. 514. In Virginia, the common-law rule still prevails, it is said; and perhaps in Kentucky, 4 Kent, (5th ed.) 421 and 422, notes; Hamilton *v.* Haynes, Cam. & Nor. 413. See Hutchinson *v.* Stiles, 3 N. Hamp. 404; Boyd *v.* Armstrong, 1 Yerg. 40; Thompson *v.* Brown, 4 Johns. Ch. 619; Benson *v.* Le Roy, 4 Johns. Ch. 651; Helm *v.* Darby, 3 Dana, 186.

* 6thly. Specific legacies pro rata. (*a*) [547]

7thly. Real estate devised, and if the rule be subject to the old law, whether in terms general or specific.[1] (*b*)

* In fixing these several gradations of liability, the [548] great struggle for a long period was to determine whether the descendent assets were applicable before or after devised lands which the testator had simply charged with (not particularly selected and appropriated for the payment of) his debts, (*i. e.* between the third and fourth classes in the preceding series,) and the question was finally settled in favor of the prior liability of the heir, (though with disapprobation of the rule,) by Lord Thurlow, in Donne *v.* Lewis, (*c*) and by Lord Alvan-

(*a*) But see and consider cases, post, p. 555. As to what legacies are pecuniary or general, and what specific, see 1 P. W. 539; 2 P. W. 328; Amb. 556; (but see 2 B. C. C. 111; 2 B. C. C. 18; 2 Ves. Jun. 639; 4 Ves. 150, 555, 568; 5 Ves. 199, 461 [see Sumner's ed. 461, Perkins's note (*a*); Nesbitt *v.* Murray, 5 Ves. (Sumner's ed. 157) Perkins's note (*a*) and cases cited]; 11 Ves. 160; 15 Ves. 384; 1 Mer. 178; 5 Sim. 530. The rule, established in England—that residuary devises are to be regarded as specific, on the ground, that a testator can only dispose of the lands owned by him at the time of *making* his will—if it ever was in force in Massachusetts, was abrogated by the Rev. Stat. c. 62, § 3, by which testators are enabled to dispose by will of subseqnently acquired real estate. Blaney *v.* Blaney, 1 Cushing, 107.

(*b*) Clifton *v.* Burt, 1 P. W. 678. But in Long *v.* Short, 2 Vern. 756; S. C. 1 P. W. 403, Lord Cowper seems to have made specific legatees and devisees contribute ratably to pay specialty creditors. It is difficult to sustain this doctrine, and the distinction taken in it between cases where the devise is specific, and where it is in general terms, is clearly untenable, the established doctrine of the cases under the old law being that every devise, however general in terms, was virtually specific. Forrester *v.* Lord Leigh, Amb. 173; Scott *v.* Scott, 1 Eden, 459; Sheeling *v.* Brown, 5 Ves. 359; Milnes *v.* Slater, 8 Id. 303, overruling Gower *v.* Mead, Pre. Ch. 3. And see particularly Mirehouse *v.* Scaife, 2 Myl. & Craig, 695, where Lord Cottenham took a general view of the authorities for the proposition that pecuniary legatees are not entitled to have the assets marshalled as against a residuary devisee of lands, the principle applicable to specific and residuary devisees being identical. The ground for this doctrine was, that, as the testator could dispose only of the lands actually belonging to him when he made his will, any devise therein, however general in terms, amounted in reality to nothing but a gift of the lands he then had. Thus, if a testator having lands called Blackacre and Whiteacre, before the year 1838, devised Blackacre to A, and the residue of his real estate to B, the devise to B, though residuary in expression, was, in point of fact, a mere devise of Whiteacre, and was so regarded for all purposes. Therefore, if in such a case the testator owed specialty debts, which were to be satisfied out of his real estate, Whiteacre, the property of B, was not first applicable, (as would be the case if the respective subjects of disposition were personal estate,) but A and B stood upon an equal footing, both estates being applied pro rata. It remains to be seen whether this doctrine will prevail in reference to wills which are subject to the new law, to which the ground of the doctrine does not apply, as a general or residuary devise is, by the recent enactment, made to extend to all the real estate belonging to a testator at the time of his decease, thereby abolishing all distinction between real and personal estate in this particular. While analogy might seem to require the adoption of a uniform rule in regard to real and personal estate, it is probable that such a construction will not be adopted without a struggle, seeing that the present rule has obtained so firm a footing. The point is one on which adjudication may be looked for with some interest.

(*c*) 2 B. C. C. 254.

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[1] Real estate devised is not liable to *contribute* to the payment of legacies, on a deficiency of personal assets, unless specially charged. Hayes *v.* Seaver, 7 Greenl. 237. See Hubbell *v.* Hubbell, 9 Pick. 561; Hume *v.* Wood, 8 Pick. 478.

ley in Manning *v.* Spooner. (*a*) And in the case of Harmood *v.* Oglander (*b*) Lord Eldon recognizes the distinction between a mere charge of debts, and a devise directing the mode in which the debts are to be paid, which he characterizes as "thin," but considers too firmly established by authority to be disturbed.[1] A devise to the heir, though inoperative according to the old law (*c*) to break the descent, was held to demonstrate an intention to place, and to have the effect of placing the heir on an equal footing with the devisees, properly so called in this respect. (*d*)

Here it should be observed, that where several distinct properties, subject to a common charge, are disposed of among several persons, recourse is had, by an obvious rule of justice, to the principle of contribution. Thus, if the testator, after subjecting his real estate to the payment of his debts or legacies, devise Blackacre to A and Whiteacre to B, and these estates in the administration of the assets become applicable, the [549] charge will be thrown upon * the devisees in proportion to the value of their respective portions of the property. (*e*) And, by parity of reason, where several estates, subject to a common charge, devolve by descent upon different persons, (which happens where they descended to the last owner from opposite lines of ancestry, and his own paternal and maternal heirs are different persons, or they are held by several tenures, involving different courses of descent,) the same principle of contribution obtains.[2] (*f*)

And the rule is the same where the property charged is partly real and partly personal. Thus, if a testator, after commencing his will with a general direction that his debts shall be paid, proceeds to dispose specifically of his real and personal estate among different persons; as the charge would, we have seen, affect the whole property so given, real as well as personal, the devisees and legatees will bear their respective shares of the burden pro rata. (*g*)

(*a*) 3 Ves. 114.
(*b*) 8 Ves. 125.
(*c*) But now see Stat. 3 & 4 Will. IV. c. 106, § 3; ante, p. 510.
(*d*) Biederman *v.* Seymour, 3 Beav. 368.
(*e*) See Henningham *v.* Henningham, 2 Vern. 355; S. C. 1 Eq. Ca. Ab. 117; Growcock *v.* Smith, 2 Cox, 397; Carter *v.* Barnardiston, 1 P. W. 504. See also 3 P. W. 98.
(*f*) See Lord Eldon's judgment in Aldrich *v.* Cooper, 8 Ves. 590. See this case as to the question whether a mortgage equally affects both subjects comprised in it, or the one that was to be *first* applied.
(*g*) Irvin *v.* Ironmonger, 2 Russ. & M. 531.

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[1] See Bailey *v.* Ekins, 7 Ves. (Sumner's ed.) 319, note (*a*); Davies *v.* Topp, 1 Bro. C. C. (Perkins's ed. 524, and notes; Donne *v.* Lewis, 2 Ib. 257, and notes.

[2] See Hays *v.* Jackson, 6 Mass. 153; Livingston *v.* Livingston, 3 Johns. Ch. 148; Livingston *v.* Newkirk, 3 Johns. Ch. 312; Marvin *v.* Stone, 2 Cowen, 781.

The Rules of Contribution are fixed by statute, in Massachusetts. Rev. Stat. c. 62, § 25 to § 31.

It should seem, then, that, although personalty, not expressly charged with debts, is applicable before real estate not so charged, yet when both species of property are expressly onerated, no distinction of this nature is admitted, but the whole stands on an equal footing.

In precise accordance with this principle, too, where a testator creates out of real and personal estate a mixed fund to answer certain charges, he is considered as intending, not that the personalty shall be the primary and the realty the auxiliary fund for those charges, but *that each shall con- [550] tribute ratably to the common burden. And it is immaterial that the combined fund comprises the whole of the testator's real and personal estate.[1]

Thus, in the case of Roberts *v.* Walker, (*a*) where a testatrix gave to trustees certain freehold, copyhold, and leasehold estates and shares in certain companies, and all other her real and personal estate, upon trust to sell and convert the same, and as to the moneys arising therefrom, and the rents and profits in the mean time, upon trust in the first place to pay all her debts, funeral and testamentary expenses, and in the next place to pay certain legacies with interest and the duty thereon, and to apply the residue in such a manner as the testatrix by any codicil should direct. The testatrix died without making any codicil. The question being, whether the debts and legacies were to be paid out of the personalty, so far as it would go, in exoneration of the real estate and for the benefit of the heir, or whether they were to be borne by the real and personal estate proportionally, Sir J. Leach, M. R., decided in favor of the latter construction, observing, " When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estates which have been converted into that fund shall answer the stated purposes and every of them pro rata, according to their several values. If any of those purposes fail, then the part of the fund which, according to the intention of the testator, would otherwise have been applicable to those purposes, is undisposed of. As far as this part *of the [551] fund has been composed of real estate, the heir is to have the benefit of it, as so much real estate undisposed of; and as far as this part of the fund has been composed of personal estate, I am of opinion that it is personal estate undisposed of for the

(*a*) 1 Russ. & Myl. 752. See also Dunk *v.* Fenner, 2 Russ. & Myl. 557, (being another decision of the same Judge.)

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[1] See Adams *v.* Brackett, 5 Metcalf, 282; Hassanclever *v.* Tucker, 2 Binn. 525; Witman *v.* Norton, 6 Binn. 395; Kidney *v.* Coussmaker, 1 Ves. Jun. 436; Bench *v.* Miles, 4 Madd. 187. See Swoope's appeal, 27 Penn. State Rep. 58; ante, 362 [508] in note.

benefit of the next of kin; and in order to ascertain the proportions which will thus belong to the heir and next of kin respectively, it must be referred to the Master to compute the respective values of the real and personal estates which are thus blended by the testator into one common fund."

So in the case of Stocker *v.* Harbin, (*a*) where a testator gave all his real and personal estate to A, B, and C, upon trust to sell all his real estate, and convert into money his personal estate; and he directed his trustees to stand possessed of the moneys to arise by virtue of his will, in trust to pay all his just debts, and funeral and testamentary expenses, and then to appropriate and take out of his said *trust moneys* the sum of £1000, and invest the same in manner therein mentioned, for the benefit of his son D, which sum, in a certain contingency, was to revert to and become part of his *residuary moneys and estate;* and the testator then proceeded to give certain directions concerning his residuary moneys and estate. The testator, by an unattested codicil, revoked the legacy of £1000; and Lord Langdale, M. R., held that, as the codicil was inoperative in regard to the freehold estate, the legacy remained in force as to such proportion of it as was payable out of the produce of the freeholds, for the legacy being given out of a mixed fund, constituted of both real and personal estate, would have been payable out of both, in proportion to their respective amounts.

[552] * Again, in the case of Salt *v.* Chattaway, (*b*) where a testator devised and bequeathed his real and personal estate in trust to sell, and out of the proceeds and out of the ready money he might die possessed of, to pay to J. £100, and to divide one third of the residue of the moneys to arise as aforesaid among J. and five other persons; J. died in the testator's lifetime. It was held that the next of kin and the heir were entitled to their proportionate parts of the lapsed share of the residue, and that the legacy of £100 fell into the residue and passed by the gift thereof. (*c*) Lord Langdale observed that the two sorts of estate being blended, each contributing in proportion to fulfil the purposes which could be accomplished, the share of residue which had lapsed must be deemed to consist of proportionate parts of the two sorts of estate.

As to the general right of a devisee to be exonerated from an incumbrance to which the testator, either before or after the making of his will, has subjected the devised estate, there cannot, at this day, be any doubt or controversy; and it is clear that the legatee of any chattel, specifically bequeathed, has the same right.

Thus, if a testator bequeathes a watch or a painting, and it

(*a*) 3 Beav. 479. (*b*) 3 Beav. 576.
(*c*) As to this, vide ante, vol. 1, p. 587.

turns out that at his decease the watch or painting is in pawn, the legatee is entitled to have it redeemed. And by parity of reason if a testator specifically bequeathes a legacy to which he is entitled under a will, and afterwards assigns such legacy by way of mortgage, the legatee may claim to have the mortgage debt liquidated in exoneration of the subject of gift; and it would be immaterial that the mortgage deed contained a power of sale, by virtue of which the mortgagee might have absolutely disposed of *the property, and thereby have [553] defeated the bequest; (*a*) for in all these cases the mortgage being considered to have been created by the testator for his own convenience, and not for the purpose of subtracting so much from the bequest, the act is not, as between the parties claiming under the will, an ademption pro tanto, and cannot, without at least equal impropriety, be termed a partial revocation, though the latter designation has been commonly applied to it. If, therefore, the testator's right of redemption remain unbarred at his decease, the devisee or legatee is entitled to require that it shall be exercised for his benefit.

Upon the same principle, it is clear, that, if a person bequeath shares in a railway company or any other such adventure, on which, at the time of his death, the whole amount subscribed has not been paid, the legatee is entitled to have the future calls paid out of the general personal estate, or any other fund on which the testator may have thrown the burden of his debts. (*b*)

II. But the points which have been chiefly in controversy, and are here to be considered, are:—

1st, Whether the will indicates an intention that the devisee or legatee shall take cum onere; and, if not, then, 2dly, out of what funds he is entitled to claim exoneration. The Courts require very clear expressions in order to fasten the incumbrance on the devisee or legatee of the property in question.

Thus it is settled that a devise of lands, *subject to the mortgage or incumbrance thereupon*, does not so throw the charge on the estate, as to exempt the funds, which *by law [554] are preferably liable; (*c*) the testator being considered to use the terms merely as descriptive of the incumbered condition of the property, and not for the purpose of subjecting his devisee to the burden,—a construction which, though well established, it is probable, generally defeats the intention.

(*a*) Knight *v.* Davis, 3 Myl. & Keen, 358. In this case the mortgage was created for the benefit of the legatee himself.

(*b*) Blount *v.* Hopkins, 7 Sim. 51.

(*c*) Serle *v.* St. Eloy, 2 P. W. 386; Duke of Ancaster *v.* Mayer, 1 B. C. C. 454; Astley *v.* Earl of Tankerville, 3 B. C. C. 545; S. C. 1 Cox, 82; Beckham *v.* Crutwell, 3 My. & Craig, 763. See also Lord Eldon's judgments in Milnes *v.* Slater, 8 Ves. 306; Bootle *v.* Blundell, 1 Mer. 227, and Noel *v.* Lord Henley, in Dom. Proc. 1 Dan. 337.

And even where the property devised "subject to the mortgage" was given upon trust for sale, and the proceeds were to be applied in the first instance in payment of the mortgage debt, Sir J. Leach, M. R., held, that, as it appeared on the whole will that the testator did not intend to exonerate his personal estate from the mortgage debt, the devisees of the residue of the proceeds of the fund were entitled, under the general rule, to have the personalty applied in exoneration of the mortgaged estate. (*a*)

Suppose, then, that the will contains no intimation of an intention to the contrary, the devisee of a mortgaged estate is entitled to have the incumbrance discharged out of the following funds:— 1st, *The general personal estate;* (*b*)[1] 2dly, *Lands expressly devised for payments of debts;* (*c*) 3dly, *Lands descended* [555] *to the heir;* (*d*) and 4thly, *Lands * devised charged with debts;* (*e*) and if the charge happened to reach the last class of estates, and if the devised mortgaged estate were included therein, (as it of course would be if the charge were general,) the devisee in question would be liable to contribute ratably with the other devises. (*f*)

But the devisee of a mortgaged estate is not entitled to have it exonerated out of *personalty specifically bequeathed,*—a point which was determined in the case of O'Neal *v.* Mead; (*g*) where a testator having devised lands, which he had mortgaged, to his eldest son in fee, and bequeathed a leasehold estate to his wife, it was held that the leasehold premises, being specifically bequeathed, were not liable to pay off the mortgage.

And a fortiori a specific legatee of incumbered leaseholds cannot call upon a specific legatee of unincumbered leaseholds to contribute towards the liquidation of the mortgage debt affecting the former exclusively; and a direction that the mortgage money shall be paid out of the general personal estate, would not confer such right. (*h*)

(*a*) Wythe *v.* Henniker, 2 Myl. & Kee. 635. It is difficult, however, to reconcile his Honor's conclusion with the reported facts of the case, as the codicil is stated to have contained an explicit declaration that the mortgage debt should not be paid out of the personal estate. This discrepancy (however important as affecting the particular decision) does not touch the principle on which it is founded.

(*b*) Phillips *v.* Phillips, 2 B. C. C. 273, and cases cited. [See Perkins's ed. notes; Ancaster *v.* Mayer, 1 Bro. C. C. 454, 467, notes and cases cited; Tweddell *v.* Tweddell, 2 Bro. C. C. (Perkins's ed.) 154, note (*a*), and cases cited.]

(*c*) Serle *v.* St. Eloy, 2 P. W. 386, and other cases cited ante, p. 546.

(*d*) Galton *v.* Hancock, 2 Atk. 424, 427, 430, and other cases cited ante, p. 546.

(*e*) Davies *v.* Topp, 1 B. C. C. 524, and notes, and other cases cited ante, p. 546.

(*f*) Carter *v.* Barnardiston, 1 P. W. 504.

(*g*) 1 P. W. 693.

(*h*) Halliwell *v.* Tanner, 1 Russ. & Myl. 633.

[1] Under a will directing the payment of all the testator's debts out of his estate, bequeathing the residue of his personal estate to his wife absolutely, and devising his real estate also to her during widowhood, with remainder to his children, a note given by the testator in payment for real estate, and secured by a mortgage thereon, is to be paid out of his personal estate, unless the creditor elects to resort to the real estate. Hewes *v.* Dehon, 3 Gray, 205.

It is clear, also, that the devisee of a mortgaged estate cannot claim exoneration as against pecuniary legatees.

Thus, in Lutkins *v.* Leigh,(*a*) where the testator, having mortgaged certain lands, devised them to his wife for life, with remainder over, and gave her a legacy of £1500, and bequeathed the residue of his personal estate to other persons. The personal estate not being sufficient to pay the £1500 and liquidate the mortgage, Lord Talbot held that the devisees must take the devised estate cum onere.

*And, of course, such a devisee is not entitled to call upon the devisees of other lands, not charged by the testator with debts, for contribution, although such other estates were liable to the *creditor*. (*b*) It is true that a devisee of incumbered land can only claim exoneration out of property which his creditor can reach, but the converse of the proposition is not true. [556]

The application of descended assets in exoneration of a devised estate has generally been thought to be a hardship upon the heir; but such an opinion can only be maintained on a ground which would go to prove that the estate ought not to be exonerated at all, namely, that the devisee was intended to take cum onere, which is probably in general the case; for if it be admitted that the testator meant the incumbrance to be liquidated, it would seem to follow that the devisee should be placed in the same position as if the mortgage were a debt not affecting the estate, and should only be liable to contribute to or pay it, precisely to the same extent as any other claim upon the *general* assets; though the Courts, it will be observed, have not carried the rule quite so far. The extent of the devisee's claim to exoneration seems now to be well defined by the cited cases.

So where an estate *descends* subject to a mortgage, the heir is entitled to exoneration out of those funds which, in the established order of application, (*c*) are anterior to the descended assets, namely, the general personal estate, and realty expressly devised for the payment of debts. (*d*)

The principle of the preceding cases, however, extends only to incumbrances created by the testator or ancestor himself; *for the claim to exoneration is founded on the notion that the personal estate of the testator who made the mortgage had the benefit of its creation, and therefore shall be the fund to liquidate it; and cases which do not fall within [557]

(*a*) Cas. Temp. Talb. 53. See also Lucy *v.* Gardener, Bunb. 137; and Lord Loughborough's judgment in Hamilton *v.* Worley, 2 Ves. Jun. 66 [Sumner's ed. 62, note (*a*)].

(*b*) Lord Hardwicke's judgment in Galton *v.* Hancock, 2 Atk. 438. Here the debt was secured by bond; a circumstance not now a necessary ingredient in the case. Vide ante, p. 510.

(*c*) See ante, p. 546.

(*d*) Hill *v.* Bishop of London, 1 Atk. 621.

the reason are excluded from the operation of the rule.[1] Thus it is clear that where the estate has come to the last owner, either by devise or descent, incumbered with a mortgage, and he has done no act in his lifetime evincing an intention to make the debt his own, the personal estate (not having had the benefit of the mortgage) will not be liable to pay it; but the devisee or heir of the last owner will take the estate cum onere; nor, it seems, will the act of such last owner, rendering himself personally liable to the debt, in every instance transfer it to himself as between *his own* representatives, unless such appears upon the whole transaction to have been his deliberate intention. (*a*)

Thus it has been held that the giving a bond or covenant on the transfer of the mortgage has no such effect, (*b*) even though it include an agreement to pay a higher rate of interest (*c*) or a further sum to be advanced to pay an arrear of interest on such mortgage, (*d*) in which case the effect is merely to convert interest into principal; and in the case of the Duke of Ancaster *v.* Mayer, (*e*) it was so decided, though a small further principal sum was advanced, and a further real security given for the whole.

[558] Nor in such a case is the personal estate of the last *owner rendered primarily liable by a covenant or bond given for particular purposes, as upon the apportionment of the debt among several persons, entitled to different parts of the property subject to the charge. (*f*)

Upon the same principle, where a testator charges his estate with the payment of his debts, an incumbrance on a real estate devised or descended to him, will not be considered as his debt, so as to bring it within the operation of the charge.

Thus, in Lawson *v.* Lawson, (*g*) where A being the devisee of real estate, which was subject to certain incumbrances, died, leaving the estate onerated with the charge, having by his will charged his real and personal estate with the payment of his debts, and devised the real estate to B, and appointed his wife executrix. The wife having in the administration of the assets paid off the charge on the real estate devised by the first testator,

(*a*) Scott *v.* Beecher, 5 Madd. 96.

(*b*) Bagot *v.* Houghton, 1 P. W. 347; Evelyn *v.* Evelyn, 2 Id. 664; Leman *v.* Newnham, 1 Ves. Sen. 51; Lacam *v.* Mertins, Id. 312. See also Robinson *v.* Gee, Id. 251; Duke of Ancaster *v.* Mayer, 1 B. C. C. 454; Earl of Tankerville *v.* Fawcett, 1 Cox, 237.

(*c*) Shafto *v.* Shafto, 2 Cox's P. W. 664, n.

(*d*) Earl of Tankerville *v.* Fawcett, 1 Cox, 237.

(*e*) 1 B. C. C. 454; but see Woods *v.* Huntingford, 3 Ves. 128.

(*f*) Billinghurst *v.* Walker, 2 B. C. C. 604. As to which see Sir W. Grant's judgment in Earl of Oxford *v.* Rodney, 14 Ves. 425. See also Forrester *v.* Leigh, 2 Cox's P. W. 664, n.; S. C. Amb. 171, where, however, the owner was *purchaser*.

(*g*) Lawson *v.* Lawson, 3 B. P. C. (Toml. ed.) 424. See also Lawson *v.* Hudson, 1 B. C. C. 58; Hamilton *v.* Worley, 2 Ves. Jun. 62.

[1] See Hewes *v.* Dehon, 3 Gray, 205, 208.

it was held that she was entitled to satisfaction from B, whose estate was thus exonerated; for that A, in charging his estate with his debts, could not intend to encumber it with debts which were not his in contemplation of law.

And where a person, to whom lands are devised or descended subject to the payment of debts or legacies, executes a bond or mortgage of the devisor or ancestor's estate to raise money for payment of the debts, (*a*) or to a legatee to secure his legacy, (*b*) he has not by * these acts primarily sub- [559] jected his personal estate. Such also was adjudged to be the result where the heir mortgaged an estate to pay simple contract debts owing by his ancestor, to which it does not appear that the real estate was liable. (*c*)

The same doctrine, to a certain extent at least, applies to cases in which the estate was *purchased* by the testator subject to the charge,[1] for it has been held that "where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to show an intention to transfer the debt from the estate to himself, as between his heir and executor, but merely that which he must do if he pays a less price for it in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally;" (*d*) but at his death the person upon whom the estate devolves takes it *cum onere*. (*e*)

And it is immaterial whether the covenant with the vendor be to pay the debt or to indemnify him against it.[2] (*f*)

(*a*) Perkins *v.* Baynton, 2 Cox's P. W. 664, n.; Bassett *v.* Percival, 1 Cox. 268; Noel *v.* Lord Henley, 7 Pri. 241; S. C. 1 Dan. 211; S. C. in Dom. Proc. Id. 322.

(*b*) Hamilton *v.* Worley, 2 Ves. Jun. 62.

(*c*) Earl of Tankerville, *v.* Fawcett, 1 Cox, 237.

(*d*) Per Sir R. P. Arden, M. R., in Woods *v.* Huntingford, 3 Ves. 128 [Sumner's ed. notes (*a*) and (*b*)].

(*e*) Cornish *v.* Shaw, Ch. Cas. 271; Pockley *v.* Pockley, 1 Vern. 36; Duke of Ancaster *v.* Mayer, 1 B. C. C. 454, [Perkins's ed. notes.]

(*f*) Butler *v.* Butler, 5 Ves. 534, which seems to overrule Parsons *v.* Freeman, before Lord Hardwicke, 1751, stated 2 Cox's P. W. 664, n., but which does not appear to have been cited in Butler *v.* Butler.

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[1] But see Thompson *v.* Thompson, 4 Ohio, (N. S.) 333.

[2] The same is true although the purchaser has paid off part of the incumbrance; and, although the purchaser has even rendered himself liable at law, to the mortgagee or creditor for the payment of the mortgage debt, this circumstance will not be sufficient to change the natural course of *assets;* there must, in addition to all this, be proof of strong and decided intention to subject the personal estate to the charge: as by an express direction in the will of the purchaser, or by disposition, or by language equivalent to an express direction. Cumberland *v.* Codrington, 3 Johns. Ch. 229, where will be found a thorough and masterly argument on this subject. See also McLearn *v.* McLellan, 10 Peters, 625; 2 Story, Eq. Jur. § 1248; Billinghurst *v.* Walker, 2 Bro. C. C. (Perkins's ed.) 604, note (1), 608, 609, notes; Fonbl. Eq. b. 3, c. 2, § 1, note (*b*); Keyzey's case, 9 Serg. & R. 73; Tweddell *v.* Tweddell, 2 Bro. C. C. (Perkins's ed.) 101, 108, and notes; S. C. Ib. 154, note; Ancaster *v.* Mayer, 1 Ib. 454, 467, notes (*a*) and (*b*); Ram on Assets, c. 29, § 1, p. 357. *et seq.;* 1 Story, Eq. Jur. § 576; 4 Kent, (5th ed.) 420; 2 Williams, Ex. (2d Am. ed.) 1207, *et seq.;* Graves *v.* Hicks, 6 Sim. 398; Hamilton *v.* Worley, 4 Bro. C. C. 199; S. C. 2 Ves. 62, note (*a*); Gibson *v.* McCormick, 10 Gill & Johns. 66.

But if the *mortgagee* be a party to the transaction, the vendee covenanting with *him* to pay the debt, and the estate be subjected to a fresh proviso for redemption, it will be considered, with respect to the purchaser's representatives, as a purchase of the whole estate, not of the equity of redemption merely. (*a*)

[560] *And the same principle of course applies where upon the purchase the mortgage is transferred to a new mortgagee, who advances a further sum of money.

Thus in Woods *v.* Huntingford, (*b*) where the deceased ancestor, having purchased the equity of redemption in consideration of his agreeing to take upon himself the mortgage debt, afterwards obtained a further sum from the mortgagee, and executed to him a mortgage for the whole; Sir R. P. Arden held that he had made the mortgage debt his own, so as to entitle the heir upon whom the land had descended to have it exonerated out of the personal estate.

From the observations of the Master of Rolls in this case, it is to be inferred that he thought that almost any dealing by *a purchaser* of an equity of redemption with the mortgagee, by which he had rendered himself liable to him to pay the debt, would amount to an adoption of the debt, as between his own representatives. He observed, that in most of the cases collected by Mr. Cox, in his note to Evelyn *v.* Evelyn, (*c*) (on which he pronounced a high encomium,) the estate had come to the owner *by descent or devise.*[1] (*d*)

[561] But it is clear that an actual dealing with the mortgagee *is not essential to render the debt personal to the purchaser, for the same effect will be produced if the transaction between the vendor and vendee is such as to show that the purchase was inclusive of the mortgagee's inter-

(*a*) Earl of Oxford *v.* Lady Rodney, 14 Ves. 417 [Waring *v.* Ward, 7 Ves. (Sumner's ed.) 332, notes (*a*) and (*b*)]. The mortgage appears to have been for a larger sum. Probably the difference consisted of interest, which was on this occasion converted into principal. Waring *v.* Ward, 5 Ves. 670; S. C. 7 Ves. 532 [Sumner's ed. notes].

(*b*) 3 Ves. 128 [Sumner's ed. notes (*a*) and (*b*)]. Compare this case with Duke of Ancaster *v.* Mayer, 1 B. C. C. 454, noticed ante, p. 557, which it is remarkable was not cited by the M. R.

(*c*) 2 P. W. 664, n.

(*d*) The principal exception is Forrester *v.* Leigh, 1753, 2 Cox's P. W. 664, n., where the testator had purchased several estates subject to mortgages, with regard to one of which he entered into a covenant for payment of the mortgage money, for the purpose *of indemnifying a trustee;* and as to another, which was part only of an estate subject to a mortgage, upon splitting the incumbrance both parties reciprocally covenanted to pay their respective shares, and indemnify each other. Lord Hardwicke thought that these covenants would not have the effect of making the mortgages personal debts of the testator, being entered into for *particular purposes* only. S. C. Amb. 171.

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[1] See 4 Kent, (5th ed.) 421; Cumberland *v.* Codrington, 3 Johns. Ch. 252; 1 Story, Eq. Jur. § 76.

est in the land, not of the equity of redemption only, the mortgage *debt forming part of the price of the estate.* (*a*)

This doctrine was distinctly recognized by Lord Thurlow in Billinghurst *v.* Walker; (*b*) but it is difficult to reconcile with that recognition his Lordship's decision in Tweddell *v.* Tweddell, (*c*) that the debt had not been adopted by the purchaser, where the purchase-money, as stated in the recital of the conveyance, included the mortgage debt, although in the testatum clause the consideration was stated to be the amount of the mortgagor's proportion, exclusive of that debt, and the covenant thereinafter contained; and the vendee then covenanted to indemnify the vendor against the payment of the mortgage debt.

Still more difficult is it to reconcile with the rule in question Lord Thurlow's disapproval of the case of the Earl of Belvedere *v.* Rochfort, (*d*) which was as follows: A mortgaged to B for £450 and interest. A afterwards agreed with C for the sale of the premises for £900, and subsequently, in consideration of £900, conveyed the premises to C and his heirs. In the covenant against incumbrances, the mortgage made to B was excepted, and it was added, "which said principal money of £450, with interest thereof from the 10th day of February last past * before the date hereof, is to be paid and discharged [562] by the said C (the purchaser) his heirs and assigns, *out of the consideration money in this present deed expressed.*" (*e*) And indorsed on the conveyance was a receipt, signed by A (the vendor) acknowledging the receipt of the £900 thus, "£450 sterling in money on the perfection of the deed, and £450 *allowed on account of the mortgage.*" C did not pay off the mortgage debt in his lifetime, and devised the premises to D in fee, whom he made his residuary legatee and executor. D also died without paying off the mortgage debt, and by his will devised the estate in question to E in fee, and bequeathed the residue of his personal estate to F, whom with another he made executors. On a bill filed in the Irish Chancery, Lord Lifford declared that the mortgage was to be considered as the debt of C (the original purchaser) and that his personal estate, which came to the hands of D his executor, and since to the hands of F (the residuary legatee and one of the executors of D) was liable to its liquida-

(*a*) Cope *v.* Cope, Salk. 449; Earl of Belvedere *v.* Rochfort, 5 B. P. C. (Toml. ed.) 299, but as to which, see post.

(*b*) 2 B. C. C. 608 [Perkins's ed. 609, note (*a*)].

(*c*) 2 B. C. C. 101 [Perkins's ed. note (2), 108, note (*b*)], 151, [154, note (*a*)]. See Sir W. Grant's observations upon this case in Earl of Oxford *v.* Earl of Rodney, 14 Ves. 423.

(*d*) 5 B. P. C. (Toml. ed.) 299.

(*e*) It appears, from the answer of the defendant in the original cause, that there was a covenant to indemnify the vendor from the debt, but it is not stated in the case, and, according to the view in which that circumstance is now regarded, was certainly not material.

tion. Against this decree F appealed to the House of Lords, contending that the mortgage was not the debt of C, and, if it were, that E, as the devisee of D, the devisee of C, was not entitled to have it exonerated out of the assets of C, the original testator. On the other side it was insisted that the transaction of C with A was upon the face of it a contract, not for the purchase of the equity of redemption only, but of the land itself.

[563] The plain intent of the deed was to put the purchaser in the place of the vendor, who was to * be no longer liable, (*a*) and that he might not be so, a sufficient part of the purchase-money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage, as fully as if he had himself covenanted to pay it off, and either the vendor or mortgagee might upon that contract have compelled him to pay it off. The decree was affirmed.

Of this case Lord Thurlow has observed, (*b*) "The House of Lords were of a different opinion to what I entertain upon this case; the personal estate never was liable, and the party never was liable to an action of covenant. In that case George (*i. e.* D. in the preceding statement) had a fee simple in the estate; he was capable of giving it after the charges were extinguished; however, it was held, *contrary to my opinion*, that the personal estate was liable."

It is true that the purchaser was not liable to an action of COVENANT *at the suit of the mortgagee*, (to whom his Lordship must have referred,) who was not a party to the deed. If this be considered necessary, in order to transfer the debt to the purchaser as between his own representatives, it is idle to say that the mortgage money *may* form part of the price between the mortgagor and his vendee. But surely there can be no doubt that the purchaser would be liable to an action *for money had and received*, at the suit of the mortgagee, where, as in Belvedere *v.* Rochfort, the mortgage debt constitutes part of the purchase-money, and is retained by him expressly on account of

[564] the mortgagee. To affirm that * the mortgage debt does not form part of the price in such a case, is virtually to declare that it never can.

Lord Thurlow's disapproval of this case is rendered more extraordinary by the circumstance of his having been the leading counsel *for the respondent* in the appeal, and it is probable contributed greatly by the force of his arguments (which are unanswerable) to the result.

But the writer cannot help distrusting his own impressions

(*a*) *I. e.* as between the vendor and vendee, for it is clear they could not affect the right of the mortgagee to resort to the vendor, his original debtor.

(*b*) See Tweddell *v.* Tweddell, 2 B. C. C. 107 [Perkins's ed. 108, note (*a*)].

upon the subject, strong as they certainly are, when he finds that the opinion of Lord Thurlow (himself a high authority) has been acquiesced in by Lord Alvanley, who in Woods *v.* Huntingford (*a*) said, "Lord Thurlow intimates his doubt of Lord Rochfort *v.* Belvedere, upon which therefore I shall not rely, *as there are many difficulties occurring against that judgment, though by so high an authority.*"

It were much to be wished, that instead of adopting a rule out of which have grown so many distinctions, the Courts originally had said, that wherever a man purchases an equity of redemption, since he is liable in equity, whether he makes an express stipulation or not, (*b*) to indemnify the vendor from the payment of the mortgage debt, and his own personal estate has in effect had the benefit of it in the reduced price of the estate, the debt has become for all purposes his own. But whatever be the purchaser's intention on the subject, such intention should, in order to avoid dispute, be distinctly expressed in the deed by which the equity of redemption is conveyed to him.

III. The next subject of inquiry is as to what will exempt the general personal estate from its primary liability to debts *and other charges, for which the testator has [565] provided another fund; in other words, what demonstrates an intention that such primary liability shall be transferred to the fund in question;[1] a point which, it will be seen, has been a prolific source of litigation.

That the making a provision for debts or legacies out of the real estate, does not discharge the personalty, is implied in the very terms of this question. There must be an intention not only to onerate the realty, but to exonerate the personalty; not merely to supply another fund, but to substitute that fund for the property antecedently liable.

Thus in numerous cases it has been held that neither a charge of debts on the testator's lands generally, or on a specific portion of them, (*c*) nor a devise upon trust for sale, however formally or anxiously framed, (*d*) nor the creation of a term of years for the purpose of such charge, (*e*) will exonerate the personalty.[2]

Nor is it material that the charge is imposed on the devisee in

(*a*) 3 Ves. 131, [Sumner's ed. notes.]
(*b*) See Lord Eldon's judgment in Waring *v.* Ward, 7 Ves. 337, [Sumner's ed. notes.]
(*c*) White *v.* White, 1 Vern. 43; Bridgman *v.* Dove, 1 Atk. 103.
(*d*) Lord Inchiquin *v.* French, 1 Cox, 1; Hancox *v.* Abbey, 11 Ves. 186.
(*e*) Tower *v.* Lord Rous, 18 Ves. 132, [Sumner's ed. note (*a*), and the references.]

[1] See the cases cited in the note to *ante*, page 390.
[2] See Ancaster *v.* Mayer, 1 Bro. C. C. (Perkins's ed.) 454, and Mr. Belt's note (2); Ram on Assets, c. 3, § 5, pp. 41, 42; Kidney *v.* Coussmaker, 1 Ves. (Sumner's ed.) 436, note (*a*); 2 Williams, Ex. (2d Am. ed.) 1215, *et seq.*

the terms of a condition, as where real estate is devised to A, he paying the debts and legacies. (*a*)

In order to exonerate the personal estate, the very early cases required express words; (*b*) but this rule was subsequently relaxed, not only by the admission of implication, but that implication was held to be raised by circumstances of a very slight and equivocal character, affording little more than conjecture. (*c*)

[566] Judges of a later period, however, feeling the evils to which this *latitude of interpretation had given rise and proceeding upon sounder principles of construction, have, without rejecting implication, required that it should be supported by such evidence eviscerated from the will, as ought fairly to satisfy a judicial mind of the testator's intention. A wish has been sometimes intimated, that the old rule had been restored, but this was impracticable in the state of the authorities, and perhaps would have been hardly consistent with right principles of construction, for it is difficult to perceive any solid ground for excluding implication in this more than in any other species of case. The evil seems to have consisted in the extreme laxity with which the implication doctrine was, at one period, applied, which tended in effect to subvert altogether the rule establishing the primary liability of the personal estate; but this has been so far corrected by later adjudications, as greatly to diminish the uncertainty which the numerous cases occurring on the subject indicated to have prevailed half a century ago. From the nature of the question, however, which is ever presenting itself under new combinations of circumstances, it is even now often attended with no little perplexity.

[567] It is well settled, that the intent is to be collected from the whole will, (*d*) and must appear by "evident *demonstration," "plain intention," or "necessary implication;" though it must be confessed, that such propositions rather change the terms than afford a solution of the question; for, upon being told that the implication must be necessary, or must amount to evident demonstration, we are inevitably led to in-

(*a*) Bridgman *v.* Dove, 3 Atk. 201. See also Read *v.* Hide, 2 Vern. 120; Watson *v.* Brickwood, 9 Ves. 447.

(*b*) Fereyes *v.* Robinson, Bunb. 301.

(*c*) Adams *v.* Meyrick, 1 Eq. Ca. Ab. 271, as to which, see 2 Atk. 626; 3 Ves. 110; Walker *v.* Jackson, 2 Atk. 624, and the other cases referred to, post.

(*d*) Though this has been frequently stated as a rule peculiarly applicable to particular classes of cases, yet the student should be reminded that it is not confined to *any* class of cases, for it would not be possible to specify any point of testamentary construction which is excluded from its operation; nor is it of novel or recent introduction, for the old authorities never denied the effect of the context to express a particular intention, or control particular expressions. One cannot help, therefore, feeling some surprise that Lord Eldon should treat the applicability of this rule to the cases under consideration as a discovery of Sir W. Grant. "We have," said his Lordship in Gittens *v.* Steele, 1 Swanst. 128, "now reached the sound rule, that, for the purpose of collecting the intention, every part of the will must be considered. That rule was first established by the great Judge whom we have just lost, the late Master of the Rolls."

quire what in judicial construction has been held to constitute such "necessary implication," or "evident demonstration;" the answer to which must be an appeal to the cases.[1]

It has also long been established, in opposition to some early decisions, (*a*) that in order to exonerate the personalty, parol evidence is not admissible; (*b*) and that no inference of intention can be drawn from the relative amount of the personal estate and debts, or of the personal and real estate; (*c*) for the fact that the charges will exhaust the whole subject-matter of the residuary bequest does not vary the construction.[2]

This was decided in the case of Tait *v.* Lord Northwick, (*d*) which is a leading authority on the general doctrine. The testator appointed certain estates to trustees, upon trust, by sale or mortgage thereof, or by sale of timber thereon, *to pay his debts*, and directed the trustees to convey the lands not so applied to certain uses. He gave £100 to each of his trustees, and all the residue of his personal estate whatsoever between his two sisters, and appointed two of the trustees executors. Lord
* Loughborough held that the personal estate was first [568]
to be applied, as far as it would go, to pay the debts.

But in Gray *v.* Minnethorpe, (*e*) the same Judge thought that where the purchase-money of an estate, devised in trust to be sold to pay debts and certain pecuniary legacies, was inadequate to pay the debts alone, this circumstance furnished an argument *against* exempting the personal estate. Such an argument, however, seems to be obnoxious to the reasoning which applies against making the amount of the personal estate a ground *for* the exemption; since the adequacy of the fund to pay debts must depend upon the amount of those debts at the death of the testator, and their amount at that period can afford no indication of his intention when he made his will.

(*a*) Gainsborough *v.* Gainsborough, 2 Vern. 252; Granville *v.* Beaufort, Id. 648.
(*b*) Inchiquin *v.* French, 1 Cox, 1; Stephenson *v.* Heathcote, 1 Ed. 39.
(*c*) Cro. El. 379; Cowp. 833; 1 Cox, 8; 2 B. C. C. 273, 297; 2 Ves. Jun. 593; 3 Ves. 299; 1 Ball & Be. 315; 1 Mcr. 222, which overrule Pre. Ch. 101; Cas. Temp. Talb. 202; 1 B. C. C. 457, n.
(*d*) 11 Ves. 816.
(*e*) 3 Ves. 103, [Sumner's ed. note (*a*), and cases cited.]

[1] Express words, or plain intention, on the whole will is necessary. Watson *v.* Brickwood, 9 Ves. (Sumner's ed.) 447; Hartley *v.* Hurle, 5 Id. 540, note (*a*), and cases cited; Howe *v.* Earl of Dartmouth, 7 Ib. 137, note (*c*); Ram on Assets, c. 3, § 5, pp. 42, 43, 44, 45; 4 Kent, (5th ed.) 421, and cases in note; Milnes *v.* Slater, 8 Ves. 295; 2 Williams, Ex. (2d Am. ed.) 12, 13, *et seq.*; Stevens *v.* Gregg, 10 Gill & Johns. 143; Tessier *v.* Wyse, 3 Bland, 28; Garnett *v.* Macon, 2 Brock. 185; S. C. 6 Call, 208; M'Campbell *v.* M'Campbell, 5 Litt. 97; 1 Story, Eq. Jur. § 571; Rogers *v.* Rogers, 1 Paige, 188; Hoye *v.* Brewer, 3 Gill & Johns. 153; Lupton *v.* Lupton, 2 Johns. Ch. 614; McKay *v.* Green, 3 Johns. Ch. 66; Livingston *v.* Newkirk, 3 Johns. Ch. 312; Stroud *v.* Barnett, 3 Dana, 394; Schermerhorn *v.* Barhydt, 9 Paige, 29, 49; Chase *v.* Lockerman, 11 Gill & Johns. 185; Kidney *v.* Coussmaker, 1 Ves. Jun. 436, note (*a*); Hancock *v.* Minot, 8 Pick. 29, 37, 38.

[2] See Andrews *v.* Emmot, 2 Bro. C. C. (Perkins's ed.) 297, note; Nannock *v.* Horton, 399, 400.

It is clear that the charging the land with (in addition to debts) *funeral or testamentary* expenses, or both, will not per se exempt the personalty; for although it seems improbable that the testator should mean to create an *auxiliary* fund to answer expenses, which are payable out of the personal estate in priority to all other claims, and which it could hardly be insufficient to liquidate, yet such an argument amounts only to conjecture, and falls short of that necessary implication which is now held to be requisite to transfer the primary onus to the new fund.

Many opinions have been expressed on this point. Thus Lord Hardwicke, in Walker *v.* Jackson, (*a*) remarked, that the words "debts, legacies, and funeral expenses," were only words of style, an observation in which Sir W. Grant, in Brydges *v.* Phillips, (*b*) seems to have concurred. The circumstance of funeral expenses being included in the charge, was
[569] also disregarded by Lord * Northington, in Stephenson *v.* Heathcote, (*c*) and by Lord Kenyon, in Williams *v.* Bishop of Llandaff, (*d*) (though the latter Judge decided in favor of the exemption, on grounds perhaps not less equivocal,) and by Lord Manners, in Aldridge *v.* Wallscourt. (*e*) On the other hand, Sir R. P. Arden, in Burton *v.* Knowlton, (*f*) thought a direction to pay funeral expenses a strong circumstance in favor of the exemption where the trustees of the fund, on whom the direction was imposed, were not the executors to whose duty it naturally belonged. This case, however, has been commented upon both by Lord Loughborough, (*g*) and Lord Eldon, (*h*) in terms which throw great doubt upon its authority; and, if it rest on this ground, (and it is difficult to find one more solid,) the decision is clearly overruled by the cases already referred to, and those which remain to be stated.

Thus in Gray *v.* Minnethorpe, (*i*) where the testator devised certain lands to W. and J., and their heirs, in trust to sell, and out of the moneys arising therefrom to pay all his just debts and *funeral expenses*, and the residue over, and appointed his brother G. sole executor; Lord Loughborough held that the executor did not take the personal estate exempt from debts.

So, in Hartley *v.* Hurle, (*k*) where the testator directed that all his just debts *and funeral and testamentary expenses* be in the first place fully paid and satisfied, and then, after making a certain bequest, devised all his lands and hereditaments, and

(*a*) 2 Atk. 624.
(*b*) 6 Ves. 570.
(*c*) 1 Ed. 38.
(*d*) 1 Cox, 254.
(*e*) 1 Ball & Beatty, 312, post.
(*f*) 3 Ves. 108 [Sumner's ed. note (*a*)].
(*g*) See Tait *v.* Lord Northwick, 4 Ves. 803.
(*h*) Bootle *v.* Blundell, 1 Mer. 229.
(*i*) 3 Ves. 103.
(*k*) 5 Ves. 540, [Sumner's ed. notes.]

moneys in the funds, to A and B, upon trust out of the rents of his lands and the dividends * of his moneys [570] to pay all his *just debts*, FUNERAL AND TESTAMENTARY EXPENSES, *and certain legacies*, (*a*) and the residue over. After other bequests, the testator devised and bequeathed all the residue of his real and personal estate, not by him otherwise given and disposed of, to C his daughter, and he appointed A, B, and C executors. Sir R. P. Arden, M. R., held that the residuary personal estate was not exempt from the payment of debts.

The M. R. distinguished this case from Burton *v.* Knowlton, (*b*) on the ground of the general introductory words, which he said were a direction to *the executors* to pay the debts, &c., and therefore favored the non-exemption; (*c*) but we have seen that a direction in such terms, followed by the appropriation of a particular fund for the purpose, has reference to the provision so made. (*d*) Such a distinction is clearly untenable.

So in M'Leland *v.* Shaw, (*e*) where a testatrix devised certain lands to trustees to sell, and out of the money arising from such sale, "in the first place" desired her FUNERAL EXPENSES *and the debts which she should owe at her death to be paid;* secondly, she directed the payment of several sums to persons who were creditors of her late husband. She then gave several legacies, including one to her executors for their trouble, adding, "the said several sums to be paid by my said executors and trustees out of the money arising from the sale of my said lands, which I do order to be sold with all convenient speed after my decease, and such of the said purchase-money as shall remain after paying the said legacies, and the execution of this my will, I bequeath in the following manner." The testatrix then disposed of such residue. * There was no [571] disposition of the personal estate, otherwise than by the appointment of executors, who, having legacies for their trouble, could not take beneficially. (*f*) The next of kin claimed to take it exempt from debts, legacies, and funeral expenses; but Lord Redesdale held, that there were not sufficient words to raise an implication of intent to exempt the personalty from these charges. His Lordship, however, thought the sums to be paid to the creditors of the husband were to be satisfied out of the real estate *only*. (*g*)

It is not denied, indeed, that the subjecting of the real estate to *all* the charges which belong to the personalty, as legacies,

(*a*) The legacies were held to be payable out of the real estate *only*. See post.
(*b*) 3 Ves. 107. See post.
(*c*) See an observation upon this, ante, p. 569.
(*d*) Ante.
(*e*) 2 Sch. & Lef. 538.
(*f*) But now see 1 Will. IV. c. 40.
(*g*) As to this see cases cited, post.

funeral and testamentary expenses, favors the supposition that the personalty is intended to be given as a specific legacy, and consequently to be exempt; (*a*) but no case which rests on this single circumstance is now to be relied on. Such seems to be the situation of the case of Gaskell *v.* Gough, cited by Sir R. P. Arden, in Burton *v.* Knowlton, (*b*) which, however, is too loosely stated to enable us to form a satisfactory opinion of the grounds of it. It does not appear who was the executor, or in what terms the personalty was given.

In the much-considered case of Bootle *v.* Blundell, (*c*) the extension of the charge to funeral and testamentary expenses, seems to have been treated by Lord Eldon as having much weight, though it was there aided by the circumstance, that some particular charges incident to the administration of the estate, namely, that of supporting the will against any
[572] attempt to invalidate *it, was, by a codicil, imposed *exclusively* on the real estate. "On looking through the precedents, (said his Lordship,) it is impossible to deny that this is a circumstance on which great stress has always been laid; namely, where the real estate is made liable to such expenses as exclusively regard the administration of the personal estate, such as the costs of probate, and other costs sustained in the execution of the will."

It has been decided that the *expressly* subjecting the personal estate to certain charges, to which it was before liable, does not, by force of the principle *expressio unius est exclusio alterius*, raise a necessary implication that it is not to bear other charges *not* so expressly directed to be payable out of it, but which are thrown upon the land.

Thus, in Brydges *v.* Phillips, (*d*) where the testator devised certain real estate upon trust for sale, and out of the money arising thereby *to pay his debts* and certain legacies, and devised over the lands which should remain unsold. The testator then gave certain other legacies, *and directed the last-mentioned legacies to be paid out of his* PERSONAL *estate*, and bequeathed the residue of his said personal estate, except as aforesaid, to his wife, whom, with two other persons, he appointed his executrix and executors: Sir W. Grant, M. R., held, that though there was room for conjecture that the testator did mean to throw his debts primarily upon the real estate, yet that this did not appear with a sufficient degree of certainty to enable him judicially to collect such an intention. He said, that by directing the lega-

(*a*) See Sir W. Grant's judgment in Tower *v.* Lord Rous, 18 Ves. 159. Also Greene *v.* Greene, 4 Madd. 148; Michell *v.* Michell, 5 Madd. 69; Driver *v.* Ferraud, 1 Russ. & M. 681.

(*b*) 3 Ves. 111 [Sumner's ed. 107, note (*a*)]. See also Kynaston *v.* Kynaston, 1 B. C. C. 457, n.; post, p. 579, n.

(*c*) 1 Mer. 193.

(*d*) 6 Ves. 567

cies to be paid out of the personal estate, the testator might merely have intended * to distinguish those leg- [573] acies from the others which were to be paid out of the real estate. His Honor also adverted to the circumstance, that the trustees and executors were not wholly the same persons.

This principle, too, was strongly recognized by the same learned Judge, in the case of Watson *v.* Brickwood, (*a*) which also establishes, that an intimation, however anxiously made, as to the proportions and mode in which the charge is to be borne among the devisees of the real estate, will not have the effect of onerating it primarily; such a clause being considered only as providing for the event, *in case the land does become chargeable*, and not as charging it at all events. (*b*) The case was as follows: A testator devised all his freehold lands to the use of his nephews W. and R. and their sons successively in strict settlement, with remainder to G. for life, and such son as he should by will appoint, with remainder to N. and his first and other sons in tail male; he then gave to several nieces legacies in blank, and proceeded thus: "And I direct the same legacies to be paid at the end of twelve months next after my decease, by my executor hereinafter named. I give and bequeath all and singular *my goods, chattels, personal estate, and effects, whatsoever and wheresoever, not hereinbefore disposed of*, unto my said nephew W., his executors, administrators, and assigns, forever, he paying thereout all and singular legacies, *and all my funeral expenses and* SIMPLE CONTRACT *debts*. And whereas, I have, * at different times, borrowed, on mortgage and [574] bond, divers sums of money of different persons, to enable me to make purchases of part of the said estates hereinbefore limited; and being minded that the whole should be discharged in equal proportions by the said W. R. G., and such his son so to be appointed as aforesaid, as they respectively shall become entitled to the possession of my said estates: Now I hereby will, order, and direct, that all such sum or sums of money as the said W. R. G., or his son so to be appointed as hereinbefore mentioned, or the said N. shall pay off and discharge during the time each of them shall be in possession of my said estates under this my will, and also all such sum or sums of money as any of them shall expend, or be put to in the Court of Chancery, or elsewhere, in protecting or defending my said leasehold estate, and a due proportion of any of the two last

(*a*) 9 Ves. 447, [Sumner's ed. notes.]

(*b*) But see Anderton *v.* Cooke, cit. 1 B. C. C. 456; Williams *v.* Bishop of Llandaff, 1 Cox, 254, where an estate was charged *in case another estate devised upon trust to pay debts should be insufficient;* and the personal estate was held to be exempt. Such a case seems to fall directly within the principle stated in the text. It does not appear, however, whether the decisions rested on the words in question. See another case of this kind, Dawes *v.* Scott, 5 Russ. 32.

fines, to be paid from time to time for the renewal of the leases thereof, shall be a debt and charge against the whole of such estates in favor of the person or persons, his and their executors, administrators, and assigns, so paying off and discharging such sum or sums, for so much money as shall be actually so paid and expended; and I direct the next taker of all my said estates under this my will to repay such sum and sums of money as his predecessor from time to time shall have so paid off and expended to such person or persons, and in such manner as his predecessor shall direct by any deed or will, to be by him duly executed, and for want thereof to the executor or administrator of such predecessor from time to time, deducting from time to time the due share or proportion thereof of such preceding taker, until the whole of such sum or sums of money shall be paid off; and I direct the same course to be used by each of the takers in succession until the full payment thereof, before such
[575] next taker or takers can * have any benefit under this my will: it being my will and desire, that no part of my estates be sold or parted with, and that all possible care be taken and observed in regard to such leasehold estates, as well with respect to the renewal of leases from time to time, as with respect to any dispute that may at any time hereafter arise in consequence thereof." *And the testator appointed W. his executor.* By a codicil, reciting the disposition of his estates to T. (the trustee) he gave the same to J., revoked the former devise, and gave to J. the powers and authorities given by the will to T.; and he further willed that J. and his heirs should and might, in order to raise money *for the payment of all and singular his debts and legacies*, from time to time *mortgage*, with the approbation of the taker for the time being of the said estates, according to his said will, a competent part of *his said freehold estates* for so much money as should be necessary for the purpose, and he directed his trustees for the time being to keep down the interest. By another codicil, the testator appointed another trustee, and gave other legacies. It was contended that the personal estate was discharged from the debts, or at least subject only to the *simple contract* debts: but Sir W. Grant was of a different opinion. He admitted that there was some indication of an intention to exonerate the personalty; but thought *that it was not so conclusive as to come up to the requisition of the rule laid down by* Lord Thurlow, *in the* Duke of Ancaster *v.* Mayer, (*a*) *that is, a plain intention;* and that by directing the executor, to whom he gave all his personal estate, to pay thereout all the legacies, funeral expenses, and simple con-
[576] tract debts, *primâ * facie* there was some appearance

(*a*) 1 B. C. C. 454. This case was decided by Lord Thurlow principally upon another point (see ante); but the positions laid down by his Lordship on the doctrine in discussion have been much referred to.

of an intention that he did not mean the personal estate to be liable to debts *by specialty*, but that alone upon the authorities was not sufficient; there must be a charge clearly and distinctly upon the real estate (*a*) to make it liable. When he declared his intention as to the real estate, it did not appear he had any fixed and distinct resolution by any act of his own to throw the specialty debts on the real estate; but he seemed to suppose either that the personal estate would not be sufficient both for the simple contract and specialty debts, or that the latter would of course fall upon the real estate, and any act by him to throw them upon the real estate was not necessary; for he had not in direct terms made any charge upon the real estate, but he took it for granted that the real estate would be called upon for bond debts and mortgages, and his object was to secure an equal distribution of the burden among the devisees, who were to take the real estate in succession, and no other object whatsoever. His intention was not to favor the executor taking the personal estate against those taking the real estate, *but to take care that those who were to take the real estate as against each other, should bear the burden in equal proportions.* It was contended, his Honor said, that the codicil operated as a total exoneration both from debts and legacies; the codicil contained as complete a provision for all debts and legacies as could be; but that was nothing more than there was in Tait *v.* Northwick. (*b*) This case was hardly so strong in that respect, for in that case were more circumstances from which it might have been argued that the testator could not have had it in contemplation to burden his real estate merely in aid of the personal. At most
* this was but the same case, and could not be con- [577]
tended higher than as equivalent to that; and there Lord Rosslyn, adhering to Lord Thurlow's rule, said expressly, that the most anxious provision for payment of debts out of the real estate would not be sufficient to exonerate the personal estate. His Honor was therefore of opinion that there was no exoneration of the personal estate.

Of this case Lord Eldon has said, (*c*) he thought it was rightly decided, taking the will and codicil together; "but if (said his Lordship) the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do not occur either in the judgment or in the argument; *still I repeat that I think that case was rightly decided.*"

The case of Watson *v.* Brickwood is an important authority on the general doctrine, since no case better exemplifies the species of evidence which is necessary to exonerate the per-

(*a*) And that *only*. See the sequel of his Honor's judgment.
(*b*) 4 Ves. 816; ante, p. 567.
(*c*) In Bootle *v.* Blundell, 1 Mer. 230.

sonal estate, as distinguished from mere conjecture. It would have been well if this principle had been steadily adhered to.

Another question which has much divided the opinions of Judges is, whether the circumstance of the bequest being of *all* the personal estate, (with or without an enumeration of particulars,) not a gift of the *residue*, demonstrates an intention to exempt it from the charges to which the general personal estate is primarily liable. The negative appears to have been decided in several instances where the legatee was appointed executor, a circumstance which has always been considered to favor the non-exemption, by raising the inference that the legatee was to take the personalty subject to the charges devolving upon him in the character of executor. French *v.* Chichester (*a*) *has
[578] generally been treated as a case of this kind. The testator there directed that the trustees of a certain real estate which he had conveyed by deed should out of the trust estate pay his debts, legacies, and funerals; and devised to his wife, whom he made executrix, *all his personal estate not otherwise disposed of*, intending thereby a provision for her, she having been prevailed upon to sell away part of her own inheritance. Lord Keeper Wright, and afterwards Lord Cowper, held that the devise being in the same clause in which she was named executrix, and not said exempt from the payment of debts, she must therefore take it as executrix, and the same must be applied in payment of debts.

But in this case the words "not otherwise disposed of" render it scarcely distinguishable from that of a residuary bequest. A similar remark applies to Watson *v.* Brickwood (*b*) and Bootle *v.* Blundell; (*c*) but as in both these cases there were anterior specific bequests, to which the words "hereinbefore disposed of" might relate, no argument against the exemption could be drawn from them. It is only where the will contains no other disposition than the charges which are to come out of the personal estate that such an argument applies; and it would seem, by parity of reason, that it is then only that even the circumstance of the gift being *residuary* raises any very strong inference *against* the exemption, though in every case the fact of the bequest *not* being residuary in its terms may afford an argument *in favor of* the exemption.

The case of Brummel *v.* Prothero, (*d*) however, seems more directly to support the doctrine in question; and it is observable that in this case the land was devised in trust to pay *all*
[579] the testator's * debts. The testator devised all his real estate to A. and his heirs, in trust, in the first place, to pay *all* his just debts, and then to other limitations. Lastly, he

(*a*) 2 Vern. 568; S. C. in Dom. Proc. 1 B. P. C. (Toml. ed.) 192; but see Cas. Temp. Talb. 209.
(*b*) 9 Ves. 447. (*c*) 1 Mer. 193. (*d*) 3 Ves. 111.

gave and bequeathed unto his brother E. all his *moneys, goods, chattels, rights, credits, personal estate, and effects*, whatsoever and wheresoever, *and appointed him executor*. Sir R. P. Arden, M. R., at first expressed an opinion that a direction to pay *all* the debts would, according to the authorities, throw them upon the land only; but he afterwards came to a contrary conclusion, observing that the case was stripped of every circumstance to exonerate the personal estate, except that of a devise to a trustee for payment of debts, and a general bequest of the personal estate to the executor; and that there was no one case since French *v.* Chichester, the first upon the subject, in which such words as these had been held alone sufficient to exempt the personal estate. (*a*)

*So in Aldridge *v.* Lord Wallscourt, (*b*) where A. devised all his lands to trustees, (subject to the payment of his just debts, funeral expenses, and several portions afterwards charged for his daughters,) to certain limitations, and directed his trustees to raise certain portions for his daughters. He appointed T., his son, executor, and bequeathed him *all* his personal estate in trust for such persons as he (the testator) should appoint. By a codicil reciting that bequest, he directed his executor to hold the personal estate in trust for his daughter M. Lord Manners thought there was nothing to exempt the personal estate from its primary liability to debts. [580]

In this case the legatee herself was not the executrix, but as the subject of gift was to flow to her through the executor as trustee, it might be considered as subject to charges attaching to him in that character, and consequently as falling under the same principle.

But though these cases may seem to authorize the conclusion

(*a*) This is not quite correct. There are several cases in which a contrary decision has occurred under circumstances hardly distinguishable. Thus, in Kynaston *v.* Kynaston, 1 B. C. C. 457, n., a testator charged his whole estate with the payment of all his debts, legacies, and funeral expenses, and for that purpose devised particular lands to trustees, upon trust to sell the same, and pay his debts, legacies, and funeral expenses; and he gave to his wife *all* his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate, (a circumstance which is now immaterial.) Lord Bathurst determined the personal estate to be exempt.

So, in Holliday *v.* Bowman, cit. 1 B. C. C. 145, A. devised a manor to trustees, in trust to sell, and directed the moneys to be raised thereby to be paid in discharge of all his debts; and after payment thereof, in the first place to invest the residue, and pay the interest to his wife for life, and the principal, after her decease, to B; and, after several specific and pecuniary legacies, gave to his wife *all* his goods and chattels, and appointed her executrix. It was held, upon the authority of Kynaston *v.* Kynaston, that the personalty was exempt from the debts. Bamfield *v.* Wyndham, Pre. Ch. 101, is a case of the same kind, but is much weakened as an authority, by the stress that was laid upon the inadequacy of the personalty to pay the debts. How far Lord Bathurst was influenced by this circumstance in Kynaston *v.* Kynaston, does not appear; but it is evident that both this case and Holliday *v.* Bowman are overruled by Brummel *v.* Prothero. It would have been more satisfactory if they had been noticed in that case.

(*b*) 1 Ba. & Be. 312.

that where the legatee is appointed executor, (notwithstanding the funeral expenses are thrown upon the land, the personalty is not exempted by the mere circumstance of the bequest being of *all* the personal estate, with or without an enumeration of particular species of property, yet in several instances the distinction between such a bequest and a gift of the *residue* has been treated as having weight. Thus in Tower *v.* Lord Rous,(*a*) Sir W. Grant, M. R., observed, that there was nothing
[581] except the common *residuary clause, not "all my personal estate," not "all which I have not hereinbefore disposed of," or any other of those forms *which in several cases have been held to denote an intention to give the personal estate as a specific bequest.* And Lord Eldon, in Bootle *v.* Blundell, (*b*) observed, in reference to the Duke of Ancaster *v.* Mayer, (*c*) that a great deal of argument might have been raised as to the distinction between a gift of residue, as residue, and a bequest of enumerated particulars followed by the words, "and personal estate whatsoever," not "and all *the residue of* my personal estate;" though his Lordship admitted that the argument in this case was excluded by a subsequent clause, in which the testator referred to the bequest as a gift of "the residue." It should be observed, too, that in Duke of Ancaster *v.* Mayer there were circumstances which operated quite as strongly against the exemption as in Brummell *v.* Prothero. The same persons were appointed *trustees* of the term to raise money to pay the debts and funeral charges, *and executors* (which has been generally considered to favor the non-exemption); (*d*) and there was even a direction to them as "executors" to pay the funeral charges, debts and legacies; and they were to reimburse themselves
[582] the expenses attending the execution of the will *out of the personal estate or moneys to be raised by the term; and yet, under these circumstances, all tending to oppose the exemption, Lord Eldon thought the distinction between a gift of enumerated particulars followed by a bequest of the *residue*, and of *all* the personal estate, entitled to some weight. It is unfortunate that Brummel *v.* Prothero was not among the numerous decisions cited by his Lordship in Bootle *v.* Blundell.

In several subsequent cases, indeed, one main ground of ex-

(*a*) 18 Ves. 139.
(*b*) 1 Mer. 228.
(*c*) 1 B. C. C. 454.
(*d*) See Lord Northington's judgment in Stephenson *v.* Heathcote, 1 Ed. 38; Lord Thurlow's, in Duke of Ancaster *v.* Mayer, 1 B. C. C. 454 (see also 1 Mer. 223); Lord Alvanley's, in Burton *v.* Knowlton, 3 Ves. 108; and Gray *v.* Minnethorpe, 3 Ves. 103. But see Lord Hardwicke's judgment in Walker *v.* Jackson, 2 Atk. 624; and Lord Eldon's judgment in Bootle *v.* Blundell, 1 Mer. 227, where, though his Lordship seems to have treated this circumstance as adverse to the exemption, yet he admitted that there might be such a cautious discrimination of the two characters of trustee and executor, as not only to render their union in the same person unimportant, but afford an inference in favor of the exemption.

emption was, the fact of the personalty being given, not as a residue, but as *all* the personal estate, accompanied by an enumeration of articles, notwithstanding that in one of them it may be inferred that the trustees of the real estate were executors; but it is observable that in all these cases the real estate was onerated with all the charges to which the personal estate is liable, namely, the debts, funeral expenses, and costs of proving the will. The first is Greene *v.* Greene, (*a*) where the testator, in the first place, gave and bequeathed unto his wife all his *ready money, securities for money, goods, chattels, and other personal estate and effects whatsoever*, which he should be possessed of or entitled to at the time of his decease, except such part or parts thereof which, by that his will, or by any codicil or codicils thereto, he should dispose of specifically to, and for her own sole and absolute use; he also devised his real estate to A, B, and C, upon trust for sale, directing them out of the moneys arising out of such sale, to pay *his debts, funeral expenses, and the costs of proving his will*,[1] and, after payment thereof, to invest the residue upon certain trusts for his wife for life, and then for his children; and he appointed his wife, and A, B, and C, executrix and executors. * Sir John Leach, V. C., [583] held the personal estate to be exempt, observing that the direction that the trustees, "who formed only a part of the executorship," should out of the produce by sale of the real estate, pay all debts and expenses, and after payment thereof invest the surplus for the benefit of the wife for life, with remainder to the children, when coupled with the circumstance that the devise to the trustees was expressly made subject to the payment of debts and funeral expenses, and with the gift to the wife for her own sole and absolute use of all the testator's ready money, securities for money, goods, chattels, and other personal estate and effects whatsoever, which the testator should be possessed of at the time of his death, did appear to him to convey a clear intimation of intention, not that this real estate should be auxiliary only, to be applied in case the personal estate should prove deficient, but that the real estate should directly, and at all events, be applied as the primary fund for the payment of the debts, funeral expenses, and the expenses of the probate, and that the wife should take the personal estate, exempt from those charges. His Honor distinguished the case from the Duke of Ancaster *v.* Mayer, (*b*) Stephenson *v.* Heathcote, (*c*) Inchiquin *v.* O'Brien, (*d*) Tait *v.* Northwick, (*e*) and Watson *v.* Brick-

(*a*) 4 Madd. 148. (*b*) 1 B. C. C. 454. (*c*) 1 Ed. 38.
(*d*) Amb. 33. (*e*) 4 Ves. 816.

[1] See 1 Story, Eq. Jur. § 574; Ram on Assets, c. 6, § 2, p. 89–93; Dunlap *v.* Dunlap, 4 Desaus. 305, 329; M'Campbell *v.* M'Campbell, 5 Litt. 95; Wyse *v.* Smith, 4 Gill & Johns. 295; Rogers *v.* Rogers, 1 Paige, 188.

wood, (*a*) on the ground that, in those cases, the bequest was of a residue; and observed that, in the latter, it was given expressly after payment of debts, funeral expenses and legacies.
[584] He relied upon Burton *v.* * Knowlton (*b*) and Kynaston *v.* Kynaston. (*c*) But, in reference to Watson *v.* Brickwood, it is to be observed that the clause expressly subjecting the personalty to the payment of legacies, funeral expenses, and debts, referred to simple contract debts only; whereas the only argument in favor of the exemption much insisted on, was in relation to specialty debts, the exclusion of which from the clause in question favored their being thrown exclusively on the real estate.

The principal circumstances in which the case of Greene *v.* Greene differs from Brummel *v.* Prothero, (*d*) are, that in the latter case, the legatees of the personalty were also the executors, whereas in Greene *v.* Greene the legatee was only *one* of the executors, and the land was onerated with *all* the charges which would otherwise have come out of the personal estate, namely, the debts and funeral *and testamentary* expenses; (*e*) but in Brummel *v.* Prothero with the debts and funeral expenses only.

So, in Michell *v.* Michell, (*f*) where a testator bequeathed to his daughters E. and M. all and singular his *plate*, *linen*, *china*, *household goods*, *and furniture and effects*, which he should die possessed of; and devised his real estate to trustees, upon trust to pay his funeral expenses, costs of proving his will,
[585] and in the next place to retain all sum * and sums of money then due, or thereafter to grow due, from him to them respectively, on mortgage, bond, or memorandum, and the interest thereof, and also to pay all such other debts as should be owing from him at the time of his decease, and divide the residue among his children; Sir J. Leach, on the authority of the last case, held that the real estate was made the primary fund for these charges. The executors appear to have been the trustees of the real estate, as they proved the will. It is evident, there-

(*a*) 9 Ves. 447.

(*b*) 3 Ves. 107; but this case has been noticed with disapprobation, both by Lord Loughborough, in Tait *v.* Northwick, 4 Ves. 803, and by Lord Eldon, in Bootle *v.* Blundell, 1 Mer. 229. Besides, it was a bequest of *the residue*, which increases the surprise that it should be cited by Sir John Leach, who rested the exemption mainly on the circumstance of the bequest being of the whole, as distinguished from the residue of the personal estate.

(*c*) Cit. 1 B. C. C. 457. The authority of this case is considerably weakened by the stress laid on the inadequacy of the personal estate to pay the debts. It is clearly irreconcilable with the current of authorities, particularly French *v.* Chichester, ante, Brummel *v.* Prothero, ante, and Aldridge *v.* Lord Wallscourt, ante, being nothing more than a charge upon the land of all the debts, and a gift of all the personal estate to the individual who was appointed executrix. According to those cases, therefore, the personalty was not exempt.

(*d*) Ante, p. 578.

(*e*) See an observation upon this, ante, p. 582.

(*f*) 5 Madd. 69.

fore, that the Vice-Chancellor did not consider the union of the two characters of trustees and executors sufficient to negative the exemption in such a case.

The same remark applies to the case of Driver *v.* Ferrand, (*a*) decided by the same learned Judge, where a similar construction prevailed; the charge on the real estate extended to debts, legacies, funeral and testamentary charges, and the bequest of personalty was not residuary in its terms, but the legatee was one of the executors. A difficulty in the way of the construction was, that the legacies were directed to be paid by the executors, but Sir J. Leach considered this to be inconclusive, as they were also trustees, and that the testator in such direction had in view the real estate, was, he thought, shown by a clause which immediately followed, authorizing the trustees to deduct their expenses out of the real estate.

So, in the case of Blount *v.* Hipkins, (*b*) where a testator gave to his wife M. all his household goods, plate, linen, china, pictures, farming stock, ready money, debts, personal estate and effects of every kind which he should happen to die possessed of, except certain articles which he bequeathed to another person. The testator devised *certain real estate to [586] his wife M. He then gave all other his real estate to trustees upon trust for sale, and out of the proceeds to pay his funeral expenses, the costs of proving his will, and all his debts (including a mortgage on the estate devised to M.) and certain legacies and the residue of the proceeds to G. Sir L. Shadwell, V. C., considered it to be clear that the personal estate, bequeathed to his wife was intended to be exonerated from his debts.

So, in the case of Jones *v.* Bruce, (*c*) where a testator gave to his wife absolutely all his goods, chattels, and personal estate whatsoever and wheresoever, and charged his real estate in D. and S. with the payment of his funeral and testamentary expenses and debts, and he exempted, so far as he was able, his personal estate from the payment thereof. He then gave certain legacies to children, and charged all his real estate with the payment thereof, and directed that until the legacies were payable the trustees should raise out of the rents any annual sums by way of maintenance not exceeding four per cent. The testator then gave his real estate, subject to such portions thereof as were situate in D. and S. to the charges thereinbefore mentioned, and subject also to such charges as they were then liable to, to his wife for life, with remainders over. Sir L. Shadwell, V. C., held the real estate to be the primary fund for payment of the legacies, adverting much to the terms in which the personalty was bequeathed, and the gift of interest out of the rents of the real estate.

(*a*) 1 Russ. & M. 681. (*b*) 7 Sim. 43. (*c*) 11 Sim, 221.

These cases, then, seem to authorize the proposition, that wherever the personal estate is bequeathed in terms as a whole and not as a residue, and the debts, funeral and testa-
[587] mentary charges are thrown on the real estate, * this constitutes the primary fund for their liquidation. In the last case the principal was applied to legacies, where the funeral and testamentary charges and debts were thrown on the realty expressly as the primary fund.

That Sir John Leach did not mean by his preceding adjudications to deny the general rule, appears from the subsequent case of Rhodes *v.* Rudge, (*a*) where a testator gave all his real and personal estate to A and B upon trust, in the first place, to sell and dispose of the living of C, and the money to arise from the sale thereof to go in discharge of his debts and legacies and the charges of the trusts thereby created, and if such money were not sufficient to discharge the said debts and legacies, upon trust to cause timber to be felled on his real estates to the amount of £500, to be applied in discharge thereof; and if that should not be sufficient, then upon trust by mortgage or sale to raise such deficiency out of his real estates; and the testator then proceeded to give certain legacies, and appointed A and B executors of his will. Sir J. Leach, V. C., thought that there was nothing in this will to change the usual order of application, and therefore that the personalty was primarily to be applied.

No case could well be stronger against the exemption than this: the same persons who were trustees of the real and personal estates were also executors, and there was no other bequest of the personal estate than to these trustees.

The personal estate is of course held to be exempt from debts where real estate is devised to be sold to pay debts, with a direction that the residue shall *be added to the testator's personal estate*, (*b*) which is obviously incompatible with the
[588] primary application of the personalty. * So where the testator declares that he has charged his lands with the payment of his debts, in order that the personal estate may *come clear to the legatee*. (*c*)

Again, where the testator charges his debts, funeral and testamentary expenses and legacies, on estate A, as a primary fund, and in case that should be deficient, he charges estate B with the deficiency, he thereby conclusively shows that the latter estate is the secondary fund in exoneration of the personal estate. (*d*)

In the much-considered case of Bootle *v.* Blundell, (*e*) the tes-

(*a*) 1 Sim. 79. (*b*) Holliday *v.* Bowman, cit. 1 B. C. C. 145.
(*c*) March *v.* Fowkes, Finch's Rep. 414.
(*d*) Dawes *v.* Scott, 5 Russ. 32.
(*e*) 1 Mer. 193; S. C. 19 Ves. 494 [Sumner's ed. 494 c, note (*a*)].

tator first directed his funeral expenses to be paid. He then gave to his son R., and his daughters S. and J., £3000 each, with a substitution of their children in a certain event. The testator then directed that his said funeral expenses and legacies should be paid out of such moneys as he should have by him, moneys due to him from C, and out of rents and fines which should be due to him; and gave the surplus unto his sons and daughters. The testator then devised all his manors of Lostock, &c., to A, B, and C, for five hundred years, in trust out of the rents *to pay* HIS DEBTS, and also all such annuities or legacies as were thereinafter mentioned, or which he might thereafter specify in any codicil or instrument in writing. He then bequeathed certain legacies, including one of £300 to each of his trustees for their trouble, and several annuities, among the rest one to his housekeeper M. The testator then declared that his trustees and executors should not be answerable for any losses, and that if they were called to such account, or sustained any expenses in respect thereof, the same, and also at all events all other their costs and expenses should stand charged upon his said hereditaments, *and be paid out of the [589] rents and profits thereof; and that so soon as the trusts of the term should have been satisfied, and all the expenses incident thereto discharged, the remainder of the term should thenceforth cease; and, subject thereto, he devised his said manors, &c., in undivided moieties to his two daughters, and their issue, in strict settlement. The testator then appointed a certain person to be steward and agent, to have the management of the estates comprised in the said term of five hundred years, so long as the same should remain in the hands of his trustees, with particular directions as to his salary and conduct, and afterwards proceeded as follows: "And it is my will that as soon as the debts hereby charged on my said estate, and the legacies or sums of money hereby given, are paid and satisfied, and as soon as such satisfactory security shall have been given by my said trustees for the due payment of the said annuities, and all expenses as shall satisfy the said annuitants, and when all expenses incurred in the execution of the said trusts respecting the said term and of this will shall be fully paid, then the person or persons who shall at that time be next entitled to the same estates under and by virtue of the limitations in this my will contained, shall be let into the possession thereof." (*a*) The testator then provided for the appointment of new trustees in certain events, who were to be allowed out of the rents and profits of the estates comprised in the term of five hundred

(*a*) This clause is very important, for the testator could hardly intend that the devisees should be kept out of possession until the whole personal estate was administered, which would be the consequence of holding it to be not exempt from the debts.

years the sum of £300. He also devised one half of the manor of Lydiate, and all the lands purchased by him in
[590] Ince, &c., not *thereinbefore disposed of, to the use of his son C. for life, with remainders over; and he directed that all his pictures, drawing-books, prints, statues, and marble, should be enjoyed by his son during his life, and after his decease he gave the same to the first son of his body who should attain twenty-one; his intention being that they should go along with the capital messuage called Ince Hall. After devising to J. certain lead mines, and to M., his housekeeper, several articles of furniture, and other things, which he directed should be removed by his executors at the expense of his personal estate, the testator bequeathed to his said son the furniture of his house, his wines, horses, cattle, and carriages, plate, *and other his goods, chattels, and personal estate not thereinbefore specifically disposed of*, or which might thereinafter be disposed of by him; and appointed the said A, B, and C executors of will, providing that immediately after his decease his executors should enter into his dwelling-house, and take into their custody all moneys and papers there found. By a codicil, the testator, after noticing the devise to his son of his estate at Lydiate, and that attempts might be made to invalidate some of the dispositions of his will or codicil, and the trustees and executors, or other devisees, might incur expenses in supporting the same, which expenses it was his will should be paid out of the said lands, and not be a charge upon any other part of his property, he thereby devised the said hall, manor, &c., unto the said A, B, and C, trustees and executors named in his said will, their executors, administrators, and assigns, for the term of one thousand years, in trust by sale, lease, or mortgage, or out of the rents and profits, to raise such moneys as should be sufficient to pay all expenses which should be so incurred.

The question was, whether the estates comprised in the term of 500 years were liable, in the first place, to the pay-
[591] ment *of the testator's debts, in exoneration of the personal estate. Lord Eldon, after much consideration, and reviewing most of the authorities, held that it was: he adverted to the circumstance, that though the same persons were trustees and executors, the two characters were anxiously kept distinct; the testator never using the word "executors" but with reference to the personal estate, nor the word "trustees" but with reference to the real estate; that the clause charging the expenses on the estates devised, having blended together the costs attending the real and personal estate, made it impossible to say that the testator could have meant that the costs of the real estate should be paid out of the real estate, but that the costs of the personal estate should not be paid in the same manner, except in the case of a deficiency of the personal

estate; that the testator had directed that his funeral expenses should not be paid out of his general personal estate; that the costs of performing the trusts of his real estate should be paid out of the rents and profits of the estates devised; and that the persons respectively entitled under his will should not be let into possession of the devised estates until payment of all debts and legacies, and security given for payment of the annuities; that the new trustee of the term to be appointed should receive the sum of £300 out of the rents and profits of the estates comprised in the term; that the purpose of keeping together, as objects of public curiosity, the pictures, &c., sufficiently accounted for their being set aside from the rest of the personal estate, given to his son, without resorting to the supposition that it was merely to exempt them from the debts and legacies to which the remainder was meant to be liable; that because the testator had charged his personal estate with the costs of removing the specific articles given to Mrs. M., it did not * follow (as had been insisted) that it should also [592] be liable to the payment of his debts and legacies; that the words "not hereinbefore specifically disposed of" might be taken to mean not specifically disposed of *to others*, and not as referring to the application of the personalty to debts, &c.; and, lastly, (on which his Lordship laid much stress,) that the costs incurred by the litigation of the will were to be paid exclusively out of the real estate; though he doubted whether if there were no circumstances in the *will* that afforded a ground for saying the personal estate should be exempted, this provision alone in the codicil would have been a sufficient manifestation of the intention to exempt it. He nevertheless thought that it deserved great consideration.

Here it may be observed, that the exemption of the personalty in favor of the *legatee* does not necessarily extend to the *next of kin*, in case of the failure of the bequest thereof by lapse or otherwise.

Thus it was laid down by Sir R. P. Arden in Waring *v.* Ward, (*a*) that if an estate be given to A subject to debts, and the personal estate to B exempt from debts, that exemption is to be considered as intended only for the benefit of B, and not as a general exemption of the personal estate.

On the other hand, Lord Eldon in Milnes *v.* Slater, (*b*) expressed an opinion that if the testator, having bequeathed the personal estate, directed that it should not be applied in payment of mortgages, and gave the mortgaged estates to different persons, *they paying out of them the mortgages*, the devisees would take cum onere even as against the next of kin.

(*a*) 5 Ves. 676. See also Hale *v.* Cox, 3 B. C. C. 332 [Perkins's ed. notes]; Noel *v.* Lord Henley, 7 Price, 240.

(*b*) 8 Ves. 308.

[593] *The distinction, it is conceived, is, that if the exemption arise from the terms in which the *personal* estate is bequeathed, and that bequest lapse, the exemption fails with it, as part of, and incidental to, such bequest; but if the *real* estate be given in such a manner as to indicate that the devisee is at all events to be onerated with the charge, the failure of the bequest of the personalty does not affect the situation of the devisee. This removes the seeming discrepancy between the two dicta.

It has been already stated that under a general charge of, or a trust to pay *legacies*, the several funds liable to their liquidation are applied in the same order as in the case of *debts*, and therefore the general personal estate, if not exempted, is first applicable; but such cases are carefully to be distinguished from those in which the trust is to pay certain specified sums, when, *as the only gift is in the direction to pay them out of the land*, that fund alone is liable. (*a*)

Thus, where a testator devises his estate to trustees, upon trust to sell, and out of the proceeds to pay legacies generally, and afterwards gives to A a legacy of £100, that legacy will be charged upon the land in aid of the personalty only; but if the devise be upon trust to sell, and out of the produce to pay to A £100, the sum so given will be considered as a portion of the real estate, and will in no event be payable out of the [594] personalty; and if the testator *sell the estate in his lifetime, the legacy will be adeemed. (*b*)

And in Spurway *v.* Glynn, (*c*) Sir W. Grant thought that a direction at the end of the will, that the personal estate should be applied in payment of *legacies*, in exoneration of the real estate, did not apply to a sum given out of a particular estate, of which there was no other gift than the trust so to pay it.

So, in the case of Welby *v.* Rockliffe, (*d*) where the testator, after devising an estate at W. to A in fee, and reciting a mar-

(*a*) Whaley *v.* Cox, 2 Eq. Ca. Ab. 549, pl. 29; Amesbury *v.* Brown, 1 Ves. Sen. 481; Phipps *v.* Annesley, 2 Atk. 57; Wood *v.* Dudley, 2 B. C. C. 316; Reade *v.* Litchfield, 3 Ves. 479; Hartley *v.* Hurle, 5 Ves. 540 [Sumner's ed. note (*a*), and cases cited]; Brydges *v.* Phillips, 6 Ves. 567; Spurway *v.* Glynn, 9 Ves. 483; Hancox *v.* Abbey, 11 Ves. 179; Aldridge *v.* Wallscourt, 1 Ba. & Be. 312; Noel *v.* Lord Henley, 7 Pri. 241; S. C. 1 Dan. 211; S. C. in Dom. Proc. 1 Dan. 322; but see Holford *v.* Wood, 4 Ves. 78.

(*b*) Newbold *v.* Roadknight, 1 Russ. & M. 677. Whether, if the particular fund fails, by an act of the testator in his lifetime, the legacy is payable out of the general assets, in other words whether the legacy is demonstrative or specific, is often a question of some nicety. As to this, see Savile *v.* Blacket, 1 P. Wms. 778; Att. Gen. *v.* Parkin, Ambler, 566; Cartwright *v.* Cartwright, 2 B. C. C. 114 (see two last cases cited, 3 Beavan, 575); Roberts *v.* Pocock, 4 Ves. 150; M'Leland *v.* Shaw, 2 Sch. & Lef. 538; Smith *v.* Fitzgerald, 3 Ves. & Bea. 2; Mann *v.* Copland, 2 Madd. 223; Fowler *v.* Willoughby, 2 Sim. & Stu. 354; Wilcox *v.* Rhodes, 2 Russ. 452; Colville *v.* Middleton, 3 Beav. 570; Bradford *v.* Haynes, 2 Appleton (Maine), 105; Foote, Appt. 22 Pick 299.

(*c*) 9 Ves. 483.

(*d*) 2 Russ. & My. 571.

riage annuity bond given by him, charged the estate and also A, his heirs, executors, and administrators, with the payment of the annuity, and then disposed of the personal estate, the residuary personal estate was held to be exempt, the annuity not being merely charged on the estate, but the payment being imposed on A as a personal obligation.

It seems that in these cases, if the sums in question are bequeathed free from the legacy duty, the duty will be payable out of the same fund as the legacy. (*a*)

It does not, however necessarily follow that the principle above stated applies to trusts for the payment of particular *debts*, to which the personal estate was antecedently
*liable and with respect to which, therefore, the charg- [595]
ing the land would seem to be merely for the purpose
of providing an auxiliary fund for those debts not in order to discharge the personalty.

The contrary, indeed, seems to have been assumed by Sir W. Grant, in Hancox *v.* Abbey, (*b*) for he held that a devise of real estate to trustees upon trust to sell, and to pay a mortgage due on some part of the testator's property, subjected the land in the first instance, although the personalty was given "after payment of debts," but which his Honor thought might be construed, after payment of debts *not before provided for*.

This doctrine and decision, however, are inconsistent with the principle upon which the more recent case of Noel *v.* Lord Henley (*c*) was professedly decided. The testator devised lands upon trust for sale, and directed the trustees to stand possessed of the moneys arising therefrom, upon trust to pay a mortgage debt of £2000 affecting one of his estates; and in the next place to pay all costs, &c., attending the execution of the trust for sale, &c.; *and then to pay a sum of* £20,000 *due on mortgage of certain parts of the testator's other estates thereinbefore devised;* and upon further trust to pay £5000 unto his wife, (which devise lapsed,) and the sum of £3000 unto T., both which last-mentioned sums the testator directed to be paid as soon as sufficient moneys should arise by such sale or sales after the other payments thereinbefore directed to be made thereout, and that the same should carry interest from his death. The testator then directed his trustees out of the moneys to arise from the sale to pay so much of his *other just* DEBTS, and of the pecuniary legacies by him there-
inafter bequeathed, as his own personal estate, *or the [596]
personal estate of his uncle R., should not extend to
pay; and, after such payments, to invest the residue of the said moneys upon trust for certain persons; and then, after giving several legacies, he declared that all his legacies should be paid without any deduction of the legacy duty; and he bequeathed

(*a*) Noel *v.* Lord Henley, 7 Price, 241. (*b*) 11 Ves. 179.
(*c*) 7 Price, 241; S. C. 1 Dan. 211.

all the residue of his personal estate, after payment of such of his debts as were not therein otherwise provided for, and of his legacies, &c., to his wife, her heirs, executors, administrators, and assigns, and appointed his said wife and two other persons executrix and executors. One question was, whether the sums of £2000, £20,000, and £3000, were payable out of the land exclusively, or only in aid of the personal estate. Richards, C. B., thought that there was not sufficient evidence of an intention to exonerate the personalty from these sums; for, although he admitted that there was no doubt that the testator, in giving the residue of his personal estate after payment of such of his debts as were not therein otherwise provided for, intended to exonerate some part of his personal estate from its liability to pay some of his debts, yet it did not appear what debts, and there was no intimation that he meant the sums particularized as distinguished from the rest of his debts. His Lordship thought that this was the ordinary case of a testator giving his personal estate to A, and his real estate to B, subject to the payment of his debts, and that the circumstance of the testator having enumerated particular debts made no difference. *He could not make any distinction between a direction that real estate should be chargeable with a* PARTICULAR *debt of* £20,000, *and a devise of real estate subject to* ALL *the testator's debts; for the* £20,000 *was only part of these debts.* But he thought that legacies stood upon a very different footing: debts (he said) were prima facie
[597] to be paid out of the personal estate; *legacies might be paid out of the personal or out of the real estate, according to the intentions of the testator; therefore such *legacies* as were not thrown upon the personal estate were not to be paid out of it. The Court accordingly held that the mortgage of £2000, (which it appeared was not the testator's own debt, but was created by a prior owner, from whom the lands had descended to him,) (*a*) with the £3000 and the legacy duty on both these sums, were to be paid out of the real estate exclusively; but that the testator's mortgage debt of £20,000 and duty were to be raised out of it only in aid of the personalty.

As to the £20,000, the decree was reversed in the House of Lords, (*b*) but merely on the ground that the mortgage was the debt of the estate, not of the devisor, having been made for the purpose of liquidating incumbrances created by the preceding owner. (*c*)

If there had been nothing more than a general provision for debts, as the learned Chief Baron appears from *some* of his observations to have thought, the case is not an adjudication upon the point in question; but considering the testator's anxious

(*a*) As to this, see ante, p. 556.
(*b*) 1 Dan. 322.
(*c*) See this treated of, ante, p. 558.

discrimination between the enumerated debts and the others, (*a*) and his subsequent reference to the debts as consisting of two classes, there was perhaps some difficulty in so treating it. At all events, the doctrine in the judgment is in direct opposition to that of Sir W. Grant's determination in Hancox *v.* Abbey. Upon principle, the distinction taken by that learned Judge, between a trust to pay particular debts and debts generally, seems to be hardly tenable. There is no * apparent reason why a testator, who provides an additional fund, should intend to discharge the fund primarily liable, more in the one case than in the other; or why debts, which before subsist as a charge upon the personal estate, independently of the will, should necessarily be considered as governed by the same rule as legacies, which owe their existence to the trust to pay them. [598]

It should seem, that where a specific portion of *personal* estate is appropriated to charges to which the general personalty is liable, such fund is not, as in the case of land, subsidiary only, but is primarily applicable.

Thus, in the case of Browne *v.* Groombridge, (*b*) where a testator gave to his executors his exchequer bills, money at the bankers, and due to him on policies of insurance, money in the funds, and debts, upon trust thereout to pay his wife £200, and then *to pay his debts, funeral and testamentary expenses*, and, after making the said payments, to pay certain legacies, and then to stand possessed of the moneys upon certain trusts; it was contended, on the authority of Waring *v.* Ward, and Noel *v.* Lord Henley, that the specific fund was charged with the debts and legacies only in aid of the personal estate; but Sir J. Leach, V. C., held, that the fund was immediately liable, observing that Waring *v.* Ward was the case of a devisee of *real* estate, who was entitled to the aid of the personal estate.

So, in Choat *v.* Yeates, (*c*) where a testatrix gave the residue of her *funded property*, after payment of her *just debts, legacies, funeral and testamentary expenses*, to A, and all the residue of her personal estate upon certain trusts; it was held, that the funded property was primarily liable, though the effect was to leave nothing for the legatee.

Again, in Bootle *v.* Blundell, (*d*) we have seen that the * direction to pay the funeral expenses, and certain legacies out of a specified fund, was treated by Lord Eldon as tantamount to a declaration, that they should not be paid out of the general personal estate. [599]

(*a*) It seems, however, that in general the charging of a particular debt or legacy expressly gives it no priority over debts or legacies subsequently charged in general terms. Clark *v.* Sewall, 3 Atk. 96.

(*b*) 4 Madd. 495.

(*c*) 1 Jac. & Walk. 102.

(*d*) 1 Mer. 193; ante, p. 591.

But a different construction prevailed in the anterior case of Holford *v.* Wood, (*a*) where a testatrix bequeathed certain leasehold hereditaments, household goods, furniture, and personal estate, then late belonging to W., to F., his executors, &c., for his own use and benefit, *subject to the payment of "the following annuities and legacies."* The testatrix then specified certain legacies and annuities, and appointed F. executor. One question was, whether the specific property was liable to the legacies and annuities in the first instance, or only in aid of the general personal estate. Sir R. P. Arden, M. R., held that the specific fund was *not* primarily charged; his Honor adverting to the hardship of making legatees liable to lose their legacies, if the fund upon which they were specifically charged was deficient.

Admitting that, in this case, the legacies were not payable out of the specific fund *alone;* (*b*) yet it is clear, according to the doctrine *now* established by Browne *v.* Groombridge, and Choat *v.* Yeates, that even if the legacies were general, the fund charged being personal, was primarily applicable. In regard to this point, the case may be considered as overruled by the two last-mentioned authorities, in which unfortunately it was not cited. The doctrine of those authorities seems upon the whole to be the more reasonable; for, although, where a testator subjects real estate to charges to which the personal estate, and most frequently that only, was before liable, there is no rea-
[600] son why the added fund should be applied before * the original one, yet in regard to personal property, the whole of which was antecedently applicable to debts, as additional security to the creditor, could not be the object of the provision, the natural inference is, that the testator, in appropriating for this purpose a particular portion of that estate, intended that it should be primarily applied.

IV. It remains to consider in what case assets are marshalled in favor of legatees or creditors.

On this subject it may be stated, as a general rule, that wherever a creditor, having more than one fund, resorts to that which, as between the debtor's own representatives, is not primarily liable, the person whose fund is so taken out of its proper order, is entitled to be placed in the same situation as if the assets had been applied in a due course of administration, in other words, to occupy the position of the creditor in respect of that fund, or those funds which ought to have been applied, to the extent to which his own has been exhausted.

Thus, if the specialty creditors of a testator who died before the 29th of August, 1833, (*c*) or the simple contract creditors of

(*a*) 4 Ves. 78 [Sumner's ed. note (*b*)].
(*b*) See cases collected, ante, p. 594.
(*c*) See Stat. 3 & 4 Will. IV. c. 104, ante, p. 510.

any other testator, choose to enforce payment from the personal representatives of their debtor, instead of suing (as they may do) the heir in respect of any real estate which may have descended to him, and thereby withdraw the personalty from the claim of specific or pecuniary legatees, the Court will marshal the assets in favor of such legatees, by placing them in the room of the creditors, as it respects their claim on the descended lands; such descended assets, according to the order of application before stated, being *liable before [601] pecuniary legacies or even personalty specifically bequeathed. (*a*)

But legatees are not entitled to have the assets marshalled against the *devisees* of real estate, either specific or residuary; (*b*) for to throw the debts upon the devisees, in such a case, would be to apply devised *real* estate before personal estate, specifically bequeathed, and thereby break in upon the established order of application before stated. (*c*) It is not correct in such cases to account for the non-interference of the Court, by saying that the parties have *equal equities*, (*d*) which would seem to imply that there exists such an equality between them in the consideration of a court of equity, as to entitle neither party to its interposition against the other; whereas it is clear that if the *devised* lands had been resorted to by any creditor, having no specific lien thereon, instead of the personal estate, the devisee would have been entitled to be reimbursed out of personalty *specifically* bequeathed. The reason therefore, and the only reason, why assets are not marshalled in the case under consideration is, that the creditor having resorted to the fund *in the proper order*, no ground exists for disturbing it.

But if the lands devised are *charged with debts*, it is clear, upon the same principle, that the assets will be marshalled in favor of pecuniary and specific legatees;[1] lands so charged being

(*a*) See ante, p. 546.
(*b*) Mirehouse *v.* Scaife, 2 My. & Cr. 695; Forrester *v.* Leigh, Amb. 171; Scott *v.* Scott, Amb. 383; S. C. 1 Ed. 458; Hamly *v.* Fisher, Dick. 105; Keeling *v.* Brown, 5 Ves. 359, [Sumner's ed. Perkins's note (*a*) and cases cited.] Mr. Roper has treated this case as if the specialty debts had been charged upon the land by the testator, 1 Treat. on Leg. 463; although Lord Alvanley distinctly determined that none of the debts were charged, (see ante,) and grounded his refusal to marshal the assets on this circumstance. See also Lord Hardwicke's judgment in Hanby *v.* Roberts, Amb. 128.
(*c*) Ante, p. 546.
(*d*) See 1 Rop. on Leg. 469.

[1] Equity will marshal the real estate descended to the heir, in favor, or for the relief, of specific legatees; but it will not, for such a purpose, interfere with the lands devised, unless they were devised subject to the payment of debts. Keeling *v.* Brown, 5 Ves. (Sumner's ed.) 359, Perkins's note (*a*); Livingston *v.* Livingston, 3 Johns. Ch. 153. See Adams *v.* Brackett, 5 Metcalf, 282, 283; 2 Williams, Ex. (2d Am. ed.) 1221, 1222; M'Dowell *v.* Lawless, 6 Monroe, 141; Miller *v.* Harwell, 3 Murph. 194; Ram on Assets, c. 4, § 3, p. 64, c. 28, § 3, p. 341; Mollan *v.* Griffith, 3 Paige, 402; Warley *v.* Warley, 1 Bailey, Eq. 397.

[602] applicable before pecuniary or specific *legacies. (a) Thus, in Foster *v.* Cook, (b) (where a testator had charged his real estate with the *debts*, and given legacies not so charged,) the creditors having been paid out of the personal estate, which was not sufficient to pay both them and the legatees, the latter were allowed to come upon the real estate, so far as it had been applied in payment of debts.

So, if the mortgagee of a devised or descended estate resort in the first instance (as he clearly may) to the personal estate of the deceased mortgagor, to the prejudice of specific or even of general pecuniary legatees (who, it will be remembered, are not liable to exonerate a devised or descended mortgaged estate,) (c) equity will give those legatees a claim on the estate to the extent to which their funds may have been applied in its exoneration. (d)

In the case of Wythe *v.* Henniker, (e) an attempt was made, by impugning the authority of the case of Forrester *v.* Leigh, to shake this doctrine, in regard to pecuniary legatees; but Sir J. Leach, M. R., adhered to it, observing that, since that case, he had always considered it to be a settled rule of courts of equity, that a pecuniary legatee is entitled to stand upon the devised estate in the place of the mortgagee, to the extent to which the mortgage has been satisfied out of the personal estate. That doctrine proceeded upon the assumption, that the de-

[603] vise of the *mortgaged estate is a devise of the equity of redemption only, and that the testator intended that the devisee should take the estate cum onere. That doctrine, his Honor, however, observed, has not been universally approved, because, in all other cases, the devisee of a mortgaged estate does not take it cum onere, but has a right to have the mortgage satisfied out of the personal estate, even where the devise is made expressly subject to the mortgage.

It has been much debated whether, where a vendor, who has an equitable lien for his purchase-money on the property, as well as a claim on the personal estate of the deceased purchaser, resorts to the latter, to the prejudice of specific or pecuniary legatees, the legatees are entitled to have the assets marshalled against the heir or devisee of such property.

In regard to the heir, it would seem clear upon principle, and by analogy to the case of a descended mortgaged estate, that in

(a) Ante, p. 547.

(b) 3 B. C. C. 347. See also Bradford *v.* Foley, Rolls, 14 Aug. 1791, 3 B. C. C. 351, n.; Webster *v.* Alsop, Rolls, 12 July, 1791, 3 B. C. C. 352, n.; Fenhoulett *v.* Passavant, Dick. 253. Lord Hardwicke's judgment in Arnold *v.* Chapman, 1 Ves. Sen. 110; Norman *v.* Morrell, 4 Ves. 769; Aldrich *v.* Cooper, 8 Ves. 396. But, as to the widow's paraphernalia, see Probert *v.* Clifford, Amb. 6; the principle of which, however, it is not easy to reconcile with Snelson *v.* Corbet, 3 Atk. 368.

(c) Vide ante, p. 547.

(d) Lutkins *v.* Leigh, Cas. Temp. Talb. 53; Forrester *v.* Lord Leigh, Amb. 171.

(e) 2 Myl. & K. 635.

such a case the Courts would marshal the assets in favor of the legatees; descended assets being, according to the order before stated, applicable before specific or pecuniary legacies to the payment of all charges affecting them both.

And this view of the case seems to agree with Lord Eldon's observations in Austen *v.* Hasley, (*a*) where, however, the land was devised, and his Lordship's opinion upon another question rendered it unnecessary to decide the point. A contrary determination, indeed, was made in the case of Coppin *v.* Coppin, (*b*) where a person, who was both heir and executor of the vendee, was held to be entitled to retain out of the personal assets the purchase-money of an estate which his ancestors had purchased, *against the legatees of the vendee. This [604] case has been questioned by Lord Eldon, (*c*) and seems to have been overturned by the case of Trimmer *v.* Bayne, (*d*) where Sir Wm. Grant, M. R., decided that the heir who had paid the purchase-money for an estate contracted for by his ancestor, was not entitled, as against the legatees of such ancestor, to be reimbursed out of his personal estate.

It is not distinctly stated, however, whether the legatees, out of whose bequests the heir unsuccessfully claimed to be reimbursed, were specific or pecuniary legatees.

The right of a pecuniary legatee to have the assets marshalled, as against the heir of a testator who purchased, but died without having paid for, an estate, is placed beyond all doubt by the recent case of Sproule *v.* Prior. (*e*)

Where the purchased estate is *devised*, the question is somewhat different; but as the established rule is, we have seen, that the devisee of a mortgaged estate is not entitled to exoneration out of personal estate specifically bequeathed, and not expressly made subject to debts, there seemed ground to contend that in the present case the estate must, by parity of reasoning, also bear its own burden against such legatees, and accordingly, that if their funds have been taken by the vendor, they are entitled to have the assets marshalled against the devisee.

And the case of Pollexfen *v.* Moore, (*f*) was considered to lend some countenance to this doctrine; but it appears to have been decided upon different, though it should seem untenable, *grounds. Sir Wm. Grant in Trimmer *v.* Bayne, (*g*) [605] intimated that the case had greatly perplexed him, and the eminent author of the Treatise of Vendors and Purchasers

(*a*) 6 Ves. 484 [Sumner's ed. note (*a*)].
(*b*) Selw. Ch. Cas. 78; S. C. 2 P. W. 291.
(*c*) See his Lordship's judgment in Mackreth *v.* Symmons, 15 Ves. 339.
(*d*) 9 Ves. 209.
(*e*) 8 Sim. 189.
(*f*) 3 Atk. 272; S. C. stated from the Registrar's book, Sugd. Vend. & Purch. 449. Some of the doctrine advanced in this case is at variance with the decision. See 9 Ves. 211; 15 Ves. 339.
(*g*) 9 Ves. 211.

has taken some pains to show the inapplicability of the decision to the doctrine which it has been advanced to support, and the unsoundness of that doctrine; and his high authority may have had some weight in procuring its overthrow in the recent case of Wythe *v.* Henniker, (*a*) where Sir J. Leach, M. R., held that a person having devised an estate which he had purchased, and the vendor having after his decease been paid a part of the purchase money, which remained unpaid at the testator's death, out of the deceased's personal estate, the pecuniary legatees had no right to stand in the place of the vendor in respect of his lien upon the purchased estate, to the extent of the sum so received. His Honor, however, appears to have contented himself with showing that the case of Pollexfen *v.* Moore (which had been cited on behalf of the legatees) was not applicable to the point, and we look in vain throughout his judgment for an explanation of the principle of his decision, or an answer to the plausible, if not convincing, arguments founded upon analogical reasoning from the cases by which the claim of the legatees was attempted to be sustained.

Sir W. Grant decided that, even where the testator expressly directed his executors to pay the purchase-money of the devised estate, and the personal estate was inadequate to pay both the purchase-money and the pecuniary legacies, the devisee was liable to contribute ratably with the legatees. (*b*)

[606] It may be observed that Lord Eldon, in Austen *v.* Hasley, (*c*) thought that a clause *giving the executors "power" to pay the purchase-money out of the personal estate, was not necessarily to be construed as an absolute direction.

The preceding cases, however, in which equity interferes to prevent an eventual derangement, by the act of third persons, of the order of applying the assets, do not completely exemplify an important principle by which the Courts, in marshalling assets, are governed, and which forms the peculiar feature of the doctrine; it is this—that wherever a party has a claim upon one fund only, and another upon more than one, the party having several funds must resort, in the first instance, to that on which the other has no claim, or, in other words, the Court will so arrange the funds as to let in as large a number of claims as possible, and if the person having the several funds should, in violation of this rule, have resorted to the fund common to himself and the person having no other fund, the Court will place that person in his room, to the extent to which the common fund has been so applied. (*d*)

(*a*) 2 Myl. & K. 635.
(*b*) Headley *v.* Redhead, Geo. Coop. 50, noticed ante, p. 547, n.
(*c*) 6 Ves. 478.
(*d*) See this doctrine referred to, in regard to charities, ante, vol. 1, p. 207.

This principle is applied in favor of both creditors and legatees.

In regard to the former, however, it is to be remembered, that the statute of 3 & 4 Will. IV. c. 104, (*a*) renders all real estate, including copyholds, liable to the claims of creditors of every class.

But the doctrine may still be called into operation in reference even to creditors, as specialty creditors retain their priority under the new law to those by simple contract; and it is also observable, that the recent statute, by widening the range of the claims of creditors, has given greater scope to the application *of the doctrine among legatees. Thus, as [607] it was formerly the rule that where a specialty creditor resorted to the personal estate, and thereby rendered it inadequate to the payment of pecuniary legacies, the legatees might claim to stand in his place in respect of his demand upon the realty, which had descended, or was charged with legacies; so it is equally clear that, under the existing law, the same consequence would follow in the case of a simple contract creditor taking such a course.

Upon the same principle, it is settled that, where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both, the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate for those who have no other fund.

Thus in Hanby *v.* Roberts, (*b*) where the testator, by his will, gave several legacies, (not charging them upon the real estate,) and by codicil bequeathed a legacy of £3000, *with the payment of which he charged the real estate;* the personal estate having been exhausted in the payment of the £3000 legacy, Lord Hardwicke held that the other pecuniary legatees should stand in the place of the satisfied legatee to this extent.

But in Prowse *v.* Abingdon, (*c*) Lord Hardwicke refused to marshal assets in favor of a legatee whose legacy had been originally charged upon the land, but had failed in respect of the real estate, by his death before the time of payment; (*d*) his Lordship observing, that the rule as to *marshalling [608] would hold only where it was proper to be done at the

(*a*) Ante, p. 510.

(*b*) Amb. 127. See also Masters *v.* Masters, 1 P. W. 421; Bligh *v.* Earl of Darnley, 2 P. W. 620; Hamley *v.* Fisher, Dick. 104; Norman *v.* Morrell, 4 Ves. 769; Bonner *v.* Bonner, 13 Ves. 383.

(*c*) 1 Atk. 482.

(*d*) As to this doctrine, see ante, vol. 1, p. 756; but see also Pearce *v.* Loman, 3 Ves. 135, where Lord Loughborough doubted whether, in such a case, the legacy was payable even out of the personal estate. It is not easy, however, to perceive upon what sound principle the circumstance of its having been charged upon the real estate as the auxilliary fund, and having failed as to that, should vary the construction of it as a personal legacy.

time the legacy first took place, and not where it was owing to a fact which happened subsequently to the death of the testator; (*a*) and this has since been followed in the case of Pearce *v.* Loman. (*b*)

(*a*) But is it not always the fact of some legatee or creditor resorting to a particular fund *after the death of the testator* that occasions the requisition to marshal?
(*b*) 3 Ves. 135.

CHAPTER XLVIII.

LIMITATIONS TO SURVIVORS.

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III. *Words of Survivorship, to what Period referable.*

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I. WHETHER the word "survivor" is to receive a construction accordant with its strict and proper acceptation, or is, by a liberal interpretation, to be changed into *other*, is a point which has been often discussed, and variously decided. On more than one occasion, expressions have fallen from eminent Judges calculated to create an impression that the term "survivor" might by its own inherent force, and without one single ray of light from the surrounding context, be read as synonymous with *other*. In particular, Sir Wm. Grant, in the case of Barlow *v.* Salter, (*a*) seems to have assumed this point; and the construction recommends itself so forcibly, as carrying into effect the probable intention of testators, and as supplying a defect or inaccuracy of expression very commonly to be found in testamentary instruments, that it appears to have obtained too ready an acceptance in the profession; for we are now taught by a series of decisions which outweigh any opposing dicta or opinions, that the word "survivor," like every other term, when un-

(*a*) 17 Ves. 479. See also Wilmot *v.* Wilmot, 8 Ves. 10.

explained by other parts * of the will, is to be inter- [610]
preted according to its strict and literal meaning.

Thus, in the case of Ferguson *v.* Dunbar, (*a*) where a testator gave to his executor so much of his personal estate as would purchase an annuity of £550, which he gave to his wife for life, and he directed the principal after her decease to be paid to his children, that is to say, one half to his son G., and one half to his daughters E. and C., if living at the death of their mother, and if any of them should die in the lifetime of their mother, leaving issue, he gave that share to the issue of such child or children equally at the age of twenty-one years, or day of marriage; but if any of them should die before the age of twenty-one years without issue, he gave that share to the *survivors;* and if all of them should die without leaving children, the same was to fall into the residue. C. died leaving children. E. afterwards died under twenty-one, and without issue. The question was, whether the children of C. were entitled to any part of the share of E. Lord Thurlow said that this was one of those cases in which he had the mortification to see that what was most probably the testator's intention could not be executed, for want of his having been properly advised, and having sufficiently explained himself; that he thought the testator meant the children should take the share which would have accrued to the parent if living; but not having said so, but limited such share to the survivors or survivor, he must declare G., as the only surviving child, entitled to the whole of E.'s share, and decreed accordingly.

So, in the case of Milsom *v.* Awdry, (*b*) where a testator bequeathed the residue of his personal estate to * trus- [611]
tees, upon trust to pay and apply the same to and among his nephews and nieces (the sons and daughters of his late brothers and sister M. D. and H.) equally between them for their lives, the children of such of them his said brothers and sister to have only their father's or mother's share; and after the death of either of the testator's said nephews and nieces, in trust to call in the share of the principal money out of which the said interest was to be paid, and pay it equally unto and among the children of such of his said nephews and nieces as should happen to die; and if any of his (the testator's) said nephews and nieces should die without leaving any child or children, then the share or shares of him, her or them so dying should go to and among *the survivors and survivor* of them in manner aforesaid. One nephew died without leaving issue; then another died leaving issue; a third then died without issue, leaving a sole survivor. Sir R. P. Arden, M. R., after much hesitation, de-

(*a*) 3 B. C. C. 468, n.
(*b*) 5 Ves. 565. See also Wollen *v.* Andrews, 9 Moore, 248.

cided that the share of the third belonged exclusively to the survivor, and was not divisible (as had been contended by the issue of the second) between him and such issue.

Again, in the case of Davidson *v.* Dallas, (*a*) where a testator bequeathed to the children of his brother R. D. £3000, to be equally divided among them, and if either of them should die before the age of twenty-one years, their shares to go to the *survivors*. Lord Eldon, after referring to the rule for construing "survivors" as importing *others*, observed that there was nothing in this will indicating a general intention upon which the forced construction of the term "survivors" had been adopted. The words must therefore have their natural meaning.

So, in the case of Crowder *v.* Stone, (*b*) where a tes-
[612] tator * bequeathed certain stock in the funds to his executors, in trust for his wife and brother for their respective lives, and after the decease of the survivor to be divided equally between his nephew and four nieces; and in case of the death of his said nephew or of any or either of his said nieces, without lawful issue, before their respective parts or shares should become due and payable to them, then the part or share of him, her, or them so dying without issue as aforesaid, should go and be equally divided between and amongst the *survivor and survivors* of them share and share alike. At the decease of the testator's wife, (who survived his brother,) one niece only survived, several of the deceased nieces having left issue. Lord Lyndhurst held that the survivor was entitled to the whole. "It was contended," he observed, "that the words 'survivor and survivors of them' were to be construed 'other and others.' That is a construction which the Court has, in some cases, put upon those or similar words; but it is what Lord Eldon, in Davidson *v.* Dallas, (*c*) calls a 'forced construction of the term survivor,' and he contrasts it with what he calls its 'natural meaning.' It is a construction which the Court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will; and in Wilmot *v.* Wilmot it was scarcely possible to put any other meaning on the words. But, in looking at the language and the provisions of this will, I do not find any such necessity; and it seems to me, that the words 'survivor and survivors' are here to be taken in their natural meaning. The shares which became subject to the operation of the bequest to the survivor and survivors, will be divisible among such only of the five legatees as were living at the time when the
[613] events happened * on which the shares were to go over respectively."

Again, in the case of Ranelagh *v.* Ranelagh, (*d*) where a tes-

(*a*) 14 Ves. 576.
(*b*) 3 Russ. 217.
(*c*) 14 Ves. 578.
(*d*) 2 Myl. & Keen, 441.

tator, after bequeathing certain pecuniary legacies to his children for life, added, "in case of the demise of any of the above parties without legitimate issue, their, his, or her proportions to be divided among the *survivors*." Lord Brougham, C., treated it as clear (though it was not necessary to decide the point) that the word "survivors" was used in its plain and obvious sense, as meaning such of the individuals named as should be living when any of them happened to die.

And lastly, the same construction prevailed in the case of Cromek *v.* Lumb, (*a*) as to a clause providing that, in case any of the testator's grandchildren (who were the objects of a prior gift) should die, being a son, under the age of twenty-three and without lawful issue, or, being a daughter, under that age and unmarried, then the share or shares of him, her, or them so dying should go to the *survivor and survivors*, and the lawful issue of such as might be dead.

And the mere circumstance, that there occurs in the same will, in reference to another subject or other subjects, an instance of the words "survivor" and "other" being used conjunctively and as if synonymous, is not considered to imply an intention that "survivor," standing alone, shall have the same force or signification as the term with which, in other instances, the testator has associated it.

Thus, in the case of Winterton *v.* Crawfurd, (*b*) where a testator devised the residue of his real estate to trustees, upon trust as to one third to pay the rents to the separate use [614] of his daughter Harriet during her life, and after her decease, in trust for all her children, in equal shares, and the respective heirs of their bodies; and in case one or more of such children should die without issue, then as to his, her, or their share or shares, in trust for the survivors or survivor *and others or other of them;* and after giving the other two thirds by similar limitations to his daughters Louisa and Fanny, with remainder to their children, the testator proceeded to declare, that, in case one or more of his said daughters should die without issue of her or their body or bodies, then the share or shares of her or them so dying should be in trust for the *survivors or survivor* of them for the lives or life of such *survivors or survivor*, to be held and enjoyed by the trustees for the joint natural lives of such *survivors* of the testator's said daughters, in trust for them as tenants in common, and the rents and profits of the accruing share or shares to be for their separate use, and after the decease of the *survivor* of his said daughter, in trust for the child and children *of the survivors or survivor* of his said daughters per stirpes, and the heirs of the bodies of such child and children; and in case any one or

(*a*) 3 You. & Coll. 565. (*b*) 1 Russ, & Myl. 407.

more of such children should die without issue, then as to the shares of him, her, or them so dying, in trust for the *survivors or survivor, others or other* of them, and the heirs of the body of such survivors or survivor, others or other of them; and if all such children but one should die without issue, in trust for such surviving or only child and the heirs of his or her body; and in default of such issue, in trust for testator's nephews. Fanny died, leaving children. Louisa afterwards died without children, and the share of Louisa was claimed by and was now held to belong to Harriet, the only surviving daughter, to the exclusion of the children of Fanny. Sir J. Leach, M. R., said—

[615] "In order to effectuate the intention *of the testator, the Court sometimes gives to the word 'survivors' the sense of 'others.' Here the expressions of the testator are too precise to impute to him such an intention; and the survivors are to take as tenants in common for life for their separate use, which is wholly inconsistent with the notion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent. It is true that, in the gift over after the death of the surviving daughter to the children of the survivors or survivor, the words 'survivors or survivor,' may receive a more enlarged meaning. The intention of the testator appears to have been, that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters: and this intention would be defeated, if, upon the death of lady Winterton (*a*) without issue, which is stated to be a probable event, the children of the deceased sister were excluded. This question cannot, however, be decided during Lady Winterton's life; and all that can now be done is to declare, that Lady Winterton is entitled for life, to her separate use, to the one third share of the real estate, which by the will was given to her sister Louisa."

Sir J. Leach's observation, in regard to the inconsistency of the devise *for life* to the survivors with the supposition that the children of the deceased devisees were to stand in their place, is inconclusive, because, though the estate for life could not take effect as to any deceased child, the devise in remainder to the issue of such child might. Indeed, if his Honor was right in the opinion expressed by him, that after the death of the last surviving daughter the property would go over to the children

[616] of the *deceased daughter, and not to the ulterior devisees, there seems to be great difficulty in maintaining the soundness of his decision, as it has the effect of reading words occurring in different parts of the same will in various senses. The case too would then be in direct opposition to Doe *v.* Wainwright, (*b*) where *even in a deed* the limitation of cross remain-

(*a*) This lady was the survivor of the three daughters.
(*b*) 5 Durn. & East, 427.

ders in tail to *surviving* children was held to take effect in favor of the issue of a deceased child, on the sole ground of its appearing, by the terms of the ultimate limitation, that the estate was not to go over unless the issue of *all* the children failed.

In a recent case, however, it was considered that, where the gift to the survivors was to take effect in the event of the decease of any of the prior objects of gift *combined with some collateral event*, the rule of construction adopted in the preceding cases did not apply, but that the word "survivor" might be construed *other*, on the ground, it should seem, that as in such cases the ulterior or substituted gift is not to take effect absolutely and simply on the decease of the prior objects, it is the less likely that the testator should intend survivorship to be an essential ingredient in the qualification of the ulterior or substituted legatees.

The case here referred to is Aiton *v.* Brooks, (*a*) where a testator bequeathed £1500 stock to A and B during their lives, in equal shares, and immediately on the death of either he directed his trustees to pay the share of such deceasing legatee to her children who should be living at their mother's decease, and who should attain the age of twenty-one years, the interest in the mean time to be applied for maintenance; *but in case any of such children should die before they should attain the age of twenty-one* **years*, the testator gave the share of [617] such deceasing child to the *survivor;* provided always, that *in case either of them, the said A or B should leave any child living at their respective deceases, but which should all die before they attained the age of twenty-one years*, then the trustees were to assign the share of such legatee so dying unto the *survivor* of them, the said A and B, her executors or administrators. A died in the lifetme of B, leaving a child who attained twenty-one; B afterwards died without issue. Sir L. Shadwell, V. C., held A to be entitled to B.'s moiety, observing, "the word 'survivor' must of necessity be taken to mean 'other,' for the testator contemplated the event, not of one of the legatees dying in the lifetime of the other, *but of one of them dying childless.*"

There appears to be much good sense in the distinction here suggested by his Honor, and had it originally obtained, a large amount of litigation would probably have been prevented; but the authorities seem now to present an insuperable obstacle to its adoption, for, in almost every instance in which the strict construction of the word "survivor" has prevailed, the gift to the survivors was to take effect in the event of the death of the predeceasing objects without issue, or combined with some other contingency. In Ferguson *v.* Dunbar, Milson *v.* Awdry, Davidson *v.* Dallas, and lastly in Crowder *v.* Stone, (which is a recent and leading case,) the gift over was to take effect on any of the

(*a*) 7 Sim. 204.

objects dying, either without issue or under age, and yet it was held to apply only to the persons actually living at the period in question. Seeing, therefore, that the case of Aiton *v.* Brooks was professedly grounded on a circumstance which is common to nearly all the authorities, and that some of those authorities were not cited to or present to the mind of the learned and
[618] able Judge who decided it, the case can hardly be *relied on as a general authority. In fact, a different rule prevailed in the subsequent case of Leeming *v.* Sherratt, (*a*) which may be added to the authorities for giving to the word "survivor" a strict construction. A testator bequeathed £1000 to each of his six children to be paid at twenty-one, except as to girls, one half of whose shares was to be invested and the interest to be paid to them for life, and the principle to be disposed of in such manner as they should direct, among their issue; and in case they should die without issue, he gave the principal among the survivors of his children in equal proportions. The testator then gave his freehold property and the residue of his personalty to trustees, the proceeds to be divided among his children when the youngest should attain twenty-one; one half of the daughter's shares to be invested, the interest to be paid to such daughters, and the principal to be disposed of in such manner as they should direct among their children; but if there were no children, then such share to be divided equally among the *survivors* of the testator's children: and in case of the death of any of his children, leaving lawful issue, the testator gave to such issue the share of the parent so dying would have been entitled to have. One question was, whether the words "survivors of my children" were to be construed *others*. Sir James Wigram held, that the strict construction must prevail. He said, "In Davidson *v.* Dallas, (*b*) Lord Eldon's language obviously imports that the word 'survivors' is to be construed in its natural sense, unless the will itself shows that it was used by the testator in a different sense; and Crowder *v.* Stone (*c*) is to the same effect. In Barlow *v.* Salter, (*d*) the dictum of the Court tends rather to treat
[619] *the word as having a technical meaning, (that of 'others,') impressed upon it in practice. According to Davidson *v.* Dallas, one reason for construing 'survivors' to mean 'others' has been to take in all persons who should be born before the period of distribution. In other cases the object suggested has been to prevent a family losing the provision intended for it is by the death of a parent leaving children. The reason of the former of these cases could not occur here, in the case of the residue, because the testator's own children are the legatees of that residue. And, according to the construction that I feel myself at liberty to put upon that clause in the will which, in

(*a*) 2 Hare, 14. (*b*) 14 Ves. 576. (*c*) 3 Russ. 217. (*d*) 17 Ves. 479.

certain cases, substitutes the issue for the parents, I think the testator has guarded against the second inconvenience; and, so far at least as the residue is concerned, I think that, in the residuary clause, the word 'survivor' must be construed in its natural sense, and that this construction of the word, in one part of the will, must, in this will, determine its construction in the other part also."

The result then would seem to be that the word "survivor," when unexplained by the context, must be interpreted according to its literal import; but the conviction that this construction most commonly defeats the actual intention of testators will no doubt induce a readiness in the Courts to listen to any arguments drawn from the context for reading the word "survivor" as synonymous with *other*. And the writer cannot dismiss the subject without the cautionary remark, that the present state of the authorities, by cutting off the hope of any considerable aid from liberality of construction in correcting this often-occurring slip, should teach to framers of wills the necessity of increased attention to its avoidance.

* II. It has long been an established rule, that clauses [620] disposing of the shares of devisees and legatees dying before a given period, do not, without a positive and distinct indication of intention, extend to shares accruing under the clauses in question. "As where a man gives a sum of money to be divided amongst four persons as tenants in common, and declares, that if one [qu. any] of them died before twenty-one or marriage, it shall survive to the others. If one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies nothing will survive to the remainder but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship." (*a*)

Thus, in Ex parte West, (*b*) were a testator bequeathed to A, B, and C, the three sons of S., £1000 each, the interest to be added to the principal yearly, until they should respectively attain the age of twenty-one years; *and in case any of them should die before that age, then to the survivors.* A, and then B, died under twenty-one; and the question (which was raised upon petition) was, whether that part of the share of B, which accrued to him on the death of A, went over to C on the death of B. Lord Thurlow thought it did not survive again; but his Lordship hesitating to decide it upon petition, a bill was filed, and the cause came to a hearing before Sir Lloyd Kenyon, M. R., who decided against the survivorship of such accrued share.

(*a*) Per Lord Hardwicke, in Pain *v.* Benson, 3 Atk. 80. See also Perkins *v.* Micklethwaite, 2 Ch. Rep. 171; S. C. 1 P. W. 274; Rudge *v.* Barker, Cas. Temp. Talb. 124; Barnes *v.* Ballard, before Lord King, cit. 2 Atk. 78.

(*b*) 1 B. C. C. 575, [Perkins's ed. notes.] See also Crowder *v.* Stone, 3 Russ. 217.

This doctrine, though it has been much disapproved of, is now well established; but the question sometimes arises as
[621] *to the effect of particular expressions to carry the accrued as well as the original share.

The word *share* from an early period (*a*) has been held *not* to have this operation, though the contrary was decided by Lord Hardwicke in the case of Pain *v.* Benson; (*b*) but the authority of this case has been repeatedly denied, (*c*) and the point has long ceased to be the subject of controversy. One example of the construction, therefore, will suffice. In the case of Rickett *v.* Gillermard, (*d*) a testator bequeathed £300 to four persons, to be divided into equal shares, to be paid at twenty-one; and in case of the death of either before twenty-one, *such share* to survive to the others. Two of the legatees died during minority in the testator's lifetime. Sir L. Shadwell, V. C., held, that on the death of the first, his fourth devolved to the other three; on the death of the second, his original fourth devolved to the two survivors; but the third of the first-mentioned fourth, which he would have been entitled to absolutely if he had survived the testator, lapsed.

And the word "portion," which is evidently synonymous with "share," has also been held not to comprise an accrued share.

Thus, in the case of Bright *v.* Rowe, (*e*) where a testatrix, by virtue of a power, appointed the reversion of a sum of £2000, in which herself and her husband had life interests, to trustees, upon trust for her daughter M., or any other children she might thereafter have by her husband J., to be equally divided be-
[622] tween them; but it was her * will, that in case the £2000 should become payable before M. should attain twenty-one or day of marriage, or before any other of her children being a son should attain twenty-one, or being a daughter the same age or marry, then the trustees were to invest the same, and apply the interest of each child's share for maintenance, and when any such children being sons, should attain twenty-one, or being daughters the like age or day of marriage, upon trust to pay them their respective shares of the principal with the unapplied interest. And in case her said daughter M., or any other child she might have by her husband, should happen to die before his, her, or their *portion* or *portions* of the said sum of £2000 should become payable, then the same should respectively go and belong to the survivors or survivor of them. The testatrix left three children, one of whom died in 1826, and another in 1829, before the period of payment. It was held by Sir J. Leach, M. R., that

(*a*) Woodward *v.* Glassbrook, 2 Vern. 388; Barnes *v.* Ballard, 3 Atk. 79, cit. Rudge *v.* Barker, Cas. Temp. Talb. 124; Perkins *v.* Micklethwaite, 1 P. W. 274.
(*b*) 3 Atk. 78.
(*c*) See 1 B. C. C. 575; 2 Ves. Jun. 534 [Sumner's ed. note (*a*)].
(*d*) 26 March, 1841, reported 6 Jurist, 818.
(*e*) 3 Myl. & Kee. 316.

the share which accrued to the latter on the decease of the former, did not pass with the original share to the surviving child.

But although the words "share" and "portion" will not proprio vigore carry the accruing share, yet if the testator manifest an intention that the entire property, which is the subject of disposition, shall pass over to the ultimate objects of distribution in one mass, and that all the shares, original and accruing, shall be distributed among one and the same class of objects, the accruing shares will be carried over, together with the original shares, to those objects. Thus, in the case of Worlidge *v.* Churchill, (*a*) where a testator devised his real and personal estate to *trustees upon trust to sell, and gave the moneys aris- [623] ing therefrom in trust for his four children, R., E., W., and J., to be equally divided among them on their attaining twenty-one; *but if any of them died under that age, then such deceased child's* SHARE *to go to the survivors or survivor;* and he directed the trustees to apply the interest of such trust money during their minority for their maintenance and education; but if the interest should be more than sufficient for such purpose, he directed the trustees to lay out the same for the children's mutual benefit; but if *all* the four children should happen to die before twenty-one, and leave M. living, then he directed the trustees to pay M. the interest of such *trust money* from time to time, as it should grow due; and after the decease of *all*, he bequeathed the said *trust money* to the children of his late uncle F. J. died in testator's lifetime. R. and W. survived the testator, but afterwards died under twenty-one. The question was, whether E., the last survivor, was entitled to the accrued shares of the two deceased survivors. Mr. Justice Buller, sitting for Lord Thurlow, said, "If this were res nova, and there was a limitation to survivors and survivor, no one could collect the intent to be otherwise than that the survivor should take the whole; but if the case had rested there, I should have thought it difficult to get over the objections. But the strong part of the present case is the testator's intention to keep it as an aggregate fund; he has made use in two different parts of the will of the words '*trust money;*' that expression does not apply to the share of each child, but to the whole fund in the *trustee's hands, [624] and takes in the whole fund that is to be distributed under the will. The second place where he uses the expression

(*a*) 3 B. C. C. 465. [Perkins's ed. 471, note (*a*); 2 Williams, Ex. (2d Am. ed.) 877, 898; M'Kay *v.* Hendon, 3 Murph. 21.] See also Barker *v.* Lea, 1 Turn 413, where Sir T. Plumer, M. R., also reasoned upon the intention apparent in the will, that the fund should go over among the legatees in one mass, as excluding the doctrine in the text; but the point did not arise, as the deceased person (whose alleged share was the subject of dispute) had not attained the vesting age, and therefore had no share upon which the limitation over could operate. This, indeed, was admitted by his Honor in his judgment, but the terms of the decree are contrary. The case abounds in inaccuracies.

'*trust money*,' is in the gift over to the children of his uncle; and though the expressions 'the whole,' or 'all,' are not used, the words 'trust money' are tantamount to them."

So, in the case of Eyre *v.* Marsden, (*a*) where a testator gave his real and personal estate to trustees upon trust to sell, and out of the income of his estate to pay certain life annuities to his children. And the testator then directed his trustees to accumulate the income of his realty and personalty for the benefit of his grandchildren, and after the decease of his surviving child, if not sold before, to sell and distribute the proceeds among his grandchildren then living in equal shares, except the share of F., the son of a deceased daughter, half of whose share in the testator's estate and effects, in consideration of the benefit taken by F. under his uncle's will, the testator gave to his brother G.; and if any of his grandchildren should die before his share became payable, leaving issue, such issue to be entitled to the share which his, her, or their deceased parent would be entitled to if then living; but in case of the death of any grandchild without leaving issue before he or she should become entitled to receive his or her share in manner aforesaid, then his or her *share* was given among his surviving grandchildren, *to be paid at the same time, and in the same manner, as before mentioned, touching the original share or shares of his said grandchildren.* One question was, whether that portion of the shares of grandchildren dying without issue, which had previously accrued to them by the pre-

[625] decease of other objects, passed over with the original shares to the survivors, * or belonged to their representatives. Lord Langdale, M. R., while he admitted the general rule, considered that here the testator had manifested an intention that the accrued and original shares should, at the decease of his surviving child, be distributed together among one and the same class of objects. He observed that the testator meant that an aggregate and previously undivided fund should be then, for the first time, divided among a class in whom the fund vested from the time of the testator's death, subject to a provision for divestment, which was meant to be applied to every interest—to the interests which accrued in the grandchildren, and to the interests which accrued in the children of grandchildren.

Again, in the case of Sillick *v.* Booth, (*b*) where a testator devised and bequeathed all his real estate and his convertible personal estate to trustees, upon trust to convert the same into money, and thereout to pay his debts, funeral expenses, and a weekly sum to his wife, and to divide the residue of his said

(*a*) 2 Kee, 564.

(*b*) 1 You. & Coll. N. C. 121. See also Leeming *v.* Sherratt, 1 You. & Coll. N. C. 121, stated ante, p. 518, where the words, "the *part or share*, the parent so dying would have been entitled to have," were held to comprise accruing shares.

estate and effects equally between and among his children J. M., and C., and his grandson R., share and share alike, the share of M. to be paid her as soon after his decease as conveniently might be; the share of C. to be paid him at the age of twenty-two, and the share of R. at the age of twenty-one; and in case any of his children or grandchildren should die before his or her said share should become so *vested* (which was construed to mean *payable*) as aforesaid, then the share or shares of him, her or them so dying should go and be equally divided among the survivors and survivor of them *in equal [626] shares and proportions, if more than one, and if but one, then *the whole to and for the use and benefit of such survivor.* J. and C. died in the testator's lifetime, the latter being under twenty-two. R. survived the testator, but died under twenty-one. Sir K. Bruce, V. C., held that the word "whole" meant the entire residue, not the whole share merely, and consequently, that the accrued as well as the original shares devolved to M. as the sole survivor of the four residuary legatees.

It is clear, however, that a gift over in case *all* the legatees die without leaving issue, does not necessarily indicate that a limitation to survivors, in case of the death of *any* without leaving issue, is intended to carry the accruing shares. (*a*) Such a clause, of course, divests the accruing as well as the original shares of all, on the happening of the prescribed event.

It may be observed, that upon a principle very similar to that which governs the preceding cases, if original shares are given expressly for life, and accruing shares indefinitely, (which of course carries the absolute interest,) the latter are not considered as impliedly subject to the restriction in point of interest imposed on the original shares; (*b*) for although it is highly probable that the testator had the same intention in regard to the accruing and the original shares, yet this is not so clear as to amount to what the law deems a necessary implication. (*c*)

*So, where a testator limits an estate to three or [627] more objects, subject to many provisions, with a devise over of the whole in case of the death of any one to the survivors, expressly *subject to the provisions contained in the original gift*, and goes on to limit the property in case of the death of any of such survivors to the remaining survivors or survivor, *but does not repeat the qualifying words*, it has been held that a similarity of intention is not to be implied in regard to the last limitation.

(*a*) Vandergucht *v.* Blake, 2 Ves. Jun. 534, [Sumner's ed. note (*a*)].

(*b*) Vandergucht *v.* Blake, 2 Ves. Jun. 534. But in Doe d. Gigg *v.* Bradley, 16 East, 399, Lord Ellenborough cut down the gift of a leasehold house to survivors indefinitely to an interest for life, on no other ground, it would seem, than that words of limitation were used in the original gift, not in the gift to survivors, which has not in general been considered as affording more than conjecture. The will certainly was very obscure.

(*c*) As to what is and is not such, see also ante, vol. 1, p. 460.

Thus, in the case of Georges *v.* Georges, (*a*) where the testator gave the residue of his estate, both real and personal, to trustees, in trust to keep the same together till the 1st day of January, 1804, and till that period to dispose of the profits for the benefit of his daughter and granddaughters as therein directed; and then as to the final disposition of the rest and residue of the estate, he declared that all such parts thereof as consisted of real estates, slaves, &c., should be upon further trust, that his said trustees should immediately after the arrival of the period aforementioned divide the same into three equal parts or shares, to and for the separate use and benefit of his daughter F., his granddaughter R., and his granddaughter S., whom he thereby willed and ordained to be his residuary devisees and legatees in manner and form following, (that is to say,) &c. The testator then proceeded to declare the trusts of the respective thirds in favor of his daughter and granddaughters respectively, and their respective children, with a proviso that if one of his three residuary devisees should die before the period should arrive for making the division without issue, or leaving issue, and such issue should die before that period, then the division
[628] should be made between *the survivors of his said residuary devisees aforenamed, agreeable to the same directions, and *subject to the same terms, limitations, and restrictions as were thereinbefore expressed and declared*, and that in the same manner as if all three of his said residuary legatees and devisees were then alive; and if two of them should depart this life before the arrival of such period without issue then living as aforesaid, then he declared it to be his further will and desire that the whole should be *in trust, and to and for the use of the survivor or her issue living at the period aforesaid.* F. and S. died before the 1st of January, 1804, without issue then living; but R. was living at that period. The question was, whether the will was to be read as if the qualifying words, "agreeable to the same directions, and subject to the same terms, limitations," &c., which occurred after the gift to the *two* surviving, had also been inserted after the gift to the *one* surviving. It was contended that necessary implication does not mean only what arises from force of language or plain logical conclusion, but that in a moral sense, and not in a grammatical sense, it is when there exists so strong a probability of intent that it would be irrational to draw a contrary inference. But Lord Eldon, after great consideration, held that the words of the will did not raise a necessary inference, that the gift of the whole to the one surviving was intended to be subject to the same limitations as the share which that survivor would have taken on a division between the three, or the two, would, by the express words of

(*a*) Hayes's Inquiry, 52.

the will, have been subject to, and that such a construction would be mainly founded on conjecture.

The principle that restrictions or qualifications applied to original shares, are not, by necessary inference, to be extended to accruing shares, is further illustrated by *the [629] case of Gibbons *v.* Langdon, (*a*) where a testator bequeathed £2800 stock, in trust for his wife for life, and at her decease to be equally divided between his three sons and daughter, the interest of his daughter's share to be paid to her for life, and at her decease the said share to be equally divided among her children living at the testator's decease at the ages therein mentioned. If his daughter had no children living at her decease, her share to be equally divided among such of his sons who were then living, or their issue; *but if any of his said sons and daughter should die before his said wife and without leaving any issue, such share or shares to be equally divided among his other children;* but if all his children should die without issue before his said wife, then to his next of kin. One of the sons died in the lifetime of the wife and without issue, and the question was, whether the share of the daughter, in her deceased brother's share, was subject to the trusts affecting her original share. Sir L. Shadwell, V. C., decided in the negative, his Honor observing that it would be nothing but conjecture if he were to say that the testator meant his daughter to take her accruing share with the same limitations over to her children as her original share was subject to.

Upon the same principle it is clear that, where the subject of gift is disposed of among the original objects in unequal shares, there is no necessary inference, in the absence of any declared intimation of intention to assimilate the accruing to the original shares, that the survivors are to take accruing shares in the same relative proportions. (*b*)

But here it is proper to observe, that though a departure from the ordinary rules of construction, for the purpose of bringing a devise or *bequest within due limits, is not [630] an acknowledged principle of construction, indeed is always professedly discarded, yet it is impossible to deny that, where the bequest of the accruing shares would be void for remoteness, unless the qualifications applied in terms to the original shares are extended to such accruing shares, the Courts have lent a more willing ear to such construction, than the preceding cases prepare us to expect. An example of this occurs in the case of Trickey *v.* Trickey, (*c*) where a testator bequeathed the residue of his personal estate to trustees, in trust for his daughter, and after her decease for all and every the child

(*a*) 6 Sim. 260.
(*b*) Walker *v.* Main, 1 Jack. & Walk. 1, stated post.
(*c*) 3 Myl. & Kee. 560.

or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the mean time; and in case any of the said children should die under twenty-one and leave one or more child or children *who should survive the testator's daughter* and live to attain twenty-one, such child or children to be entitled to his or their parent's share; provided also, that in case any child or children of his daughter should die before attaining twenty-one, the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one, to be equally divided between them if more than one; the issue of any deceased child or children to stand in the place of the parent or parents, with a limitation over, *provided there should be no child of his daughter, or, there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age.*

By a codicil, the testator willed that, on failure of children and grandchildren of his daughter, as in his will was
[631] expressed, his bank stock, etc., should be transferred * to certain relations. It was contended that the testator's intention was that all such grandchildren of his daughter as should attain twenty-one, should take a vested interest, and that the limitation over, which was to take effect only upon failure of such grandchildren, was too remote; but Sir J. Leach, M. R., observed, that it was reasonable to intend that the testator meant that the same grandchildren, who, by the former clause, were to take their parent's original share should take that portion of the share which accrued by the death of another child of the daughter without leaving issue, and which their deceased parent, if living, would have taken, namely, the grandchildren only *who should survive the daughter.* If the prior gifts were only in favor of grandchildren who should survive the daughter, the gift over must be intended to take effect upon the failure of the former gifts.

III. Another question which arises under gifts to survivors is, whether they mean survivors indefinitely, or survivors at some specific point of time. Where the objects are tenants in common it was for a long period considered that indefinite survivorship being inconsistent with a tenancy in common, some period was to be found to which the words of survivorship could be referred. This reasoning, however, is obviously inconclusive, for although survivorship is not incident to a tenancy in common, yet there is no inconsistency between a tenancy in common and an *express* limitation to survivors. (*a*) The testator's intention that

(*a*) See judgment in Doe d. Borwell *v.* Abey, 1. M. & Selw. 428. Sometimes a gift to survivors, accompanying a joint tenancy, is considered as merely expressive of the jus accrescendi, which is incident to such a devise. See Doe *v.* Sotheron, 2 Barn. & Adol. 628.

the property shall devolve to the survivors is better
* effected by an express gift to them than by a joint [632]
tenancy, the survivorship which is incidental to the latter being liable to be defeated by a severance of the tenancy.

In seeking for a period to which the words of survivorship could be referred, the obvious rule where the gift took effect in possession, immediately on the testator's decease, was to treat these words as intended to provide against the death of the objects in the lifetime of the testator, the devise affording no other point of time to which they could be referred; accordingly we find this to be the established construction.[1]

Thus, in the case of Lord Bindon *v.* Earl of Suffolk, (*a*) where a testator bequeathed £20,000 (due to him from the crown) to his five grandchildren, share and share alike, equally to be divided between them, *and if any of them died, his share to go to the survivors and survivor of them;* Lord Cowper said, that by the first words it was very plain that the legatees were tenants in common, and by the subsequent words it must be intended, if any of them should die *in the lifetime of the testator.*

This decree, however, was reversed in the House of Lords, on the ground that the words in question referred not to the death of the testator, but to the time of receiving the money, which was a debt due from the crown of rather a desperate nature; but the principle of Lord Cowper's decision has since been repeatedly recognized. (*b*)

* The more recent case of Smith *v.* Horlock (*c*) pre- [633]
sents an instance of a similar construction in reference to real estate. A testator gave all his real and personal property to be equally divided between his two children, *and to the longest liver* in fee simple; (there were some intervening words, which are immaterial to the point in question;) and it was held, that one child who alone survived the testator took the whole.

Where, however, the gift was not immediate, (*i. e.* in possession,) there being a prior life or other particular interest carved out, so that there *was* another period to which the words in question could be referred, the point was one of greater difficulty. In *these* cases, indeed, as well as in those of the other class,

(*a*) 1 P. W. 99. But see Hawes *v.* Hawes, 1 Wils. 165; S. C. 3 Atk. 523, where the testator devised an estate to his four younger children in fee as tenants in common, and not as joint tenants, with *benefit of survivorship;* and Lord Hardwicke held that, inasmuch as personal estate was bequeathed to them with a limitation to the survivor, if any of them died *under age and unmarried*, the devise of the real estate was to receive the same construction.

(*b*) See Roebuck *v.* Dean, 2 Ves. Jun. 267; Russell *v.* Long, 4 Ves. 553 [Sumner's ed. 551, note (*a*)].

(*c*) 7 Taunt. 179. But see Barker *v.* Gyles, 1 P. W. 280, post; Blisset *v.* Cranwell, 1 Salk. 226; Doe d. Borwell *v.* Abey, 1 Man. & S. 428, post.

[1] See Lawrence *v.* M'Arter, 10 Ohio, 37; Passmore's Appeal, 23 Penn. State Rep. 381; Rewalt *v.* Ulrick, 23 Penn. State Rep. 388.

the Courts for a long period uniformly applied the words of survivorship to the death of the testator, on the notion (as already observed) that there was no other mode of reconciling them with the words of severance creating a tenancy in common. The weight ascribed to this argument, however, was still more extraordinary in these than in the former cases; for, even if *indefinite* survivorship were inconsistent with a tenancy in common (but which it clearly was not), yet surely there could be no incongruity between such an interest and a limitation to the survivors *at a given period;* nevertheless, decision rapidly followed decision, in which, on reasoning of this kind, survivorship was held, in cases of this sort, to refer to the period of the testator's decease.[1]

One of the first of these cases is Stringer *v.* Phillips, (*a*) where £100 was bequeathed to five persons at the decease of
[634] * testator's sisters L. and C., (*b*) equally to be divided between them, *and the survivors and survivor of them;* and if A., one of the five, died before marriage, her share to go over to another; and it was decreed that they took this £100 as tenants in common, and that the limitation to the survivors must be construed to be inserted to give it to such as were the survivors *at the death of the testator*, and to prevent a lapse.

So, in Rose d. Vere *v.* Hill, (*c*) where the testator devised his lands to his wife for life, and after her decease to his five children, (naming them,) *and the survivors and survivor* of them, and the executors and administrators of such survivors, *share and share alike, as tenants in common, and not as joint tenants;* Lord Mansfield, and the other Judges of the King's Bench, held that these words were inserted to carry the property to the survivors, in case of the death of any of the devisees in the devisor's lifetime, and that they took as tenants in common.

Again, in Wilson *v.* Bayly, (*d*) where a testator bequeathed certain leasehold estates, in the event of his two sons dying unmarried, and in case neither of them should have issue, to his three daughters *and the survivors and survivor of them*, and their assigns, as tenants in common, and not as joint tenants. It was contended, on the other hand, that the words of survivorship were intended to give estates to such of them as should be living when the contingency happened, who were then to take as tenants in common; but the House of Lords, reversing a decree of the Irish Chancery, adjudged, that each of
[635] the daughters surviving * the testator took a vested in-

(*a*) 1 Eq. Ca. Ab. 293, pl. 11; but see 1 Cox's P. W. 97, n.

(*b*) It is probable these persons were legatees for life, but it does not appear in the note extracted by Mr. Cox. In Eq. Ca. Ab. the legacy is inaccurately stated as given immediately to the five legatees.

(*c*) 3 Burr. 1881.

(*d*) 3 B. P. C. (Toml. ed.) 195.

[1] Moore *v.* Lyons, 25 Wendell, 119; Martin *v.* Kirby, 11 Grattan (Va.) 67.

terest in one third share, which on her death before the contingency happened was transmissible to her representatives.

It is evident, therefore, that the House considered the words of survivorship to refer to the death of the testator.

So in Roebuck *v.* Dean, (*a*) where a testatrix bequeathed certain stock in the funds in trust for her niece for life, and, after her decease, directed that it should be equally divided among her (testatrix's) brother and four sisters, and in like manner *to the survivors or survivor of them*; Lord Loughborough held that these words referred to survivors *at the death of the testatrix*, (being introduced to prevent a lapse,) and not to the death of the niece.

Down to this period the decisions are uniform in referring survivorship to the death of the testator. In the interval, however, between the last and the next case, a doctrine was broached in Brograve *v.* Winder, (*b*) also decided by Lord Loughborough, which made a considerable inroad upon this rule of construction; but as it will be more convenient to reserve these cases for future consideration as a separate class, we now proceed with the decisions on the general rule.

Of these cases, the next is Perry *v.* Woods, (*c*) where a testator gave £1500 Old South Sea Annuities, upon trust to pay the interest or dividends to A for life, and after her decease to B for life, and after his decease to transfer the principal to C, D, and E, in equal shares and proportions, and to the survivor or survivors of them who should be living at their decease.

He * gave another sum of stock to a different person [636] for life, with a similar ulterior gift among these persons and the survivors. He then gave another sum of £1500 Old South Sea Annuities to E for life, and after her decease to and among her children, to be paid them at twenty-one; and in case E should die, and leave no child or children, he directed his executors to pay the principal unto C and D, *share and share alike, or to the survivor of them.* Sir R. P. Arden, M. R., held, that C and D *surviving the testator* were entitled to the last £1500 as tenants in common. He thought that he was precluded from adopting any other construction by the case of Stringer *v.* Phillips, (*d*) there being no single circumstance of distinction, except that in some particular cases, as to other legacies, the testator had referred survivorship to the time of division.

Sir W. Grant, however, seems to have considered that this circumstance favored the construction adopted; for, (*e*) in allu-

(*a*) 2 Ves. Jun. 265. As to this case, see Sir W. Grant's judgment in Halifax *v.* Wilson, 16 Ves. 171; and Sir J. Leach's, in Cripps *v.* Wolcott, 4 Madd. 15, post; [Drayton *v.* Drayton, 1 Desaus. 324; Campbell *v.* Heron, Cam. & Nor. 298.]

(*b*) 2 Ves. Jun. 634.

(*c*) 3 Ves. 204.

(*d*) Ante, p. 633.

(*e*) See Newton *v.* Ayscough, 19 Ves. 537.

sion to Perry *v.* Woods, he said, "where the testator meant the survivorship to refer to the death of the tenant for life, he expressly declared that intention in two instances, and the omission of that reference in another instance *is an indication of a different intention.*" (*a*)

Again, in Maberly *v.* Strode, (*b*) the words "with benefit of survivorship," were held to contemplate the death of any of the objects in the lifetime of the testator. A testator devised his real estate to trustees, to sell and invest the produce with his personal estate in trust for his son S. for life, and after his decease for his children. But in case his son should die unmarried and without issue, or they should die, being sons, before twenty-one, or, being daughters, before twenty-one or marriage,
[637] then in trust to transfer such funds * unto his (testator's) nephews W. and J., and unto his niece C., in equal proportions, share and share alike, his, her, and their issue, or the issue of either of them, to take their parent's share *with benefit of survivorship* to his nephews and niece. The question was whether these words referred to survivorship at the death of the testator or of the son. Sir R. P. Arden, M. R., held, that they referred to survivorship at the death of the testator, being introduced to prevent a lapse. (*c*)

It is remarkable, however, that the same learned Judge, in Russell *v.* Long, (*d*) inclined to hold words of survivorship to refer to the death of the tenant for life, not to that of the testator, observing that the latter construction was unnatural, and was not to be adopted if any other could be—a doctrine which it is difficult to reconcile with Perry *v.* Woods.

The next case in the series is Brown *v.* Bigg, (*e*) where a testator bequeathed the interest of his stock in the funds to his wife for life, provided that if she married again she should be entitled to one moiety only of the interest, the other moiety to be applied to the use of the testator's nephews and nieces "after mentioned, in manner and proportions therein expressed;" and as to the residue of his personal estate, and the produce of some real, he gave the interest to his wife for life, under the like restrictions as before in case of a second marriage, and after the decease of his said wife without issue by him, the testator left the whole of his personal estate to his several nephews and nieces after named, viz: A, B, and C, and the four
[638] children of D, * *to be divided amongst them and the survivors of them share and share alike.* A having died in the lifetime of the widow, her personal representatives claimed

(*a*) But see Daniel *v.* Daniel, 6 Ves. 297, post.
(*b*) 3 Ves. 450.
(*c*) But see Gibbs *v.* Tait, 8 Sim. 32, post, where a different construction was given to a similar expression.
(*d*) 4 Ves. 551 [Sumner's ed., n. (*a*)].
(*e*) 7 Ves. 279.

her share as vested at the decease of the testator; and Sir W. Grant so decreed, though during the argument he observed, that the general leaning of the Court is against construing the words of survivorship to relate to the death of the testator, if any other period can be fixed upon, the testator generally supposing the legatee will survive him. If he intended his wife to have the whole for life, the probable conclusion was that he meant the time of division.

In explanation of the seeming inconsistency between his remarks during the argument and his decree, his Honor observed, on a subsequent occasion, (*a*) that he "found the result of the authorities, *contrary to what had fallen from the Court during the argument*, founded upon what Lord Alvanley had said in one of the cases; *and that in a great majority of them survivorship had been referred to the period of the testator's death.*"

This seems to be the latest case in which the construction, which reads words of survivorship as referring to the period of the testator's death, has been applied to bequests of personal estate.[1] Examples, however, of its application to devises of real estate occur in several subsequent cases; as in Garland *v.* Thomas, (*b*) where the devise was to R. C. for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to the testator's niece S., and his two nieces E. and A., *and the survivor and survivors of them* and the heirs of the body of such survivor or survivors, as tenants in common, and not as joint tenants; and for want of such issue over; and Sir James Mansfield, and the Court of Common Pleas, on the *authority of Bindon *v.* Suffolk, (*c*) Stringer *v.* Phil- [639] lips, (*d*) and Rose *v.* Hill, (*e*) held, that the limitation to the survivors was intended to provide for the event of the death of any of the devisees *in the testator's lifetime*, and that all surviving the testator took as tenants in common.

So, in Edwards *v.* Symons, (*f*) where a testator devised certain lands, which he was entitled to on the death of his mother, to trustees upon trust to receive and apply the rents for the maintenance, education, and advancement of his six children (naming them), and immediately on E. (the younger of the children) attaining twenty-one years, then he devised the said premises to his said six children, *and the survivors and survivor of them*, their heirs and assigns forever, to hold as tenants in common, and not as joint tenants. By a codicil the testator extended the

(*a*) Shergold *v.* Bonne, 13 Ves. 375 [Sumner's ed., note (*a*)].
(*b*) 1 Bos. & Pull. New Rep. 82.
(*c*) Ante, p. 632.
(*d*) Ante, p. 633.
(*e*) Ante, p. 634.
(*f*) 6 Taunt. 213.

[1] Hill *v.* Chapman, 1 Ves. [Sumner's ed., note (*b*)].

devise to another child. Five of the children survived the testator, of whom one died before he attained twenty-one ; and it was held that one fifth share descended to his heir at law, the Court being of opinion that the words of survivorship referred to *the death of the testator*, and not to the period of E.'s attainment to twenty-one.

In both the preceding cases, it will be observed, the devise was to individuals nominatim. But in the more recent case of Doe d. Long *v.* Prigg, (*a*) the applicability of the construction to a devise *to a class* came under consideration. The testator devised real estate to his mother *for life*, and after her death to his wife, for her life, and from and after the decease of his mother and wife, he gave and bequeathed all the above-mentioned premises unto the *surviving* children of J. and W., and to their heirs, forever ; the rents and profits to be divided between them
[640] *in equal proportions. The question was to what period the words " surviving children " referred ; Mr. Justice Bayley (who delivered the judgment of the Court) said— " The testator's death is in this case so much the more rational period, so much the more likely to have been intended, and falling in, as it does, with the rule of law for vesting estates as soon as they may, instead of leaving them contingent, that we are of opinion that the estate here vested in remainder immediately upon the testator's death, in the then children of J. and W."

This case closes the long series of authorities in favor of the construction in question, which might seem to have established, if reiterated adjudication could settle any point, that a gift to several objects, as tenants in common, and the survivors and survivor of them, vested the subject of gift absolutely in the objects living at the death of the testator, the words of survivorship being referable to that period. The sequel will serve to show that no rule of construction, however sanctioned by repeated adoption, is secure of permanence, unless founded in principle ; for to the inadequacy of the grounds upon which the rule was established may, it is conceived, be ascribed, not only the frequent agitation of the question evinced by the multitude of cases just stated, but the sweeping, and, as we shall see, sometimes, groundless, exceptions engrafted upon it, which at length rendered it doubtful whether such a rule of construction any longer existed, or rather occasioned its total subversion, in reference at least to personal estate. For the reader, on a perusal of the cases which remain to be stated, will probably find himself impelled to the conclusion, that where there is a gift of personal estate to a person for life or any other limited interest, and after the determination of such interest to certain persons nominatim, or
[641] to a class of persons as tenants in *common *and the*

(*a*) 8 Barn. & Cress. 231.

survivors of them, these words are construed as intended to carry the subject of gift *to the objects who are living at the period of distribution.* This result, however, was not attained until after many gradations. In the first instance, survivorship was held to relate to the period of distribution, and not to the death of the testator, on the ground that the subject of gift (being the produce of land devised to be sold) was not in esse until this period.

Thus, in the case of Brograve *v.* Winder, (*a*) where a testator devised his real estates to A, for life, with remainder to his first and other sons in tail male, and in default of sons of A, gave his estates to trustees to sell, and willed that the money arising by such sale or sales should be equally distributed among the three sons and daughters of W., *or the survivors or survivor of them*, and that such fourth or other part as the daughter should become entitled to, should be settled in a certain manner. Lord Loughborough admitted, that in general it was perfectly true that these words would not prevent the vesting at the death of the testator, but the circumstances of this will, he said, gave it a very different effect. "In this will, (observed his Lordship,) the penning of which is very particular, when once you fix the intention that they shall take it as money, which is clearly the sense of this will, there is no gift till the distribution; the object of the distribution is pointed out to be among the persons named, 'or the survivors or survivor;' that excludes the possibility of taking in, as objects of the distribution, persons who are dead."

So, in Newton *v.* Ayscough, (*b*) where a testator gave to A £400 four per cent. Consolidated Annuities for her to receive the interest during her life, and after her decease the £400 *to be sold and divided among his residuary legatees, [642] *or the survivor of them, share and share alike;* and he appointed B, C, and D, residuary legatees of his will, share and share alike. On a question, whether one of the legatees dying in the lifetime of A was entitled, Sir W. Grant, said, "To what period survivorship is to relate, depends not upon any technical words, but upon the apparent intention of the testator, collected either from the particular disposition or the general context of the will."—"Here is a direction to trustees at the death of the tenant for life to sell the fund, and divide the produce among his residuary legatees, 'or the survivor of them, share and share alike.' That naturally points to the period of sale as the period to ascertain who are the persons to take, and brings this case much nearer Brograve *v.* Winder (*c*) than Perry *v.* Woods. (*d*) In Brograve *v.* Winder, Lord Loughborough's opinion was, that the survivor at the time of the sale, not at the death of the testator, was intended. In Perry *v.* Woods, the testator had by his

(*a*) 2 Ves. Jun. 634. (*b*) 19 Ves. 534. (*c*) Ante, p. 641. (*d*) Ante, p. 635.

will, furnished evidence of his own intention with regard to the meaning of the word 'survivor.'" — "The case of Russell *v.* Long, (*a*) decided by Lord Alvanley soon afterward, shows that he did not conceive there was any rule requiring survivorship to be generally referable to the death of the testator, but thought it might refer either to that period or the death of the tenant for life, according to the apparent intention of the testator."

The inconsistency between the expressions of Lord Alvanley, (or rather Sir R. P. Arden,) in Russell *v.* Long, and his decisions in Perry *v.* Woods, (*b*) and Maberly *v.* Strode, (*c*) has
[643] been already pointed out. The latter * shows that he *did* consider survivorship in these cases to be generally referable to the death of the testator, as the only mode of reconciling it with the tenancy in common; and even Sir W. Grant himself, in Shergold *v.* Boone, (*d*) stated this to be the result of the authorities; which opinion accords with his Honor's decision in Brown *v.* Bigg.

It is a circumstance worthy of remark, that, down to this period, in all the cases where survivorship had been referred to the time of division, the expression was "*or* the survivor," although no attempt was made to found a distinction on this particular phraseology.

Another instance, in which the case of Brograve *v.* Winder has been followed, is Hoghton *v.* Whitgreave, (*e*) where a testator gave his real and the residue of his personal estate to his wife for life, and after her decease to trustees, upon trust to sell the real estate; and directed that the money arising from the sale, as also the rents from the death of his wife until the sale, as well as the residue of his personal estate, should be paid and equally divided among his nephews and nieces after mentioned, *and the survivors or survivor of them*, viz: A. M., &c.; and he thereby bequeathed the same to them, *and to the survivors or survivor of them*, after the decease of his wife, and in manner aforesaid. The question was, whether the nephews and nieces surviving the widow were entitled, to the exclusion of those who died in her lifetime. Sir T. Plumer, V. C., held that the former *were* entitled, considering the case as not distinguishable from Brograve *v.* Winder. (*f*) "The subject-matter (said his Honor) is not to be converted into money until after the death of the tenant for life. It is then that for the first time any
[644] thing is given * to the trustees; it is given upon trust to be converted into money, and then to be divided. Thus, not only was there no bequest until the widow's death, but the subject-matter did not till then exist in the shape and form in which it is given. It is given to those persons and the survivors or survivor of them, and seems to fall under the gen-

(*a*) Ante, p. 637. (*b*) Ante, p. 635. (*c*) Ante, p. 636.
(*d*) 13 Ves. 375. (*e*) 1 Jac. & Walk. 146. (*f*) Ante, p. 641.

eral rule, that legacies given to a class of persons vest in those who are capable of taking at the time of distribution. (*a*) Here he mentions them nominatim, but he then takes off the effect of that by adding the words, 'and to the survivors or survivor.' He cannot mean such as survive him, for the governing clause, that containing the gift, refers to the death of his wife as the period when it is to operate." And his Honor afterwards adverted to the subsequent gift, "in manner aforesaid," as precluding the argument that it was to go to those who survived him, after the death of his wife.

Another ground upon which a gift to survivors has been held to refer to survivors at the period of distribution, and not at the death of the testator, is that some other subject-matter given to the same objects is *expressly* limited in that matter.

Thus, in Daniell *v.* Daniell, (*b*) where the testator bequeathed certain stock in trust for his wife for life, and after her decease to his children, but in case his wife should have no child of his at her decease living, then, as to £1000, part thereof, to pay the interest to his sister J. D. during her life, and at her decease the £1000 to be paid equally between *her said two sons J. and F., or the whole to the survivor of them.* In the preceding part of the will, another sum of £1000 was given to trustees, in trust, after the decease of his wife without issue by him, to pay
*his said sister the interest for life, and after her de- [645]
cease the principal to be paid to the said J. and F., share and share alike, *in case they should be living at their mother's death;* but in case either of them should die before her, then the whole to be paid to the survivor. F. died in the lifetime of the testator's widow; at her death, the testator's sister J. D. being also dead, a bill was filed by J. for the first mentioned £1000, as the survivor at the death of the last surviving tenant for life, which was resisted by the representatives of F., claiming as one of the survivors at the death of the testator. Sir W. Grant, said, "It is clear the testator meant the survivor at the time of the division. He did not conceive that would take place till both his wife and Mrs. D. (*i. e.* J. D.) were dead; he conceived the deaths would happen in the order of the limitation. *The mode in which he disposed of the other two sums confirms instead of opposing this construction,* showing that the period of division was the period at which he intended it to vest. *He had the same meaning as to this fund;* he who is alive when the division takes place, takes the whole of the capital."

The reasoning of this case agrees with that of Lord Hardwicke in Hawes *v.* Hawes, (*c*) and, it would seem, with Lord Alvanley's in Perry *v.* Woods; (*d*) but stands singularly con-

(*a*) This is a mistake; see ante, p. 75. (*b*) 6 Ves. 297. (*c*) Ante, p. 632, n.
(*d*) See ante, p. 635. See also Sheppard *v.* Lessingham, Amb. 122, ante, vol. 1, p. 428.

trasted with Sir W. Grant's own observations upon the latter case in Newton *v.* Ayscough, already noticed, where he considered that survivorship being expressly made referable to the death of the tenant for life in another bequest, raised an argument in favor of a *different* construction in the bequest
[646] in question, where such expressions * were omitted. (*a*) The only circumstance of distinction is, that in Perry *v.* Woods the other bequest was to different objects.

The doctrine of the case of Daniell *v.* Daniell was referred to with approbation, and adopted in the recent case of Wordsworth *v.* Wood, (*b*) where a testator gave certain real and personal property to his wife for life, and after her decease to his *then* surviving children, share and share alike, independently of the rental of his said estates, which he gave to *his surviving female children.* Lord Langdale, M. R., held that a daughter who died in the lifetime of the widow was excluded from the rents, and one of the grounds of this construction he considered to be, that such a daughter was not an object of the immediately preceding devise of the estates, the testator's apparent intention being by the second gift merely to exclude the sons, and not to introduce a new class of daughters. His Lordship, in the course of his judgment, said, " The rule is, that where an interest is given to a person for life, and after his death to his surviving children, those only can take who are alive when the distribution takes place." Upon appeal, Lord Cottenham also considered that, independently of the general rule, there was sufficient ground for holding the deceased daughters to be excluded, according to the cases of Brograve *v.* Winder, Newton *v.* Ayscough, Hoghton *v.* Whitgreave and Daniell *v.* Daniell; his Lordship more particularly expressing his concurrence in the line of argument pursued by Sir William Grant, in the last-mentioned case.

The general rule referring survivorship to the death
[647] of * the testator was, it will be observed, departed from in the preceding cases only upon particular grounds, and these cases, by resting the construction on the special circumstances, might seem indirectly to afford a confirmation of that rule. Their effect, however, in consequence of the indefinite and questionable nature of the exceptions which they went to establish, evidently was to strike at the root of the rule itself, and to prepare the way for its abandonment in cases where such circumstances did not exist.

It is curious to observe, in the history of this rule of construction, the steps by which an established doctrine is overturned. Lord Loughborough, we have seen, first departed from it, founding that departure upon a circumstance which furnished no real distinction, but at the same time with an anxious recognition of

(*a*) See also Campbell *v.* Campbell, 4 B. C. C. 15.
(*b*) 2 Beav. 25; S. C. 4 My. & Craig, 641.

its authority. (*a*) Sir W. Grant, in Daniell *v.* Daniell, (*b*) probably disapproving of the reasoning which led to the adoption of the rule, as well as of the distinction which had been engrafted on it, applied the principle of the exception to a case not warranted by the terms of the former decision; and although he did not treat the established rule with the same professions of reverence and submission as Lord Loughborough, yet, by placing his own case upon special grounds, impliedly bowed to its authority. In Newton *v.* Ayscough, (*c*) however, the same learned Judge went a step further, and, while he applied Lord Loughborough's construction in Brograve *v.* Winder to an exactly similar case, boldly denied the existence of any contrary rule of interpretation. Its overthrow, we shall find, was completed in a subsequent case, remaining to be stated, in which *another [648] learned Judge not only disavowed the rule, the foundation of which had been thus gradually sapped, but confidently laid down an opposite doctrine.

The case here referred to is Cripps *v.* Wolcott, (*d*) where the testatrix gave and appointed her real and personal estate, in trust for her husband for life, and after his decease directed that her personal estate should be equally divided between her two sons A and B, and C, her daughter, *and the survivors or survivor of them, share and share alike.* A died in the lifetime of the husband; B and C, as the survivors at his death, claimed the whole. Sir J. Leach said: "It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, *the survivorship is to be referred to the period of division.* If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of Stringer *v.* Phillips. (*e*) *But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy.* This is the principle of the cited cases of Russell *v.* Long, (*f*) Daniell *v.* Daniell, (*g*) and Jenour *v.* Jenour. (*h*) In Bindon *v.* Lord Suffolk, (*i*) the House of Lords found a special intent in the will, that the period of division should be suspended until the debts

(*a*) See Brograve *v.* Winder, ante, p. 641.
(*b*) Ante, p. 644.
(*c*) Ante, p. 641.
(*d*) 4 Madd. 11. See also Browne *v.* Lord Kenyon, 3 Madd. 410.
(*e*) This is not correct; see ante, p. 633.
(*f*) Ante, p. 637.
(*g*) Ante, p. 644.
(*h*) Post, p. 652.
(*i*) Ante, p. 632.

[649] were recovered from * the Crown, and they referred the survivorship to that period. The two cases of Roebuck *v.* Dean, and Perry *v.* Woods, before Lord Rosslyn, (*a*) do not square with the other authorities. *Here there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband, who took a previous estate for life.*"

Although this seems to have been at the time a very bold decision, involving, as it did, direct opposition to no less than nine cases (one decided by the House of Lords); (*b*) and although it is to be regretted that the actual state of the authorities was not brought to the attention of the learned Judge, yet the rule of construction which he propounded seems to be so reasonable and convenient for general application, that it is not surprising that subsequent Judges have been favorably disposed to its adoption, as will appear by the cases about to be stated.

Thus, in the case of Gibbs *v.* Tait, (*c*) where a testator gave the residue of his personal estate to his wife for life, and after her decease or marriage again, he gave *what should be remaining of such residuary moneys*, in manner thereafter mentioned; that is to say, one moiety to J., son of T., the other moiety unto and equally between all the daughters of T. and their issue, *with benefit of survivorship and accruer.* Sir L. Shadwell, V. C., held that the daughters who were living at the death of the widow, were entitled, to the exclusion of the representatives of one who survived the testator, and died without issue in the lifetime of the widow. His Honor observed, that the testator [650] speaks of the residue as if it would be uncertain * at the death or marriage again of the widow what the residue would consist of; and therefore he meant that those only should take who should be in existence when the property which they were to take was to be distributed.

It is observable, that the Vice-Chancellor does not in terms recognize the general rule laid down in Cripps *v.* Wolcott, but cautiously pursues a narrower line of reasoning, by which his decision is brought into consistency with, and under the shelter of, Brograve *v.* Winder, and that class of cases.

The same learned Judge, however, seems to have unhesitatingly adopted this construction, without it should seem the same limited grounds of argument, in the subsequent case of Blewitt *v.* Stauffers, (*d*) where a testator gave an annuity to his wife for life, and directed that after her death, the annuity should be equally divided between his children (naming six), *and the*

(*a*) Perry *v.* Woods was decided by Lord Alvanley.
(*b*) Wilson *v.* Bayly, 3 B. P. C. (Toml. ed.) 195.
(*c*) 8 Sim. 32. See also Wordsworth *v.* Wood, ante, p. 646.
(*d*) 9 Law Journ. N. S., Ch. 209.

survivors or survivor. Sir L. Shadwell held, that such of the legatees as survived the widow were entitled in equal shares.

The construction adopted in this case seems to agree with and to be supported in its full extent by the earlier case of Pope *v.* Whitcombe, (*a*) which is another important authority for the general rule, which refers survivorship to the period of distribution. The testatrix gave the interest of the residue to her brother during his life, and after his death, she gave the residue to her executors, in trust for four persons by name, *and the survivors and survivor of them,* share and share alike, to be paid to them respectively when they should attain twenty-one, with interest in the mean time. Of these four persons, two died during the life of the brother: Lord Eldon held, that they did not take vested interests in any part of the residue, but that the whole belonged to the two survivors; such being, his Lordship considered, the intention of the testatrix.

In this state of the recent authorities, one scarcely need hesitate to affirm, that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator, is confined to those cases in which there is no other period to which survivorship can be referred; and that where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only.[1]

It must be remembered, however, that the cases of Garland *v.* Thomas, Edwards *v.* Symons, and Doe *v.* Prigg, (the last decided after Cripps *v.* Wolcott,) forbid the application of this rule to devises of real estate; although it is difficult to discover any ground for making them the subject of a different rule, unless a reason can be found in the greater tendency in devises of real estate towards a vesting of the interests of the devisees. The reader, however, cannot be recommended to rely implicitly on any such distinction; and it must be left for future decisions to tell us what is the actual rule of construction on this perplexing point in reference to real estate.

It is to be observed, that where the gift to survivors is to take effect *upon a contingency,* none of the reasoning (infirm as that reasoning is) upon which it was held to refer to survivors at the death of the testator applies; for it cannot for an instant be contended that a tendency in common is inconsistent with such a qualified survivorship. The only question, therefore, in such a case is, whether the gift was meant to extend to survivors indefinitely, (*i. e.* whenever the contingency should happen,) or is

(*a*) 3 Russ. 124.

[1] See Den *v.* Sayre, 2 Penn. 598.

restricted to survivorship within a given period after the testator's decease.

[652] * Thus, in Jenour *v.* Jenour, (*a*) where a testator bequeathed £400 Long Annuities to his sister for life, and declared that £200 should be his brother's for life if he survived his sister, and after his decease should be equally divided between his two nephews J. and M., *and go to the survivor of them in case his brother should leave no lawful issue;* if he should, such issue should be in place of their father with regard to the said annuities. The sister and brother having both died in the lifetime of J. and M., M. claimed to be absolutely entitled to a moiety. The question seems to have been whether survivorship was indefinite, or referable to the death of the surviving legatee for life. Sir W. Grant, observing that he was always indisposed to indefinite survivorship, adopted the latter construction; that is, that the legatees should take absolutely, if living at the death of the tenant for life; if then dead, leaving issue, then the issue to be entitled to the place of their parent. On appeal, Lord Eldon was of the same opinion.[1]

In Roe *d.* Sheers *v.* Jeffrey, (*b*) it seems to have been taken for granted that an executory limitation for life to certain persons or the survivors, was not confined to survivors at the happening of the contingency; but, as the devise had not at the death of the object fallen into possession, it does not appear whether survivorship was considered as indefinite, or as restricted to this period. The devise was to A for life, remainder to B in fee; but in case B should depart this life and leave no issue, then that the premises should return unto E., M., and S., *or the survivors or survivor of them, equally to be divided between them.* E., M., and S. survived the testator, but one of them died in the lifetime of A, but *after* the contingency had happened by

[653] the death of B, without issue. * The two surviving tenants for life recovered the property, on a different point of construction; (*c*) and no objection seems to have been made to their claim to the entirety, on the ground that the limitation to survivors was restricted to survivors at the death of the testator, or at the happening of the contingency.

But in the case of Doe d. Lifford *v.* Sparrow, (*d*) an executory limitation to survivors was held to refer to the death of the testator (the devise being to A and B in fee as tenants in common, and in case of the death of either without children to the survivor); but this construction was aided by the context, particularly by a gift over of the entire property, in case *both* the

(*a*) 10 Ves. 562. (*b*) 7 D. & E. 589.
(*c*) Ante, p. 434. (*d*) 13 East, 359.

[1] See Morgan *v.* Morgan, 5 Day, 517; Couch *v.* Gorham, 1 Conn. 36.

devisees were dead *at the time of the decease of the testator* without children, from which the Court inferred, that in the clause in question, he contemplated death at the same period.

It sometimes happens that a testator, after giving to several persons and the survivors generally, goes on to make an express gift to survivors, to take effect in a particular event, thereby explaining the sense in which he used the word in the former instance. As, in the case of Weeden *v.* Fell, (*a*) where A bequeathed a sum of money, in trust for his wife for life, and after her decease to divide the whole among his four children, share and share alike, *and the survivors*, but not before they should have respectively attained twenty-one or days of marriage; for his intent was, that *if any of his four children should die before twenty-one or days of marriage*, then his, her, or their share so dying should go and be equally divided *among the survivors*. It was held that a child attaining twenty-one was entitled, though she died in the lifetime of her mother.[1]

Where the time of distribution depends upon the
*happening of two events, one of which is personal, and [654]
the other is not personal, to the legatees, (as where the
gift is to children attaining twenty-one, and the distribution is postponed until the youngest object attains that age,) the courts strongly incline to construe a gift to the survivors as referring to the former event exclusively, in order to arrive at what is considered to be a more reasonable scheme of disposition than that of rendering the interests of the legatees liable to be defeated by the event of their dying before the time to which, for some reason irrespective of the personal qualifications of the legatees, the distribution was postponed.

Thus, where (*b*) a testator devised certain leasehold property to his wife for life, then to his daughter for life, and at her death to her husband for life, and at his decease to a trustee upon trust to receive the rents for the benefit of all the children of the daughter. The testator then proceeded thus: "And my further will is, that my said trustee shall from time to time, as the rents become due, pay unto such child or children a just proportion of such interest as they shall arrive at their age of twenty-one years, and to place the interest of the infants' shares in the three per cents. consolidated bank annuities for their own sole use and benefit, and so on alternately till the youngest child shall arrive at his or her age of twenty-one years, and then all the said children *or the survivors* of them to be let into full possession of all the said estates, share and share alike." The question was at what time the interest of the children vested. Sir J. Leach, M. R. observed that the Court would not, unless

(*a*) 2 Atk. 123. (*b*) Crozier *v.* Fisher, 4 Russ. 398.

[1] See Lindsey *v.* Burfoot, 1 Murph. 494; Dickenson *v.* Jordan, Ib. 388.

forced by the plainest words, adopt a construction, by
[655] which the interest of a child of full age, and * settled in life, would be divested, if he happened to die before the youngest child attained twenty-one; that here the word "survivor" admitted of another and more rational meaning, namely, surviving so as to attain twenty-one; that, therefore, every child attaining twenty-one acquired a vested interest in his proportion of the capital; and that the children who died before attaining twenty-one, took, during their lives, a vested interest in that proportion of the rents and profits which corresponded to their presumptive shares; but that such interest determined on their deaths.

Where a gift is made to several persons as tenants in common for life, and the survivor, with a limitation over after the death of the survivor, indicating therefore unequivocally that the survivor is to take *at all events*, the testator is considered to refer to survivorship indefinitely, and not to survivorship at his own death.

Thus, in Doe d. Borwell *v.* Abey, (*a*) where the testator devised to his three sisters, for and during their joint natural lives, *and the natural life of the survivor of them, to take as tenants in common, and not as joint tenants;* and after the determination of their respective estates, then to trustees during the lives of his said sisters, and the life of the survivor of them, to preserve contingent estates; and after the respective deceases of his said three sisters, *and the decease of the survivor* of them, then over; Lord Ellenborough observed, that, to take as tenants in common, is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean that they were to take it as tenants in common, which they might do with benefit of survivorship, then the only repugnance seemed to be in the words, "and not as joint ten-
[656] ants." (*b*) *"I would (said his Lordship) preserve the words, 'to take as tenants in common.' The words '*tenants in common*' are of a flexible meaning, and may be understood, that although they should take by survivorship as joint tenants, yet the enjoyment was to be regulated amongst them as tenants in common. The prevailing intention of the testator seems to have been, that the estate should not go over until the death of the survivor." And Mr. Justice Bayley observed with great truth, "A tenancy in common, with benefit of survivorship, is a case which may exist without being a joint tenancy, because survivorship is not the only characteristic of a joint tenancy."

(*a*) 1 M. & Selw. 428.

(*b*) But are not these words susceptible of the same explanation? They were not to enjoy as joint tenants, with a right of accruer, but as tenants in common, with an express or implied limitation to survivors.

It is evident that, by "benefit of survivorship," the learned Judge meant *a gift to the survivor;* and his observation goes to this: that although survivorship is not an *incident* to a tenancy in common, yet an express gift to survivors is consistent with it. It is observable, however, that there was no express gift to the survivor; but the Court seems to have implied one. (*a*) The principle, however, is the same.

It remains to be observed, that in devises of estates of inheritance, for the avowed purpose of reconciling words of division or severance with a gift to the survivor, the devisees have been held to be joint tenants for life, and tenants in common of the inheritance in remainder.

Thus, in Barker *v.* Giles, (*b*) where the testator devised his real estate to be sold to pay debts and legacies, and *the surplus of the money arising from the sale to be [657] laid out in lands, to be settled to the use of J. and R., *and the survivor of them*, their heirs and assigns forever, *equally to be divided between them, share and share alike;* it was held, that they were joint tenants for life, with several inheritances, so that by the death of J. in the lifetime of the testator, R. took the whole for his life, and the devise of the moiety of the inheritance lapsed.

But in Blissett *v.* Cranwell, (*c*) where the testator devised to his two sons and their heirs, *and the longest liver of them equally to be divided between them and their heirs*, after the death of his wife; it was held, that though it was given to them and the survivor, yet that the last words (namely, the words of division) explained what the testator meant by the words "survivor," that the survivor should have an equal division with the heirs of him who should die first.

In Stones *v.* Heartley, (*d*) Lord Hardwicke recognized the authority of this case, and applied the same construction to a devise of the residue of the testator's estate, "to be equally divided among his three younger children, D., F., and M., *and the survivor of them* and their heirs forever."

The objection to the construction adopted in the last two cases is, that it renders the gift to the survivor wholly inoperative. It is probable that the Courts at this day would incline to construe such gift as intended to provide for the event of any of the objects dying in the lifetime of the testator, as in Smith *v.* Horlock; (*e*) at any rate, in such a case as Stones *v.* Heartley, where there was no other period to which it could be referred. The other *case, Blissett *v.* Cran- [658]

(*a*) This case may, therefore, be added to those cited ante, vol. 1, p. 476.
(*b*) 2 P. W. 280; 9 Mod. 157; 14 Vin. 487; 2 Eq. Ca. Ab. 536; S. C. affirmed on appeal, 3 B. P. C. (Toml. ed.) 104. See also Folkes *v.* Western, 9 Ves. 456.
(*c*) Salk. 226; S. C. 3 Lev. 373.
(*d*) 1 Ves. Sen. 165.
(*e*) 7 Taunt. 129.

well, would raise the question (to which so considerable a portion of the present chapter has been devoted) whether it meant survivorship at that time or the period of division. Barker *v.* Giles (*a*) is distinguishable, inasmuch as the words of severance were not, as in the other cases *necessarily* applied to the estate for life. The authority of the case was recognized in the recent case of Doe d. Littlewood *v.* Green. (*b*)

(*a*) Ante, p. 656. (*b*) 4 Mee. & W. 229.

CHAPTER XLIX.

WORDS REFERRING TO DEATH SIMPLY, WHETHER THEY RELATE TO DEATH IN THE LIFETIME OF THE TESTATOR.

"In *case of the death*," &c. to what period referred.
Where the bequest is *immediate*.
"*If any die*," held to mean *in the lifetime of the testator*, [p. 660.]
Cases of contrary construction, [p. 660.]
"*In case of* her demise," construed *at* her death, [p. 661.]
"In case of death happening," &c. not confined to death *in lifetime of the testator*, [p. 661.]
Sir W. Grant's remark on Nowlan *v.* Nelligan, [p. 662.]
"*In case of*" construed *at*, death, [p. 662.]
Remark on Lord Douglas *v.* Chalmer, [p. 663.]
No distinction in gifts to children, [p. 663.]
"But should she happen to die," held *not* to be restrictive, [p. 663.]
"In case of her death," applied to testator's lifetime, [p. 664.]
"In the event of the death of either," similarly construed, [p. 664.]
Rule where bequest is *future*, [p. 664.]
"In case of the death," referred to period *of possession*, [p. 665.]
"Or" used synonymously with *in case of*, [p. 666.]
Distinction where prior gift is expressly for life, [p. 666.]
Remarks on Smart *v.* Clark, [p. 667.]
Where prior gift comprises the income only, [p. 667.]
Words following an indefinite devise of land, [p. 668.]
Estate tail, [p. 669.]

WHERE a bequest is made to a person, with a gift over *in case of his death*, a question arises whether the testator uses the words "in case of," in the sense of *at* or *from*, and thereby as restrictive of the prior bequest to a life interest, *i. e.* as introducing a gift to take effect on the decease of the prior legatee under all circumstances, or with a view to create a bequest in defeasance of or in substitution for the prior one, in the event of the death of the legatee, in some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance, in association with which it is contingent; that circumstance naturally is the time of its happening; and such time, where the bequest is immediate, (*i. e.* in possession,) necessarily is the death of the testator, there being no other period to which the words can be referred.[1]

Hence it has become an established rule, that where the be-

[1] In a will, the words "on the event of the death" of the devisee, are never construed to mean the event of a *lapse*; unless the will can have no other construction. Montgomery *v.* Montgomery, 2 Irish Eq. 161.

quest is simply to A, and *in case of his death, or if he die*, to B, A surviving the testator takes absolutely.[1] (*a*)

[660] * The case of Trotter *v.* Williams, (*b*) appears to have carried this construction to a great length. J. S. bequeathed to A £500, to B £500, and in like manner gave £500 apiece to five others, and *if any died*, then her legacy, and also the residue of his personal estate, to go to such of them as should be *then* living, equally to be divided betwixt them all. The Court held, that these words referred to a dying before the testator, so that the death of any of the legatees after would not carry it to the survivors.

The word "then" seemed to present some difficulty in the way of the construction adopted in this case. It followed immediately after the reference to the death of the legatees, and might with great plausibility have been held to refer to that event whenever it should happen; for a testator could hardly intend to make existence at a period anterior to his own death a necessary qualification of a legatee. This case exhibits the extreme point to which the construction in question has been carried.

There are, however, a few cases of immediate bequests, in which the words under consideration have been construed to refer to death at *any* time, and not to the contingent event of death in the lifetime of the testator; but in each there seems to have been some circumstance evincing an intention to use the words in that rather than in the ordinary sense. Thus, the circumstance of the testator having bequeathed other property to the same person, * to be "at her own disposal," has been considered to indicate that the testator had a different intention in the instance in question.

[661]

In Billings *v.* Sandom, (*c*) the testator being at Gibraltar, bequeathed to his sister A, (who was in England,) £1000, and *in case of her demise* he gave to B £800, and to C £200. And he bequeathed unto A, whom he left executrix, whatever goods, chattels, and money should be due to him at the time of his decease, "*to be disposed of as she should think proper.*" Lord Thurlow said the testator intended to give a share of his bounty to his sister, and also to the others. The word "and" implied this; therefore she should take it for life, and then they should

(*a*) Lowfield *v.* Stoneham, 2 Stra. 1261; Hinckley *v.* Simmons, 4 Ves. 160; King *v.* Taylor, 5 Ves. 806, [Sumner's ed. note (*a*) and cases cited;] Cambridge *v.* Rous, 8 Ves. 12, [Sumner's ed. Perkins's note (*a*) and cases cited;] Webster *v.* Hale, Id. 410; Ommaney *v.* Beavan, 18 Ves. 291; Wright *v.* Stephens, 4 Barn. & Ald. 674. But see Billings *v.* Sandom, 1 B. C. C. 393; Nowlan *v.* Nelligan, Id. 489; Lord Douglas *v.* Chalmer, 2 Ves. Jun. 501; also Chalmers *v.* Storil, 2 Ves. & Bea. 222. As to a similar question arising in the word *or*, as in a gift to A, "or his children," see post, 666; also 1 Russ. 165.

(*b*) Pre. Ch. 78; S. C. 2 Eq. Ca. Ab. 344, pl. 2.

(*c*) 1 B. C. C. 393.

[1] Lord Douglas *v.* Chalmer, 2 Ves. (Sumner's ed.) 501, note (*a*) and cases cited.

take it. As to the residuary devise, he meant that she should take that unfettered, at her own disposal, *but the other fettered by the gift over.*

This case has been referred to by Sir W. Grant, (*a*) as decided upon the contrast afforded by the residuary clause.

In Nowlan *v.* Nelligan, (*b*) the bequest was in these words: "I give and devise unto my beloved wife H. N. all my real and personal estate: I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; *but in case of death happening to my said wife*, in that case I hereby request my friends S. and H. to take care of and manage to the best advantage for my daughter H., all and whatsoever I may die possessed of." Lord Thurlow said it was impossible to tell with precision what was the testator's meaning, but he thought it too much to determine, that, in case of death happening, meant
*dying in the husband's (*i. e.* the testator's) lifetime; [662]
that therefore the meaning must be supposed to be in the event of her death *whenever it should happen.*

Of this case Sir W. Grant (*c*) has said, "It was evident that some benefit was intended for the daughter, but it was doubtful, as the extent was not clearly expressed, whether it could be made effectual by imposing a trust upon the will, [*quære*, wife?] Some benefit, however, was evidently intended for the daughter, and none could be assured to her except by limiting her mother to an interest for life."

These cases show, that, in the opinion of Lord Thurlow, very slight circumstances suffice to make the words under consideration refer to death at any period; but no case has perhaps gone so far in adopting this construction as Lord Douglas *v.* Chalmer, (*d*) where a testatrix bequeathed her residuary personal estate for and to the use and behoof of her daughter Frances, Lady D., and *in case of her decease* to the use and behoof of her (Lady D.'s) children, share and share alike, to whom her said trustees and executors were to account for and pay over and assign the said residue. By a codicil, the testatrix gave a ring to her daughter, Lady D. Lord Loughborough treated the notion, that the testatrix intended to provide for the event of Lady D. dying in her lifetime as contrary to the natural import of the words, and the distinction between the expression used, and *at* or *from* her decease, as too subtle. He also relied upon the bequest of the ring in the codicil, which he observed was inconsistent with the supposition of her taking the whole interest in the residue; but, if she took it for life only, was very natural. And his Lordship ob-

(*a*) 8 Ves. 22.
(*b*) 1 B. C. C. 489.
(*c*) 8 Ves. 22, [Sumner's ed. Perkins's note.]
(*d*) 2 Ves. Jun. 501, [Sumner's ed. notes.]

[663] served, that, under the circumstances which had * happened, there was no other way by which the testatrix's bounty could reach the children but by giving to Lady D. for life and the capital to the children.

The reliance which was placed on these circumstances shows that Lord Loughborough did not intend to controvert the general rule, which is still more apparent from his subsequent decision in Hinckley *v.* Simmons, (*a*) where a bequest of all the testatrix's "fortune" to A, and "*in case of* her death" to B, was held to confer an absolute interest on A surviving the testatrix. And this has been followed by several other decisions. (*b*)

It might seem perhaps, that Lord Douglas *v.* Chalmer goes to establish an exception to the construction in question, where the first gift is to the parent and the second to the children; but this hypothesis is not only unsound in principle, but is contradicted by subsequent authority.

Thus, in Webster *v.* Hale, (*c*) where the testator bequeathed certain stock for the use, exclusive right, and property of his sister C., *but should she happen to die*, then to her children; and the testator also bequeathed to his sister H. certain stock, *and in case of her death* to be divided among her children., Sir W. Grant held, that C. surviving the testator was entitled to her legacy absolutely; he remarked that the word "but" strengthened this construction, being disjunctive, and implying that the children were to take in an event different from that on which the parent was to take. The other bequest to H., his Honor observed was in the very terms of Lord Douglas *v.* Chalmer, and, if that stood alone, he should be bound to the same construction; but he thought it sufficiently clear, that C.

[664] was to take absolutely, and he could not from the * very slight variation, collect a different intention as to the other sister. It seems, therefore, that the M. R. did not think the gift of the ring in Lord Douglas *v.* Chalmer as making any real difference.

The absence of any distinction where the respective bequests are to parent and children, is still further evident from the case of Slade *v.* Milner, (*d*) where, under a bequest to A, "*and in case of her death*" to be equally divided between her children, Sir J. Leach held, that A having survived the testatrix, took an absolute interest. And it is of course equally immaterial that the substituted gift confers a life interest only on the first taker, and the ulterior interest on a third person. (*e*)

The most recent case exemplifying the construction now under consideration is Clarke *v.* Lubbock, (*f*) where a testator bequeathed the residue of his property to A and B, the interest

(*a*) 4 Ves. 160.
(*b*) See cases cited ante, p. 659.
(*c*) 8 Ves. 411.
(*d*) 4 Madd. 144.
(*e*) Crigan *v.* Baines, 7 Sim. 40.
(*f*) 1 You. & Coll. N. C. 492.

to be paid for their support; *but in the event of the death of either*, the whole of the interest to be paid to the survivor; and on his or her demise, should they leave no children, then over; Sir Knight Bruce held, that both A and B having survived the testator and left children, each was entitled to one moiety, the words in question being construed to refer to death in testator's lifetime.

But although in the case of an *immediate* gift it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made ex necessitate rei, from the absence of any other period to which the words can be referred, as a testator * is not supposed to [665] contemplate the event of himself surviving the objects of his bounty; and, consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease,) the words in question are considered as extending [*quære, whether* confined ?] to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession.

Thus in Hervey *v.* M'Lauchlin, (*a*) where a testatrix bequeathed two several sums of stock to a trustee, in trust to pay the dividends to T. for life, and after her death she gave the said two sums to G., E., and E., the three children of T., in equal shares, *and in case of the death of either of them*, the share of such as might die to go to and belong to the children, or child if but one, of the person so dying. G. survived the testatrix, and died in the lifetime of the mother, the legatee for life; and it was contended that the words "in case of the death" of the legatees, referred to a dying in the lifetime of the testatrix, and therefore that the children were not entitled. But the Court considered that the intention of the testatrix was to substitute the children of those dying in the lifetime of the *legatee for life* in the place of their parent, and that, therefore, the parents took vested interests on the death of the testator, subject to be divested in the event specified.

On this principle, too, it should seem, that in the case of a bequest to A at the age of twenty-one years, *and in the event of his death* then over to another, the * words [666] would be construed to mean, in the event of his dying under twenty-one at any time. (*b*)

And here it may be observed, that those cases in which the word "or" has been construed as introductory to a substitutional bequest, (in which sense it seems to be tantamount to the

(*a*) 1 Price, 264. See also Moon d. Fagge *v.* Heaseman, Willes, 138; Galland *v.* Leonard, 1 Swanst. 171; Girdlestone *v.* Doe, 2 Sim. 225.

(*b*) See Home *v.* Pillans, 2 My. & Kee. 24.

words "in case of the death,") present a distinction between immediate and future gifts similar to that which has been just pointed out. Thus, a legacy to A or to his children, or to A or his heirs, is construed as letting in the children or next of kin ("heirs" being in reference to personal estate construed as synonymous with *next of kin*,) in the event of A dying in the lifetime of the testator; while, on the other hand, a bequest to A for life, and after his decease to B or his children, is held to create a substitutional gift in favor of the children of B, in the event of B dying in the lifetime of A. (*a*)

It should be noticed, that the construction of the words "in case of the death," which makes them provide against the event of the legatee dying in the testator's lifetime, applies only when the prior gift is absolute and unrestricted, and not where such legatee takes a life interest only; for, if a testator bequeathes the interest of a sum of money to A expressly for life, "and in case of his death" to B, the irresistible inference is, that these words are intended to refer to the event on which the prior life interest will determine, and that the bequest to B is meant to be, not a substituted but an ulterior gift, to take effect on the death of A *whenever that event may happen.*

[667] * Thus, in the case of Smart *v.* Clark (*b*) where a testator gave to his son E., who was then at sea, the interest of £500 stock in the five per cents. during his natural life, if he came to claim the same within five years after the testator's decease; but *if he should die*, or not come to claim the same within the time limited, then he gave the said stock to the children of his daughter A., with the interest that might be due thereon. E. claimed within the five years, and received the dividends until his death, when the children of A. filed a bill to obtain a transfer; and Sir J. S. Copley, M. R., on the authority of Billings *v.* Sandom, (*c*) held that they were entitled.

It is singular that the Master of the Rolls did not advert to the circumstance of the prior bequest being expressly for life, which distinguished the case before him from all that had been cited, including Billings *v.* Sandom; which case stands upon its special circumstances, and is only to be reconciled with subsequent authorities, on the ground that the context warranted the construing the words "and in case of her demise" to mean *at* her demise.

Where the prior gift, though not expressly for life, comprises the annual income only of the fund, which is the subject of the bequest, the same construction seems to prevail as where the prior gift is expressly for life.

(*a*) Vide cases cited, vol. 1, p. 452, 454; also Salisbury *v.* Petty, cor. Sir J. Wigram, V. C., 7 Jurist, 1011.
(*b*) 3 Russ. 365.
(*c*) But as to which, vide ante, p. 661.

Thus, in the case of Tilson *v.* Jones, (*a*) where a testatrix directed the interest of certain stock and a canal share to be equally divided between her son and daughter, exclusive of any husband; *and in case of the death of either*, then the whole of the interest to the survivor; and if her son should not be in England at the time of her decease, then the execution of the trusts, so far as they related to him, should be postponed until his return; *but in case of his* * *death*, then [668] the trustee should pay the whole of such interest to her daughter; *and in case of her death*, the testatrix gave the whole of such principal and interest between her niece and nephew; and in case of their death before her son and daughter, then she gave the principal and interest at the deaths of the son and daughter to C. M. The daughter survived the son, and claimed to be absolutely entitled; but Sir J. Leach, M. R., said, that the testatrix must be understood as if she expressed herself thus: "I give the principal and interest to my niece and nephew, if they shall survive my son and daughter; and if they shall not survive them, then to C. M." She could not refer here to the death of her son and daughter in her lifetime; the daughter therefore took for life only. *Besides this, the testatrix in her gift to her son and daughter spoke of the interest only, but in the gift over she spoke of the principal and interest.*

Consistently with the principle of the two cases just stated, it has been held, that the words under consideration, succeeding an indefinite devise of *land*, would (as such a devise, if contained in a will which is subject to the old law, confers only an estate for life), be held to be synonymous with "*after* the death," and accordingly the estate to which they are prefixed is a vested remainder expectant on such life estate. (*b*)

Thus, in the case of Bowen *v.* Scowcroft, (*c*) where an undivided share in lands was devised to W. and B., and in case of their demise the testator devised their respective shares to be equally divided among their children or their lawful heirs, Mr. Baron Alderson was of opinion, that, as this was the case of a devise of land, the * authorities relating to [669] personal estate did not apply, and that the words were to be construed "*after* their decease."

It seems, that where a testator devises an estate *tail* to a person, and "if he die," then over to another, the words, "without issue" are supplied to render it consistent with that estate. (*d*)

(*a*) 1 Russ. & Myl. 553.
(*b*) Fortescue *v.* Abbott, Pollex. 479; S. C. Sir T. Jones, 79.
(*c*) 2 You. & Coll. 640. This overrules Lord Kenyon's suggestion in Goodtitle *v.* Edwards, 7 Durn. & E. 635.
(*d*) Anon. 1 And. 33, ante, vol. 1, p. 427.

CHAPTER L.

WORDS REFERRING TO DEATH COUPLED WITH A CONTINGENCY.—TO WHAT PERIOD THEY RELATE.—CLASSIFICATION OF THE CASES.

Distinction between the cases discussed in the last and in the present chapter.
Classification of the cases.
Death of object of prior gift in testator's lifetime, [p. 671.]
Ulterior legatees held to be entitled, [p. 671.]
Ulterior gift not defeated by death of prior legatee in testator's lifetime, [p. 672.]
Distinction where gift is to class, [p. 673.]
Ulterior gift not defeated by death of prior legatee in testator's lifetime, [p. 674.]
Gift over in case of death to executors or administrators or personal representatives, [p. 675.]
Gift to personal representatives not substitutional, [p. 676.]
Gift over of interest of married woman in case of death, to her next of kin, [p. 677.]
Whether children of objects dead at date of will can have the benefit of clause of substitution, [p. 677.]
Children of objects dead at date of will excluded, [p. 678 to 680.]
Suggested distinction where decease is after will, [p. 681.]
Case of Thornhill *v.* Thornhill overruled, [p. 682.]
Distinction where children of deceased claim under original gift, [p. 683.]
Children of deceased objects allowed to participate, [p. 684.]
Children of deceased objects let in, [p. 685.]
Disinclination of Courts to exclude children of deceased, [p. 685.]
Children of deceased objects let in, [p. 686.]
General conclusion from preceding cases, [p. 687.]
Whether gift over takes effect on happening of event subsequent to death of testator, [p. 687.]
Case of Allen *v.* Farthing, [p. 688.]
The event of death leaving children held to apply to period after testator's death, [p. 689.]
Gift over on A marrying, and having children, extended to event *after* death of testator, [p. 690.]
Effect where gifts over comprise every possible event, [p. 690.]
Remarks on Craton *v.* Lowe, [p. 691.]
Distinction where prior gift may be regarded as a mere life interest, [p. 692.]
Rule where there is a prior life or other interest, [p. 693.]
Contingency restricted to period of distribution, [p. 694.]
Remark on Galland *v.* Leonard, [p. 694.]
Contingency restricted to period of distribution, [p. 695.]
Remark on Lord Brougham's judgment in Home *v.* Pillans, [p. 696.]
Word "payable" occurring in gift over, whether it refers to majority or the period of distribution, [p. 696.]
Word "payable" referred to majority, not to period of distribution, [p. 697, 698.]
Word "payable" referred to period of distribution, [p. 699.]
Remarks on Bright *v.* Rowe, [p. 700.]
Word "payable" referred to period of majority, [p. 700.]
Result of the cases, [p. 701.]

The distinction between the cases which form the subject of the present inquiry, and those discussed in the last chapter, is obvious. There it was necessary either to do violence to the

testator's language, by reading the words providing against the event of death as applying to the occurrence of death at any time, (in which sense, death is not a contingent event,) or else to give effect to the words of contingency, by construing them as intended to provide against death within a given period.

In the cases now to be considered, however, the expositor of the will is placed in no such dilemma; for the testator having himself associated the event of death with a collateral circumstance, full scope may be given to his expressions of contingency without seeking for any restriction in regard to time; and accordingly there seems to be no reason (unless it be found in the context of the will) why the gift over should not take effect in the event of the prior legatee's dying under the circumstances described at *any* period. Cases of this kind, however, will be found to present many distinctions which require particular attention. The cases are divisible into two classes: 1st. Where the question is, whether the substituted gift takes effect in the event of the prior legatee dying under the circumstances described in the testator's lifetime. 2dly. Where the question is, whether the substituted gift takes * effect [671] in the event of the prior legatee surviving the testator, and *afterwards* dying under the circumstances described; and if so, whether at *any* time subsequently.

I. It may be stated as a general rule, that where the gift is to a designated individual, with a gift over, in the event of his dying without having attained a certain age, or under any other prescribed circumstances, and the event happens accordingly in the testator's lifetime, the ulterior gift takes effect immediately on the testator's decease, as a simple absolute gift.

In the early case of Darrel *v.* Molesworth, (*a*) where a legacy of £50 was given to D. T. at twenty-one or marriage, and at the close of his will, (which contained several pecuniary bequests,) the testator added, that *if any legatee died before his legacy was payable*, the same should go to the brothers or sisters of such legatee. D. T. died in the lifetime of the testator, (it is presumed under twenty-one, though the fact is not stated,) and it was adjudged that it was no lapsed legacy, but went to the sister of the legatee.

So in the case of Haughton *v.* Harrison, (*b*) where a legacy of £500 was bequeathed to A the son of B, if he should live to be twenty-one; *and if he should die before*, then to the other children of B. A died under age in the lifetime of the testator; and the right of the other children of B to the legacy, in this event, if any such, was not denied; the only question being,

(*a*) 2 Vern. 378. See also Miller *v.* Warren, Id. 207.
(*b*) 2 Atk. 320.

whether the ulterior bequest had not failed by the event
[672] of *the non-existence of objects thereof living at the testator's decease, and which was decided in the negative.

Again, in the case of Mackinnon *v.* Peach, (*a*) where a testatrix directed certain chattels to be divided between her two daughters, *and that upon the demise of either of them without lawful issue*, the share of her so dying should go to her sister; it was held, that one of the legatees having died unmarried in the testatrix's lifetime, such legatee's surviving sister was entitled to the whole.

So, in the case of Le Jeune *v.* Le Jeune, (*b*) where a testator gave all his estates to his wife for her life, and directed the whole of his property to be sold at her decease, and the proceeds to be divided into five equal shares, one of which shares he directed should be paid to each of his four sons that should be living at her decease; *and in case of either of their deaths*, then the share of such son so dying to be paid to his issue, as they should attain the age of twenty-one years; and in case either of his sons should die without issue, then his share to go to the survivors of his five children. The testator then gave the remaining fifth, with the proportions of his sons' shares who might die without issue, to his daughter and her children. One of the four sons died in the testator's lifetime, leaving a daughter, who survived the testator and attained twenty-one; and Lord Langdale, M. R., held, that such daughter was entitled to her father's one fifth share.

And this construction prevailed (in spite of some apparently opposing expressions) in the case of Rheeder *v.* Ower, (*c*) where a testator bequeathed the interest of the residue of his property to his five sisters for life, *and in case any of them should*
[673] *die leaving issue*, then the trustees *were to pay and transfer the share *to which his sister so deceasing was entitled at or before the time of her decease to receive the interest and dividends thereon*, unto and amongst all and every such child or children of such deceased sister equally between them, share and share alike, at their respective ages of twenty-one years. One of the sisters died in the testator's lifetime leaving children, and it was objected to the claim of such children that the trust was confined to the children of those sisters who had become entitled to receive the interest; but Lord Thurlow decided in favor of their claim, observing, that in a will so loosely drawn, it was more probable that that was the testator's intent than the contrary.

Where, however, the gift is to a class, the objects of which are not, according to the general rules of construction, ascer-

(*a*) 2 Kee. 555. (*b*) Id. 701. (*c*) 3 B. C. C. 240.

tainable until the decease of the testator, (as in the case of a gift to children generally,) the application of the words, providing against the event of death to children dying in the testator's lifetime becomes rather more questionable, they not being, in event, actual objects of the gift, and therefore not within the clause in question, if that clause is to be construed strictly as a clause of substitution. There are not wanting cases, however, in which, even under such circumstances, the words have been held to apply to death in the testator's lifetime, though the language of the will seemed to afford a plausible argument in favor of the contrary construction, the gift over being of the "legacy" or "share" of the deceased object—terms which might seem in strictness to apply only to persons who, by surviving the testator, had become actual objects of gift, in contradistinction to those who, dying before him, could, in point of fact, have no "share" or "legacy" under the will.

* Thus, in the case of Willing *v.* Baine, (*a*) where a [674] testator bequeathed £200 a-piece to his children, payable at their respective ages of twenty-one, *and if any of them die before their age of twenty-one*, then the legacy given to the person so dying to go to the surviving children. One of the children died in the testator's lifetime, (a minor, it is presumed, though the fact is not stated,) and it was held that the children living at the death of the testator were entitled to his legacy.

So, in the case of Walker *v.* Main, (*b*) where a testator devised real estate to his wife for life, and after her decease to trustees in trust for sale, and to pay the produce to his children and grandchildren in certain shares, on their attaining twenty-one or marrying; *but if any of his grandchildren should happen to die before the time of such legacy becoming due and payable*, then the testator bequeathed the part or share of the child, children, or grandchildren so dying, unto and amongst those that should be then living, share and share alike. Two of the children died in the testator's lifetime, and it was held that their shares devolved to the survivors.

Again, in the more recent case of Humphreys *v.* Howes, (*c*) where a testator bequeathed the residue of his personal estate to trustees upon trust for A, B, and C, * for their [675] lives, and to the survivors for life, and after their decease

(*a*) 3 P. W. 113. But compare these cases with Rider *v.* Wager, 2 P. W. 331; where a testator bequeathed a sum of money owing to him by A to the younger children of A, and directed the same to remain in A's hands until the children should be capable of receiving it, *and the legacy or share of any of them dying before such time* to go to the survivors and survivor of them, and it was considered that this must be intended if the legatee should have survived the testator; but that where the legatee died in the lifetime of the testator, as nothing could ever vest in the legatee, so neither could it survive from him.

(*b*) 1 Jac. & Walk. 1.

(*c*) 1 Russ. & My. 639.

upon trust to transfer and pay the same to E (son of B) and F (son of C); *and in case E or F should happen to die before his share of the trust moneys should become payable, without leaving issue of his body*, then his share to go to the survivor; and in case *both* should die before their shares should become payable without leaving issue, then over. E and F both died in the testator's lifetime without issue. It was contended, that the event intended to be provided against was the death of the legatees after the testator's decease, until which event they could not with propriety be said to have any "shares" in the property; but Sir J. Leach, M. R., held, that the case of Willing *v.* Baine was applicable, and accordingly that the ulterior bequest took effect, notwithstanding the death of the legatees in the testator's lifetime.

It seems, however, that where the objects of gift in the clause in question are the executors or administrators, or personal representatives of the deceased legatee, such clause is considered as merely showing that the legacy is to be vested immediately on the testator's decease, notwithstanding the subsequent death of the legatee before the period of distribution or payment, and not as indicating an intention to substitute as objects of gift the representatives of those who die in the testator's lifetime.[1]

Thus, in the case of Bone *v.* Cook, (*a*) where a testator bequeathed the residue of his estate, at the death of his wife, equally between four persons, and then provided, that in case of the death of any of the legatees before their legacies should become payable, then that the legacy of each so dying
[676] should go to his, her, or their children; and * *in case of such decease of any of the said legatees without having a child or children*, the legacy of him or her so dying *should go to his or her executors or administrators.* It was held that the share of one of the legatees who died in the testator's lifetime unmarried, lapsed, though it was admitted, that if she had left a child, such child would have been entitled under the previous clause.

So, in the case of Corbyn *v.* French, (*b*) where a testator bequeathed the residue of his estate to his wife for life, and at her decease gave (among other legacies) one to each of the children of E., or their representatives or representative; Sir R. P. Arden, M. R., was of opinion, that by the death of one of the children, in the testator's lifetime the legacy lapsed, on the ground that a testator must be supposed to contemplate that his legatees will survive him.[2]

(*a*) M'Clel. 168. (*b*) 4 Ves. 418 [Sumner's ed. note (*a*)].

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[1] See ante, vol. 1, p. 301, note and cases cited.

[2] See ante, vol. 1, p. 301, note and cases cited; 2 Williams, Ex. (2d Am. ed.) 869; Dickinson *v.* Purvis, 8 Serg. & R. 71; Trippe *v.* Frazier, 4 Harr. & Johns. 446; Harris

Again, in the case of Tidwell *v.* Ariel, (*a*) where a testator, after bequeathing several legacies, directed that they should be paid "in one whole year after his decease, *or to their several and respective heirs*," Sir J. Leach, M. R., held, that one of the legacies failed by the death of the legatee in the testator's lifetime, the intention being that the legacies should be paid to the representatives if they died within the year.

It is proper to remind the reader, in connection with the three last cases, that in several instances the words "representatives" and "heirs," when applied to personalty, and even the words "executors or administrators," have been held to be synonymous with *next of kin*; (*b*) but perhaps this does not much weaken the special ground to which these cases have been referred.

* And here it may be noticed, that a bequest to the [677] next of kin of a married woman, in the event of her dying in the lifetime of her husband, has been viewed in much the same light as a bequest to heirs or executors and administrators; namely, as being intended merely to apply to the event of the legatee dying in the lifetime of her husband, after having survived the testator, and not to prevent lapse in the event of the legatee dying under similar circumstances in the testator's lifetime.

Thus, where (*c*) a testator bequeathed to trustees £10,000, to be invested in stock, in trust for A, a married woman, during the joint lives of herself and her husband, and, in case she survived him, to her absolutely; but, if she did not survive him, to such person as she should by will appoint, and, in default of appointment, to her next of kin, exclusive of her husband: A died in the lifetime of her husband and the testator; and it was held that the legacy lapsed.

Where, too, there is a devise or bequest to a class of objects who are to be ascertained at the testator's death, or at some period subsequent to it, with a substitution of the children of objects who should happen to be deceased at the period of distribution, and it happens that some individual of the class was dead when the will was made, it is not too readily to be concluded from the preceding authorities that the clause in question lets in the children of such pre-deceased person; for in several such cases it has been construed strictly as a clause of substitution, and therefore as not comprehending the children of any who could not in any possible event have been objects of the original gift.

Thus, in the case of Christopherson *v.* Naylor, (*d*) where

(*a*) 3 Madd. 403. And see Tate *v.* Clarke, 1 Beav. 100.
(*b*) Ante, p. 22, 39.
(*c*) Baker *v.* Hanbury, 3 Russ. 340.
(*d*) 1 Mer. 320.

v. Fly, 7 Paige, 421; Nelson *v.* Moore, 1 Ired. Eq. 31; Bone *v.* Cooke, 1 M'Clel. 177; Comfort *v.* Mather, 2 Watts & S. 450.

[678] *a testator bequeathed to "each and every of the child and children of my brother and sisters A, B, C, and D, which shall be living at the time of my decease, except my nephew F.," (for whom he had already provided;) "*but if any child or children of my said brother and sisters, or any of them*, (besides the said F. my nephew,) *shall happen to die in my lifetime*," *and leave issue living at his or her decease*, "then and in such case the legacy or legacies hereby intended for such child or children so dying shall be upon trust for, and I give and bequeath the same to his, her, or their issue, such issue taking only the legacy or legacies which his, her, or their parents or parent would have been entitled to if living at my decease." It was contended, that the expression "*shall* die in my lifetime," though literally applicable only to *future* death, might be held to embrace the children who were dead at the time of making the will, by analogy to those cases in which a gift to children "*to be* begotten" had been held to include children previously born; (*a*) but Sir W. Grant, M. R., observed, that the question did not depend upon these words, which, though according to strict construction importing futurity, might have been understood as speaking of the event at whatever time it might happen. "The nephews and nieces," said his Honor, "are, here, the primary legatees; nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But, of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can consequently show [679] no object of *substitution; and to give them original legacies would be, in effect, to make a new will for the testator."

So, in the case of Butter *v.* Ommaney, (*b*) where a testator bequeathed the residue of his estate after the death of his wife and brother Joseph, to be equally divided between the children of his said brother and his late sister Betty and late brother Jacob, who should be then living, in equal shares; *and as to such of them as should be then dead*, leaving a child or children, such child or children were to be and stand in the place or places of his, her, or their parent or parents; Sir L. Shadwell, V. C., held, that the children of the testator's brother Jacob who died in the testator's lifetime (*and who were also dead at the date of the will*) were not entitled to any share of the residue.

Again, in the case of Waugh *v.* Waugh, (*c*) where a testator bequeathed £5000, three per cent. consols, to his executors, upon trust to pay the dividends arising therefrom to his nephew J. during his life; and (in a certain event which happened) as to

(*a*) Ante, p. 101. (*b*) 4 Russ. 70. (*c*) 2 Myl. & Keen, 41.

the principal, in trust for all the brothers and sisters of the said J. who should be living at the time of his death, *and the children then living of any of his brothers and sisters who should have previously departed this life*, equally to be divided among such brothers and sisters and children; but so nevertheless that the children of such deceased brother and sister should take only the share which their parent would have taken if living, which should be equally divided among such children. At the date of the will, one of J.'s brothers was dead, leaving a daughter, to whom the testator gave a legacy, describing her as the daughter of his late nephew A. The question was, whether this great niece was entitled to share in the legacy of £5000 stock. Sir J. *Leach, M. R., decided against her [680] claim, observing, that the words used in the first part of the bequest would comprise the claimant; but by the subsequent part of the gift it was expressed, that the children of a deceased brother of J. were to take only the share which their parent would have taken if living, by which was to be understood, would have taken *under that bequest* if living; and the parent of E., being dead at the time of making the will, could have taken nothing under that bequest.

Of this case, Sir L. Shadwell, V. C., (*a*) has observed, that he thought the decision might have been supported, on the ground that the testator, by making a separate provision for the daughter, had shown an intention to exclude her from any share of the £5000.

So, in the case of Neal *v.* Callow, (*b*) where a testator bequeathed one sixth of his residuary estate to the children of his late sister Jane equally, and in case any such child or children should die under twenty-one, leaving issue, their shares to be paid to such issue; and if any such child or children should die under twenty-one and leave no issue, then the share of him or her so dying to go to the survivors, and the issue of such of the deceased children as should have died so leaving issue as aforesaid (such issue to take no greater share than his, her, or their parent, or respective parents would have been entitled to if living); and as to one other sixth, in trust for the testator's sister Mary C. for life, and after her decease, in trust for her *issue*, to be payable at the like times and with the like benefit of survivorship, and in like manner as was thereinbefore expressed concerning the sixth part thereinbefore given to the children of the testator's sister Jane; and in case the testator's sister Mary should depart this life without *leaving issue of [681] her body, or leaving any they should die under twenty-one and should leave no issue, then over. A child of Mary C. was dead at the date of the will, (*c*) leaving a child; and Sir L.

(*a*) 6 Sim. 332. (*b*) 9 Sim. 372.
(*c*) It does not appear whether the deceased child had attained majority.

Shadwell, V. C., held that this grandchild of Mary C. was not entitled; for that, under the trusts declared of the share of the testator's sister Jane, (to which reference was here made,) no grandchild could take except by way of substitution for its parent, and as the grandchild's mother never could have become entitled to take, her claim could not be sustained.

So, in the case of Gray *v.* Garman, (*a*) where the testator gave the residue of his real and personal estate to his wife E. for life, and at her decease to be equally divided between the brothers and sisters of his wife E.; and in case any or either of them should be dead at the time of the decease of E., leaving issue, then such issue to stand in the place of their respective parent or parents. The question was, whether the issue of a brother of E., who was dead at the date of the will, were entitled. Sir J. Wigram, V. C., after a full examination of the cases, held, that they were not; his Honor considering that the word "them" in the second clause referred to the brothers and sisters described in the first, which clearly did not extend to a brother or sister previously dead. (*b*)

It will be observed, that, in the five preceding cases, the person whose children it was attempted to bring within the compass of the clause in question was dead at the date of the will, and could not possibly have been an object of the primary bequest; and it does not follow that the same construc-
[682] tion would have obtained, if *such person had been then living, and had *subsequently* died in the testator's lifetime. There is, however, not wanting a case even of this kind. Thus, in Thornhill *v.* Thornhill, (*c*) where a testator directed that a certain estate, which by his marriage settlement he had settled on his wife for life, and another estate which he had devised to her for her life, should be sold at her decease, and the money arising therefrom equally divided among his nephews and nieces, *the children of such of them as should be then dead standing in the place of their father and mother deceased.* The question was, whether the children of such of the nephews and nieces as died in the testator's lifetime were entitled. Sir J. Leach, V. C., decided in the negative: his Honor being of opinion, that the latter clause applied to the children of such of the nephews and nieces only as died after the testator, and before the wife.

The case of Thornhill *v.* Thornhill, however, has been much disapproved of, as applying a very harsh and rigid rule of construction to testamentary provisions for children; and its au-

(*a*) 7 Jurist, 275.

(*b*) It was also held, that the children of such of the brothers and sisters of E. as survived the testator, and afterwards died in the lifetime of E., were entitled; as to which, indeed, there could be no doubt.

(*c*) 4 Madd. 377. Whether the nephews and nieces were in existence at the date of the will is not stated.

thority was unequivocally denied in the recent case of Smith *v.* Smith, (*a*) where a testator gave his residuary estate to trustees, in trust for his wife for life, and after her death, to divide it amongst all his children who might * be [683] *then* living; the shares of such of them as should then have attained twenty-one, to be paid to them within three months after his wife's death, and the shares of others, on their attaining twenty-one, or to the survivors of them, in case of the death of any of them in his wife's lifetime, and without leaving issue. *Provided, that if any of his children who should die in his wife's lifetime should have left issue*, such issue should have such share or shares as his, her, or their parent or parents would have been entitled to if living. The testator's wife survived him. One of his children who was living at the date of his will died in his lifetime, leaving issue, who survived the testator and his widow; and it was held, that such issue were entitled to a share of the residue. Sir L. Shadwell, V. C., said, "I think that the decision in Thornhill *v.* Thornhill is wrong.

Where, however, the children of the deceased person found their claim not on a mere clause of substitution, but on a substantive, independent, original gift, comprehending them concurrently with another class of objects, the doctrine of the preceding cases does not apply, and the gift will extend to the children of persons who were dead when the will was made.

Thus, in the recent case of Tytherleigh *v.* Harbin, (*b*) where a testator devised a certain estate to trustees in trust for Robert Tytherleigh for life, and after his decease, in trust to convey the same "unto or amongst all and every and such one or more of the child or children of the said Robert Tytherleigh who shall be living at the time of his decease, *and the issue of such of them as shall be then dead, leaving issue*, such issue to take equally between them the share only, which their parent would have been entitled to if then living." * The question [684] was, whether the issue of a child of Robert Tytherleigh, who was dead at the date of the will, were included in the devise. It was contended, on the authority of Christopherson *v.* Naylor, Thornhill *v.* Thornhill, and Waugh *v.* Waugh, that they were not entitled; but Sir L. Shadwell, V. C., decided that the gift included these objects. "In this case," said his Honor,

(*a*) 8 Sim. 353. The case of Thornhill *v.* Thornhill is said to have been overruled by Sir C. C. Pepys, M. R., in the previous case of Collins *v.* Johnson, 8 Sim. 356, n.; but as the bequest in that case was to the nephews and nieces nominatim, and not as a class, its authority on the point is much less conclusive than the case of Smith *v.* Smith, stated in the text. The writer, however, distrusts his own impressions on this point; as, since the preceding remark was written, he finds the case referred to by Sir L. Shadwell, 9 Sim. 550, as one which presented much greater difficulty than the case then before the Court (Jarvis *v.* Pond, post, p. 686); though on what ground his Honor arrived at this conclusion does not appear.

(*b*) 6 Sim. 329.

" there is an original substantive gift to the child or children of Robert Tytherleigh living at the time of his decease, and the issue of such of them as should be then dead leaving issue; and I think that the word 'them' means nothing more than 'child or children.' This case, therefore, differs from the first three cases cited for the plaintiffs. The testator then says: 'Such issue to take, between or amongst them, the share only, which their parent or parents would have been entitled to, if then living.' These words were necessary in order to show what share the issue of a deceased child were to take amongst them; for, if there had been two surviving children, and ten children of a deceased child, and those words had not been used, there might have been a question whether each of the ten grandchildren was not entitled to an equal share with the two surviving children."

So, in the case of Clay *v.* Pennington, (*a*) where a testator in a certain event bequeathed a residuary fund unto the children of his brother B. *and their lawful issue*, in equal shares and proportions, or unto such of them as should prove their right, to the satisfaction of the trustees, within two years after notice thereof, to be inserted in the London Gazette. Some of the children of B. were dead at the date of the will; and it was held, that the issue of such children were entitled to participate with the other children and their issue, it being considered that the gift *included all the descendants of the brother, without distinction, who were living at the period in question.

[685]

Again, in the case of Rust *v.* Baker, (*b*) where a testator gave one fifth part of his residuary personal estate to A, B, and C, and all and every other the children of D, and *the issue of such of his children as should have departed this life*. Long before the date of the will, D had had a child, who went abroad, and had not been heard of for twenty years. It was held, that he must be presumed to have been dead at the date of the will; but nevertheless that his children were entitled under the bequest.

So, in the case of Bell *v.* Beckwith, (*c*) where the trust was for all and every the children of J. B., deceased, to be divided equally amongst them, and the *issue of such of them as should be deceased, share and share alike, such issue to be entitled to the share of his, her, or their deceased parents* equally amongst them; Lord Langdale, M. R., held, that the bequest included a grandchild of J. B. whose parent was dead when the will was made; his Lordship considering that the effect of the latter words was merely to limit the amount of the share to which the issue was entitled, not to show that they were to take only by way of substitution.

(*a*) 7 Sim. 370. (*b*) 8 Sim. 443. (*c*) 2 Beav. 308.

And even where there is no original and independent gift to the issue, but their claim is founded on a clause apparently of mere substitution, the Courts anxiously lay hold of slight expressions as a ground for avoiding a construction, which in all probability defeats the actual intention, by excluding the issue of a deceased child from participation in a general family provision.

Thus in the case of Giles *v.* Giles, (*a*) where a testator bequeathed the general residue to trustees, in trust for all *his children living at the decease of his wife (to whom [686] a life interest had been given) as tenants in common; and *if any such children or child should be deceased before his wife, and should leave issue*, then the children of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife, upon their attaining the age of twenty-one years; with a proviso, that, until the portions thereby provided for any of the said children of his said *sons or daughters*, who might have died before their mother, should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child. The testator at the date of his will had four sons and one daughter, and he had had another daughter, who was then dead, leaving children who survived the testator.

The question was, whether these children were objects of the bequest; and Sir L. Shadwell, V. C., decided that they were, considering that the special language of the will authorized this conclusion, without infringing the authority of the general cases before stated, which had been pressed upon him. The V. C. relied particularly on the expression "sons and *daughters*," which he considered to indicate that the testator had the issue of the deceased daughter in his view, he having but one daughter living at the date of the will, the learned Judge deeming it more probable that the plural word was used in remembrance of the child that had been born and died, than in anticipation of a future child to be born, and be a daughter.

So, in the case of Jarvis *v.* Pond, (*b*) where the testatrix bequeathed the residue of her property to her *daugh- [687] ter during her life, and after her decease to be divided among such of her sons and daughters as should be living at the time of the decease of M.; *and in case of the decease of any of the testatrix's sons and daughters, the surviving children of any of her sons and daughters to have their father's or mother's part*, to be equally divided among them. At the date of her will, several of the testatrix's children were dead, two of them leaving issue. The testatrix gave legacies to the surviving hus-

(*a*) 8 Sim. 360. (*b*) 9 Sim. 549.

band and widow of two of her deceased children, but not to the children of those who left issue. Sir L. Shadwell held, that they were entitled to participate in the residue. The words "in case of the decease," meant only this: "in case any child or children shall be then alive who are the issue of any of my children who are then dead;" though his Honor admitted that there was some violence in assigning a share to the father or mother, when they never would have taken any.

These cases, it is conceived, fully warrant the position that, in the absence of an explanatory context, a gift over, to take effect in the event of the prior devisee or legatee dying under certain circumstances, applies to the event happening in the lifetime of the testator; the prevention of lapse being, it is considered, one of the purposes of such substituted gift.

II. We now proceed to examine the second class of cases before referred to, namely, those in which the question has been —whether the substituted gift takes effect in the event of the prior legatee dying *subsequently to the testator's decease*, under the circumstances prescribed; and if so, then, whether at any time subsequently.

It is somewhat hazardous, in the state of the authorities, to lay down any general rule on the subject; but it will commonly be found, it is conceived, that where the context is
[688] * silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well *after* as before the death of the testator.

Thus, in the case of Allen *v.* Farthing, (*a*) where a testator, after directing that a sum of £200, recently paid to his daughter, should be deducted from the amount of any moneys, or any share of his personal estate thereinafter bequeathed to her, or to which she should be entitled under and by virtue of that his will, proceeded to devise all his real estate to trustees upon trust for sale, and to apply the moneys to arise therefrom upon the trusts thereinafter declared concerning his personal estate. The testator then bequeathed his personalty to the same persons, upon trust to get in and recover the same, and to pay and divide the same moneys, estate, and effects unto and between his son, John Allen, and his daughter, Ann Smith, in equal moieties, share and share alike, the share of the daughter to be for her separate use; *and in case of the death of either of them, the said John Allen and Ann Smith leaving any child or children him or her surviving*, upon trust that the said trustees should

(*a*) MSS., 12th Nov. 1816. This case and the decree thereon are stated 2 Madd. 310; but without the arguments and judgment, which are necessary to elucidate the principle of the decision; the author has, however, been favored with a note of them by a friend.

stand possessed of the said moiety of the said estate so given to him or her the said J. Allen and A. Smith as aforesaid, in trust for such child or children, as and when they should attain twenty-one, and, in the mean time, to apply the income for maintenance; and in case of the *death of either of them, the said John Allen and Ann Smith leaving no issue lawfully begotten*, then, upon trust, as to the moiety of him or her so dying, for the survivor of them. * The son and [689] daughter having survived the testator, claimed absolute interests in the residue, contending that the several gifts in favor of the children and the survivor respectively were intended to provide only for the event of the legatees dying in the testator's lifetime; and that the terms in which the testator had directed the £200 to be deducted out of his daughter's share aided this construction. Sir J. Leach, V. C., however, held, that the testator's children took life interests only. He observed, that where a testator refers to death simply, the words are necessarily held to mean death in his (the testator's) lifetime, the language expressing a contingency, and death generally being not a contingent event (though even then slight circumstances would vary the construction); but in the present instance it was not necessary to resort to such a construction, the event described being not death simply, but death *leaving children*, so that there was a clear contingency expressed, and nothing to prevent the words from having full scope. Although the trustees were directed to "pay" and "divide" the property between the son and daughter, yet these words were to be taken in connection with the subsequent limitations, which cut down and qualified them; and his Honor thought that the argument founded on the manner in which the advance of £200 was directed to be deducted out of the daughter's share was too weak and inconclusive to control the words.

So, in the case of Child *v.* Giblett, (*a*) where a testator bequeathed the residue of his estate to trustees, upon trust, after payment of his debts, to divide the same between his two daughters, A and B, share and share alike, * to [690] whom he bequeathed the same; and in case of the death of either, the testator gave the whole to the survivor, *and in the event of their marrying and having children*, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years, but if not, then among the children of C, share and share alike; and if only one child, then the whole thereof to that one child. A and B both survived the testator; and the question was whether they were entitled to the property absolutely, or for life only. Sir J. Leach, M. R., held, that they took life interests only. "The rule is," said the learned Judge, "that where there is a bequest to two persons,

(*a*) 3 Myl. & Keen, 71.

and, in case of the death of one of them, to the survivor, the words 'in case of the death,' are to be restricted to the life of the testator; but the question is, whether the first expression used by this testator, to which this rule would apply, is not qualified by the subsequent words of the will. The testator cannot possibly have intended that the children of C should take, in the event of a marriage of his daughters, and their death without children in his lifetime, and that they should not take, in the event of a marriage of his daughters, and their dying without children after his decease. That would not be a rational distinction. I am of opinion, therefore, that the general rule is here qualified by the subsequent words used by the testator, and that in the event of A dying without children, or if she should have children, and none of them live to attain the age of twenty-one, the children of C will be entitled to the residuary property of the testator."

Sometimes, however, it happens, that a devise in fee simple is followed by alternative limitations over, which collectively provide for the event of the death of the devisee, under all possible circumstances. In such a case, we are, it is said,
[691] compelled to read the words * of contingency as applying exclusively to the happening of the event in the testator's lifetime, in order to avoid repugnancy, inasmuch as the alternative limitations, if not so qualified and restricted in construction, would reduce the prior devise in fee to an estate for life. This argument seems to have prevailed in the case of Clayton *v.* Lowe; (*a*) where a testator gave his residuary real and personal estate to be equally divided between his three grandchildren, *A*, *B*, and *C*, share and share alike; *forever; and if either of them should happen to die without child or children lawfully begotten*, then he directed that such part or share of the one so dying should be equally divided amongst the surviving brothers or sister; *but if any of his grandchildren should die and leave child or children lawfully begotten*, that such child or children should have their parent's share equally divided amongst them, share and share alike. All the grandchildren survived the testator, and it was held, by the Court of King's Bench, on a case from Chancery, that in the events which had happened, they took estates in fee simple as tenants in common.

The reasons for the conclusion at which the Court arrived do not appear, but we may presume them to be in consistency with the argument (already noticed) which was strongly urged by the very able counsel for the plaintiffs, namely, that the several alternative limitations would, unless confined to the happening of the event in the testator's lifetime, operate to cut down the fee previously devised to an estate for life; but the reasoning, when closely examined, is not so conclusive as at first sight it . . .

(*a*) 5 Barn. & Ald. 636.

may appear. Why, it may be asked, may not a testator intend that the estate of his devisee, though determinable at all events on his decease, should comprise the inheritance *in the mean time, which is certainly something different from an estate for life? (a) Besides, the devise over, in Clayton *v.* Lowe, of the shares of grandchildren who should die without children, in favor of the surviving grandchildren, would not apply to, and would therefore leave the fee in the last survivor, who might die without children; and this, even, independently of the more general ground first suggested, makes a solid difference between such a devise and a mere estate for life. Whether the certificate of the Court of King's Bench was confirmed by the Vice-Chancellor does not appear. Under such circumstances it would be unsafe to rely on the case as a deliberate adjudication in support of so doubtful a principle. [692]

At all events, where the gift, which precedes the alternative gifts over, is not (as in the last case) absolute and unqualified, but is so framed as to admit of its being, without inconsistency or violence, restricted to a life interest, the ground for the construction adopted in these cases failing, the gift in question is held to confer a life interest only, there being no reason why the fullest scope should not be given to the several alternative gifts over.

As where (*b*) a testatrix bequeathed to *A* the sum of £400, to be vested in the public funds, the interest whereof she should receive when she should attain twenty-one. *In the event of her decease at, before, or after the said period*, the sum so bequeathed to be divided between *B* and *C*. Lord Langdale, M. R., said that the words "at, before, or after," involved all time present, past, and future, and that the only construction to be put on these words therefore was, "in the event of her decease whenever that event might happen."

*In all the preceding cases it will be observed, that the gift to the person on whose death, under the circumstances described, the substituted gift was to arise, was immediate, *i. e.* to take effect in possession, so that the Court was placed in the alternative of construing the words either as applying exclusively to death in the lifetime of the testator, or as extending to death at any time, the will supplying no other period to which the words could be referred; but where the two concurrent or alternative gifts are preceded by a life or other partial interest, or the enjoyment under them is otherwise postponed, the way is open to a third construction, namely, that of applying the words in question to the event of death occurring before the period of possession or distribution. In such case, the orig- [693]

(*a*) For instance, dower and curtesy would attach to the one, not to the other.
(*b*) Miles *v.* Clark, 1 Keen, 92.

inal legatee, surviving that period, becomes absolutely entitled. An example of this construction is afforded by the case of Da Costa *v.* Keir, (*a*) where a testator gave the residue of his estate to trustees, upon trust to pay the interest to his wife for life, and after her decease, *he gave the principal to A for her own use and benefit;* but if the said A should die leaving any child or children living at her decease, then he gave the residue to her children; but if she should die without any child living at her decease, then he gave the same to *B* and *C* equally; but if either of them should die before they should become entitled to receive the said residue, then he gave the whole to the survivor; *and if both should die in the lifetime of his wife*, then he gave the said residue to his wife. A survived the testator and his widow, and therefore claimed to be entitled absolutely. The legatees over resisted this claim, on the ground that the residue was given to them in the event of A dying without leaving a
[694] * child, *whenever that event should happen.* Sir J. Leach, M. R., considered this construction objectionable, as it simply revoked the prior gift to A, (*b*) since, by parity of reasoning, the children, if any, living at her decease, would also have been entitled without regard to the period of death; whereas, the testator intended the subsequent gift to operate only by way of qualification or exception in particular events; and he thought that the ultimate gift to the wife in the event of B and C dying in her lifetime, plainly indicated that the life of the widow was to be the period to which the event of A dying with or without children was to be referred, and consequently that A having survived, the widow was absolutely entitled.

A question of this nature arose in the case of Galland *v.* Leonard, (*c*) where a testator gave the residue of his personal estate to trustees, upon trust to place the same out at interest during the life of his wife, and pay her a certain annuity, and upon her death to pay and divide the said trust moneys unto and equally between his two daughters, H. and A. *And in case of the death of them his said daughters, or either of them, leaving a child or children living*, upon trust for the children in manner therein mentioned; and the testator declared that the children of each of his said daughters should be entitled to the same share his, her, or their mother would be entitled to, if then living. Sir T. Plumer, M. R., held that the testator intended only to substitute the children for the mother, in the event of the decease of the latter, *during the widow's life*, and that the daughters who survived her (the widow) became absolutely entitled.

In this case the frame and terms of the bequest showed that the testator contemplated the death of the widow as the period

(*a*) 3 Russ. 360. (*b*) *I. e.* ultra the life interest. (*c*) 1 Swanst. 161.

of distribution, and any doubt which his *previous [695] expressions may have left on this point is dispelled by the clause entitling the children to the shares which their parents, *if living*, would have taken. A similar construction prevailed, partly on the authority of Galland *v.* Leonard, in the more doubtful case of Home *v.* Pillans, (*a*) where a testator bequeathed to his nieces, C. and M., the sum of £2000 each, when and if they should attain their ages of twenty-one years; and which said legacies he gave to them for their sole and separate use, free from the debts or control of their, or either of their husbands; *and in case of the death of his said nieces, or either of them, leaving children or a child*, the testator bequeathed the share or shares of each of his said nieces so dying, unto their or her respective children or child. Sir J. Leach, M. R., held that the nieces did not take absolute interests at majority; but that the bequest to them continued to be liable to the executory gift, on their dying leaving children. Lord Brougham, C., reversed the decree, on the ground, that the construction adopted by the Court below, was irreconcilable with the authorities, especially those cases in which words, referring to death generally, had been held to be restricted to death occurring in the lifetime of the prior legatee for life; (*b*) and he adduced the case of Galland *v.* Leonard as an authority precisely in point. His Lordship also dwelt on the inconvenience of holding the absolute vesting to be suspended during the life of the legatee, which was a construction the Court could never adopt but from necessity; and he considered that, in the present instance, such a construction would have the effect of defeating the testator's intention, which evidently was, that at the age of twenty-one the legacies should become absolutely vested.

* It is observable, that Lord Brougham, in his remarks [696] on Hervey *v.* M'Lauchlin, (*c*) and that class of cases, but very faintly adverts to the fact, that, in them, the gift over was in case of death simpliciter, and in the will before him, it was in case of death *in connection with a collateral event*, (*i. e.* leaving children,) which forms a most material distinction, and excludes from the latter case much of the reasoning adopted by his Lordship from the cited authorities. The point which he had to decide was certainly one of great difficulty.

And here it will be convenient to notice the frequently occurring point of construction arising on the word "payable," in such a case as the following: A money fund is given to a person for life, and, after his decease, to his children at majority or marriage, with a gift over in the event of any of the objects dying before their shares become *payable*. In such cases it becomes a question whether the word "payable" is to be considered as

(*a*) 2 My. & K. 15. (*b*) Vide ante, p. 664. (*c*) 1 Pri. 264.

referring to the *age* or marriage, (or any other such circumstance affecting the personal situation of the legatee,) on the arrival or happening of which the shares are made "payable," or to the actual period of distribution; in other words, whether the shares vest absolutely at the majority or marriage of the legatees, in the lifetime of the legatee for life; or whether the vesting is postponed to the period of such majority or marriage, *and the death of the legatee for life.* As the latter construction exposes the legatees to the risk of losing the testator's provision, in the event of their dying in the lifetime of the legatee for life, although they may have reached adult or even advanced age, and may have left descendants, however numerous, the Courts have strongly inclined to hold the word "payable" to refer
[697] to the majority or *marriage of the legatees, especially if the testator stood towards the legatees in the parental relation.

And where (as often happens) the question has arisen under marriage settlements, (*a*) the leaning to this construction is strongly aided by the occasion and design of the instrument, whose primary object obviously is, to secure a provision for the issue of the marriage. In wills, the point, like all others, depends solely upon the intention to be collected from the context; and the cases will be found to present instances of the vesting being held to take place at majority, or at majority or marriage, (as the case may be,) in the lifetime of the legatee for life, or to be further suspended until the period of actual distribution, according as the language of the will was deemed to admit or to exclude the more eligible and convenient construction.

Thus, in the case of Hallifax *v.* Wilson, (*b*) where a testator gave to trustees all his estate and effects, upon trust to lay out the proceeds thereof, after payment of debts, upon security, and pay the interest to his mother, R. M., for life; and after her decease, upon trust to pay and transfer the said trust moneys unto and among his four nephew and nieces; their respective shares, with the accumulated interest, to be paid or transferred to them at their respective ages of twenty-one years; and in case any of his said nephew and nieces should happen to die before his, her, or their share or shares in the said trust moneys and premises should become *payable*, then the testator directed that the share or shares of him, her, or them so dying, should go, to be
[698] paid to the survivors or survivor; and in case of the *death of all his said nephew and nieces before the said trust moneys should become *payable*, the testator gave the same to his

(*a*) Emperor *v.* Rolfe, 1 Ves. Sen. 208; Woodcock *v.* Duke of Dorsett, 3 B. C. C. 569 [Perkins's ed. notes]; Hope *v.* Lord Clifden, 6 Ves. 499; Willis *v.* Willis, 3 Ves. [(Sumner's ed.) 51, note (*a*)]; Schenck *v.* Legh, (which is a leading case,) 9 Ves. 300; Powiss *v.* Burdett, Id. 428 [Sumner's ed. note (*a*)]; Howgrave *v.* Cartier, 3 Ves. & B. 79; Lord Curzon, 5 Madd. 422.

(*b*) 16 Ves. 168 [Sumner's ed. note (*a*)].

trustees, share and share alike. The question was, as to the destination of the share of the nephew, who attained twenty-one and died in the lifetime of the testator's mother. Sir William Grant, M. R., held that the share in question vested absolutely at majority. "The testator," he observed, "has used the word 'payable,' a word of ambiguous import; in one sense, and with reference to the capacity of the persons to take, he had just before declared, that the age of twenty-one was the period at which their shares were to be payable; in another sense, with reference to the interest of the tenant for life, they would not be payable until her death; but then it is with the direction to pay at the age of twenty-one, that the bequest over is immediately connected; and it is to that period of payment, as it seems to me, that the subsequent words are most naturally to be referred. The declaration that the shares should be paid at the age of twenty-one, naturally led the testator to consider, what was to become of the shares of those who should not live to attain that age; and there he adds the direction, that the shares should go over. I think it is no strain to understand him as adverting merely to the age of twenty-one, which he had just before appointed as the period of payment.

So, in the case of Walker *v.* Main, (*a*) where a testator devised real estate to his wife for life, and, after her decease, to a trustee upon trust for sale, and directed the produce to be distributed among his children and grandchildren in the following manner:— He first gave to several of his grandchildren, £20 each, to be paid on their attaining the age of twenty-one years or marrying; and, after bequeathing * other legacies, gave [699] to his four children the residue of the money arising from the sale, to be equally divided between them, by his trustee, as soon as each of them should attain to their respective age or ages of twenty-one years; but upon marriage, whether of age or not, each of their receipts should be a sufficient discharge. But if any or either of his said children or grandchildren should happen to die before the time of such legacy becoming *due and payable*, then the testator gave the share of such child or children or grandchildren so dying, unto and among those that should be then living. Two of the grandchildren attained twenty-one, and married, and died in the lifetime of the widow; and Sir T. Plumer, M. R., on the authority of the cited cases, and especially of Sir W. Grant's decision in Schenck *v.* Legh, (*b*) held, that the shares vested absolutely at twenty-one or marriage, in the lifetime of the prior cestui que trust.

On the other hand, in the subsequent case of Bright *v.* Rowe, (*c*) where a testatrix, by virtue of a power, appointed the reversion of

(*a*) 1 Jac. & Walk. 1. (*b*) 9 Ves. 300.
(*c*) 3 Myl. & Kee. 316.

a sum of £2000, in which she and her husband had life interests, to trustees, upon trust for her daughter M., or any other children she might thereafter have by her husband J., to be equally divided between them; but it was her will that, in case the £2000 should become payable before M. should attain twenty-one or day of marriage, or before any other of her children, being a son, should attain twenty-one, or, being a daughter, the same age, or marry, then the trustees to invest the same, and apply the interest of each child's share for maintenance; and when any such children, being sons, should attain twenty-one, or, being daugh-
[700] ters, *the like age or day of marriage, upon trust to pay them their respective shares of the principal with the unapplied interest; and in case her said daughter M., or any other child she might have by her husband, should happen to die before his, her, or their portion or portions of the said sum of £2000 should become *payable*, then the same should respectively go and belong to the survivors or survivor of them. The testatrix left three children, two of whom died in the lifetime of her husband (who, it will be remembered, had a life interest under the settlement) after having attained twenty-one. Sir J. Leach, M. R., while he admitted the presumption in favor of the vesting of children's shares where the will was ambiguously expressed, yet considered that there was no ambiguity here; and that by dying before the portions became "payable," the testatrix meant dying in the lifetime of the husband, and consequently that the shares of the deceased children had devolved to the survivors.

Upon comparing this case with the two preceding cases, especially Hallifax *v.* Wilson, the writer has been unable to find the slightest distinction between them; and the judgment of the late M. R. affords no aid in the attempt. We are greatly relieved, however, from the perplexity in which the case of Bright *v.* Rowe had involved the rule of construction under consideration, by the recent case of Jones *v.* Jones, (*a*) where a testator bequeathed £10,000 to trustees, upon trust for A for life, and from and after his decease, then to pay it to the children of A, when
[701] and as they should severally attain *the age of twenty-one years; and in case any of the said children should die before his, her, or their share or shares should become *payable*, leaving no issue, then the share or shares of him or them so dying to go to and amongst the survivors or survivor: Sir L. Shadwell, V. C., held, that a son of A, who attained twenty-one, but died in A's lifetime, took a vested interest in the legacy, and that his personal representative was entitled; his Honor being of opinion, that the word "payable" meant *attain twenty-one*.

(*a*) Cor. Sir L. Shadwell, V. C., Nov. 2, 1843, reported 7 Jurist, 986, and see cases there cited.

In this state of the authorities, it seems not to be too much to say, that the word "payable," occurring in the executory bequests under consideration, is held to apply to the age or marriage of the legatee, and not to the period of the death of the legatee for life, unless the latter is shown by the context to be intended by the testator.

CHAPTER LI.

EFFECT OF FAILURE OF A PRIOR GIFT ON AN ULTERIOR EXECUTORY OR SUBSTITUTED GIFT OF THE SAME SUBJECT; ALSO THE CONVERSE CASE.

EFFECT upon executory gift of failure of prior gift.
Failure of prior gift held to let in ulterior gift, [p. 703.]
Gift over, in case there be but one child, extended by implication to event of there not being any, [p. 704.]
Sir William Grant's reasoning in Murray *v.* Jones, [p. 705.]
Gift over extended by implication to event not falling within terms of will, [p. 706.]
Gift over on prior devisee's refusal to do a certain act, [p. 706.]
Effect of prior devisee not coming into existence, on gift over if he refuse to do a certain act, [p. 706.]
Death of prior devisee held to let in ulterior devisee, [p. 707.]
Remarks on Avelyn *v.* Ward, [p. 707.]
Effect where prior gift fails by lapse, [p. 708.]
Effect where prior devise fails by lapse, [p. 709.]
Remark on Tarbuck *v.* Tarbuck, [p. 709.]
Remark on preceding cases, [p. 710.]
Effect upon prior gift, of failure of executory gift, [p. 711.]
When prior gift made absolute by failure of executory gift, [p. 712.]

WHERE real or personal estate is given to a person for life, with an ulterior gift to B, as the gift to B is absolutely vested, and takes effect in possession whenever the prior gift ceases or fails, (in whatever manner,) the question discussed in the present chapter cannot arise thereon.

Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift, *i. e.* to arise on an event which determines the interest of the prior devisee or legatee, and it happens that the prior gift fails ab initio, either by reason of its object (if non-existing at the date of the will) never coming into existence, or by reason of such object (if a person in esse) dying in the testator's lifetime. It then becomes a question whether the executory gift takes effect, the testator not having in terms provided for the event which has happened, although there cannot be a shadow of doubt that, if asked whether, in case of the prior gift failing altogether for want of an object, he meant the ulterior gift to take effect, his answer would have been in the affirmative. The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication. Thus, in the well-known case of Jones *v.*
[703] Westcomb, (*a*) * where a testator bequeathed a term of

(*a*) Pre. Ch. 316; S. C. 1 Eq. Ca. Ab. 245, pl. 10.

years to his wife for life, and after her death to the child she was then (*i. e.* at the making of the will) enceinte with; and if such child should die before the age of twenty-one, then one third part to his wife, and the other two third parts to other persons. The wife was not enceinte; nevertheless Lord Harcourt held, that the bequest over took effect; and the Court of King's Bench, (*a*) on two several occasions, (in opposition to a contrary determination of the Common Pleas,) (*b*) came to a similar conclusion on the same will.

So, in Statham *v.* Bell, (*c*) where a testator, reciting that his wife was pregnant, devised that if she brought forth a son, then that he should inherit his estate; but if a daughter, then one moiety to his wife, and the other to his two daughters (he had one daughter then living) at twenty-one. If either died before that time, the survivor to have her sister's share; *if both died before that time*, then both shares to his wife and her heirs. The wife was not enceinte; and the other daughter dying under twenty-one, the wife was held to be entitled to the whole.

It would be immaterial in such case whether the wife had or had not an after-born child subsequent in procreation as well as birth, as such child would not be an object of the gift to the child with which the wife was then enceinte. (*d*)

So, in the case of Meadows *v.* Parry, (*e*) where a testator * bequeathed the residue of his estate to trustees, [704] upon trust to apply the dividends and interest for the maintenance of all such children as he should happen to leave at his death, and born in due time after, equally, until the age of twenty-one, and then to transfer the funds to them; and in case any of the children should die before twenty-one, such deceased child's share to go to the survivors; and if there should be only one child who should attain that age, upon trust to pay the residue to such child; *and in case all the children should die before attaining that age*, then he bequeathed the residue to his wife. The testator died without leaving, or ever having had, any issue; but Sir W. Grant, M. R., held, that the bequest to the wife took effect.

And, upon the same principle, a bequest over, in the event of the prior legatee having but one child, has been held to extend, by implication, to the event of her not having any child. Thus in the case of Murray *v.* Jones, (*f*) where a testatrix, after bequeathing the residue of her personal property to her daughters

(*a*) Andrews *v.* Fulham, 2 Stra. 1892; Gulliver *v.* Wickett, 1 Wils. 105.
(*b*) See Roe *v.* Fulham, Willes, 303, 311.
(*c*) Cowp. 40.
(*d*) Foster *v.* Cook, 3 B. C. C. 347.
(*e*) 1 Ves. & Bea. 124. See also Fonnereau *v.* Fonnereau, 3 Atk. 315, and Earl of Newburgh *v.* Eyre, 4 Russ. 454, where a question of this nature arose under a special will, and was much discussed.
(*f*) 3 Ves. & B. 313. See also Aiton *v.* Brookes, 7 Sim. 246, antc, p. 616.

and younger sons, provided, that in case she should have but one child living at the time of her decease, or in case she should have two or more sons and no daughter or daughters living at the time of her decease, and all of them but one should depart this life under the age of twenty-one years, or in case she should have two or more daughters and no son or sons living at the time of her decease, and all of them but one should depart this life under twenty-one, and without having been married; or in case she should have both sons and daughters, and all but one, being a son, should die under twenty-one, or being a daughter
[705] under that age * and unmarried, then she bequeathed the property to another family. The testatrix died without having had a child; but Sir W. Grant, M. R., held, that the ulterior gift nevertheless arose; his opinion being, that the case put by the testatrix, namely, that of her having but one child, did not contain a condition that she should have one child living at that time. His reasoning well deserves a particular statement. "At first sight," said the M. R., "a proposition relative to having but one child may seem to include in it and to imply the having one. That is true if the proposition be affirmative; but by no means so, if the proposition be hypothetical or conditional. The proposition that A has but one child, is as much an assertion that he has one, as that he has no more than one; but when the having but one is made the condition on which some particular consequence is to depend, the existence of one is not required for the fulfilment of the condition, unless the consequence be relative to that one supposed child. As, if I say that, in case I have but one child, it shall have a certain portion, it is in the nature of the thing necessary that the child should exist to be entitled to the portion; but if I say, that, in case I shall have but one child of my own, I will make a provision for the children of my brother, it is quite clear that my having one child is no part of the condition on which the supposed consequence is to depend. My having one child of my own would be rather an obstacle than an inducement to the making a provision for the children of another person. The case I guard against is the having a plurality of children; and it is only the existence of two or more that can constitute a failure of the condition on which the intended provision of my brother's children was to depend. The plain sense of the proposition is, that unless I have more than one, the provision shall be made."

[706] * Again, in the case of Mackinnon *v.* Sewell (*a*) where the testatrix bequeathed her residue in trust for her daughter Caroline for life, and after her death for her daughter's daughter, if she should survive her mother and attain twenty-one; but in case she should not survive her mother and attain

(*a*) 5 Sim. 78

twenty-one, then in trust for such other child or children of the testatrix's daughter as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and if all such other children of the testatrix's daughter *should die before attaining twenty-one*, then in trust for M. The granddaughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive her mother; afterwards the daughter died. Sir L. Shadwell, V. C., on the authority of the preceding cases, held, that the bequest over to M. took effect; his Honor considering that the bequest over, in the event of the children that might survive the mother not attaining the age of twenty-one, was but equivalent to a bequest over in the event of there being no child who should survive the mother and attain twenty one.

On the principle of the preceding cases it could not be doubted that an executory gift made to take effect on the prior devisee's neglect or refusal to accept the devise, (*a*) or perform some other prescribed act, would take effect, notwithstanding the object of the prior gift never happened to come into existence, such a contingency being implied and virtually contained in the event described. For (to proceed to the second class of cases before referred to) it has been decided that where a testator gives real or personal property to A, and in [707] * case of his neglect or failure to perform a prescribed act within a definite period after his (the testator's) decease, then to B, and it happens that the prior devisee or legatee dies *in the testator's lifetime*, the gift over to B takes effect.

Thus, in the case of Avelyn *v.* Ward, (*b*) where a testator devised his real estate to his brother A and his heirs on this express condition that he should within three months after the testator's decease, execute and deliver to his trustee a general release of all demands on his estate; *but if A should neglect to give such release*, the devise to him to be null and void, and in such case the testator devised to W., his heirs and assigns, forever. A died in the testator's lifetime. Lord Hardwicke held, that the gift over took effect; observing, that he knew of no case of a remainder or conditional limitation over of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation; *but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place.*

This observation of his Lordship, however, is not to be taken in too extensive a sense; for it is clear, according to subsequent

(*a*) See Scatterwood *v.* Edge, 1 Salk. 229.
(*b*) 1 Ves. Sen. 420. See also Doe d. Wells *v.* Scott, 3 M. Selw. 300, ante, vol. 1, p. 592.

cases, that if the event upon which the prior gift is made defeasible, and the subsequent gift to take effect, is one which may happen as well in the lifetime of a testator as afterwards, (in which respect such case obviously stands distinguished from those just stated,) and the events which happen are such as would, if the first devisee had survived the testator, have vested the property absolutely in him, the lapse of such prior
[708] * devise by the death of the devisee in the testator's lifetime, *though it removes the prior gift out of the way*, does not let in the substituted or executory devise, which was to take effect on the happening of the alternative or opposite event.

Thus, in Calthorpe *v.* Gough, (*a*) where a legacy of £10,000 was given to trustees, in trust for Lady Gough for life; and in case she should die in the lifetime of her husband, as she should appoint; and, in default of her appointment, to her children; *but if Lady G. should survive her husband, then for her absolutely.* Lady Gough survived her husband, but died in the lifetime of the testator. The M. R. held the legacy to be lapsed, and that the children were not entitled.

So, in Doo *v.* Brabant, (*b*) a legacy was bequeathed in trust for A. until she attained twenty-one, and then to her executors and administrators; and in case A. should die *under the age of twenty-one years*, leaving any child or children of her body lawfully begotten, then in trust for such child or children; but in case A. should die under twenty-one without leaving any child or children, then over; A. attained twenty-one, and died in the lifetime of the testator, leaving children; and Lord Thurlow, on the authority of Calthorpe *v.* Gough, held that the legacy lapsed, and that the children were not entitled; and the Court of King's Bench, on a case from Chancery, certified an opinion to the same effect.

Again, in the case of Williams *v.* Chitty, (*c*) where the testator devised in trust for and to the use of his daughter Sarah, her heirs and assigns; *but in case of her decease under*
[709] * *twenty-one and unmarried*, in trust, and to the use of his daughter Elizabeth, her heirs and assigns. Sarah died in the lifetime of the testator under age, but having been married. One question was, whether, in the event which had happened, the devise over to Elizabeth was good. Her counsel considered her claim to be so obviously untenable, that he gave up the point; and Lord Loughborough seems to have entertained a similar opinion.

(*a*) Rolls, 18th Feb. 1789, cit. 3 B. C. C. 395.

(*b*) 3 B. C. C. 393 [Perkins's ed., notes; 2 Williams, Ex. (2d Am. ed.) 879, *et seq.* 912; Winslow *v.* Goodwin, 7 Metcalf, 363; Parsons *v.* Parsons, 5 Ves. (Sumner's ed.) 578, note (*a*) and cases cited]; S. C. 4 Durn. & E. 703.

(*c*) 3 Ves. 549. See also Miller *v.* Faure, 1 Ves. Sen. 84; Humberstone *v.* Stanton, 1 Ves. & Bea. 385.

In the three preceding cases, it will be observed, the devise or bequest which lapsed, was in favor of a designated individual, but, in the next case, (*a*) we have an example of the application of the principle to a case of mere doubtful complexion, the gift being in favor of a *class*.

The devise, in substance, was to A. for life, remainder to his children in fee; and if he should die without leaving issue, then over. A. died in the testator's lifetime, leaving a son, who also died in the testator's lifetime; and Sir C. C. Pepys, M. R., held, that under these circumstances, the devise over failed; observing, that it was clear that, if A.'s son had survived the testator, the devise over could not have taken effect; and it was, he thought, established by authority that the situation of the parties was not altered by the fact of the prior devisee having died before the testator.

This is an important extension of the doctrine; for, as a devise to a fluctuating class, as children, operates in favor of such of them only as are living at the testator's decease, there might seem to be ground to contend, that, in effect, the case was one in which the failure of the gift * was owing [710] to the fact of no object having come into existence rather than to lapse. It is presumed, however, that, if the gift had been *in terms* to such children as should be living at the testator's decease, the result would have been different, as the failure of the devise would then clearly have been the consequence, not of lapse merely, but of the non-happening of the contingency on which the gift was made contingent, and therefore the gift over would take effect.

It is proper to apprize the reader, that the distinction which has been suggested as reconciling the construction adopted in the last four cases with that which prevailed in Jones *v.* Westcomb and Avelyn *v.* Ward, was not adopted or recognized as the ground of decision in those cases. On the contrary, Lord Thurlow, in Doo *v.* Brabant, treated Calthorpe *v.* Gough (on the authority of which he decided the former case) as inconsistent with and as overruling the line of cases in question. In support of the writer's suggested distinction, however, it is to be observed that the cases of Calthorpe *v.* Gough and Doo *v.* Brabant have been since followed as well in Williams *v.* Chitty, (*b*) already stated as in the subsequent case of Humberstone *v.* Stanton, (*c*) without any denial of the authority of Jones *v.* Westcomb and Avelyn *v.* Ward; while, on the other hand, the principle of Jones *v.* Westcomb, and more especially that of Avelyn *v.* Ward, has been fully recognized in the case of Doe d. Wells *v.* Scott, (*d*) already stated.

There is, it is submitted, a solid difference between sustaining

(*a*) Tarbuck *v.* Tarbuck, Rolls, 2d Feb. 1835, MS., stated more fully, ante, p. 375.
(*b*) 3 Ves. 549, ante, p. 708.
(*c*) 1 Ves. & Bea. 385.
(*d*) 3 Man. & Selw. 300, ante, vol. 1, p. 593.

a devise which is to take effect in the event of a person not in esse dying under a certain age, though such person
[711] *never come into existence, and holding it to take effect in the event of his being born and dying *above* that age in the lifetime of the testator. In the former case the contingency of no such person coming in esse may be considered as included and implied in the contingency expressed; but, in the latter, the event to which it would be applied is the exact opposite or alternative of that on which the substituted gift is dependent. To let in the ulterior devise in such case would be to give the estate to one, in the very event in which the testator has declared that it shall go to another, whose incapacity, by reason of death, to take, seems to form no solid ground for changing its object. In the event which has happened, the lapsed devise must be read as an absolute gift.

The same principles which determine the effect upon a posterior or executory gift, of a prior gift, apply also to the converse case, namely, that of the failure of an ulterior or executory gift, and the consequence of such failure on the prior gift. According to these principles, if lands are devised to A and his heirs, and in case he shall die without issue living at his decease, then to B and his heirs, and B dies in the testator's lifetime, and afterwards A dies accordingly without issue, having survived the testator; the event having happened upon which the ulterior devise would have taken effect, and that devise having failed by lapse in the testator's lifetime, the title of the heir is let in; or (if the will be regulated by the new law) then the title of the residuary devisee, the effect being precisely the same, in the events which have happened, as if the ulterior devise had been a simple absolute devise in fee. On the other hand, if the devise were to A and his heirs, and if he should die without leaving issue at his decease, then to B for life, with remainder to his children in fee,
[712] and A, having survived the testator, *dies without leaving issue, and B also dies without having had a child, (whether such event happens in the testator's lifetime, or after his decease,) the devise to A becomes absolute and indefeasible, by the removal out of the way of the executory devise engrafted thereon; such devise having failed (not by lapse, as in the former case, but) by the failure of the event on which it was made dependent. (*a*) If B had had a child, and such child had died in the testator's lifetime, the case would, it should seem, according to the principle of the case of Tarbuck *v.* Tarbuck (*b*) have become assimilated to the case first stated.

The difference then in short, is between a failure of the posterior gift by lapse, letting in the title of the heir or residuary devisee, (as the case may be,) and a failure in event, of which the prior devise has the benefit.

(*a*) Jackson *v.* Noble, 2 Keen, 590.
(*b*) Ante, p. 709.

CHAPTER LII.

COMMENTS ON SOME RECENT CASES.

I. Cooke *v.* Crawford, *Devise of Trust Estates.*
II. Brown *v.* Bamford, *Clause restrictive of Anticipation, engrafted on Trust for separate use.*
III. Ashley *v.* Waugh, *Doctrine of Republication.*
IV. Johnson *v.* Johnson, *Construction of sect.* 33 *of Stat.* 1 *Vict. c.* 26.
V. Cole *v.* Sewell, *Rule against Perpetuities as applicable to Remainders.*
VI. "*Survivors*," *construed others.*

WHETHER trusts can be performed by devisee of trust estates.
Case of Cooke *v.* Crawford, [p. 714.]
Devisee of trust estate held unable to make a title to a purchaser, [p. 714.]
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"Survivor," whether to be construed *other*, [p. 735.]
Probability of strict construction of *survivor* being adhered to, [p. 736.]

A DEVISE of estates vested in the testator as trustee or mortgagee is found in every well-drawn will. The insertion of such

devises evidently supposes that the trusteeship relating to the estate vested in the testator, will commonly pass with that estate to the devisee; for the severance of the estate and the fiduciary duty could not be a proper act on the part of the trustee. Cases may be suggested in which the greatest inconvenience would arise from permitting a trust estate to descend. The trustee's heir may be an infant or married woman, or insane, or resident abroad, or there may be several co-heirs or co-heiresses, each laboring under some such disability, or the trustee may happen to have *no* heir at law, as is necessarily the case where he is illegitimate in birth and dies without issue, or the several parts of the trust estate may descend in different modes. To say that a trustee ought, under such circumstances, to leave the estate to devolve to the person whom the law constitutes his legal successor, is rather a startling doctrine; and yet we are
[714] *driven to this conclusion if the trusteeship does not pass with the estate. Indeed, but little advantage would be gained by a devise of the estate, if the devisee were incapable of exercising the functions of the office.

A question of this nature arose in the case of Cooke *v.* Crawford, (*a*) which was as follows. A testator devised all his real and personal estates to A, B, and C, upon trust, that they, or the survivors or survivor of them, *or the heirs of such survivor*, should as soon as conveniently might be after his decease, but at their discretion, sell all the real estates; and he authorized the trustees and their heirs to enter into contracts, and make conveyances, and declared that the receipt or receipts of the said A, B, and C, or of the survivors or survivor of them, *or the heirs, executors, or administrators of such survivor*, should be good discharges to the purchasers. And the testator directed his said trustees, their heirs, executors, or administrators, to stand possessed of the proceeds of the sale of the real estate, and the conversion of his personal estate, which he thereby directed, upon certain trusts. Two of the trustees declined the trusteeship, and the third (who was also the heir at law of the testator) accepted the trust, but died before the sale of the estates, having made his will, whereby he devised and bequeathed all estates vested in him as a trustee, unto D and E, their heirs, executors, administrators, and assigns, upon the trusts affecting the same respectively, and appointed D and E executors of his will. D and E entered into a contract to sell part of the trust estate, when the question arose, whether they, as devisees and executors of the surviving trustee, could make a title to the purchaser. Sir L. Shadwell, V. C., held that they could not, and that the devise of trust estates by
[715] the vendors' testator was *an unauthorized act. "The sole question," he observed, "is whether the execution

(*a*) 6 Jurist, 723.

of a trust by persons to whom the testator has given no power, is good. There has been no case in which any person other than those persons mentioned, appointed for the purpose of executing the trust have been held to have such a power. It is clear, that when the heir at law thought proper to devise the legal estate which he had, he did something he was not authorized to do; and here I must protest against the argument which was made use of, namely, that it was beneficial to the estate, that a trustee should have been appointed in this manner, and that generally a trustee should have power to devise the trust. If the matter were pushed to extremity, I rather apprehend, that the estate of the person who devised it ought to pay the expenses, for it is not lawful for persons who have a trust estate to devise it in the manner alluded to; and I see no distinction between a conveyance inter vivos and a post-mortem conveyance; for if a trust could be lawfully executed by a trustee by devise, it would also be lawful by a conveyance inter vivos; but Bradford *v.* Belfield (*a*) being acquiesced in, I think that the case is concluded; and if not decided by that case, still, the case of Townsend *v.* Wilson (*b*) decides the present question; for it was * acknowledged as [716] good law in the case of Grey *v.* Duke of Northumberland."

It will be observed, that in the preceding case the trust estate was not expressly limited by the original testator to the heirs *and assigns* of the surviving trustee. Whether the V. C. would have considered that this made any difference, does not appear. Possibly subsequent Judges may be disposed to adopt a distinction of this nature, for the purpose of narrowing the operation of so inconvenient a doctrine, if they felt themselves bound by the authority of the case of Cooke *v.* Crawford. It were much to be desired, however, that instead of adopting any such distinction, the Courts would establish the general rule, that trusts for sale and other trusts relating to real estate, and which are not specially restricted to the trustee personally, but extend to his representatives, should be held to devolve to every person to whom the estate happens to come, either by devise or descent, unless the author of the trust has shown a special intention, by negative words to restrict it to the heirs, properly so called of

(*a*) In Bradford *v.* Belfield, 2 Sim. 264, it was held, that a trust for sale, vested in A and his heirs, could not be executed by an assignee of the heir of A, *i. e.* a person to whom the heir, in his lifetime, conveyed the estate. This, therefore, was a question, not between the *hæres natus* and *hæres factus* of the trustee, but as to the competency of the alienee of the former to execute the trust. The trustee having permitted the estate to descend to the heir, the latter could no more divest himself of the trusteeship, than the ancestor could have done, by a conveyance *inter vivos*.

(*b*) But this was the case of a power, not of a trust, and merely decided, that a power of sale reserved to three persons and *their heirs*, was not well executed by two survivors.

the trustee. Convenience requires, and principle, it is conceived, allows such a general doctrine; and the Courts might surely adopt it without going the length of enabling a trustee to transfer the trust estate to a third person in his lifetime. *This* would be a substitution of a stranger for the person nominated by and enjoying the confidence of the author of the trust; *that* operates only to regulate the transmission of the estate and office when they can no longer be held and exercised by the trustee himself; in short, substitutes the hæres factus for the hæres natus of the trustee. The former is clearly as much within the scope of the confidence of the creator of the trust as the latter, who is equally unknown to him, and may be connected with the original trustee by only a very remote
[717] degree of relationship, * and may, moreover, be subject to personal or legal disability. The writer cannot help expressing his hope, if not his conviction, that eventually the more liberal doctrine will be established, notwithstanding the cloud brought upon the prospect by the case of Cooke *v.* Crawford; and sure he is, that if the able Judge by whom that case was decided, were aware of the perplexity and uncertainty in which numerous titles have been involved by his decision, he would have paused before he had given his judicial sanction to such a doctrine, and would willingly acquiesce in its reversal. At present it is dangerous to assume the validity of a sale by the devisee, in defiance of the authority of an actual decision, and it is almost equally unsafe to rely on the competency of the heir to sell, in deference to a solitary recent case, which contradicts previous opinions and practice, and goes to establish a rule most inconvenient in its operation; though the evil of the present state of uncertainty is even greater than that of the worst positive well-established doctrine. If Cooke *v.* Crawford is law, then almost every devise of trust estates in wills involves a breach of trust, (*a*) and most of the titles derived
[718] through such * devisees are bad. The construction, too, harmonizes ill with the doctrine of Braybroke *v.*

(*a*) The doctrine of Cooke *v.* Crawford, if established, would seem to require that every devise of trust estates should contain an exception, applicable to whatever estates may happen to be vested in the testator, upon any trusts which cannot be executed by a devisee. The question, whether the estate passed by the devise, and whether the devisee could execute the trust, would then be identical, and it would have to be left to the judgment of the practitioner in each particular case, to satisfy himself whether, regard being had to the nature of the trust and the terms of its creation, it was exercisable by a devisee—which would be found to be a task of no small difficulty. A qualification such as has been suggested would certainly render nugatory the greater part of the devises of trust and mortgage estates.

Another suggestion arising out of Cooke *v.* Crawford is, that where in a mortgage-deed a power of sale is reserved to the mortgagee, his heirs and assigns, it should be stated in express terms that such power is intended to extend to, and be exercisable by, any person in whom the legal estate shall become vested by devise, conveyance, or otherwise. A similar precaution would be requisite in the case of a trust for sale created by will.

Inskip,[1] and other cases of that class; (*a*) for surely if the devise of trust estates is unauthorized, unless in the mere case of a dry legal estate, unaccompanied by any fiduciary duty, the Courts were wrong in seeing an intention to include property of this description in a general devise uncontrolled by the context, which, in point of fact, is to assume that a man intends to do a tortious act, the contrary not appearing. These cases evidently proceeded on the notion, that the exclusion of the heir by means of a devise was in general a proper and beneficial act on the part of a trustee, and led, naturally enough to the introduction into wills of an express devise of trust and mortgage estates, as a thing of course.

II. Trusts by which the income of property, real or personal, is devoted to the separate use of married women, are usually accompanied by a restraint on anticipation, which, indeed, is essential to their complete efficiency; for it is only by withholding from a wife the power of affecting her future income that she can be effectually protected against marital influence. Hence, to ascertain by what terms a restrictive provision of this nature may be best created, is a point of some practical interest, and it seems most desirable, where technical accuracy is wanting in such clauses, that effect should be given to them, so far as sound principles of interpretation admit of. The repugnance with which, in the early authorities, the law is said to regard restrictions on alienation, cannot, it is conceived, properly be applied to trusts, which it has been the policy of courts of equity to foster and encourage, as * a shield for the [719] defenceless and dependent state of coverture.

It must be confessed, that the fate of trusts for the separate and inalienable use of married women has been peculiarly unfortunate. Scarcely had they recovered from the blow which the cases of Newton *v.* Reid and Massy *v.* Parker, (*b*) struck at their existence, (if created previously to and not in contemplation of a particular coverture,) when they received another shock, in a case which applied to the clause restraining anticipation a harshness of construction little expected in the profession, and which may, perhaps, be thought scarcely to comport either with the favorable regard which is supposed to be due to the objects of such trusts, or with the established doctrine respecting the construction of misplaced words. (*c*) According to that doctrine, when the intention is apparent, the mere order and arrangement of the language of the instrument may be disregarded; any misplaced phrase or expression is not allowed

(*a*) Ante, vol. 1, p. 641. (*b*) Ante, vol. 1, p. 834. (*c*) Ante, vol. 1. p. 437.

[1] See this case; 8 Ves. (Sumner's ed.) 417, Perkins's note (*a*), and cases cited.

to fail of effect, on account of the wrong position which it is found to occupy; but a Judge, expounding the instrument, is at liberty to transpose every such clause or expression, so as to give effect to the intention, to be collected from the entire contest. The case which has elicited the preceding remarks is Brown *v.* Bamford, (*a*) which was as follows:—

A testator, by his will, gave certain leasehold houses, and stock in the funds, to trustees, upon trust from time to time, during the natural life of his daughter, Sophia Bamford, or until she should be duly declared a bankrupt, or take the benefit of any act passed or to be passed for the relief of insolvent debtors, to pay the clear rents, interest, dividends, and
[720] proceeds of such leasehold houses, * stocks, funds, and securities, unto such person or persons, for such intents and purposes, and in such manner as Sophia Bamford, by any writing or writings under her hand, when and as the same should become due, *but not by way of assignment, charge, or other anticipation thereof*, should, notwithstanding her then present or any future coverture, direct or appoint; and in default of any such direction or appointment, or so far as the same, if incomplete, should not extend, into her proper hands for her sole and separate use, independent of the debts, control, or interference of her then present or any future husband; for which purpose the testator thereby directed that the receipts in writing under the hand of his daughter, Sophia Bamford, should, notwithstanding any such coverture as aforesaid, be good and sufficient discharges for the last-mentioned rents, interest, dividends, and proceeds, or so much thereof as should in such receipts respectively be expressed to have been received; and from and after the decease of his said daughter, Sophia Bamford, or such her bankruptcy or insolvency as aforesaid, which should first happen, then in trust for her children, as therein mentioned. After the testator's death, but during her coverture, Sophia Bamford, in consideration of certain creditors of her son-in-law withdrawing a writ of execution against his goods, signed a paper writing, by which she agreed to guarantee the payment of the debt. On a bill filed by the creditors, to render this document available, as a charge on her life interest, a demurrer was put in by Sophia Bamford, which was overruled by Sir L. Shadwell, V. C., who, after observing that the words here were the same in substance as the words in Barrymore *v.* Ellis, (*b*) and that he adhered to his decision in that case, proceeded as follows: "I
[721] admit the * common form to be in the terms stated, but it always appeared to me to be defective. When I was in the habit of drawing conveyances, and wished to

(*a*) 11 Sim. 127.
(*b*) 8 Sim. 1, where a similar clause occurred in a deed.

settle on a lady property over which she was to have no power of anticipation, I always used to introduce an express proviso that no receipt should be a discharge to the trustees, except a receipt given by the lady for the rents or dividends (according to the nature of the trust property) then actually become due. The proviso to which I have alluded declared, as far as my recollection serves me, that the receipts of the lady, under her own hand, to be given from time to time after the rents or dividends should have actually accrued due, should be, *and that no other receipt should be*, sufficient discharges to the trustees for the amount of the moneys therein expressed to be received. In this case, however, there are no negative words in the receipt clause, and therefore there is nothing to restrict the power which Mrs. Bamford had to dispose of or charge the rents and dividends of the trust property, under the general direction to pay those rents and dividends to her for her separate use."

The form which the Vice-Chancellor's decision pronounced to be ineffectual, was formerly in extensive use among conveyancers, but has of late been less generally adopted, rather, it is believed, on account of its prolixity, than from any doubt of its efficacy. The clause, it is admitted, is obnoxious to the condemnatory criticism of the learned Judge, being evidently clumsy and ill-framed. The whole charge against it, however, in regard to the point under consideration is, that it transposes the negative words, which, if placed at the end of the trust for separate use, would unquestionably have applied to the entire preceding trust, and therefore have been effectual; for it cannot be contended that the repetition of the words was
* essential to their efficacy. If the mode in which the [722]
restrictive clause was framed is fatal, the effect will be to render nugatory many such provisions, an inconvenience which must certainly be submitted to, should sound principles of construction require such a decision; but on this point the writer has ventured to suggest his own doubts. The transposition of clauses, in order to give more complete effect to apparent and indubitable intention is, we have seen, a principle of interpretation which has long been familiar; and seldom, it is conceived, has a more useful occasion occurred for its application than in upholding the form in question. (*a*) It is presumed there would have been no stretch of this principle in holding, that, as the negative words would undoubtedly have been effectual if placed at the end of the trust, they must be considered as actually occupying this place, the intention to create a fetter on

(*a*) This form, like many others of the old school of conveyancing, has been rejected by most modern practitioners, on the ground that it employs *many* words to express a meaning which may be more clearly conveyed by *few*. It presents a signal, though not a solitary, instance of the possible failure in perspicuity of clauses framed in the most redundant language.

alienation being as clear as language (*i. e.* misplaced language) can render it.

It is understood that the decree of the V. C., in Brown *v.* Bamford, has been appealed from, and that the case now awaits the decision of Lord Lyndhurst.

III. The doctrine of republication seems likely to come under frequent consideration during a few years hence, in consequence of the enactment 1 Vict. c. 26, s. 34, which provides, that a will executed before the 1st of January, 1838, and reëxe-
[723] cuted and republished, (*a*) or revived by * a codicil, on or since that day, shall, for the purposes of the act, be deemed to have been made at the time at which the same shall be so reëxecuted, republished, or revived.

Whether the codicil does, in point of fact, operate to republish the will, is a question to be ascertained by a reference to the old law; for the recent statute does not appear to have introduced any new principle in regard to republication. The rule then, it is conceived, must still be, as formerly, that a codicil will operate to republish a will, unless its effect to do so is negatived by the contents of the codicil itself. (*b*) What is to be considered as supplying such negative evidence of intention, is a point to be learnt only by an attentive consideration of the authorities, which will be found to present some rather refined distinctions.

This, at least, is clear, that positive intention is not necessary to produce republication. Thus, if a testator having, in the year 1837, made a will, in 1838 makes a codicil expressed in the following simple terms: "By this codicil to my will, I, A B, bequeath to C D an additional legacy of £50. As witness my hand, this —— day of —— 1838." This would be a republication, though the codicil, it will be observed, is wholly silent as to any actual intention on the part of the testator to republish the will. As under the old law, therefore, any general devise in the will would (presuming the will and codicil to be duly attested) have been brought down to the date of the codicil, so as to pass intermediately acquired estates, it follows that, under the new law, the will would be, by the republishing effect of the codicil, brought within the operation of the recent statute, with all its new rules of construction.

[724] * It was held, however, recurring to the old law, that where the testator, by a codicil to his will, recited a general devise of his lands in such will, and then revoked the devise as to one of the trustees, and devised the "said lands" to the remaining trustees, he thereby indicated an intention that the

(*a*) Though the statute has declared publication not to be necessary, it has retained the term *re*publication.

(*b*) Ante, vol. 1, p. 175.

devise in his will should not extend beyond the lands devised by the will, (*i. e.* the lands of which he was seised at the time of its execution,) and consequently, negatived the republishing effect of the codicil, which would have extended the devise in the will to intermediately acquired lands. This point was decided by the case of Bowes *v.* Bowes, (*a*) which has always been regarded as a leading authority. The case of Ashley *v.* Waugh, (*b*) however, went a step (and it is conceived a long step) farther; for Lord Cottenham there considered, that, where a testator in his codicil recited his will as an instrument of a certain date, and then proceeded to revoke the appointment of a trustee in his "said will," and nominated another person to be a trustee of his "said will," he, by this reference to the particular instrument constituting his will, negatived the republishing effect of the codicil, the words, the "said will," being, in his Lordship's view, equivalent to the words "the said lands" in Bowes *v.* Bowes. It must be confessed, that the distinction involved in this construction is very refined. It is no other than this: that if a testator makes a codicil to his will, referring to the instrument as his will simply, the codicil has the effect of republishing the will; but that, if he recites the will by reference to its date, and then makes certain alterations in his "said will," republication does not take place. It is submitted, that in each instance the testator's meaning is the same. When he speaks of * his will, (whether he refers specifically to its date [725] or not,) he means the particular instrument constituting the will, and that to make the republishing effect of the codicil depend on such refined criticism, tends to introduce the greatest uncertainty. It is probable that, in order to narrow such an unsatisfactory exception to the doctrine of republication, other distinctions, equally subtle, would be adopted. A difference might possibly be discovered between a codicil which, as in Ashley *v.* Waugh, throughout refers to the instrument as the "said will," and one which, in some instances, refers to it as the will, and in others as the "said will."

It is confidently hoped that the Courts, rejecting all such minute distinctions, will hold, that a codicil operates invariably to republish a will, whether the terms in which such will is referred to be more or less specific, unless the contents of the codicil decisively negative such an intention; and the case of Ashley *v.* Waugh will be found, it is conceived, not to stand in the way of such a doctrine, for Lord Cottenham merely decided, that, in the state of the authorities, he could not compel a purchaser to take a title depending on the republication; and when we take into consideration the well-known indisposition of the Courts to decide doubtful points of construction incidentally arising in this manner, it is impossible to regard the case as a final

(*a*) Ante, vol. 1, p. 177. (*b*) Ante, vol. 1, p. 179.

adjudication on the doctrine suggested by the very able Judge who decided it.

Having regard to the extensive consequences which may now attend the republication of wills, the question will probably sometimes arise, whether a manifestation of intention in a codicil that the will shall not be republished for any given purpose, will prevent the republication for any other purpose. For instance, in such a case as Bowes *v.* Bowes, the Court
[726] sees in the terms of the codicil an indication * of intention that the will shall not pass the intermediately acquired lands, which was under the old law the chief practical consequence involved in the doctrine of republication. (*a*)

May not then the testator, though manifestly intending that the will should not operate to pass intermediately acquired lands, nevertheless mean, that indefinite devises in the will should carry the fee, or words importing a failure of issue relate to issue *at the death?* An indication of intention not to republish in any particular is not necessarily decisive of the intention not to republish at all, it being assumed, of course, that the contrary does not appear; for if the context discloses a positive intention to republish the will in *any* particular, this must, it is conceived, be decisive of its republishing effect for *every* purpose in which the negative intention is not evinced. The intention to republish, as to A, appearing, and the intention not to republish, as to B, also appearing, the effect must be (each neutralizing the other) to place the will and codicil, in regard to C, in the same position as if the affirmative and negative evidence were both wanting.

IV. It will be remembered, that the thirty-third section of the recent act preserves from lapse a gift to a child or more remote descendant of the testator, who dies in his lifetime leaving issue who survive the testator. The writer, in his strictures on this enactment in a former chapter, (*b*) expressed an unhesitating opinion that its effect is to render the devised or bequeathed property the disposable estate of the deceased devisee or legatee, and not to let in the issue whose existence prevents the
[727] lapse. He * subsequently found that he did not carry with him the unanimous opinion of the profession on this point, for that several gentlemen, whose views were entitled to great weight, conceived, that the surviving issue was substituted for the deceased parent. His own opinion, nevertheless, remained unshaken, that, however plausible might be the conjecture as to the *probable* intention of the legislature, the language of the act was clear and decisive against the claim of the issue of the deceased child or other issue; the enactment having ex-

(*a*) See the converse case, Upfill *v.* Marshall, 7 Jurist, 819.
(*b*) Ante, vol. 1, p. 314.

pressly placed the gift to the deceased child, or other issue, in the same position as if he had survived the testator, or, to use the precise words of the statute, as if the death of such person had happened immediately after the death of the testator. This construction (which had been adopted, it is believed, by all the text writers on the recent act), has recently received the judicial sanction of Sir James Wigram, V. C., in the case of Johnson *v.* Johnson. (*a*)

V. Since the publication of the first volume of the present work, many cases have occurred in which the rule against perpetuities has been applied; (*b*) but as they do not intrench upon the doctrines advanced in the chapter on the subject, (*c*) a simple reference to them will suffice; (*b*) with the exception of some remarks which fell from the Lord Chancellor of Ireland, (Sir E. Sugden,) in the late case of Cole *v.* Sewell, (*d*) which deny the applicability to remainders of the rule against perpetuities. (*e*) The case was in * substance as follows: [728] An estate was settled by deed on A, B, and C, for life, as tenants in common, remainder to their first and other sons respectively in tail *male*, remainder to their daughters respectively, as tenants in common, in tail general, remainder, "in case one or two of the said A, B, and C should happen to die *without issue* of her or their bodies, then as to the share or shares of such one or two so dying *without issue*, to the use of all and every the daughter and daughters of such survivor or survivors," as tenants in common of the respective shares of such survivors, in case of two survivors, or to the daughter and daughters of such survivor, in case there were but one, and the heirs of the body and bodies of all and every the daughter and daughters of such survivors or survivor. It was objected to the validity of the ulterior limitation that, being to take effect after an indefinite failure of issue, it was void for remoteness. On this point the Lord Chancellor observed, "As to remoteness, I was rather surprised to hear it argued at this time of day, that that consideration could affect the question as to the validity of this limitation. As a contingent remainder, I apprehend it is quite settled, that, if the limitation be a remainder, remoteness is out of the question; the remainder is either a vested one, and then of course there is no remoteness, as the vesting has already taken place; or the remainder is contingent, and, if so, no mat-

(*a*) Michaelmas Term, 1843, not yet reported.

(*b*) Ibbetson *v.* Ibbetson, 19 Law Jour. 49; Kerr *v.* Lord Dungannon, 1 Conn. & Lawson, 235; Green *v.* Harvey, 1 Hare, 428; Griffith *v.* Blunt, 4 Beav. 248. See also Jackson *v.* Majoribanks, 12 Sim. 93; Greet *v.* Greet, 5 Beav. 123; Harvey *v.* Harvey, Id. 134, where the gifts were held to be within the line.

(*c*) Ante, c. 9, sect. 2, p. 219.

(*d*) 2 Conn. & Laws. 344.

(*e*) Ante, vol. 1, p. 226.

ter how remote may be the contingency until the happening of which the vesting is deferred; still, by the rules of law, if it does not happen so that the remainder may vest on the termination of the particular estate, it cannot take effect at all. There was a difficulty under the old law, not on the rule as to perpetuities, which is a modern one, that is, modern as regards the law of this country; but the old law certainly, even in respect of remainders, did speak of remoteness, and of a contingency being a mere possibility, and endeavored to avoid cer-
[729] tain limitations, * as being limited on too remote a possibility. *This rule is, however, long done away with.* If the limitation be a springing or shifting use, or executory devise, and does or may go beyond the limits of perpetuities, it is void; but if it be a contingent remainder, there is no such rule; the contingency may, no doubt, be so remote as not to take effect until the particular estate has failed, and so the limitation cannot take effect; but mere remoteness is no objection. That doctrine never can be brought to bear against the validity of a contingent remainder."

His Lordship, in a subsequent part of his judgment, after citing a passage from Coke Litt. 378, in which the great commentator speaks of a remainder depending on the contingency of one man dying before another, as being a "common possibility," continued: "Therefore, in those early times, they were looking to remoteness. But this has long ceased to be the case. Look to the case in B. C. C., 215, Nichols *v.* Sheffield, before Lord Kenyon. He would not listen to an objection on the ground of remoteness, in respect of a limitation after an estate tail, because it may at any time be barred. Then the case of a general power of sale and exchange; it was much argued as to its validity, but its validity is established; and I cannot say that I ever entertained the doubt that was felt, and on the same principle, as it may be barred within the limits of perpetuities; and if a person became entitled to an estate in fee, or in tail, the power became inoperative." (*a*)

It is clear, and indeed is not denied by the eminent Judge, whose remarks have been extracted, that there was even in the ancient law a principle which was inimical to
[730] future limitations of property that savored * of remoteness. Unless this were the case, the rule against perpetuities (which was merely the application of this principle to a new species of limitations) never would have had existence.

His Lordship, however, unequivocally declares his opinion to be, that at this day all contingent remainders (including, therefore, as well common-law remainders as those created by way of

(*a*) The opinion of Sir Edward Sugden may, therefore, be added to the authorities in favor of the validity of an indefinite power of sale, cited ante, vol. 1, p. 250.

use) are withdrawn from every species of perpetuity restraint; from the old doctrine because it is exploded, and from the new (*i. e.* the rule against perpetuities) because such rule is applicable only to executory devises and springing and shifting uses, *i. e.* to those modifications of ownership which the Statute of Uses called into existence.

It is difficult to conceive how any legal doctrine once established could cease to operate so long as the subject-matter to which it applies endures, and the reason on which it is founded remains in force. A remainder is now precisely what it was in the time of Littleton, and must, therefore, one should think, be governed by the same rules, and still be amenable to the ancient doctrine of the law, which forbade limitations that savored of remoteness. How else are we to account for the often-repeated proposition, that you cannot give an estate for life to an unborn person, with remainder to his issue; and for the several cases in which attempts to limit estates for life to a succession of unborn persons have been pronounced to be illegal? Of this we have an example in Seward *v.* Willock, (*a*) where the devise was "to A for life, and, after him, to his eldest or any other son after him for life, and after them, to as many of his descendants issue male, as should be heirs *of his or their bodies, [731] "*down to the tenth generation*," during their natural lives; and it was held, that A took no more than a life estate, for that here was no general intent to give an estate tail to the first taker, as contradistinguished from the particular intent to give an estate for life, but a single intent to give estates for life to A, and, after him, to his sons, and, after them, to their sons down to the tenth generation; but this he should not do by law, inasmuch *as the law would not allow of a successive limitation of estates for life to persons unborn.*

Here it will be observed, the limitations pronounced to be illegal, were remainders at common law; but this circumstance was not adverted to by the Court, nor have we any reason to conclude that a series of remainders limited by way of use would have had a better fate. But the authorities do not stop here.

The cases involving the doctrine of cy pres are, it is submitted, quite conclusive against the supposed exemption of remainders, however created, from all restraint in respect of perpetuity. By that doctrine, it will be remembered, limitations to an unborn person for life, with remainder to the first and other sons successively of such person in strict settlement, operate to confer on the intended tenant for life an estate tail, for the purpose of giving effect to the general intention, so far as possible consistently with the rule of law, which does not per-

(*a*) 5 East, 198. See also Lord Hardwicke's judgment in Hopkins *v.* Hopkins, 1 Atk. 580; Co. Litt. 271, b., Butl. n.

mit an estate for life to be given to an unborn person, with remainder to his issue. (*a*)

The impossibility of the limitations taking effect in the manner intended, is the avowed and the only justifiable ground of this bold interference with the declared intention of the testator; and if the law would have allowed of their operating
[732] according to that intention, this doctrine, *which makes so important a figure in our books, would have been wholly uncalled for.

It is observable, that the doctrine advanced in Cole *v.* Sewell was not necessary to the decision, as there the contingent remainder was preceded by estates tail, the owners of which might have destroyed it, and therefore the remarks of the Chancellor may fairly be regarded as extra-judicial.

There is, it is conceived, no analogy, or rather, not a complete analogy, between the case of a contingent remainder capable of being destroyed, (*b*) and that (referred to by Sir Edward Sugden) of a remainder preceded by an estate tail capable of being enlarged. By the latter, the party destroying the entail acquires the fee simple, by the former, he merely extinguishes the contingent remainder for the benefit of the person entitled to the next vested remainder or reversion; unless therefore such ulterior remainder or reversion belongs to himself, he would have no interest in effecting the destruction of the intervening remainders; indeed, if the latter were limited to his own descendants, (as is commonly the case,) of course he has the strongest incentive for their preservation. (*c*)

In the recent Statute of Limitations too, (3 & 4 Will. IV. c. 27,) the distinction between the two cases is tacitly recognized, the legislature having made the eviction of a tenant in tail extend to all those whom he might have barred; but not having applied the same principle to a tenant for life in relation to a destructible contingent remainder. The doctrine in question would be fraught with danger to titles; a possession
[733] of sixty, or even one hundred years, *would be no security against eviction; for a latent settlement might be produced of even greater antiquity, limiting a long series of life estates to unborn persons, each of whom would, in his order, have a distinct right of entry as his estate fell into possession. In short, it would be impossible to affirm of any apparent owner, that he might not at some day be exposed to eviction. If it be alleged that this danger exists in the case of an estate tail, (as must be admitted to a certain extent to be the case, notwithstanding the recent enactment just referred

(*a*) Ante, vol. 1, p. 260.

(*b*) It is observable, that in Seward *v.* Willock, (ante, p. 730,) the remainders pronounced to be bad were all capable of being destroyed by the tenant for life.

(*c*) See also the ground suggested ante, vol. 1, p. 226.

to,) does it therefore follow that we ought, by proceeding on a strained analogy, to extend such danger?

The necessity for a contingent remainder taking effect, if at all, at the instant of the determination of the particular estate, affords no safeguard against remoteness, as the particular estate itself may be limited to an unborn person; for, of course, a limitation which is itself a remainder in relation to an estate which precedes, may become a particular estate in relation to an estate which follows. Thus, if lands were limited to A for life, with remainder to B, if living at A's decease, remainder to C, if living at B's decease, the estate of B would be, during A's lifetime, a remainder, and, after A's decease, would become the particular estate to the remainder of C.

It is submitted, therefore, that both principle and authority justify the questioning the proposition that remainders owe obedience to no other law than that which requires that they should take effect at the instant of the determination of the particular estate. (*a*) They are, it is conceived, either subject to the old doctrine directed against remote possibilities, or the modern rule *against perpetuities, unless [734] these are identical, as may be contended with much plausibility, although it is not necessary to go to this extent in support of the denial of the exemption of remainders from all perpetuity restraint. The matter seems to stand thus: we find in the earliest authorities a general expression of the repugnance of the law to limitations which savor of remoteness, but without any distinct definition of the limits which it allows. When uses arose, with the consequent new modifications of ownership, the necessity of preventing perpetuities was more urgently felt, and the denunciations against them were repeated with greater frequency and vehemence, but still, for some time at least, with the same absence as formerly of distinct intimation as to the actual extent of the legal restriction, until at length, after many gradations, the present well-known rule was distinctly and authoritatively propounded. May it not, then, fairly be presumed, that the rule thus eventually elicited from the Judges, is, in fact, no other than the doctrine which, in the old language of the law, forbade the limiting a possibility upon a possibility?

This identification of the ancient and modern doctrine would avoid many anomalous and inconvenient distinctions, and re-

(*a*) The views which the writer has here ventured to express, (he is pleased to find,) coincide with those of Mr. Lewis, in his Treatise on the Law of Perpetuity, p. 495—a work of much research and ability; but the writer of these sheets differs from the learned author when he urges, as a reason for applying to contingent remainders the rule against perpetuities, the possibility of remote remainders being preserved from destruction by estates interposed in trustees. It is submitted, that such remainders in trust, if expectant on the estate for life of unborn persons, would be themselves necessarily contingent, and, therefore, equally liable to destruction.

duce all to coherence and consistency, and would, moreover, rescue the Judges who fixed the perpetuity rule, from the charge of exceeding the due limits of judicial authority. It may fairly be questioned, whether they were justified [735] in imposing * a new restraint, *of their own creation*, on the limitations to which the Statute of Uses had given rise. It was the province of the Legislature to have applied whatever restrictions were required for the new modifications of ownership which they had called into existence; though if there was an actual preëxisting rule of law applicable in its nature thereto, the Courts might, without any great stretch of judicial power, apply it to the new species of limitation, seeing that it was within the mischief which that rule was intended to prevent.

VI. The case of Cole *v.* Sewell, stated in the last section embraces another practical point of great importance, namely, whether the word "survivors" can be construed *others*, which was decided in the affirmative, not by force of the context in the particular instrument, (which it will be observed, was a deed,) but on the general ground of its being a reasonable construction, and justified by the case of Doe *v.* Wanewright, (*a*) and the opinion of Lord Eldon, who, though in Davidson *v.* Dallas, (*b*) he called it a forced construction, always (Sir E. Sugden remarked) adopted it.

That such was the general impression in the time of Lord Eldon and Sir William Grant may be readily conceded, (*c*) but the current of recent decisions, founded on Crowder *v.* Stone, (*d*) has been the other way; and accordingly the writer felt himself warranted in stating the decided preponderance of authority to be in favor of the strict construction. (*e*) How far the recent decision of the Chancellor of Ireland, thrown into the opposite scale, may cause it again to oscillate, remains to be seen. [736] * The state of the authorities seems hardly to justify the hope that litigation has reached its limit on this often-occurring point. Without adverting to the contrariant opinions of deceased Judges, we have now Lord Lyndhurst, (*f*) Lord Brougham, (*g*) and Sir James Wigram (*h*) in favor of the strict, and Sir Lancelot Shadwell (*i*) and Sir Edward Sugden in favor of the less definite, construction; though it is to be remembered that the Vice-Chancellor of England rested *his* decision upon a special ground, which, however, it has been shown, does, in point of fact, apply to many cases in which the contrary interpretation has prevailed. It is, perhaps, to be regretted that the liberal construction (which formerly obtained, and, no doubt,

(*a*) 5 Durn. & E. 427. (*b*) 14 Ves. 576. (*c*) Ante, p. 609.
(*d*) Ante, p. 611. (*e*) Ante, p. 609. (*f*) Ante, p. 612.
(*g*) Ibid. (*h*) Ante, p. 618. (*i*) Ante, p. 617.

generally accords with the actual intention) was not adhered to; but there seems much difficulty in retracing the steps which have since been taken, and sound principles of construction seem somewhat violated in allowing the diversion of a word from its strict and more appropriate signification, without the aid of an explanatory context. At all events the course of the recent decisions in the English Courts of Equity renders it highly probable that the strict construction of the word "survivor" will eventually be adopted, though with a readiness to yield to the slightest indication in the context, of an intention to use the word in the sense of *other*. (*a*)

(*a*) In the recent case of Slade *v.* Parr, 7 Jurist, 102, the strict interpretation of the word "survivor" was contended for, although it was coupled with *other;* but this construction (which militated against the express terms of the will) was not adopted or countenanced by the Court.

CHAPTER LIII.

GENERAL RULES OF CONSTRUCTION.

GENERAL rules of construction.
Summary of the rules of construction, [p. 740.]

THERE are certain rules of construction common to both deeds and wills; but as, in the disposition of property by deed, an adherence to settled forms of expression is either rigidly exacted by the Courts, or maintained by the practice of the profession, the rules to which the construction of deeds has given rise are comparatively few and simple. But the peculiar indulgence extended to testators, who are regarded as *inopes consilii*, has exempted the language of wills from all technical restraint, and withdrawn them in some degree from professional influence. By throwing down these barriers, a wide field is laid open to the caprices of language; though, at certain points, we have seen, its limits are ascertained by rules sufficiently definite, and we are guided through its least beaten tracks by general principles.

It has been a subject of regret with eminent judges, (*a*) that wills were not subjected to the same strict rules of construction as deeds, since the relaxation of those rules introduced so much uncertainty and litigation; and was, indeed, at an early period, productive of so much embarrassment, as to draw from Lord Coke, (*b*) the observation, that "wills, and the construction of them, do more perplex a man than any other learning; [738] and, to make *a certain construction of them, this *excedit jurisprudentum artem.* But (he adds) I have learned this good rule, always to judge in such cases, as near as may be, and according to the rules of law."

This quotation will serve to introduce the observation, that, though the intention of testators, when ascertained, is implicitly obeyed, however informal the language in which it may have been conveyed; yet the Courts, in construing that language, resort to certain established rules, by which particular words and expressions, standing unexplained, have obtained a definite meaning; which meaning, it must be confessed, does not always quadrate with their popular acceptation. This results from the intendment of law, which presumes every person to

(*a*) See Lord Kenyon's judgment in Denn d. Moor *v.* Miller, 5 Durn. & E. 561; Doe *v.* Allen, 8 Durn. & E. 502. See, also, Wilm. 398.
(*b*) 2 Bulst. 130.

be acquainted with its rules of interpretation, (*a*) and consequently to use expressions in their legal sense,—*i. e.* in the sense which has been affixed by adjudication to the same expressions occurring under analogous circumstances: a presumption which, though it may sometimes have disappointed the intention of testators, is fraught with great general convenience; for, without some acknowledged standard of interpretation, it would have been impossible to rely with confidence on the operation of any will not technically expressed, until it had received a judicial interpretation. And, indeed, dispositions conceived in the most appropriate forms of expression, must have been rendered precarious by a license of construction which set up the intention, to be collected upon arbitrary notions, as paramount to the authority of cases and principles. In such a state of things, the most elaborate treatise on *the construction of wills, though it might, per- [739] haps, like other curious researches, prove interesting to some inquirers into the wisdom and sagacity of our ancestors, could contribute little or nothing towards placing the law of property, as it regards testamentary dispositions, on a secure and solid foundation. It is therefore necessary to remind the reader, that the language of the Courts, when they speak of the intention as the governing principle, sometimes calling it "the law" of the instrument, (*b*) sometimes the "pole star," (*c*) sometimes the "sovereign guide," (*d*) must always be understood with this important limitation—that here, as in other instances, the Judges submit to be bound by precedents and authorities in point; and endeavor, as we have seen, to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture.

The result, upon the whole, has been satisfactory; for, by the application of established rules of construction, with due attention to particular circumstances, a degree of certainty had been attained, which must have been looked for in vain, if less regard has been paid to the principles of anterior decisions. And, though the cases on the construction of wills have become, by the accumulation of more than three centuries, immensely numerous; yet when we consider the vast augmentation which, during this period, and the last century in particular, has taken place in the wealth and population of the country; the several new species of property, which the ever-varying exigencies of a commercial nation have from time to time called into existence, and to which the rules of construction were to be applied; the

(*a*) See Doe d. Lyde *v.* Lyde, 1 D. & E. 596; Langham *v.* Sanford, 2 Mer. 22. But see Lord Thurlow's judgment in Jones *v.* Morgan, 1 B. C. C. 221; and Lord Alvanley's observations in Seale *v.* Barter, 2 Bos. & Pull. 594.

(*b*) Per Lord Hale, in King *v.* Melling, 1 Vent, 231.

(*c*) Per Wilmot, C. J., in Doe d. Long *v.* Laming, 2 Burr. 1112.

(*d*) Per Wilmot, C. J., in Roe d. Dodson *v.* Grew, 2 Wils. 322.

complexity which a more refined and artificial state
[740] of society has introduced into *dispositions of property; and, lastly, the more extensive use of the art of writing, leading to increased facility in the exercise of the testamentary power—we are prepared to expect an incessantly growing accession to questions of this nature. But it will be found, I apprehend, that, so far from having increased in a corresponding ratio, they have, and particularly at a recent period, numerically diminished.

This must be attributed partly to the more frequent practice of resorting to, and the increased facility of obtaining professional assistance in the preparation of wills; and partly to the maturity which the system of construction has gradually attained, and which enables persons, conversant with the subject, in most cases to predicate, with a considerable approach to certainty, what would be the decision of a court of judicature in any given case; and, consequently, to render an appeal to its authority unnecessary.

Some uncertainty, it will be admitted, is inseparable from the nature of the subject. Many of the rules of construction are such as necessarily involve uncertainty in the application of them to particular cases; and, in a few instances, the rules themselves are, we have seen, yet subject of controversy. To discuss and illustrate these rules has been the design of the writer in the preceding pages.

It may be useful, however, in conclusion, to present to the reader a summary of the several rules of construction which have already been the subject of detailed examination.

I. That a will of real estate, wheresoever made, and in whatever language written, is construed according to the law
[741] of England, in which the property is situate, (*a*) *but a will of personalty is governed by the lex domicilii. (*b*)

II. That technical words are not necessary to give effect to any species of a disposition in a will. (*c*)

III. That the construction of a will is the same at law and in equity, (*d*) the jurisdiction of each being governed by the nature of the subject; (*e*) though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other.

IV. That a will speaks, for some purposes, from the period of execution, and for others from the death of the testator; but never operates until the latter period. (*f*)

(*a*) Pre. Ch. 577.
(*b*) Ante, vol. 1, p. 2.
(*c*) 3 Durn. & E. 86; 11 East, 246; 16 Id. 222.
(*d*) 3 P. W. 259; 2 Ves. Sen. 74.
(*e*) 1 Ves. Jun. 16; 2 Id. 417; 4 Ves. 329.
(*f*) Vide ante, ch. 10, vol. 1, p. 277.

V. That the heir is not to be disinherited without an express devise, or necessary implication;[1] (*a*) such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed. (*b*)

VI. That merely negative words are not sufficient to exclude the title of the heir or next of kin. (*c*) There must be an actual gift to some other definite object.

VII. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcilable, the latter must prevail.[2] (*d*)

* VIII. That extrinsic evidence is not admissible to [742] alter, detract from, or add to, the terms of a will;[3] (*e*) (though it may be used to rebut a resulting trust attaching to a legal title created by it,[4] (*f*) or to remove a latent ambiguity.)

IX. Nor to vary the meaning of words; (*g*) and, therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible; (*h*) but the

X. Courts will look at the circumstances under which the devisor makes his will—as the state of his property, (*i*) of his family,[5] (*k*) and the like. (*l*)

XI. That, in general, implication is admissible only in the absence of, and not to control, an express disposition.[6] (*m*)

XII. That an express and positive devise cannot be controlled

(*a*) Br. Devise, 52; Dyer, 330, b.; 2 Stra. 969; Ca. t. Hardw. 142; 1 Wils. 105; Willes, 303; 2 D. & E. 209; 2 Man. & S. 448. See, also, 3 B. P. C. (Toml. ed. 45.)

(*b*) 1 Ves. & Bea. 466; 5 Durn. & E. 558; 7 East, 97; 1 New Rep. 118; 18 Ves. 40.

(*c*) Ante, vol. 1, p. 294; 4 Beav. 318.

(*d*) 9 Mod. 154; 2 Bl. 979; 1 Durn. & E. 630; 6 Ves. 100; 16 Ves. 314; 3 Man. & S. 158; Swanst. 28; 2 Atk. 372; 6 Durn. & E. 314; 2 Taunt. 109; 18 Ves. 421; 6 Moore, 214. But see Barnard, C. C. 261.

(*e*) See judgment in 16 Ves. 486; 5 Rep. 68; Cas. Temp. Talb. 240; 3 B. P. C. (Toml. ed.) 607; 2 Ch. Cas. 231; 7 Durn. & E. 138.

(*f*) Cas. Temp. Talb. 78.

(*g*) 4 Taunt. 176; 4 Dow, 65; 3 Man. & S. 171. But see 2 P. W. 135.

(*h*) 11 East, 441.

(*i*) 1 Mer. 646; 7 Taunt. 105; 1 Barn. & Ald. 550; 3 Barn. & Cress. 870; 1 B. C. C. 472.

(*k*) 3 B. P. C. (Toml. ed.) 257; 4 Burr. 2165; 4 B. C. C. 441; 3 Barn. & Ald. 657; 3 Dow, 72; 3 Barn. & Ald. 632; 2 Moore, 302.

(*l*) 1 Black. 60; 1 Mer. 384.

(*m*) 8 Rep. 94; 2 Vern. 60; 1 P. W. 54.

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[1] Ante, vol. 1, p. 465, note, to this point.
[2] Ante, vol. 1, p. 411, note.
[3] Ante, vol. 1, p. 349, *et seq.* and notes.
[4] Ante, vol. 1, p. 357, note and cases cited.
[5] Ante, vol. 1, p. 349, note;[1] ib. 363, note.[1]
[6] Ante, vol. 1, p. 460, 465, notes.

by the reason assigned, (*a*) or by subsequent ambiguous words, (*b*) or by inference and argument from other parts of the will; (*c*) and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents; (*d*) though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt.

XIII. That the inconvenience or absurdity of a de-
[743] vise * is no ground for varying the construction, where the terms of it are unambiguous; (*e*) nor is the fact, that the testator did not foresee all the consequences of his disposition, a reason for varying it; (*f*) but, where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose. (*g*)

XIV. That the rules of construction cannot be strained to bring a devise within the rules of law; (*h*) but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid; and therefore the Court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word, by mistake, for one which would have rendered the devise void. (*i*)

XV. That favor or disfavor to the object ought not to influence the construction. (*k*)

XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, (*l*) and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; (*m*) and of two modes of construction, that is to be preferred which will prevent a total intestacy. (*n*)

XVII. That, where a testator uses technical words,
[744] he * is presumed to employ them in their legal sense (*o*) unless the context clearly indicates the contrary.[1] (*p*)

(*a*) 16 Ves. 36.
(*b*) 8 Bligh, N. S. 88.
(*c*) 1 Ves. Jun. 268; 8 Ves. 42; Cowp. 90.
(*d*) Moore, 13, pl. 50; 1 And. 8; Cowp. 83.
(*e*) 1 Mer. 417; 2 Sim. & Stu. 295.
(*f*) 3 Mau. & S. 37; 1 Mer. 358.
(*g*) 4 Madd. 67. See, also, 3 B. C. C. 401.
(*h*) 1 Cox, 324; 2 Mer. 389; 1 Jac. & Walk. 31. But see 2 Russ. & M. 306; 2 Kee. 756; 2 Beav. 352.
(*i*) 3 Burr. 1626; 3 B. P. C. (Toml. ed.) 209.
(*k*) See 4 Ves. 574. But see 2 Ves. & Bea. 269.
(*l*) 18 Ves. 466, [Sumner's ed. notes.]
(*m*) 3 Ves. 450; 7 Id. 455; 7 East, 272; 2 Barn. & Ald. 441.
(*n*) Cas. Temp. Talb. 161; 3 Ves. 204; 2 Mer. 386.
(*o*) Doug. 340; 6 Durn. & E. 352; 4 Ves. 329; 5 Ves. 401.
(*p*) Doug. 341; 3 B. C. C. 68; 5 East, 51; 2 Ball. & Be. 204; 3 Dow, 71.

[1] 2 Williams, Ex. (2d Am. ed.) 788, 789; Ide *v.* Ide, 5 Mass. 500; Mowatt *v.* Carow, 7 Paige, 328.

XVIII. That words, occurring more than once in a will shall be presumed to be used always in the same sense, (*a*) unless a contrary intention appear by the context, (*b*) or unless the words be applied to a different subject. (*c*) And, on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning. (*d*)

XIX. That words and limitations may be transposed, (*e*) supplied, (*f*) or rejected, (*g*) where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument. (*h*)

XX. That words which it is obvious are miswritten (as dying *with* issue, for dying *without* issue) may be corrected. (*i*)

*XXI. That the construction is not to be varied by [745] events subsequent to the execution; (*k*) but the Courts, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called upon to affix a signification to them. (*l*)

XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intention in regard to both. (*m*) There must be an apparent design to connect them. (*n*)

XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible. (*o*)

(*a*) 2 Ch. Cas. 169.

(*b*) Doug. 269.

(*c*) 1 P. W. 663; 2 Ves. Sen. 616; 5 Mau. & S. 126; 1 Ves. & Bea. 260. But see 14 Ves. 488.

(*d*) 4 B. C. C. 15; 13 Ves. 39; 7 Taunt. 85. The writer has heard Lord Eldon lay down the rule in these words. But see Amb. 122; 6 Ves. 300; 10 Ves. 166; 13 East, 559; 13 Ves. 476; 19 Ves. 545; 1 Mer. 120; 3 Mer. 316—where the argument that the testator, notwithstanding some variation of expression, had the same intention in several instances, prevailed.

(*e*) 2 Ch. Ca. 10; Hob. 75; 2 Ves. Sen. 34; Amb. 374; 8 East, 149; 15 East, 309; 1 B. & A. 137. But see 2 Ves. Sen. 248.

(*f*) Cro. Car. 185; 7 Durn. & E. 437; 6 East, 486; 3 Dowl. & Ryl. 398. See also 2 Bl. 1014.

(*g*) 2 Ves. Sen. 276; 3 Durn. & E. 87, n.; 3 Id. 484; 4 Ves. 51; 5 Ves. 243; 6 Ves. 129; 12 East, 515; 9 Ves. 566.

(*h*) 18 Ves. 368; 19 Id. 652; 2 Mer. 25.

(*i*) 8 Mod. 59; 5 Barn. & Adolph. 621; 3 Adol. & Ellis, 340.

(*k*) Cases Temp. Talb. 21; 3 P. W. 259; 11 East, 558, n.; 1 Cox, 324; 1 Ves. Jun. 475.

(*l*) 11 Ves. 457.

(*m*) Cro. Car. 368; Doug. 759; 8 Durn. & E. 64; 1 N. R. 335; 9 East, 267; 11 Id. 220; 14 Ves. 304; 4 Mau. & S. 58; 1 Pri. 353; 4 Barn. & Cress. 667. See, also, Godb. 146.

(*n*) Leon. 57; Cas. Temp. Hardw. 143; 10 East, 503. This and the former class of cases chiefly relate to a question of frequent occurrence: whether words of limitation, preceded by several devises, relate to more than one of those devises.

(*o*) Finch 139; 3 P. W. 250. See, also, 4 Ves. 325; 13 Ves. 486.

XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and, accordingly, a provision for the death of devisees will not be considered as intended to provide exclusively for lapse, if it admits of any other construction.[1] (*a*)

(*a*) 2 Atk. 375; 4 Ves. 418; 4 Ves. 554; 7 Ves. 586; 1 Ves. & Bea. 422; 1 Pri. 264. See, also, 1 Swanst. 161; 2 Ves. Jun. 501; and 1 M'Cleland, 168.

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[1] Montgomery *v.* Montgomery, 2 Irish, Eq. 161.

APPENDIX.

SUGGESTIONS TO PERSONS TAKING INSTRUCTIONS FOR WILLS.

DESCRIPTION of lands, [p. 748.]
Immediate profits, [p. 748.]
Mortgaged lands, [p. 748.]
Payment of debts, legacies, &c. [p. 748.]
Provision for wife and children, [p. 748.]
In regard to children, &c. [p. 749.]
Daughters or other females' shares, [p. 749.]
Uses to prevent dower, [p. 750.]
Survivorship, [p. 750.]
To what period referable, [p. 750.]
Suggestion as to clauses of survivorship, [p. 750.]
As to vesting, [p. 750.]
Words of recommendation, &c. [p. 751.]
Making will conditional on testator's leaving no issue, [p. 751.]
As to the persons through whom instructions are received, [p. 751.]

FEW of the duties which devolve upon a solicitor, more imperatively call for the exercise of a sound, discriminating, and well-informed judgment, than that of taking instructions for wills. It frequently happens, that, from a want of familiar acquaintance with the subject, or from the physical weakness induced by disease, (where the testamentary act has been, as it too often is, unwisely deferred until the event which is to call it into operation seems to be impending,) testators are incapable of giving more than a general or imperfect outline of their intention, leaving the particular provisions to the discretion of their professional adviser. Indeed, some testators sit down to this task with so few ideas upon the subject, that they require to be informed of the ordinary modes of disposition under similar circumstances of family and property, with the advantages and disadvantages of each; and their judgment, in the selection of one of these modes, is necessarily influenced by, if not wholly dependent on, professional recommendation. To a want of complete and accurate information as to the consequences of their proposed schemes, must be ascribed many of the absurd and inconvenient provisions introduced into testamentary gifts; to say nothing of the obscurities and inconsistencies which frequently throw an impenetrable cloud over the testator's real intentions. It may be useful to mention some particulars on which information should be obtained in taking instructions for a will, most of the inquiries being suggested by the various classes of cases discussed at large in this work, and being framed with a view to prevent such questions as those
*cases present. It will be obvious that the nature of the in- [748]
quiries in every case must be greatly regulated by the situation in life, and other circumstances of the testator. They may be distributed

into those that relate—*first*, to the subject, and *secondly*, to the objects of testamentary disposition, including in the former some general points.

1. Where lands specifically devised are described by their local situation and occupancy, (though a reference to occupancy is in general better omitted, unless it forms a necessary discriminating feature in the description,) should be carefully ascertained, that the whole of the land answering to the locality, answers also to the occupancy, or, in other words, that both parts of the description are coextensive, to avoid any question as to the less comprehensive term being restricted.

2. Where there is an immediate devise to a class of persons, who may not be in existence at the death of the testator, as to the children of A, who may then have no children, it should be ascertained, what, in this event, is to become of the intermediate profits. In the absence of any provision in this nature, they will go to the residuary devisee or heir at law.

3. Where the subject of devise is a mortgaged estate, inquiry should be made, whether the devisee is to take it subject to the mortgage; and, if so, words should be used negativing his right to have it exonerated out of the assets, for which, it will be seen, the devising the property *subject to the mortgage debt* is not alone sufficient.

4. Another question which may be proper, under some circumstances, is, whether any specific fund, constituted of real or personal estate, is to be appropriated for payment of debts, funeral and testamentary expenses, and legacies; and it should always be stated, whether a fund so appropriated, is to exempt the general personal estate from being first applied, as is generally intended, though the intention frequently fails for want of an explicit expression of it.

II. In relation to the *objects* of gift.—When a testator proposes to make a disposition of his property in favor of his wife and children, (naturally the first objects of his regard,) several modes of disposition present themselves. One is, to give the income to the wife for life, clothed or not with a trust for the maintenance of the children, and to give the in-
[749] heritance or capital * to their children, equally, subject or not to a power in the wife of fixing their shares, or limiting the property to some in exclusion of others, as she may think proper. Another mode is, to give the wife and children immediate absolute interests in the property in certain proportions, according to the nature of the distribution of personal property under the statute in case of intestacy; but this mode of disposition is less frequently adopted than the former. To empower the widow to regulate the shares, is often found convenient, not only as it preserves her influence over her children, but because it enables her to adapt the disposition of the property to their various exigencies at the period of her death, and it has, moreover, a salutary effect in restraining the children from disposing of their reversionary interests. Where the children do not take absolutely vested interests until their majority or marriage, it is useful to confer a power on the trustees, with the consent of the widow, or other person taking the prior life interest, to advance some proportion (the maximum of which is usually fixed at a half or one third) of their presumptive shares, in order to place out the sons as apprentices, etc., or for other such purposes. Even where the children take vested, (*i. e.* absolutely vested) interests at their birth, a power of ad-

vancement may be requisite where the prior legatee for life is a married woman restrained from alienation, and, therefore, incompetent to accelerate the payment of the shares by relinquishing her life interest. In no other case can the power be wanted under such circumstances.

1. The obvious inquiries (in addition to those immediately suggested by the preceding remarks) to be made of a testator, of whose bounty children are to be objects, are—at what ages their shares are to vest;—whether the income, or any portion of it, is to be applied for maintenance until the period of vesting, and if not *all* applied, what is to become of the excess? Whether, if any child die in the testator's lifetime, or, subsequently, before the vesting age, leaving children, such children are to be substituted for the deceased parents. If the vesting of the shares be postponed to the death of a prior tenant for life, or other possibly remote period, the necessity for providing for such events is of course more urgent; and in that case it should also be ascertained, whether, if the objects die leaving grandchildren, or more remote issue, but no children, such issue are to stand in the place of their parent.

2. If any of the objects of the gift (whether of real or *personal property) be females, or the gift be made capable of comprehending them, as in the case of a general devise or bequest to children, it should be suggested, whether their shares are not to be placed out of the power of husbands; *i. e.* limited to trustees for their separate use for life, subject or not to a restriction on alienation, (which, however, is a necessary concomitant to give full effect to the intention of excluding marital influence,) with a power of disposition over the inheritance, or capital, as the case may be; and if it be intended to prevent that power of disposition from being exercised, under marital influence, without the possibility of retraction, it should be confined to dispositions *by will*, which, being ambulatory during her life, can never be exercised so as to fetter her power of alienation over the property. [750]

3. If the devise be of the legal estate of lands of inheritance to a man, it should be inquired, (though the affirmative may be presumed in the absence of instructions,) whether they are to be limited to uses to bar the dower of any wife to whom he was married on or before the first of January, 1834.

4. If a gift be made to a plurality of persons, it should be inquired whether they are to take as joint tenants, or tenants in common; or, in other words, whether with or without survivorship; though it is better in general, where survivorship is intended to make the devisees tenants in common, with an *express* limitation to the survivors, than to create a joint tenancy, which may be severed.

5. In all cases of limitations to survivors, it should be most clearly and explicitly stated *as to what period survivorship is to be referred;* that is, whether it is to go to the persons who are survivors at the death of the testator, or at the period of distribution. It should always be anxiously ascertained, that the testator, in disposing of the shares of dying devisees or legatees among surviving or other objects, does not overlook the possible event of their leaving children or other issue. There can be little doubt that in many cases of absolute gifts to survivors, this contingency is lost sight of. This observation, in regard to the unintentional exclusion of issue, applies to all gifts in which it is made a necessary qualification of the objects, that they should be living at a prescribed period posterior to

the testator's decease, and in respect of whom, therefore, the same caution may be suggested.

6. It may be observed, that where interests not in possession
[751] are created, which are intended to be contingent until a * given event or period, this should be explicitly stated; as a contrary construction is generally the result of an absence of expression. Explicitness, generally, on the subject of vesting, cannot be too strongly urged on the attention of the framers of wills.

7. Where a testator proposes to recommend any person to the favorable regard of another, whom he has made the object of his bounty, it should be ascertained whether he intends to impose a legal obligation on the devisee or legatee in favor of such person, or to express a wish without conferring a right. In the former case, a clear and definite trust should be created; and in the latter, words negativing such a construction of the testator's expressions should be used. Equivocal language in these cases has given rise to much litigation.

Lastly. It may be suggested, that where a testator is married, and has no children, unless provision be made in his will for children coming *in esse*, or it be unreasonable to contemplate his having issue, the dispositions of his will should be made expressly contingent on his *leaving* no issue surviving him; for, as the birth of children alone is not a revocation, they may be excluded under a will made when their existence was not contemplated; and cases of great hardship of this kind have sometimes arisen from the neglect of testators to make a new disposition of their property at the birth of children; indeed, it has sometimes happened that a testator has left a child *en ventre*, without being conscious of the fact; for the same reason provisions for the children of a married testator, who has children, should never be confined to children *in esse* at the making of the will. A gift to the testator's children generally will include all possible objects. Where, however, the gift is to the children of *another* person, and it is intended (as it generally is) to include all the children *thereafter to be born*, terms to this effect should be used, unless a prior life interest is given to the parent of such children; in which case, as none can be born after the gift to them vests in possession, which is the period according to the established rule of ascertaining the objects, none can be excluded.

To the preceding suggestions, it may not be useless to add, that it is in general desirable, that professional gentlemen taking instructions for wills, should receive their instructions immediately from the testator himself, rather than from third persons, particularly where such persons
[752] are interested. In a case in * the Prerogative Court, (*a*) Sir J. Nicholl "admonished professional gentlemen generally, that where 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."

(*a*) Rogers *v.* Pittis, 1 Add. 46.

THE NEW STATUTE OF WILLS.

7 WILL. IV. & 1 VICT. CAP. 26.

An Act for the Amendment of the Laws with respect to Wills,
[3D JULY, 1837.]

MEANING of certain words in this act.
"Will."
12 Car. II. c. 24.
14 & 15 Car. II. (I.)
"Real estate."
"Personal estate," [p. 754.]
Number, [p. 754.]
Gender, [p. 754.]
Repeal of the Statutes of Wills, 32 H. VIII. c. 1, and 34 & 35 H. VIII. c. 5, [p. 754.]
10 Car. I. sess. 2, c. 2, (I.) [p. 754.]
Sects. 5, 6, 12, 19, 20, 21, & 22, of the Statute of Frauds, 29 Car. II. c. 3; 7 W. 3, c. 12, (I.) [p. 754.]
Sect. 14 of 4 & 5 Anne, c. 16, [p. 754.]
6 Anne, c. 10, (I.) [p. 754.]
Sect. 9 of 14 G. II. c. 20, [p. 755.]
25 G. II. c. 6, (except as to colonies,) [p. 755.]
25 G. II. c. 11, (I.) [p. 755.]
55 G. III. c. 192, [p. 755.]
All property may be disposed of by will; comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised, [p. 755.]
Estates pur autre vie; contingent interests; rights of entry; and property acquired after execution of the will, [p. 756.]
As to the fees and fines payable by devisees of customary and copyhold estates, [p. 756.]
Wills, or extracts of wills of customary freeholds and copyholds to be entered on the court rolls; and the lord to be entitled to the same fine, &c., when such estates were not previously devisable, as he would have been from the heir in case of descent, [p. 757.]
Estates pur autre vie, [p. 758.]
No will of a person under age valid; nor of a feme covert, except such as might have been previously made, [p. 758.]
Will to be in writing, and signed or acknowledged in the presence of two witnesses at one time, who attest, [p. 758.]
Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed, [p. 759.]
Soldiers' and mariners' wills excepted, [p. 759.]
Act not to affect certain provisions of 11 G. IV. and 1 W. IV. c. 20, with respect to wills of petty officers, and seamen, and marines, [p. 759.]
Publication not to be requisite, [p. 759.]
Will not to be void on account of incompetency of attesting witnesses, [p. 759.]
Gifts to an attesting witness to be void, [p. 759.]
Creditor attesting to be admitted a witness, [p. 760.

Executor to be admitted a witness, [p. 760.]
Will to be revoked by marriage, [p. 760.]
No will to be revoked by presumption, [p. 760.]
No will to be revoked but by another will or codicil, or writing, or by destruction, [p. 761.]
No alteration except in certain cases, in a will, shall have any effect, unless executed as a will, [p. 761.]
No will revoked to be revived otherwise than by reëxecution, or a codicil, [p. 761.]
A devise not to be rendered inoperative by any subsequent conveyance or act, [p. 762.]
A will shall be construed to speak from the death of the testator, [p. 762.]
A residuary devise shall include estates comprised in lapsed and void devises, [p. 762.]
A general devise of lands shall include copyhold and leasehold as well as freehold lands, [p. 762.]
A general gift shall include estates over which the testator has a general power of appointment, [p. 762.]
A devise without any words of limitation to pass the fee, [p. 763.]
Words importing failure of issue to mean issue living at the death, [p. 763.]
Proviso, [p. 763.]
No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest, [p. 764.]
Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee, [p. 764.]
Devises of estates tail shall not lapse when, [p. 764.]
Gifts to children or other issue who leave issue living at the testator's death shall not lapse, [p. 764.]
Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who die before 1838, [p. 765.]
Act not to extend to Scotland, [p. 765.]

EXPLANATION OF TERMS.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing, in the nature of a will in exercise of a power; and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled, An act for taking away the court of wards and liveries, and tenures in capite and by knights' service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof, or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled, An Act for taking away the court of wards and liveries, and tenures in capite and by knights' service, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of

government and other funds, securities for money, (not being real estates,) debts, choses in action, rights, credits, goods, and all other property whatsoever, which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

REPEAL CLAUSE.

II. And be it further enacted, That an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled, The Act of wills, wards, and primer seisins, whereby a man may devise two parts of his land; and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled, The Bill concerning the explanation of wills; and also an act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled, An Act how lands, tenements, etc., may be disposed by will or otherwise, and concerning wards and primer seisins; and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled, An Act for prevention of frauds and perjuries, and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled, An Act for prevention of frauds and perjuries, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels, or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled, An Act for the amendment of the law and the better advancement of justice, and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled, An Act for the amendment of the law and the better advancement of justice, as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled, An Act to amend the law concerning common recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled, "An Act for prevention of frauds and perjuries," as relates to estates pur autre vie; and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled, An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain called England, and in his Majesty's colonies and plantations in America, except so far as relates to his Majesty's colonies and plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled, An Act for the avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates; and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled, An Act to remove certain difficulties in the disposition of copyhold estates by will, shall be

and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates pur autre vie to which this act does not extend.

GENERAL ENABLING CLAUSE.

III. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that being entitled as heir, or devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will, should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same, subsequently to the execution of his will.

FEES ON COPYHOLDS.

IV. Provided always, and be it further enacted, That where any real estate of the nature of customary freehold, or tenant right, or customary or copyhold, might, by the custom of the manors of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate

had been surrendered to the use of the will of such testator; provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the *same to the use of his will, and shall not [757] have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will, shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

COPYHOLD.

V. And be it further enacted, That when any real estate of the nature of customary freehold, or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir, in case of the descent of the same real estate; and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services, as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

ESTATES PER AUTRE VIE. [758]

VI. And be it further enacted, That if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands,

and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

AGE OF TESTATOR.

VII. And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid.

MARRIED WOMEN.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.

EXECUTION OF WILLS.

IX. And be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

EXECUTION OF TESTAMENTARY APPOINTMENTS.

X. And be it further enacted, That no appointment made by will, in exercise of any power shall be valid, unless the same be executed
[759] in manner hereinbefore required; and every will executed * in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

WILLS OF SOLDIERS AND SEAMEN.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

PETTY OFFICERS, SEAMEN, AND MARINES.

XII. And be it further enacted, That this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled, An Act to amend and consolidate the laws relating to the pay of the Royal Navy, respecting the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect of services in her Majesty's Navy.

PUBLICATION.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof.

ATTESTING WITNESSES' COMPETENCY.

XIV. And be it further enacted, That if any person who shall attest the execution of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

GIFTS TO ATTESTING WITNESSES.

XV. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or * appointment [760] of or affecting any real or personal estate, (other than and except charges and directions for the payment of any debt or debts,) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such persons attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

CREDITOR ATTESTING WITNESS.

XVI. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

EXECUTOR ATTESTING WITNESS.

XVII. And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

REVOCATION BY MARRIAGE.

XVIII. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions.)

REVOCATION BY PRESUMPTION.

XIX. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

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REVOCATION BY SUBSEQUENT WILL OR CODICIL, OR DESTRUCTION OF INSTRUMENT.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

OBLITERATIONS AND INTERLINEATIONS.

XXI. And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

REVIVAL OF REVOKED WILL.

XXII. And be it further enacted, That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the reëxecution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

REVOCATION—SUBSEQUENT CONVEYANCE.

XXIII. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or re-
[762] lating to any real or personal estate therein comprised, * except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

WILL SPEAKS, FROM WHAT PERIOD.

XXIV. And be it further enacted, That every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

LAPSED AND VOID DEVISES.

XXV. And be it further enacted, That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

GENERAL DEVISE—COPYHOLDS.

XXVI. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise, which would describe a customary copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

GENERAL DEVISE.—APPOINTMENT.

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, (as the case may be,) which he may * have power to appoint in any [763] manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, (as the case may be,) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

FEE SIMPLE WITHOUT WORDS OF LIMITATION.

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or

interest, which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

WORDS IMPORTING FAILURE OF ISSUE.

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words, which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

ESTATE OF TRUSTEES.

XXX. And be it further enacted, That where any real estate, (other than or not being a presentation to a church,) shall be devised
[764] to *any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

ESTATE OF TRUSTEES.

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

LAPSE OF ESTATE TAIL.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

LAPSE.—CHILDREN OR ISSUE DYING IN TESTATOR'S LIFETIME.

XXXIII. And be it further enacted, That where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

* WHEN ACT OPERATES. [765]

XXXIV. And be it further enacted, That this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will reëxecuted or republished, or revived by any codicil, shall, for the purposes of this act, be deemed to have been made at the time at which the same shall be so reëxecuted, republished, or revived; and that this act shall not extend to any estate per autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

SCOTLAND.

XXXV. And be it further enacted, That this act shall not extend to Scotland.

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