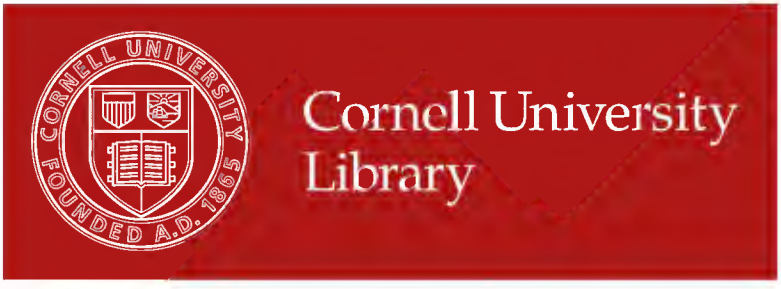

A

TREATISE ON WILLS.

BY

THOMAS JARMAN, Esq.

THE FIFTH AMERICAN
FROM
THE FOURTH ENGLISH EDITION.

By MELVILLE M. BIGELOW, Ph.D.
OF THE BOSTON BAR.

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NOTE

TO THE FIFTH AMERICAN EDITION.

In the present volume, authorities are brought down to October, 1880; in the second volume, now in the press and soon to follow this one in publication, they will be brought down to the present time. The notes of the previous American editions have for the most part been rewritten and made one with the new matter. The Editor takes this occasion to make suitable acknowledgment to Mr. William E. Spear, of the Boston Bar, for valuable aid on both volumes, especially in the collection and arrangement of the statutes of the different states, and in making the indexes and tables of cases. It should be mentioned that reference to passages in this work is always made to the top paging, when not otherwise stated.

Boston, January 1, 1881.

PREFACE

TO THE FIRST EDITION.

SIXTEEN years have now elapsed since the writer diffidently presented to the profession his first publication on Testamentary Law, in the form of an edition of Powell on Devises, with a supplementary treatise on the Construction of Devises. The reception given to this work was such as abundantly to compensate for the severe labor which it exacted, and under which the health of its Editor more than once sank. This was followed, after the interval of a few years, by the Tenth Volume of the Precedents in Conveyancing, being the portion of that work which was devoted to the same subject. The materials afforded by these publications have been freely used in the present work; but considering the very large accessions since made to the adjudications on testamentary law, and that it has not escaped the activity of modern legislation, it will be obvious that many of the various subjects embraced by so extensive a range of disquisition, now present themselves under a different aspect, requiring, not only very large additions to the matter which composed the former works, but the rejection of no inconsiderable portion of that matter; and the writer is not ashamed to avow, that another, though certainly a less extensive, head of alteration arises from the changes which experience has wrought in some of the opinions of his earlier days. The result is, that probably more than one-half of the present treatise is entirely original; and the writer therefore feels that he has to subject his performance (as partially new) to the criticism of his professional brethren, whose kind consideration he again bespeaks, convinced that those who are the most competent to detect error, will be the most generous and indulgent in the appreciation of the difficulties which beset the inquirer into

the principles of one of the most intricate branches of the law. To those difficulties have been added the daily interruptions of professional avocation, which have long delayed, and have sometimes threatened wholly to prevent, the present publication. The recent Act has created some additional embarrassment to a writer on Wills, by introducing new principles of construction, partial in their application; for, by drawing a line between wills of an earlier and those of a later date, the legislature has diminished the importance, without permitting the rejection or the neglect of the old law. On these subjects, conciseness and compression have been specially aimed at, and some additional labor has been willingly incurred, in order to avoid incumbering the present work unnecessarily with matter which every passing day tends to render less practically useful.

THOMAS JARMAN.

New Square, Lincoln's Inn,
December, 1843.

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THE LAW

WITH RESPECT TO

WILLS.

CHAPTER I.

BY WHAT LOCAL LAW WILLS ARE REGULATED.

To ascertain by what local law a will is regulated is an inquiry which necessarily precedes all others relating to the instrument, and which seems, therefore, properly to form the commencing subject of the present treatise. After showing to what wills the English law applies, we shall proceed to discuss the nature of such law.

By what local law wills are regulated.

A will of fixed or immovable property is generally governed by the *lex loci rei sitæ;* and hence the place where such a will happens to be made and the language in which it is written are wholly unimportant, as affecting both its construction and the ceremonial of its execution; the locality of the devised property is alone to be considered. Thus, a will made in Holland (*a*) and written in Dutch must, in order to operate on lands in England, contain expressions which, being translated into our language, would comprise and destine the lands in question, and must be executed and attested in precisely the same manner as if the will were made in England (*b*).[1] And, of course, lands in England * belonging to a British subject domiciled abroad, who dies intestate, descend according to the English law (*c*). *2

Realty ruled by *lex loci rei sitæ.*

(*a*) In Holland the Code Napoleon prevails, subject to modifications which have been ingrafted thereon by Dutch legislation. See Gambier *v.* Gambier, 7 Sim. 263.

(*b*) Bovey *v.* Smith, 1 Vern. 85; see also Bowaman *v.* Reece, Pre. Ch. 577; Drummond *v.* Drummond, 3 B. P. C. Toml. 601; Brodie *v.* Barry, 2 V. & B. 131.

(*c*) See Doe d. Birtwhistle *v.* Vardill, 5 B. & Cr. 438. [As to land in Italy, see Earl Nelson *v.* Earl Bridport, 8 Beav. 547.]

[1] The American common law is in accord with the text: the law of the state or country in which the land lies governs the will. The authorities to this effect are very numerous. The following contain useful illustrations: Eyre *v.* Storer, 37 N. H. 114; Knox *v.* Jones,

In regard to personal, or rather movable property, the *lex domicilii*

47 N. Y. 389; Abell *v.* Douglass, 4 Denio, 305; Calloway *v.* Doe, 1 Blackf. 372, and notes; Story, Confl. Laws, § 474 and notes; 4 Burge, Comm. Col. & For. Law, pt. 2, c. 15, pp. 217, 218; 4 Kent, 513; 2 ib. 429; Robertson *v.* Barbour, 6 T. B. Mon. 527; Crofton *v.* Ilsley, 4 Greenl. 138; Potter *v.* Titcomb, 22 Me. 303, 304; Bailey *v.* Bailey, 8 Ohio, 239; Kerr *v.* Moon, 9 Wheat. 565; Darby *v.* Mayer, 10 Wheat. 465; Morrison *v.* Campbell, 2 Rand. 209; U. S. *v.* Crosby, 7 Cranch, 115; Varner *v.* Bevil, 17 Ala. 286; Cornelison *v.* Browning, 10 B. Mon. 425. A different rule has been adopted by statute in some of the states, as in Massachusetts, where by Gen. Stat. ch. 92, § 8, it is provided that a will made out of the state, which might be proved and allowed according to the laws of the state or country in which it was made, may be proved, allowed, and recorded in Massachusetts, and shall thereupon have the same effect as if it had been executed according to the laws of Massachusetts. See Bayley *v.* Bailey, 5 Cush. 245; Slocomb *v.* Slocomb, 13 Allen, 38. In the latter case the law finds a good illustration. It was decided under the foregoing statute that a nuncupative will made in another state, which would not have been valid had it been executed in Massachusetts, but might be proved and allowed in the state in which it was made, might be proved, allowed, and recorded in Massachusetts, having the same effect as any valid will, duly proved in that state. In many other states provision has been made by statute for allowing and recording foreign wills or wills made in sister states, according to the laws of the place where made. Thus, the record of a will, with the proof of it and the letters issued thereon, constitutes the probate of it in New Jersey, and entitles a New Jersey will to be filed for probate in Michigan. Wilt *v.* Cutler, 38 Mich. 189. See Irwin's Appeal, 33 Conn. 128; Manuel *v.* Manuel, 13 Ohio St. 458; State *v.* M'Glynn, 20 Cal. 233. And statutes also often provide that no effect shall be given to such wills unless made and executed according to their own laws. Such is the law of Maine, Alabama, North Carolina, and some other states. See Potter *v.* Titcomb, 22 Me. 300; Varner *v.* Bevil, 17 Ala. 286; Ward *v.* Hearne, 3 Jones, 326. In Michigan, wills made by persons domiciled within that state, but abroad at the time of execution, are required to be executed with no other formalities than those required at common law. High, App. 2 Douglass, 515. A will made in another state, and not executed in conformity with the laws of South Carolina, cannot be admitted to probate in South Carolina. Ganse *v.* Ganse, 4 McCord, 382. A will made in another state, if admitted to probate in Ohio, will pass lands in Ohio, though not executed according to the laws in Ohio. Bailey *v.* Bailey, 8 Ohio, 239; Meese *v.* Keefe, 10 Ohio, 362. The same principle was held in Dublin *v.* Chadbourn, 16 Mass. 433. This, however, is on the ground of the conclusiveness of the probate on all questions relating to the due execution of wills. In Vermont, a will made in another state cannot be read in evidence on trial of the title derived under it to lands in that state, unless a copy of such will is filed and recorded in the probate court in that state. Ives *v.* Allyn, 12 Vt. 589. See also Ex parte Povall, 3 Leigh, 816; Lancaster *v.* M'Bryde, 5 Ired. 421. Wills made in Virginia, and there proved and recorded, before the separation of Kentucky, will pass lands in the latter state. Gray *v.* Patton, 2 B. Mon. 12; Morgan *v.* Gaines, 3 A. K. Marsh. 613. In Virginia, it has been held that a will of lands in that state may be proved there, although it has been declared void in another state, where the testator resided. Rice *v.* Jones, 4 Call, 89; Morrison *v.* Campbell, 2 Rand. 217. A will executed in Pennsylvania, according to the laws of California, by a person domiciled in California, may be proved in Pennsylvania, and letters testamentary there granted. Flannery's Will, 24 Penn. St. 502. If, by the law of the country in which the land lies, a posthumous child, not provided for by the testator, is entitled to part of the estate, his rights will prevail, notwithstanding the law of the country in which the testator resided. Eyre *v.* Storer, 37 N. H. 114. It is not to be understood from the text that the foreign law will, in any case, be invoked as to the construction of ambiguous language; though, as to the interpretation of language which is not ambiguous, but which has a peculiar meaning in the foreign state or country where the land lies, the foreign law will govern. On the other hand, when the land lies within the state or country of the testator, the fact that the will was written and executed elsewhere will afford no ground for doing more than translating it (if in a foreign language) into equivalent English. Technical terms must be rendered in their equivalent, as such, unless they appear to have been used in their ordinary or popular sense; — then in their popular equivalent; and any real ambiguity found in the original must, it is apprehended, be treated like ambiguity in any ordinary case. See Wallace *v.* Att.-Gen., 35 Beav. 21; Martin *v.* Lee, 14 Moore, P. C. 142; Duhamel *v.* Ardovin, 2 Ves. Sr. 162. If at last the will, expounded accordingly, conform to the law where the land lies, it will be valid; otherwise not. And the invalidity will go to the whole or to but part of the will, according to the facts proved. See Story, Confl. Laws, § 479 *h*; Trotter *v.* Trotter, 3 Wils. & S. 407; S. C. 5 Bligh (N. S.), 502, 505. If the will of a party is made in the place of his actual domicile, but he is, in fact, a native of another country; or if it is made in his native country, but in fact his actual domicile at the time is in another country; still it is to be interpreted by reference to the law of the place of his actual domicile. Story, Confl. Laws, § 479 *f*; Harrison *v.* Nixon, 9 Peters, 483. Of course, no executor or administrator has any authority, as such, out of the state in which he has qualified. Campbell *v.* Sheldon, 13 Pick. 8.

prevails (*d*),[1] [that is to say, the law of the country in which the testator or intestate was domiciled at the time of his death (*e*). By a modern statute, indeed (*f*) some material exceptions (affecting chiefly the mode of execution by British subjects dying after 6th August, 1861, of wills of personal estate) are made to the general rule; but in most respects the rule still holds good, and will, therefore, be most conveniently dealt with before adverting in detail to the statutory exception.] Movables by *lex domicilii*.

If, then, a British or foreign subject dies domiciled in England, his personal property in England, in case he was intestate, will be distributed according to the English law of succession (*g*); and if he left a will, his testamentary capacity [(both as regards personal status (*h*) and the bequeathable quality of the property willed (*i*))] and the construction of the instrument (*k*), (whether this be Domiciled Englishman.

(*d*) This position respects only the devolution of the property, and not the court of administration, which, by our law is regulated by the *lex loci rei sitæ*. [Enohin *v.* Wylie, 10 H. L. Ca. pp. 19, 24, per Lords Cranworth and Chelmsford, following Preston *v.* Melville, 8 Cl. & F. 1, diss. Lord Westbury.

(*e*) Bremer *v.* Freeman, 10 Moo. P. C. C. 306; *i.e.* the law as it stood at the death; subsequent changes between death and the grant of probate or administration being disregarded. Lynch *v.* Paraguay, L. R. 2 P. & D. 268.

(*f*) 24 & 25 Vict. c. 114.

(*g*) Thorne *v.* Watkins, 2 Ves. 35; Bempde *v.* Johnstone, 3 Ves. 198; Balfour *v.* Scott, 6 B. P. C. Toml. 550; Bruce *v.* Bruce, id. 566, 2 B. & P. 229, n.

[(*h*) Price *v.* Dewhurst, 8 Sim. 299, 4 My. & Cr. 76; Robins *v.* Dolphin, 1 Sw. & Tr. 37, 7 H. L. Ca. 390.

(*i*) Kilpatrick *v.* Kilpatrick, 6 B. P. C. Toml. 584, cit.]

(*k*) Anstruther *v.* Chalmer, 2 Sim. 1; [Reynolds *v.* Kortwright, 18 Beav. 417; Boyes *v.* Bedale, 1 H. & M. 798; Peillon *v.* Brooking, 25 Beav. 218.]

[1] Moultrie *v.* Hunt, 23 N. Y. 394; Parsons *v.* Lyman, 20 N. Y. 103; Knox *v.* Jones, 47 N. Y. 389; Chamberlain *v.* Chamberlain, 43 N. Y. 424; Lawrence *v.* Kitteridge, 21 Conn. 577; Fellows *v.* Miner, 119 Mass. 541; Perin *v.* McMicken, 15 La. Ann. 154; High, Appellant, 2 Dougl. (Mich.) 515; Mills *v.* Fogal, 4 Edw. (N. Y.) 559; Hunt *v.* Mootrie, 3 Bradf. (N. Y.) 322; Bloomer *v.* Bloomer, 2 Bradf. 339; Schultz *v.* Dambmann, 3 Bradf. 379; Despard *v.* Churchill, 53 N. Y. 192; Nat *v.* Coons, 10 Mo. 543; Gilman *v.* Gilman, 52 Me. 165; Story, Confl. Laws, § 465; Crofton *v.* Ilsley, 4 Greenl. 138; Potter *v.* Titcomb, 22 Me. 304; 4 Kent, 513, 514; Irving *v.* M'Lean, 4 Blackf. 53; McConnell *v.* Wilcox, 1 Scammon, 373; Conover *v.* Chapman, Bailey, 2 436; Smith *v.* Union Bank of Georgetown, 5 Peters, 519; Barnes *v.* Brashear, 2 B. Monroe, 382; Meese *v.* Keefe, 10 Ohio, 362; In re Roberts's Will, 8 Paige, 519; Bempde *v.* Johnstone, 3 Vesey (Sumner's ed.), 198, note (*a*) and cases cited; Desesbats *v.* Berquier, 1 Binn. 336; Harrison *v.* Nixon, 9 Peters, 483, 504, 505; Somerville *v.* Somerville, 5 Vesey (Sumner's ed.), 750, and note (*a*); Turner *v.* Fenner, 19 Ala. 355. As to personal property, the rights of legatees, as well as the rights of the next of kin, in a case of intestacy, depend upon the laws of the country where the deceased, from whom the bequest or succession is claimed, had his home and domicile. Dawes *v.* Boylston, 9 Mass. 355; Stephens *v.* Gaylord, 11 Mass. 264; Olivier *v.* Townes, 14 Martin, 99; Schultz *v.* Pulver, 3 Paige, 182; Holmes *v.* Remsen, 4 Johns. Ch. 460; Harvey *v.* Richards, 1 Mason, 381; Jennison *v.* Hapgood, 10 Pick. 100; Davis *v.* Estey, 8 Pick. (2d ed.) 476, note (1); Porter *v.* Haydock, 6 Vermont, 374; Fay *v.* Haven, 3 Met. 109; Goodall *v.* Marshall, 11 N. H. 88; Campbell *v.* Sheldon, 13 Pick. 8; Dawes *v.* Head, 3 Pick. 128; Potter *v.* Titcomb, 22 Me. 300; Dixon *v.* Ramsay, 3 Cranch, 319; U. S. *v.* Crosby, 7 Cranch, 115; Stent *v.* McLeod, 2 McCord, Ch. 354, 359; Richards *v.* Dutch, 8 Mass. 506; Hunter *v.* Bryson, 5 Gill & J. 483; Kerr *v.* Moon, 9 Wheat. 565; Grattan *v.* Appleton, 3 Story, C. C. 755, 765; Garland *v.* Rowan, 2 Smedes & M. 617; Bradley *v.* Lowry, 1 Speers, Eq. 3, 13; Suarez *v.* Mayor of New York, 2 Sandf. 174, 177; Thomas *v.* Tanner, 6 T. B. Monroe, 52, 58; Dorsey *v.* Dorsey, 5 J. J. Marsh. 280; Atchison *v.* Lindsey, 6 B. Monroe, 86. 89; Leake *v.* Gilchrist, 2 Dev. 73; Ennis *v.* Smith, 14 How. 400. A clause, however, granting both real and personal property upon the same trust, is generally severable, the validity of one not depending upon the validity of the other; and though the real estate be situated in another country, the trust, so far as it relates to personalty within the country of the forum,

made in the testator's native or in his adopted country, or elsewhere, and wherever he may have died) must be tried by the law of England.[1] And it is scarcely neeessary to observe, that stock in the public funds is undistinguishable in this respect from other personal prop-
*3 erty (*l*). And the movable property * of such a person, which

(*l*) *Domicile as affecting legacy duty.* — In re Ewin, 1 Cr. & J. 151. In this case the question was, as to the liability of property to legacy duty, the discussion of which sometimes indirectly involves points as to domicile, alienage, &c. [Where the domicile of the testator is foreign, it is now settled beyond question that under no circumstances whatever is legacy duty payable. Re Bruce, 2 Cr. & J. 436, 2 Tyr. 475; Hay *v.* Fairlie, 1 Russ. 117; Logan *v.* Fairlie, 1 My. & Cr. 59, reversing the decision 2 S. & St. 284; Arnold *v.* Arnold, 2 My. & Cr. 256; Commissioners of Charitable Donations *v.* Devereux, 13 Sim. 14; Thomson *v.* Adv.-Gen., 12 Cl. & Fin. 1, 13 Sim. 153, 9 Jur. 217; Re Coales, 7 M. & Wels. 390. The cases of Att.-Gen. *v.* Cockerell, 1 Pri. 165, and Att.-Gen. *v.* Beatson, 7 Pri. 560, are now clearly overruled. Where the testator is domiciled in this country three cases arise: 1. If neither his personal representatives nor his effects ever come within the jurisdiction of the courts of this country, no question as to liability to duty can ever be raised. 2. Where a personal representative is constituted in this country for the purpose of recovering the testator's effects situated here, duty is payable not on that part alone which rendered representation necessary, but on the whole of the testator's effects. Att.-Gen. *v.* Napier, 6 Exch. 217; Re Ewin, 1 Cr. & J. 151; Re Coales, 7 M. & Wels. 390. 3. The third case is where the property is found in this country in the hands of the foreign representative, but no representative has been constituted in this country. This was the case in Jackson *v.* Forbes, 2 Cr. & J. 382, 2 Tyr. 354; S. C. in D. P. Att.-Gen. *v.* Forbes, 2 Cl. & Fin. 48, nom. Att.-Gen. *v.* Jackson, 8 Bli. 15, 3 Tyr. 982; the duty was held not payable, but the decision seems to have been rested by Lord Brougham on the fact that the property was appropriated in India as well as on the fact of the absence of a representative in this country. Lord Cottenham (Logan *v.* Fairlie, 1 My. & Cr. 59) referred it solely to the former ground; but in Att.-Gen. *v.* Napier, it was said appropriation had nothing to do with the question, and that Att.-Gen. *v.* Jackson went upon a mistaken notion of the testator's domicile, which was supposed in D. P. to have been in India, whereas in fact it was in England; at the same time, if Att.-Gen. *v.* Jackson really proceeded on the question of appropriation, it is equally difficult to reconcile it with the doctrine of Att.-Gen. *v.* Napier. The only way of reconciling the cases taken upon their respective facts is by referring the decision in Att.-Gen. *v.* Jackson to the absence of an English representative, though here again we are met by the dictum of Lord Cottenham, in Arnold *v.* Arnold, 2 My. & Cr. 273, to the effect that it was impossible that the liability of the legatee to duty could depend on an act of the executor in proving or not proving the will in this country; yet if Lord Cottenham be correct, it is difficult to see how the law could be enforced. The amount of duty, the fact whether any duty is payable, the person from whom it is to be recovered, in short, everything necessary to found a specific claim on the part of the Crown, depends on whether the will is valid or invalid, or whether revoked or altered by subsequent codicils; these are matters to be determined by the English law (the testator's domicile being English), and they remain undetermined if the will has not been proved in this country.

Estates *pur autre vie* are realty: the question whether they are liable to duty is therefore independent of the question of domicile. Chatfield *v.* Berchtoldt, L. R. 7 Ch. 192.

Succession duty, like legacy duty, is payable only where the deceased was domiciled in this country (Wallace *v.* Att.-Gen., L. R. 1 Ch. 1); but the property once received by the executor and invested here upon the trusts of the will, any subsequent devolution (as on the death of a tenant for life) confers a succession which attracts the duty. Att.-Gen. *v.* Campbell, L. R. 5 H. L. 524.

The question of *probate duty* does not depend on domicile, but (except in the case of personal estate appointed under a general power, which is expressly made subject to probate duty by 23 & 24 Vict. c. 15, s. 4) is payable on so much only of the testator's property as, but for the will, the ordinary would have been entitled to administer. Att.-Gen. *v.* Dimond, 1 Cr. & J. 356, 1 Tyr. 243; Att.-Gen. *v.* Hope, 1 Cr. M. & R. 530, 4 Tyr. 878, 2 Cl. & Fin. 84, 8 Bli. 44; Drake *v.* Att.-Gen., 10 Cl. & Fin. 257, affirming Platt *v.* Routh, 3 Beav. 257, 6 M. & Wels. 756; and overruling Att.-Gen. *v.* Staff, 2 Cr. & M. 124, 4 Tyr. 14; and Palmer *v.* Whitmore, 5 Sim. 178. Compare Att.-Gen. *v.* Bouwens, 4 M. & Wels. 171, as to foreign securities *transferable in this country by delivery*, which were held liable to duty as ordinary chattels. And see Pearse *v.* Pearse, 9 Sim. 430; Vandiest *v.* Fynmore, 6 Sim. 570; Fernandes' Executors' case, L. R. 5 Ch. 314; Att.-Gen. *v.* Pratt, L. R. 9 Ex. 140. As to certain Indian securities, see 23 & 24 Vict. c. 5.]

will be enforced. Knox *v.* Jones, 47 N. Y. 389.

[1] Story, Confl. Laws, §§ 479*f*, 479*g*; Harrison *v.* Nixon, 9 Peters, 483, 504, 505; 4 Burge, Comm. Col. & For. Law, part 2, c. 12, pp. 590, 591; Ferraris *v.* Hertford, 3 Curteis, 468; Westlake, International Law (2d ed.), §§ 106, 107.

is out of England at the time of his death, will also, it seems, generally speaking, follow the domicile; but this, of course, depends on the laws of the state in which the property is situate, which may not (though the codes of many civilized states do (*m*)) accord with our own in this particular. Sometimes, however, a difficulty occurs in the application of the principle, from the fact that the foreign state, though it recognizes * the general doctrine, yet imposes restrictions on the testamentary power unknown to the law of the adopted country, and from which it may not permit its citizens to escape, in regard to property within its jurisdiction, by a mere change of domicile. For instance, the French law does not, like our own, permit a man to bequeath his entire property away from his wife and children (*n*). Now, if a Frenchman dies domiciled in England, is it quite clear that his movable property in France would be subject to British law, so as to pass by such a will? In such cases the Code Napoleon seems to draw a distinction between the acquisition of a foreign domicile by mere residence, and some other more decided acts of self-expatriation, such as that of becoming the naturalized subject of another state (*o*). *4

It follows, from the same rule, that if any person, whether a British subject or a foreigner, dies whilst domiciled abroad, the law of the place which at his death constituted his home will regulate the distribution of his movable (*p*) property in England, in case of intestacy, *i.e.* should he happen to have left no instrument which, according to the law of his adopted country, would amount to a testamentary disposition of such property (*q*) ; and if he left a will, the same law will determine its validity [both as regards personal competence in the testator (*r*) and the bequeathable nature of the prop- Domiciled foreigner.

(*m*) See Price *v.* Dewhurst, 4 My. & Cr. 83.

(*n*) Vide post, p. 5, note (*y*).

(*o*) Liv. 1, tit. 1, chap. 2, sect. 17.

(*p*) *Leaseholds are governed by the lex loci.* — The word *movable* is here used advisedly instead of *personal*, as the distinction between real and personal estate is peculiar to our own policy, and is not known to any foreign system of jurisprudence that is founded on the civil law, in which the only recognized distinction was between movable and immovable property. Leaseholds for years, therefore, which obviously belong to the latter denomination, though they are with us transmissible as personal estate, are governed by the *lex loci*, and do not follow the person; so that, if an Englishman domiciled abroad dies possessed of such property, it will devolve according to the English law. [See Freke *v.* Lord Carbery, L. R. 16 Eq. 461. It is shown in Bacon's Abr. tit. Leases, how it happened that leaseholds were held to pass to the executor. A lease for years was only a contract between lessor and lessee; and lessee, if evicted, could only recover damages in a *personal* action against lessor, not the possession. The benefit of such a contract of course passed to the executor; and though lessees were afterwards held entitled to recover the possession itself, no change was made in the rule of succession.

Since then the rule *mobilia sequuntur personam* is inapplicable to leaseholds, it follows (subject to 24 & 25 Vict. c. 114, s. 2, presently stated, and which speaks of "personal" estate) that to dispose of leaseholds a will must be executed according to 1 Vict. c. 26, and that the will of a domiciled foreigner not so executed, though it may be proved here, and will enable the executor to sell leaseholds (Hood *v.* Lord Barrington, L. R. 6 Eq. 218), will nevertheless not operate on the beneficial interest. The title of the executor is from the probate: the beneficial interest will devolve as undisposed of.]

(*q*) Somerville *v.* Lord Somerville, 5 Ves. 750; and see Hogg *v.* Lashley, 6 B. P. C. Toml. 577.

[(*r*) Re Osborne, 1 Deane, 4, 1 Jur. N. S. 1220; Re Maraver, 1 Hagg. 498.

*5 erty willed (*s*)], and will also regulate *the construction (*t*) of such will, of which, therefore, an English court will not grant probate unless it appear to be an effectual testamentary instrument according to the law of the domicile.[1] And, by parity of reasoning, the English court *will* grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicile, though invalid and incapable of operation as an English will. Thus (*u*), probate was granted of the will of a married lady, who at the time of her death was domiciled in Spain (of which country she was, it seems, also a native), on its being shown that by the Spanish law a *feme covert* may, under certain limitations, dispose of her property by will as a *feme sole*.

Ancillary probate.

And it is the constant practice of the court here to grant [ancillary] probate of wills of [testators domiciled in foreign countries] which have been previously proved there, without inquiring [or permitting inquiry] into the grounds of the [foreign] proceeding, though the bulk of the property of the deceased testator should happen to be in England (*x*).[2]

Effect where probate is granted in error.

Where probate has been granted of an instrument eventually ascertained not to be testamentary according to the law of the domicile, this proceeding (though it vests the whole personalty which is within the jurisdiction of the court in the executor, as to whose *legal* title the grant of probate is conclusive[3]) does not regulate or affect the ultimate destination of the property, which, therefore, the executor will be bound to distribute according to the law of the domicile (*y*).

Where the construction of the will is to be regulated by foreign law,

(*s*) Kilpatrick *v.* Kilpatrick, 6 B. P. C. 584, cit.; Doglioni *v.* Crispin, L. R. 1 H L. 301.]

(*t*) Bernal *v.* Bernal, 3 My. & Cr. 559 n. [Barlow *v.* Orde, L. R. 3 P. C. 164 (*lex loci* admitting illegitimate with legitimate children).]

(*u*) Re Maraver, 1 Hagg. 498. As to the law of Spain respecting testamentary dispositions, vide Moore *v.* Budd, 4 Hagg. 346.

(*x*) Re Read, 1 Hagg. 474; [Hare *v.* Nasmyth, 2 Add. 25; Re Gaynor, 4 No. Cas. 696; Enohin *v.* Wylie, 10 H. L. Ca. 1; Re Earl, L. R. 1 P. & D. 450; Miller *v.* James, L. R. 3 P. & D. 4; Re Cosnahan, L. R. 1 P. & D. 183.]

(*y*) Thornton *v.* Curling, 8 Sim. 310. In this case, an Englishman went to reside in France, where he was domiciled at his death, and left a will providing for an illegitimate child and its mother, to the exclusion of his wife and legitimate child, which the French law does not permit. Donations by a Frenchman (whether testamentary or by act *inter vivos*) must not exceed a moiety if he leave at his decease one legitimate child, a third if he leave two, and a fourth if he leave three or more; the descendants of a deceased child being considered as one. Moreover, a Frenchman cannot dispose of the whole of his property, if he leaves only ascendants.

1 Hyman *v.* Gaskins, 5 Ired. 267; In re Osborne, 33 Eng. Law & Eq. 625. If after making a will, valid by the laws of the place where the testator was domiciled, he changes his domicile to a place by the laws of which the will thus made is not valid, and there dies, the will is void. If, however, before his death, he should return and resume his former domicile, where his first will or testament was made, its original validity will revive also. Story, Confl. Laws, § 473; 2 Greenl. Ev. § 668; 4 Burge, Comm. Coll. & For. Law, 550, 581.

2 A person claiming under a will executed and proved in one State cannot sue for or claim a legacy in another State, unless the will be proved in the latter State, or unless the action be authorized by some statute of the latter State. Carr *v.* Lowe, 7 Heisk. 84; Kerr *v.* Moon, 9 Wheat. 565; Richards *v.* Dutch, 8 Mass. 506. See, further, Fleeger *v.* Pool, 1 M'Lean, 189.

3 The same is true of real estate, where the probate court has exclusive jurisdiction over wills of both real and personal estate. Bailey *v.* Bailey, 8 Ohio, 239; Dublin *v.*

the opinion of an advocate versed in such law is obtained, for the information and guidance of the English court on which devolves the task of construing it (*z*); [or the English * court may remit a case for the opinion of a court in any other part of the British dominions (*a*), or of a court in any foreign country with which there is a convention for that purpose (*b*).] But if the point in dispute depend upon principles of construction common to both countries, the court will adjudicate upon the question, according to its own view of the case, without having recourse to the assistance of a foreign jurist (*c*).[1] Foreign law how ascertained. *6

As a will, in regard to movable property, is construed according to the law of the domicile, there is, it will be observed, nothing on the face of it which gives the peruser the slightest clue as to the nature of the laws by which its construction is regulated; it may have been made in England, be written in the English language, the testator may have

[(*z*) Harrison *v.* Harrison, L. R. 8 Ch. 346: *i.* e. of an advocate practising in the particular foreign country — study elsewhere of its laws is insufficient. Bristow *v.* Sequeville, L. R. 5 Ex. 275; Re Bonelli, 1 P. D. 69.

(*a*) 22 & 23 Vict. c. 63: acted on in Login *v.* Princess of Coorg, 30 Beav. 632.

(*b*) 24 Vict. c. 11.]

(c) Bernal *v.* Bernal, 3 My. & C. 559. [Collier *v.* Rivaz, 2 Curt. 855; Earl Nelson *v.* Earl Bridport, 8 Beav. 527, 547; Yates *v.* Thompson, 3 Cl. & Fin. 586; Martin *v.* Lee, 9 W. R. 522. But the court here is bound by a previous judgment *in re* of the foreign court. Doglioni *v.* Crispin, L. R. 1 H. L. 301.]

Chadbourn, 16 Mass. 433; Ex parte Fuller, 2 Story, C. C. 327, 328, 329; Laughton *v.* Atkins, 1 Pick. 548, 549; Tompkins *v.* Tompkins, 1 Story, C. C. 554.

[1] Concerning proof of the foreign law, the following are the conclusions of the courts: 1. Evidence as to the unwritten law is to be proved as matter of fact by persons skilled in that law, *i. e.* by experts. Ely *v.* James, 123 Mass. 36; Kline *v.* Baker, 99 Mass. 253; Holman *v.* King, 7 Met. 384; Dyer *v.* Smith, 12 Conn. 384; Moore *v.* Gwynn, 5 Ired. 187; Ingraham *v.* Hart. 11 Ohio, 255; Ennis *v.* Smith, 14 How. 400, 426; Story, Confl. Laws, § 642; Church *v.* Hubbart, 2 Cranch, 238; Brush *v.* Wilkins, 4 Johns. Ch. 520; Francis *v.* Ocean Ins. Co., 6 Cowen, 429; Delafield *v.* Hand, 3 Johns. 310; Smith *v.* Elder, 3 Johns. 105. See Haven *v.* Foster, 9 Pick. 130; Talbot *v.* Seeman, 1 Cranch, 12, 38; Strother *v.* Lucas, 6 Peters, 763; Hill *v.* Packard, 5 Wend. 375; Brackett *v.* Norton, 4 Conn. 517; Denison *v.* Hyde, 6 Conn. 508; Ripple *v.* Ripple, 1 Rawle, 386; Raynham *v.* Canton, 3 Pick. 293, 296; Carnegie *v.* Morrison, 2 Met. 404, 405; Kenny *v.* Van Horne, 1 Johns. 385, 394; Woodbridge *v.* Austin, 2 Tyler, 364, 367; Lincoln *v.* Battelle, 6 Wend. 482; Bagley *v.* Francis, 14 Mass. 453; M'Rae *v.* Mattoon, 13 Pick. 53, 59; Wilson *v.* Smith, 5 Yerger, 398, 399; Frith *v.* Sprague, 14 Mass. 455; Hempstead *v.* Reed, 6 Conn. 480; Dyer *v.* Smith, 12 Conn. 384; 1 Greenl. Ev. §§ 486–489; Packard *v.* Hill, 2 Wend. 411. The unwritten law of a foreign country, or of another State, may also be proved by books of Reports and cases decided. Raynham *v.* Canton, 3 Pick. 293, 296; M'Rae *v.* Mattoon, supra; Dougherty *v.* Snyder, 15 Serg. & Rawle, 87; Lattimer *v.* Eglin, 4 Desaus. 26, 32; Brush *v.* Scribner, 11 Conn. 407. So by public history. Dougherty *v.* Snyder, supra. Sometimes certificates of persons of high authority have been allowed as evidence, without other proof. In re Dormoy, 3 Hagg. Eccles. 767, 769; Story, Confl. Laws, § 642. 2. The same appears to be true when the question is of the peculiar construction of a statute. Kline *v.* Baker, supra; Ely *v.* James, 123 Mass. 36. 3. The statute or written law must be proved by the law itself. Francis *v.* Ocean Ins. Co., 6 Cowen, 429; Delafield *v.* Hand, 3 Johns. 310; Lincoln *v.* Battelle, 6 Wend. 482; Ennis *v.* Smith, 14 How. 400, 426; Nelson *v.* Bridport, 8 Beav. 527. 4. The qualifications of the experts, or other questions of competency, are of course questions of law. Ib. 5. When the evidence admitted consists entirely of a written or printed document, statute, or judicial opinion, and no peculiar local construction is alleged to govern it, the question of its construction and effect must be determined by the court. Kline *v.* Baker; United States *v.* McRae, L. R. 3 Ch. 86; Di Sora *v.* Phillipps, 10 H. L. Cas. 624; Bremer *v.* Freeman, 10 Moore, P. C. 306; People *v.* Lambert, 5 Mich. 349; Owen *v.* Boyle, 15 Maine, 147; State *v.* Jackson, 2 Dev. 563. 6. As to the laws of the sister states, Congress has provided a mode for their authentication; but they may be admitted without such authentication, if otherwise proved to the satisfaction of the court. Taylor *v.* Bank of Illinois, 7 T. B. Mon. 576.

described himself as an Englishman (*d*), and it may have been proved in an English court; and yet, after all, it may turn out, from the extrinsic fact of the maker being domiciled abroad at his death, that the will is wholly withdrawn from the influence of English jurisprudence.

Execution of will of movables.

[As in other respects, so with regard to its execution, a will of movables must, as a general rule, be tried by the law of the testator's domicile at his death. So that an English court will not grant probate of the will of a testator domiciled in England, unless it be executed according to the law of England (*e*); nor of a testator domiciled abroad, unless it be executed according to the law of the foreign domicile (*f*). In Bremer *v.* Freeman (*g*), *7 the testatrix was an English subject resident at Paris, *and executed a will conformably to English law; but probate of it was refused on the ground that she was domiciled in France, and that the will was not valid according to French law.[1]

Lord Kingdown's Act.

To obviate such questions with regard to testators dying after 6th August, 1861, it is enacted by 24 & 25 Vict. c. 114, that (s. 1) every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his death) shall as regards *personal* estate be held to be well executed for the purpose of being admitted to probate, if the same be made according to the forms required *either* by the law of the place where the same was made, *or* by the law of the place where such person was domiciled when the same was made, *or* by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin: and (s. 2) that every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his death), shall as regards *personal* estate be held to be well executed, and shall be admitted to probate if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same was made. By s. 3 no will or other testamentary instrument shall be held to be revoked [or to have become invalid, nor shall the construction thereof be altered,

(*d*) This of course is not conclusive (as to which see Nevinson *v.* Stables, 4 Russ. 210), though the fact of a testator being described as resident abroad would produce suspicion and inquiry as to the foreign domicile.

[(*e*) Countess Ferraris *v.* M. of Hertford, 3 Curt. 468, 7 Jur. 262, 2 No. Cas. 230; Croker *v.* M. of Hertford, 4 Moo. P. C. C. 339, 8 Jur. 863, 3 No. Cas. 150.

(*f*) Stanley *v.* Bernes, 3 Hagg. 373; Moore *v.* Darell, 4 Hagg. 346.

(*g*) 10 Moo. P. C. C. 306. The case was a curious one; for the law of France does not permit a foreigner to acquire a domicile there, so as to affect the mode of making a will, without license from the government; in other words, without such license the foreigner may make a will according to the law of his original domicile. In France, therefore, the English will would have been held good (see Sug. R. P. S., p. 404; Collier *v.* Rivaz, 2 Curt. 855; *secus* as to intestate succession, 1 Ch. D. 270), and it had in fact been pronounced valid on that ground by the Prerogative Court (1 Deane, 192).

[1] But see Hamilton *v.* Dallas, L. R. 1 Ch. D. 257; Wharton, Confl. Laws (2d ed.) § 77a. *Contra*, Dupuy *v.* Wurtz, 53 N. Y. 556.

by reason of any subsequent change of domicile of the person making the same (*h*); nor (s. 4) is the act to invalidate any will or other testamentary instrument as regards *personal* estate which would have been valid if the act had not been passed, except as such will or instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by the act.

Thus, for the purpose of British probate, a choice is given among several forms of execution, all in addition (s. 4) to that which alone was formerly sufficient; and, in terms, the act is directed only to modes of execution; but it has been held that a testamentary instrument, depending on the act for the validity of its execution, must also depend for its legal effect on the local *law on which its execution is rested. Thus, in Pechell v. Hilderley (*k*), a British subject with an English domicile died in 1867, leaving a will and codicil, neither of which was executed according to the law of England, but the codicil (though not the will) was well executed according to the law of Italy, where it was made. By that law, as proved in the case, it could not stand alone without the will, and did not set up the will, although indorsed upon and referring to it. It was argued that the codicil being well executed according to the act, its legal effect must be determined by the *lex domicilii*, and that according to that law the codicil republished and made good the will (*l*). But Lord Penzance held otherwise. Whether such would be the effect of applying the English law in the manner proposed, he said it was not necessary to discuss, for he was of opinion that in determining the question whether any paper was testamentary, regard could be had to the law of one country only at a time, and that the mixing up of the legal precepts of two different countries could only result in conclusions conformable to neither. The court therefore pronounced against both documents.

— its effect on the legal operation of wills.

*8

The act affects British subjects only (*m*), and can only be enforced where the property in question is locally situate within British jurisdiction. Foreign courts are not bound to recognize the act in determining whether a given instrument is a valid will of personal property within their own jurisdiction: and thus the personal property, British and foreign, of a British subject may be distributable according to two distinct laws (*n*). Therefore], the necessity of conforming in the testamentary act to the law of the ultimate domicile is still an important doctrine to the numerous British residents in foreign countries; and

— affects British subjects only.

Suggestions as to wills of Englishmen domiciled abroad.

(*h*) Re Rippon, 32 L. J. Prob. 141, 3 Sw. & Tr. 177; Re Reid, L. R. 1 P. & D. 75. This section also excludes the further question whether resumption of the former domicile restored the will. Story, Confl. c. xi. s. 473; Williams, Exec. p. 352, n. (*h*), 6th ed.

(*k*) L. R. 1 P. & D. 673.

(*l*) Vide post, Ch. VI., Sect. 4.

(*m*) Including subjects by naturalization, Re Gally, 1 P. D. 438; Re Lacroix, 2 P. Div. 94.

(*n*) See Sug. R. P. S. 405-6: being the very [result which the rule *mobilia sequuntur personam* was established to prevent. 1 H. L. Ca. 15.]

it appears that the circumstance of the contents of the will indicating that the testator contemplated returning to England (but which intention he never executed (*o*),) [or even an express declaration that he intends to retain his domicile of origin (*p*),] is insufficient to exclude the law of his domicile ascertained by the facts of the case (*q*).[1]

If an Englishman, domiciled abroad, has real estate (including
*9 *in this definition property held by him for terms of years) in his native country, and also personal property there or elsewhere, he ought to make two wills, one devising his English lands, duly framed and executed for that purpose according to the forms of the English law, and the other bequeathing, if permitted, his personal (or rather his movable) estate conformably to the foreign law. Wills made under such circumstances require more than ordinary care, in order to avoid some perplexing questions arising out of the conflict in the laws governing the real and personal property respectively (*r*).

Such questions may arise, and indeed have most frequently arisen, in regard to the property of Englishmen domiciled in Scotland, or of Scotchmen domiciled in England; the law of succession and testamentary disposition being, in some respects, different in these two sections of the United Kingdom (*s*). Thus, in Balfour *v.* Scott (*t*), where a person domiciled in England died intestate, leaving real estate in Scotland, the heir was one of the next of kin, and claimed a share of the personal estate. To this claim it was objected, that, by the law of Scotland, the heir cannot share in the personal property with the other next of kin, except on condition of collating the real estate; that is, bringing it into a mass with the personal estate, to form one common subject of division (*u*). It was determined, however, that he was entitled to take his share without complying with that obligation, the case being regulated as to the movable property by the English law.

As to Scotland.

In Drummond *v.* Drummond (*x*) a person domiciled in England had real estate in Scotland, upon which he granted a heritable bond to secure a debt contracted in England. He died intestate; and the

(*o*) Stanley *v.* Bernes, 3 Hagg. 375.
[(*p*) Re Steer, 3 H. & N. 594.]
(*q*) As to the *animus revertendi*, see also Bruce *v.* Bruce, 2 B. & P. 229, n.
(*r*) See Brodie *v.* Barry, 2 V. & B. 130.
(*s*) In Scotland there [was formerly] no direct power of disposing of real estate by will, but if there was a conveyance previously executed according to the proper feudal forms, the party might by will declare the use and trust to which it should inure. Per Sir W. Grant, in Brodie *v.* Barry, 2 V. & B. 132. [But by 31 & 32 Vict. c. 101, s. 20, land in Scotland may now be disposed of directly by will.] Where a domiciled Scotchman dies intestate, leaving infant children, and possessed of property in Scotland and England, the Court of Session, it seems, appoints a factor to the children, to whom the English court grants administration. (Re Johnston, 4 Hagg. 182.)
(*t*) Stated in Somerville *v.* Lord Somerville, 5 Ves. 750, and cited 2 V. & B. 131; [and see Allen *v.* Anderson, 5 Hare, 163.]
(*u*) Ersk. Inst. Law of Scotland, 701, 5th ed.
(*x*) Cit. 2 V. & B. 132.

[1] If a party die *in itinere* from one domicile to another, his property will be distributed according to the law of the former domicile. State *v.* Hallett, 8 Ala. 159; Story, Confl. Laws, § 481 *a*, in note. See Monroe *v.* Douglas, 5 Madd. 379.

question was, by which of the estates this debt was to be borne? It was clear that, by the English law, the personal estate was the primary fund for the payment * of debts. It was equally clear that by the *10 law of Scotland, the real estate was the primary fund for the payment of the heritable bond. It was said for the heir, that the personal estate must be distributed according to the law of England, and must bear all the burdens to which it is by that law subject. On the other hand, it was contended that the real estate must go according to the law of Scotland, and bear all the burdens to which it is by that law subject. It was determined that the law of Scotland should prevail, and that the real estate must bear the burden (*x*).

Speaking of these two cases, Sir Wm. Grant has observed (*y*) —

"In the first case, the disability of the heir did not follow him to England; and the personal estate was distributed as if both the domicile and the real estate had been in England. In the second, the disability to claim exoneration out of the personalty did follow him into England; and the personal estate was distributed as if both the domicile and the real estate had been in Scotland." [1]

[But by the law of Scotland, as of England, real estate is only a subsidiary fund for the payment of movable debts; and if the Scotch heir of a domiciled Englishman has paid them, the law of the domicile allows him to recover against the personal estate (*z*). Conversely, English rules of marshalling in favor of legatees will not be applied so as to throw on Scotch real estate debts of a domiciled Englishman, to which it could not be made liable by the *lex loci* (*a*).

In all these cases the claim of the Scotch heir to exoneration or his liability to be charged was enforced by English courts in distributing the personal estate only where the laws of both countries agreed in conceding the claim or imposing the charge.

Even before Lord Kingsdown's Act a will of personalty made under a power formed an exception to the general rule, *mobilia sequuntur personam;* for if executed in the particular form * required by the power, it was, as it will still be, good without reference to the testator's foreign domicile, because the appointee takes, not under the instrument exercising, but under the instrument creating the power (*b*); and the latter instrument is

Will under a power is not governed by *lex domicilii.* *11

[(*x*) But an express direction by a testator domiciled in England for payment of all his debts out of a specified fund will include the heritable bond, Maxwell *v.* Maxwell, L. R. 4 H. L. 506. Locke King's Acts (post, Ch. XLVI.) do not extend to Scotland. A heritable bond will not pass by an English will; Jerningham *v.* Herbert, 4 Russ. 388; but where there is an English security, and the debt is further secured by a Scotch heritable bond, the debt will pass by an English will; Bucclengh *v.* Hoare, 4 Mad. 467; Cust *v.* Goring, 18 Beav. 383. See further, as to the nature of heritable bonds, Bell's Commentaries on the Laws of Scotland, 206; Ersk. Inst. 194.]

(*y*) 2 V. & B. 132. [(*z*) Earl of Winchelsea *v.* Garetty, 2 Keen, 293.

(*a*) Harrison *v.* Harrison, L. R. 8 Ch. 342.

(*b*) Tatnall *v.* Hankey, 2 Moo. P. C. C. 342; Re Alexander, 1 Sw. & Tr. 454, n., 29 L. J. Prob. 93; Re Hallyburton, L. R. 1 P. & D. 90.

[1] See Story, Confl. Laws, §§ 485–489.

to be construed according to the law of the place where it is executed, if it deals with movables, and according to the *lex loci rei sitæ* if with immovables (*c*). However, in D'Huart *v.* Harkness, (*d*), where, by an English instrument, power was given to appoint a money fund "by will duly executed," it was held that this did not mean any one particular form of will recognized by the law of this country, but any will entitled to probate here, and that the will of the donee, having been admitted to probate, was, *therefore*, a good exercise of the power. Thus it came back to trying the validity of the will by the law of the testatrix's domicile (*e*). She was domiciled abroad, and her will conformed to the law of her domicile. If she had been domiciled here, the will would not have been a valid appointment (*f*). But if a power requires a will to be executed in a particular form, a will executed in that form may be a valid appointment, though not executed according to the law of the domicile (*g*).

nor where there is a treaty to the contrary.

Another exception to the general rule exists where by treaty between this country and the country of domicile it is agreed that the English law shall prevail. Thus subjects of the Ottoman Empire cannot dispose of their property by will, but by treaty English subjects domiciled there are allowed to do so, and their wills must be executed according to the English law (*h*).

Domicile how ascertained.

A statement of some of the more important rules for ascertaining the domicile of a testator or intestate, and a reference to some of the cases of most frequent occurrence, may here be made (*i*). The law attributes to every one as soon as he is *born the domicile of his father if he be legitimate, and the domicile of the mother if illegitimate. This is the domicile of origin, and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For, as soon as an individual is *sui juris*, it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of

Domicile of origin

*12

— of choice.

Recurrence of domicile of origin.

(*c*) Story, Confl. c. viii.; 3 Burge, pt. 2, c. 20.

(*d*) 34 Beav. 324 (case before Lord Kingsdown's Act).

(*e*) It is presumed that the will was proved in the ordinary way, and not merely on an allegation that it was in execution of a power (Barnes *v.* Vincent, 5 Moo. P. C. 201). The latter proceeding would have decided nothing, and would have given the Court of Construction no ground on which to build its argument. Vide post, Ch. II.

(*f*) Re Daly's Settlement, 25 Beav. 456. (*g*) Per Romilly, M. R., 34 Beav. 328.

(*h*) Maltass *v.* Maltass, 3 Curt. 234, 1 Rob. 67, 7 Jur. 135, 8 Jur. 860, 2 No. Cas. 33, 3 No. Cas. 257.

(*i*) See Lord Westbury's judgment, Udny *v.* Udny, L. R. 1 H. L. Sc. 441. By stat. 24 & 25 Vict. c. 121, rules are made for determining the question of domicile as between this country and any other with which the sovereign may have entered into a convention for that purpose. As to the operation of this act see Sugd. R. P. S. p. 405.

Domicile is distinct from allegiance or nationality, per Lord Westbury, L. R. 1 H. L. Sc. 459; Brunel *v.* Brunel, L. R. 12 Eq. 298.

[the domicile of choice, but it revives and exists whenever there is no other domicile (as when the domicile of choice is in fact abandoned (*k*) with the intention of never returning), and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a domicile of choice (*l*). Domicile of choice is constituted by residence freely chosen and intended to continue for a non-limited period; and length of residence is a most important ingredient from which to infer the *animus manendi* (*m*).]

Where an Englishman or Scotchman divides his time about equally between the two countries, the actual domicile is sometimes difficult to be ascertained, from the absence of preponderating evidence in favor of either.[1] Such was the case of Lord Somerville (*n*), a Scotchman by birth and extraction, originally domiciled in Scotland, who [was elected a representative peer for Scotland] took a house in London, and lived there half the year, the remainder of which he spent in Scotland, where he still had an establishment: he died at his house in London. Sir R. P. Arden, M. R., after an elaborate argument, held that the original domicile remained unchanged, and, consequently, the succession to the personal property of the deceased nobleman (who had died intestate) was to be governed by the law of Scotland. The argument in favor of the English domicile was urged

Divided residence.

(*k*) The intention without the act of abandonment is insufficient, Re Raffenell, 3 Sw. & Tr. 49, 32 L. J. Prob. 203.

(*l*) King *v.* Foxwell, 3 Ch. D. 518.

(*m*) Cockrell *v.* Cockrell, 25 L. J. Ch. 732; Doucet *v.* Geoghegan, 9 Ch. D. 441.]

(*n*) 5 Ves. 750, [and see Forbes *v.* Forbes, Kay, 353. The duties of an English peer as such do not prevent his acquiring a foreign domicile, Hamilton *v.* Dallas, 1 Ch. D. 257. For the purposes of succession a man cannot have more than one domicile. Ib.

[1] The question of a person's domicile or place of abode is a question of fact. It is in most cases easily determined by a few decisive facts; but cases may be readily conceived where the circumstances tending to fix the domicile are so nearly balanced that a slight matter will turn the scale. There are certain well-settled maxims on this subject. These are, that every person has a domicile somewhere; and no person can have more than one domicile for one and the same purpose at the same time. It follows from these maxims that a man retains his domicile of origin till he changes it by acquiring another; and so each successive domicile continues until changed by acquiring another. And it is equally obvious that the acquisition of a new domicile does, at the same instant, terminate the old one. Opinion of the Judges of the Supreme Court of Massachusetts, in Supplement to 5 Met. 588, 589. See Abington *v.* North Bridgewater, 23 Pick. 170; Thorndike *v.* City of Boston, 1 Met. 242; Kilburn *v.* Bennett, 3 Met. 199; Moore *v.* Wilkins, 10 N. H. 455, 456; Greene *v.* Greene, 11 Pick. 411, 416; Walke *v.* Bank of Circleville, 15 Ohio, 288, 289; Bradley *v.* Lowry, 1 Speers, Eq. 3, 15; In re Roberts's Will, 8 Paige, 519. The mere place of birth or death does not constitute the domicile. Somerville *v.* Somerville, 5 Ves. 750. See Harvard College *v.* Gore, 5 Pick. 372, 373. Two things must concur to constitute a domicile; first, residence; and, secondly, the intention to make it the home of the party. Harvard College *v.* Gore, supra. See Jennison *v.* Hapgood, 10 Pick. 77; Hallowell *v.* Saco, 5 Greenl. 143; Casey's case, 1 Ashmead, 126; Greene *v.* Windham, 13 Me. 225, 228; Gorham *v.* Springfield, 21 ib. 58; State *v.* Hallett, 8 Ala. 159. Actual residence is not necessary to retain a domicile once acquired. It is retained by the mere intention not to change it. Ib. Sackett's case, 1 Mass. 58; Abington *v.* Boston, 4 Mass. 312; Granby *v.* Amherst, 7 Mass. 1; Lincoln *v.* Hapgood, 11 Mass. 350; Sears *v.* City of Boston, 1 Met. 250; Bradley *v.* Lowry, supra; Thorndike *v.* City of Boston, supra; Know *v.* Waldoborough, 3 Greenl. 455; Waterborough *v.* Newfield, 8 ib. 203, 205; Shattuck *v.* Maynard, 3 N. H. 123; Cadwalader *v.* Howell, 3 Harrison, 138. In regard to the subject of domicile, see Story, Confl. Laws, ch. 3, § 39, et seq.; 2 Williams, Executors (6th Am. ed.), 1516 et seq., and notes; Somerville *v.* Somerville, 5 Ves. (Sumner's ed.) 750, and notes; Greene *v.* Greene, 11 Pick. 410; Craigie *v* Lewin, 4 Curteis, 435.

on behalf of the relations of the half-blood, whom the law of Scot-
*13 land excluded. Had the deceased nobleman had no * original domicile in either of the two countries which in his later life he alternately made his home, the difficulty of applying the principle adopted by the M. R. as the ground of his decision would have been greatly increased; in such a case the question would be, whether this state of things did not let in the original (*i. e.*, in the case supposed, the foreign) domicile. [In cases of residence equally divided between two places, it has been said that the wife's constant residence in one of them is strong evidence of animus in favor of domicile in that place (*o*).]

"The question of domicile," said Lord Loughborough, in the case of Bempde *v.* Johnstone (*p*), "*primâ facie*, is much more a question of fact than of law.[1] The actual place where a person is, is *primâ facie*, to a great many purposes, his domicile. You encounter that, if you show it is either constrained,[2] or from the necessity of his affairs, or transitory, that he is a sojourner, and you take from it all character of permanency. If, on the contrary, you show that the place of his residence is the seat of his fortune, or the place of his birth, upon which I lay the least stress; but, if the place of his education, where he acquired all his early habits, friends and connections, and all the links that attach him to society are found there; if you add to that, that he had no other fixed residence upon an establishment of his own, you answer the question." [3]

Residence of necessity, — in public service, &c.

[If the residence is "constrained" by external necessity, as by the duties of military or naval service (*q*); or of a temporary political (*r*) or judicial (*s*) office; by imprisonment (*t*), or by flight from civil commotion or revolution (*u*); it
*14 will not confer * a domicile. So, neither an ambassador (*x*), nor a consul (*y*), loses his original domicile by residence in the foreign country where he is accredited. But if a consul engage in

[(*o*) Forbes *v.* Forbes, Kay, 364. But see per Wickens, V. C., Douglas *v.* Douglas, L. R. 12 Eq. 647.]

(*p*) 3 Ves. 201 [Udny *v.* Udny, sup.; Stevenson *v.* Masson, L. R. 17 Eq. 78.

(*q*) Phillim. Domicile, p. 79. Persons entering the military service of a *foreign* state acquire the domicile of that state. Ib. Where, as in the United Kingdom, different laws prevail in different parts, a domicile in one, as Jersey or Scotland, is not altered by entering the military or naval service of the kingdom. Re Patten, 6 Jur. N. S. 151; Brown *v.* Smith, 15 Beav. 444. But service under the East India Company gave an Indian domicile, Bruce *v.* Bruce, 2 B. & P. 229; Forbes *v.* Forbes, Kay, 356. However, with a few immaterial differences, the stat. 1 Vict. c. 26, was made law in India by an act of council, No. 25, A. D. 1838, and applies to all wills made on or after 1st February, 1839. And by the Indian Succession Act (Act X.), 1865, succession to immovable property in India is regulated by the law of India; that to movables by the law of the domicile. See Macdonald *v.* Macdonald, L. R. 14 Eq. 60.

(*r*) Att.-Gen. *v.* Pottinger, 6 H. & N. 733, 747, Governor of the Cape and of Madras.

(*s*) Att.-Gen. *v.* Rowe, 1 H. & C. 31, Chief Justice of Ceylon.

(*t*) Phillim. Domicile, p. 87.

(*u*) De Bonneval *v.* De Bonneval, 1 Curt. 856.

(*x*) Story, Confl. s. 48; Phillim. Dom. p. 79.

(*y*) Sharpe *v.* Crispin, L. R. 1 P. & D. 611.

[1] Opinion of the Judges of the Supreme Judicial Court of Massachusetts in Supplement to 5 Met. 588.

[2] See Grant *v.* Dalliber, 11 Conn. 234, 238.

[3] See the note of Mr. Chancellor Kent on this subject, 2 Kent, 430.

trade there, his character of consul is, for some purposes at least, merged in that of merchant (*z*). And if, being already domiciled in a foreign country, a man be appointed by his own sovereign ambassador (*a*) or consul (*b*) in that country, his original domicile is not thereby restored *quoad* succession to personal property. On the other hand, a life employment abroad in the public service alters the domicile (*c*).

One who settles as a trader in a foreign country will thereby commonly acquire a domicile in that country (*d*); nor is the contrary to be inferred merely because, being a British subject, he has the benefit of treaties which, without making special provision for testamentary questions (*e*), secure to him certain immunities and privileges, and because he invariably acts and regards himself as an Englishman (*f*). Nor will his being an officer in the British service on half-pay, and (in order to retain his pay) requiring and obtaining leave of absence (*g*), nor being an officer on unlimited furlough, subject to a positive obligation to return to duty when ordered (*h*), prevent his acquiring a domicile other than British; though such an obligation would be strong to rebut any presumption that a domicile was contemplated in a foreign country where the obligation could not be enforced, for an intention contrary to duty is not to be presumed (*i*).

—as trader.

Officer on half-pay.

Residence in any place for health's sake is of dubious import; and further manifestation of intention is requisite before such residence can be assumed to be permanent (*k*).]

Residence for health's sake.

*It has been made a question, whether infant children, who, after the death of the father, remain under the care of their mother, follow the domicile which she may from time to time acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority in such cases seems to be in favor of the mother's domicile; and, therefore, where an Englishman, domiciled in Guernsey, died there, and the widow came to and took up her residence in England, bringing her children with her; it was held that the succession to the

*15

Domicile of children.

(*z*) Phillim. Domicile, pp. 124, 125. By the rules of their service British Consuls are forbidden to take part in mercantile affairs. Sharpe *v.* Crispin, L. R. 1 P. & D. 617.

(*a*) Heath *v.* Sampson, 14 Beav. 441; Att.-Gen. *v.* Kent, 1 H. & C. 12.

(*b*) Sharpe *v.* Crispin, L. R. 1 P. & D. 611.

(*c*) Commissioners of Inland Revenue *v.* Gordon's Executors, 12 Cas. Court Sess. 657. The cases decided on service with the East India Company, sup. n. (*q*), are to the like effect.

(*d*) Cockrell *v.* Cockrell, 2 Jur. N. S. 727; 25 L. J. Ch. 730; Allardice *v.* Onslow, 12 W. R. 397; Doncet *v.* Geoghegan, 9 Ch. D. 441.

(*e*) Maltass *v.* Maltass, 3 Curt. 231, 1 Rob. 67, 7 Jur. 135, 8 Jur. 860, 2 No. Cas. 33, 3 No. Cas. 257.

(*f*) Moore *v.* Budd, 4 Hagg. 346.

(*g*) Cockrell *v.* Cockrell, 25 L. J. Ch. 730. See also Commissioners of Inland Revenue *v.* Gordon's Executors, 12 Cas. Court Sess. 657.

(*h*) Att.-Gen. *v.* Pottinger, 6 H. & N. 733, 747; Forbes *v.* Forbes, Kay, 359. Secus, if the furlough be for a limited period; Craigie *v.* Lewin, 3 Curt. 435, 7 Jur. 519, 2 No. Cas. 185.

(*i*) Hodgson *v.* De Beauchesne, 12 Moo. P. C. C. 285.

(*k*) See Hoskins *v.* Matthews, 8 D. M. & G. 13; and per Wood, V. C., Kay, 367.]

personal property of two of her children, who died there at an early age, was to be governed by the law of England, there being no ground to impute the removal to fraudulent intention (*l*).[1]

(*l*) Pottinger *v.* Wightman, 3 Mer. 67; but see Story, s. 46. [The general rule is well known that infants and married women cannot change their domicile by their own acts. See Kay, 353, Robins *v.* Dolphin, 1 Sw. & Tr. 37, in D. P. 29 L. J. Prob. 11; Re Daly's Settlement, 25 Beav. 456; Yelverton *v.* Yelverton, 29 L. J. Matr. 34. So in the case of one lunatic from infancy, Sharpe *v.* Crispin, L. R. 1 P. & D. 611. But the scope of this treatise does not admit of a full exposition of the law of domicile; this will be found in books specially devoted to the subject; and see Hayes & Jarman, Conc. Forms of Wills, p. 543, 8th ed. by Dunning.]

[1] See 2 Macpherson, Infants (Lond. ed. 1842), 578, 579; Story, Confl. Laws, § 46. Whether a minor can gain a new domicile with the consent of his father, who does not change his own, see 2 Macpherson, supra; Story, Confl. Laws, note. The domicile of a minor or of a person *non compos mentis*, under guardianship may be changed by the direction or with the assent of the guardian, express or implied. Holyoke *v.* Haskins, 5 Pick. 20; Leeds *v.* Freeport, 1 Fairf. 356; 2 Kent, 227, note. See Upton *v.* Northbridge, 15 Mass. 239; Cutts *v.* Haskins, 9 Mass. 543; Buckland *v.* Charlemont, 3 Pick. 173; Guier *v.* O'Daniel, 1 Binn. 349, note; Story, Confl. Laws, 46, note. But the domicile of a guardian was held not necessary to be the domicile of his minor ward, in School Directors *v.* James, 2 Watts & S. 568. See 2 Kent, 227, in note.

CHAPTER II.

FORM AND CHARACTERISTICS OF THE INSTRUMENT.

A WILL is an instrument by which a person makes a disposition (*a*) of his property, to take effect after his decease, and which is *in its own nature* ambulatory and revocable during his life.[1] Ambulatory nature of wills. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is, in such case, produced by the express terms, and does not result from the nature of the instrument. Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of A. in fee, the effect upon the usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A. in fee; and yet the case fully illustrates the distinction in question; for, in the former instance, A., *immediately* on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation.

[A will may be made so as to take effect only on a contingency, and if the contingency does not happen, the will ought not to be admitted to probate (*b*).[2] Contingent wills. The contingency will generally attach to every part of the will, *e.g.* to a clause revoking former wills (*c*). But a codicil in other respects contingent will be admitted to probate if it expressly confirms the will, for this operates as a re-execution of the will (*d*). A reference to some impending danger is common to most of these cases, * and the question is whether the possible occurrence of the event is the reason for the particular disposition which the testator makes of his property, as where *17

[(*a*) Where one by will said, "I propose to give the residue by codicil, or otherwise to let it devolve as if I had died intestate," and he left no codicil, he was held not to have disposed of the residue, Ash *v.* Ash, 10 Jur. N. S. 142.

(*b*) Parsons *v.* Lanoe, 1 Ves. 190, 1 Wils. 243; Sinclair *v.* Hone, 6 Ves. 607.

(*c*) Re Hugo, 2 P. D. 73.

(*d*) Re Da Silva, 30 L. J. Prob. 171.

1 Brown *v.* Betts, 9 Cow. 208. The term includes every kind of testamentary act emanating from a sound mind and manifested by writing (Bayley *v.* Bailey, 5 Cush. 245) or by nuncupation. Slocomb *v.* Slocomb, 13 Allen, 38. It follows that a separate and distinct writing revoking a will, when duly executed, is itself a will. Bayley *v.* Bailey, supra.

2 Wagner *v.* M'Donald, 2 Har. & J. 346; Todd's Will, 2 Watts & S. 145; Dougherty *v.* Dougherty, 4 Met. (Ky.) 25; Vol. 2, p. 2, n.

he says, "Should anything happen to me on my passage to W., I leave," &c. (*e*); or only the reason for making a will, as where he says, "In case of accident, being about to travel by railway, I bequeath," &c. (*f*). A will may also be made contingent on the assent of another person (*g*).

A will intended to take effect as an exercise of a power, is not necessarily conditional on the existence of the power, if the testator has an interest independent of the power (*h*), or a power not expressly referred to (*i*), sufficient to support the disposition: for, if an intention appears to dispose of the property, it matters not that the testator mistook the origin or nature of his dispositive power.

Where the will is, in terms, clearly contingent, and the contingency has failed, the will cannot, either as to real estate (*k*), or, since 1 Vict. c. 26, as to personal estate (*l*), be set up but by some act amounting to a re-execution of it (*m*). Without some such act it is a nullity, and a previous will stands unrevoked (*n*). When on the death of the testator the event is still in suspense, general probate will be granted at once (*o*). Of course, the question still remains open what effect the will is to have.

Joint will.

Two or more persons may make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon the death of each, as if he had made a separate will (*p*). But a *18 joint will made by two persons, to take effect after the * death of both, will not be admitted to probate during the life of either (*q*).[1]

(*e*) Roberts *v.* Roberts, 1 Sw. & Tr. 337, 31 L. J. Prob. 46; Re Porter, L. R. 2 P. & D. 22; Re Robinson, ib. 171; Lindsay *v.* Lindsay, ib. 459; Re Hugo, 2 P. D. 73.

(*f*) Re Thorne, 4 Sw. & Tr. 36, 34 L. J. Prob. 131; Re Dobson, L. R. 1 P. & D. 88; Re Martin, ib. 380. (*g*) Re Smith, L. R. 1 P. & D. 717.

(*h*) Southall *v.* Jones. 1 Sw. & Tr. 298, 28 L. J. Prob. 112, 30 Beav. 187; Sing *v.* Leslie, 2 H. & M. 68. (*i*) Re Wilmot, 29 Beav. 644; Bruce *v.* Bruce, L. R. 11 Eq. 371.

(*k*) Parsons *v.* Lanoe, 1 Ves. 190, 1 Wils. 243.

(*l*) Roberts *v.* Roberts, supra; Re Winn, 2 Sw. & Tr. 147. *Secus*, before 1 Vict. c. 26, Burton *v.* Collingwood. 4 Hagg. 176; Strauss *v.* Schmidt, 3 Phillim. 209.

(*m*) Re Cawthron, 33 L. J. Prob. 23. (*n*) Re Robinson, L. R. 2 P. & D. 171.

(*o*) Re Cooper, 1 Deane, Eccl. R. 9. It is presumed, though it is not so stated in the report, that the children were minors. See also Re Bangham, 1 P. D. 429.

(*p*) Re Stracey, 1 Deane, Eccl. R. 6, 1 Jur. N. S. 1177.

(*q*) Re Raine, 1 Sw. & Tr. 144.

[1] The text scarcely discloses the difficulties which the courts have found in the consideration of joint wills. In Darlington *v.* Pulteney, 1 Cowp. 260, 268, Lord Mansfield observed that there could not be a joint will; but whether he meant this as an absolute proposition of law, or as an assertion merely that a joint will would not accomplish the requirement of the power of which he was speaking, or something else, is not clear. However, Sir John Nicholl declared in Hobson *v.* Blackburn, 1 Addams, 274, upon an offer to make probate of a joint will, that he must reject the offer on the ground that such an instrument was unknown to the testamentary law of England. It might be valid in equity to the extent of making the devisees of the will trustees for performing the decedent's part of the compact; but it was not a will, because it was irrevocable by any one of the testators. In this case of Hobson *v.* Blackburn, the joint will had previously been probated on the death of one of the three testators as to his estate. Then, on the death of one of the survivors, a separate will of that party was offered by donees under it, while one of the executors of the original will offered that will for probate as to the estate of this second decedent. The separate will was in effect a revocation of the testator's disposition of property in the joint testament. Upon these two authorities, probate of a joint will was refused in Clayton *v.* Liverman, 2 Dev. & B. 558, Daniel, J., dissenting. On the other hand, probate as to one of two parties to a joint will was admitted in Eng-

If a testator makes separate wills of separate parts of his property,

land in In re Stracey, 1 Deane & S. 6, the case of Hobson *v.* Blackburn, supra, being thought (for reasons not stated) distinguishable. And see Denyssen *v.* Mostert, L. R. 4 P. C. 236; S. C. 8 Moore, P. C. N. S. 502, as to the law prevailing in the Cape of Good Hope. It has been held in Maine that a will made and executed jointly by husband and wife, devising estate of which the husband was sole owner, might on his death be probated as the will of the husband alone. Rogers, Appellant, 2 Fairf. 303. This was put upon the ground that the wife was a mere cipher in the transaction; and the expression above mentioned of Lord Mansfield was referred to as merely implying that a will could not operate *jointly*. The instant it was said, that either testator died, the principle of joint ownership, if that existed, was terminated. At this point, a distinction begins to appear between a joint and a mutual will; a distinction sufficiently vague and unsatisfactory. It is laid down in Lewis *v.* Scofield, 26 Conn. 452, that, though the instrument in point of form be joint, yet, if it only dispose of the estate of the one who may die first, its legal operation is the same as if each had made a separate will disposing of the estate of each to the other in case of that other surviving. Such a case was deemed different from that of an attempt to dispose of a joint estate to some third party, becoming operative only upon the death of both. The distinction made in Lewis *v.* Scofield, and equally applicable to Evans *v.* Smith, 28 Ga. 98, was followed in Walker *v.* Walker, 14 Ohio St. 157; and it was there held that where separate owners (husband and wife) of property assumed by will to treat the same as a joint fund, and to dispose of it to third persons, the instrument could not be admitted to probate, either as the joint will of both parties or as the separate will of either. The same distinction was taken in Schumaker *v.* Schmidt, 44 Ala. 454, in favor of a will of two persons, disposing of the separate property of each testator in favor of the other; the instrument being treated as the separate will of the first decedent and revocable like other wills. See Diez's Will, 59 N. Y. 88. This supposes that no contract has been made between the parties of which the will is an execution. To this extent, the law appears to be settled. But other cases do not stop here. In Ex parte Day, 1 Bradf. 476, it was held that a mutual or conjoint will might be admitted to probate; and this, too, though it was irrevocable as a contract ("compact" is the word started by Sir John Nicholl in Hobson *v.* Blackburn, and adopted by all the judges since); for it would still be revocable as a will by either, on notice, during the common life of the testators. After the death of either, it would be binding upon the other. Dufour *v.* Pereira, 2 Harg. Jurid. Arg. 304; S. C. 1 Dick. 419. But see *contra* as to the right of either to revoke (except as to himself) without the act of the other in the case of a will by husband and wife executed under authority of a power, Breathitt *v.* Whittaker, 8 B. Mon. 530, 534. The attempted distinction between joint and mutual wills, by which if the will only professes to dispose of the estate of the one joint testator in favor of the other, without any valid contract for the purpose, the testamentary provision is good and may be probated as a will, and if it attempts to make a disposition in favor of others, or is based upon a valid contract, the provision is not good as a will, has little to commend itself to favor. In either case, there must have been a contract: the very idea of the arrangement supposes an agreement that the one party will execute a will of his property in the particular manner if the other will do the like. This is a contract upon a good consideration. If a will made jointly is good as a will, a will made mutually must, therefore, be good as such. The fact that the property may be wholly or partly given to third persons can in reason make no difference. No attention was given to such a circumstance in In re Stracey, Deane & S. 6. The real difficulty is that to treat a joint or a mutual will as a testament is to declare that a will may be irrevocable; unless it be true as above intimated that the joint or mutual will may be revoked by either testator on notice to the other, a suggestion which will not be readily accepted. It appears to be settled that a contract to execute an ordinary will (*i. e.* not a joint or mutual will), if based upon a good consideration, is binding upon the death of the party so agreeing, and may be specifically enforced against his representatives. Walpole *v.* Orford, 3 Ves. Jr. 402; Caton *v.* Caton, L. R. 1 Ch. 137; S. C. L. R. 2 H. L. 127; Gould *v.* Mansfield, 103 Mass. 408; Bynum *v.* Bynum, 11 Ired. 632; Anding *v.* Davis, 38 Miss. 574; Izard *v.* Middleton, 1 Desaus. 116; Rivers *v.* Rivers, 3 Desaus. 190. Though, if the agreement relate to land, it must be in writing, or there must have been a part performance, to take the case out of the Statute of Frauds. Gould *v.* Mansfield, supra. If then the agreement be specifically enforceable against the defaulting party's representatives, it would seem that it might have been enforceable against the party himself during his lifetime; refusal or attempted revocation as to that party not being ground merely for an action for breach of contract. Hence there is here in effect a case of an irrevocable will, whether the agreement be carried out or not. It may then be doubted if revocability is so essential to the validity of a will as is commonly believed. A will is none the less a will because it may be based upon a binding contract; and yet the will in such a case is irrevocable, as we have just seen (though innocent third persons, taking for value from the testator, without notice, would no doubt obtain a good title). If this is true in the case of an ordinary will, the mere fact of irrevocability should not be fatal to a joint or a mutual will. Indeed, the doctrine of the revocability of a

Separate wills of separate properties.

they need not all be proved together (*r*), unless one incorporates another, as by expressly confirming it (*s*).

Will in pencil or with blanks valid.

A will may be written in pencil (*t*).[1] But where a printed form was filled up partly in ink and partly in pencil, and the writing in ink made sense with the form without help from the writing in pencil, part of which was written over by the ink, the ink writing alone was held to be the will (*u*). A will is not invalid by reason of blank spaces having been left in it (*x*).][2]

Form of wills.

The law has not made requisite to the validity of a will, that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and, if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded.[3]

Instruments in the form of deeds, agreements, &c., held to be testamentary.

Instrument commencing as an inden-

Thus (*y*), a deed-poll, and even an agreement or other instrument between parties, has repeatedly been held to have a testamentary operation.[4] As in Hixon *v.* Wytham (*z*), where A., by indenture made between him on the one part, and B. and C. of the other part, in consideration of 5*l.*, bargained and sold to them certain lands in trust to sell after his decease, and directed the money to arise by the sale to be employed in the payment of certain sums therein mentioned, and the

(*r*) Re Astor, 1 P. D. 150.

(*s*) Re Harris, L. R. 2 P. & D. 83. See further on incorporation, post, Chap. VI.

(*t*) Bateman *v.* Pennington, 3 Moo. P. C. C. 223; Kell *v.* Charmer, 23 Beav. 195; and see Lucas *v.* James, 7 Hare, 419. (*u*) Re Adams, L. R. 2 P. & D. 367.

(*x*) Corneby *v.* Gibbons, 1 Roh 705, 6 No. Cas. 679; Re Kirby, 1 Rob. 709, 6 No. Cas. 693.]

(*y*) West's case, Mo. 177, pl. 314; Manly *v.* Lakin, 1 Hagg. 130; Re Dunn, ib. 488; Henderson *v.* Farbridge, 1 Russ. 479.

(*z*) 1 Ch. Cas. 248; S. C. Finch, 195.

will amounts merely to this, that a will is ambulatory during the lifetime of the testator, provided he has not bound himself not to change it. The mere fact that the surviving party of two testators who had made mutual and separate wills had in bad faith revoked or not executed his will before the death of the other will not, it seems, bar him from taking under the will of such other; because if there was a valid contract for the survivor's will, the engagement could have been enforced against his representative had he died first, and if there was no valid contract the revocation or non-execution would have been immaterial in any view. Bynum *v.* Bynum, 11 Ired. 632.

[1] Myers *v.* Vanderbelt, 84 Penn. St. 510. It has been held, however, that a will written upon a slate cannot be admitted to probate, as a written will. Reed *v.* Woodward, 32 Leg. Int. 337. But it has long been settled that, where a statute requires the formality of writing, printing is a sufficient compliance. Schneider *v.* Norris, 2 M. & S. 286; Temple *v.* Mead, 4 Vt. 536; Hensbaw *v.* Foster, 9 Pick. 312. And, if a portion of the will or the whole of it be engraved or lithographed, the statute is probably complied with. 1 Redf. Wills, 166 (4th ed.), referring to 2 Black. Com. 376, Chitty's notes.

[2] See Soward *v.* Soward, 1 Duv. 126; Tilghman *v.* Steuart, 4 Hur. & J. 156.

[3] Leathers *v.* Grecnacre, 53 Me. 561; Mealing *v.* Pace, 14 Ga. 596; Jacks *v.* Henderson, 1 Desaus. 554; Jackson *v.* Jackson, 6 Dana, 257; Brown *v.* Shaud, 1 M'Cord, 409; Allison *v.* Allison, 4 Hawks, 141; Rohrer *v.* Stehman, 1 Watts, 442; Wheeler *v.* Durant, 3 Rich. Eq. 452; Symmes *v.* Arnold, 10 Ga. 506; Means *v.* Means, 5 Strob. 167; Ragsdale *v.* Booker, 2 Strob. Eq. 348; Robinson *v.* Schly, 6 Ga. 515.

[4] Milledge *v.* Lamar, 4 Desaus. 617; Gage *v.* Gage, 12 N. H. 371: Ingram *v.* Porter, 4 M'Cord, 198; Thorold *v.* Thorold, 1 Phillim. 1, and cases cited; Singleton *v.* Bremar, 4 M'Cord, 12; Symmes *v.* Arnold, 10 Ga. 506; Wheeler *v.* Durant, 3 Rich. Eq. 452.

rest thereof, and all his personal estate, he gave and bequeathed (for the language was here changed to the first person), in favor of certain persons. A. made B. and C. executors of *his will;* and signed, sealed, published, and declared the instrument as his will in the presence of several witnesses. The court declared this to be a good will.

ture, but ending as a will.

So, in Green *v.* Proude (*a*), where, by instrument entitled * "Articles of Agreement," made between A. of the one part, and B. of the other part: it was agreed between them that A., being sick in body, gives, &c.; in consideration whereof B. promised to pay several sums of money. The instrument concluded in the ordinary manner of deeds, *i.e.* "in witness whereof the parties have hereunto interchangeably set their hands and seals." This instrument was delivered as a deed; but it was held to be testamentary, and as such revocable, and the court seems to have been influenced by the circumstance, that the person who prepared it was instructed to make a will.

*19 Instrument entitled "Articles of Agreement."

Again, in Peacock *v.* Monk (*b*), where A., being about to settle his affairs, upon the same day made two instruments; one he called a deed, by way of agreement between him and B., and the other he called a will. By the deed he put 4,000*l.* into the hands of B., to pay to A. himself an annuity for life of 160*l.*, and afterwards to pay 1,000*l.* apiece to C. and D. if they survived him, and an annuity of 100*l.* to E. for life if she survived him, the residue to B. There was a proviso, that if the 160*l.* annuity was in arrear, B. should repay the 4,000*l.* to A. to be placed out in the joint names of A. and B. (*c*). By the will B. was appointed executor and made residuary legatee. Lord Hardwicke said, "B. being both executor in the will and contractor in the deed, and both instruments being executed at the same instant (as it must be taken, being on the same day), it speaks the whole to be a testamentary act. In several cases, the nearness of one act to another makes the court take them as one; so that it is a testamentary act, though not strictly so, because not revocable" (*d*).[1] The case of Tomkyns *v.* Ladbroke (*e*),

Contemporaneous deed and will both held to be testamentary.

(*a*) 3 Keb. 310; S. C. 1 Mod. 117. (*b*) 1 Ves. 127; Belt's Suppl. 82.

(*c*) This clause showed that the instrument was designed to operate in the donor's lifetime. In a much earlier case (Audley's case, 4 Leon. 166), it appears to have been considered as conclusive against the construing of an instrument as a will, that by it an estate was to be taken by the maker, "who could not take by his own will."

(*d*) By this observation it should seem that his Lordship thought that the instrument might be testamentary, for some purposes, but not for others; [as to which see Doe *v.* Cross, 8 Q. B. 714, stated post, p. 26.] (*e*) 2 Ves. 591.

[1] Any document in existence at the time of the execution of a will may by reference be incorporated into and become part of the will, provided the reference is distinct and clearly identifies, or renders capable of identification by extrinsic proof, the document referred to. Brown *v.* Clark, 77 N. Y. 369; Habergham *v.* Vincent, 2 Ves. Jr. 204, 228; Smart *v.* Prujean, 6 Ves. Jr. 565; Williams *v.* Evans, 1 Cromp. & M. 42; Allen *v.* Maddock, 11 Moore, P. C. 427; Burton *v.* Newbery, L. R. 1 Ch. D. 234; Tonnele *v.* Hall, 4 Comst. 145; Chambers *v.* McDaniel, 6 Ired. 226; Johnson *v.* Clarkson, 3 Rich. Eq. 305; Harvy *v.* Chouteau, 14 Mo. 587. This is the rule both at common law and in equity; the

before the same judge, was very similar in its circumstances. A., a freeman of London, two days before his death, executed a will and a deed, by the last of which he assigned 5,000*l.*, part of his personal estate, to trustees, to the separate use of his daughter. Lord Hardwicke held that this was a testamentary act, and, as such, a fraud on the custom, which allows a freeman to give away his personal
*20 estate by act ** *in extremis*, provided he divest himself of all property in it; but not if he reserve to himself a power over it. Hogg *v.* Lashley, decided in D. P. (*f*), is confirmatory of the same principle; an instrument, executed in the form of a Scotch settlement (for lands in Scotland were not then disposable by will), but containing dispositions intended for the most part to take effect after the decease of the maker, having been by the House adjudged to be testamentary.

Instrument in form of deed-poll, held testamentary.

Again, in Habergham *v.* Vincent (*g*), where A., by his will duly executed and attested, devised his freehold and copyhold estates to certain uses, with remainder to such persons and for such estates as he by any deed or instrument in writing, to be executed by him and attested by two witnesses, should appoint. By an instrument executed on the following day, under the

(*f*) 7th of May, 1792, stated 3 Hagg. 415 n.

(*g*) 2 Ves. Jr. 204, 4 B. C. C. 355.

instrument being considered as identified with and forming part of the will duly executed in the same manner as if it had been repeated *totidem verbis* in the will itself. Ferraris *v.* Hertford, 3 Curteis, 468, 493. But the paper must be both distinctly referred to, and must have been in existence at the time of the execution of the will. Habergham *v.* Vincent, 2 Ves. Jr. 204, 228; Ferraris *v.* Hertford, supra; Wilkinson *v.* Adam, 1 Ves. & B. 422, 445; Von Straubenzee *v.* Monck, 3 Swab. & T. 6, 12; Smart *v.* Prujean, 6 Ves. 565; Chambers *v.* McDaniel, 6 Ired. 226; Johnson *v.* Clarkson, 3 Rich. Eq. 305; Tonnele *v.* Hall, 4 Comst. 145; Thayer *v.* Wellington, 9 Allen, 283. It is held, in accordance with this proposition, that a testator cannot by will reserve a power to dispose of an estate at a future time by an instrument not executed as required by the statute, so that it may take effect under his will. Thayer *v.* Wellington, 9 Allen, 283; Langdon *v.* Astor, 3 Duer, 477; S. C. 16 N. Y. 9; Thompson *v.* Quimby, 2 Bradf. 449. The reason for this is, not that there may not be a sufficient reference to the instrument to be executed to identify it, but that an attempt is virtually made by the testator to express what his will shall be in the future; Habergham *v.* Vincent and Ferraris *v.* Hertford, supra; and as the will, under the statute, must be a good will at the time of its execution, making a final disposition then, the future document cannot be probated with it unless itself executed as a will. And it makes no difference that it can be shown that the testator had not changed his mind at the time of his death. Indeed the authorities have gone further, and declared that the reference must be to a document as then existing, in order to admit of its incorporation into the will; and that if the reference is to a document to be executed, as to furniture which "shall be ticketed or described in a paper in my own handwriting," parol evidence will not be received to show that the paper was already in existence, though its identification be perfectly clear. In re Sunderland, L. R. 1 P. & D. 198; Allen *v.* Maddock, 11 Moore, P. C. 427, 454. In re Hunt, 2 Robt. Eccl. 622, appears to be in conflict with these cases. The question there was, whether unexecuted papers (duly described) "to be annexed" to the will, but executed afterwards before the making of a codicil duly signed and attested, which however contained no reference to those papers, could be incorporated into and probated with the will. No decision was known in point, but the papers were admitted to probate. In view of the later cases, this one is of doubtful authority. As to what amounts to a sufficient reference and act to incorporate an existing unattested instrument into a will, see In re Gill, L. R. 2 P. & D. 6; In re Mercer, ib. 91; Pollock *v.* Glassell, 2 Gratt. 439; Bailey *v.* Bailey, 7 Jones 44; Zimmerman *v.* Zimmerman, 23 Penn. St. 375. And see Grabill *v.* Barr, 5 Penn. St. 441; Wikoff's Appeal, 15 Penn. St. 281; Crosby *v.* Mason, 32 Conn. 482. As to how far the document (sufficiently) referred to is incorporated into the will, see Tonnele *v.* Hall, 4 N. Y. 140, 144; Fesler *v.* Simpson, 58 Ind. 83. The case of Thompson *v* Quimby, 2 Bradf. 449, which declares that reference can be made only for the purpose of description, is opposed to the authorities, and is expressly denied in Fesler *v.* Simpson, supra.

hand and seal of the testator, stamped and concluded like a deed, the testator recited this power in his will, and then proceeded thus: — "Now know ye, that, by this my deed-poll, I do direct and appoint that my trustees (naming them) shall immediately after," &c., convey to certain uses, &c. It was held by Lord Loughborough, assisted by Wilson and Buller, JJ., that the second instrument was testamentary. Buller, J., said, that the cases had established that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. In one of the cases there were express words of immediate grant, and a consideration to support it as a grant; but as, upon the whole, the intention was that it should have a future operation after his death, it was considered as a will.[1]

The consequence in this case of holding the instrument to be a codicil to the will was, that it operated on the copyholds, but not on the freeholds, for want of an adequate attestation; the court being decidedly of opinion that a testator could not, by a will attested by three witnesses, reserve to himself a power to dispose of freehold estates by an unattested codicil.

Remark upon Habergham v. Vincent.

The question, whether an instrument in the form of a deed operated as a will, was much discussed in Att.-Gen. v. Jones (*h*), where A., by indenture dated March 25, 1813, assigned, for a nominal pecuniary consideration, certain leasehold property to *C. and D.; also certain stock in the funds, with the dividends which should be due thereon at his decease, the arrears of any pension that might be due to him at his death, and his household furniture, &c., and all other his personal estate then belonging to him, or which should belong to him at his decease, upon trust for himself for life, and after his decease, for B. (an illegitimate daughter). The instrument reserved to A. a power of revocation by deed or will. By will, dated April 16, 1813, A. confirmed the deed except as to certain particulars, which he specified, and appointed the same persons as were trustees in the deed executors. A. did not transfer the stock, or part with the possession of the assigned property, or even communicate to the trustees the existence of the deed, which he retained in his own custody. The question was, whether the property assigned by it was liable to the legacy duty; and three of the Barons of the Exchequer decided in the affirmative,

*21

Att.-Gen. v. Jones. Whether property professedly settled by deed was liable to legacy duty.

(*h*) 3 Price, 368.

[1] Allison *v.* Allison, 4 Hawks, 141; Wheeler *v.* Durant, 3 Rich. Eq. 452; Frederick's Appeal, 52 Penn. St. 338; Carey *v.* Dennis, 13 Md. 1; Singleton *v.* Bremar, 4 M'Cord, 12; Babb *v.* Harrison, 9 Rich. Eq. 111; Millican *v.* Millican, 24 Texas, 426; Stevenson *v.* Huddleson, 13 B.Mon. 299; Gillham *v.* Mustin, 42 Ala. 365; Mosser *v.* Mosser, 32 Ala. 551; Walker *v.* Jones, 23 Ala. 448; Hall *v.* Bragg, 28 Ga. 330; Symmes *v.* Arnold, 10 Ga. 506; Watkins *v.* Dean, 10 Yerg. 321. See Walls *v.* Ward, 2 Swan, 648; Swails *v.* Bushart, 2 Head, 561; Jackson *v.* Culpepper, 3 Ga. 569; Jones *v.* Morgan, 13 Ga. 515; Moye *v.* Kittrell, 29 Ga. 677; Baltimore *v.* Williams, 6 Md. 235; Edwards *v.* Smith, 35 Miss. 197; Hocker *v.* Hocker, 4 Gratt. 277; Lyles *v.* Lyles, 2 Nott & M'C. 531.

adverting, in the course of very long judgments, to the circumstance that the consideration was nominal; that the trust for the grantor was not to receive the dividends merely, but implied a power in him to dispose of the property as he should think proper (*i*); that he kept the deed in his own possession; never transferred the stock to the trustees, nor invested them with the control of the property, or even informed them of it; that, *though the legal estate was in the trustees* (for this with singular inconsistency was admitted), the actual ownership remained with the grantor; that the deed professed to grant the property of which the maker should be possessed at the time of his decease, which, otherwise than as a will, it could not do; that it contained a power of revocation by the most informal instruments; and, lastly (on which great stress was laid), that the will, by referring to and confirming the deed, "threw a testamentary character over the whole." Wood, B., in support of his contrary opinion, relied not only on the form of the instrument, which was perfect as a deed, but on its effect; which, he said, was to vest the legal estate in the leasehold property in the trustees *instanter; and was there*, he asked, *a case where the estate passed by a will in the lifetime of the testator?* He argued, that the confirmation of it in the subsequent will made no difference. "Suppose," he said, "there had been no power of revocation, would it not have been valid as a deed? and suppose, in that case, the party had made a will,
*22 * disposing of the property differently, that will would not avail against a deed; but the deed, notwithstanding the alteration of the will, if he had not reserved the power, would prevail against the will. That shows it as a deed. If, on the other hand, he had made a will, and then another, the second would have been a revocation of the first."

The principle of this decision has been generally condemned: indeed, the reasoning of some of the learned barons seems very inconclusive and unsatisfactory. The reliance placed on the power of revocation was especially unfortunate; for the insertion of such a clause, so far from indicating an intention to make a will, imparts quite a contrary color to the transaction, as a will wants not an express power to render it revocable. The fact, too, of the assignment being extended to all the property of which the grantor should happen to be possessed at his decease, shows only that he attempted to include what he could not, and not that he meant to resort to a different species of disposition. Nor do the arguments founded on the retention of the custody of the deed (*k*) and the possession of the property appear to be more convincing; for, though these circumstances are often very important when the claims of *creditors* and *purchasers* are under consideration, yet it has never been ruled, that in order to render

Remarks upon Att.-Gen. *v.* Jones.

(*i*) It was merely for the use and benefit of A. for life.

(*k*) [See Alexander *v.* Brame, 7 D. M. & G. 530; S. C. nom. Jeffries *v.* Alexander, 8 H. L. Ca. 594.]

a settlement binding on the settlor's own representatives the deed must be disclosed, and the possession of the property relinquished by him; on the contrary, dispositions of property by a deed taking effect *inter vivos*, have often been supported under such circumstances. Still more difficult is it to accede to the position, that the reference to the settlement in the subsequent will "threw a testamentary character over the whole." Testators frequently refer to, for the purpose of confirming, some antecedent disposition of property by deed; and it has never been surmised that such confirmation rendered the instrument referred to testamentary. If testamentary for one purpose, it must be so for every purpose; and hence we are forced to conclude that if B., the *cestui que trust*, had died in her putative father's lifetime, the property in question would have gone, not to *her* representatives (which if she had died intestate and unmarried would have let in the title of the crown), but to those of the settlor, who would necessarily have been entitled, under the doctrine of lapse, if the instrument were to be construed as a will!

* A similar question arose in Tompson v. Browne (*l*), which was as follows: By an indenture of settlement dated August 19, 1823, made between A. of the first part, B. of the second part, C. and D. (natural daughters of A. and B.) of the third part, and E. and F. of the fourth part, after reciting that A. was desirous of making some provision for their children C. and D., and had therefore lately transferred into the joint names of E. and F., the sum of 6,090*l.* new 4 per cent. Bank Annuities; it was then witnessed, that E. and F. and the survivor, &c., should stand possessed of the said stock, upon trust, to permit A. or his assigns to receive the dividends during his life; and after his decease, upon trust, to appropriate so much of the stock as would produce 80*l.* per annum, and pay the dividends thereof, to B. for her life; and as to the residue of the stock, and also, after the decease of B., as to the appropriated fund, upon trust, to transfer the same to C. and D., in equal shares, at the age of twenty-five or marriage. The settlement contained a power to A. to revoke the trusts and appoint any others in lieu thereof. A. and B. being both dead, the *cestuis que trust* claimed a transfer of the fund; and the question raised by the trustees was, whether the instrument was not testamentary, and the fund accordingly subject to legacy duty? The affirmative was attempted to be maintained on the authority of Att.-Gen. *v.* Jones; but Sir C. C. Pepys, M. R., decided that the legacy duty did not attach. "The decision in Att.-Gen. *v.* Jones," he said, "seems to have proceeded upon the ground that, under the circumstances of that case, nothing passed from the maker of the instrument, so as to entitle any other person to interfere with his property in his lifetime. *If there be anything in that decision to support the notion, that*

*23

Tompson *v.* Browne. Settlement reserving life interest to settlor, with power of revocation, held that the property was not liable to legacy duty.

(*l*) 3 My. & K. 32.

where a person by deed settles property to his own use during his life, and after his decease, for the benefit of other persons, a power of revocation reserved in such a deed alters the character of the instrument, and renders it testamentary, and consequently subject to legacy duty, I can only say that if this were law, a great number of transactions, of which the validity has never been doubted, would be liable to be impeached."

Although the remarks of the M. R. are expressed with great caution, they leave no doubt of his opinion of Att.-Gen. *v.* Jones [and when that case was cited to Lord St. Leonards in D. P. (*m*), he said, "That case is quite wrong."

*24 * In Majoribanks *v.* Hovenden (*n*), an instrument commencing with a recital, and having an attestation clause, like a deed-poll, and sealed, stamped, and registered, was held by the same learned Lord not to be invested with a testamentary character by the mere nature of the power (a power to appoint by will, misrecited as a power to appoint by deed or will) under which it purported to be made. The fact of registration as a deed appears to have been deemed almost conclusive against its testamentary character.]

Instrument sealed, stamped, and registered, not testamentary.

The Probate Court (before which, of course, questions of this kind are most frequently agitated) act fully up to the principle which regards as testamentary any instrument that is designed not to take effect until the maker's decease, though assuming the form of a disposition *inter vivos;* and more especially if it be incapable of operation in the intended form (*o*); and accordingly, in repeated instances, probate has been granted of such irregular documents, as the assignment of a bond by indorsement[1] (*p*), receipts for stock and bills indorsed (*q*), a letter[2] (*r*), marriage articles (*s*), and promissory notes, and notes payable by executors, in order to avoid the legacy duty[3] (*t*), [and cheques on a banker (*u*), even though the testator made a subse-

Rule in Probate Court as to instruments testamentary in *substance:*

— bills, notes, &c.

[(*m*) Brown *v.* Att.-Gen., 1 Macq. Sc. Ap. 85. (*n*) 1 Dru. 11.]

(*o*) But now that all wills require attestation by two witnesses, the validity of an instrument as an actual disposition of property would, if not so attested, depend on the maintenance of its non-testamentary character; [Mitchell *v.* Smith, 33 L. J. Ch. 596.]

(*p*) Musgrave *v.* Down, T. T. 1784; cit. 2 Hagg. 247.

(*q*) Sabine *v.* Goate and Church, 1782; cit. 2 Hagg. 247.

(*r*) Drybutter *v.* Hodges, E. T. 1793; cit. 2 Hagg. 247; [and see Passmore *v.* Passmore, 1 Phillim. 218; Re Mundy, 7 Jur. N. S. 52, 30 L. J. Prob. 85.]

(*s*) Marnell *v.* Walton, T. T. 1796; cit. 2 Hagg. 247.

(*t*) Maxee *v.* Shute, H. T. 1799; cit. 2 Hagg. 247; [and see 4 Ves. 565; Jones *v.* Nicolay, 2 Rob. 288, 14 Jur. 675; Re Marsden, 1 Sw. & Tr. 542.

(*u*) Bartholomew *v.* Henley, 3 Phillim. 317.

[1] Where the payee of a note made on it the following indorsement, — "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," — and, having signed it, afterwards died before the note was paid, it was held that the indorsement was testamentary, and entitled to probate as a will. Hunt *v.* Hunt, 4 N. H. 434; Jackson *v.* Jackson, 6 Dana, 257. See Plumpstead's Appeal, 4 Serg. & R. 545.

[2] Boyd *v.* Boyd, 6 Gill & J. 25; Denny *v.* Barton, 2 Phillim. 575; Manly *v.* Lakin, 1 Hagg. 130; Morrell *v.* Dickey, 1 Johns. Ch. 153.

[3] So drafts on bankers. Bartholomew *v.* Henley, 3 Phillim. 317; Jones *v.* Nicolay, 2 Eng. Law & Eq. 591.

quent will containing a clause revoking any former will or codicil (*v*)]. On the same principle, Sir J. Nicholl admitted to probate, as testamentary, the drafts of three bonds, prepared in the lifetime of the deceased, and intended to be executed by him, to the trustees of the marriage settlement of his three daughters, in substitution for legacies which he had, by a revoked will, bequeathed for the benefit of the daughters, and the execution of which bonds was prevented by his death (*x*).

Instruments in the form of present or past gifts held testamentary.

[So papers in these words, "I wish A. to have my bank book for her own use" (*y*); "I hereby make a free gift to A. of the * sum deposited," &c. (*z*); "I have given all to *25 A. and her sons: they are to pay" certain weekly sums to "X. and Y., and to divide the residue among themselves" (*a*); have been held testamentary, chiefly upon collateral evidence, which is always admissible (*b*), that they were executed with that intent.

Likewise deeds *inter partes*.

So, as at common law, instruments in the form of deeds *inter partes*, and purporting to convey property to trustees, but providing that the trusts should not take effect until after the death of the donor, have been held testamentary in the Probate Court (*c*).]

Paper containing words of present gift held to be not testamentary;

But if the instrument is not testamentary either in form or in substance (none of the gifts in it being expressed in testamentary language, or being in terms postponed to the death of the maker) and if no collateral evidence is adduced to show that it was intended as a will,[1] probate will not be granted of it as a testamentary document.[2] Thus, where a minor aged nineteen (at a period when minors of such an age were capable of making wills of personal estate), wrote a paper in these words: "I, A. B., of &c., in the presence of the two under-mentioned witnesses, C. D. of &c., and E. F. of &c., do give all my goods and chattels to M. D. of ——, spinster." This paper was dated, and witnessed

(*v*) Gladstone *v.* Tempest, 2 Curt. 650. But the Court of Chancery declared the checks to be in effect revoked. Walsh *v.* Gladstone, 1 Phil. 294.]
(*x*) Masterman *v.* Maberley, 2 Hagg. 235. [(*y*) Cock *v.* Cooke, L. R. 1 P. & D. 241.
(*z*) Robertson *v.* Smith, L. R. 2 P. & D. 43. (*a*) Re Coles, L. R. 2 P. & D. 362.
(*b*) Re English, 3 Sw. & Tr. 586, 34 L. J. Prob. 5.
(*c*) Re Morgan, L. R. 1 P. & D. 214. And see cases, p. 18, nn. (*y*) (*z*).] See also Re Knight, 2 Hagg. 554; Shingler *v.* Pemberton, 4 Hagg. 356; both of which cases were before Tompson *v.* Browne, stated above.

[1] Warcham *v.* Sellers, 9 Gill & J. 98; Gage *v.* Gage, 12 N. H. 371; Witherspoon *v.* Witherspoon, 2 M'Cord, 520. Where it was doubtful whether an instrument offered in evidence was a deed or a will, the facts of its execution and delivery, and the declarations of the maker at the time, together with the instrument, were held to be proper for the consideration of the jury, in Herrington *v.* Bradford, Walker, 520; Gage *v.* Gage, supra.

[2] A paper, though containing some technical expressions, which might embrace the idea of a testamentary disposition of property, is not considered in the nature of a will, if the acts to be done by the person named in it are to be executed as speedily as possible, and in the lifetime of the maker. Hamilton *v.* Peace, 2 Desaus. 92; Thompson *v.* Johnson, 19 Ala. 59; Robey *v.* Hannon, 6 Gill, 463.

by the two persons referred to in the body of it. The court was of opinion that, as the paper bore upon the face of it no evidence of its being intended to be testamentary, but it rather appeared, both from its contents and the evidence *dehors* (though the latter was rather conflicting), to have been intended as a present gift, probate ought not to be granted (*d*).

—so as to other papers in form of letters.

So probate was refused of a letter addressed by the deceased to a friend, directing the sale of stock in the public funds, and the distribution of the proceeds, on the ground that it referred to an immediate and not to a posthumous sale (*e*).[1] And in another case, a paper addressed by a testator to his executors was held not to be testamentary, the same not being dispositive in terms, nor shown by extrinsic evidence to have been so intended (*f*). In this case Sir Herbert Jenner observed that there was this distinction in the consideration of papers which are in their terms dispositive, and those which are of an equivocal * character, that the first will be entitled to probate, unless, as in Nicholls *v.* Nicholls (*g*), they proved not to have been written *animo testandi;* whilst, in the latter, the *animus* must be proved by the party claiming under it.[2]

*26

Instrument not made testamentary by postponing enjoyment.

[But, as already observed, an instrument is not testamentary merely because actual enjoyment under it is postponed until after the donor's death. If it has present effect in fixing the terms of that future enjoyment, and therefore does not require the death of the alleged testator for its consummation, it is not a will. Therefore where there was an agreement for a lease, which contained a provision for the distribution of the rent after the lessor's death among his grandchildren, of whom the lessee was one, it was held that this provision being part of the consideration for which the lessee was to pay his rent was irrevocable; it was therefore not testamentary (*h*). The court was asked to grant probate only of a part of the document, namely, that which contained the provision in question: and as to this, Sir J. P. Wilde said he had met with no case where it had been done, although he by no means said it could not be done. And in fact in the case (there cited) of Doe *d.* Cross *v.* Cross (*i*), where an instrument in the form of a power of attorney was given by a person abroad, whereby he appointed his mother to receive the rent of his lands for her own use, until he might return to England; or in the event of his death, he "thereby assigned and delivered to her the sole claim to his

Probate of *part* of an instrument,

—of a power of attorney.

(*d*) King's Proctor *v.* Daines, 3 Hagg. 218; [and see Langley *v.* Thomas, 26 L. J. Ch. 609.]
(*e*) Glynn *v.* Oglander, 2 Hagg. 428.
(*f*) Griffin *v.* Ferard, 1 Curt. 97.
(*g*) 2 Phillim. 180.
[(*h*) Re Robinson, L. R. 1 P. & D. 384. And see Patch *v.* Shore, 2 Dr. & Sm. 589.
(*i*) 8 Q. B. 714.]

[1] A letter disposing of personal property, in case of the writer's death, was held a good will in Boyd *v.* Boyd, 6 Gill & J. 25. See Porter *v.* Turner, 3 Serg. & R. 108; Rose *v.* Quick, 30 Penn. St. 225.

[2] See Wareham *v.* Sellers, 9 Gill & J. 98; Lyles *v.* Lyles, 2 Nott & M'C. 531.

lands," but her occupancy was to cease on his return: this instrument was properly executed as a will, and was held to be a good will of the lands in question. The court was clear that there was no objection to one part of an instrument operating *in præsenti* as a deed, and another *in futuro* as a will.] [1]

The granting of probate is conclusive as to the testamentary character of the instrument in reference to personalty. (*j*) [2] [Everything included in the probate copy (*k*), but no word * besides (*l*), must be taken by the Court of Construc- *27 tion to be part of the will, and the original will cannot be

Probate, how far conclusive as to personalty,

(*j*) See Douglas *v.* Cooper, 3 My. & K. 378. The executors are considered as representing the legatees, in regard to the litigation respecting the validity of the will; and unless a case of fraud and collusion can be made out against them, the legatees are bound by the adjudication in the suit to which the executors are parties; Colvin *v.* Fraser, 2 Hagg. 292; Medley *v.* Wood, 1 Hagg. 645; Newell *v.* Weeks, 2 Phillim. 224; and that, too, though the same persons are executors under two conflicting testamentary instruments. Hayle *v.* Hasted, 1 Curt. 236. The court, however, sometimes directs the parties interested to be brought before it. Reynolds *v.* Thrupp, 1 Curt. 570. [(*k*) Gann *v.* Gregory, 3 D. M. & G. 777.

(*l*) Barneby *v.* Tassell, L. R., 11 Eq. 368. As to omission from the probate of scurrilous imputations on character, see Re Honywood, L. R. 2 P. & D. 251.

[1] In Thompson *v.* Johnson, 19 Ala. 59, the court made the suggestion that it may be collected from a variety of cases that one and the same instrument cannot be both a will and a deed. The suggestion is liable to mislead, and appears to be true only in the sense in which it was applicable to the case before the court; to wit, that if the true intention of the person who executed the instrument be to make a testamentary disposition (a disposition to take effect upon his death), then, notwithstanding the fact that in its external aspects the instrument resembles a deed, it must be treated as a will alone. It cannot be considered "both a will and a deed." But, if upon a true construction of the instrument (in the light of surrounding circumstances, when the language requires the aid of external evidence), it appears to have been the intention of the signer that a distinct part of its provisions should operate as a will, and another part take effect in his lifetime, there can be no reasonable objection to carrying out the intention and admitting to probate that part of the instrument intended to operate as a will. This view is sanctioned by the text, and by Robinson *v.* Schly, 6 Ga. 515. See Taylor *v.* Kelly, 31 Ala. 59; Dawson *v.* Dawson, 2 Strob. Eq. 34. It is apprehended there is no authority opposed to this position.

[2] See Colton *v.* Ross, 2 Paige, 396; Van Rensselaer *v.* Morris, 1 Paige, 13; Nalle *v.* Fenwick, 4 Rand, 585; Morrell *v.* Dickey, 1 Johns. Ch. 153; Darrington *v.* Borland, 3 Porter, 11; Russell *v.* Dickson, 1 Con. & Law. 284; 2 Greenl. Ev. § 672; 1 Williams, Ex. (6th Am. ed.) 549 et seq.; Appeal of Peebles, 15 Serg. & R. 42; Tompkins *v.* Tompkins, 1 Story, C. C. 547; Bogardus *v.* Clark, 4 Paige, 623. In most of the states, the granting of probate in the courts, by well settled authority, is as conclusive upon the testamentary character of the instrument in reference to real as to personal estate. Independent of statute modifications, the powers of the Court of the Surrogate, Judge of Probate, Orphans' Court, Ordinary, or of whatever officer, coming in the place of the English Ecclesiastical Court (and such a court exists in every state), are the same with those of the English Ordinary, in respect to the wills and estates of testators and intestates, and their decrees are to be received as conclusive evidence under the same limitations. See Crosland *v.* Murdock, 4 M'Cord, 217; Bogardus *v.* Clark, 1 Edwards Ch. 266-270; S. C. 4 Paige, 623; Harrison *v.* Rowan, 3 Wash. C. C. 580, 582; Den *v.* Ayres, 1 Green, 153; Darby *v.* Mayer, 10 Wheat. 465, 469; Donaldson *v.* Winter, 1 Miller (La.), 137, 144; Lewis *v.* Lewis, 5 Miller (La.), 387, 393; Dubois *v.* Dubois, 6 Cowen, 494. Probate of a will determines all questions of fraud, imposition, and undue influence in procuring such wills, as well as the general question relative to the capacity of the testator. Clark *v.* Fisher, 1 Paige, 176. See M'Dowall *v.* Peyton, 2 Desaus. 313. But by reason of its jurisdiction as a court of construction, equity may, under particular circumstances, so construe an instrument of which probate has been obtained as to render it ineffectual. Gawler *v.* Standerwick, 2 Cox, 16. In this case, a paper, it appeared, had been proved in the Spiritual Court as a codicil of the testator, which was signed by the executors and others, and purported to be an acknowledgment of what they *understood* to be the will of the testator, when he was unable to speak, in favor of certain legatees; and a bill having been filed in equity, a question was raised whether they were entitled to their legacies under this paper proved as a codicil. Sir Lloyd Kenyon, Master of the Rolls, said that as it had been proved in the Spiritual Court, he was bound to receive it as a testamentary paper, but, having so

appealed to for the purpose of showing that such copy is erroneous. Thus where probate was granted, with cross lines drawn over the bequests of certain legacies, Lord Cranworth held that it was to be taken as conclusively settled by the probate, that the will was at its execution in the state in which it was then found; *i.e.* that the testator had executed the instrument with the cross lines drawn over it (*m*). That being so, the only question for him to determine was, what did the instrument mean? and he thought the meaning was, that the testator's original intention to give the legacies had ceased, and that he had placed the lines there to show this. The result was that the legacies were struck out (*n*). Neither was it competent for the Court of Chancery, on the ground that legacies given by a codicil were fraudulently obtained, to declare the legatee a trustee for the person who would otherwise have taken. The objection on the ground of fraud should be taken in the Probate Court, which, on being satisfied of the fraud, would direct probate to issue, omitting that part containing the bequest complained of (*o*). And practically this division of jurisdiction is continued as between the Chancery and Probate divisions of the High Court of Justice (*p*), the judges of the former Division declining (in their discretion) to exercise the jurisdiction of the latter in matters of probate (*q*).

The Court of Probate Act, 1857 (*r*), gives to probate, after citation of the heir and other persons interested, and proof in solemn form, the same effect with regard to realty as it had before with regard to personalty (*s*). But the granting of probate in common form has no effect as regards] real estate, either * freehold or copyhold (*t*) : [except (under the Act of 1857) to fur-

—as to realty,

*28

(*m*) The general presumption is that alterations in a will were made *after* its execution; see post, Chap. VII. s. 2, *ad fin.*; but that was for the consideration of the Court of Probate.

(*n*) Gann *v.* Gregory, 3 D. M. & G. 777.

(*o*) Allen *v.* Macpherson. 1 H. L. Ca. 191, 11 Jur. 785, affirming 1 Phil. 133, and reversing 5 Beav. 469; Hindson *v.* Weatherill, 5 D. M. & G. 301. So the Court of Chancery had no jurisdiction to set aside a will of lands for fraud. The remedy was by ejectment. Jones *v.* Gregory, 2 D. J. & S. 83.

(*p*) Meluish *v.* Milton, 3 Ch. D. 27, 35.

(*q*) Pinney *v.* Hunt, 6 Ch. D. 98.

(*r*) 20 & 21 Vict. c. 77, ss. 61, 62.

(*s*) To bring a will within the purview of this enactment, it must be one which both as to realty and personalty is to be tested by the same considerations. For if there were any difference between them it would be absurd to enact that probate of one should be conclusive evidence of the validity of the other. Consequently it must be a will executed since and according to the stat. 1 Vict. c. 26. Campbell *v.* Lucy, L. R. 2 P. & D. 209.]

(*t*) Hume *v.* Rundell, 6 Madd. 331. [See also Bonser *v.* Bradshaw, 5 Jur. N. S. 86; Loffus *v.* Maw, 3 Giff. 592. A will disposing of real estate only is not entitled to probate. Re Bootle, L. R. 3 P. & D. 177. *Secus*, if it appoints executors, though they afterwards renounce. Re Jordan, L. R. 1 P. & D. 555. If a will appointing executors be made in execution of a power, the appointment of executors taking effect under the power does not entitle the will to probate; for here the executors take nothing *jure representationis*. Tugman *v.* Hopkins, 4 M. & Gr. 389; O'Dwyer *v.* Geare, 29 L. J. Prob. 47; Re Barden, L. R. 1 P. & D. 325.

done, the Court of Equity was to construe it. Now the effect of this codicil was only that the parties *understood* it to be the will of the testator that the asserted legatees should have legacies, and the heir promised to perform this; but the court could not convert the promise of the heir into the will of the testator; and it was therefore decided that the paper, though testamentary, operated nothing. See 1 Williams, Ex. (6th Am ed.), 549-570, where the jurisdiction of Probate and Equity Courts is considered. Of course, the probate of a will settles no question of the title of property. Holman *v.* Perry, 4 Met. 492.

nish *primâ facie* evidence of the validity and contents of the will (*u*). And, even with respect to personal estate, the granting pro- — as to personalty. bate of any paper has no other effect than to establish generally its claim to be received as testamentary; and it remains for the Court of Construction to determine the meaning and effect of the instrument thus stamped with a testamentary character (*x*).] The adjudication of this court may, and often does, render the paper wholly nugatory. It may be found not to contain any intelligible disposition of the deceased's property (*y*); or to be in substance the same as [or in substitution for] another paper of which probate has been granted (*z*); or that its provisions are invalid according to the law of a foreign country which constituted the domicile of the maker at the time of his decease (*a*); in all which cases the instrument so proved operates merely as an appointment of an executor, who distributes the property as under an intestacy.

[And to *determine the construction*, the original will, both of real and personal property, may be looked at. It was said, indeed, by Sir W. Grant (*b*), that his decision on the construction of the will before him could not depend on the grammatical skill of the writer, in the position of the characters expressive of a parenthesis: that it was from the words and from the context, not from the punctuation, that the sense must be collected. And there are, probably, few imaginable cases in which punctuation could exercise a very important influence upon the construction (*c*). But it seems a little unreasonable to refuse all effect to "grammatical skill," when employed in fixing a position for parenthetical characters, when that same skill is the * foundation of all testamentary construction. Certainly, in recent times, no hesitation has been felt by the courts, in following what is stated to have been Lord Eldon's practice, viz. in examining original wills "with a view to see whether anything there appearing, — as, for instance, the mode in which it was written, how 'dashed and stopped,' — could guide them in the true construction to be put upon it" (*d*). It is true that Lord Cranworth expressed an opinion that it was not competent for the Court of Construction on every occasion to look at the original will. But that was

Original will may be examined by Court of Construction.

*29

(*u*) Barraclough *v.* Greenhough. L. R. 2 Q. B. 612.

(*x*) Re Mundy, 30 L. J. Prob. 85.]

(*y*) See Gawler *v.* Standerwick, 2 Cox, 16; [Mayor, &c. of Gloucester *v.* Wood, 3 Hare, 131, 1 H. L. Ca. 272.]

(*z*) See Hemming *v.* Clutterbuck, 1 Bli. N. S. 479; [S. C. nom. Hemming *v.* Gurrey, 1 D. & Cl. 35; Walsh *v.* Gladstone, 1 Phil. 290, 13 Sim. 261; Campbell *v.* Radnor, 1. B. C. C. 271.]

(*a*) Thornton *v.* Curling, 8 Sim. 310.

[(*b*) Sandford *v.* Raikes, 1 Mer. 651.

(*c*) See per Sir E. Sugden, Heron *v.* Stokes, 2 Dr. & War. 98; and per Lord Westbury, Gordon *v.* Gordon, L. R. 5 H. L. 276.

(*d*) Per K. Bruce, L. J., in Manning *v.* Purcell, 24 L. J. Ch. 523, n.; also reported 7 D. M. & G. 55. See also Compton *v.* Bloxham, 2 Coll. 201; Child *v.* Elsworth, 2 D. M. & G. 683; Oppenheim *v.* Henry, 9 Hare, 802, n.; Gauntlett *v.* Carter, 17 Beav. 590; Milsome *v.* Long, 3 Jur. N. S. 1073.

in a case where the object proposed was, by looking at an original will of personal property, virtually to procure a reversal of the decision come to by the Probate Court with respect to the form of the probate copy in question (*e*).]

As to probate of testamentary appointments.

Where a paper professed to be an appointment under a power, the Ecclesiastical Court applied to it the ordinary principles of testamentary law, without attempting, in that proceeding, to pronounce on its sufficiency as a due execution of the power under which it purported to be made (*f*). [This practice was indeed temporarily departed from, but was ultimately restored by the decision in Barnes *v.* Vincent (*g*), in which it was held that probate ought to be granted of every paper *professing* to be executed under a power, if in other respects its testamentary character was established; and further, that, if the power was alleged, the probate should be granted without production of the power, and without reference to the question whether the power existed or not (*h*). This, it was said, restored the ancient and laudable practice of the Ecclesiastical Courts.] The granting of probate precluded the Court of Chancery from questioning the testamentary character of the paper. It remained for that court to determine whether the formalities prescribed by the power had been complied with (*i*), [and whether in other respects besides the testamentary character of the paper the power *had been duly exercised (*k*). But if no special formalities were prescribed, the granting of probate was final on that head (*l*).

*30

Judges of the Probate Court have pronounced the practice described above to be inconvenient, since it required them to grant probate of an instrument which, but for the existence and due execution of the alleged power (into which they were forbidden to inquire), did not amount even to the appointment of an executor (*m*). It is probable, therefore, that under the Judicature Act, 1873, which gives equal jurisdiction to all the judges of the High Court, and directs that all questions "properly brought forward by the parties in any cause or matter" shall be completely disposed of in that cause or matter (*n*), the judges of the Probate Division will, in a proceeding for probate, themselves determine whether the power has been well executed when-

(*e*) Gann *v.* Gregory, 3 D. M. & G. 780, already referred to.]

(*f*) Draper *v.* Hitch, 1 Hagg. 674. See also Stevens *v.* Bagwell, 15 Ves. 139.

[(*g*) 5 Moo. P. C. C. 201, 10 Jur. 233, 4 No. Cas. Supp. xxxi.; Tatnall *v.* Hankey, 2 Moo. P. C. C. 342; De Chatelain *v.* De Pontigny, 1 S. W. & Tr. 411, 29 L. J. Prob. 147; Paglar *v.* Tongue, L. R. 1 P. & D. 158; Re Fenwick, ib. 319.

(*h*) The case of Re Monday, 1 Curt. 590, seems therefore overruled.]

(*i*) Douglas *v.* Cooper, 3 My. & K. 378.

[(*k*) Paglar *v.* Tongue, L. R. 1 P. & D. 158, where the question left was, whether the will, dated 1844, of a married woman who died 1865, was a due exercise of testamentary powers given to her in the mean time.

(*l*) Ward *v.* Ward, 11 Beav. 377. In Gullan *v.* Grove, 26 Beav. 64, the questions whether the third and fourth sheets of a will constituted a "will," or whether they were "in the nature of or purporting to be a will" were held to be identical. See also D'Huart *v.* Harkness, 34 Beav. 324, ante, p. 8.

(*m*) Re Hallyburton, L. R. 1 P. & D. 90; Paglar *v.* Tongue, ib. 158.

(*n*) Sect. 24, snbs. 7.

ever the necessary parties are before them (*o*). But where any of the parties entitled to be heard on those questions are not before the court (*e.g.* persons who, under the instrument creating the power, claim in default of appointment), the former practice must be followed].

The question whether any particular fund forms part of the separate estate of a testatrix, a *feme covert*, is differently situated. [There can be but two parties to this question, namely, the husband and the executor (*p*). Both claim through the *feme covert*, and both are necessarily before the Court of Probate; and since the Judicature Act, 1873, if not before (*q*), that court ought to decide the question, whether there is separate estate or not, in all cases where the question is ready and properly presented for decision: and probate will be granted, not confined to the property decided to be separate, but including all over which the testatrix had a disposing power, and which she has disposed of;[1] thus leaving the question as it regards other items of property "to be decided at a future period" (*r*).][2] If no executor * is appointed, the court commonly grants a general administration to the husband, and not a limited administration to the legatees under the appointment (*ra*), the effect of which would be that if the deceased left other property, a further administration, *i.e.* a general administration to the husband, would be requisite. *31

Probate of wills of married women.

The facility with which loose papers were proved in the Ecclesiastical Courts was sometimes complained of by the judges of other courts, on whom has fallen the duty of expounding the jargon thus pronounced to be testamentary (*s*). It has been, doubtless, induced by the consideration that a leaning on this side is less injurious than the opposite excess; the effect of rejection often being to debar parties from the further litigation of their rights under the contested instrument (*t*). The exclusion, however, by the statute 1 Vict., of all testamentary papers which are not attested by two witnesses, has materially checked the evil which has been the subject of complaint; for it rarely happens that these informal and irregular papers are attested. The occurrence will also

Effect of 1 Vict. c. 26, in checking informal and irregular testamentary papers.

(*o*) See per Jessel, M. R., Re Tharp, 3 P. D. 76.

(*p*) The executor represents the legatees, ante p. 26, n. (*j*).

(*q*) See cases cited Re Tharp, 3 P. D. 79, in all of which the decision *affirmed* that the property in question was separate property; but in Ledyard *v.* Garland, 1 Curt. 286, it appears that this was not thought to be the proper forum.

(*r*) Re Tharp, 3 P. D. 79.]

(*ra*) Salmon *v.* Hayes, 4 Hagg. 386.

(*s*) See Matthews *v.* Warner, 4 Ves. 208, 210.

(*t*) As to the admissibility in evidence of paper writings, not proved as testamentary, vide Doug. 707, 1 Cox, 1, 15 Ves. 153, 2 East, 552; Smith *v.* Attersoll, 1 Russ. 266. [This case shows that there is a distinction where a paper declaring trusts is signed by the *legatees* in trust, and not by the testator only. Johnson *v.* Ball, 5 De G. & S. 80; Consett *v.* Bell, 1 Y. & C. C. C. 577.]

[1] See Holman *v.* Perry, 4 Met. 492.

[2] The will of a *feme covert* under a power reserved to her in a settlement must be proved in our Courts of Probate before it can be acted upon elsewhere, exactly as the wills of persons *sui juris*. The Courts of Probate have exclusive jurisdiction of such questions. Picquet *v.* Swan, 4 Mason, 443; See Tappenden *v.* Walsh, 1 Phillim. 353; Temple *v.* Walker. 3 Phillim. 394; West *v.* West, 3 Rand. 374; Osgood *v.* Breed, 12 Mass. 525.

be [generally] prevented of the question whether the execution of a testamentary appointment conforms to the requisitions of the power, for which will be substituted the more simple inquiry, whether or not the donee has complied with the requisitions of the statute; so that, instead of the partial entertainment of the question, as heretofore, by the Probate Court, the whole matter relating to the sufficiency of the execution (so far at least as the personal estate is concerned) will [even independently of the Judicature Act, 1873] be brought within the jurisdiction of that court (*u*).[1]

[(*u*) A power to appoint by "writing" with certain stated solemnities, though exercisable according to the general law by will *executed in conformity with the requirements of the power*, is not within the terms of the statute 1 Vict. c. 26, s. 10, which speaks of a power to be executed "by will." West *v.* Ray, Kay, 385, following the doubt expressed in Collard *v.* Sampson, 4 D. M. & G. 224, and overruling Buckell *v.* Blenkhorn, 5 Hare, 131. See also Taylor *v.* Meads, 4 D. J. & S. 597.]

[1] [The following note was prepared by the editor of the last American edition, the late Hon. J. C. Perkins, and there printed as a separate chapter. In order to preserve the English text intact, and at the same time to retain the valuable work of the late editor, the chapter is now printed as a note.] In England, wills of personalty must be proved in the Ecclesiastical Court. It appears to have been a subject of much controversy, whether the probate of wills was originally a matter of exclusive ecclesiastical jurisdiction. Bac. Abr. Ex. (*c*). But whatever may have been the case in earlier times, it is certain that, at this day, the Ecclesiastical Court is the only court in which, except by special prescription, the validity of wills of personalty, or of any testamentary paper whatever relating to personalty, can be established or disputed. Fonbl. Treat. Eq. Pt. 2, c. 1, § 1, n. a.; Bac. Abr. Ex. (*e*) 1; Gascoyne *v.* Chandler, 2 Cas. Temp. Lee, 241. Equity indeed considers an executor as trustee for the legatees in respect to their legacies, and as trustee for the next of kin of the undisposed surplus; 2 Story, Eq. Jur. § 1208; Hays *v.* Jackson, 6 Mass. 153; Hill *v.* Hill, 2 Hayw. 298; and as all trusts are the peculiar objects of equitable cognizance, courts of equity will compel the executor to perform these his testamentary trusts with propriety. Hence, although, in those courts, as well as in courts of law, the seal of the Ecclesiastical Court is conclusive evidence of the *factum* of a will of personal property, an equitable jurisdiction has arisen of *construing* the will, in order to enforce a proper performance of the trusts of the executor. The courts of equity are accordingly sometimes courts of construction, in contradistinction to the spiritual courts, which, although they also are courts of construction, are the only courts of probate. 1 Williams, Ex. (6th Am. ed.) 294, 295.

The consequence of this exclusive ecclesiastical jurisdiction is, that an executor cannot assert or rely on his right in any other court, without showing that he has previously established it in the spiritual court; Hensloe's case, 9 Co. 38, a.; Fonbl. Treat Eq. b. 4, Pt. 2, c. 1, § 2; Chaunter *v.* Chaunter, 11 Viner, Abr. 205; the usual proof of which is, the production of a copy of the will by which he is appointed, certified under the seal of the ordinary. This is usually called the probate, or the letters testamentary. In other words, nothing but the probate (or letters of administration with the will annexed, when no executor is therein appointed, or the appointment of executor fails) or other proof, tantamount thereto, of the admission of the will in the spiritual court, is legal evidence of the will in any question respecting personalty. Rex *v.* Netherseal, 4 T. R. 260; 1 Williams, Ex. (6th Am. ed.) 293.

An executor in England may perform almost all the acts incident to his office, except only some of those which relate to suits, before he proves the will in the spiritual courts. Godolph. Pt. 2, c. 20, § 1; Wankford *v.* Wankford, 1 Salk. 301; Bagwell *v.* Elliott, 2 Rand. 194, per Green, J.; 1 Williams, Ex. (6th Am. ed.) 303–310; Strong *v.* Perkins, 3 N. H. 517; 1 Arnould, Ins. 233. Where one named as executor in a will paid a debt in full before probate of the will, under an erroneous belief that the estate was solvent, and afterwards took out letters testamentary, it was held that he was entitled to recover back the difference between the sum thus paid and the sum allowed by the Judge of Probate on the report of Commissioners of Insolvency. Bliss *v.* Lee, 17 Pick. 83.

In Strong *v.* Perkins, 3 N. H. 517, it was held that an executor derives his authority from the testator, and may *commence* an action as such before probate of the will. But in Kittredge *v.* Folsom, 8 N. H. 111, it seems to have been doubted, whether, under Stat. N. H. July 2, 1822, requiring bonds to be given by the executor before he intermeddled with the estate, an individual named as executor could do any act as such until after probate of the will.

In Massachusetts, Maine, Vermont, and New Hampshire, it is expressly provided by statute, that "no will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the Probate Court." Gen. Stat. Mass. c. 92,

§ 38; Rev. Stat. Me. 1871, c. 74, § 15; Gen. Stat. Vt. 1862, c. 49, § 20; Gen. Laws, N. H. c. 194, § 1. A will may be proved in the Probate Court at any time, even after the lapse of twenty years, for the purpose of establishing a title to real estate. Shumway *v.* Holbrook, 1 Pick. 114. In Massachusetts and Maine, this is merely affirmative of the law as it stood in those States before this legislative provision, on the construction of former statutes. Shumway *v.* Holbrook, 1 Pick. 114; Dublin *v.* Chadbourn, 16 Mass. 433; Ex parte Fuller, 2 Story, C. C. 327, 332; Spring *v.* Parkman, 3 Fairf. 127; Hutchins *v.* State Bank, 12 Met. 421. Such is also the law in Ohio, Swazey *v.* Blackman, 8 Ohio, 5; Bailey *v.* Bailey, ib. 245; Hall *v.* Ashby, 9 Ohio, 95; Wilson *v.* Tappan, 6 Ohio, 172: in Rhode Island, Moore *v.* Greene, 2 Curt. C. C. 202; Tompkins *v.* Tompkins, 1 Story, C. C. 355; Wilkinson *v.* Leland, 2 Pet. 655; and probably in some other states. See Budd *v.* Brooke, 3 Gill, 198; Ratcliff *v.* Ratcliff, 12 Smedes & M. 134. In Connecticut, the Probate Court is the only tribunal competent to decide the question of the due execution of a will. Fortune *v.* Buck, 23 Conn. 1.

A will cannot be used as evidence in any court of common law in New Hampshire, until it has been duly proved and allowed in a probate court. Strong *v.* Perkins, 3 N. H. 517, 518; Kittredge *v.* Folsom, 8 N. H. 111. A will made in a sister state must be recorded, in Ohio, before any title under it can vest in the devisee. Wilson *v.* Tappan, 6 Ohio, 172; Bailey *v.* Bailey, 8 Ohio, 239. In Virginia, it is held not necessary that a will should be proved in a court of probate, in order to give it validity as a will of land, in Bagwell *v.* Elliott, 2 Rand. 190. So in Arkansas, Campbell *v.* Garven, 5 Pike (Ark.), 458. But if proved in that court, it seems that it will be binding as to the authenticity of the will, with respect to both the real and the personal estate. 2 Rand. 196, 200, per Green, J.

A will made in execution of a power, by a married woman or other person, must be proved in the Court of Probate, before it can be acted on elsewhere, exactly as any other will. Picquet *v.* Swan, 4 Mason, 443; Holman *v.* Perry, 4 Met. 492, 498; Osgood *v.* Breed, 12 Mass. 525; Newburyport Bank *v.* Stone, 13 Pick. 423; Ross *v.* Ewer, 3 Atk. 160.

Probate is, however, operative merely as the authenticated evidence, and not at all as the foundation, of the title to the property disposed of by the will. The title passes to the devisee or legatee at the death of the testator, and the probate of the will relates back to that time. Fuller, Ex parte, 2 Story, C. C. 327; Spring *v.* Parkman, 3 Fairf. 127; Strong *v.* Perkins, 3 N. H. 517, 518; Hall *v.* Ashby, 9 Ohio, 96; Fleeger *v.* Poole, 2 M'Lean, 189. The will before probate is, in no just juridical sense, a nullity. The probate ascertains nothing but the original validity of the will as such, and that the instrument, in fact, is what it purports on its face to be. Ex parte Fuller, 2 Story, C. C. 332. Rights are not lost by failure to make probate. Arrington *v.* McLemore, 33 Ark. 759; Janes *v.* Williams, 31 Ark. 175.

In England, the Ecclesiastical Courts have no jurisdiction whatsoever over wills, excepting such as relate to personal estate; and consequently the probate thereof by the sentence or decree of those courts is wholly inoperative and void, except as to personal estate; it is not, as to the realty, even evidence of the execution of the will. The validity of wills of real estate is solely cognizable by courts of common law, in the ordinary forms of suits; and the verdict of the jury in such suits, and the judgment thereon, are, by the very theory of the law, conclusive only as between the parties to the suit and their privies. But the sentence or decree of the proper Ecclesiastical Court is, in reference to the personalty, final and conclusive as to the validity or invalidity of the will. The same question cannot be re-examined or litigated in any other tribunal. The reason of this is, that it being the sentence or decree of a court of competent jurisdiction, directly upon the very subject-matter in controversy, to which all persons who have any interest are, or may make themselves, parties, for the purpose of contesting the validity of the will, it necessarily follows that it is conclusive between all parties. Tompkins *v.* Tompkins, 1 Story, C. C. 552, 553; 1 Williams, Ex. (6th Am. ed.) 288–292; 1 Greenl. Ev. § 550; 2 Greenl. § 672; Muir *v.* Leake & Watts Orphan House, 3 Barb. Ch. 477; Thompson *v.* Thompson, 9 Barr, 88; Fouvergne *v.* New Orleans, 18 How. 470. But if the Court of Probate had not jurisdiction, or if the testator should turn out to be alive, of course the probate of the will would be void. 2 Greenl. Ev. § 339; Moore *v.* Tanner, 5 B. Mon. 42.

But in many of the United States, courts have been established by statute, under the title of Courts of Probate, Orphans' Courts, Courts of Surrogate, Ordinary, Register's Court, or other names, with general power to take the probate of wills, no distinction being expressly mentioned between wills of personal, and wills of real, estate; and where such power is conferred in general terms, it is understood to give to those courts complete jurisdiction over the probate of wills, as well of real as of personal estate, and hence their decrees have been held to be conclusive upon the question of the validity of such wills, in relation both to real and personal estate, and not re-examinable in any other court. Potter *v.* Webb, 2 Greenl. 257; Small *v.* Small, 4 Greenl. 220, 225; Ex parte Fuller, 2 Story, C. C. 327, 328, 329; Patten *v.* Tallman, 27 Me. 17; Osgood *v.* Breed, 12 Mass. 533, 534; Dublin *v.* Chadbourn, 16 Mass. 433, 441; Laughton *v.* Atkins, 1 Pick. 548, 549; Brown *v.* Wood, 17 Mass. 68, 72; Parker *v.* Parker, 11 Cush. 519; Tompkins *v.* Tompkins, 1 Story, C. C. 554; Poplin *v.* Hawke, 8 N. H. 124; Strong *v.* Perkins, 3 N. H. 517, 518; Judson *v.* Lake, 3 Day, 318; Bush *v.* Sheldon, 1 Day, 170; Fortune *v.* Buck, 23 Conn. 1; Lewis *v.* Lewis, 5 La. 388, 393, 394; Donaldson *v.* Winter, 1 La. 137, 144. In Dublin *v.* Chadbourn, 16 Mass. 433, 442, it was held that, in no case can the due execution of a will, the sanity of the testator, the attestation of the witnesses, or any question

of the kind, be tried in the courts of common law. The probate of the will, so long as it remains unreversed, is conclusive upon such questions. See Poplin *v.* Hawke, 8 N. H. 124. So the probate of the will of a married woman, unappealed from and unreversed, is final and conclusive upon the heirs-at-law of the testator, and they cannot, in a court of common law, deny the legal capacity of the testatrix to make such will. Parker *v.* Parker, 11 Cush. 519. See also Judson *v.* Lake, 3 Day, 318; Robinson *v.* Allen, 11 Gratt. 785; Poplin *v.* Hawke, 8 N. H. 124; Cassels *v.* Vernon, 5 Mas. 332; Picquet *v.* Swan, 4 Mas. 443, 461, 462. This is true even in regard to a will made and admitted to probate in another state or country, which has also been allowed and recorded in Massachusetts according to the mode prescribed by the statute of that state. Parker *v.* Parker, 11 Cush. 519; Dublin *v.* Chadbourn, 16 Mass. 433. So it is held in Ohio, that a will made in another state, according to the law of the latter state, if admitted to probate in Ohio, will pass lands in Ohio, though not executed according to the laws of Ohio. Bailey *v.* Bailey, 8 Ohio, 239. See Meese *v.* Keefe, 10 Ohio, 362.

In some of the states the probate of wills of real estate is not held conclusive until after the lapse of a certain number of years; as in Virginia, after seven years, Parker *v.* Brown, 6 Gratt. 554; see Bagwell *v.* Elliott, 2 Rand. 190, 200: In Alabama, after five years, Darrington *v.* Borland, 3 Port. 37, 38; Hardy *v.* Hardy, 26 Ala. 524; Tarver *v.* Tarver, 9 Pet. 180: In Mississippi, after five years, Scott *v.* Calvit, 3 How. (Miss.) 157, 158: In Ohio (unless reversed in manner prescribed by statute in that state), after two years, Bailey *v.* Bailey, 8 Ohio, 246; Swazey *v.* Blackman, ib. 18, 19. See Hathaway's will, 4 Ohio (N. S.), 383. In Pennsylvania, a will of lands may be given in evidence on due proof of its execution, notwithstanding a verdict and judgment against the will, upon a feigned issue out of the Register's Court. Smith *v.* Bonsall, 5 Rawle, 80. In this latter state, and in North Carolina, the probate of a will of lands is *primâ facie* evidence of the due execution of the will, but not conclusive, ib.; Coates *v.* Hughes, 3 Binn. 498, 507; Loy *v.* Kennedy, 1 Watts & S. 396; Logan *v.* Watt, 5 Serg. & R. 22; Barker *v.* McFerran, 26 Penn. St. 211; Stanley *v.* Kean, 1 Tayl. 93; Rev. Stat. N. C. (1837) p. 621; Harven *v.* Spring, 10 Ired. 180. So in Maryland, Townshend *v.* Duncan, 2 Bland, 45; Randall *v.* Hodges, 3 Bland, 47; Stat. Md. 1831, c. 315, § 1. See Smith *v.* Steele, 1 Harr. & McH. 419; Darbey *v.* Mayer, 10 Wheat. 470. So in Florida, Thompson's Dig. 193. See as to Kentucky, Robertson *v.* Barbour, 6 B. Mon. 527; Welles's will, 5 Litt. 273; Singleton *v.* Singleton, 8 B. Mon. 340. In Delaware, the record of the probate of a will is sufficient evidence, both as to real and personal estate. Del. Rev. Code, 1874, c. 89, p. 539.

But in New York, Mr. Chancellor Walworth remarked, in Bogardus *v.* Clark, 4 Paige, 623, 626, 627: "The law appears to be well settled, that the sentence of the Surrogate, or of a higher court, having power to review his decision, in relation to the competency of the testator to make a will of personal property, is not conclusive upon the parties to the litigation in a subsequent suit as to the validity of a devise of real estate contained in the same will." See Jackson *v.* Le Grange, 19 Johns. 386; Jackson *v.* Thompson, 6 Cowen, 178; Rogers *v.* Rogers, 3 Wend. 514, 515; Dubois *v.* Dubois, 6 Cowen, 494. So in New Jersey, Sloan *v.* Maxwell, 2 Green, Ch. 566; Harrison *v.* Rowan, 3 Wash. C. C. 580. So in South Carolina, Crosland *v.* Murdock, 4 M'Cord, 217; Taylor *v.* Taylor, 1 Rich. 533, 534.

In Maine, Massachusetts, Vermont, and New Hampshire, it is expressly provided by statute, that "the probate of a will devising real estate shall be conclusive as to the due execution of the will, in like manner as it is of a will of personal estate." Rev. Stat. Me. c. 74, § 15; Gen. Stat. Mass. c. 92, § 38; Rev. Stat. Vt. c. 49, § 20; Gen. Laws, N. H. c. 194, § 1.

A party who has received a legacy under a will cannot be permitted to contest the validity of such will, without repaying the amount of the legacy, or bringing the money into court. And the rule applies even if the party was a minor when the legacy was received. Hamblett *v.* Hamblett, 6 N. H. 333; Bell *v.* Armstrong, 1 Addams, 365; Braham *v.* Burchell, 3 Addams, 243.

The general rule of law, both in England and the United States, is, that letters testamentary granted abroad, give no authority to sue or to be sued in another jurisdiction, though they may be sufficient ground for new probate authority. Lee *v.* Bank of England, 8 Ves. 44; Dixon *v.* Ramsay, 3 Cranch, 319; Morrell *v.* Dickey, 1 Johns. Ch. 153; Thompson *v.* Wilson, 2 N. H. 291; Stearns *v.* Burnham, 5 Greenl. 261; Ives *v.* Allen, 12 Vt. 589; Story, Confl. Laws, § 517. This rule does not apply, except where the party sues in right of the deceased. If he sues in his own right, though the right be derived under a foreign will, no new administration need be taken out, if it does not affect real estate passed by the will. Trecothick *v.* Austin, 4 Mason, 16; Story, Confl. Laws, § 517; Robinson *v.* Crandall, 9 Wend. 425. But see Stearns *v.* Burnham, 5 Greenl. 261; Thompson *v.* Wilson, 2 N. H. 291. A derivative right to personal property may be proved under a foreign will, without probate in the State where it is sought to be established. Trecothick *v.* Austin, 4 Mas. 16; Hutchins *v.* State Bank, 12 Met. 421 An executor, who has proved the will in the probate court of another state, may legally convert bank shares, belonging to the estate, into money, in Massachusetts, without the aid of the Probate Court of the latter state, if he can do so without legal process. Hutchins *v.* State Bank, 12 Met. 421.

A will may be proved in two ways; either in Common Form, or by Form of Law; the latter mode is also called the Solemn Form, and, sometimes, proving *per testes*. Swinb. Pt. 6, § 14, pl. 1; Godolph. Pt. 1, c. 20, § 4; 1 Williams, Ex. (6th Am. ed.) 325.

A will is proved in *common form*, when

the executor presents it before the judge, and in the absence of, and without citing, the parties interested, produces witnesses to prove the same. Upon the testimony of these witnesses that the will exhibited is the true, whole, and last will and testament of the deceased, and sometimes upon less proof, and even upon the oath of the executor alone, the judge grants probate thereof. 1 Williams, Ex. (6th Am. ed.) 325; Swinb. Pt. 6, § 14, pl. 2; Godolph. Pt. 1, c. 20, § 4; 2 Black. Comm. 508; 1 Greenl. Ev. § 518. This mode of proof, though not in very common use (1 Greenl. Ev. § 518), is still adopted and practised in some of the United States. In New Hampshire, if the probate of a will is not contested, the judge may allow and approve the same in *common form*, upon the testimony of one of the subscribing witnesses thereto, though the others may be living, and within the process of the court. Gen. Laws, N. H. c. 194, § 6. In Mississippi and Virginia; by Code of Virginia, 1873, provision is made for proof of wills and testaments upon notice to all parties, and it is made the duty of courts to appoint guardians *ad litem* in case of infants and persons of unsound mind being interested. Personal notice is required to be given to an infant resident of the state above the age of fourteen years. After notice, the court must proceed to a hearing, and any person interested has a right to an issue to a jury. The court has power to require the production of all testamentary papers of the same testator, so as to decide finally what is the true, last will of the testator. Any sentence or final order made in such case is a bar to any farther proceeding in equity, saving to infants one year after they come of age, and to persons residing out of the commonwealth, or not having been actually summoned, two years after such sentence or order. The court in which the will is to be proved is authorized to proceed, immediately, on the will being exhibited for proof, to receive probate thereof and grant letters testamentary; Miss. Rev. Code, 1871, c. 9, p. 213; Rev. Code Va. 1873, c. 118, pp. 915, 916; and in Mississippi, this first probate of the will is regarded as a mere incipient step, necessary to enable the court to carry the will into execution; but it is not conclusive upon heirs and distributees, and may be opened and set aside, if necessary, and applied for within due time. Cowden *v.* Dobyns, 5 Smedes & M. 82. The law of North Carolina is very similar on this point. Etheridge *v.* Corprew, 3 Jones, 14. In case of probate in common form, if actual notice of the will and probate is relied upon as barring the right to probate in solemn form, it must be alleged and proved. Etheridge *v.* Corprew, supra.

At common law, when a will had been proved only in *common form* without notice to those interested, the probate might be reexamined within thirty years after probate. Noyes *v.* Barber, 4 N. H. 406; 1 Williams, Ex. (6th Am. ed.) 335.

In Tennessee, it has been decided that where a paper purporting to be a will, has been proved in *common form*, by the *ex parte* examination of witnesses, the probate may be set aside after the lapse of eighteen years, and an issue *devisavit vel non* be directed to try its validity; Gibson *v.* Lane, 9 Yerg. 475. See Hodges *v.* Bauchman, 8 Yerg. 186; and in South Carolina, Johnson, J., remarked in Brown *v.* Gibson, 1 Nott & M'C. 326, "The probate of a will in *common form* may be revoked either on a suit by citation, or on appeal, and that at any time within thirty years." The period within which probate may be contested, has been prescribed by statute in some of the states. Thus, in the states of Alabama and Missouri, any person interested may contest the validity of a will within five years, and infants, married women, and persons absent from the state or *non compotes*, have five years after the removal of the disability for the same purpose. Alabama Code, 1876, c. 2, p. 594; Missouri, R. S. 1880, c. 71, p. 683. In Arkansas, a period of three years is allowed. Digest, 1871, c. 135, p. 1015. In Mississippi, two years are allowed for contesting the probate of a will, and in cases of disability, two years after it is removed. Rev. Code, 1871, c. 9, p. 213. In Delaware, provision is made by statute for review of probate of a will by any person who shall not have appeared, or had notice, within seven years, and, in case of disability, within three years after its removal. Rev. Code Del. 1874, c. 89, p. 339. In Virginia, again, five years are allowed for contesting a will. Rev. Code, 1873, c. 118, p. 915; Nalle *v.* Fenwick, 4 Rand. 418. If not contested within that time, it stands, though informal. Parker *v.* Brown, 6 Gratt. 554. In New Hampshire, any party interested may have the probate of any will, proved without notice, re-examined, and the will proved in *solemn form*, at any time within one year of such probate, if there has been no appeal, and, in such case, persons under disability have one year for the same purpose after the removal of the disability. Gen. Laws, N. H. 1878. c. 194, §§ 7, 8, 9. In most of the above States, provisions are made for using the evidence taken on the first probate, or the proceedings on a former trial, in case the subscribing witnesses are deceased, or cannot be produced, at the subsequent trial or hearing.

Where the validity of a will has been once fully contested in manner pointed out by statute for contestation, review, or re-examination, that is conclusive on all persons. Scott *v.* Calvit, 3 How. (Miss.) 157, 158; Nale *v.* Fenwick, 4 Rand. 588; Hodges *v.* Bauchman, 8 Yerg. 186; Malone *v.* Hobbs, 1 Robinson, 346.

In New Hampshire (Noyes *v.* Barber, 4 N. H. 406), where the heirs at law were under the age of thirteen years, when a will was proved, and the executor named in the will was made residuary legatee and testamentary guardian of the heirs, a probate of the will before any other guardian of the heirs was appointed, was not allowed to have the effect of a probate in *solemn form*. In New Hampshire, no decree allowing or disallowing any will can be made in *solemn form*, until guardians have been appointed for all minors and others interested therein who are incapacitated to take care of their estates, and agents

appointed by the Judge of Probate for all persons interested who reside out of the State or are unknown. Gen. Laws, N. H. 1878, c. 194, § 11.

As to the probate of wills in *solemn form* or *per testes*, Richardson, C. J., in Noyes *v.* Barber, 4 N. H. 409, said: "We understand a probate in *solemn form* to be a probate made by the judge, after all the persons, whose interests are to be affected by the will, have been duly notified, and had an opportunity to be heard on the subject." Lovelass on Wills, 211–213; Godolph. Pt. 1. c. 20, § 4, p. 60; 1 Greenl. Ev. § 518; 2 Black. Comm. 508. This is the mode of proof now very generally required in the United States; 2 Greenl. Ev. § 692; 1 Greenl. Ev. § 518, and generally after the will is proved in this form and admitted to record, the probate is forever binding. 1 Williams, Ex. (6th Am. ed.) 334, 335; 2 Greenl. Ev. § 692.

Any person interested in a will has a right to apply for probate of it, and the Judge of Probate, or other person having authority for the probate of a will, on such application may summon the executor, or other person having the custody of the will, to exhibit it for probate. Stebbins *v.* Lathrop, 4 Pick. 42; 1 Williams, Ex. (6th Am. ed.) 311. This right is given by statute in Indiana. Stat. Ind. 1877, c. 3, p. 576. This authority in the Judge of Probate is incident to his general jurisdiction of the probate of wills, and the power of granting administrations. Stebbins *v.* Lathrop, 4 Pick. 42; 3 Bac. Abr. 34, Executors, &c. (e) 1; 1 Williams, Ex. (6th Am. ed.) 311, Swinb. Pt. 6, § 12, pl. 1; Godolph. Pt. 1, c. 20, § 2. This power is conferred by statute in Mississippi. Miss. Rev. Code, 1871, c. 9, p. 211. It is said that the Judge of Probate may *ex officio*, or at the instance of any one, cite the executor to prove the will, because the applicant may be ignorant of the contents of the will, and may expect a legacy, and has a right to be informed. Stebbins *v.* Lathrop, 4 Pick. 42; Godolph. Pt. 1, c. 20, § 2; 3 Bac. Abr. 40, Executors, &c. (e) 8. Besides, the legatees or devisees may be absent or unknown, in which case it is proper for the Judge of Probate to proceed *ex officio*, and to prevent the concealment, suppression, or loss of the will. Stebbins *v.* Lathrop, 4 Pick. 42; 1 Williams, Ex. (6th Am. ed.) 311. See per Lord Hardwicke in Tucker *v.* Phipps, 3 Atk. 360.

In Massachusetts, whoever has a right to offer a will in evidence, or to make title under it, may insist on having it proved. A creditor of a devisee has this right for the purpose of obtaining satisfaction of his debt. Stebbins *v.* Lathrop, 4 Pick. 33. In some of the states the executor is required by statute to present the will to the Probate Court having jurisdiction of the same within a certain period (in New Hampshire, Vermont, and Connecticut, this period is thirty days) of time after the death of the testator; in default of which, he is liable to a penalty. But the statute penalty is merely cumulative, and does not take away the rights of any party claiming under the will, nor the jurisdiction of the Judge of Probate. Stebbins *v.* Lathrop, 4 Pick. 33, 42. See State *v.* Pace, 9 Rich. (S. C.) 355.

If the executor has not the custody of the will, but some other person has it, such person may be compelled to exhibit it. Swinb. Pt. 6, c. 12, pl. 2; Godolph. Pt. 1, c. 20, § 2; Bethun *v.* Dinmure, 1 Cas. temp. Lee, 158; Ex parte Law, 2 Ad. & E. 45; Georges *v.* Georges, 18 Ves. 294. By statute in Massachusetts and in other states, persons having the custody of wills are required, within a certain period after notice of the death of the testator, to deliver the same into the Probate Court which has jurisdiction of the case, or to the executors named in the will, under a penalty If they neglect so to do. Gen. Stat. Mass. c. 92, § 16. So in Vermont, New Hampshire, and Maine. Gen. Stat. Vt. (1862) c. 49, p. 378; Gen. Laws, N. H. c. 194, § 2; Rev. Stat. Me. (1871) c. 64, p. 505. The time within which, after the testator's death, the will is to be proved, is said, in England, to be somewhat uncertain, and left to the discretion of the judge, according to the distance of the place, the weight of the will, the quality of the executors, the absence of the witnesses, the importunity of the creditors and legatees, and other circumstances incident thereto. 1 Williams, Ex. (6th Am. ed.) 319; Godolph. Pt. 1, c. 20, § 3. In Massachusetts, a will may be proved in the Probate Court at any time, even after twenty years, in order to establish the title to real estate. Shumway *v.* Holbrook, 1 Pick. 117. In Georgia, wills are required to be registered within three months from the death of the testator, on failure of which they shall be deemed and construed to be void, and of no effect. Laws of Georgia, Code by Hotchkiss (1845), pp. 456, 457, c. 17, § 13. What constitutes sufficient evidence of the execution of a will is said to be a matter of law for the court. Vernon *v.* Kirk, 30 Penn. St. 218.

The attesting witnesses to a will are regarded in the law as placed around the testator, in order that no fraud may be practised upon him in the execution of the will, and to judge of his capacity; and whenever a will is to be proved in the more ample or solemn form, any person interested has a right to insist on the testimony of all the attesting witnesses, if living and within reach of the process of the court. Chase *v.* Lincoln, 3 Mass. 236; Burwell *v.* Corbin, 1 Rand. 131, 141; Sears *v.* Dillingham, 12 Mass. 358; Apperson *v.* Cottrell, 3 Porter, 51; Brown *v.* Wood, 17 Mass. 72, 73; 2 Greenl. Ev. § 692: Bailey *v.* Stiles, 1 Green, Ch. 231, 232; Nalle *v.* Fenwick, 4 Rand. 585; Rush *v.* Parnell, 2 Harrington, 448; Jones *v.* Arterburn, 11 Humph. 97; Patten *v.* Tallman, 27 Me. 29. This is required by statute in Illinois. Rev. Stat. (1880) c. 148, p. 1108. In Kentucky, a will, though of land, is admitted to probate on proof by one witness, as on a trial at common law, provided he is able to speak to all the requisite solemnities. Overall *v.* Overall, Litt. Sel. Ca. 503; Hall *v.* Sims, 2 J. J. Marsh. 511. So in Georgia. Walker *v.* Hunter, 17 Ga. 364. In Doe *v.* Lewis, 7 Carr. & P. 574, the attestation to a will of lands purported that the will had been

signed by the testator in the presence of three witnesses, who, in his presence, and in the presence of each other, signed the attestation. To prove the execution of the will, one of the three witnesses was called, and he stated, that he and one of the other witnesses saw the testator sign the will, but that the third witness was not then present, though the signature to the attestation was in his handwriting. It was held that this was not sufficient proof of the will, without either calling the third witness, or accounting for his absence.

In a case where one of the subscribing witnesses was called, and proved the signature of himself, and the two other subscribing witnesses, and stated that he could not remember particularly whether the other witnesses subscribed in the presence of the testator, but presumed they all did so, as he would not have subscribed his name as a witness, unless the requisites of the statute had been complied with; but it appeared that the other witnesses were living and within the jurisdiction of the court. It was held that, although such evidence would have been sufficient, if the other witnesses had been dead, to authorize the jury to believe that all the formalities had been complied with, yet, in this case, it was not sufficient. Jackson *v.* Vickory, 1 Wend. 406; Fetherly *v.* Waggoner, 11 Wend. 599; Smith *v.* Jones, 6 Rand. 32. See Welch *v.* Welch, 9 Rich. (S.C.) 133. But if any of those witnesses, from death, or absence from the country, or other cause, cannot be produced at the trial, any of them have become infamous, insane, or interested, since the time of their attestation, the will may be proved by the other subscribing witnesses, and by proof of the handwriting of those who are thus absent or rendered incompetent to testify. Smith *v.* Jones, 6 Rand. 32; Sears *v.* Dillingham, 12 Mass. 358, 361, 363; 1 Phill. Ev. (Cowen & Hill's ed.) 501; Bernett *v.* Taylor, 9 Ves. 381; Chase *v.* Lincoln, 3 Mass. 236; Wilde, J., in Hawes *v.* Humphrey, 9 Pick. 357; Miller *v.* Miller, 2 Bing. N. C. 76; Carrington *v.* Payne, 5 Ves. 411; Jones *v.* Arterburn, 11 Humph. 97; Jauncey *v.* Thorne, 2 Barb. Ch. 40; Patten *v.* Tallman, 27 Me. 29; Dean *v.* Dean, 1 Williams (Vt.), 746; Verdier *v.* Verdier, 8 Rich. (S. C.) 135; Greenough *v.* Greenough, 11 Penn. St. 489; Barker *v.* McFerran, 26 Penn. St. 211; Vernon *v.* Kirk, 30 Penn. St. 218. The competency of an attesting witness to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of attestation. Patten *v.* Tallman, 27 Me. 17. In New Hampshire it is enacted, that if the attesting witnesses shall, after the execution of any will, become incompetent from any cause, the same may be proved and allowed upon other satisfactory evidence. Gen. Laws, N. H. 1878, c. 194. § 12. A similar provision exists in Massachusetts, Gen. Stat. Mass. c. 92. § 6. The recent Act of 1 Vict. c. 26, § 14, provides 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.

Where all the witnesses to a will are dead, out of the jurisdiction of the court, or cannot be found, or have become incompetent to testify since their attestation, the handwriting of all of them should be proved. Hopkins *v.* Albertson, 2 Bay, 484; Jackson *v.* Luquere, 5 Cowen, 221; Crowell *v.* Kirk, 3 Dev. 355; Sampson *v.* Bradley, 1 M'Cord, 74. It appears that in such case the handwriting of the testator should be proved also. Hopkins *v.* De Graffenreid, 2 Bay, 187; Jackson *v.* Luquere, 5 Cowen, 221; Chase, C. J., in Collins *v.* Elliott, 1 Harr. & J. 2; 2 Stark. Ev. (5th Am. ed.) 923; Jackson *v.* Le Grange, 19 Johns. 288, 289. In Anderson *v.* Welch, 1 Ca. temp. Lee, 577, in the Ecclesiastical Court, it was held, that, under certain circumstances, the validity of a will may be established by proving the handwriting of the attesting witnesses, though no evidence can be given of the handwriting of the deceased. 1 Williams, Ex. (6th Am. ed.) 352. Where the witnesses have set their marks to a will, there must be proof that such marks are the marks of the witnesses. Collins *v.* Nichols, 1 Harr. & J. 399; Jackson *v.* Van Deusen, 5 Johns 144. See Davies *v.* Davies, 9 Q. B. 648.

"The *degree of diligence in the search* for the subscribing witnesses is the same," says Mr. Greenleaf (1 Greenl. Ev. § 574) "which, is required in the search for a lost paper, the principle being the same in both cases. 1 Greenl. Ev. § 558. It must be a strict, diligent, and honest inquiry and search, satisfactory to the court, under the circumstances of the case. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found; and inquiry should be made of his relatives, and others, who may be supposed to be able to afford information. And the answers given to such inquiries may be given in evidence, they not being hearsay, but parts of the *res gestæ*. If there is more than one attesting witness, the absence of them all must be satisfactorily accounted for, in order to let in the secondary evidence." Miller *v.* Miller, 2 Bing. N. C. 76; James *v.* Parnell, 1 Turn. & R. 417.

Where there is a failure of recollection on the part of an attesting witness, less strictness of proof is sometimes required; as where one of the attesting witnesses to a will had no recollection of having subscribed it, but testified that the signature of his name thereto was genuine, the testimony of another attesting witness that the first did subscribe his name in the testator's presence was held sufficient evidence of the fact. Dewey *v.* Dewey, 1 Met. 349. Dewey, J., said: "The question is not whether this witness now recollects the circumstance of the attestation, and can state it as a matter within his memory. If this were requisite, the validity of a will would depend, not upon the fact whether it was duly executed, but whether the testator had been fortunate in securing

witnesses of retentive memory. The real question is, whether the witness did in fact properly attest it." See Dudleys *v.* Dudleys, 3 Leigh, 443; Clarke *v.* Dunnavant, 10 Leigh, 13; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Davies *v.* Davies, 19 Q. B. 648; Welty *v.* Welty, 8 Md. 15; Newhouse *v.* Godwin, 17 Barb. 236; Cheney *v.* Arnold, 18 Barb. 434.

In Clarke *v.* Dunnavant, 10 Leigh, 13, Tucker, President, said: "That on a question of probate, the defect of memory of the witnesses will not be permitted to defeat the will, but that the court may, from circumstances, presume that the requisitions of the statute have been observed; and that they ought to presume from the fact of attestation, unless the inferences from that fact are rebutted by satisfactory evidence." See also Dayrell *v.* Glasscock, Skinn. 413; Smith *v.* Jones, 6 Raod. 32; Boyd *v.* Cook, 3 Leigh, 32; Gwinn *v.* Radford, 2 Litt. 137; Dudleys *v.* Dudleys, 3 Leigh, 443; Jackson *v.* LeGrange, 19 Johns. 386; Welty *v.* Welty, 8 Md. 15; Lewis *v.* Lewis, 1 Kern. (N. Y.) 220; Vernon *v.* Kirk, 30 Penn. St. 218. If the memory of the witness be partially or wholly gone, the law presumes, after proof of attestation, that everything else necessary to give the instrument validity existed. The rule is different if the witness is able to recollect that things essential were positively wanting. Then the presumption is changed. Barr *v.* Graybill, 13 Penn. St. 396.

If the subscribing witness should deny the execution of the will, he may be contradicted, as to that fact, by another subscribing witness; and even if they all swear that the will was not duly executed, the party interested to sustain the will would be allowed to go into circumstantial evidence to prove the due execution. 1 Phill. Ev. (Cowen & Hill's ed.) 502; Austin *v.* Willes, Bull. N. P. 264; Jackson *v.* Christman, 4 Wend. 277, 283; Pearson *v.* Wightman, 1 Const. Ct. Rep. 336; Rush *v.* Purnell, 2 Harrington, 448; Rigg *v.* Wilton, 13 Ill. 15; Jauncey *v.* Thorne, 2 Barb. Ch. 40. The subscribing witnesses to a will differed in the account they gave of the execution, one not recollecting whether the deceased signed or not, the other deposing that she did not see the deceased sign. They agreed that the signature was not acknowledged in their presence. A witness present at the time deposed that the deceased signed her name in the presence of the subscribing witnesses; and on this evidence the will was held to be duly executed. Bennett *v.* Sharp, 33 Eng. L. & Eq. 618. But the evidence in favor of the will must be clear and full to substantiate it. Handy *v.* State, 7 Harr. & J. 42; Pearson *v.* Wightman, 1 Const. Ct. 336; MacKenzie *v.* Handasyde, 2 Hagg. 211; 2 Stark. Ev. (5th Am. ed.) 922; Vernon *v.* Kirk, 30 Penn. St. 218.

If one of the subscribing witnesses impeach the validity of the will on the ground of fraud, and accuse other witnesses, who are dead, of being accomplices in the fraud, it has been held that evidence may be given of their general good character. 1 Phill. Ev. (Cowen & Hill's ed.) 308, 502; 2 Stark. Ev. (5th Am. ed.) 922. See Provis *v.* Reed, 5 Bing. 435; Doe *v.* Harris, 7 Carr. & P. 330.

By placing his name to the instrument, the witness, in effect, certifies to his knowledge of the mental capacity of the testator, and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Walworth, Chancellor, in Scribner *v.* Crane, 2 Paige, 147. But in Maryland, where an attesting witness to a will (who died before the trial) declared, on the same day the will was executed, that he had witnessed the will, that he did not believe the testator, at the time he executed the will, to be a sane person, and that he had signed the will as a witness merely to gratify the testator, it was held that these declarations were admissible in evidence, on the ground that the attestation of a witness imparts all that is requisite to make the will good and valid, so far as his signature can go; and not only convenience and necessity, but justice would seem to require that his declarations, almost simultaneous with the act, should be admitted to rebut the presumptions of law. Townshend *v.* Townshend, 9 Gill, 506; Harden *v.* Hays, 9 Barr, 151. See Weatherhead *v.* Sewell, 9 Humph. 272.

Should such witness afterwards attempt to impeach his own act, and to prove that the testator did not know what he was doing when he made his will, though such testimony will be far indeed from conclusive, Hudson's case, Skinn. 79; and Lord Mansfield even held that a witness impeaching his own acts, instead of finding credit, deserved the pillory, Walton *v.* Shelly, 1 T. R. 300; Lowe *v.* Jolliffe, 1 Sir Wm. Bl. 366; yet Lord Elden has not gone so far in exclusion of such evidence, admitting, however, that it is to be received with the most scrupulous jealousy. Boetle *v.* Bluodell, 19 Ves. 504; Howard *v.* Braithwaite, 1 Ves. & Bea. 208. Sir John Nicholl has perhaps laid down the most distinct rule, namely, that such testimony is not to be positively rejected; but, at the same time, no fact stated by a witness open to such just suspicion can be relied on, where he is not corroborated by other evidence. Kinleside *v.* Harrison, 2 Phill. 499. It has lately been decided that a will may be pronounced for, though both the attesting witnesses depose to the incapacity of the testator. Le Breton *v.* Fletcher, 2 Hagg. 568; 1 Williams, Ex. (6th Am. ed.) 348; Jauncey *v.* Thorne, 2 Barb. Ch. 40; Hall *v.* Hall, 18 Ga. 40. So in Landon *v.* Nettleship, 2 Addams, 245, a will was pronounced for against the testimony of two out of three of the subscribing witnesses, on the question of capacity.

When the subscribing witnesses to a will are dead and no proof of their handwriting can be obtained, as must frequently happen in the case of old wills, it has been considered sufficient to prove the signature of the testator alone. 1 Phill. Ev. (Cowen & Hill's ed.) 503. This was held in a case where the will was over thirty years old. Duncan *v.* Beard, 2 Nott & M'C. 400.

It is said by Mr. Greenleaf (1 Greenl. Ev.

§§ 21, 570 (see Doe *v.* Wolley, 8 Barn. & C. 22; Jackson *v.* Christman, 4 Wend. 277, 282; Hall *v.* Gittings, 2 Harr. & J. 112) that, "where deeds and wills are over thirty years old, and are unblemished by any alterations, they are said to prove themselves; the bare production thereof is sufficient, the subscribing witnesses being presumed to be dead. This presumption, so far as this rule of evidence is concerned, is not affected by proof that the witnesses are living. But it must appear that the instrument comes from such custody as to afford a reasonable presumption in favor of its genuineness, and that it is otherwise free from just grounds of suspicion." Proof of possession or other acts of ownership under the will, has, however, been held necessary, in some cases, in connection with the antiquity of the will. Jackson *v.* Luquere, 5 Cowen, 221, 225; 1 Phill. Ev. (Cowen & Hill's ed.) 503, 504; Fetherley *v.* Waggoner, 11 Wend. 599; Jackson *v.* Christman, 4 Wend. 277, 282, 283; Shaller *v.* Brand, 6 Binn. 435; Jackson *v.* Thompson, 6 Cowen, 178; Hewlett *v.* Cook, 7 Wend. 374; Staring *v.* Bowen, 6 Barb. Sup. Ct. 109. There is a difference between the English and the American cases as to the period from which the thirty years are to run, whether from the date of the will or from the death of the testator, the English cases holding the former and the American the latter. See Doe *v.* Wolley, 8 Barn. & C. 22; Doe *v.* Deakin, 3 Carr. & P. 402; Jackson *v.* Blanshan, 3 Johns. 202; Jackson *v.* Luquere, 5 Cowen, 221, 224; Nelson, J., in Hewlett *v.* Cook, 7 Wend. 374. In those states where the probate of a will is conclusive in an action at law to try the title to the land devised, the will, however old, would probably not be received in evidence, at common law, unless it had been admitted to probate. But, under the statute of 1852 in North Carolina, a will dated in 1741, found in the office of the Secretary of State, and having three subscribing witnesses, and otherwise in proper form to pass land, is admissible in evidence, though there is no other evidence of its probate. Stephens *v.* French, 3 Jones, 359.

It is ordinarily held sufficient in courts of common law (in those states in which the probate of a will is not regarded as conclusive in respect to lands), to call only one of the subscribing witnesses, if he can speak to all the circumstances of the attestation; but he must be able, alone, to prove all the facts necessary to a full and perfect execution of the will, in order to dispense with the other witnesses, if they are alive and within the jurisdiction of the court. 1 Phill. Ev. (Cowen & Hill's ed.) 496; Jackson *v.* Le Grange, 19 Johns. 336; Dan *v.* Brown, 4 Cowen, 483; Jackson *v.* Vickory, 1 Wend. 406; Jackson *v.* Betts, 6 Cowen, 377; Turnipseed *v.* Hawkins, 1 M'Cord, 272; 2 Greenl. Ev. § 694; Howell *v.* House, 2 Const. 80; Lindsay *v.* McCormack, 2 A. K. Marsh. 229; Elmendorff *v.* Carmichael, 3 Litt. 479; Denn *v.* Milton, 7 Halst. 70. In Pennsylvania, to entitle a will to be read to a jury, both witnesses must testify as to all that the law requires. Mullen *v.* M'Kelvy, 5 Watts, 399; Hock *v.* Hock, 6 Serg. & R. 47; Lewis *v.* Maris, 1 Dall. 278; Weigel *v.* Weigel, 5 Watts, 486. If the adverse party would impeach the will, he may examine the others. 1 Phill. Ev. (Cowen & Hill's ed.) 496.

But on a bill in chancery to establish a will, the rule is, that all the witnesses ought to be examined by the plaintiff. "It is the invariable practice in chancery," said Lord Camden, in the case of Hindson *v* Kersey, 4 Burn, Eccl. Law, 93 (see Burwell *v.* Corbin, 1 Rand. 131, 141; Ogle *v.* Cook, 1 Ves. 177; Bailey *v.* Stiles, 1 Green, Ch. 220; Townsend *v.* Ives, 1 Wils. 218; S. P. Fitzherbert *v.* Fitzherbert, 4 Bro. C. C. 231; Powel *v.* Cleaver, 2 Bro. C. C. 504) "never to establish a will, unless all the witnesses are examined, because the heir has a right to proof of sanity from every one of those whom the statute has placed about his ancestor." And, on the trial of an issue directed by the Court of Chancery to examine the validity of a will, all the attesting witnesses ought to be examined; for the issue is a part of the proceedings of the court. When the court sends an issue to be tried, it reserves to itself the review of all that passes; and there would be an inconsistency in requiring that all the three witnesses should be examined in the Court of Chancery yet dispensing with their examination on the trial of an issue at law. Bootle *v.* Blundell, 1 Coop. Ch. 136; 1 Phill. Ev. (Cowen & Hill's ed.) 496, 497. "There is, however," said Lord Brougham, in Tatham *v.* Wright, 2 Russ. & M. 1, "a broad line of distinction between cases where the moving party seeks to set the will aside, and cases where the moving party is a devisee seeking to establish it; the rule which makes it imperative to call all the witnesses to a will must be considered as applicable to the latter only." And although the general rule is, that upon every issue directed out of chancery and trial at law to ascertain the validity of a will, all the witnesses to the will should be examined, if practicable, unless the heir should waive the proof, yet this rule is not absolutely inflexible, but it will yield to peculiar circumstances. 2 Story, Eq. Jur. § 1447; Tatham *v.* Wright, 2 Russ. & M. 1; Bootle *v.* Blundell, 19 Ves. 499, 502, 505, 509.

If a will duly executed, and not revoked, is lost, destroyed, or mislaid, either in the lifetime of the testator, without his knowledge, or after his death, it may be admitted to probate upon satisfactory proof being given of its having been so lost, destroyed, or mislaid, and also of its contents. Trevelyan *v.* Trevelyan, 1 Phillim. 149; Davis *v.* Davis, 2 Addams, 224; Graham *v.* O'Fallan, 3 Mo. 507; Jackson *v.* Betts, 9 Cowen, 208; Dickey *v.* Malechi, 6 Mo. 177; Bailey *v.* Stiles, 1 Green, Ch. 220; Reeves *v.* Reeves, 2 Const. 334; Clark *v.* Wright, 3 Pick. 67; 1 Edw. Ch. 148; Dan *v.* Brown, 4 Cowen, 483; 2 Dana, 106; Jackson *v.* Russell, 4 Wend. 543; Kearns *v.* Kearns, 4 Harrington, 83; Buchanan *v.* Matlock, 8 Humph. 390.

Where the testator handed his will to a person to keep for him, and four years after-

wards died, when the will was found gnawed to pieces by rats, and in part illegible; on proof of the substance of the will, by the joining of the pieces, and the memory of witnesses, the probate was granted. 1 Williams, Ex. (6th Am. ed.) 380.

If a will be wholly or partially cancelled, or destroyed, by the testator whilst of unsound mind, probate will be granted of it, as it existed in its integral state, that being ascertainable. Scruby *v.* Fordham, 1 Addams, 74: Apperson *v.* Cottrell, 3 Port. 51; Rhodes *v.* Vinson, 9 Gill, 169. But to entitle a party to give parol evidence of the contents of a will, alleged to be destroyed, where there is not conclusive evidence of its absolute destruction, the party must show that he has made diligent search and inquiry after the will, in those places where it would most probably be found, if in existence. Jackson *v.* Hasbrouck, 12 Johns. 192; Dan *v.* Brown, 4 Cowen, 483; Fetherley *v.* Waggoner, 11 Wend. 599; Jackson *v.* Betts, 9 Cowen, 208; Eure *v.* Pittman, 3 Hawkes, 364. The evidence must be most clear and satisfactory of the whole contents of the will so lost, destroyed, or mislaid, or it cannot be admitted to probate. Davis *v.* Sigourney, 8 Met. 487; Durfee *v.* Durfee, ib. 490, note; Huble *v.* Clark, 1 Hagg. Eccl. 115; Rhodes *v.* Vinson; 9 Gill, 169. Sometimes a copy of the original will in the hands of the scrivener is the only evidence, and sometimes a will is set up solely from the recollection of those who read it before it was destroyed. 2 Caines, 363; Jackson *v.* Russell, 4 Wend. 543; Harr. Eq. 243; Smith *v.* Steele, 1 Harr. & M'H. 419; 2 Harr. & J. 112; Happy's will, 4 Bibb, 553. In Steele *v.* Price, 5 B. Mon. 58, it was held that where a will is proved to have been duly published, but is lost or destroyed, and only a part of the contents is proved, it may be established as far as proved. It would seem that, independent of statute, a single witness is sufficient to prove a lost or destroyed will. Lewis *v.* Lewis, 6 Serg. & R. 497. One witness to a will lost or destroyed has been held enough to establish the due execution thereof, if he could declare that he saw the other witness subscribe it in the testator's presence. Graham *v.* O'Fallan, 3 Mo. 507. But in Bailey *v.* Stiles, 1 Green, Ch. 231, it is assumed, that the subscribing witnesses to a lost will must be produced as in other cases, with the same exceptions in case of death, absence from the state, &c., and this is undoubtedly the true rule. In Johnson *v.* Durant, 2 Rich. 184, it was held, on the trial of a suggestion to set up a lost or destroyed will, that a subscribing witness to the will, who was named one of the executors, but who had renounced the executorship, was competent to prove the contents of the will. Where a prior will has been revoked by a subsequent one, and both are improperly destroyed, the first instrument cannot be set up as the testator's will by proof of its contents, although the contents of the second cannot be ascertained. Day *v.* Day, 2 Green, Ch. 549.

*CHAPTER III. *32

PERSONAL DISABILITIES OF TESTATORS (*a*).

THE general testamentary power over freehold lands of inheritance was originally conferred by the statute of 32 Hen. 8, c. 1, into the precise import of which it is now unnecessary to inquire, as it was quickly followed by the explanatory act of 34 & 35 Hen. 8, c. 5 (*b*), which, after reciting the former statute, enacted, "That all and singular person and persons having a sole estate or interest in fee simple, or seised in fee simple in coparcenary, or in common in fee simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, [or of rents or services incident to any reversion or remainder, and having no manors, lands, tenements, or hereditaments, holden of the king, his heirs or successors, or of any other person or persons by knight's service (*c*),] shall have full and free liberty, power, and authority to give, dispose, will, or devise to any person or persons (except bodies politic and corporate), by his last will and testament in writing, as much as in him of right is or shall be, all his said manors, lands, tenements, rents, hereditaments, or any of them, or any rents, commons, or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure." [The statute then proceeds to empower persons holding by knight's service to devise two parts of their lands.]

Persons having sole estate in fee enabled to devise.

Sect. 14 provides that wills or testaments made of any manors, &c., by any woman coverte, or person within the age of twenty-one years,[1] idiot, or by any person of non-sane memory, shall not be taken to be good or effectual in law. This clause did not create any disability that was unknown, or,

Exception as to *femes covertes*, infants, lunatics, and idiots.

[(*a*) The subject of this chapter, especially with reference to the decisions in the Ecclesiastical Courts, is very fully treated of in Williams on Executors, Pt. I. Bk. II. c. 3.]

(*b*) Ir. Parl. 10. Car. 1, sess. 2, c. 2.

[(*c*) The statute 12 Car. 2, c. 24. by changing tenure by knight's service into free and common socage tenure, in effect abolished this exception.]

[1] There is great lack of uniformity as to the age of capacity for making wills under the laws of the several states. In some of the states the testator, whether male or female, must be of the age of twenty-one years, to make a will either of personalty or of realty: —

Delaware. Rev. Code, 1874, ch. 84, p. 508.
Florida. Bush's Digest, 1872, ch. 4, p. 75.
Indiana. Stat. 1876, Vol. 2, ch. 3, p. 570.
Iowa. Rev. Code, 1880, Vol. 1, ch. 2, p. 607.
Kansas. Comp. Laws, 1879, ch. 117, p. 1001.
Kentucky. Gen. Stat. 1873, ch. 113, p. 831.

indeed, comprise all that were known to the common law; but *33 seems to have been * dictated by an apprehension that the general terms of the prior act of the thirty-second year of the same reign might possibly have had the effect of removing pre-existing disabilities, according to the construction given to the nearly contemporary Statute of Jointures (*d*). That the disqualifications in question were not the creation of the statute, is evident from the fact that they all extended equally to the bequeathing of personal estate, except that infants of a certain age, namely, males of fourteen and females of twelve, were, at the period now under consideration, competent to dispose by will of personalty (*e*); and such a will was valid, although the testator or testatrix afterwards lived to attain majority without confirming it (*f*). On the other hand, infants of every age were (as they still are) incompetent to alien any portion of their property, real or personal, by deed. In some places a custom exists, or rather did exist (for it is to be remembered we are now speaking of the old law), enabling infants to devise even real estate; but it was essential to the validity of such a custom, that it prescribed some definite and reasonable age; for a custom authorizing the making of a will by persons too young to be capable of exercising a discretion would be no less absurd than one which should empower lunatics or idiots to devise their property (*g*).

As to wills of infants.

(*d*) 27 Hen. 8, c. 10.

(*e*) Bishop *v.* Sharpe, 2 Vern. 469; Whitmore *v.* Weld, 2 Ch. Rep. 383; Hyde *v.* Hyde, Pre. Ch. 316; [Co. Lit. 896, n. (6).]

(*f*) Hinckley *v.* Simmons, 4 Ves. 160.

(*g*) 2 Anders. 12. Fourteen, it seems, would be considered a proper age.

Maine. R. S. 1871, ch. 74, 564.

Massachusetts. Gen. Stat. 1860, ch. 92, p. 476.

Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, pp. 1371, 1372.

Minnesota. Stat. 1878, ch. 47, pp. 567, 568.

Mississippi. Rev. Code, 1871, ch. 54, p. 525.

Nebraska. Gen. Stat. 1873, ch. 17, pp. 299, 300.

New Hampshire. Gen. Laws, 1878, ch. 193, p. 454.

New Jersey. Revision, 1709–1877, p. 1244.

North Carolina. Battle's Revisal, 1873, p. 847.

Ohio. R. S. 1880, Vol. 2, ch. 1, p. 1424.

Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1474.

South Carolina. R. S. 1873, ch. 86, p. 442.

Texas. R. S. 1879, Title 99, p. 712, or if lawfully married.

Vermont. Gen. Stat. 1862, ch. 49, p. 377.

In other States a distinction is made concerning wills of personalty and of realty, the age of twenty-one being generally, but not universally, required for the execution of wills of realty, while personalty may be disposed of by younger persons, generally of the age of eighteen years.

Alabama. Code, 1876, ch. 2, pp. 585, 586.

Arkansas. Digest, 1874, ch. 135, p. 1012.

Missouri. R. S. 1879, Vol. 1, ch. 71, p. 679.

Oregon. Gen. Laws, 1843–1872, ch. 64, p. 788.

Rhode Island. Gen. Stat. 1872, ch. 171, pp. 373, 374.

Virginia. Code, 1873, ch. 118, p. 910.

West Virginia. R. S. 1878, ch. 201, p. 1168.

The laws of some of the other States make a distinction in respect of age between males and females.

Colorado. Gen. Laws, 1877, ch. 103, p. 929.

Illinois. R. S. 1880, ch. 148, p. 1108.

Maryland. Rev. Code, 1878, art. 49, p. 419.

In New York, males of eighteen and females of sixteen years may dispose of personalty, R. S. 1875, Vol. 3, ch. 6, p. 60.

In Colorado, Gen. Stat. 1877, ch. 103, p. 929, persons over seventeen years of age may dispose of personal estate.

In Wisconsin, a distinction is made in favor of an infant married woman of the age of eighteen years, R. S. 1878, ch. 103, p. 650.

Every person over the age of eighteen years may dispose of both real and personal estate, in California, Codes & Stat. 1876, Vol. 1., ch. 1, p. 719. So in

Connecticut. Gen. Stat. 1875, ch. 2, p. 368.

Dakota. Rev. Code, 1877, Title 5, ch. 1, p. 343.

Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 199.

Utah. Comp. Laws, 1876, ch. 2, p. 271.

The disability of infancy was expressly taken away, in regard to the paternal appointment of testamentary guardians, by the statute of 12 Car. 2, c. 24, s. 8, which enabled any father, *within the age of twenty-one, or of full age*, who should leave any child under twenty-one, and not married, *by deed or will*, executed in the presence of two witnesses, to dispose of the custody of such child or children during such time as he or they should continue under twenty-one, or any less time, to any person or persons other than Popish recusants (*h*); and it gave to such person the custody of the infant's estate, both real and personal, and the same actions as guardians in socage. As to testamentary appointment of guardians by infants.

The guardianship draws after it the custody of the land which the infancy of the father would have prevented him from devising directly (*i*); and it is observable, that though the authority of guardians, appointed under the statute of Charles, does not * extend *34 to infant children who are married at the father's death, yet as to children who are then unmarried, the guardianship is not determined by subsequent marriage (*j*). The statute has been held not to interfere with the lord's right [by special custom] to the guardianship of his infant copyhold tenant (*k*).

The will of an idiot is of course void (*l*). Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may destroy testamentary power (*m*).[1] Wills of idiots.

(*h*) This exception seems to be now inoperative: see Simpson on Infants, p. 201, and stats. cited.

(*i*) Bedell *v* Constable, Vaugh. 178.

(*j*) Earl of Shaftsbury's Case, cit. 3 Atk. 625, [2 P. W. 102; but see *contra* as to daughters, 1 Ves. 91, per Lord Hardwicke.]

(*k*) Clench *v.* Cudmore, 3 Lev. 395.

(*l*) Dyer, 143 b.

(*m*) See Swinb. P. II. ss. 5, 6. [And as to the difference in proof of lucid intervals in case of imbecility from drinking and ordinary imbecility, see Ayrev *v.* Hill, 2 Add. 206. In Foot *v.* Stanton, 1 Deane, 19, the will of a person subject to epileptic fits was admitted to probate, although there was no evidence that the testatrix knew its contents, the memory of the attesting witnesses failed, and a third person declared she was unfit to make a will.

[1] Extreme old age does not of itself disqualify a person from making a will, since it is not the soundness of the body but of the mind that is requisite in testaments. Extreme age may raise some doubt of capacity, but only so far as to excite the vigilance of the court. Kinleside *v.* Harrison, 2 Phillim. 461; Griffiths *v.* Robins, 3 Madd. 192; Potts *v.* House, 6 Ga. 324; Kirkwood *v.* Gordon, 7 Rich. 474. Yet if a man in his old age become a very child again in his understanding, or is become so forgetful that he knows not his own name, he is then deemed no more fit to make his testament than a natural fool, or a child, or a lunatic person. Swinb. Pt 2, § 5, pl. 1; Godolph. Pt. 1, c. 8, § 4; Bird *v.* Bird, 2 Hagg. 142; Lewis *v.* Pead, 1 Ves. Jr. 19; Shelf. Lunacy, 276. See Van Alst *v.* Hunter, 5 Johns. Ch. 148; Sloan *v.* Maxwell, 2 Green, Ch. 581; Bonner *v.* Matthews, cited Shelf. Lunacy, 327. In Lowe *v.* Williamson, 1 Green, Ch. 82, a will was sustained, although the testator was eighty years of age, very deaf, and his eyesight was defective when he made his will. In Reed's Will, 2 B. Mon. 79, the testator was eighty years of age, and was afflicted with the palsy so that he could neither write nor feed himself, and his will was held valid. See also Watson *v.* Watson, 2 B. Mon. 74; Whitenack *v.* Stryker, 1 Green, Ch. 8; Andress *v.* Weller, 2 Green, Ch. 605; Stevens *v.* Vancleve, 4 Wash. C. C. 262; Bird *v.* Bird, 2 Hagg. 142; Mackenzie *v.* Handasyde, 2 Hagg. 211; Nailing *v.* Nailing, 2 Sneed, 630. "He that is overcome by drink," says Swinburne, Pt. 2, § 6, "during the time of his drunkenness is compared to a madman, and therefore, if he make his testament at that time, it is void in law, Duffield *v.* Robeson, 2 Harrington, 375, 383; which is to be understood, when he is so excessively drunk that

Of persons deaf and blind.

A person who has been from his nativity blind, deaf, and dumb, is intellectually incapable of making a will, as he wants those senses through which ideas are received into the mind (*n*). Blindness or deafness alone, however, produces no such incapacity. [It seems, however, that a person born deaf and dumb, but not blind, though *primâ facie* incapable (*o*), may be shown to have capacity, and to understand what is written down (*p*);[1] and this of

(*n*) See Co. Lit. 42 b.

(*o*) Swinb. P. II. s. 10.

(*p*) Dickenson *v.* Blissett, 1 Dick. 268; In re Harper, 6 M. & Gr. 731, 7 Scott, N. R. 431. As to the evidence required, see Re Owston, 31 L. J. Prob. 177; Re Geale, 33 L. J. Prob. 125.

he is utterly deprived of the use of reason and understanding, otherwise, albeit his understanding is obscured, and his memory troubled, yet he may make his testament, being in that case." On one occasion, where it appeared that the testator was a person not properly insane or deranged, but habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted in most respects like a madman, it was held that, as the testator was not under the excitement of liquor at the time of making his will, he was not to be considered as insane. The will was accordingly established; and the court pointed out the difference between such a case and one of actual insanity. Insanity, it was said, might often be latent, whereas there can scarcely be such a thing as latent ebriety; and consequently in a case like the one under consideration, all that was to be shown was the absence of the excitement at the time of the act done; at least, the absence of excitement in any such degree as would vitiate the act done. Ayrey *v.* Hill, 2 Addams, 206; Shelf. Lunacy, 276. See also Wheeler *v.* Alderson, 3 Hagg. 602, 608; Starrett *v.* Douglass, 2 Yeates, 48; Black *v.* Ellis, 3 Hill (S. C.), 68; Shelf. Lunacy, 304. In Andress *v.* Weller, 2 Green, Ch. 604, 608, it was held that, if the testator's habits of intoxication were not such as to render him habitually incompetent for the transaction of business, it was necessary for the party setting up the incapacity of the testator on the ground of casual intoxication, to show its existence at the time of executing his will. See Harper's Will, 4 Bibb, 244. Hence, where no fixed and settled delusion is shown, and consequently no decided insanity, and an extravagant act of a party can be accounted for by the excitement of liquor, while at all other times his mind was sound; in order to avoid a will made by him, it must be proved that he was so excited by liquor, or so conducted himself during the particular act, as to be at that moment legally disqualified from giving effect to it. Wheeler *v.* Alderson, 3 Hagg. 606; Shelf. Lunacy, 276. In a suit to set aside a will on the ground that the testator was intoxicated at the time of executing it, his declarations, subsequently made, "that he never made the will; that if he signed it, they got him drunk and made him do it; that he had no recollection of it;" have been held inadmissible. Gibson *v.* Gibson, 24 Mo. 227.

[1] In a case of mere blindness, with no allegation of fraud, undue influence, or the like, the court will grant probate of the will upon satisfactory evidence that the testator knew and approved of the contents of the instrument. In re Axford, 1 Swab. & T. 540. The evidence naturally expected in such a case is that of the reading over the contents to the testator, perhaps in the presence of those who witness the will. Fincham *v.* Edwards, 3 Curteis, 63; Weir *v.* Fitzgerald, 2 Bradf. 42. But other evidence showing that he was acquainted with the contents may be received. Ib.; Barton *v.* Robins, 3 Phillim. 455, n.; Harrison *v.* Rowan, 3 Wash. C. C. 580, 583; Clifton *v.* Murray, 7 Ga. 564; Wampler *v.* Wampler, 9 Md. 540 (where the will was read to the testator, but not before the attesting witnesses); Longchamp *v.* Goodfellow, 2 Bos. & P. N. R. 415 (to the same effect); Martin *v.* Mitchell, 28 Ga. 382 (the same); Davis *v.* Rogers, 1 Houst. 44. See further, Lewis *v.* Lewis, 6 Serg. & R. 489. The case of one who cannot read appears to stand upon similar footing. It should be shown that he was aware of the contents of the will; but it is not necessary that the will should be read over to him if the fact of the testator's knowledge can be otherwise clearly shown. Guthrie *v.* Price, 23 Ark. 396; Day *v.* Day, 2 Green, Ch. 551 (where the inability to read was due to the physical weakness of the testator). Deafness, though absolute, cannot, of course, create incapacity to make a will. See Gombault *v.* Public Admr., 4 Bradf. 226. Nor is the case different, though the person be both deaf and dumb from birth. Brower *v.* Fisher, 4 Johns. Ch. 441; Potts *v.* House, 6 Ga. 324, 356. Though it was formerly considered that such a person was to be presumed, *primâ facie*, to be an idiot. Potts *v.* House supra. That perhaps would not now be the case. The modern authorities go no further than to require very great scrutiny, in such cases, into the testator's knowledge and approval of the contents of the will. In re Geale, 3 Swab. & T. 431; In re Owston, 2 Swab. & T. 461. The difference in legal effect is little less than one of words; for the party's testamentary capacity must be proved. So far as any question of absolute incapacity is concerned, no intelligent court would at the

course applies more strongly to a person deaf and dumb from accident (*q*).] Indeed, it has even been held that a will need not be read over to a blind testator previously to its execution, [provided there be proof *aliunde* of a clear knowledge of the contents of the instrument (*r*); but] it is almost superfluous to observe, that, in proportion as the infirmities of a testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised. This remark especially applies to wills executed by the inmates of lunatic asylums (*s*), * or any other persons habitually or occasionally afflicted with insanity. *35 Lunatics.

A mad or lunatic person cannot, during the insanity of his mind, make a testament of land or goods; but if, during a lucid interval, he make a testament, it will be good (*t*). Lord Hardwicke has observed that fraud and imposition upon weakness may be a sufficient ground to set aside a will of real, much more a will of personal estate (*sed quære* as to this distinction?) although such weakness is not a sufficient ground for a commission of lunacy (*u*). And in Mountain *v.* Bennett (*x*), Lord C. B. Eyre laid it down, that although a man may have a mind of sufficient soundness and discretion to manage his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising that discretion in the making his will, he cannot be considered as having such a disposing mind as will give it effect. In this case the will was attempted to be invalidated on the ground that it was obtained by the undue influence of the testator's wife, whom he had married from an inferior station; but the will was finally supported, amidst much conflicting testimony as to the state of the testator's mind, principally on the evidence of the attesting witnesses, who were persons of high character and respectability, and were unanimous as to the testator's sanity and freedom from control.[1]

Fraud.

Undue influence over a weak mind.

(*q*) Swinb. P. II. s. 10.]

(*r*) Longchamp d. Goodfellow *v.* Fish, 2 B. & P. N. R. 415; [Edwards *v.* Fincham, 3 Curt. 63, 7 Jur. 25; and see Mitchell *v.* Thomas, 6 Moo. P. C. C. 137, 12 Jur. 967.]

(*s*) Lord Eldon once mentioned his having been concerned in a cause, in which a gentleman who had been some time insane, and was confined at Richmond, had made a will. It was, his Lordship observed, of large contents, proportioning the different divisions with the most prudent care, with a due regard to what he had previously done for the objects of his bounty, and in every respect pursuant to what he declared before his malady he intended to have done; and it was held that he was of sound mind at the time. See 1 Dow, 179; [Martin *v.* Johnston, 1 Fost. & Finl. 122; Nichols *v.* Binns, 1 Sw. & Tr 239.]

(*t*) Swinb. P. II. s. 3, pl. 1, 4; Beverley's case, 4 Rep. 123 b; Kemble *v.* Church, 3 Hagg. 273. (*u*) Vide 2 Ves. 408. (*x*) 1 Cox, 355.

present day affirm such incapacity even of a person deaf, dumb, and blind. See Reynolds *v.* Reynolds, 1 Speer, 256, 257. It may be added that the disability, under the Roman law, of persons deaf or dumb to execute wills, like the disability of such persons to contract (explained, 2 Kent, Com. 451, n., 12th ed.), was the necessary consequence of the peculiar formulary system of that law: they could not do the physical acts required. Gaius, ii. 102–104; Inst. ii. 12, 3.

[1] The question whether a will is the free and voluntary act of the testator, or the result of fraud or of influences operating upon

[In cases of weakness of mind arising from the near approach of

him in consequence of which his will was made subordinate to that of another, depends upon the question, whether he had sufficient intelligence to detect the fraud or strength of will to resist the influences brought to bear upon him. Griffith *v.* Diffenderffer, 50 Md. 466, 480. The state of mind and of body of the testator, at the time of executing the will, accordingly becomes material upon a question of fraud or of undue influence. What would, for example, be improper influence in a person of feeble health, might not be such in the case of one in robust health; and it is thought that, in some cases, the declarations of the testator may be satisfactory evidence thereof, as where they are made soon after the execution of the will. Ib. But there is much conflict of authority as to the admissibility of such evidence. Ib.; Waterman *v.* Whitney, 1 Kern. 168; Boylan *v.* Meeker, 4 Dutch. 274. If a testator, after executing a will, should say that the will was forced from him, or that it was executed by him under pressure of undue influence, such evidence, of course, would be hearsay, and inadmissible. Mooney *v.* Olsen, 22 Kans. 69, 76; Cudney *v.* Cudney, 68 N. Y. 148; Jackson *v.* Knifen, 2 Johns. 31; Stevens *v.* Vancleve, 4 Wash. C. C. 265; Hayes *v.* West, 37 Ind. 21. But while the declarations of the testator are not admissible for such a purpose, they are admissible for the purpose of showing the state of his mind. Mooney *v.* Olsen, supra; Waterman *v.* Whitney, 11 N. Y. 157. The difference appears to be the difference between declarations concerning some external fact, such as fraud or undue influence, which itself is commonly mere matter of inference from other facts, and the effect of those declarations (or rather statements, facts, acts, and conduct of the testator), in showing the party's mental condition at the time he executed the will. Ib. See further, as to the admissibility of the testator's declarations on the question of undue influence, Allen *v.* Public Admr., 1 Bradf. 378; Dennis *v.* Weekes, 51 Ga. 24. When it has been proved that a will has been executed with due solemnities, the burden of proving that it was executed under undue influence rests upon the party who makes the objection. Boyse *v.* Rossborough, 6 H. L. Cas. 2, 49; Tyler *v.* Gardiner, 35 N. Y. 559; Davis *v.* Davis, 123 Mass. 590; Baldwin *v.* Parker, 99 Mass. 79. He must, at least, show facts from which the court will be justified in treating the circumstances attending the execution of the will as suspicious. Further, in order to set aside the will of a person of sound mind, it is not sufficient that the circumstances are consistent with the hypothesis that it was obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Ib. p. 51. A distinction is made in some authorities between control and undue influence. Control is considered more easily capable of description approaching definition, because it imports something of the nature of duress or fear. On the question of undue influence, such definiteness cannot be predicated. Ib. The books, however, afford the general guide. For example, it has been observed that importunity must be such as to take away the testator's free agency. Kinleside *v.* Harrison, 2 Phillim. 551; Davis *v.* Calvert, 5 Gill & J. 302; Wampler *v.* Wampler, 9 Md. 540; Small *v.* Small, 4 Greenl. 223; Eckert *v.* Flowry, 43 Penn. St. 46; McMahon *v.* Ryan, 20 Penn. St. 329; Blakey *v.* Blakey, 33 Ala. 611; Hall *v.* Hall, 38 Ala. 131; Turner *v.* Cheesman, 15 N. J. Eq. 243. In other words, the influence necessary to vitiate the will must amount to force and coercion in its effect upon free agency. Williams *v.* Goude, 1 Hagg. 577; Morris *v.* Stokes, 21 Ga. 552; Rollwagen *v.* Rollwagen, 63 N. Y. 504; Armstrong *v.* Huddlestone, 1 Moore, P. C. 478; Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387, 394; Gardiner *v.* Gardiner, 34 N. Y. 155, 162; Seguine *v.* Seguine, 3 Keyes, 663, 669; Brick *v.* Brick, 66 N. Y. 144; Coit *v.* Patchen, 77 N. Y. 394. In other cases, it is said that undue influence, in the legal sense, must be influence which can justly be described, by a person looking at the matter judicially, to have caused the execution of a paper pretending to express the testator's mind, which really did not express his mind, but expressed something else, something which he did not really mean. Boyse *v.* Rossborough, 6 H. L. Cas. 2, 34. In this case, the Lord Chancellor observed that, in a popular sense, we often speak of a person exercising undue influence over another when the influence is not of a nature to invalidate a will. And his meaning was thus illustrated: A young man is sometimes led into dissipation by following the example of a person of maturer years, to whom he looks up, and who leads him to consider habits of dissipation, perhaps, as creditable. The companion is then said to exercise undue influence. But if, in these circumstances, the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave him everything he possessed, the will certainly could not be impeached for undue influence. Nor would the case be altered merely because the companion had urged or even importuned the testator so to dispose of his property; provided only the young man was really carrying into effect his own intention, formed without either coercion or fraud. If, however, the will be really the will of another, as where the testator has assented from mere habit of yielding to the person, and that habit has been produced by prostration of mind and body, the supposed will is invalid. Newhouse *v.* Godwin, 17 Barb. 236. The difficulty of fixing upon the point at which influence exerted over the mind of a testator becomes legally undue, is greatly enhanced when the question arises between husband and wife. It is both difficult to inquire and impolitic to permit inquiry into all that may have passed in this intimate relation. But the difficulty is one of fact; and the general criterion is probably

death, strong proof is required that the contents of the will were

the same as in other cases. It has been laid down in the House of Lords, that the influence in such a case must amount to coercion or fraud. Boyse *v.* Rossborough, supra. It was observed, for example, in this case, that if a wife, by falsehood, raise prejudice in the mind of her husband against those who would be the natural objects of his bounty, and, by contrivance, keep him from intercourse with his relatives, to the end that these impressions which she knows he has thus formed to their disadvantage may not be removed, such acts may avoid the will. But a will cannot be set aside on account of any persuasions or representations of the testator's wife, even while the testator is at the point of death, to induce him to make a more liberal provision than he is disposed to make, though it should appear that such persuasions had prevailed upon him to comply with her wishes; provided it appear that the testator was of sound mind, and was not imposed upon by false representations, and that the provision made for the wife is not greatly disproportionate to that of others near of kin, nor unreasonable. Lide *v.* Lide, 2 Brev. 403. Indeed, it has been declared that when a wife has, by her virtues, so gained the affection of her husband that "her good pleasure is a law to him," the result cannot be undue; and though the husband, while thus situated, should by will give his whole property to his wife, there would be no legal ground for impeaching the disposition. Small *v.* Small, 4 Greenl. 223. Nor, according to the authorities, would it be proper to set aside a will of the husband in favor of his wife, on the ground of influence, importunity, or undue advantage taken by the wife, though it should appear that she possessed a powerful influence over his mind and conduct in the general concerns of life; unless there should be evidence that such influence was exerted in a special degree to procure a will peculiarly acceptable to her, and to the prejudice and disappointment of others naturally expecting the testator's favor. Ib.; Miller *v.* Miller, 3 Serg. & R. 267; Meeker *v.* Meeker, 75 Ill. 260; Rankin *v.* Rankin, 61 Mo. 295; O'Neall *v.* Farr, 1 Rich. (S. C.) 80; Thompson *v.* Farr, 1 Speer, 93; Zimmerman *v.* Zimmerman, 23 Penn. St. 375; Hughes *v.* Murtha, 32 N. J. Eq. 701. But such latitude of influence should, it seems, be allowed only in favor of a wife, or perhaps of a child: it certainly should not be extended to a woman not the wife, with whom the testator has been consorting in shame. Kessinger *v.* Kessinger, 37 Ind 341; Denton *v.* Franklin, 9 B. Mon. 28. But mere unlawful cohabitation with the mother of an illegitimate child is not alone evidence of undue influence in a contest with the child as legatee of his father. Wainwright's Appeal, 89 Penn. St. 222; Rudy *v.* Ulrich, 69 Penn. St. 177. Though with other facts it may be such evidence. Ib.; Dean *v.* Negley, 41 Penn. St. 317; Main *v.* Ryder, 84 Penn. St. 217. See Farr *v.* Thompson, Cheves, 37; S. C. 1 Rich. 80, supra. And, in general, it is not unlawful in any case for a person by honest intercession and persuasion, or by fair and flattering speech, to procure a will in favor of himself or of another person. Calvert *v.* Davis, 5 Gill & J. 301. See Harrison's Will, 1 B. Mon. 351; Sechrest *v.* Edwards, 4 Met. (Ky.) 163; Elliott's Will, 2 J. J. Marsh, 340; Gilreath *v.* Gilreath, 4 Jones, Eq. 142; Yoe *v.* McCord, 74 Ill. 33; Tyler *v.* Gardiner, 35 N. Y. 559. It may be added that undue influence is more readily inferred of a husband over his wife than the reverse, Marsh *v.* Tyrrell, 2 Hagg. 84, and that neither kindness of action, Eddy's case, 32 N. J. Eq. 701; In re Gillespie, 26 N. J. Eq. 523; Tawney *v.* Long, 76 Penn. St. 106, nor bad treatment can alone show undue influence, Tawney *v.* Long, supra. See Tingley *v.* Cowgill, 48 Mo. 291. It will be correctly inferred, from what has been stated, that to invalidate a will for undue influence (and the same is true of fraud) it must be shown that this was exercised with respect to the will itself, or so contemporaneously, or so connected with it, as by almost necessary presumption to affect it. Other acts not relating to the bounty in question, even though contemporaneous, are only evidence to raise suspicion against any act done under the superintendence or by the interference of those committing it. Jones *v.* Godrich, 5 Moore, P. C. 16, 40; Rutherford *v.* Morris, 77 Ill. 397; Eckert *v.* Eckert, 40 Penn. St. 46; McMahon *v.* Ryan, 20 Penn. St. 329. Thus threats, violence, or undue influence long past, cannot be shown to impeach a will. Wainwright's Appeal, 89 Penn. St. 222: McMahon *v.* Ryan, 21 Penn. St. 329; Eckert *v.* Flowry, 43 Penn. St. 417; Thompson *v.* Kyner, 65 Penn. St. 368. *Secus* of contemporaneous threats, though only of estrangement and non-intercourse. Moore *v.* Blauvelt, 15 N. J. Eq. 367. But this rule as to past acts should not be carried too far. Where a jury, for instance, see that, at and near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the will that as to him he was not a free agent, but was acting under control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly upon the execution of the will, that, in regard to that also, the same undue influence was exercised. Boyse *v* Rossborough, 6 H. L. Cas. 2, 51; Rossborough *v.* Boyse, 3 Irish Ch. 489, 510. It is upon the general principle that fraud or undue influence must be practised towards the will, that it is held that fraud or undue influence in procuring one legacy will not *per se* invalidate other legacies; but if the fraud or undue influence affect the whole will, the whole will be void, though the wrongful conduct was the conduct of but one of several beneficiaries. Florey *v.* Florey, 24 Ala. 241. And if the portion affected by undue influence be inseparable from the rest of the will, it seems that the whole is invalid. See Baker's Will, 2 Redf. 179. Nor will a

In case of weakness of mind, strong proof required as to knowledge of contents of will.

known to the testator (*y*),[1] and that it was his spontaneous act (*z*). A suspicion is justly entertained of a will conferring large benefits on the person by whom or by whose agent it was prepared (*a*), or of a will in favor of a medical attendant in whose house the testator resided (*b*); but it seems that this suspicion goes no further than to necessitate somewhat stricter proof as to the testator's *capacity*, though not as to his *knowledge* of the contents of the will (*c*).

Suspicion when will prepared by legatee, or in favor of medical attendant.

*36 Such knowledge is of course * requisite (*d*); but it will be presumed if there is no evidence to the contrary (*e*), and if capacity is duly proved (*f*).

In such cases *capacity* must be *proved*.

Where undue influence is supposed to have been exercised in obtain-

[(*y*) Mitchell *v.* Thomas, 6 Moo. P. C. C. 137, 12 Jur. 967; Durnell *v.* Corfield, 1 Rob. 51, 8 Jur. 915. But see Reece *v.* Pressey, 2 Jur. N. S. 380.

(*z*) Tribe *v.* Tribe, 1 Rob. 775, 13 Jur. 793; and see Dufaur *v.* Croft, 3 Moo. P. C. C. 136; Harwood *v.* Baker, ib. 282; Re Field, 3 Curt. 752.

(*a*) Paske *v.* Ollatt, 2 Phillim. 323; Durling *v.* Loveland, 2 Curt. 225; Baker *v.* Batt, 2 Moo. P. C. C. 317.

(*b*) Jones *v.* Godrich, 5 Moo. P. C. C. 16; and see Major *v.* Knight, 4 No. Cas. 661; Cockcroft *v.* Rawles, ib. 237.

(c) Barry *v.* Butlin, 2 Moo. P. C. C. 480, 1 Curt. 614, 637. If a will rational on the face of it is shown to have been duly executed, it is presumed in the absence of any evidence to the contrary that it was made by a person of competent understanding. But if there are circumstances not merely opposed to, (Foot *v.* Stanton, 1 Deane, 19,) but sufficient to counterbalance that presumption, the decree of the court must be against its validity, unless the evidence on the whole is sufficient to establish *affirmatively* that the testator was of sound mind when he executed it. Sutton *v.* Sadler, 3 C. B. (N. S.) 87; Symes *v.* Green, 1 Sw. & Tr. 401, 5 Jur. N. S. 742, 26 L. J. Prob. 83.

(*d*) Hastilow *v.* Stobie, L. R. 1 P. & D. 64. (e) Fulton *v.* Andrew, L. R. 7 H. L. 448.

(*f*) Browning *v.* Budd, 6 Moo. P. C. C. 435. As to the nature of *fraud* necessary to invalidate a will, see 5 Moo. P. C. C. 40. As to the nature of *undue influence* necessary for that purpose, see Stulz *v.* Schæfle, 16 Jur. 909. And on both points, Boyse *v.* Rossborough, 6 H. L. Ca. 1, 3 Jur. N. S. 373.

prohibition in the will from questioning it prevent an interested party from impeaching it for fraud or undue influence. Lee *v.* Colston, 5 T. B. Mon. 246. If, in a question of the mental strength of the testator, it be shown that the disposition of the property runs along the line of his established friendships and previously expressed intentions, this tends strongly against the alleged exercise of undue influence; while, if the contrary be shown, there will be some ground for a different inference. Mooney *v.* Olsen, supra, referring to Howell *v.* Barden, 3 Dev. 442; Hester *v.* Hester, 4 Dev. 228; Rambler *v.* Tryon, 7 Serg. & R. 90; Beaubien *v.* Cicotte, 12 Mich. 459; Cawthorn *v.* Haynes, 24 Mo. 236; Davis *v.* Calvert, 5 Gill & J. 269; Allen *v.* Public Admr., 1 Bradf. 378. It is error, under the law of Indiana, to ask the jury "if the testator was of sound mind when he executed the will, if he was then under duress, and if the will was duly executed, or was obtained by fraud," in the face of a request to ask them whether the testator had mind and memory sufficient to understand the ordinary affairs of life, and to act with discretion therein, whether he knew his children and grandchildren, and whether he had a general knowledge of his estate. Todd *v.* Fenton, 66 Ind. 25. As to instructions to the jury concerning undue influence, see In re Ames, 51 Iowa, 596, 604; Mowry *v.* Selbu, 2 Bradf. 133, 147; Hanel *v.* Hanel, 1 Duv. 203; Coleman *v.* Robertson, 17 Ala. 84; Rogers *v.* Diamond, 13 Ark. 474; Taylor *v.* Wilburn, 20 Mo. 306; Brown *v.* Molliston, 3 Whart. 129; Thornton *v.* Thornton, 39 Vt. 122.

[1] But it is not necessary, in ordinary cases, to prove that the will was read to the testator. Huss's Appeal, 43 Penn. St. 73. Ordinarily, the execution of the will constitutes sufficient evidence (unless there is counter-evidence) of the testator's knowledge of the contents. Beall *v.* Mann, 5 Ga. 456; Gaither *v.* Gaither, 20 Ga. 709; Vernon *v.* Kirk, 30 Penn. St. 268. But special circumstances may exist requiring express evidence of the testator's knowledge, even, it seems, before any evidence is adduced of his want of knowledge. Such are the cases referred to in the text where a relation of confidence is shown to have existed between the testator and legatee or devisee. The same is true when the draftsman of the will claims a considerable gift under the instrument. Hughes *v.* Meredith, 24 Ga. 325.

ing a will, it seems that the whole will is not necessarily void, but it will be left to a jury in the case of real estate (*g*), and to the Judge of the Court of Probate in the case of personalty (*h*), to determine what gifts were obtained by undue influence, and such gifts only will be declared void.] [1]

Part of a will may be void and the rest valid.

(*g*) Trimleston *v.* D'Alton, 1 D. & Cl. 85; Hippesley *v.* Homer, T. & R. 48, n.; Lord Guillamore *v.* O'Grady, 2 J. & Lat. 210; Haddock *v.* Trotman, 1 Fost. & Finl. 31. See post, Chap. XIII. (*h*) See Allen *v.* Macpherson, 1 H. L. Ca. 191, 11 Jur. 785.]

[1] Where a confidential relation exists, such as that of client and attorney, or patient and physician, between a testator and a large beneficiary under the will, far less will be deemed undue influence than in other cases. Indeed, when the relation is once shown to have existed, it appears to devolve upon the beneficiary to show a clear intention or that no pressure was brought to bear by him or by his procurement upon the testator. Barry *v.* Butlin, 1 Curteis, 637; Walker *v.* Smith, 29 Beav. 394; Riddell *v.* Johnson, 26 Gratt. 152; Wilson *v.* Moran, 3 Bradf. 172; Meek *v.* Perry, 36 Miss. 190; Crispell *v.* Dubois, 4 Barb. 393; Breed *v.* Pratt, 18 Pick. 115; Paske *v.* Ollat, 2 Phillim. 323; Greville *v.* Tylee, 7 Moore, P. C. 320; Ashwell *v.* Lomi, Law Rep. 2 P. & D. 477; Harvey *v.* Sullens, 46 Mo. 147; Boyd *v.* Boyd, 66 Penn. St. 283; Wright *v.* Howe, 7 Jones, 412; Downey *v.* Murphey, 1 Dev. & B. 82, 90. Testamentary provisions in favor of a party occupying the superior position of confidence, have, however, been thought to stand upon somewhat more favorable ground than gifts *inter vivos* in favor of such a person. Hindson *v.* Weatherill, 5 DeG. M. & G. 301. But see Walker *v.* Smith, 29 Beav. 394. Perhaps it is better in all cases of confidence merely to say that proof of intention is very strictly required than that a presumption of wrong-doing arises. The mere existence of a confidential relation between the testator and devisee or legatee certainly never operates to bar the right of the beneficiary to receive the bounty: at most it only affords ground for suspicion, requiring the party to show that the testator was of sound mind, that he clearly understood the contents of the will, and that he was at the time under no restraint. Barry *v.* Butlin, 1 Curteis, 637; Riddell *v.* Johnson, 26 Gratt. 152. But see Downey *v.* Murphey, supra, in which the learned court (1 Dev. & B. 90) appear to have lost sight of the true rule upon the point of knowledge of the contents of the instrument. (It is never necessary to show that the will was read over to the testator, if it can be shown in other ways that the testator was fully aware of its contents and approved thereof. Infra.) A confidential relation, within this rule, exists wherever a continuous trust is reposed in the skill or integrity of another, or the property or pecuniary interest in whole or in part, or the bodily care of one person is entrusted to another. Bigelow, Fraud, 190. Closely related to questions arising upon confidential relations stands the effect of *large* bounties bestowed in the will upon the draftsman. Indeed, it often happens that the superior person in the relation of confidence is also the draftsman of the will; as in Barry *v.* Butlin, 1 Curteis, 637; in Riddell *v.* Johnson, 26 Gratt. 152; in Paske *v.* Ollat, 2 Phillim. 323; in Newhouse *v.* Godwin, 17 Barb. 236; in Durling *v.* Loveland, 2 Curteis, 225, and in other cases supra. But the only result of such a fact, it is clear, is to require greater scrutiny into the circumstances attending the particular bequest. When no further relation of confidence exists than is implied in employing a draftsman (the relation between a testator and his draftsman is not *per se* a confidential relation in the proper legal sense, it is apprehended), the suspicion of undue influence is probably weaker than in like cases of confidence; but the suspicion still exists. Cramer *v.* Crumbaugh, 3 Md. 491; Baker *v.* Batt, 2 Moore, P. C. 317; Adair *v.* Adair, 30 Ga. 102; Duffield *v.* Robeson, 2 Harr. (Del.) 375, 384; Tomkins *v.* Tomkins, 1 Bailey, 92; Patton *v.* Allison, 7 Humph. 320. It will be slight or strong according to the amount of the bounty and the subject of it. Butlin *v.* Barry, 1 Curteis, 637; Durnell *v.* Corfield, 1 Robt. Eccl. 51, 63; Lee *v.* Dill, 11 Abb. Pr. 214. Or it may be overcome entirely by the language of the will. Ib.; Coffin *v.* Coffin, 23 N. Y. 9. See further, Billinghurst *v.* Vickers, 1 Phillim. 187; Hitchings *v.* Wood, 2 Moore, P. C. 355, 436; Watterson *v.* Watterson, 1 Head, 1; Harvey *v.* Sullens, 46 Mo. 147; Beall *v.* Mann, 5 Ga. 456; Tyler *v.* Gardiner, 35 N. Y. 559; Carr *v.* McCamm, 1 Dev. & B. 276. That the draftsman is not incapacitated as such to take under the will is perfectly clear. Barry *v.* Butlin, Coffin *v.* Coffin, and other cases supra. And this though the will was written while the testator was *in extremis*. Downey *v.* Murphey, 1 Dev. & B. 82. But see the criticism upon this case, supra. The rule of increased strictness of scrutiny in cases where the person by whom, or by whose procurement and direction, a will is drawn, receives a large benefit under it, and, in cases of doubtful capacity, appears to be satisfied by proof to the full and entire satisfaction of the court or jury that the testator was not imposed upon, that he knew what he was doing, and understood the dispositions he was making when he made his will. Duffield *v.* Robeson, 2 Harrington, 384, 385; Barry *v.* Butlin, 1 Curteis, 637; Durnell *v.* Corfield, 1 Robt. Eccl. 51. The law presumes, in general, that the will was read over by or to the testator. But if evi-

Inquisition *primâ facie* evidence of testamentary incapacity.

It appears, that though an inquisition finding a man a lunatic is *primâ facie* evidence of lunacy during the whole period covered by such inquisition, yet it does not preclude proof that the execution of a will, or any other act, occurred during a lucid interval (*i*).

Lucid intervals.

The principle is very ably stated by Sir W. Wynn in his judgment in Cartwright *v.* Cartwright (*k*): "If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved, is sufficient, and the general habitual insanity will not affect it; but the effect of it is this — it inverts the order of proof and of presumption; for, until proof of habitual insanity is made, the presumption is, that the party, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, then the party who would take advantage of the fact of an interval of reason, must prove it."

In what unsoundness of mind consists.

[It has been laid down that the test of a person being of *unsound mind in a legal sense is the existence of a delusion (*l*), or a belief in facts which an *37

(*i*) Hall *v.* Warren, 9 Ves. 605; Re Watts, 1 Curt. 594; [and see Creagh *v.* Blood, 2 J. & Lat. 509; Snook *v.* Watts, 11 Beav. 105; Cooke *v.* Cholmondely, 2 Mac. & G. 22; Bannatyne *v.* Bannatyne, 16 Jur. 864.]

(*k*) 1 Phillim. 100; [and see 2 Phillim. 465, 2 Add. 209; Steed *v.* Calley, 1 Keen, 620; Tatham *v.* Wright, 2 R. & My. 1; Borlase *v.* Borlase, 4 No. Cas. 106.

(*l*) But see Nichols *v.* Binns, 1 Sw. & Tr. 239.

dence be given that the testator was blind, or from any cause incapable of reading, or if a reasonable ground is laid for believing that it was not read to him, or that fraud or imposition of any kind was practised upon him, it is incumbent on those who would support the will, to meet such proof by counter evidence, and to satisfy the jury either that the will was read or that the contents were known to the testator. Day *v.* Day, 2 Green, Ch. 549. In this case, it was held that if it appears affirmatively that the testator did not read the will himself, and that it was not read to him, it must then be satisfactorily shown that he was in some way made acquainted with the contents of the instrument, and approved them. Thus, if it appear that the will in question was truly copied from a previous will with the contents of which the testator was acquainted, the instrument will be admitted to probate although it was neither read by him nor in his hearing. Ib. So, if it can be shown that the will is substantially in accordance with the instructions of the testator, it may be considered as sufficient evidence that he was acquainted with its contents. But if, in drawing up a will from instructions, they are materially departed from, the testator must be made acquainted with the deviations and alterations: if the will is not read over to him, or its contents and variations otherwise made known to him, it cannot be sustained. Chandler *v.* Ferris, 1 Harrington, 454, 464. See Tomkins *v.* Tomkins, 1 Bailey, 92; Gerrish *v.* Nason, 22 Me. 438; Harding *v.* Harding, 18 Penn. St. 340; Clifton *v.* Murray, 7 Ga. 564; Vernon *v.* Kirk, 30 Penn. St. 218. In ordinary cases, where the testator is in health, and of testable capacity, it is not necessary to give evidence in the first instance of a knowledge of the contents of the will. Pettes *v.* Bingham, 10 N. H. 514; Downey *v.* Murphey, 1 Dev. & B. 82; Carr *v.* M'Camm, ib. 276; Smith *v* Dolby, 4 Harrington, 350. The burden imposed on a party propounding a will is discharged by proof of capacity and the fact of execution; from this proof, the knowledge of, and assent to, the contents of the will are presumed. Barry *v.* Butlin, 1 Curteis, 637; McNinch *v.* Charles, 2 Rich. 229; Day *v.* Day, 2 Green, Ch. 549; Stewart *v.* Lispenard, 26 Wend. 287, 288; Hoshauer *v.* Hoshauer, 26 Penn. St. 404; In re Maxwell, 4 Halst. Ch. 251; Vernon *v.* Kirk, 30 Penn. St. 218. See Rice *v.* Dwight Manuf. Co. 2 Cush. 80. But where the capacity of the testator is shown to be doubtful, other proof of knowledge is required. McNinch *v.* Charles, 2 Rich. 229; Tomkins *v.* Tomkins, 1 Bailey, 92, 96; Day *v.* Day, 2 Green, Ch. 549; Gerrish *v.* Nason, 22 Me. 438. Still, proof of instructions for making the will, or reading it over, is not indispensable; other evidence of knowledge or assent may be given. Barry *v.* Butlin, 1 Curteis, 637; Durling *v.* Loveland, 2 Curteis, 225; McNinch *v.* Charles, 2 Rich. (S. C.) 229; Day *v.* Day, 2 Green, Ch. 549.

ordinary person would not credit, or a belief which one cannot understand how any person in his senses should hold; and that mere eccentricity of habits or perversion of feeling and conduct, forming what is termed moral insanity, do not constitute legal incapacity (*m*). General insanity must be distinguished from partial insanity or monomania. In case of the former, a lucid interval, a real absence, at the time of making the will, of the disease itself, and not of its apparent delusions only, must be shown (*n*). In case of the latter, opinions have differed. In Waring *v.* Waring (*o*), it was laid down by Lord Brougham, that it was incorrect to speak of partial insanity; that a mind unsound on one subject could not be called sound on any; and that unless a lucid interval (as explained above) could be shown, testamentary incapacity was the necessary consequence, although the subject on which the unsoundness was manifested might be quite unconnected with the testamentary disposition in question. It is not perfect sanity, however, but only a mind that comprehends the testamentary act that is required; and in Banks *v.* Goodfellow (*p*), Lord Brougham's doctrine, which it was observed was unnecessary to the decision of the cases in which it was stated, was rejected; and it was decided that monomania, which had not, and was not capable of having, any influence on the provisions of a will, did not destroy the capacity to make one; that the inquiry whether the monomania has or not had any such effect might be difficult, but was not impracticable; and that if, in the result, the court was convinced that it had, the conclusion must be against the will. The case of Greenwood is, on this point, ambiguous. It is thus stated by Lord Erskine] (*q*): "He was bred to the bar, and acted as chairman at the quarter sessions; but becoming diseased, and receiving in a fever a draught from the hands of his brother, the delirium taking its ground then, connected itself with that idea: and he considered his brother as having given him a potion with a view to destroy * him. He recovered in all other *38 respects, but that morbid image never departed; and that idea appeared connected with the will, by which he disinherited his brother; nevertheless, it was considered so necessary to have some precise rule, that though a verdict was obtained in the Common Pleas against the will, the judge strongly advised the jury, on a second trial, to find the other way; and they did accordingly find in favor of the will. [Further proceedings took place afterwards, and concluded in a compromise." But] in Dew *v.* Clarke (*qa*), where the Prerogative Court was called upon to decide as to the testamentary capacity of a gentleman named Stott,

A disposing mind suffices.

(*m*) Frere *v.* Peacocke, 1 Rob. 442, 11 Jur. 247; see S. C. in a previous stage, 3 Curt. 664, 7 Jur. 998, where a plea of hereditary insanity was disallowed. See also Grimani *v.* Draper, 12 Jur. 925; Mudway *v.* Croft, 3 Curt. 671, 7 Jur. 979; Ditchbourn *v.* Fearn, 6 Jur. 201; Goldie *v.* Murray, ib. 608; Austen *v.* Graham, 8 Moo. P. C. C. 493.

(*n*) Waring *v.* Waring, 6 Moo. P. C. C. 341, 12 Jur. 947; Smith *v.* Tebbitts, L. R. 1 P. & D. 398.

(*o*) 6 Moo. P. C. C. 341, 12 Jur. 947.

(*p*) L. R., 5 Q. B. 549.]

(*q*) In White *v.* Wilson, 13 Ves. 89.

(*qa*) 3 Add. 79, [5 Russ. 163; and see Fowlis *v.* Davidson, 6 No. Cas. 461.

an eminent electrician, who had an only child, against whom he had conceived a strong and groundless aversion, exhibited in a series of absurd acts of harshness and severity, and which he followed up by making a will in favor of some collateral relations, to the almost total exclusion of such only child; Sir J. Nicholl and the Court of Delegates, successively pronounced against the validity of the will, after the delivery of very able and elaborate judgments, which should be perused by all inquirers into this interesting subject. [And a like decision was made in the somewhat similar case of Boughton *v.* Knight (*r*)].[1]

(*r*) L. R. 3 P. & D. 64.]

[1] The term "testamentary capacity" has had an unfortunate use, and has come to be ambiguous. Without overlooking the fact that it may often be difficult, if not impossible, to distinguish between loss or want of intellect and perversion of the same as indicated by delusions or by madness, it is still apprehended that the term "testamentary capacity" is applicable properly only to issues of decay or of want of mind; the true question in such cases being whether the supposed testator had sufficient mental ability at the time to exercise will. In fact, however, the term is often applied to issues of insanity in the sense of perverted (diseased) intellect; where the real question is, not whether the decedent had capacity to will, but whether he did (normally) will. Now it may be remarked that it appears improper in any case to ask a jury whether the decedent possessed testamentary capacity in the abstract at the time of the supposed will, even upon an issue of mental imbecility; for there is no ideal standard by which a man's testamentary capacity can be judged. But see Delafield *v.* Parish, 25 N. Y. 9. A man of weak mind may have mental ability sufficient to enable him to dispose of his property in a simple way, and not have mental ability sufficient to dispose of it in a complicated way. He may not, for example, have power to grasp the arithmetic of a complicated disposition. The true question upon an issue of decay or of want of mind, it is conceived, notwithstanding the language of Delafield *v.* Parish, is whether the supposed testator had mental capacity sufficient for the particular alleged will. But the term "capacity" becomes wholly improper upon an issue of insanity, when that word is used in its common sense of perversion (and not want or weakness) of intellect, i. e. lunacy. Ability to will in the particular manner in question may be quite consistent with such insanity. A lunatic is not necessarily a man of weak mind, much less an imbecile. A person merely affected with delusions, and not a maniac, wills when he takes the steps necessary for disposing of his property, though his will may have acted abnormally: he expresses *his* will. An imbecile, however, in taking such steps, if he has taken them properly, does not, generally speaking, will. The will is that of another: the case is almost always one of fraud or of undue influence; the very fact of orderly dispositions, if at all complicated clearly telling that way. Now the will of a lunatic may or may not have been affected by his insanity; but where the insanity is deemed total, or where it runs along the line of the dispositions attempted, it must be impossible to say that his action was not influenced by his insanity. In this impossibility to find the actual fact, the law is compelled to look to probabilities and to substitute presumption for fact. The decedent, being found to have had a perverted intellect in respect of some or all of the dispositions of his alleged will, is presumed not to have exercised true will. The question, therefore, to be asked is, not whether the decedent had capacity to make the will in question, much less whether he possessed testamentary capacity in the abstract, but whether the supposed testator was of sound and disposing mind in respect of the subject-matter of the will when he executed it. Until recently it was supposed, in England, that insanity, even in one particular, was sufficient to prevent the execution of a will; upon the extremely narrow hypothesis that, as the mind is a unit, what affects a part affects the whole. Waring *v.* Waring, 6 Moore, P. C. 341; Smith *v.* Tebbitt, L. R. 1 P. & D. 398. But the fallacy of this position has recently been shown by the Queen's Bench, and it is now held that insanity not running in the direction of the will does not invalidate the testament. Banks *v.* Goodfellow, L. R. 5 Q. B. 549; Smee *v.* Smee, L. R. 5 P. D. 84. See Boughton *v.* Knight, L. R. 3 P. & D. 64. And this appears to be the law in the United States. Stackhouse *v.* Horton, 15 N. J. Eq. 202; Lathrop *v.* Borden, 5 Hun, 560; Lathrop *v.* American Board, 67 Barb. 590; Evans *v.* Arnold, 52 Ga. 169; Gardner *v.* Lamback, 47 Ga. 133; Lucas *v.* Parsons, 24 Ga. 640; Benoist *v.* Murrin, 58 Mo. 307; Denson *v.* Beazley, 34 Texas, 191; Cotton *v.* Ulmer, 45 Ala. 378. Or, to state the law in the language of late authority (though the language is somewhat objectionable), if delusions existing in the mind of the testator cannot reasonably be conceived to have had any thing to do with his power of considering the claims of his relatives upon him, and the manner in which he should dispose of his property, the presence of such delusions will not incapacitate him from making a will. Smee *v.* Smee, supra. But it is well settled that if insanity,

Lord Thurlow is said to have intimated an opinion, that where lunacy is once established by clear evidence, the party ought to be restored

not caused by violent disease or accident (Hix *v.* Whittemore, 4 Met. 545, and cases infra), be once shown to have existed before the execution of the will, it will be presumed, *primâ facie*, to have existed when the will was made; and the will in such a case cannot be admitted to probate unless this presumption is clearly removed. Boughton *v.* Knight, supra; Nichols *v.* Binns, 1 Swab. & T. 239; Rush *v.* Megee, 36 Ind. 69; Chandler *v.* Barrett, 21 La. An. 58. Thus, when general insanity antedating the will is established, it must be proved, if the will is to stand, either that such insanity had ceased to exist when the will was executed, or that the will was executed during a lucid interval. Chandler *v.* Barrett, supra; Cartwright *v.* Cartwright, 1 Phillim. 100; Clark *v.* Fisher, 1 Paige, 171, 174; Jackson *v.* Van Dusen, 5 Johns. 144, 159; Boyd *v.* Eby, 8 Watts, 66; Harden *v.* Hays, 9 Barr, 151; Halley *v.* Webster, 21 Me. 461; Whitenach *v.* Stryker, 1 Green, Ch. 8; Goble *v.* Grant, 2 Green, Ch. 629. But the courts look with great scrutiny into evidence of lucid intervals; and the facts should be clear to make out such a case. White *v.* Driver, 1 Phillim. 88; Brogden *v.* Brown, 2 Addams, 445; Ayrey *v.* Hill, ib. 210. The rule, no doubt, is similar as to cases of partial insanity, whether shown to exist before or at the time of the execution of the will. Inasmuch as the burden of showing that the testator was a person of sound and disposing mind and memory is upon him who propounds the will (Delafield *v.* Parish, 25 N. Y. 9; Crowninshield *v.* Crowninshield, 2 Gray, 524; Baker *v.* Butt, 2 Moore, P. C. 317; Barry *v.* Butlin, ib. 480), it appears to follow that any satisfactory evidence of insanity will be considered *primâ facie* as fatal to the supposed will. It is then for the party who wishes to maintain the instrument to prove that the partial insanity did not exist in respect of the dispositions made in the will. Indeed, the burden of proof is deemed by high authorities to rest throughout upon the party who propounds the will. The court must be satisfied that the testator was of sound mind and disposing memory; and if, upon the whole evidence, there be any doubt upon this point, the will cannot be considered to have been proved. Crowninshield *v.* Crowninshield, supra; Delafield *v.* Parish, supra; Robinson *v.* Adams, 62 Me. 369. See Baker *v.* Butt, supra; Perkins *v.* Perkins, 39 N. H. 163; Boardman *v.* Woodman, 47 N. H. 120, 132; Mayo *v.* Jones, 78 N. C. 402; Beaubien *v.* Cicotte, 8 Mich. 9; Taff *v.* Hosmer, 14 Mich. 309; Aikin *v.* Weckerly, 19 Mich. 482; Kempsey *v.* McGinnis, 21 Mich. 123; Turner *v.* Cook, 36 Ind. 129; Thompson *v.* Kyner, 65 Penn. St. 368; Williamson *v.* Robinson, 42 Vt. 658. But see Higgins *v.* Carlton, 28 Md. 415, in which the distinction commonly taken between the proof of deeds and of wills is criticised, and the current of authority supposed to favor the rule that the burden of proof rests upon the person who avers insanity. There is, by nearly all the authorities (*contra* Robinson *v.* Adams, 62 Me. 369; Williamson *v.* Robinson, supra), a presumption of sanity; and in the absence of evidence the case may be decided, according to the better opinion, upon this presumption. So, no doubt, the presumption must be considered in considering the evidence. But when evidence of insanity is once introduced and counter evidence brought forward, the case cannot, by the better authorities, be decided upon the mere existence of the presumption of sanity. See cases last cited. (Comp. an analogous case of the burden of proof concerning the doctrine of presumption of consideration in the law of bills and notes. Bigelow's Bills & Notes, 90.) There is then, between cases like Higgins *v.* Carlton, supra, which make much of the presumption of sanity, and cases like Robinson *v.* Adams, supra, in which the existence of the presumption is wholly denied, a large and, it is conceived, a better class of authorities which treat the burden of proof as resting in all cases upon the proponent of the will; which burden is probably sustained by a presumption of sanity in the (unusual) case of an absence of evidence, but not sustained by that presumption in a case left doubtful upon evidence adduced. Where there is doubt, there is not proof; and the will should be *proved*. Baker *v.* Butt, supra; Baxter *v.* Abbott, 7 Gray, 71, 83; Baldwin *v.* Parker, 99 Mass. 79, 84; Crowninshield *v.* Crowninshield, supra; Delafield *v.* Parish, supra. It may be added that almost the only case, under the practice in Massachusetts, of an entire absence of evidence concerning sanity, would be where the attesting witnesses were all dead or had removed to parts unknown: when their testimony can be had, they are uniformly asked concerning the testator's mental condition. Crowninshield *v.* Crowninshield, supra. But still, in the absence of evidence of unsoundness, the will must stand. Baxter *v.* Abbott, 7 Gray, 71, 83. (The burden of proof as to undue influence, however, after proof of soundness of mind, is upon him who alleges it. Baldwin *v.* Parker, 99 Mass. 79; Tyler *v.* Gardiner, 35 N. Y. 559.) With regard to what facts may be shown upon an issue of insanity, it may be stated by way merely of illustration, that delusion with respect to a devisee may be shown. Mill's Appeal, 44 Conn. 484; Cleveland *v.* Lyne, 5 Bush, 383. So of delusion with respect to the testator's daughter. Clapp *v.* Fullerton, 34 N. Y. 190. And all facts concerning the personal history of the testator mentally and physically, Ross *v.* McQuiston, 45 Iowa, 145; or of his parents, and perhaps remoter ancestors, are admissible. Baxter *v.* Abbott, 7 Gray, 71; Coughlin *v.* Poulson, 2 McArth. 308. Whether the insanity of an uncle or aunt alone would be admissible is doubtful.

to as perfect a state of mind as he had before; but Lord Eldon has expressed his dissent from this notion; suggesting the case of the

In Baxter *v.* Abbott, supra, the insanity of the testator's parents *and* of an uncle was admitted. The question would seem to be determinable only on the evidence of experts in mental disease. Prejudice, however strong or unjust, is no evidence of insanity, if not founded on delusion. Trumbull *v.* Gibbons, 2 Zabr. 117. So, too, neither peculiar beliefs as to a future state (Bonard's Will, 16 Abb. Pr. N. S. 128), nor peculiar beliefs in other matters, without delusion, are evidence of insanity. Denson *v.* Beazley, 34 Texas, 191; Thompson *v.* Quimby, 2 Bradf. 449. Nor is the existence of foolish and absurd ideas evidence of insanity if the testator was still in the possession of his faculties. Thompson *v.* Thompson, 21 Barb. 107. Nor is suicide alone evidence thereof. Elwee *v.* Ferguson, 43 Md. 479; Brooks *v.* Barrett, 7 Pick. 94; Duffield *v.* Robeson, 2 Harrington, 375; Burrows *v.* Burrows, 1. Hagg. 109. The same may be said of the existence of insanity some years *after* the execution of the will. Taylor *v.* Creswell, 45 Md. 422. Moral insanity not impairing the intellect is not fatal to a will, unless accompanied by delusions, Frere *v.* Peacocke, 1 Robt. Eccl. 442; Boardman *v.* Woodman, 47 N. H. 120; Forman's Will, 54 Barb. 274; delusion being deemed a true test of insanity; Boardman *v.* Woodman, supra; Seamen's Soc. *v.* Hopper, 33 N. Y. 619. Indeed the finding of insanity upon a commission *de lunatico inquirendo* is thought not conclusive against a will. Taylor's Will, Edm. Sel. Cas. 375. See Searles *v.* Harvey, 6 Hun, 658. So guardianship as of an insane person is but *primâ facie* evidence of insanity. Crowninshield *v.* Crowninshield, 2 Gray, 524; Little *v.* Little, 13 Gray, 264; Garnett *v.* Garnett, 114 Mass. 379. And it appears to be the result of authority that evidence of insanity considerably prior to the will may be rebutted by evidence that the misfortune was caused by violent sickness; the presumption of continued insanity being deemed not to prevail in such cases. Hix *v.* Whittemore, 4 Met. 545; McMasters *v.* Blair, 29 Penn. St. 298; Halley *v.* Webster, 21 Me. 461. And the same is perhaps true where the insanity was caused by an accident. Ib.; Swinb. Wills, Pt. 2, § 3; 1 Collins. Lunacy, 55; Shelf. Lunacy, 275; Cartwright *v.* Cartwright, 1 Phillim. 100; Little *v.* Little, 13 Gray, 264, 266; Townshend *v.* Townshend, 7 Gill, 10. But, of course, the nature of the disease or accident must be taken into account in determining whether the presumption of continued insanity must prevail. And the question whether the presumption must stand cannot, it should seem, in all cases be decided by the court as matter of law, since it must often depend upon facts the bearing of which can be understood only by medical men. In such cases it should be left to the jury to find whether the presumption ought to stand. See Hix *v.* Whittemore, supra. The foregoing observations consider insanity in the ordinary sense of perverted intellect, manifested in common cases by delusion, in distinction from want or decay of intellect. The distinction upon which the separation of lunatics from imbeciles in the asylums for such unfortunate persons is made, must be accepted as sound; and the like distinction should, it is conceived, be kept in mind in declaring the *law* as to *non compotes mentis*, so far as possible. But it may happen that there is an issue both of weakness and of lunacy, or that the two questions are so blended as to be inseparable from each other; a situation which must, of course, complicate the inquiry. It is apprehended, however, that the distinction stated should still be kept in mind. The jury should be asked at least two questions: whether the decedent was, at the time of executing the will, affected with delusions upon the subject of the dispositions in question, and, if not, whether he had capacity at the time to call to mind the property to be disposed of, the persons to be benefited or disappointed, and to grasp the dispositions professed to be made. And then there may be another question, in case this second should be answered in the affirmative; to wit, if, supposing the testator possessed such capacity, the will was still *his* will, or that of another; that is, if undue influence was exercised or fraud practised upon him. Upon the mental condition of the testator at the time of executing the will, in the sense (it seems), either of idiocy, decay, or lunacy, it is generally agreed that the attesting witnesses to the will may state their opinions, though they may not be experts in mental pathology. The reasons for this may not be very satisfactory. The effect may be to permit the testator himself to express an opinion upon his own sanity; for he, of course, has the selection of the attesting witnesses. Still the law permits such to express their opinions. Hastings *v.* Rider, 99 Mass. 622; Barker *v.* Comins, 110 Mass. 477, 487; Nash *v.* Hunt, 116 Mass. 237, 251; May *v.* Bradlee, 127 Mass. 414, 421; Robinson *v.* Adams, 62 Me. 369; Dewitt *v.* Barley, 9 N. Y. 371. The attesting witnesses may further state their opinions without stating the facts upon which they base them. Robinson *v.* Adams, supra. It is settled law in Massachusetts that (besides the witnesses to a will) the physician who has been the usual or occasional medical adviser of the deceased, or who attended him in a sickness during which he executed the will, and witnesses who, by special skill and experience, are qualified as experts in the knowledge and treatment of mental diseases, are alone competent to give opinions in evidence as to the mental condition of a testator when he executed the will. The testimony of other witnesses cannot extend beyond a statement of such facts and declarations manifesting mental condition, as they have knowledge of.

strongest mind reduced by the delirium of a fever, or some other cause, to a very inferior degree of capacity; and he observed that the conclusion was not just, that, as that person was not what he had been, he should not be allowed to make a will of personal [qu., or real?] estate (*s*).[1]

(*s*) Ex parte Holyland, 11 Ves. 10. See further as to lunatics and their acts, Lord Ely's case in D. P. in Ireland, 1784: 1 Ridg. P. C. 16; and the six appendices; Lord Thurlow's celebrated judgment in Attorney-General *v.* Parnther, 3 B. C. C. 441; particularly the case of Mr. Greenwood, cited p. 444; 1 Fonbl. Eq. 46; see also Niell *v.* Morley, 9 Ves. 478; Hall *v.* Warren, ib. 605; [Chambers *v.* Yatman, 2 Curt. 415; and see 2 De G. & S. 620.]

Hastings *v.* Rider, 99 Mass. 622, 625; Barker *v.* Comins, 110 Mass. 477, 487; Nash *v.* Hunt, 116 Mass. 237, 251; May *v.* Bradlee, 127 Mass. 414, 421. In the last case, it was deemed proper, under a suitable explanation by the judge, to ask a general witness (guardian of the testator) whether he had ever observed any fact which led him to infer that there was in the testator any derangement of intellect. So in Maine, general witnesses are limited to stating facts. Wyman *v.* Gould, 47 Me. 159. See Robinson *v.* Adams, 62 Me. 369, 410. So in Texas, Gehrke *v.* State, 13 Texas, 568. In New York, also, general witnesses are permitted in actions at law to state facts only. Dewitt *v.* Barley, 9 N. Y. 371. See S. C. 17 N. Y. 340; Van Pelt *v.* Van Pelt, 30 Barb. 134, 141; Clapp *v.* Fullerton, 34 N. Y. 190, 195; O'Brien *v.* People, 36 N. Y. 276, 282. In most of the states, however, general witnesses are allowed to give their opinions upon facts stated by them to the court (not otherwise), on the ground of the difficulty of separating fact from opinion in respect of evidence concerning mental condition. The authorities are collected and examined in State *v* Pike, 49 N. H. 399, in the dissenting opinion of Mr. Justice Doe, and in Hardy *v.* Merrill, 56 N. H. 227, adopting the dissenting opinion mentioned, and overruling Boardman *v.* Boardman, 47 N. H. 120, and State *v.* Pike, supra. Opinions of medical experts as to sanity, based on hypothetical facts not shown to exist in the particular case, are held inadmissible. In re Ames, 51 Iowa, 596; Hurst *v.* C., R. I. & P. R. Co., 49 Iowa, 76. See Harrison *v.* Rowan, 3 Wash. C. C. 587; Duffield *v.* Robeson, 2 Harr. 385; Gibson *v.* Gibson, 9 Yerg. 329; Potts *v.* House, 6 Ga. 324; Commonwealth *v.* Rich, 14 Gray, 335. It seems that, when medical witnesses give their opinions upon facts observed by themselves, they should, with their opinions, state the facts upon which such opinions are founded. Hathorn *v.* King, 8 Mass. 371; Dickinson *v.* Barber, 9 Mass. 227; Hastings *v.* Rider, 99 Mass. 622; Clark *v.* State, 12 Ohio, 483; Gibson *v.* Gibson, supra. See Baxter *v.* Abbott, 7 Gray, 71, 80. Medical books should not be admitted. Ware *v.* Ware, 8 Green1. 42. It is not necessary to the statement of an opinion by a physician that he should be an expert in mental diseases; it is enough that he *is* a physician and has attended the decedent as such, even though he was not the decedent's regular medical adviser. Baxter *v.* Abbott, 7 Gray, 71.

[1] There seems to be no distinction in the degree of mental capacity requisite for the execution of a will of real estate, and that requisite for the execution of a will of personal estate. Sloan *v.* Maxwell, 2 Green, Ch. 563, 566; Winchester's case, 6 Co. 23. Still in those states where the probate of a will in the Probate Court is not conclusive of the title to real estate, it is clear law that though the probate of a will of both real and personal estate is conclusive evidence of the sanity of the testator to make such will of personalty, yet it is by no means conclusive evidence of his capacity to dispose of his real estate. This, however, is upon the principle that the capacity of a party to do one act is not conclusive as to his capacity to do another, if his capacity as to the other be triable by a different jurisdiction. Shelf. Lunacy, 66, 67; Wood *v.* Teage, 5 Barn. & C. 335. In Winchester's case, supra, it is said that it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason; and that is such a memory as the law calls sane and perfect memory. See Combe's case, Moore, 759; 4 Burn's Ecc. L. 49; Harrison *v.* Rowan, 3 Wash. C. C. 586. It was observed by Sir John Nicholl, in Marsh *v.* Tyrrell, 2 Hagg. 122, that it is a great but not an uncommon error to suppose that, because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect, sound mind, and is capable of making a will for any purpose whatever, whereas the rule of law, and it is the rule of common sense, is far otherwise; the competency of mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. See also Blewitt *v.* Blewitt, 4 Hagg. 419; Boyd *v.* Eby, 8 Watts, 70: Shropshire *v.* Reno, 5 J. J. Marsh. 91; McTaggart *v.* Thompson, 14 Penn. St. 149; Brown *v.* Torrey, 24 Barb. 583; Hall *v.* Hall, 18 Ga. 40. A man in whom this faculty of memory is wholly extinguished cannot be said to possess an understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom

The disability of coverture[1] differs materially from that of infancy, idiocy, or lunacy. It does not arise from natural infirmity, but is the creature of civil policy, and may be dispensed with at the pleasure of the contracting or disposing parties

Disability of coverture, whence arising;

he had been intimately acquainted (see Brooks *v.* Barrett, 7 Pick. 98); he may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. Comstock *v.* Hadlyme, 8 Conn. 264; Rambler *v.* Tryon, 7 Serg. & R. 95; Kinne *v.* Kinne, 9 Conn. 105; Converse *v.* Converse, 21 Vt. 168; Kirkwood *v.* Gordon, 7 Rich. (S. C.) 474. But in Maryland, by the testamentary system of that State, he, who is not competent to make a valid deed or contract, is incompetent to make a valid will or testament. Davis *v.* Calvert, 5 Gill & Johns. 269, 299, 300. See also Coleman *v.* Robertson, 17 Ala. 84; Minor *v.* Thomas, 12 B. Mon. 106. The question is not so much what was the degree of memory possessed by the testator, as, Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? In a word, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged, at the time when he executed his will? Stevens *v.* Vancleve, 4 Wash. C. C. 262, Washington, J.; Harrison *v.* Rowan, 3 Wash. C. C. 385. See Converse *v.* Converse, 21 Vt. 168; Horne *v.* Horne, 9 Ired. 99; Lowe *v.* Williamson, 1 Green, Ch. 82, 85; Sloan *v.* Maxwell, 2 Green, Ch. 563; Andress *v.* Weller, ib. 604; Verplanck, Senator, in Stewart *v.* Lispenard, 26 Wend. 255, 306, 311, 312; Comstock *v.* Hadlyme, 8 Conn. 265; Kinne *v.* Kinne, 9 Conn. 105; Brown *v.* Torrey, 24 Barb. 583; Hall *v.* Hall, 18 Ga. 40; McMasters *v.* Blair, 29 Penn. St. 298. Something more is required than a mere *passive* memory. There must be an active power to collect and retain the elements of the business to be performed for a sufficient time to perceive their obvious relation to each other. Converse *v.* Converse, 21 Vt. 168. It is not then essential to the legal capacity of a testator to make a will, that he should be capable of managing business generally; it is enough, if, in the making of his will, and at the time of making it, he understands what he is doing. Kinne *v.* Kinne, 9 Conn. 102. See Hathorn *v.* King, 8 Mass. 371; Comstock *v.* Hadlyme, 8 Conn. 254; Boyd *v.* Eby, 8 Watts, 66; Dornick *v.* Reichenback, 10 Serg. & R. 84; Goble *v.* Grant, 2 Green, Ch. 630; Chandler *v.* Ferris, 1 Harrington, 454, 464; Kachline *v.* Clark, 4 Whart. 320; Den *v.* Johnson, 2 South. 454; Shelf. Lunacy, 283. In a case where the will was executed at the time of the testator's being in a feeble and almost unconscious state, only five hours before death, occasioned by a recent accession of disease affecting the brain and producing torpor, the will was set aside. Harwood *v.* Baker, 3 Moore, P. C. 282. Mere weakness of understanding is no objection to a man's disposing of his property by will; for courts cannot measure the degree of people's understandings and capacities, nor examine into the wisdom or prudence of men in disposing of their estates. Duffield *v.* Robeson, 2 Harrington, 379; Elliott's will, 2 J. J. Marsh. 340; Dornick *v.* Reichenback, 10 Serg. & R. 84; Osmond *v.* Fitzroy, 3 P. Wms. 129; Newhouse *v.* Godwin, 17 Barb. 236. See Clark *v.* Fisher, 1 Paige, 171; Patterson *v.* Patterson, 6 Serg. & R. 56; Tomkins *v.* Tomkins, 1 Bailey, 92; Stewart *v.* Lispenard, 26 Wend. 313. "If a man," says Swinburne, Pt. 2, § 4, pl. 3, "be of a mean understanding (neither of the wise sort or the foolish) but indifferent, as it were betwixt a wise man and the fool, yea, though he rather incline to the foolish sort, so that for his dull capacity he might worthily be termed *grossum caput*, a dull pate, or a dunce, such a one is not prohibited from making his testament" Shep. Touch. 403; Shelf. Lunacy, 275, 276. For a case where a will was established, though made by a person of very inferior capacity, see Stewart *v.* Lispenard, 26 Wend. 255. But see Delafield *v.* Parish, 25 N. Y. 9, 27.

[1] States in which married women may dispose of general property by will: —

Alabama. Code, 1876, ch. 1, p. 647.

Arkansas. Digest, 1874, ch. 135, p. 1012.

California. Codes and Stats. 1876, Vol. 1, Title 6, ch. 1, p. 720.

Colorado. Gen. Laws, 1877, ch. 64, p. 614.

Dakota. Rev. Code, 1877, Title 5, ch. 1, p. 343.

Delaware. Rev. Code, 1874, ch. 84, p. 508; Act for Protection of Women, see ch. 76, p. 479.

Florida. Bush'a Digest, 1872, ch. 118, p. 580.

Georgia. Code, 1873, ch. 2, p. 415.

Illinois. R. S. 1880, ch 148, p. 1108.

Indiana. Stat. 1876, Vol. 2, ch. 3, p. 570.

Iowa. Rev. Code, 1880, Vol. 1, Title 15, ch. 2, p. 588.

Kansas. Comp. Laws, 1879, ch. 117, p. 1004.

Kentucky. Gen. Stat. 1873, ch. 113, p. 832.

Maine. R. S. 1871, ch. 61, p. 491.

Maryland. Rev. Code, 1878, Art. 49, p. 421.

Massachusetts. Gen. Stat. 1860, ch. 108, p. 538.

Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1371.

Minnesota. Stat. 1878, ch. 47, p. 567.

Mississippi. Rev. Code, 1871, ch. 23, p. 378.

Missouri. R. S. 1879, Vol 1, ch. 7, p. 680.

Nebraska. Gen. Stat. 1873, ch. 17, p. 299.

through whom the property is derived, so far, at least, as the *jus disponendi* is concerned; while the contrary has been decided * with respect to infancy, which alone of the other enumerated *39 disabilities could admit of any question being raised on the subject (*t*): as, of course, any attempt to give a power of disposition to an idiot or lunatic would be abortive.

[No contract can enable a married woman to pass the legal interest in her lands at common law by an ordinary will; since being excepted out of the statute 34 & 35 Hen. 8, c. 5 (which exception is preserved by the 1 Vict. c. 26, s. 8), she was, as we have seen, left subject to her pre-existing disabilities. Every will of a married woman passing a legal estate must operate as an appointment of an use; but a mere contract before marriage, as to specified lands, will be sufficient to give the wife an equitable power (*u*) to devise, and the legal estate must be obtained by conveyance from the heir. In the case of personal estate, the will of a married woman will be valid if made in pursuance of an agreement before marriage, or of an agreement made after marriage for consideration (*x*), or if the husband assents to the particular will and survives her (*y*). A married woman can also, in equity, dispose by will of the fee-simple of real estate (*z*), and of the absolute interest in personal estate (*a*), which belong to her for her separate use (*b*), whether vested, or contingent on her sur-

— cannot be dispensed with as to estates at common law;

— but may as to uses;

— or as to equitable interests;

— or as to personalty by contract or with husband's assent;

or property settled to separate use;

(*t*) Hearle *v.* Greenbank, 3 Atk. 897, 2 Ves. 298. [*Contra* of a power simply collateral, Grange *v.* Tiving, Bridg. by Ban. 107, 2 Sug. Pow. App. 7th ed.]

[(*u*) Wright *v.* Lord Cadogan, 2 Ed. 239; and see Churchill *v.* Dibben, 9 Sim. 447, n.; Dillon *v.* Grace, 2 Sch. & Lef. 463. As to copyholds, see George *v.* Jew, Amb. 627.

(*x*) 1 Rop. Husb. & Wife, 170.

(*y*) Willock *v.* Noble, L. R. 7 H. L. 580, 590, 597; Ex parte Fane, 16 Sim. 406; Re Reay, 4 Sw. & Tr. 215, 31 L. J. Prob. 154; Re Isaacs, 31 L. J. Prob. 158. The assent may be retracted at any time before probate, unless it has been given or confirmed after the wife's death, Maas *v.* Sheffield, 1 Rob. 364, 10 Jur. 417.

(*z*) Taylor *v.* Meads, 4 D. J. & S. 597; Pride *v.* Bubb. L. R. 7 Ch. 64. And the will defeats the husband's equitable right to curtesy, Cooper *v.* Macdonald, 7 Ch. D. 288. In Troutbeck *v.* Boughey, L. R. 2 Eq. 534, the separate use was attached only to the annual rents.

(*a*) Rich *v.* Cockell, 9 Ves. 369; Parker *v.* Brooke, ib. 583; Fettiplace *v.* Gorges, 1 Ves. Jr. 46, 3 B. C. C. 8; Caton *v.* Ridout, 1 Mac. & G. 599, 2 H. & Tw. 33; Rowe *v.* Rowe, 2 De G. & S. 294.

(*b*) A declaration in the husband's will is sufficient to show that the property is the wife's separate estate, and does not merely operate as an assent, which, as we have seen, would be

Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 200.

New Hampshire. Gen. Laws, 1878, ch. 183, p. 435.

New Jersey. Revision, 1709–1877, Vol. 1, p. 638.

New York. N. Y. 1875, Vol. 3, ch. 8, p. 160.

North Carolina. Battle's Revisal, 1873, ch. 69, p. 592.

Ohio. R. S. 1880, Vol. 2, ch. 1, p. 1424.

Oregon. Gen. Laws, 1843–1872, ch. 64, p. 788.

Pennsylvania. Brightl. Purd. Digest, 1700–1872, Vol. 2, p. 1477.

Rhode Island. Gen. Stat. 1872, Title 20, ch. 152, p. 331.

South Carolina. R. S. 1873, ch. 100, p. 482.

Tennessee. Stat. 1871, Vol. 2, Title 3, ch. 1, p. 1001.

Texas. R. S. 1879, Title 99, p. 712.

Utah. Comp. Laws, 1876, ch. 2, p. 271.

Vermont. Gen. Stat. 1862, ch. 71. p. 471.

Virginia. Code, 1873, ch. 118, p. 910.

West Virginia. R. S. 1878, ch. 122, p. 774.

Wisconsin. R. S. 1878, ch. 103, p. 649.

viving her husband (*c*); since, in respect of such property,
*40 * she is a *feme sole;* and it is immaterial that the legal estate is not vested in trustees, since the husband, and all persons on whom the legal estate may devolve, will be deemed trustees for the persons to whom the wife has given the equitable interest (*d*).

— and its produce and accumulations.

And this separate trust of the principal attaches on all the produce or accumulations of such principal (*e*).

Savings out of maintenance.

Savings out of an allowance made by a husband for the separate maintenance of his wife are in equity treated as her separate estate (*f*); of which, therefore, she may dispose by will.

Pin-money.

But savings out of pin-money are said to belong to the husband (*g*); on the principle that pin-money is an allowance made for a particular purpose, and, if not applied for that purpose, reverts to the donor.]

Wife of an exile may make a will,

A woman, whose husband has been banished for life by act of parliament (*h*), may dispose by will of her real and personal estate; for, as he is civilly defunct, she is restored to the rights and privileges of discoverture. [This doctrine was held to be applicable to the case of a felon-convict transported for life, so as to enable his wife to dispose by will of personalty acquired by her after the conviction (*i*), although the felon had received a conditional free pardon (*k*)];

— or wife of a felon-convict transported for life.

insufficient if the husband died first, Re Smith, 1 Sw. & Tr. 125, 27 L. J. Prob. 39. A declaration of trust by the husband in favor of his wife for her separate use may be either express (Baddeley *v.* Baddeley, 9 Ch. D. 113) or implied by his acts, as, where with his assent she carries on a separate business, and the profits and stock in trade are treated as her separate property, Haddon *v.* Fladgate, 1 Sw. & Tr. 125, 27 L. J. Prob. 39; Ashworth *v.* Outram, 5 Ch. D. 923; and see Married Women's Property Act, 1870. Although a married woman may have no power to make a will, it seems that she may by "writing" under 1 Vict. c. 26, s. 20, revoke one already made. Hawksley *v.* Barrow, L. R. 1 P. & D. 147, 152.

(*c*) Bishop *v.* Wall, 3 Ch. D. 394.

(*d*) See Hall *v.* Waterhouse, 5 Giff. 64, as to realty; and cases in n. (*a*) as to personalty.

(*e*) Fettiplace *v.* Gorges, supra; Gore *v.* Knight, Pre. Ch. 255, 2 Vern. 535; Ashton *v.* McDougal, 5 Beav. 56; Darkin *v.* Darkin, 17 Beav. 578; Humphery *v.* Richards, 25 L. J. Ch. 442; Scales *v.* Baker, 28 Beav. 91. But the wife's dealings with the produce may show an intention to put an end to the separate trust, Wright *v.* Wright, 2 J. & H. 647.

(*f*) Brooke *v.* Brooke, 25 Beav. 342; Re Tharp, 3 P. D. 76 (separate allowance to wife of lunatic). *Secus* at law, Messenger *v.* Clark, 5 Exch. 388.

(*g*) Jodrell *v.* Jodrell, 9 Beav. 45; Howard *v.* Digby, 2 Cl. & Fin. 634; and per Wood, V.-C., Barrack *v.* M'Culloch, 3 K. & J. 114. See, however, Sugden's Law of Property, p. 163, *contra.*]

(*h*) Countess of Portland *v.* Prodgers, 2 Vern. 104. [The report speaks only of a bequest of legacies.

(*i*) Re Martin, 2 Roberts. 405, 15 Jur. 686; Re Coward, 4 Sw. & Tr. 46, 34 L. J., Prob. 120. In the latter case sentence of death had been recorded, so that the felon was attainted, and being thus dead in the eye of the law, was incapable of claiming *jure mariti* (per Wood, V.-C., Gough *v.* Davies, 2 K. & J. 627). However, the court did not take this ground, but relied expressly on Ex parte Franks, 1 M. & Sc. 11, 7 Bing. 762, where the felon was transported for a term of years. See also Atlee *v.* Hook, 23 L. J. Ch. 776 (where a legacy bequeathed, after the conviction, to the wife of a felon transported for life, but so far as appears not attainted, was ordered to be paid to her); and per Romilly, M. R., Re Harrington's Trust, 29 Beav. 24. Attainder for felony is now abolished and the status of a felon-convict regulated by 33 & 34 Vict. c. 23, as to which see post.

(*k*) Under 5 Geo. 4, c. 84, s. 26, a convict was entitled to retain against the crown and to recover in the courts of the United Kingdom personalty acquired by him after receiving such a pardon. Gough *v.* Davies, 2 K. & J. 623. But see and consider Re Church's Will, 16 Jur. 517; Coombs *v.* Queen's Proctor, 2 Roberts. 547, 16 Jur. 820 (transportation for term of years), and see now the act referred to in the last preceding note.]

and when a felon was transported for a definite term of years, his marital rights (and therefore it * should seem his wife's con- *41
jugal disabilities) were suspended for that period (*l*).[1]

(*l*) Ex parte Franks, 1 M. & Sc. 11, 7 Bing. 762 [where it was held that the wife could be made bankrupt. But where the wife of a felon transported for years had died intestate in the husband's lifetime, it was held that the crown and not her next of kin was entitled to her personal property acquired after the conviction. Coombs *v.* Queen's Proctor, 2 Roberts. 547, 16 Jur. 820.]

[1] [The following note prepared as text by the editor of the last American edition, will show the common-law doctrine of testamentary disability by coverture; much of which, however, is now obsolete in many states:] The English Statute of Wills, 32 Hen. 8c. 1, authorized *every person having lands*, &c., to devise them; and it seems to have been the better opinion on the construction of that statute that a married woman could not make a valid will of lands. Calverlye's case, Dyer 354 b; Marston *v.* Norton, 5 N. H. 211. But as "divers doubts, questions, and ambiguities" had arisen, or were apprehended on that and other points, the statute of 34 & 35 Hen. 8, c. 5, was made to remove them; and this last statute (§ 14) expressly prohibits such devises by married women. Osgood *v.* Breed, 12 Mass. 525. A married woman cannot, at common law, make a will of personal, any more than of real estate, except under a settlement, or marriage contract, or by her husband's license, 2 Black. Comm. 498; 4 Kent, 506; Steadman *v.* Powell, 1 Addams, 58; Hood *v.* Archer, 1 M'Cord, 225; Newlin *v.* Freeman, 1 Ired. 514; 1 Williams, Ex. (6th Am. ed.) 53; for all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself, if he survives her. It would therefore be extremely inconsistent to give her a power of defeating that provision of the law, by bequeathing those chattels to others. 1 Williams, Ex. (6th Am. ed.) 53; Ognell's Case, 4 Co. 51 b; 2 Black. Comm. 498. Since the husband has no beneficial interest in the personal estate which the wife takes in the character of executrix, and as the law permits her to take upon herself that office, it enables her, in exception to the general rule that a married woman cannot dispose of property, to make a will in this instance, without the consent of her husband; restricted, however, to those articles to which she is entitled as executrix. Scammell *v.* Wilkinson, 2 East, 552; 1 Williams, Ex. (6th Am. ed.) 54; Cutter *v.* Butler, 5 Fost. 353. The effect of such an instrument is merely to pass, by a pure right of representation, to the testator or prior owner, such of his personal assets as remain outstanding, and no beneficial interest which the wife may have in any part of them; and with respect to the assets which may have been received by the feme executrix, during the marriage, and not disposed of, they immediately become the husband's property, and are not affected by the will. Hodsden *v.* Lloyd, 2 Bro. C. C. 534, 543; Scammell *v.* Wilkinson, 2 East, 556, 557; 1 Williams, Ex. (6th Am. ed.) 54. As the husband may waive the interest which the law bestows on him, he may empower the wife to make a will to dispose of her personal estate. Osgood *v.* Breed, 12 Mass. 525, 532; Estate of Wagner, 2 Ashm. 448; Newlin *v.* Freeman, 1 Ired. 514; Fisher *v.* Kimball, 17 Vt. 323; 2 Black. Comm. 498; Emery *v.* Neighbor, 2 Halst. 142; Cutter *v.* Butler, 5 Fost. 354, 355. In Osgood *v.* Breed, 12 Mass. 532, Jackson, J., speaking of the will of personal property by a married woman with the consent of her husband, said: "Upon a bequest by her of money or other chattels, his assent alone will make it valid, because he alone is interested to question her authority. The gift, if it is effectual, is his gift; and the property passes from him." Thus a husband may assent to his wife's will, and such assent entitles the wife's executor to claim such articles of her personal estate as would have been her husband's as administrator. 1 Williams, Ex. (6th Am. ed.) 54; 1 Rop. Husb. and Wife (2d ed.), 170; George *v.* Bussing, 15 B. Mon. 558. But in order thus to establish the will, a general assent that the wife may make a will is not sufficient; it should be shown that he has consented to the particular will that she has made, Rex *v.* Bettesworth, 2 Strange, 891; 1 Williams, Ex. (6th Am. ed.) 54; 2 Black. Comm. 498; Cutter *v.* Butler, 5 Fost. (N. H.) 357; George *v.* Bussing, 15 B. Mon. 558; and it has been held that his consent should be given when it is proved, Henley *v.* Phillips, 2 Atk. 49; Swinb. Pt. 2, § 9, pl. 10, and that he may therefore revoke his consent at any time during his wife's life, or after her death before probate. Swinb. Pt. 2, § 9, pl. 10; 1 Rop. Husb. and Wife, 170; 4 Burn's Ecc. L. 52; George *v.* Bussing, 15 B. Mon. 558. In Estate of Wagner, 2 Ashm. 448, it was held, that the husband may revoke his assent to a will made by his wife of her personal estate; but it must be done before probate of the will. But the better opinion appears now to be, that if the husband acts upon the will or agrees to it, after the death of the wife, he is not at liberty to retract his assent and oppose the probate. Cutter *v.* Butler, 5 Fost. 357; 1 Rop. Wills, 23; Maas *v.* Sheffield, 10 Jur. 417. The assent of the husband may be implied from circumstances. Cutter *v.* Butler, 5 Fost. 357, 358. If the will is in the handwriting of the husband, this is evidence of his assent. Grimke *v.* Grimke, 1 Desaus. 366. See Smelie *v.* Reynolds, 2 Desaus. 66; 1 Rop. 169; Lov. Wills, 266. And when the will is made in pursuance of an express agreement or consent, it is said that a little proof will be sufficient to make out the continuance of the consent after her death. 1 Williams,

A will made during any personal disability, of course, is not [since the act 1 Vict. c. 26] rendered valid by the fact of the testator having outlived such disability, unless its removal were followed by some act of confirmation or adoption amounting

Subsequent confirmation of will originally void.

Ex. (6th Am. ed.) 55. See Smelie *v.* Reynolds, 2 Desaus. 66. This assent on the part of the husband is no more than a waiver of his rights as his wife's administrator. 1 Rop. Husb. and Wife, 170. It therefore can only give validity to the instrument in the event of his being the survivor. Hence it follows, that if he die before his wife, her will is void against her next of kin, so far as it derived its effect from his consent; and it therefore does not pass the right to property bequeathed to her during the coverture. Stevens *v.* Bagwell, 15 Ves. 156. A married woman may, without the assent of her husband, dispose by will of her separate personal estate, settled upon her, or held in trust for her, or the savings of her real estate given to her separate use, whether the instrument under which she takes it determines as to the power of disposition or not, Rich *v.* Cockell, 9 Ves. 375, 376; and this she may do without the intervention of trustees, for the power is incident to such an ownership. 2 Kent (5th ed.), 170, 171; Fettiplace *v.* Gorges, 1 Ves. Jr. (Sumner's ed.) 46, 48, 49, and notes; S. C. 3 Bro. C. C. 8, and notes; Rich *v.* Cockell, 9 Ves. 375; Tappenden *v.* Walsh, 1 Phillim. 352; Grigby *v.* Cox, 1 Ves. Sen. 518; Braham *v.* Burchell, 3 Addams, 243; Peacock *v.* Monk, 2 Ves. Sen. 190; Picquet *v.* Swan, 4 Mason, 455; West *v.* West, 3 Rand. 373; Barnes *v.* Irwin, 2 Dallas, 199. The principle upon which the above doctrine is founded is this: that when once the wife is permitted to take personal property to her separate use, as a *feme sole*, she must so take it with all its privileges and incidents, one of which is the *jus disponendi*. 1 Williams Ex. (6th Am. ed.) 61. And this rule prevails without regard to the circumstance whether the property be in possession or reversion. Sturgis *v.* Corp. 13 Ves. 190; Headen *v.* Rasher, 1 M'Clell. & Y. 89. And when she has such a power over the principal, it extends also to its produce and accretions, *e.g.* the savings of her pin-money. Gore *v.* Knight, 2 Vern. 535; Herbert *v.* Herbert, Prec. Ch. 44; Picquet *v.* Swan, 4 Mas. 454, 455. Nor does it make any difference whether the property be given to trustees for the wife's separate use, or, without the intervention of trustees, to the wife herself, for her own separate use and benefit. See Braham *v.* Burchell, 3 Addams, 263. For in the latter case a court of equity would decree the husband to stand as a trustee to the separate use of the wife. Tappenden *v.* Walsh, 1 Phillim. 352; Rollfe *v.* Budder, Bunb. 187; 1 Williams, Ex. (6th Am. ed.) 62. A married woman may make a testamentary disposition of her real estate under a power by way of execution of such power. 2 Kent, 171, 172; 4 Kent 50, 506; Bradish *v.* Gibbs, 3 Johns. Ch. 523; Anderson *v.* Miller, 6 J. J. Marsh. 573. In Bradish *v.* Gibbs, 3 Johns. Ch. 523, 540, it was decided that a mere agreement entered into before marriage by a female with her intended husband, that she should have power to dispose of her real estate during coverture, will enable her to do so; and it is not necessary in such case that the legal estate should be vested in trustees. This doctrine has received the approbation of the Supreme Court of Pennsylvania. West *v.* West, 10 Serg. and R. 447. Whether a married woman can make a devise of real estate which has not been conveyed to a trustee, but of which she and her husband are seised in her right, was made a question and discussed, but left undecided in Holman *v.* Perry, 4 Met. 492, 497. Equity will carry into effect the will of a married woman disposing of her real estate in favor of her husband (see Holman *v.* Perry, 4 Met. 492, 495; Picquet *v.* Swan, 4 Mas. 443. But see Morse *v.* Thompson, 4 Cush. 562), or other persons than her heirs at law, provided the will be in pursuance of a power reserved to her in and by the ante-nuptial agreement with her husband. Bradish *v.* Gibbs, 3 Johns. Ch. 523; 2 Kent, 172. But in the absence of any agreement between them, that the wife should hold her personal property to her separate use, a testamentary disposition by her of such estate in favor of her husband has been held void, though made with his assent. Hood *v.* Archer, 1 M'Cord, 225, 477; Newell's case, 2 M'Cord, 453. A power to make a testamentary disposition of her estate may be conferred upon a married woman by a settlement either before marriage or subsequently thereto. 4 Kent, 505. It may emanate either from her husband or from a third person. A post-nuptial settlement, made by a stranger upon the wife, is good, unless expressly dissented from by the husband. Picquet *v.* Swan, 4 Mas. 443. This subject has been discussed in a recent case, Holman *v.* Perry, 4 Met. 492, in Massachusetts. The important facts were these: A woman, before marriage, conveyed to a trustee, with the assent of her intended husband, all the property, real and personal, which she then had, or might acquire after marriage, to be held by such trustee for her sole and separate use, and reserved to herself in the instrument of conveyance, full power to dispose of all such property by will or otherwise; after marriage she purchased and took a deed of real estate, which she, jointly with her husband, conveyed to the same trustee, for her sole and separate use; she afterwards executed her last will, thereby disposing of all the real estate, which had been reserved by her, and also of all such real estate as she might die seised and possessed of, which she might thereafter purchase. There was a devise in the will, of a part of the estate reserved by her, in favor of her husband. After the execution of the will, she purchased real estate

in law to [re-execution (*m*). Before the act] the delivery by a widow of an instrument executed during coverture into the custody of another, as the will of the depositor, was held to be a sufficient republication of a will of personal estate (*n*).

[At common law, a] devise of lands by an alien was at least voidable (*o*); the crown being entitled, after office found, to seize them in the hands of the devisee, as it might have done in those of the alien during his life. Until office, the lands of an alien remained in him with all the incidental qualities belonging to such estates; on which ground it has been held, that an alien tenant in tail in possession might suffer a common recovery (*p*); and he might, of course, execute its substitute, an enrolled conveyance, and thereby bar the issue in tail and remainders: and, by parity of reasoning, the will of an alien vested his defeasible title in the devisee (*q*); though, if he died intestate, the land escheated to the crown, or other lord, *pro defectu tenentis*, without any inquest of office, because an alien could have no heirs (*r*). [But by the Naturalization Act, 1870 (*s*), "real and personal property of every description may be taken, acquired, held, *and disposed of* by an alien in the same manner as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject. Provided that . . . this section shall not affect (*t*) any estate or interest in real or personal property to which any person has or may become entitled either mediately or immediately in possession * or expectancy in pursuance of any disposition made before the act, or in pursuance of any devolution by law on the death of any person dying before the act."] *42

Devises by aliens.

Persons attainted of high treason [were formerly] incompetent to devise their lands, since, by several old statutes (*u*), the real estates of a traitor were, by the attainder, *ipso facto* vested in the crown.

Devises by traitors and felons; —realty.

(*m*) 1 Eq. Ca. Ab. 171, pl. 3; [Price *v.* Parker, 16 Sim. 198; Trimmell *v.* Fell, 16 Beav. 537; Willock *v.* Noble, L. R. 7 H. L. 580.]
(*n*) Miller *v.* Brown, 2 Hagg. 209. (*o*) See Shep. Touch. 404. (*p*) 4 Leon. 84.
(*q*) See Shep. Touch. 404. (*r*) Co. Litt. 2 b.
[(*s*) 33 Vict. c. 14, s. 2: not confined to alien friends, as 7 & 8 Vict. c. 66, s. 3.
(*t*) *I. e.*, shall not validate or invalidate, Sharp *v.* St. Sauveur, L. R. 7 Ch. 343.]
(*u*) See 4 Jarm. Conv. 2d ed. 186.

of which she was the legal owner at her decease. The court held that as to the real estate which was conveyed to the trustee, under the ante-nuptial agreement, and as to the real estate which the testatrix afterwards jointly with her husband conveyed to the trustee, for her sole and separate use, she had the power to dispose thereof by will; and that the will ought to be allowed and approved, so far as would be necessary to give effect to her disposal of the same. The question whether the real estate which she purchased after the execution of her will would pass under the will was raised, but not decided. There is a distinction between the power of a married woman to dispose of her separate real estate, and her power to dispose of her separate personal estate, by will. As to the personal estate, she has the *jus disponendi* as a necessary incident to a separate estate; but a married woman cannot devise her real estate except under a power. See Holman *v.* Perry, 4 Met. 496, per Dewey, J.; Osgood *v.* Breed, 12 Mass. 525; Marston *v.* Norton, 5 N. H. 205.

The lands of all persons attainted for petit treason and felony, formerly escheated to the king or other feudal lord (*x*), by reason of the corruption of blood consequent on attainder, which of course prevented the descent to the heir; and the devises of such persons were absolutely void, or rather, by the better opinion, were voidable, as in the case of an alien (*y*); and such [until 1870 was] still the case as to persons not entitled to the benefit of the statute 54 Geo. 3, c. 145, which provided, that no attainder for felony, except in cases of high treason, or of the crimes of petit treason (afterwards abolished by statute (*z*)), or murder, or of abetting, procuring, or counselling the same, "shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same."

There was some ground to contend, that the concluding words of this provision enabled persons convicted of, or rather attainted for, any other than the excepted offences, to alien their real estate by will, [and this ground was strengthened by the statutes (*a*), which in all cases where a title had accrued to the crown by escheat for want of heirs, or by reason of any forfeiture, empowered the sovereign (notwithstanding the statute (*b*) which had restrained the alienation of the royal demesnes in general to leases for thirty-one years) to make grants to any person for the purpose of restoring the land to the family of the former owner, or carrying into effect any grant, conveyance, or *devise* of it which he might have intended to make.

*43 * But the point is now of the less importance, since, by stat. 33 & 34 Vict. c. 23, attainder (which, and not the conviction, caused the disability) is thenceforth abolished, and express provisions (presently noticed) are made regarding the real estate both of traitors and felons.]

Wills of traitors and felons; —personalty.

Treason and felony incapacitated persons from making a will of personal estate, which [if vested (either in possession or remainder),] became forfeited to the crown on conviction (*c*); and this incapacity extended to a *felo de se*, who was, however, capable of devising his real estate, as there was in such

[(*x*) Subject to the right of the crown to hold the lands vested in the person attainted at the period of the attainder for a year and a day. 1 Steph. Com. 417.]

(*y*) Shep. Touch. 404.

(*z*) 9 Geo. 4, c. 31, s. 2.

[(*a*) 39 & 40 Geo. 3, c. 88, s. 12; 47 Geo. 3, sess. 2, c. 24; 59 Geo. 3, c. 94; 6 Geo. 49, c. 17.

(*b*) 1 Ann. st. 1, c. 7, s. 5.]

(*c*) 2 Bl. Comm. 499; Re Thompson's Trusts, 22 Beav. 506; Re Bateman's Trust, L. R. 15 Eq. 355. *Contra* as to goods which he has as executor of another, of which he may make a will, Re Bailey, 2 Sw. & Tr. 156, 31 L. J. Prob. 178. *Contra*, also, as to contingent interests, where the felony was not capital, Stokes *v.* Holden, 1 Keen, 145; Barnett *v.* Blake, 2 Dr. & Sm. 117, 128; and as to personalty acquired by him after a conditional free pardon, Gough *v.* Davies, 2 K. & J. 623.

case no attainder (*d*). In every case of felony in which sentence of death was not recorded, [that is to say, in which there was no attainder,] the prisoner's competency to devise or otherwise dispose of his real estate was not affected (*e*).

[But the law as to both real and personal property is now regulated by stat. 33 & 34 Vict. c. 23, which enacts (s. 1) that after the passing of it, "no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat; provided that nothing in this act shall affect the law of forfeiture consequent on outlawry." The statute, then, after defining (s. 6) "convict" to mean any person against whom sentence of death, or of penal servitude, shall have been pronounced or recorded upon any charge of treason or felony; and after providing (s. 7) that when any convict shall *die*, or become bankrupt, or shall have suffered his punishment, original or commuted, or have been pardoned, he shall thenceforth, as to the provisions thereinafter contained, cease to be subject to the act, enacts (s. 8) that no action or suit for the recovery of any property shall be brought by any convict during the time that he is subject to the act, and that every convict shall be incapable during that time of *alienating* or charging any property, or of making any contract, save as thereinafter provided. Sect. 9 provides for the appointment of an administrator, in whom, upon his appointment, (s. 10) all the real and personal property (including * choses in action) to which the convict was at the time of his conviction, or shall afterwards, while subject to the act, become or be entitled, vests all the convict's estate and interest. And the administrator has full power (s. 12) to let, sell, and mortgage the property, and thereout (ss. 13 to 17) to pay costs, debts, damages, &c., and to make allowances for the support of the convict and his family. Subject thereto, the administrator is (s. 18) to hold the property *in trust*, and may accumulate the income, *for the benefit of the convict* and his heirs, or legal personal representatives, or such other persons as may be lawfully entitled thereto, according to the nature thereof; and the same is to *revest* in the convict on his ceasing to be subject to the act, or in his heirs or representatives, or such other persons. The convict is to be entitled as against the administrator to all property acquired by him while at large under license, and, during the same time, his disabilities under s. 8 are suspended (s. 30).

Attainder and forfeiture for treason or felony abolished.

*44

Subject, therefore, to the temporary estate of the administrator, and to the charges imposed by the act, the real and personal property of a traitor or felon remains his own, and he may dispose of it by his will; for the prohibition against alienation during the

Effect of the abolition.

(*d*) Norris *v.* Chambres, 29 Beav. 258.
(*e*) Rex *v.* Willes, 3 B. & Ald. 510, 3 Inst. 55; Rex *v.* Bridger, 1 M. & Wel. 147; Re Harrop's estate, 3 Drew. 726.

time that he is subject to the act can have no application to his will, whensoever executed; a will being no alienation until the testator's death.]

Effect of 1 Vict. c. 26 upon the disabilities of testators.

The statute of 1 Vict. c. 26, has left all personal disabilities affecting the testamentary power as they stood under the pre-existing law (*f*), with the exception of infancy, which formerly (we have seen) did not incapacitate persons of a certain age from bequeathing personal estate; whereas that statute (s. 7) has provided, in general terms, that *no will* made by any person under the age of twenty-one years shall be valid; thus destroying at a blow the long-existing distinction between wills of real and wills of personal estate in regard to the age of testamentary competency. The statute has even carried this principle so far as to abolish, in regard to infant testators, the paternal power of appointing guardians, conferred by the act of 12 Car. 2, c. 24; so that a person under age is now not competent by will to appoint a guardian to his children. In short, the disability of infancy affects the testamentary power, under the new law, no less universally than it does the power of disposition *by deed;* and, *45 with respect to the appointment of guardians just referred * to, is even more extensive (*g*), for the power of nominating guardians by deed given to an infant father by the statute of Charles seems to be still in force; and this will go far towards preventing any practical inconvenience which might otherwise have resulted from the abolition of the power of infant fathers to appoint guardians *by will.*

Mode of computing age.

It may not be quite superfluous to remark, in conclusion of this branch of the subject, that in computing the age of a person for testamentary or other purposes, the day of his birth is included: thus, if he were born on the 16th of January, 1800, he would have attained his majority on the 15th of January, 1821 (*h*); and as the law does not recognize fractions of a day (*i*), the age would be attained at the first instant of the latter day.

[(*f*) See as to coverture Noble *v.* Willock, L. R. 7 H. L. 580. But as to revocation by "writing," see Hawksley *v.* Barrow, L. R. 1 P. & D. 152.]

(*g*) Infants, too, of the age of fifteen, are, in certain cases, competent to convey gavelkind lands by feoffment.

(*h*) Herbert *v.* Torball, 1 Sid. 162, Raym. 84, [8 Vin. Dev. G. pl. 20; Anon. 1 Salk. 44; Howard's case, 2 ib. 625. But a person attains "his 25th year" when he becomes 24 years old, Grant *v.* Grant, 4 Y. & C. 256.

(*i*) See Lester *v.* Garland, 15 Ves. 257.]

CHAPTER IV.

WHAT MAY BE DEVISED OR BEQUEATHED.

Testator may dispose of whatever would devolve upon his general representatives.

Joint estates not devisable.

THE power of testamentary disposition extends to all interests in real and personal estate, which, at the decease of the testator, would, if not so disposed of, devolve to his general real, or personal representatives (*a*), whether the testator be the legal or the beneficial owner only, or unite in himself both these characters.[1] Tried by this rule, it is obvious that a devise or bequest by a joint tenant of real or personal estate is void, in the event of the testator dying in the lifetime of his co-proprietor, whose title by survivorship takes precedence of the claim of the devisee or legatee, as it would of that of the heir or administrator, of the pre-deceased joint tenant, in case he had died intestate (*b*). If, on the other hand, the testator survives his companion in the tenancy, the efficacy of the devise or bequest formerly depended on the nature of the property; in the case of a freehold interest, the devise was void as not authorized by the statute 34 Hen. 8, c. 5, the testator not having a sole estate when he made his will; and, by parity of reasoning, any divided part or share which, after the execution of the will, he might have acquired on [a severance of the jointure, or] a partition of the property, would not pass thereby (*c*). But this reasoning, it is obvious, did not apply to leasehold property or other personal estate; a future interest in which, devolving by survivorship or acquired by partition, would, like all other after-acquired personalty, pass by a general or residuary bequest; and such,

[(*a*) Or, if he become entitled by descent, on the heir or customary heir of his ancestor, 1 Vict. c. 26, s. 3. And see Ingilby *v.* Amcotts, 21 Beav. 585.]

(*b*) Co. Litt. 185 a.

(*c*) Swift d. Neale *v.* Roberts, 1 W. Bl. 476, 3 Burr. 1488.

[1] Canfield *v.* Bostwick, 21 Conn. 550; Gold *v.* Judson, ib. 616; Brimmer *v.* Sohier, 1 Cush. 118; Waitt *v.* Belding, 24 Pick. 129, 136; Loveren *v.* Lamprey, 2 Fost. 434; Collin *v.* Collin, 1 Barb. Ch. 630; Van Vechten *v.* Van Veghten, 8 Paige, 104; Fahrney *v.* Holsinger, 65 Penn. St. 388; Scott *v.* Guernsey, 60 Barb. 163; S. C. 48 N. Y. 106. All contingent estates of inheritance, including springing and executory uses and possibilities, coupled with an interest, if the person to take be ascertained, are devisable, 4 Kent, Com. 261; Whitfield *v.* Fausset, 1 Ves. Sen. 391; Wright *v.* Wright, ib. 411: Lawrence *v.* Bayard, 7 Paige, 76; Varick *v.* Edwards, 1 Hoff. Ch. 383, 395-405; Pond *v.* Bergh, 10 Paige, 141. But in the case of a possibility, if the person to take be not ascertained, there can be no valid devise thereof, 4 Kent, Com. 262. Vested estates are, of course, devisable, though liable to be defeated by the non-performance of conditions subsequent, or the happening of subsequent events. Pinbury *v.* Elkin, 1 P. Wms. 563, 566; Winslow *v.* Goodwin, 7 Met. 363; Doe d. Ingram *v.* Girard, 1 Houst. 276; 1 Redf. Wills, 390 (4th ed.).

it will be remembered, is now the rule with respect to real estate devised by wills made since the year 1837. In regard to such a will, therefore, it is unnecessary to inquire whether the devising joint tenant had become solely seised by survivorship at the period of its exe-
*47 * cution; it is enough that he had acquired a devisable interest in the estate at the time of his decease (*d*).[1]

Where the several co-proprietors are tenants in common, or coparceners, each has [a sole estate, and therefore] an absolute power of testamentary disposition over his or her undivided share.

Executory interests, when devisable.

An executory interest in real or personal estate was (and of course still is) disposable by will, if the nature of the contingency on which it is dependent be such that the interest does not cease with the life of the testator; in other words, if it be descendible or transmissible. This doctrine, in regard to real estate, was recognized in Goodtitle *v.* Wood (*e*), and was finally established in Roe d. Perry *v.* Jones (*f*), where an estate was devised by will (on failure of certain limitations to the younger sons of A.) to the only son of A. in fee, in case he should have but one son who should live to attain twenty-one. A. had an only son B., who, in the lifetime of his father, after he had attained his majority, made a will, devising all his estate in possession or reversion; and the question was, whether this will operated to pass the executory use which B. had during his
*48 father's lifetime. * The court of K. B. held that it did; Lord Kenyon, C. J., drawing a distinction between such an interest and a mere possibility, like that which an heir has from his ancestor.

(*d*) The doctrine respecting joint tenancies comes under consideration in practice most frequently in regard to trust estates which, where vested in a plurality of persons, are commonly limited to them as joint tenants, on account of the obvious convenience attending the devolution of the estate to the survivors or survivor for the time being, instead of the title to the respective shares being deducible through the representatives of the several deceased trustees. The testacy or intestacy of any trustee, who at his decease leaves a co-trustee (between whom and himself there existed a joint tenancy), it is unnecessary to inquire into; but in case he were the sole trustee at his death, his will, if he left any, should be examined, in order to ascertain whether it contains an express devise of, or a devise capable of operating on freehold interests vested in the testator as trustee; and if the will (being made before the year 1838) were subject to the old law, it would be also proper to see that the surviving trustee had become solely entitled by survivorship before the making of the will. Where the deceased trustee was a female under coverture, or was uninterruptedly subject to any other personal disability affecting the testamentary capacity, of course the necessity of an inquiry into the existence of a will is superseded. It is then only requisite to ascertain who is the common-law heir (as to freehold interests), or the customary heir (as to copyholds) of the deceased trustee; though it is to be observed that, if the trustee in question were a married woman, and the subject of the trust were a freehold of inheritance, the legal title would not be complete without the junction of her surviving husband, in case she had had issue by him capable of inheriting the property; the husband having, under such circumstances, an estate for life as tenant by the curtesy. This is a point which is sometimes overlooked. Dower also attaches on a mere legal ownership, but as it is not an actual estate, being only a legal right, the enforcement of which would be restrained in Equity, the concurrence of the widow of a deceased trustee is never required.

(*e*) Willes, 211; S. C. cited 3 T. R. 94.

(*f*) 1 H. Bl. 30; S. C. in B. R. 3 T. R. 88; [and see Moore *v.* Hawkins, 2 Eden, 342, Fearne, C. R. 366; Ingilby *v.* Amcotts, 21 Beav. 585, which also explains the sense in which "descendible" is to be here understood.]

[1] 4 Kent, 513.

Buller, J., observed, that if it was such an interest as was descendible, it was also devisable, as they must both be governed by the same principle.

The converse of the proposition of the learned judge is equally true, namely, that an interest which is not transmissible cannot be devised. An instance of this species of interest occurred in Doe *v.* Tomkinson (*g*), where a testator devised his real estate to A. and B. and the survivor of them, and to be disposed of by the survivor as she might, by will, devise. A. survived B., having in the lifetime of B. made a will, devising her contingent interest; but which interest was held not to pass by the devise, on the ground that the person who was to take was not in any degree ascertainable before the contingency happened. The reasoning of the court merely assigns a ground for the decision which is common to executory interests of every description; for it is the uncertainty, who will become entitled, which renders the interest contingent. The true ground, it is submitted, is, that the contingency, depending on survivorship, necessarily takes effect in the lifetime of the testator, and, therefore, the interest cannot be the subject of a devise, which is inoperative until death (*h*). If the reason assigned by the court of K. B. in Doe *v.* Tomkinson were the correct reason, it would follow that, in the case of a limitation to several persons, and the heirs of the one first dying, such interest would, under the old law, not be devisable, since it differs from the limitation which occurred in that case, only in regard to the nature of the * contingency, the person to take being, in the one case no less than in the other, wholly unascertainable before the contingency happens; and yet the conclusion that such an interest may be disposed of by will, seems indisputable. The point is not now of much practical importance, as it cannot arise under a will made since the year 1837, the statute of 1 Vict. c. 26 having expressly provided (no doubt with a special view, to meet the particular case now under consideration) that the testamentary power conferred by it "shall extend 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 have become vested." *49

(*g*) 2 M. & Sel. 165.

[(*h*) It is presumed that the meaning of this passage in the text is, that the interest at the date of the will being contingent, but the interest that the will would actually operate upon being vested, there is in fact a new interest acquired after the date of the will, which cannot pass by it; in other words, the will is revoked by the alteration of estate consequent upon the happening of the contingency. To this view the case of Jackson *v.* Hurlock, 2 Ed. 263, seems directly opposed. In that case a testator devised lands, then conveyed them to uses which were to arise on his intended marriage, and under which he would take a remainder in fee; then made a codicil republishing his will, and afterwards married and died without issue of that marriage; and it was held, that the lands, in which, under the settlement, his interest at the date of the codicil was contingent, but became vested on his marriage, passed by the will and codicil. In Sug. Pow. p. 269, 8th ed., the decision in Doe *v.* Tomkinson is referred to the ground that the interest of the survivor was a power, and not an estate, and could not be exercised until the donee actually answered the description under which the power was given to him, that is, became the survivor. And see McAdam *v.* Logan, 3 B. C. C. 310, and Mr. Eden's note; Fearne, C. R. 370. But see per Lord Westbury, Thomas *v.* Jones, 1 D. J. & S. 78, 79.]

A right of action was not, under the old law, devisable. Thus, a reversion in fee expectant on an estate tail which had been discontinued by the act of the tenant in tail, could not be devised (*i*).

As to rights of action.

And the same doctrine was applicable to rights of entry. This point was much discussed in Goodright *v.* Forrester (*k*), where A. being tenant for life, with reversion to B. in fee, A. levied a fine *come ceo*, &c., after which, and when his estate had been thus reduced to a mere right of entry, B. made a will devising the property in question, the validity of which devise was the point in dispute. The case was eventually decided on another ground, after an energetic protest from Sir J. Mansfield, C. J., against the doctrine which affirmed the invalidity of the devise; but which seems nevertheless to be sound law. Such, it is evident, was the opinion of Eyre, C. J., in Cave *v.* Holford (*l*), of Lord Eldon, in Att.-Gen. *v.* Vigor (*m*), and of the Court of K. B., in Doe d. Souter *v.* Hull (*n*) [and Culley *v.* Doe d. Taylerson (*o*)]; and Lord Eldon, moreover, intimated an opinion, that a will made during *disseisin* was invalid, though the testator happened to die seised, on the ground that the testator was not seised at the date of the will; but that if he then had the land, and was disseised afterwards, the devise was good, as a disseisee after re-entry is by relation seised *ab initio;* which certainly appears to be more consistent with principle than the contrary position advanced in the early case of Bunter *v.* Coke (*p*).[1]

Rights of entry.

*50 * [When it is said that rights of entry were not devisable, this extends only to rights of entry, properly so called, created by actual disseisin, and not to a right to recover possession of the land from a mere adverse possessor, or a person holding over after the determination of his lawful title, for in such cases the freehold was in the testator, and of course might have been devised by him (*q*).] [2]

All such questions, however, are precluded as to wills made since the year 1837 by the statute 1 Vict., which has expressly extended the tes-

(*i*) Baker *v.* Hacking, Cro. Car. 387, 405; see also Doe d. Cooper *v.* Finch, 1 Nev. & M. 130, [4 B. & Ad. 283.] (*k*) 8 East, 564, 1 Taunt. 578. (*l*) 3 Ves. 669. (*m*) 8 Ves. 282. (*n*) 2 D. & Ry. 38. [(*o*) 11 Ad. & Ell. 1020.] (*p*) Salk. 237. [(*q*) Doe *v.* Hull, 2 D. & Ry. 38; Culley *v.* Doe, 11 Ad. & Ell. 1021.]

[1] See Humes *v.* McFarlane, 4 Serg. & R. 435; Mass. Gen. Stats. c. 92, § 3. In New York, in Varick *v.* Jackson, 2 Wend. 166, it was held that a right of entry is devisable, though at the time of the devise, and of the testator's death, the land was held adversely. Such a right would pass by descent, and there are no reasons of policy to create a distinction in this respect between descent and devise. Jackson *v.* Varick, 7 Cowen, 238. A right of entry is devisable in Virginia. Watts *v.* Cole, 2 Leigh, 664. See Turpin *v.* Turpin, 1 Wash. Va. 75; Hyer *v.* Shobe, 2 Munf. 200; Stoever *v.* Whitman, 6 Binn. 416; Waring *v.* Jackson, 1 Pet. 571; Gist *v.* Robinet, 3 Bibb, 2; Carroll *v.* Norwood, 4 Har. & M'H. 287. The settled test of a devisable interest in some parts of the United States is, whether the interest in the land is descendible. 4 Kent, 512, 513. The reasoning of the court in Whittemore *v.* Bean, 6 N. H. 47, very much favors the power of devising a right of entry. A right of entry will pass by deed in New Hampshire, ib.; Hadduck *v.* Whilmarth, 5 N. H. 181. It is now provided by statute there that no devise or bequest of any property shall be defeated by any disseisin or wrongful dispossession thereof by any other person.

[2] See Smith *v.* Bryan, 11 Ired. 418.

tamentary power to "all rights of entry for conditions broken and other rights of entry" (*r*). [And as to rights of action, the question cannot recur since the statute 3 & 4 Will. 4, c. 27, s. 36, abolishing real actions, on which alone it is conceived the question could have arisen.

Where a conveyance has been executed under circumstances which would give the grantor a right in equity to have it set aside and reconveyance decreed, such right is clearly devisable (*s*).

Conversely, possession without title confers a devisable interest which may be defended and recovered by the devisee against all but the true owner (*t*). Possession *de facto*.

Personal property limited by settlement merely to the executors or administrators of the settlor may be disposed of by his will, since he himself takes absolutely under such a limitation (*u*).

In Bishop *v.* Curtis (*v*) it was argued that under the third section of the 1 Vict. c. 26, a bequest of a chose in action would pass to the legatee the right to sue in his own name; but the court of B. R. decided that the act did not make anything bequeathable as personal estate, which might not have been bequeathed previously to the passing of that act.] Chose in action.

A will disposing of any interest in real estate of which the testator was seised, operated, under the old law, in the nature of a conveyance, and, consequently, extended only to hereditaments belonging to the testator when he made the devise. This rule was early established, in relation as well to devises by custom, as to devises under the statutes of Hen. 8, which shows that * it did not (as commonly supposed) arise from the mode of penning those statutes, but resulted from principles common to both species of devises. As equity follows the law, the doctrine extended no less to equitable than to legal interests. If, therefore, a testator before the year 1838 devised all the real estate of which he should be seised at the time of his decease, and after the making of his will he purchased lands in fee-simple, such after-acquired property, whether it was conveyed to the testator himself, or to a trustee for him, did not pass by the will, but descended, as to the legal inheritance in the former case, and as to the equitable inheritance in the latter, to the testator's heir-at-law (*x*). After-acquired freehold interests formerly not devisable. *51

Where a testator had an equitable interest in the devised lands when

(*r*) The devise must be by apt words: "real estate of which I may die *seised*" has been held not to pass land of which, though entitled thereto, the testator was not seised. Leach *v.* Jay, 9 Ch. D. 42.

(*s*) Uppington *v.* Bullen, 2 D. & War. 184, 1 Con. & L. 291; Stump *v.* Gaby, 2 D., M. & G. 623; Gresley *v.* Mousley, 4 De G. & J. 78.

(*t*) Asher *v.* Whitlock, L. R. 1 Q. B. 1.

(*u*) Morris *v.* Howse, 4 Hare, 599; Mackenzie *v.* Mackenzie, 3 Mac. & G. 559.

(*v*) 21 L. J., Q. B. 391.

(*x*) Bunter *v.* Coke, 1 Salk. 237, Holt, 248, nom. Buckingham *v.* Cook, 3 Bro. P. C. Toml. 19; Langford *v.* Pitt, 2 P. W. 629; [Harwood *v.* Goodright, Cowp. 90.]

Operation of a devise on equitable interests.

he made his will, and afterwards acquired the legal ownership, the equitable interest passed by the will, and the subsequently acquired legal estate descended to the heir, who, of course, became a trustee for the devisee. If, on the other hand, the testator were seised only of the legal estate, at the time of the execution of his will, and afterwards acquired the equitable interest (being the converse case), as where, being a mortgagee in fee at the date of the will, he subsequently purchased the equity of redemption, the devisee was a trustee of the legal estate, which he derived through the will, for the heir-at-law to whom the equitable inheritance descended (*y*).[1] Cases of the former description frequently occurred, where a man contracted to purchase a freehold estate, then devised it, and, subsequently to the execution of his will, took a conveyance of the property, and then died without republishing his will (*z*). The testator being equitable

(*y*) Strode *v.* Lady Falkland, 3 Ch. Rep. 187. [In Yardley *v.* Holland, L. R. 20 Eq. 428, a mortgagee in fee devised "all hereditaments whereof he was seised as mortgagee" (without any specific description of the mortgaged estate), and afterwards purchased the equity of redemption: this was ademption, and the devise failed both at law and in equity.]

(*z*) Greenhill *v.* Greenhill, Pre. Ch. 320, [2 Vern. 679, Gilb. Eq. R. 77;] Green *v.* Smith, 1 Atk. 572; Gibson *v.* Lord Montfort, 1 Ves. 494; Capel *v.* Girdler, 9 Ves. 509; Holmes *v.* Barker, 2 Madd. 462. [Same law as to copyholds, Seaman *v.* Woods, 24 Beav. 372. A valid contract will not be *presumed* to have been entered into before the date of the will for the purchase of lands conveyed to the testator immediately after that date, Cathrow *v.* Eade, 4 De G. & S. 527.

[1] See Perry *v.* Phelips, 1 Ves. Jun. 254, 255; Milnes *v.* Slater, 8 Ves. Jr. 295; Broome *v.* Monck, 10 Ves. Jr. 597, 605; 4 Kent, 510, 511; Johnston *v.* Hunly, 1 Taylor, 305; George *v.* Green, 13 N. H. 521; Brewster *v.* McCall, 15 Conn. 274; Carter *v.* Thomas, 4 Greenl. 341; Minuse *v.* Coxe, 5 Johns. Ch. 441; M'Kinnon *v.* Thompson, 3 Johns. Ch. 307, 310; Livingston *v.* Newkirk, 3 Johns. Ch. 312; Thomson *v.* Scott, 1 M'Cord, Ch. 32; Kemp *v.* M'Pherson, 7 Harr. & J. 320; Carroll *v.* Carroll, 16 How. 275; Hays *v.* Jackson, 6 Mass. 149; Wait *v.* Belding, 24 Pick. 129; Bullard *v.* Carter, 5 Pick. 114. This rule was strictly held in Pennsylvania, in the case of Girard *v.* City of Philadelphia, 4 Rawle, 323, although the testator declared in a codicil that it was his wish and intention, that all the real estate he should *thereafter* purchase, should pass by the said will. Such seems to have been the law of Alabama, Meador *v.* Sorsby, 2 Ala. 712; and of North Carolina, Foster *v.* Craige, 2 Ired. 533; Battle *v.* Speight, 9 Ired. 288. The rule of law upon this subject has been changed by statute in many of the states. Where a testator at the time of making his will, before the Revised Statutes of Massachusetts, changing the rule in reference to after-acquired land, took effect, held land in mortgage, and devised all his real estate, and afterwards foreclosed the mortgage, it was decided that such land did not pass by the will. Brigham *v.* Winchester, 1 Met. 390. See Swift *v.* Edson, 5 Conn. 531. So where the mortgagee perfects his estate by taking an absolute deed of the premises on which he holds the mortgage. Bullard *v.* Carter, 5 Pick. 112, 117, 118. These cases proceed on the ground, that to give effect to a devise of real estate, the testator must be the owner thereof at the time of making the devise, as well as at the time of his decease; and that it must be the same interest at these different periods of time. But since the change made in the law by the Revised Statutes of Massachusetts, respecting the operation of devises on real estate acquired after the execution of the will, and in all those states where a will may be made to operate on after-acquired real estate, a devise of the estator's land may be made to operate as well on lands acquired by foreclosure of a mortgage, or release of an equity, as by any other means. See further as to the general rule that after-acquired property will pass by the testator's will: Carter *v.* Thomas, 4 Greenl. 341; Brewster *v.* M'Call, 15 Conn. 274; Foster *v.* Craige, 2 Dev. & B. Eq. 209; Whittemore *v.* Bean, 6 N. H. 47; Turpin *v.* Turpin, 1 Wash. (Va.) 75; Hyer *v.* Shobe, 2 Munf. 200. As to *personal estate*, it is well settled that it will pass under general expressions in the will showing the testator's intent to bequeath it, although acquired after making the will. Loveren *v.* Lamprey, 2 Foster, 434, 442; per Shaw, Ch. J., in Wait *v.* Belding, 24 Pick. 136; Butler *v.* Baker, 2 Coke, 68; Wyndham *v.* Chetwynd, 1 Burr. 429; McNaughton *v.* McNaughton, 41 Barb. 50; S. C. 34 N. Y. 201; Pruden *v.* Pruden, 14 Ohio N. S. 251. And see Fluke *v.* Fluke, 1 C. E. Green, 478; Ridgeway *v.* Underwood, 67 Ill. 419. The statutes of the states as to after-acquired estate will be cited later.

owner under the contract (*a*), his interest passed by the will to the devisee, whose equitable right the heir was bound to clothe with the legal title. In these and many other cases, great * inconvenience occurred from the incompetency of a testator to dispose by will of his after-acquired real estate; and questions often arose as to the actual state of the rights and obligations of the parties under the contract, on which the validity of the devise depended (*b*), and also as to the effect of certain modes of conveyance, in producing a revocation of the devise of the equitable interest. The removal of this incapacity, therefore, is not the least of the advantages conferred by the statute 1 Vict. c. 26, which has expressly extended the testamentary power to such real and personal estate as the testator may be entitled to at the time of his death, notwithstanding he may become entitled to the same subsequently to the execution of his will. But it may, of course, be necessary, even under the new law, to go into the inquiry, whether the circumstances attending a contract for purchase or sale by a deceased person, are such as to render the contract obligatory; for upon this fact would depend the question (which has lost none of its importance), whether, as between the representatives of the deceased testator or intestate, it is to be regarded as real or personal estate; and this may and often does depend on extrinsic circumstances, ascertainable by parol testimony. In Lacon *v.* Mertins (*c*), Lord Hardwicke decreed a parol contract to be carried into execution as between the real and personal representatives of the deceased vendor, the purchaser submitting to perform it, *and acts of part performance, sufficient to take it out of the Statute of Frauds, being proved.* In Buckmaster *v.* Harrop (*d*), a bill by the purchaser's heir-at-law for a similar purpose was dismissed by Sir Wm. Grant, M. R., on the ground that a binding contract had not been proved. *52

Effect of uncompleted contract.

Where the contract is binding on the purchaser at the time of his death, his heir or devisee is entitled to the benefit of it; in other words, is entitled to consider the contract as having converted the personal estate, *quoad* the purchase-money, into real estate; although from subsequent events, arising out of the situation of the deceased purchaser's estate, the contract should, as against the vendor, be rescinded.[1] Thus, in Whittaker *v.* Whittaker (*e*), where W., having contracted for the purchase of an estate, afterwards by his will devised certain real

Contract binding on purchaser at his death, subsequently rendered incapable of completion.

(*a*) It was sufficient if the vendor alone was bound by the contract, Morgan *v.* Holford, 1 Sm. & Gif. 101, semb.]
(*b*) Duckle *v.* Baines, 8 Sim. 525.
(*c*) 3 Atk. 1.
(*d*) 7 Ves. 341.
(*e*) 4 B. C. C. 30.

[1] But where the owner of real estate died after making a contract for the sale of it, the recission of the contract after his death was held to be a reconversion of the estate into land, each legatee acquiring the same interest in the land as the will or the law would have given him in the proceeds after payment of the debts of the deceased. Leiper *v.* Irvine, 26 Penn. St. 54.

estates to trustees to certain uses, and then reciting the contract, he gave to the trustees all the residue of his property, upon trust (*inter alia*) to dispose of a sufficient part thereof, and therewith to pay
*53 * the remainder of the purchase-money, and complete the contract, and thereupon take a conveyance to the uses of the thereinbefore devised estates. Before the contract was completed the testator died, and the executors not being able to collect sufficient assets to carry the contract into execution within the necessary time, the vendor instituted a suit against them, and the contract was eventually cancelled under a decree of the court. The devisee then filed a bill to have the amount of the purchase-money laid out in the purchase of land to be settled to the same uses, and Sir R. P. Arden, M. R., decreed accordingly, being of opinion that the acts of the executors could not affect the rights of the parties; and relying, also, on the general principle, that devisees to whom a contracted-for estate is given, are, if the contract fails *from any cause*, entitled to have the money laid out for their benefit, and that the case of an heir-at-law was less favored. This doctrine, however, we shall presently see, was overruled by Lord Eldon in the case next stated.

Effect of uncompleted contract.

The true principle is, that where the contract is such as could have been enforced against the purchaser at the time of his decease, the estate, which is the subject-matter of the contract, or, failing that, the purchase-money, belongs to his heir or devisee;[1] but if, from a defect of title or any other cause, the contract was not obligatory on the purchaser at his death, his heir or devisee is not entitled to say he will take the estate with its defects, or have the purchase-money laid out in the purchase of another.[2]

If not binding on devisor, devisee cannot insist upon its being completed.

Such is the doctrine of Broome *v.* Monck (*f*), where a bill was filed by the devisee of a purchaser of a contracted-for estate against the vendor and the personal representative of his own devisor, praying a specific performance of the contract, or that the purchase-money might be laid out in the purchase of another estate, and it appeared that a good title could not be made; Lord Eldon, after great deliberation, dismissed the bill. The contract expressed, in the usual manner, that

(*f*) 10 Ves. 597. See also 1 Ves. 218; [O'Shea *v.* Howley, 1 J. & Lat. 398.]

[1] An equitable interest in land, founded on articles of agreement for a purchase, will pass to the heir or devisee. Malin *v.* Malin, 1 Wend. 625; Marston *v.* Fox, 8 Adol. & E. 14, per Tindal, C. J. It is well established, that an estate contracted for will pass under general words of devise in a will, even though the agreement to purchase is not to be carried into execution until a future day, which does not occur until after the time when the will bears date. Marston *v.* Fox, *ubi supra*, per Tindal, C. J. And the executor must pay the purchase-money for the benefit of the heir or devisee. Livingston *v.* Newkirk, 3 Johns. Ch. 312. But in order to entitle the devisee, the agreement to purchase must be made before the execution of the will. M'Kinnon *v* Thompson, 3 Johns. Ch. 307. See 2 Story, Eq. Jur. § 790 *et seq.*

[2] A will made in Ohio in 1811, by one in possession of real estate under a verbal contract, and for which he afterwards obtained a deed, was held good to pass the legal as well as the equitable title in Smith *v.* Jones, 4 Ohio, 116.

the remainder of the purchase-money should be paid upon a good title being made, and the codicil directed that the contract should be carried into execution; but the decision was founded on the general principle, and not on the particular terms of the contract. In adverting to Whittaker *v.* Whittaker, which was urged as an authority for the plaintiff, Lord Eldon observed, * that it was very difficult to maintain the doctrine in it, which went beyond what was necessary for the decision. The case was no more than this: The vendor had a good title. The estate at the death of W. in equity belonged to the devisees of his real estate. The vendor objected he was not to be held to the contract for ever, and the embarrassment of W.'s affairs gave him a right to be off. But as to the devisees of the land and the legatees of the money, their interests were completely fixed at the death of the testator, and the only question was, whether the embarrassment of his affairs giving that right to the vendor, should vary the rights as between them; and it was quite clear, that if the real representative had been an heir instead of a devisee, the question would have been just the same. The cases establish, that whatever is the state of liability of the party himself at his death, must be the state of liability to be considered upon questions between those representing him after his death (*g*); and if at his death he could not be compelled to take, clearly the heir could not say to the executor, "I will have the estate and you shall pay for it." "I have not found any case that has induced me to suppose that if this were between the heir and the personal representative, it would be possible for the heir to say, though the title was doubtful, yet being the real representative, he is entitled to take it as it is, though the ancestor never meant so to take it, or intimated any purpose of retiring from that situation in which he had a right either to insist upon a good title, or to refuse the estate; and though there is no proof that the ancestor would have paid for the estate with a bad title, yet the heir shall insist that the personal estate shall pay for it out of the assets. None of the cases give any color for that; Green *v.* Smith (*h*), indeed, seems to state a doctrine quite inconsistent." He therefore held that, as no title could be made, the devisees were not entitled to take this estate, or to have another estate bought for them.

*54 Effect of uncompleted contract.

State of liability of the party himself at his death, governs the question between those claiming under him.

It will be observed, that Lord Eldon adverted to the circumstance of the purchasing devisor not having himself shown an intention to take the estate with a bad title. It is conceived he alluded to such evidence of intention as would have amounted to an acceptance of the title. Nothing short of * this, it is presumed, could have any effect;

*55 What evidence of intention by devisor to accept title necessary.

[(*g*) See acc. Curre *v.* Bowyer, 5 Beav. 6, n.; Hudson *v.* Cook, L. R. 13 Eq. 417; Ingle *v.* Richards, 28 Beav. 365; Haynes *v.* Haynes, 1 Dr. & Sm. 451, 452; Lysaght *v.* Edwards, 2 Ch. D. 516.] (*h*) 1 Atk. 572.

for, to admit parol evidence of intention *as such* would be liable to the objection attaching to the reception of extrinsic evidence in aid of, or in opposition to, a written will (*i*). It is true that, under the doctrine in question, the devise is incidentally affected by this evidence, since, as already observed, the inquiry whether the contract was obligatory on the testator at his decease, lets in any evidence which would be admissible, in a suit between the vendor and vendee, of circumstances discharging the vendee, as a difference in the estate from that contracted for, not capable of being the subject of compensation, or the like. Of course the vendor could not take advantage of the waiver by the heir or devisee of objections to the title which his ancestor or devisor might have advanced, he (*i. e.* the heir or devisee) having in that event no interest in the estate.

Question, where the deceased purchaser was bound, but the vendor was not.

In Whittaker *v.* Whittaker, and Broome *v.* Monck, the contract seems to have been binding on the vendor, and therefore, those cases do not decide what would be the effect, where the deceased purchaser was bound at his decease, but the vendor was not, a case which clearly may and often does arise; as where a written contract has been entered into, which is duly signed by one party and not by the other, and the signing party dies before there has been any act of part performance, which would render the contract obligatory on the other. It is clear, that in such a case, the surviving (*k*) party may choose or not to enforce the performance of the contract against the representatives of the deceased: should he decline, of course the contract is at an end, and the property remains unconverted as between the real and personal representatives of the deceased party. If, on the other hand, the surviving party choose to compel performance, the question arises between the respective representatives of the deceased, whether such conversion has taken place. For instance, suppose the deceased party to be the vendor; if the surviving party, *i.e.* the purchaser, should (as he may) call upon the heir or devisee of the deceased vendor, to convey to him the property in pursuance of his ancestor's or testator's contract — upon the doctrine in question would depend the destination of the purchase-money, which, if the contract is to be considered as effecting an absolute con-
*56 version of the property, * would belong to the personal representatives (*l*); if not, to the heir or devisee of the deceased vendor. The writer is not aware of any direct authority on the point;

Cases where there is an option to purchase.

but, perhaps it would be considered as governed by the cases (which seem to be analogous in principle), in which, there being in a lease of a freehold estate a clause entitling the lessee pending the term to purchase the demised property, and the

[(*i*) See Rose *v.* Cunynghame, 11 Ves. 550.]

(*k*) The fact of survivorship is introduced merely for the convenience of distinction; it would, of course, be immaterial whether the party represented as the survivor were living or not.

[(*l*) See post, Chap. VII. s. 3 *ad fin.*]

lessor having died before the option of the lessee has been declared, the latter has *subsequently* elected to purchase the property. Under such circumstances, it was held by Lord Eldon, in Townley *v.* Bedwell (*m*), on the authority of a previous decision of Lord Kenyon (*n*) (but without, it should seem, approving the principle), that the rents, until an election to purchase should be made, belonged to the heir or devisee; but that when it was made, the purchase-money went to the personal representative of the vendor.

[There is at least equal reason for holding that conversion has taken place in cases where, at the testator's death, the contract, though unilateral, is unconditional and complete without a further act by one of the parties. But, whether contract or option, the vendor's will may show an intention inconsistent with the notion of conversion. In Knollys *v.* Shepherd (*o*) (a case of contract), a specific devise to the testator's "dear wife" of the estate "which he had lately contracted to sell," was held not to show such an intention, but to give the wife only the legal estate, the purchase-money passing by the residuary bequest. But in the case of an option, a will made or republished after the date of the contract, and specifically devising the property in strict settlement, has been held to take the case out of the rule in Townley *v.* Bedwell; and, upon the option being exercised after the testator's death, to carry the purchase-money to the devisees (*p*).

*57 Devises of copyholds.

By the common law, copyholds could not be devised except * by virtue of a special custom of the manor of which they were held, nor were they affected by the Statutes of Wills passed in the reign of Hen. 8 (*q*). When a copyholder wished to devise his copyhold, it was originally necessary that he should make a surrender to the use of his last will; the estate then passed by the surrender and not by the will, which was only a direction of the uses of the surrender (*r*); the testator till his death, and afterwards his heirs, continued to have the legal copyhold interest till the devisee was admitted (*s*); and accordingly upon a surrender without admittance by way of mortgage, the mortgagor having the whole legal estate, and not a mere equity of redemption (which we shall hereafter see was devisable without surrender), must have made a second surrender to the use of his will in order to enable him to devise (*t*).

(*m*) 14 Ves. 591. [See also Collingwood *v.* Row, 26 L. J. Ch. 649, 3 Jur. N. S. 785.]

(*n*) Lawes *v.* Bennet, 1 Cox, 167. [Compare Wright *v.* Rose, 2 S. & St. 323, which is very similar to cases of option to purchase, and in that view opposed to Townley *v.* Bedwell.

(*o*) 1 J. & W. 499, cit., affirmed in D. P. Sug. Law of Prop. 223. As to whether a general devise includes an estate which the testator has contracted to sell, see post, Chap. XXI. s. 2.

(*p*) Drant *v.* Vause, 1 Y. & C. C. C. 580; Emuss *v.* Smith, 2 De G. & S. 722. Neither a specific devise executed before (Weeding *v.* Weeding, 1 J. & H. 42), nor a general devise executed after the contract (Goold *v.* Teague, 5 Jur. N. S. 116), is sufficient for the purpose. The rule applies only as between the real and personal representatives of the vendor, and will not be extended. See Edwards *v.* West, 7 Ch. D. 858.

(*q*) 1 Watk. Cop. 122, 2 Rol. Rep. 383.

(*r*) Att.-Gen. *v.* Vigor, 8 Ves. 286.

(*s*) 1 Watk. Copp. 122; and see Roe *v.* Jeffereys, 2 Wils. 13.

(*t*) Doe d. Shewen *v.* Wroot, 5 East, 132.

The surrender, and not the will, being the operative part, so to speak, of the devise, one joint tenant could, by surrendering to the use of his will, and then devising to a stranger, sever the jointure (*u*), and, in most manors, also bar his widow of freebench. By the statute 55 Geo. 3, c. 192, all devises thereafter to be made of copyhold lands, though not surrendered to the use of the testator's will, were rendered as valid *as if a surrender had been made.* This statute merely supplied the omission of a surrender; and it was immaterial that a surrender had, in fact, been made to the use of the will, but that the will could not operate upon it, not being properly executed according to the terms of the surrender since the statute supplied a second surrender (*x*). But this statute supplied formal surrenders only, and therefore did not dispense with a particular mode of surrender required by the custom to give validity to a devise by a married woman (*y*), such surrender being considered as a protection to her.

Will of a copyholder in joint tenancy a severance.

Stat. 55 Geo. 3, dispensing with surrender to use of the will.

Only dispenses with formal surrenders.

It seems the better opinion, that a custom in a manor that the copyhold tenant shall not devise through the medium of a *58 * surrender to the use of his will, is bad (*z*): at all events, such a custom will not be presumed from the fact that no entry is to be found on the court rolls of any such surrender (*a*).

Custom not to surrender to use of a will bad.

An equitable interest in copyholds under a trust or right of redemption, or a contract for purchase, being incapable of surrender, was devisable without any such formality, and it was immaterial in the last case that a surrender had been made to the use of the purchaser, so long as he had not been admitted (*b*); and the right of the equitable owner to devise his interest could not be controlled by the custom of the manor (*c*).

Eqnitable interests in copyholds devisable without surrender.

Customary freeholds, though not held at the will of the lord, yet if alienable by surrender and admittance, were devisable in the same manner as copyholds (*d*).]

Customary freeholds.

(*u*) Co. Litt. 59 b.; Porter *v.* Porter, Cro Jac. 100; 2 Cox, 156; 2 Ves. 609. In Edwards *v.* Champion (1 De G. & S. 75), it was held by K. Bruce, V.-C., that a surrender by one joint tenant to the use of the will of a stranger whose will did not come into operation until after the death of the surrenderor produced a severance; but on appeal (3 D., M. & G. 202) this was doubted by Lord Cranworth, Parke, B., and Cresswell, J., seeing that the right by survivorship had actually accrued.

(*x*) Doe d. Hickman *v.* Hickman, 4 B. & Ad. 56.

(*y*) Doe *v.* Bartle, 5 B. & Ald. 492, 1 D. & Ry. 81.

(*z*) Wardell *v.* Wardell, 3 B. C. C. 117; Pike *v.* White, ib. 287; but see 1 Evans' Stat. p. 450.

(*a*) Doe d. Edmunds *v.* Llewellin, 2 C. M. & R. 503, 5 Tyr. 899; Doe d. Dand *v.* Thompson, 7 Q. B. 897.

(*b*) Davies *v.* Beversham, 2 Freem. 157, 3 Ch. Rep. 76; Car *v.* Ellison, 3 Atk. 73: King *v.* King, 3 P. W. 358; Gibson *v.* Lord Montfort, 1 Ves. 489; Greenhill *v.* Greenhill, 2 Vern. 679; Phillips *v.* Phillips, 1 My. & K. 664; Seaman *v.* Woods, 24 Beav. 372, where the purchaser took under a power of sale in a will.

(*c*) Lewis *v.* Lane, 2 My. & K. 449.

(*d*) Doe *v.* Huntington, 4 East, 288; Doe d. Cook *v.* Danvers, 7 East, 299; Doe d. Dand *v.* Thompson, 7 Q. B. 897. These cases appear to overrule Lord Hardwicke's apparent opinion to the contrary in Hussey *v.* Grills, Amb. 299.]

Copyholds, equally with freeholds, were subject to the rule, which, under the old law, restricted a devise to lands of which the testator was seised when he made his will (*e*). A devise of copyholds, therefore, however comprehensive in its terms, did not pass an after-acquired copyhold estate (*f*), except so far as such estate might have been brought within its operation by a subsequent surrender to the use of the will (which could not be the case where the testator's interest was only equitable), the surrender being construed to have the effect of extending a general devise of copyholds to lands acquired in the interval between the will and the surrender (*g*); and it was decided that a surrender to such uses as the testator "*shall*" by will appoint applied to a will antecedently executed, it being considered that the surrenderor referred to that will which should be in existence at his death (*h*).

As to devises of after-acquired copyholds.

And here it may be observed, that as every copyhold is parcel of the manor to which it belongs, a devise of the manor was held to comprise such copyholds, though acquired by the lord after *the making of his will (*i*). [Freeholds held of the manor coming to the lord by act or operation of law, as by escheat or descent, also passed by a previously executed devise of the manor; but not if he acquired them by purchase, for when so acquired they do not become parcel of the manor (*j*).] It is clear, too, upon a principle somewhat analogous, that if a person having a remainder or reversion in fee, expectant on an estate for life, devised that remainder or reversion, and then by any means acquired, and by such acquisition extinguished, the estate for life, the devise carried the estate thus acquired, the merger of which merely had the effect of accelerating the ulterior estate (*k*).

*59

After-acquired copyholds pass as part of a manor.

Under the old law, too, a devisee or surrenderee of copyholds before admittance, was wholly incapable of devising them (*l*). The same doctrine was at one period considered to apply to an heir, whose incompetency to devise was supposed to have been established by Smith *v.* Triggs (*m*); but which case, rightly understood, seems not to have warranted any such doctrine. It was frequently cited, however, as an authority on this point (*n*), but as such it has been completely overruled by Right d. Taylor *v.* Banks (*o*), the facts of which were as follow: On the 13th of February, 1781, John Taylor was

Devise by devisee or surrenderee of copyholds before admittance void.

Devise by an unadmitted heir held to be good.

(*e*) Harris *v.* Cutler, cit. 1 T. R. 438, n.; Spring *v.* Biles, ib. 435, n.
[(*f*) Phillips *v.* Phillips, 1 My. & K. 664.]
(*g*) Heylin *v.* Heylin, Cowp. 130; Att.-Gen. *v.* Vigor, 8 Ves. 287.
(*h*) Spring *v.* Biles, 1 T. R. 435, n., overruling Warde *v.* Warde, Amh. 299, which is *contra*. (*i*) Roe d. Hale *v.* Wegg, 6 T. R. 708.
[(*j*) Delacherois *v.* Delacherois, 11 H. L. Ca. 62. (*k*) Buckingham *v.* Cook, Holt, 253.]
(*l*) Wainwright *v.* Elwell, 1 Mad. 627; [Phillips *v.* Phillips, 1 My. & K. 664; Matthew *v.* Osborne, 17 Jur. 696.] (*m*) 1 Str. 487.
(*n*) See Sir T. Plumer's judgment in Wainwright *v.* Elwell, 1 Mad. 632; and Sir L. Shadwell's judgment in King *v.* Turner, 2 Sim. 548, [reversed, 1 My. & K. 456.]
(*o*) 3 B. & Ad. 664.

admitted to the copyholds in question, which he afterwards surrendered to the use of his will, and then by his will devised part to his son Samuel (who was his heir-at-law) in fee, and part to his daughter Mary, in fee. Mary Taylor, on the death of the testator, entered, but was never admitted; she died, leaving her brother Samuel her customary heir; Samuel Taylor, who, as heir of his father, was entitled to the whole (for the devise to him by the former did not break the descent, [and Mary never having been admitted, he took her share also, as heir to his father, and not as heir to her (*p*),]) entered, but was never admitted. By his will he devised the copyholds in question —the validity of which devise was the point at issue. The court *60 * held that the devise was good, relying much on the doctrine in Coke's Copyholder, s. 41, that the heir is tenant immediately after the death of his ancestor, and may, before admittance, surrender into the hands of the lord; and also on Brown's case (*q*), Brown *v.* Dyer (*r*), Morse *v.* Faulkner (*s*), Doe *v.* Tofield (*t*), Wilson *v.* Weddell (*u*), which severally support the same doctrine, and were considered by Lord Tenterden and the rest of the court to outweigh the recent dicta to the contrary, which were all founded on a mistaken view of Smith *v.* Triggs. The point was again agitated, and received a similar determination in [King *v.* Turner (*x*)] and Doe d. Perry *v.* Wilson (*y*).

Devises by unadmitted devisee or surrenderee under Wills Act.

The act 1 Vict. c. 26, s. 3, has precluded any question of this nature in regard to wills which are subject to its operation, by expressly affirming the testamentary power of an unadmitted heir: indeed it goes much further, by extending the devising power to an unadmitted devisee or surrenderee. [It repeals the 55 Geo. 3, c. 192, which only *supplied* a surrender, and makes the will itself, without any surrender, confer a right to admittance (*z*), notwithstanding that the testator has not surrendered to the use of his will, or notwithstanding that the copyholds, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, or in consequence of there being a custom that a will or 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 the will previously to the passing of the act. Thus all questions arising under the former act respecting the validity of a devise, in consequence of the power to devise being still left dependent on the power to surrender to the use of the will (though the surrender itself was not

[(*p*) Smith *v.* Triggs, 1 Str. 487, and observations of Lord Tenterden in Right *v.* Banks, p. 670. It is material to notice this point, as otherwise the case would be an authority, that the heir of an unadmitted devisee could devise, though the devisee herself could not.]

(*q*) 4 Rep. 22 b.
(*r*) 11 Mod. 73.
(*s*) 1 Anst. 13.
(*t*) 11 East, 251.
(*u*) Yelv. 144.
[(*x*) 1 My. & K. 456.]
(*y*) 5 Ad. & Ell. 321; [and see Doe d. Winder *v.* Lawes, 7 Ad. & Ell. 195.
(*z*) This view was adopted by the court in Garland *v.* Mead, L. R. 6 Q. B 441. Admittance is still necessary to vest the estate.

required) are now set at rest. But in Lacey *v.* Hill (*a*), it was held that the new act does not merely dispense with the surrender and the custom, but gives the devise the same effect as if there actually had been both; and that consequently a * general devise of the testator's "real estate," without more, bars his widow of her freebench. Reading the act, Sir G. Jessel, M. R., said, "That means that a testator is to have the same power of devising copyhold estate, as if he had done all the things there mentioned; as if there had been a surrender, or as if there had been a custom, and so forth. It breaks in upon the customary law of copyholds for the purpose of giving an unlimited power of devise. I am of opinion that *the same* effect is to be given to a devise of copyholds under the new law, as under the law as it stood before the Wills Act, and consequently the widow is not entitled to freebench." It is to be presumed that in this case the custom gave freebench of lands of which the copyholder was seised at his death, and not, as is the custom in some manors (*b*), of those of which he was seised at any time during the coverture; since, in the latter case, notwithstanding a custom to surrender to the use of the will, neither a devise nor an actual surrender by the husband would under the previous law have barred the freebench.] *61

Lacey *v.* Hill. Devise of copyholds bars freebench.

Copyholders also participate in the benefit of the enactments which extend the devising power to after-acquired real estate, and other interests not before devisable, and are, on the other hand, bound by those which (as we shall see) regulate the ceremonial of execution. Copyholds are also, in common with freeholds, subject to the several clauses by which the legislature has propounded certain new canons or rules of construction, which in general appear to be of a nature to admit of application to copyhold estates (*c*).

Bequests of chattel interests in land are governed by principles wholly different from those which regulate devises of freehold estates: they do not, like the latter, pass directly to the legatee, as the alienee of the testator, but, forming part of his personal estate, they devolve to the executor or other general personal representative, who is bound, in subordination to the paramount claims of creditors, to give effect to any bequest in the will, specific or residuary, comprising the property in question; and, therefore, even under the old law, it was quite unnecessary, as regarded the testator's competency of disposition, to go into the inquiry, whether he was, at the time of

Bequests of chattel interests in lands.

(*a*) L. R. 19 Eq. 346. The contrary must have been assumed in Thompson *v.* Burra, L. R. 16 Eq. 592. It was needless there to argue that the widow must elect between her freebench and the benefits given her by the will if the freebench was defeated by the devise. It need scarcely be observed that a devise by one joint tenant will not work a severance, since the power of devising under the act is given only where the property if not devised would go to the customary heir.

(*b*) Riddell *v.* Jenner, 10 Bing. 29 (Manor of Cheltenham).

(*c*) The form of admittance of a devisee of copyholds is now somewhat simplified by stat. 4 & 5 Vict. c. 35, ss. 88, 89, 90.]

making the will, possessed of a term of years which formed part of his property at his decease (*d*); such an inquiry being no less irrele-
*62 vant * in the case of a bequest of leaseholds held by a chattel lease, than in that of a horse or a watch, or any other personal chattel.

Freeholds *pur autre vie*[1] require a distinct consideration in connection with the testamentary power. This species of estate stands distinguished from all other interests, freehold or chattel, by this peculiar quality, that it is capable of being rendered transmissible to either real or personal representatives, according to the terms of the instrument creating the estate, or rather the instrument vesting it in the deceased owner, or in the person under whom he derived his title by act of law: for it seems now to be admitted that the devolution of the estate is regulated by the words of limitation contained in the last conveyance, without regard to the mode of its original creation. Estates *pur autre vie* are devisable by the express terms of the Statute of Frauds, 29 Car. 2, c. 3 (s. 12), the act of Henry 8 being (according to the prevalent and probably the better opinion) confined to estates of inheritance in fee-simple (*e*).

Freeholds *pur autre vie.*

Though the Statute of Frauds required three witnesses to the devise of an estate *pur autre vie*, yet where the property devolved otherwise than to the heirs of the owner (*i. e.* where it was limited either to his executors or administrators, or to the last taker indefinitely, without any express mention of either class of representatives), it was distributable as part of his personal estate, whether he died testate or intestate; and by a necessary consequence of this principle, an executor taking it as such was bound to give effect to any bequest or direction in the will affecting such property, though the will might not have been attested in the manner required by the statute in question (*f*). By the 1 Vict. c. 26, s. 3, [the previous enactments respecting estates *pur autre vie* were repealed, and] the testamentary power is expressly extended to such estates, 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 by sect. 6 it is enacted, that if no disposition shall be made of any estate *pur autre vie* of a freehold nature, it shall be assets in the hands of the heir, and that in case

Devolution of estates *pur autre vie.*

(*d*) See Wind *v.* Jekyl, 1 P. W. 575; see also James *v.* Dean, 11 Ves. 388.

(*e*) Anon., Cart. 211.

(*f*) Ripley *v.* Waterworth, 7 Ves. 425; [in connection with which case, see Bearpark *v.* Hutchinson, 7 Bing. 178, 4 M. & Pay. 848, as to rents *pur autre vie.*

[1] See Ripley *v.* Waterworth, 7 Ves. (Sumner's ed.) 425, 453, Hovenden's note (4); Watkins *v.* Lee, 6 Ves. (Sumner's ed.) 633, 644, Hovenden's note (3); Oldham *v.* Pickering, Carth. 376; Aylett *v.* Aylett, 1 Wash. 300; 1 Hoff. Ch. R. 204, 225. In Indiana, any estate *pur autre vie* shall be devisable by will executed as in other cases; St. 1876, Vol. 2, ch. 3, p. 571. In New Jersey, express provision is made by statute for devising estates *pur autre vie.* Revision, 1709-1877, Vol. 2, p. 1243.

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 the 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. So that where a bastard having the trust of an estate *pur autre vie* limited to him and his heirs, dies without heir, there being thus no special occupant, the property goes in case of intestacy to the administrator in trust for the crown (*g*): or if there be a will appointing an executor but not disposing of the lease, the executor will hold for his own benefit, unless the will be such as before the act 1 Will. 4, c. 40, s. 2, constituted him a trustee (*h*).] *63

A question often agitated, but never entirely settled, in regard to the devising power over estates of this description, was whether where they were limited to the tenant *pur autre vie*, *and the heirs of his body*, they could be devised without some act on his part to bar the entail. It was admitted on all hands that if the property were undisposed of, it would devolve to the heir special *per formam doni;* it was equally clear that an alienation *by deed*, [if made by the *quasi* tenant in tail in possession (*i*),] was an effectual bar to the entail; but the doubt was, whether the estate was devisable by will alone, without any such previous alienation. The authorities on the point are few and contradictory. In Doe *v.* Luxton (*k*), Lord Kenyon inclined to think that the devise was good; but his Lordship's dictum stands opposed to that of Lord Redesdale, in Campbell *v.* Sandys (*l*); and to [the opinion of the court of B. R. in Ireland, in Hopkins *v.* Ramage (*m*), who thought that a *quasi* tenant in tail could not * by will exclude the title of the issue or remainder- *64 men,] and such was evidently the impression of Sir T. Plumer in Blake *v.* Luxton (*n*) [and of Sir E. Sugden in Allen *v.* Allen (*o*).] The statute 1 Vict. does not in terms dispose of this debatable point, but has, it should seem, done so in effect, by the language of the general enabling clause, sect. 3, which extends the devising power to "all real

Devise by *quasi* tenant in tail of estates *pur autre vie.*

(*g*) Reynolds *v.* Wright, 25 Beav. 100, 2 D., F. & J. 590.

(*h*) Powell *v.* Merritt, 1 Sm. & Gif. 381.; Cradock *v.* Owen, 2 ib. 241.

(*i*) If made by tenant in tail in remainder, it must be with the concurrence of the owner of the previous estate in possession (Slade *v.* Pattison, 5 L. J. (N. S.) Ch. 51; Allen *v.* Allen, 2 D. & War. 307, 332; Edwards *v.* Champion, 3 D., M. & G. 202), and could never, therefore, be made by will.]

(*k*) 6 T. R. 293.

(*l*) 1 Schef. & Lef. 294.

[(*m*) Batty, 365. The decision of Lord Manners in Dillon *v.* Dillon, 1 Ba. & Be. 77, does not touch the question, for the *quasi* tenant in tail died without issue, and therefore, at her death, there was nothing for the will to operate upon, and the learned Judge expressly rested his decision on this fact. In Hopkins *v.* Ramage, the circumstances were precisely similar, but the opinion of the court was expressed in general terms.]

(*n*) Coop. 185.

[(*o*) 2 D. & War. 307, 326.]

estate and all personal estate which he (the testator) 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.*"

The terms of this enactment evidently restrict it to cases in which property, in the absence of disposition, would devolve to the *general* real or personal representatives of the testator, as distinguished from the case now under consideration, in which the devolution would be to the heir *special.*[1]

[1] As to language which will pass after-acquired estate, see Kimball *v.* Ellison, 128 Mass. 41.

*CHAPTER V. *65

WHO MAY BE DEVISEES OR LEGATEES (*a*).

THE statute of 34 Hen. 8, c. 5, expressly excepted out of its enabling clause devises to bodies politic and corporate; and, accordingly, it was held, that a devise to a corporation, whether aggregate or sole, either for its own benefit or as trustee, was void; and the lands so devised descended to the heir, either beneficially or charged with the trust, as the case might be.[1] The statute 1 Vict. c. 26, contains no such prohibition, the legislature having contented itself with regulating and defining the powers and capacities of testators, without in any manner interfering

Corporations can take by devise, but cannot hold without license.

[(*a*) See also Chap. III. on the personal disabilities of testators.

[1] The New York Revised Statutes have turned the simple exception in the English statute, and in the former statute of New York, into an express prohibition by declaring that no devise to a corporation shall be valid unless the corporation be expressly authorized to take by devise. 4 Kent, 507; Wright *v.* Meth. Epis. Church, 1 Hoff. Ch. 225; Andrew *v.* New York Bible Society, 4 Sandf. 156. The same construction prevailed as to the pre-existing statutes. Jackson *v.* Hammond, 2 Caines's Cas. in Error, 337; M'Cartee *v.* Orphans' Asylum, 9 Cow. 437. Indeed, where a legacy was given to a corporation, in New York, in trust, for an authorized pious use, and also for a use foreign and extrinsic to those which the corporation could execute by law, the trust, being entire and indivisible, was held void. Andrew *v.* New York Bible Soc., 4 Sandf. 156. Corporations are not excepted out of the Statute of Wills in Massachusetts, or prohibited from taking land by devise. The same is also the case in many other states. The common-law right of taking personal property by bequest, has, it seems, always been enjoyed by corporations equally with individuals. Phillips' Academy *v.* King, 12 Mass. 546; In re Howe, 1 Paige, 214; M'Cartee *v.* Orphans' Asylum, 9 Cowen, 437; Burr *v.* Smith, 7 Vt. 241; Burbank *v.* Whitney, 24 Pick. 151; Gibson *v.* M'Call, 1 Richardson, 174. The word "person" in the provision of the Statute of Wills of New York (2 R. S. 57, § 3) does not include a state or a nation; and a devise of lands to the United States is therefore void. Fox's Will, 52 N. Y. 530. Where an act of assembly, incorporating the trustees of a college, provided that their property should not exceed a certain amount, in a suit brought for a legacy so large that the whole being added to the fund then held, the limited amount would be exceeded, the court held that only so much as would raise the amount to the sum limited in the charter could be recovered, and that the overplus of the personalty vested, at the testator's death, in the next of kin. Davidson College *v.* Chambers, 3 Jones, Eq. 253. When the terms of the charter of a corporation, created by the legislation of another state, are sufficiently broad to confer upon it a capacity to take and hold real estate by devise, although not expressly authorized so to take, a provision of the Statute of Wills of that state that "no devise of real estate to a corporation shall be valid, unless such corporation is expressly authorized by its charter, or by statute, to take by devise," is operative only to the extent of disabling the corporation to take by devise real estate situate in that state, and does not affect its power to take by devise real estate in Ohio. American Bible Society *v.* Marshall, 15 Ohio St. 537. See White *v.* Howard, 46 N. Y. 144; Fox's Will, 52 N. Y. 530; Vansant *v.* Roberts, 3 Md. 119. A bequest is good to a domestic or to a foreign corporation in Massachusetts. Burbank *v.* Whitney, 24 Pick. 151. See Sutton *v.* Cole, 3 Pick. 232; Clapp *v.* Stoughton, 10 Pick. 463; Washburn *v.* Sewall, 9 Met. 280; Bartlett *v.* Nye, 4 Met. 378. Eleemosynary corporations of other states may take land in Pennsylvania by devise, although prevented by the Statutes of Wills of the states where they are incorporated from so taking lands in those states. Thompson *v.* Swoope, 24 Penn. St. 474. As to gifts to unincorporated societies, see Chap. IX.

with, or attempting to define, the capacities of persons to take under testamentary dispositions, which it has left to be ascertained and determined by the application of the general principles of law. [Now, according to those principles, corporations have capacity to take lands, though, without a sufficient license in that behalf, they cannot retain them (*b*). Their incapacity to *take* land by devise was a consequence of the exception in the statute of Henry; and since the act 1 Vict. c. 26, has repealed that statute without reviving the prohibition, they are now as capable of taking by devise as natural persons.] But, as in cases of acquisition by other means, a proper license is needed to enable them to hold.] The disability of corporations to *hold* real property was created by various statutes (*c*) before 34 Hen. 8, which appear to have been founded on the principle, that, by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats, and other feudal profits. Hence, the necessity of obtaining the king's license, he being the ultimate lord of every fee in the kingdom; but this license only remitted his own rights, and did not

*66 * prevent the right of forfeiture accruing to intermediate lords.

Doubts having arisen, however, at the Revolution, how far such license was valid (*d*), as being an exercise of the dispensing power formerly claimed by the crown (but which, it is pretty evident, it was not, but merely a waiver of its own right of forfeiture), the statute 7 & 8 Will. 3, c. 37, was passed, which provides that the crown for the future, at its own discretion, may grant licenses to alien or take in mortmain, of whomsoever the tenements shall be holden. At this day, therefore, the license from the crown protects against forfeiture to any intermediate lord.

Devises to corporations in trust.

But where [before 1 Vict. c. 26] real estate was devised upon trust to a corporation not empowered to take lands [by devise, although] the devise was, of course, void at law [under the statute of Henry, yet] the estate descended to the heir *charged with the trust* (supposing that it was not illegal, under stat. 9 Geo. 2, c. 36, as being in favor of charity), in the same manner as where a devise to a trustee fails by the death of the devisee in trust in the testator's lifetime (*e*). [And since the stat. 1 Vict. c. 26, the trust would equally be upheld; the only difference being that the corporation trustee is now capable (unless incapacitated by the stat. 9 Geo. 2) of taking by devise, though not, without license, of holding.]

(*b*) Co. Litt. 2 b. See the stat. de Religiosis and other acts cited in the margin there.]

(*c*) Magna Charta, c. 36; 9 Hen. 3, c. 36; 7 Edw. 1, c. 1; [13 Edw. 1, c. 32, &c. 33;] 34 Edw. 1, st. 3; 18 Edw. 3, st. 3, c. 3; 15 Rich. 2, c. 5; 23 Hen. 8, c. 10.

(*d*) 2 Hawk. P. C. 391, [Co. Litt. 99 a, n. (1), by Butler.]

(*e*) Sonley *v.* Clockmakers' Company, 1 B. C. C. 81; [Incorporated Society *v.* Richards, 1 D. & War. 258 (where the lands being in Ireland, the charitable trust was valid). The statute 43 Eliz. c. 4, did not, as sometimes supposed, render devises to charitable corporations valid at law. In Flood's case (Hob. 136, 1 Eq. Ca. Ab. 95, pl. 6), it was expressly "agreed that the devise was void in law," though the charitable use was upheld in equity. Benet College *v.* Bishop of London, 2 W. Bl. 1182, holding such a devise good at law, "rests on no solid foundation;" see per Lord St. Leonards, 1 D. & War. 305.]

It should be observed, however, that devises to some corporations are authorized by act of parliament. For instance, the stat. 43 Geo. 3, c. 107, enables persons to devise lands to the Governors of Queen Anne's Bounty, and the stat. 43 Geo. 3, c. 108, authorizes, under certain limitations, the devise to any persons or bodies politic or corporate of land not exceeding five acres, for the erection, repair, purchase, or providing of churches or chapels, where the Liturgy of the United Church of England and Ireland shall be used, or of the mansion-house for the residence of the minister, or of any out-buildings, offices, churchyard, or glebe for the same respectively. And similar enactments have been made in favor of many other charity * corporations (*f*). *67 And although generally devises for charitable uses are forbidden by the act of 9 Geo. 2, c. 36, yet the 4th section of that statute, which excepts out of its operation gifts to the Colleges in the two English Universities, and the Colleges of Eton, Winchester, and Westminster, [leaves devises to those corporations to be dealt with by the general law as settled by the stat. 1 Vict.

The incapacity of alienage has been removed, as we have already seen, by the Naturalization Act, 1870 (*g*). But the act not being retrospective, and giving no protection to rights acquired by an alien before it was passed (*h*), it is still necessary to consider the old law.] Alienage could not, strictly speaking, be ranked among the incapacities to *take* real estate by devise, as the property remained in the alien till office found, when it devolved to the crown (*i*). On this principle, where lands were devised to an alien and another concurrently as joint tenants, the entirety did not vest in the latter (as would have been the effect if the devise to the alien had been absolutely void), but in both jointly; and if the crown did not during the joint lives seize the alien's undivided moiety (as it might do after office found (*j*)), then, on the decease of the alien, leaving his co-devisee surviving, such moiety devolved to the latter by virtue of the *jus accrescendi*, which is incidental to every joint tenancy, subject, of course, to the crown's right of seizure, after office: which would, by relation, have overreached the title of the surviving joint tenant to the alien's moiety (*k*). If, however, the alien survived his co-devisee, he did not, in the opinion of some persons, thereby become entitled to the entirety, he being disabled from acquiring a title by operation of law, even for the benefit of the crown, on the principle that the law, by its own act, never gave an estate to one whom it did not permit to retain it (*l*); but though the principle is unquestionable, perhaps this application of it

Devises to aliens.

(*f*) Vide Church Building Act, 9 Geo. 4, c. 42, and other statutes stated post, Chap. IX, and in Shelford on Charitable Uses.

[(*g*) 33 Vict. c. 14, s. 2, stated ante, p. 41.

(*h*) Sharp *v.* St. Sauveur, L. R., 7 Ch. 351.]

(*i*) Duplessis *v.* Att.-Gen., 1 B. P. C., Toml. 415.

(*j*) King *v.* Boys, Dy. 283 b.

(*k*) Forset's case, cit. 1 Leon. 47, 4 Leon. 82.

(*l*) See Collingwood *v.* Pace, 1 Vent. 417; [Bridg. by Ban. 414.

may be fairly excepted to, as the survivor seems to have been *in* by the original gift.[1]

A trust of freehold or copyhold lands declared in favor of an alien went to the crown;

[Where a trust in lands for life or any greater estate was created in favor of an alien by will or otherwise, it was *68 *doubted whether as "the Chancery could not compel one to execute a trust for an alien" (*m*), the crown could get the benefit of it. The doubt, however, had no better foundation with regard to a trust estate than with regard to a legal estate; for an alien could never sue in a real or mixed action (*n*), and could never, therefore, recover the possession of land which he had purchased. Yet, as the estate was certainly in him, it was never doubted that the crown, on office found, might seize this legal estate (*o*). And where a trust declared in favor of an outlaw or person attainted was forfeited; although he could not sue for it, yet the crown, claiming through him, could. Accordingly the question was finally decided in favor of the crown (*p*). The crown took, not for any reason arising out of the doctrine of tenures (*q*), but

(*m*) Per Rolle, J., Rex *v.* Holland, Sty. 20. But see per Hatherley, C., L. R. 7 Ch. 354.
(*n*) Co. Litt. 129 b. (*o*) Ante, p. 67.
(*p*) Barrow *v.* Wadkin, 24 Beav. 1; Sharp *v.* St. Sauveur, L. R., 7 Ch. 343: overruling Rittson *v.* Stordy, 3 Sm. & Gif. 230.
(*q*) Escheat or forfeiture. Forfeiture there was not: and the crown cannot take the trust of realty by escheat, Burgess *v.* Wheate, 1 Ed. 177; 1 W. Bl. 123; Davall *v.* New River Company, 3 De G. & S. 394; Beale *v.* Symonds, 16 Beav. 406. In Co. Litt. 191 a, n. vi, 11, Mr. Butler suggests that a better ground in favor of the claim of the crown might, perhaps, have been found by resorting to its acknowledged prerogative of being entitled to the *bona vacantia*, or every species of property of which no owner is discoverable: but the suggestion was never acted upon. As to Lord Loughborough's often-cited dictum, that "the crown comes under no head of equity," Walker *v.* Denne, 2 Ves. Jr., 179, see per Romilly, M. R., in Barrow *v.* Wadkin. The dictum appears to be warranted when used with reference to a trust for conversion in a case where there is a total failure of the objects of the trust. Thus, in Walker *v.* Denne, the crown was held not entitled to enforce against the next of kin a trust for laying out money in land where there was a total failure of *cestuis que trustent*, and the only result would be to enable the crown to claim by escheat: and in Taylor *v.* Haygarth, 14 Sim. 8, where real and personal estate was devised to trustees on trust for sale, and the surplus proceeds were left undisposed of, and all legacies and annuities had been satisfied out of the personalty, Sir L. Shadwell. V.-C., held, on a failure of heirs and next of kin, that the trustee was entitled for his own benefit, and that the crown was not entitled to a decree for sale merely that it might take the produce as *bona vacantia*. But it does not follow "because the crown could not enforce the execution of a trust to sell in favor of a non-existing person, that therefore the crown could have no benefit of a trust for an existing person, the beneficial interest in which had through that person become vested in the crown;" per M. R. 24 Beav. 17. In Henchman *v.* Att.-Gen., 3 My. & K. 485, the claim of the crown to a sum of money provided by the will to be paid by the devisee of lands to a charity, and assumed to be an exception from the devise (see post, Ch. XI.), was negatived, and the money held to sink for the benefit of the devisee. The difference between this case and that of the alien is, that in the latter there is a person who can take though he cannot hold; in the former the object cannot take.

[1] An alien may take lands by grant. Orr *v.* Hodgson, 4 Wheat. 553; Jackson *v.* Beach, 1 Johns. Cas. 399; Jackson *v.* Lunn, 3 Johns. Cas. 109; Dudley *v.* Grayson, 6 T. B. Monr. 260; Marshall *v.* Conrad, 5 Call, 364; Trustees *v.* Gray, 1 Litt. 149. And he may take by devise as well as by grant, ib.; Fox *v.* Southack, 12 Mass. 143; Mooers *v.* White, 6 Johns. Ch. 360; Fairfax *v.* Hunter, 7 Cranch, 603; Vaux *v.* Nesbit, 1 M'Cord, Ch. 352; Marshall *v.* Conrad, 5 Call, 364; Mick *v.* Mick, 10 Wend. 379; Wadsworth *v.* Wadsworth, 2 Kern. 376; Munro *v.* Merchant, 28 N. Y. 9; Overing *v.* Russell, 32 Barb. 263; People *v.* Conklin, 2 Hill, 67; Foss *v.* Crisp, 20 Pick. 121; Wilbur *v.* Tobey, 16 Pick. 179; Crosse *v.* De Valle, 1 Wall. 1, 13; Taylor *v.* Benham, 5 How. 233; Stephen *v.* Swann, 9 Leigh, 404; Smith *v.* Zaner, 4 Ala. 99. But an alien cannot at common law hold against the state. He therefore takes under a devise a defeasible estate, good against all except the state. Wilbur *v.* Tobey, supra; Foss *v.* Crisp, supra; Wadsworth *v.* Wadsworth, supra. See

by its prerogative on grounds of public policy (*r*), a title which extended, *a fortiori*, to the trust of chattel interests in land (*s*), except such as an * alien might himself hold (*t*). But] the proceeds of real estate, which was impressed with a trust for conversion, could be given to an alien, [and the crown had no claim,] this not being a trust conferring on the alien an interest in land, but merely a right to have the land converted into money; and the policy of the law in regard to mortmain (which had been much pressed in argument as analogous in principle) depending upon considerations entirely different (*u*). "It was argued," said Lord Cottenham, "that the legatees might elect to take the estate in land; but they have not done so; and what the Attorney-General claims is money and not land. The incapacity to hold land is founded upon reasons not applicable to money. The testatrix has given to her legatees no option to take the land; and if she had, or if the law had given the option, it would be no reason why the legatee should forfeit money which he can enjoy, because, instead thereof, he might have elected to take land which he cannot enjoy."

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—also the trust of chattels real;

—but not the proceeds of real estate directed to be sold.

The disabilities of alienage might be removed partially by a grant of letters of denization from the crown, or wholly by an act of parliament investing the alien with the rights and privileges of a British subject. [Such acts, in favor of the particular individual, were superseded by the act 7 & 8 Vict. c. 66 (now repealed) which (sect. 6) empowered the Secretary of State to grant certificates of naturalization, having the same effect as the ordinary acts of naturalization; and enacted (sect. 5), that every alien friend might, by *grant*, lease, assignment, *bequest*, *representation*, *or otherwise*, take and hold any lands or tenements for the purpose of residence, occupation, or trade, for any term not exceeding twenty-one years, as if he were a natural-born subject.] [1]

Naturalization and denization,

(*r*) Co. Litt. 2 b.

(*s*) See Middleton *v.* Spicer, 1 B. C. C. 201; Taylor *v.* Haygarth, 14 Sim. 8; Cradock *v.* Owen, 2 Sm. & Giff. 241; Powell *v.* Merritt, 1 Sm. & Giff. 381; Reynolds *v.* Wright, 25 Beav. 100, 2 D., F. & J. 590; Read *v.* Stedman, 26 Beav. 495. These cases relate to a total failure of next of kin; and if they differ in principle from the point noticed in the text, go rather beyond what is needed to establish that point.

(*t*) Co. Litt. 2 b, and infra.]

(*u*) Du Hourmelin *v.* Sheldon, 1 Beav. 79, [4 My. & Cr. 525; and see Master *v.* De Croismar, 11 Beav. 184.]

1 Kent, Com. 54, 70. In Kentucky, an alien who has resided in the state two years may take land by purchase or descent. Trustees *v.* Gray, 1 Litt. 149. See Beard *v.* Rowan, 1 McLean, 135. And until the land is seised by the state, the alien has complete dominion over it, and may convey it to a purchaser, or maintain an action to recover it. M'Creery *v.* Allender, 4 Har. & M. 409; Bradstreet *v.* Supervisors, &c., 13 Wend. 546; Scanlan *v.* Wright, 13 Pick. 523; People *v.* Conklin, 2 Hill, 67; Foss *v.* Crisp, 20 Pick. 121. An alien may also take and hold a legacy of personal estate for his own benefit. Craig *v.* Leslie, 3 Wheat. 563; Commonwealth *v.* Martin, 5 Munf. 117; Polk *v.* Ralston, 2 Humph. 537.

[1] Where an alien having acquired lands by purchase is afterwards naturalized before office found, his title, it seems, becomes thereby confirmed, so that he may hold even against the state in New York. People *v.* Conklin, 2 Hill, 67; Jackson *v.* Beach, 1 Johns. Cas. 399. It is otherwise where the

An act of naturalization was always so framed as not to render valid antecedent conveyances of the alien, the terms of the enactment being, that he *shall be* and is *henceforth* naturalized, &c. (*x*); [and the act 7 & 8 Vict. is in equivalent terms. But] letters of denization expressly authorize the denizen to hold lands theretofore granted (*y*), and he may even hold such *70 * as devolve to him by act of law, except, of course, that [formerly he could] not claim by descent from or through his father, if an alien (*z*).

—were not retrospective, —but denization was.

Another disqualification, which the policy of the law, in its wholesome anxiety to remove temptations to perjury, has created, arises from the fact of the devisee or legatee being made an attesting witness of the will.[1] It is obvious that nothing could be more dangerous than to allow a will to be supported by the testimony of persons who are beneficially interested in its contents. When, therefore, the Statute of Frauds required to the validity of a devise of land, that it should be attested by *credible* witnesses, persons having a beneficial interest under the will were held not to sustain this character; and, accordingly, a will of freehold estate attested by such persons was invalid; and that, too, not only as to the part which created the interest of the attesting witness, but in regard to the whole. In applying this principle it was long a question, whether the witness could be rendered competent by destroying his interest by means of a release or payment before his examination; in other words, whether the credibility of the witnesses was to exist at the period of the attesting act, or of the judicial inquiry into its sufficiency. Against the latter hypothesis Lord Camden, in Doe d. Hindson *v.* Hersey (*a*), made an able and energetic protest. "A will," he said, "is often executed suddenly in a last sickness, and sometimes in the article of death, and a great question to be asked in such cases is, whether the testator were in his senses when he made the will, *and, consequently, the time of the execution is the critical moment which required guard and protection.* What is the employment of the witnesses? — it is to attest, and to judge of the testator's sanity when they attest; and if he is not capable, they ought to refuse to attest. In some cases the witnesses are passive; here they are active, and, in truth, the principal parties to the transaction; the testator is intrusted to their care." [The majority of the court were, however, against Lord Camden's opinion.]

As to devises and legacies to attesting witnesses.

Period of credibility.

(*x*) Fish *v.* Klein, 2 Mer. 431. (*y*) Foudrin *v.* Gowdey, 3 My. & K. 383.
(*z*) Sir M. Hale in Collingwood *v.* Pace, 1 Vent. 417. Otherwise if the father was a denizen at the son's birth. (*a*) 4 Burn's Eccl. Law, 27.

claim is by descent. People *v.* Conklin, 2 Hill, 67; Vaux *v.* Nesbit, 1 M'Cord, Ch. 370. An alien husband who makes the preliminary declaration of his intention to become a citizen before the death of his wife, and completes his naturalization after her death, is not entitled to her land as tenant by the curtesy. Foss *v.* Crisp, 20 Pick. 121.

[1] A devise or legacy to a witness is absolutely void, so that a conveyance by the devisee to a third person is inoperative. Jackson *v.* Denniston, 4 Johns. 311.

The doctrine contended for by this distinguished judge seems eventually to have prevailed (*b*), and is evidently more reasonable
* than the alternative rule, which would have led to this absurd *71
and mischievous consequence, that a will might have been invalidated by the *subsequent* conduct of a witness affecting his credibility of character, and occurring, it might be, after the death of the testator, when there was no possibility of repairing this disaster to the will.

It was soon found that the holding a will of freeholds to be invalid on account of the existence of an interest, however remote or minute, in any one of the attesting witnesses, was productive of much inconvenience; and it being apparent that to render the witness competent, by depriving him of the benefit which affected his disinterestedness, was far better than to sacrifice the entire will, the statute 25 Geo. 2, c. 6 (*c*),[1] was passed, which, after reciting the 29 Car. 2, c. 3, s. 5, provided, that if any person should attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting

Stat. 25 Geo. 2, c. 6. Beneficial devises and legacies to attesting witnesses void;

(*b*) Brograve *v.* Winder, 2 Ves. Jr. 636. [It must be observed that this case only decided that a witness disinterested at the time of the execution of the will and the death of the testator was a good witness, notwithstanding that he was interested at the time of his examination, and that Lord Camden's opinion is directly opposed to the cases of Lowe *v.* Jolliffe (1 W. Bl. 365) and Goodtitle *v.* Welford (Dougl. 139), where a legatee after release was held a competent witness.

(*c*) Ir. Parl. 25 Geo. 2, c 11.]

[1] Witnesses to a will are incapable of taking any beneficial interest under the will, unless there be the statutory number of witnesses besides the one so taking an interest, in

Arkansas. Digest, 1874, ch. 135, p. 1018. See ib. p. 1019.

California. Codes & Stat. Vol. 1. ch. 1, p. 721.

Colorado. Gen. Laws, 1877, ch. 103, p. 930.

Connecticut. Gen. Stat. 1875, ch. 11, p. 369.

Dakotah. Rev. Code, 1877, Title 5, ch. 1, p. 347.

Illinois. R. S. 1880, ch. 148, p. 1110.

Indiana. Stat. 1876, Vol. 2, ch. 3, p. 578.

Iowa. Rev. Code, 1880, Vol. 1, Title 16, ch. 2, p. 608.

Kansas. Comp. Laws, 1878, ch. 117, p. 1002.

Kentucky. Gen. Stat. 1873, ch. 113, p. 835.

Massachusetts. Gen. Stat. 1860, ch. 92, p. 477.

Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1372.

Minnesota. Stat. 1878, ch. 47, p. 568.

Mississippi. Rev. Code, 1871, ch. 9, p 214.

Missouri. R. S. 1879, Vol. 1, ch. 71, p. 685.

Nebraska. Gen. Stat. 1873, ch. 17, p. 301.

Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 200.

New Hampshire. Gen. Laws, 1878, ch. 193, p. 455.

New York. R. S. 1875, Vol. 3, ch. 6, p. 64.

Ohio. R. S. 1880, Vol. 2, ch. 1, p. 1426.

Oregon. Gen. Laws, 1843-1872, ch. 64, p. 789.

Texas. R. S. 1879, Title 99, p. 713.

Utah. Comp. Laws, 1876, ch. 2, p. 271.

Virginia. Code, 1872, ch. 118, p. 912.

West Virginia. R. S. 1878, ch. 201, p. 1172.

Wisconsin. R. S. 1878, ch. 103, p. 650.

The statute of New York provides that if the witness who has a beneficial interest under the will would be entitled to a share of the estate had the will not been made, so much of such share shall be saved to him; and he shall recover that share of the devisees or legatees. Rev. Stats. (N. Y.) 1875, Vol. 3, ch. 6, p. 64. And like provisions exist in the states of

Arkansas. Digest, 1874, ch. 135, p. 1018.

California. Code & Stat. 1876, Vol. 1, ch. 1, p. 721.

Colorado. Gen. Laws, 1877, ch. 103, p. 930.

Dakotah. Rev. Code, 1877, Title 5, ch. 1, p. 347.

Illinois. R. S. 1880, ch. 148, p. 1110.

Indiana. Stat. 1876. Vol. 2, ch. 3, p. 578.

Iowa. Rev. Code, 1880, Vol. 1, Title 16, ch. 2, p. 608.

Kansas. Comp. Laws, 1879, ch. 117, p. 1002.

any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, should be thereby given, or made, such devise, &c., should, so far only as concerned such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person should be admitted as a witness to the execution of such will or codicil within the intent of the said act, notwithstanding such devise, &c.; but it was enacted (sect. 2), that in case by any will or codicil any lands, tenements, or hereditaments were or should be charged with any debt or debts, and any creditor, whose debt was so charged, had attested, or should attest, the execution of such will or codicil, every such creditor, notwithstanding such charge, should be admitted as a witness to the execution of such will or codicil, within the intent of the said act. Sects. 3, 4, and 5, relate only to wills made

— and witnesses competent.

Creditors whose debts are charged, good witnesses.

Kentucky. Gen. Stat. 1873, ch. 113, p. 835.
Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1372.
Minnesota. Stat. 1878, ch. 47, p. 568.
Mississippi. Rev. Code, 1871, ch. 9, p. 214.
Missouri. R. S. 1879, Vol. 1, ch. 71, p. 685.
Nebraska. Gen. Stat. 1873, ch. 17, p. 301.
Ohio. R. S. 1880, Vol. 2, ch. 1, p. 1426.
Oregon. Gen. Laws, 1843–1872, ch. 64, p. 790.
Texas. R. S. 1879, Title 99, p. 713.
Virginia. Code, 1873, ch. 118, p. 912.
West Virginia. R. S. 1878, ch. 201, p. 1172.
Wisconsin. R. S. 1878, ch. 103, p. 650.

See also the following: Georgia Code, 1873, ch. 2, p. 417; Maine, Rev. Stat. 1871, ch. 74, p. 563; New Jersey, Revision, 1709–1877, Vol. 2, p. 1244; North Carolina, Battle's Revisal, ch. 119, p. 848; Pennsylvania, Bright. Purd. Digest, 1700-1872, Vol. 2, p. 1475; Rhode Island, Gen. Stat. 1872, ch. 171, p. 375; South Carolina, R. S. 1873, ch. 86, p. 443; Tennessee, Stat. 1871, Vol. 2, ch. 1, p. 997; Vermont, Gen. Stat. 1862, Title 16, ch. 49, p. 378.

If a legatee die before the testator he is considered a legal witness to a will in

Arkansas. Digest, 1874, ch. 135, p. 1019.
Missouri. R. S. 1879, Vol. 1, ch. 71, p. 685.
New Jersey. Revision, 1709–1877, Vol. 2, p. 1245.
Oregon. Gen. Laws, 1843–1877, ch. 64, p. 720.
Rhode Island. Gen. Stat. 1872, ch. 171, p. 375.

States in which a legatee is competent if he release or have been paid or refuse to accept such legacy: —

Arkansas. Digest, 1874, ch. 135, p. 1019.
Missouri. R. S. 1879, Vol. 1, ch. 71, p. 685.
New Jersey. Revision, 1709–1877, Vol. 2, p. 1244.
Oregon. Gen. Laws, 1843–1877, ch. 64, p. 790.

A witness of the execution of a will is not rendered incompetent by the facts that he received a deed of land from the testator at the time of the execution of the will, and that his mother was the principal devisee. Nash *v.* Reed, 46 Me. 168.

An heir-at-law, who is disinherited by a will, is also a competent subscribing witness thereto. Sparhawk *v.* Sparhawk, 10 Allen, 155.

A witness to a will of land, who was at the time of his attestation a presumptive heir to the devisor, is not interested in the devise within the meaning of section 11 of the North Carolina act of 1774. Old *v.* Old, 4 Dev. 500.

In Tennessee, the sons of a devisor are competent witnesses to the will, if none of the lands of the devisor he devised to them. Allen *v.* Allen, 2 Overt. 172.

By the Mexican law an *alcalde* appointed executor in the will, but not named therein as heir or legatee, and deriving no advantage under it, and being allowed nothing by law for his services, is competent to authenticate the will in his judicial capacity. Panaud *v.* Jones, 1 Cal. 488.

The judge of probate is a good witness to a will. McLean *v.* Barnard, 1 Root, 462; Ford's case, 2 Root, 232. In Illinois, a county judge is competent. Rev. Stat. 1880, ch. 148, p. 1109.

The inhabitants of an incorporated town to whom property is devised for the support of a school are competent witnesses to attest a will. Cornwell *v.* Isham, 1 Day, 35. So of towns and corporations under the New Hampshire statutes of 1789. Eustis *v.* Parker, 1 N. H. 273; S. P. Warren *v.* Baxter, 48 Me. 193; Haven *v.* Hilliard, 23 Pick. 10; Loring *v.* Park, 7 Gray, 42.

on or before the 24th of June, 1752, and the remaining sections are not very important.

On the statute it was decided: 1st. That it extended exclusively to persons beneficially interested, and not to a devisee or executor in trust (*d*). 2dly. That it applied only where the witness took a direct interest under the will, and not where his interest * arose consequentially. Thus in Hatfield *v.* Thorp (*e*), where one of the three attesting witnesses to a will was the husband of a devisee in fee of a freehold estate, and would *jure uxoris* have claimed an interest in the devised lands, it was held that the devise was not within the statute (*f*), and, consequently, that the attestation was insufficient. 3dly. That the act did not apply to wills of [copyholds (*g*) or of] personal estate (*h*), for as such wills did not require an attestation at all, there was no ground for invalidating the gift to the witness; but that in regard to wills of freehold lands, the fact that the witness was not wanted to make up the statutory number (there being three others) did not render valid a gift to such supernumerary witness (*i*). Points decided on the statute. *72

[Where a testator by will devised property to his widow, and by codicil, to which she was a witness, confirmed his will, it was held that the gift to her by the will remained unaffected: but she was of course held not to be entitled to property purchased after the date of the will, and which would have passed to her by force of the republication, if she had not been a witness to the codicil (*k*).] A witness to a codicil confirming the will can take under the will.

By the act 1 Vict. c. 26, the legislature has adopted the principle, and extended the operation, of the enactments in the statute 25 Geo. 2, c. 6 (which it repeals, except as to the colonies in America). Stat. 1 Vict. c. 26.

Sect. 14 provides, That if any person, who shall attest the execution

(*d*) Anon., 1 Mod. 107; Lowe *v.* Jolliffe, 1 W. Bl. 365; Holt *v.* Tyrrell, 1 Barn. K. B. 12; Battison *v.* Bromley, 12 East, 250; Phipps *v.* Pitcher, 6 Taunt. 220, 1 Mad. 144; see also Goss *v.* Tracey, 1 P. W. 290; Goodtitle *v.* Welford, Doug. 139.

(*e*) 5 B. & Ald. 589.

[(*f*) The court certified, on a case from Chancery, that "the will was not duly attested *so as to pass any estate to*" the wife; referring to no statute, and not expressly denying that the rest of the will was valid. Of course, it could only have been valid (if at all) by virtue of the statute Geo. 2; upon which the argument would be that the words "person to whom any estate should be thereby given," occurring in the former part of the clause, meant "taking any estate in consequence of the devise," and that the words "such devise shall, so far as concerns such person attesting," occurring in the latter part of the clause, meant "so far as it creates an interest in such person." Such an interest, and even a gift to the wife for her separate use, would have disqualified the husband as a witness under 29 Car. 2 (Holdfast *v.* Dowsing, 2 Str. 1253); and it might have seemed not unreasonable to suppose that the act Geo. 2 was intended to include such a case. But there is no trace of such an argument in the case, and the form of the certificate was probably determioed without reference to it, and simply by the form of the question proposed, which it precisely follows.

(*g*) Jillard *v.* Edgar, 3 DeG. & S. 502.]

(*h*) Emanuel *v.* Constable, 3 Russ. 436; Brett *v.* Brett, 1 Hagg. 58, n.; Foster *v.* Banbury, 3 Sim. 40.

(*i*) Doe *v.* Mills, 1 Mood. & Rob. 288.

[(*k*) Denne *v.* Wood, 4 L. J. (O. S.) 57, V. C. Leach.]

Will not to be void on account of incompetency of attesting witnesses.

of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a *73 *witness to prove the execution thereof, such will shall not on that account be invalid.

Gift to an attesting witness or wife or husband of witness to be void.

Sect. 15, 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, 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 person 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.[1]

Creditor attesting to be admitted a witness.

Sect. 16, 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.[2]

Executor to be admitted a witness.

Sect. 17, 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.[3]

[1] Sullivan *v.* Sullivan, 106 Mass. 474; Jackson *v.* Woods, 1 Johns. Cas. 163; Jackson *v.* Durland, 2 Johns. Cas. 314; Winslow *v.* Kimball, 25 Me. 493. See Fortune *v.* Buck, 23 Conn. 1.

[2] States in which creditors are competent witnesses to a will:—

Arkansas. Digest, 1874, ch. 135, p. 1018.

California. Codes and Stat. 1876, Vol. 1, ch. 1, p. 721.

Colorado. Gen. Laws, 1877, ch. 103, p. 930.

Dakotah. Rev. Code, 1877, Title 5, ch. 1, p. 347.

Delaware. Rev. Code, 1874, ch. 84, p. 509.

Illinois. R. S. 1880, ch. 148, p. 1112.

Kentucky. Gen. Stat. 1873, ch. 113, p. 835.

Massachusetts. Gen. Stat. 1860, ch. 92, p. 477.

Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1372.

Minnesota. Stat. 1878, ch. 47, p. 568.

Mississippi. Rev. Code, 1871, ch. 9, p. 214.

Missouri. R. S. 1879, Vol. 1, ch. 71, p. 685.

Nebraska. Gen. Stat. 1873, ch. 17, p. 301.

Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 200.

New Hampshire. Gen. Laws, 1878, ch. 193, p. 455.

New Jersey. Revision, 1709–1877, Vol. 2, p. 1244.

New York. R. S. 1875, Vol. 3, ch. 6, p. 58.

Oregon. Gen. Laws, 1843–1877, ch. 64, p. 790.

Rhode Island. Gen. Stat. 1872, ch. 171, p. 375.

South Carolina. R. S. 1873, ch. 86, p. 443.

Virginia. Code, 1873, ch. 118, p. 913.

West Virginia. R. S. 1878, ch. 201, p. 1172.

Wisconsin. R. S. 1878, ch. 103, p. 650.

[3] The law varies somewhat in the different states as to the competency of executors. An executor who has declined or renounced the trust is no doubt universally competent, supposing of course he has no other interest under the will. Jones *v.* Larrabee, 47 Me. 474. Burritt *v.* Silliman, 3 Kern. 93. See Dorsey *v.* Warfield, 7 Md. 65. But it has been decided in North Carolina that a renunciation by the executor will not render his wife a competent witness to prove the will. Huie *v.* McConnell, 2 Jones, 455. See further as to the law of that state,

These enactments, it will be observed, [preclude, as to wills coming within their provisions, all questions arising under the old law as to the effect of a gift to the husband or wife of an attesting witness, and they] extend the disqualification of the witness to take beneficially to wills of every description; the act having, by assimilating the execution of wills of real and personal estate, destroyed all ground for distinguishing between them in regard to this point. Remarks upon new law as to interested witnesses.

[Upon the construction of the 15th section it has been decided that a legatee under a will does not lose his legacy by attesting a codicil which confirms the will (*l*): and further, that a residuary legatee, by so doing, does not lose his share of the * residue, although the codicil in fact increases that share by revoking some particular legacies (*m*). Each witness attests only the instrument to which he puts his name. Again, where a will attested by a legatee is republished by a codicil attested by other witnesses, the gift to the legatee is made good (*n*). But where by will a legacy was bequeathed in a contingency which failed, and by a codicil attested by the legatee, the legacy was made absolute, the legatee was held disqualified to take the absolute legacy (*o*). And, following the rule regarding wills of real estate under the pre-existing law, a witness is held to be disqualified to take as legatee although he is a supernumerary (*p*). But the court of probate receives evidence *quo animo* the supernumerary signed; and if it appear that he did not sign as a witness, his signature will be omitted from the probate (*q*).] Points decided on 1 Vict. c. 26, s. 15. *74

In allowing an attesting witness to be appointed executor, whether he be or be not in terms made an executor in trust (*r*), regard is evidently had to the statute of 1 Will. 4, c. 40, which, it will be remembered, precludes executors from claiming, by virtue of their office, the beneficial interest in the Executor now not entitled to undisposed-of personalty.

[(*l*) Gurney *v.* Gurney, 3 Drew. 208; Tempest *v.* Tempest, 2 K. & J. 642, 7 D. M. & G. 470; in conformity with the rule respecting real estate before the act, see p. 72.

(*m*) Gurney *v.* Gurney, supra. (*n*) Anderson *v.* Anderson, L. R. 13 Eq. 381.

(*o*) Gaskin *v.* Rogers, L. R. 2 Eq. 284.

(*p*) Wigan *v.* Rowland, 11 Hare, 157; Randfield *v.* Randfield, 32 L. J. Ch. 668.

(*q*) Re Sharman, L. R. 1 P. & D. 661. Its presence in the probate would appear to be conclusive of its character in the case of personalty. In a case where the superfluous name was struck through in the original, probate issued in fac-simile, leaving it for the court of construction to determine the effect, Re Raine, 34 L. J., Prob. 125: as to which see Gann *v.* Gregory, 3 D. M. & G. 777, stated above p. 27. But since the Judicature Act, 1873, it should seem the Probate Division ought itself to determine the question. As to real estate the probate will be equally conclusive if the proper parties have been cited under the Court of Probate Act, 1857; see also Randfield *v.* Randfield, 30 L. J. Ch. 179 n.

(*r*) A gift to the witness as trustee of course is not invalidated. Cresswell *v.* Cresswell, L. R. 6 Eq. 69.]

Tucker *v.* Tucker, 5 Ired. 161; Morton *v.* Ingram, 11 Ired. 368; and see Laws of 1873, cited infra. By the law of several of the states an executor is competent notwithstanding acceptance of the trust if he take no interest under the testament. Wyman *v.* Symmes, 10 Allen, 153 (Gen. Stat. ch. 131, §§ 13–15); Comstock *v.* Hadlyme, 8 Conn. 254 (Gen. Stat. 1875. ch. 11, p. 369); Coalter *v.* Bryan, 1 Gratt. 18 (Code, 1873, c. 118, p. 913). Meyer *v.* Fogg, 7 Fla. 292; Murphy *v.* Murphy, 24 Mo. 526; Richardson *v.* Richardson, 35 Vt. 238; Gen. Stat. Ky. 1873, ch. 113, p. 835; Battle's Revisal, N. C. 1873, ch. 119, p. 843; R. S. S. Car. 1873, c. 86, p. 443; 2 R. S. W. Va. 1878, ch. 201, p. 1172. But acceptance of the trust is, or has been, a disqualification to the executor in some states. Vansant *v.* Boileau, 1 Binn. 444; Snyder *v.* Bull, 17 Penn. St. 54.

undisposed-of personal estate of their testator, to which, by the pre-existing law, an executor was entitled, where the will did not afford any presumption of a contrary intention, a point which was often difficult of solution.[1]

The great change, however, effected by the statute 1 Vict. in regard to the witnesses, is in expressly dispensing with all personal qualifications; but, on this subject (a discussion of which would be out of place here), the reader is referred to some remarks in a future chapter which treats of the execution of wills.

Devise to heir, its effect under the old law.

In conclusion, it is proper to notice another disability to take by devise, which formerly arose out of the doctrine, that *75 where * a title by descent and a title by devise concurred in the same individual, the former predominated, and the heir was *in* by descent and not by purchase;[2] and it was held, that neither the imposition of a pecuniary charge (*s*), nor even the engrafting on the devise to the heir an executory devise (*t*), had the effect of interrupting the descent. If, however, the quality of the estate which the heir took by the devise differed from that which would have descended upon him, he of course acquired the property as devisee. On this principle a devise for life to the testator's heir, with remainder over, conferred on him an estate by purchase (*u*).

Devises to testator's heir.

So, if a testator devised freehold lands to his two daughters (being his co-heiresses at law) to hold to them and their heirs, they both took by purchase, because under the devise they were joint-tenants and not co-parceners, as they would have been by descent (*x*); and the rule was the same if the devise were to them as tenants in common; a tenancy in common (though making somewhat nearer approach to) being different from an estate in co-parcenary (*y*). Of course a devise to one of several co-heirs or co-heiresses made the devisee a purchaser (*z*); [and so it seems would a contingent remainder devised to the person who at a stated time should be the testator's heir-at-law (*a*).]

(*s*) Haynsworth *v.* Pretty, Cro. El. 833, 919, Moo. 644; Clarke *v.* Smith, 1 Salk. 241.

(*t*) Chaplin *v.* Leroux, 5 M. & Sel. 14; Doe *v.* Timins, 1 B. & Ald. 530; Manbridge *v.* Plummer, 2 My. & K. 93. [So in case of copyholds, Smith *v.* Triggs, 1 Str. 487.

(*u*) That in cases of marshalling, the heir, under an express devise to him, had the rights of a devisee, see Biederman *v.* Seymour, 3 Beav. 368; a fortiori, since the stat. 3 & 4 Will. 4, c. 106, s. 3; see Strickland *v.* Strickland, 10 Sim. 374.]

(*x*) Cro. El. 431. [And see Swaine *v.* Burton, 15 Vee. 365.]

(*y*) Bear's case, 1 Leon. 112, 315.

(*z*) Co. Litt. 163 b; [Reading *v.* Royston, 1 Salk. 242.]

(*a*) 1 Sanders Uses, 133 n., 4th ed., citing Cholmondeley *v.* Clinton, 2 J. & W. 1.

[1] The English decisions respecting the circumstances which will make an executor trustee for the next of kin are for the most part inapplicable in America, where the surplus undisposed of by the testator is universally distributable among the next of kin. See 1 Story, Eq. Jur. § 1208; 3 Phill. Ev. (Cowen and Hill's notes, ed. 1839) 1486, 1495; Hays *v.* Jackson, 6 Mass. 153; Hill *v.* Hill, 2 Hayw. 298; Wilson *v.* Wilson, 3 Binn. 567; Neaves's estate, 9 Serg. & R. 186, 189, 190; 2 Williams, Ex. (6th Am. ed.) 1050 *et seq.*

[2] Ellis *v.* Page, 7 Cush. 161; Parsons *v.* Winslow, 6 Mass. 178; Whitney *v.* Whitney, 14 Mass. 90. See Hubbard *v.* Rawson, 4 Gray, 242; Sedgwick *v.* Minot, 6 Allen, 171; Waters *v.* Stickney, 12 Allen, 1, 17; Valentine *v.* Bordeo, 100 Mass. 273.

Whether the doctrine in question extended to testamentary appointments was a point of some nicety, and occasioned much discussion (*b*), into which, however, it is not now proposed to enter, as questions of this nature cannot arise under any will, future or recent; the statute of 3 & 4 Will. 4, c. 106, s. 3, having provided that, when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent (*c*).

Stat. 3 & 4 Will. 4, c. 106, s. 3, making heir-devisee a purchaser.

*[Infants (including infants *en ventre sa mère* (*d*)),[1] *femes coverte* and insane persons are not incapacitated from taking by devise or bequest though they cannot manifest their acceptance; for acceptance will be presumed unless it would work injury to the devisee or legatee. The disability of coverture, though invalidating a conveyance at common law from the husband to the wife, does not prevent her from taking under his will, the coverture having in fact ceased when the will takes effect (*e*).] *76

Infant, f. c. or lunatic, may take by devise.

(*b*) See Hurst *v.* Earl of Winchelsea, 1 W. Bl. 187, [2 Ld. Ken. 444, 2 Burr. 879;] Langley *v.* Sneyd, 7 J. B. Moo. 165, [3 Br. & B. 243, 1 S. & St. 45.

(*c*) The negative words seem to exclude the claim of a devisee-heir of copyholds (which are expressly included in the act) to disclaim the devise and take as heir. Bickley *v.* Bickley, L. R. 4 Eq. 216.

(*d*) Burdett *v.* Hopegood, 1 P. W. 486; Mogg *v.* Mogg, 1 Mer. 654. (*e*) Litt. s. 168.]

[1] See Jenkins *v.* Freyer, 4 Paige, 67; Petway *v.* Powell, 2 Dev. & B. Eq. 308; Smart *v.* King, Meigs, 149.

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*CHAPTER VI.

EXECUTION AND ATTESTATION OF WILLS MADE BEFORE THE YEAR 1838.

SECTION I.

As to Freeholds of Inheritance.

Enactment in the Statute of Frauds as to the execution of wills,

THE 5th section of the Statute of Frauds (29 Car. 2, c. 3) required that all devises and bequests of any lands or tenements (*a*), devisable either by force of the Statute of Wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, should be in writing[1] and signed by the party so devising the same, or by some other person[2] in his presence and by his express direction, and should be attested and subscribed in the presence of the said devisor, by three or four credible witnesses.[3]

(*a*) [Observe that the word *hereditaments* is omitted in this clause, though occurring in the next, see Buckridge *v.* Ingram, 2 Ves. Jr. 662; but no question seems ever to have been raised on this omission.]

[1] It should be observed at the outset that though a will be not properly executed as a will with subscribing witnesses, it may still be good as a holograph, where that kind of will is allowed, if it answer the requirements of the statute as to holographs, though it contain something more than the statute requires. Brown *v.* Beaver, 3 Jones, 516; Harrison *v.* Burgess, 1 Hawks, 384; Hill *v.* Bell, Phill. (N. C.) 122. A will, though written with a pencil instead of ink, would be good. In re Dyer, 1 Hagg. 219. But when the question is whether the testator intended the paper as a final declaration of his mind, and as testamentary, or whether it was merely preparatory to a more formal disposition, the material with which it was written becomes a most important circumstance. Rymes *v.* Clarkson, 1 Phill. 35; Parkin *v.* Bainbridge, 3 Phill. 321. Alterations in pencil by the testator on a regularly executed will have been admitted to probate, but it has been laid down in two cases in the Prerogative Court in England, that the general presumption and probability are, that where alterations in pencil only are made, they are deliberative; when in ink, they are final and absolute. Hawkes *v.* Hawkes, 1 Hagg. 322; Edwards *v.* Astley, 1 Hagg. 490: Dickenson *v.* Dickenson, 2 Phill. 173; Lavender *v.* Adams, 1 Addams, 406. So, too, a man may perhaps write his will *on* any material he pleases; still the material might become a most important circumstance in determining the *animus testandi*. Rymes *v.* Clarkson, 1 Phill. 35.

[2] In re Clark, 2 Curteis, 329, the testator, being too ill to sign his will, requested the drawer thereof to sign it for him, which he did in his own name, not in that of the testator, and it was held sufficient.

[3] States in which there must be at least three witnesses to a will: —

Connecticut. Gen. Stat. 1875, ch. 11, p. 369.

Florida. Bush's Digest, 1872, ch. 4, p. 75.

Georgia. Code, 1873, Title 6, ch. 2, p. 416.

Maine. R. S. 1871, ch. 74, p. 563.

Maryland. Rev. Code, 1878, art. 49, p. 420.

Massachusetts. Gen. Stat. 1860, ch. 92, p. 476.

Mississippi. Rev. Code, 1871, ch. 54, p. 525.

New Hampshire. Gen. Laws, 1878, ch. 193, p. 455.

South Carolina. R. S. 1873, ch. 86, p. 442.

Vermont. Gen. Stat. 1862, ch. 49, p. 377.

[Before proceeding to discuss this enactment, it should be premised, that though by the statute 1 Vict. c. 26, the ceremonial of execution is somewhat varied, yet several of its details remain unaltered, so that the cases decided under the later

is illustrated by decisions on 1 Vict. c. 26.

In Mississippi wills, if not wholly written by the testator, must be attested by three witnesses in case of real estate, and by one in case of personalty. Miss. Rev. Code, 1871, c. 54, p. 525. See Kirk *v.* State, 13 Smedes & M. 406. Holograph wills are good there without witnesses. Davis *v.* Williams, 57 Miss. 843, 847.

States in which there must be two attesting witnesses to a will: —

Alabama. Code, 1876, Title 4, ch. 2, p. 588.

Arkansas. Digest, 1874, c. 135, p. 1012.

California. Codes and Stat. 1876, Vol. 1, ch. 1, p. 720.

Colorado. Gen. Laws, 1877, ch. 103, p. 929.

Dakotah. Rev. Code, 1874, Title 5, ch. 1, p. 344.

Delaware. Rev. Code, 1874, ch. 84, p. 509.

Illinois. R. S. 1880, ch. 148, p. 1108.

Indiana. Stat. 1876. Vol. 2, ch. 3, p. 575.

Iowa. Rev. Code, 1880, Vol. 1, Title 16, ch. 2, p. 608.

Kansas. Comp. Laws, 1879, ch. 2, p. 1001.

Kentucky. Gen. Stat. 1873, ch. 113, p. 832.

Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1372.

Minnesota. Stat. 1878, ch. 47, p. 568.

Missouri. R. S. 1879, Vol. 1, ch. 71, p. 680.

Nebraska. Gen. Stat. 1873, ch. 17, p. 300.

Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 200.

New Jersey. Revision, 1709–1877, Vol. 2, p. 1247.

New York. R. S. 1875, Vol. 3, ch. 6, p. 63.

North Carolina. Battle's Revisal, 1873, ch. 119, p. 846.

Ohio. R. S. 1880, Vol. 2, ch. 1, p. 1425.

Oregon. Gen. Laws, 1843–1872, ch. 64, p. 788.

Rhode Island. Gen. Stat. 1872, ch. 171, p. 374.

Tennessee. Stat. 1871, Vol. 2, ch. 1, p. 997.

Texas. R. S. 1879, ch. 99, p. 712.

Utah. Comp. Laws, 1876, ch. 2, p. 271.

Virginia. Code, 1873, ch. 118, p. 910.

West Virginia. R. S. 1878, ch. 201, p. 1168.

Wisconsin. R. S. 1878, ch. 103, p. 650.

In Texas, wills, if not wholly written by testator, shall be attested by two witnesses above the age of fourteen years. R. S. 1879, ch. 99, p. 712.

Witnesses must sign in the presence of the testator, and in the presence of each other, in

Connecticut. Gen. Stat. 1875, ch. 11, p. 369.

Utah. Comp. Laws, 1876, ch. 2, p. 271.

Vermont. Gen. Stat. 1862, ch. 49, p. 377.

In some of the states, the provision as to attestation is more special. In Pennsylvania, a devise of lands in writing will be good without any subscribing witnesses, provided the authenticity of it can be proved by two witnesses; and, if the will be subscribed by witnesses, proof of it may be made by others. Hight *v.* Wilson, 1 Dallas, 94; Huston, Judge, 1 Watts, 463. Proof of the signature of the testator to a will by two witnesses, is *primâ facie* evidence of its execution, although the body of it be not in the handwriting of the testator. Wiegel *v.* Wiegel, 5 Watts, 486. In that state, unless the testator is prevented by the extremity of his last sickness, his will must be signed by him at the end thereof, or by some person in his presence and by his express direction, and in all cases must be proved by the oaths of two or more competent witnesses. Act of 8th April, 1833; Stricker *v.* Groves, 5 Whart. 386. Where the testator, having given directions for drawing his will, and being just about to sign the same, became suddenly unable either to do so himself or to request another to do so for him, and immediately died, it was held that the case was within the exception to the Penn. Act of 1833, and that the will was valid. Showers *v.* Showers, 27 Penn. St. 485. See Ruoff's Appeal, 26 Penn. St. 219. In North Carolina, two witnesses are required to a will of real estate, unless the will is in the handwriting of the deceased person, and is found among his valuable papers, or lodged with some person for safe-keeping. The name of the testator in such case must be proved by the opinion of three witnesses. 1 Rev. Law, N. C. 619, 620, c. 122, § 1, Act of 1840; Battle's Rev. 1873, c. 119, p. 846. So in Tennessee, under Stat. 1784, c. 10; Stat. 1871, c. 1, pp. 998, 999; Crutcher *v.* Crutcher, 11 Humph. 377; Tate *v.* Tate, 11 Humph. 465. In Virginia and in West Virginia, if the will is not wholly written by the testator, it must be attested by two or more credible witnesses, &c. 1 Rev. Code, Va. 375; Code, 1873, c. 118, p. 910. W. Va. R. S. 1878, c. 201, p. 1168. In Arkansas, a will written through by the testator needs no subscribing witness, but the will must be proved in such case by three disinterested witnesses, swearing to their opinion. Still, a will in due form subscribed will be effectual as against one not so subscribed. R. S. c. 157, §§ 4, 5; Digest, 1874, ch. 135, p. 1012. Every person in that state who subscribes the testator's name must sign as witness, and state that he signed the testator's name at his request. Ib. The same rule prevails in Missouri. St. Louis Hospital *v.* Wegman, 21 Mo. 17; Simpson *v.* Simpson, 27 Mo. 288; St. Louis Hospital *v.* Williams, 19 Mo. 609. A will executed in South Carolina in the presence of two witnesses, who alone subscribe it, is not sufficiently ex-

statute bearing upon the interpretation of the words "signature," "presence," "direction," "other person," "attested," "subscribed," which are common to both enactments, bear equally upon the interpretation of the same words in the statute 29 Car. 2, c. 3; and thus (since the execution of bequests of personal estate is now assimilated to that of devises of real estate), the construction of the older statute, although never within the sphere of the Ecclesiastical Courts, is nevertheless illustrated by many of their decisions on the statute of Victoria.]

Mark, a sufficient signing.

The first inquiry suggested by the statute 29 Car. 2 is, what amounts to a "signing" by the testator? It has been decided that a mark is sufficient,[1] and that, notwithstanding the testa-
*78 tor is *able to write (*b*),[2] [and though his name does not appear

(*b*) Taylor *v.* Dening, 3 Nev. & P. 228; S. C. nom. Baker *v.* Dening, 8 Ad. & Ell. 94.

ecuted under the statute to pass real estate, although the scrivener was also present at the execution; and a codicil executed in the presence of two subscribing witnesses, one of whom was different from the two witnesses to the will, does not give effect to the will as to real estate. Dunlap *v.* Dunlap, 4 Desaus. 305. The laws of South Car lina, at the time of the above decision, required three witnesses to a will of real estate only; but now they require three witnesses to a will of personal estate also. Statutes at Large of S. C., Vol. 3, p. 342, No. 544, § 2; ib. Vol. 4, p. 106, No. 1455, § 2; ib. Vol. 6, p. 238, No. 2334, § 8; R. S. 1873, c. 86, p. 442.

[1] Bailey *v.* Bailey, 35 Ala. 687; Guthrie *v.* Price, 23 Ark. 396; Smith *v.* Dolby, 4 Harr. (Del. 350); St. Louis Hospital *v.* Williams, 19 Mo. 609; St. Louis Hospital *v.* Wegman, 21 Mo. 17; Long *v.* Zook, 13 Penn. St. 400; Flannery's Will, 24 Penn. St. 502; Barford *v.* Barford, 29 Penn. St. 221; Hanswyck *v.* Wiese, 44 Barb. 494. See also infra, in the note concerning the testator's signature, and compare Main *v.* Ryder, 84 Penn. St. 217; St. Louis Hospital *v.* Williams, 19 Mo. 609; Northcutt *v.* Northcutt, 20 Mo. 266; Greenough *v.* Greenough, 11 Penn. St. 489; McCarty *v.* Hoffman, 23 Penn. St. 507; Rosser *v.* Franklin, 6 Gratt. 1.

[2] Jackson *v.* Van Dusen, 5 Johns. 144; In re Field, 3 Curteis, 752; Smith *v.* Dolby, 4 Harrington, 350; Ray *v.* Hill, 3 Strobh. 297; St. Louis Hospital *v.* Williams, 19 Mo. 609; St. Louis Hospital *v.* Wegman, 21 Mo. 17. Where a paper was produced by the testator with his name already subscribed in the handwriting of another, to which he affixed his mark in the presence of the witnesses, and acknowledged it to be his last will and testament, it was held a sufficient subscription and publication of the will, in Kentucky. Upchurch *v.* Upchurch, 16 B. Mon. 102. See Flannery's will, 24 Penn. St. 502. But see St. Louis Hospital *v.* Williams, 19 Mo. 609; St. Louis Hospital *v.* Wegman, 21 Mo. 17; Northcutt *v.* Northcutt, 20 Mo. 266; Will of Cornelius, 14 Ark. 675. A will signed by a mark, without the name of the deceased appearing in it, is held sufficiently signed under the Stat. 1 Vict. c. 26, § 9, the will being identified *aliunde*. In re Bryce, 2 Curteis, 325. In Pennsylvania it has been held that the will must be signed with the testator's own name, either by himself or by some person in his presence and by his express direction. His mark is insufficient. Purdon's Dig. 971; Assay *v.* Hoover, 7 Penn. Law Jour. 21; Cavett's Appeal, 8 Watts & S. 21; Greenough *v.* Greenough, 11 Penn. St. 489. This, however, seems to be doubted in a late case in that state, Vernon *v.* Kirk, 30 Penn. St. 218, where it is said: "It was only by judicial construction that our statute of wills, passed April 8, 1833, was made to require at the end of the will the testator's signature *by his name*. Our act was taken from 29 Car. 2, sec. 2, under which it had repeatedly been decided that a signature by a mark was sufficient. When therefore the legislature adopted words having a recognized judicial signification, it might fairly have been presumed that they intended by the words that sense in which they were understood at the time of adoption. It is probable that they looked less to the *mode* of the signature than to its *place*, which they required to be at the end of the will. If a mark was not a signature within the meaning of the statute, then those unable to write could not sign, and signing by another was permitted only when inability to sign was caused by the extremity of the last sickness. This seems to have been overlooked when Barr *v.* Graybill, Assay *v.* Hoover, and other kindred cases were decided." Under the Pennsylvania Act of 1848, signing by a cross or mark merely is sufficient. See Burford *v.* Burford, 29 Penn. St. 221. In Vernon *v.* Kirk, supra, it was decided that it was a sufficient execution of a will, where the testatrix having requested another to sign a paper as her will, he complied by signing "E. N., for R. D., at her request." When the signature of a testator is effected by another person guiding his hand with his consent, and he afterwards acknowledges it, this is, in point of law, the act of the testator. Stevens *v.* Van Cleve, 4 Wash. C. C. 262; Vandruff *v.* Rinehart, 29 Penn. St. 232.

on the face of the will (*c*). A mark being sufficient, of course the initials of the testator's name would also suffice (*d*); and it would be immaterial that he signed by a wrong[1] or assumed name (since that name would be taken as a mark (*e*)), or that against the mark was written a wrong name (*f*), and that the testator was also wrongly named in the body of the will (*g*), or that his hand was guided in making the mark (*h*). But where two sisters made mutual wills in favor of each other, the words *mutatis mutandis* being precisely the same, and by mistake each signed the will of the other, both signatures were held invalid, neither sister having in fact executed her own will, but merely a paper, which, if it was a will, gave all her property to herself, and was therefore void (*i*); and even if the gift had been to a third person, evidence would have been admitted to show that the paper, though executed by the testatrix with due formality, was not in fact her will (*j*), though such evidence could not have been used to give effect to the gift to the sister. The mere fact of signing a paper, with due formality as a will, does not, therefore, *per se* show that the paper was the testator's will.]

Wrong name.

Wrong will.

At one time it appears to have been thought, that even sealing[2] alone, without signing, would suffice (*k*); the contrary, however, is indisputable; not indeed from positive decision, but from the unanimous opinion of every judge who has referred to the point, from Parker, C. B., and his coadjutors in Smith *v.* Evans (*l*) (though the C. B., on another occasion (*m*), erroneously supposed it to have been decided the other way), down to Lord Eldon in Wright *v.* Wakeford (*n*).

Sealing insufficient.

[Both statutes expressly permit the testator's signature to be made by some other person by his direction.[3] That other person may,

[(*c*) Re Bryce, 2 Curt. 325.
(*d*) Re Savory, 15 Jur. 1042.
(*e*) Re Redding, 2 Rob. 339, 14 Jur. 1052; Re Glover, 11 Jur. 1022, 5 No. Cas. 553; and see the corresponding cases as to signature of a witness, post, p. 82.
(*f*) Re Clarke, 27 L. J. Prob. 18, 4 Jur. N. S. 243, 1 Sw. & Tr. 22.
(*g*) Re Dowse, 31 L. J. Prob. 172.
(*h*) Wilson *v.* Beddard, 12 Sim. 28.
(*i*) Anon. 14 Jur. 402; Re Hunt, L. R. 3 P. & D. 250.
(*j*) See Hippesley *v.* Homer, T. & R. 48, n.; Trimleston *v.* D'Alton, 1 D. & Cl. 85, noticed in Chap. XIII.; Re Fairburn, 4 No. Cas. 478.]
(*k*) See Lemayne *v.* Stanley, 3 Lev. 1, [1 Freem. 538; Warneford *v.* Warneford, 2 Str. 764.]
(*l*) 1 Wils. 313; [and see 2 Ves. 559.]
(*m*) Ellis *v.* Smith, 1 Ves. Jr. 12.
(*n*) 17 Ves. 458.

[1] Long *v.* Zook, 13 Penn. St. 400.

[2] A will is valid without being sealed, unless a seal is required by statute. Piatt *v.* M'Cullough, 1 M'Lean, 70; Avery *v.* Pixley, 4 Mass. 460, 462; Hight *v.* Wilson, 1 Dall. 94; Arndt *v.* Arndt, 1 Serg. & R. 256; Doe *v.* Pattison, 2 Blackf. 355; Williams *v.* Burnett, Wright, 53. Sealing is required to a will of real estate in New Hampshire. R. S. N. H. 1842, c. 156, § 6. See 1 Greenl. Ev. § 272. A seal is not unfrequently annexed to a will where not required; and if the testator, considering the seal an essential part of the execution, should tear it off with the express design thereby to revoke the will, this act, as evidence of revocation, would be vital. Avery *v.* Pixley, 4 Mass. 460, 462. As to what is sufficient sealing, see Pollock *v.* Glassell, 2 Gratt. 439.

[3] Riley *v.* Riley, 36 Ala. 496; Abraham *v.* Wilkins, 17 Ark. 292; Vines *v.* Clingfost, 21 Ark. 309; Vaudruff *v.* Rinehart, 29 Penn. St. 232. The signing may be by the hand of a subscribing witness. Ib. But see In re McElwaine's Will, 3 C. E. Green, 499. And see as to when such signing is permitted in Pennsylvania, Greenough *v.* Greenough, 11 Penn. St. 489; Main *v.* Ryder, 84 Penn. St. 217. Further, Vernon *v.* Kirk, 30 Penn. St. 218; Armstrong *v.* Armstrong, 29 Ala. 538;

Signature by another for testator.

it seems, be one of the witnesses (*o*),[1] and it is *79 immaterial * that he signed his own name instead of the name of the testator (*p*). And where the testator directed a person to sign the will for him, which that person did by writing at the foot, "this will was read and approved by C. F. B., by C. C. in the presence of, &c.," and then followed the signatures of the witnesses, the will was held good (*q*). And on the ground that whatever would be good as a signature, if made by the testator, must be equally good if made by his direction, an impression of his name stamped by his direction was held good, as a mark would also have been (*r*).]

One signature of several sheets sufficient.

One signature, of course, is sufficient, though the will be contained in several sheets of paper;[2] and [it will generally be presumed that all the sheets were put together in the same order at the time of execution as at the testator's death (*s*); and that any apparent alteration in their order and paging was made before execution (*t*). The signature may also be on a piece of paper stuck or tied on at the end of the will, and containing nothing but the signature and attestation (*u*); but in such case the fact of the piece of paper having been so attached before execution must be proved (*x*).] Where the testimonium at the end referred to the preceding sides of the sheet of letter paper as being subscribed by the testator, the fact of those sides not being so signed was held not to affect the validity of the will, as the testator evidently intended the signing and sealing of the last side to apply to the whole (*y*). It was immaterial, under the Statute of Frauds, in what part of the will the testator's name was written; and where the whole will was in the testator's handwriting, the name occurring in the body, as the usual exordium — "I, A. B., do make," &c., was decided to be a sufficient

As to position of name.

[(*o*) Re Bayley, 1 Curt. 914; Smith *v.* Harris, 1 Rob. 262.
(*p*) Re Clark, 2 Curt. 329.
(*q*) Re Blair, 6 No. Cas. 528.
(*r*) Jenkyns *v.* Gaisford, 32 L. J. Prob. 122.
(*s*) Marsh *v.* Marsh, 1 Sw. & Tr. 528, 30 L. J. Prob. 77. And see Bond *v.* Seawell, 3 Burr. 1775.
(*t*) Rees *v.* Rees, L. R. 3 P. & D. 84: agreeing with the presumption regarding other alterations, post, Chap VII. § 2, *ad fin.*
(*u*) Cooke *v.* Lambert, 32 L. J. Prob. 93; Re Horsford, L. R. 3 P. & D. 211.
(*x*) Re West, 32 L. J. Prob. 182.]
(*y*) Winsor *v.* Pratt, 5 J. B. Moo. 484, 2 Br. & B. 650.

Abraham *v.* Wilkins, 17 Ark. 292; Jenkins's Will, 43 Wis. 610; Simpson *v.* Simpson, 27 Mo. 288.

[1] In Missouri, such person must be a witness. And he should add that he wrote the testator's name by his request. St. Louis Hospital *v.* Wegman, 21 Mo. 17; St. Louis Hospital *v.* Williams, 19 Mo. 609; Simpson *v.* Simpson, 27 Mo. 288. The same is true in Arkansas. Digest, 1874, ch. 135, p. 1012. Compare Pool *v.* Buffum, 3 Oreg 438.

[2] Tonnele *v.* Hall, 4 Comst. 140; Wikoff's Appeal, 15 Penn. St. 281; Ginder *v.* Farnum, 10 Barr, 98; Martin *v.* Hamlin, 4 Strobh. 188. When a will is written on several sheets of paper, fastened together by a string, proof, by two witnesses, of the signature of the testator at the end thereof is sufficient, under the Pennsylvania Act of Assembly; and the question whether all the sheets were attached at the time of signature, or whether there had been a subsequent fraudulent addition to the instrument, is a question of fact for the jury. Ginder *v.* Farnum, supra.

signing (*z*).[1] But the signature, whatever were its local position, must have been made with the design of authenticating the instrument; for it should seem that if the testator contemplated a further signature which he never made, * the will must be considered as unsigned (*a*), though it should be observed, that in Right *v.* Price the point was not decided; and the reasoning seems only to apply where the intention of repeating the signature remained to the last unchanged; for a name originally written with such design might afterwards be adopted by a testator as the final signature; and such, it is probable, would be the presumed intention, if the testator acknowledged the instrument as his will to the attesting witnesses, without alluding to any further act of signing.[2] *80

(*z*) Lemayne *v.* Stanley, 3 Lev. 1, Freem. 538, 1 Eq. Ca. Ab. 403, pl. 9; Cook *v.* Parsons, Pre. Ch. 184. See also Hilton *v.* King, 3 Lev. 86; Grayson *v.* Atkinson, 2 Ves. 454; Coles *v.* Trecothick, 9 Ves. 249; [compare Blennerhasset *v.* Day, 2 Ba. & Be. 104, 119. The rule is different under 15 & 16 Vict. c. 24, post.]

(*a*) Right *v.* Price, Dougl. 241. See also Griffin *v.* Griffin, 4 Ves. 197, n.; Coles *v.* Trecothick, 9 Ves. 249; Walker *v.* Walker, 1 Mer. 503; Sweetland *v.* Sweetland, 4 Sw. & Tr. 9, 34 L. J. Prob. 42; and cases cited post.

[1] Armstrong *v.* Armstrong, 29 Ala. 538; Seldon *v.* Coalter, 2 Va. Cas. 553; Adams *v.* Field, 21 Vt. 256. In Kentucky, the testator's name may be in any part of the will, if the same be signed by him or by another, and acknowledged by him as his signature. Miles's Will, 4 Dana, 1. See Allen *v.* Everett, 12 B. Mon. 371. It has been held in Virginia, that where the testator's name was written only at the commencement of the will, and nothing on the face of the paper indicated affirmatively that it was intended as his signature, the requirements of the law of that state had not been complied with. Ramsey *v.* Ramsey, 13 Gratt. 664. A paper not signed at the bottom, but having the testator's name at the top, having a seal attached, and manifesting much deliberation and foresight in the disposition of the testator's property, was, however, held to be a good will of personalty in Watts *v.* Public Admr., 4 Wend. 168. The statutes of New York now require the signatures of the testator and of the witnesses to be at the end of the will, both of real and of personal estate. Watts *v.* Public Admr., supra; Lewis *v.* Lewis, 13 Barb. 17; McDonough *v.* Loughlin, 20 Barb. 238. So the statutes of Arkansas require the subscription *at the end* of the will to be made and acknowledged, &c. Ark. Digest, 1874, ch. 135, p. 1012. So in Pennsylvania, the will must be signed at the end. See Act of April, 1833; Stricker *v.* Groves, 5 Whart. 386. So in Ohio. Stat. of 1 Vict. c. 26, § 9, requires the signing to be at the foot or end of the will. Probate under the Stat. 1 Vict. c 26, was allowed of a will concluding, "signed and sealed and as for the will of me, C. E. T. W., in the presence of us, T. H. and E. H.," as being signed at the foot or end thereof. In re Woodington, 2 Curteis, 324. For other decisions showing what will be regarded as a sufficient signing at the foot or end of a will, see In re Carver, 3 Curteis, 29; In re Davis, ib. 748; In re Bullock, ib. 750; In re Martin, ib. 754; In re Gore, ib. 758; Jermyn *v.* Hervey, 1 Eng. L. & Eq. 633. Although the act, 1 Vict. c. 26, does not specify any particular place where the witnesses are to sign, but declares that the will shall be signed at the foot or end thereof by the testator, that such signature shall be made or acknowledged by the testator, in the presence of two or more subscribing witnesses, and such witnesses shall attest and subscribe the will in the presence of the testator, it is held not to be sufficiently complied with where a will was signed by the testator and the attesting witnesses on each of the sheets that contained it, but the signature of the testator alone appeared at the end of the will, and there was no evidence to show that the witnesses attested that signature. Ewens *v.* Franklin, 33 Eng. L. & Eq. 626.

[2] The intention to sign again may, perhaps, be shown by parol evidence. Waller *v.* Waller, 1 Gratt. 454; Right *v.* Price, 1 Dougl. 241; Ramsey *v.* Ramsey, 13 Gratt. 664. It has generally been held that in order to the validity of a will not subscribed at the conclusion or foot of the instrument (where the statute does not prescribe that the signature shall be at the end of the will), but the testator's name appears at the commencement or in the body of the will, the will must be in the handwriting of the testator, and he must have intended the signature, wherever inserted, to be the authentication of the instrument, and have contemplated no further signing. Catlett *v.* Catlett, 55 Mo. 330. See Waller *v.* Waller, 1 Gratt. 454. If the will close with the words, "In witness whereof I have hereunto set my hand," or words to that effect, a subscription is clearly intended, and without it the instrument, as a will, is incomplete. Catlett *v.* Catlett, supra. The

Publication, whether requisite.

It will be observed that the testator is merely required by the statute of Car. 2, to "sign;" but it was formerly considered that, independently of this enactment, publication was necessary to complete the testamentary act.[1] Lord Hardwicke, in par-

New York statute requires the signature to be at the end of the will and the end of the will, therefore, is not necessarily where the signature is. The matter previous to the signature must at least be sufficient to constitute a complete will. See Sisters of Charity *v.* Kelly, 67 N. Y. 409, where a signature within the attestation clause, written after the witnesses had signed their names, was held insufficient. Signature to a will may be made by mark even under the statute. Chase *v.* Kittredge, 11 Allen, 49; Baker *v.* Dening, 8 Ad. & E. 94; Sprague *v.* Luther, 8 R. I. 252; Guthrie *v.* Price, 23 Ark. 396; In re Cornelius's Will, 14 Ark. 675; Cozzens's Will, 61 Penn. St. 196; Higgins *v.* Carlton, 28 Md. 115. And where the testator holds the pen while another guides it, the signature is good, and the latter need not attest it. Vines *v.* Clingfost, 21 Ark. 309. It is a good subscription to a will under the New York statutes, that the testator acknowledges to the witnesses that the will was subscribed by him, or for him, and adopted by him. Sisters of Charity *v.* Kelly, 67 N. Y. 409; Hoysradt *v.* Kingman, 22 N. Y. 372; Lewis *v.* Lewis, 11 N. Y. 220. See Baskin *v.* Baskin, 36 N. Y. 416; Willis *v.* Mott, 36 N. Y. 486. Nor need the testator sign in the presence of the witnesses in Massachusetts, acknowledgment being sufficient. Chase *v.* Kittredge, 11 Allen, 49; Ela *v.* Edwards, 16 Gray, 91. So in Kentucky. Sechrest *v.* Edwards, 4 Met. 163. So in Indiana. Reed *v.* Watson, 27 Ind. 443. So in Georgia. Webb *v.* Fleming, 30 Ga. 808. So in Missouri. Cravens *v.* Faulconer, 28 Mo. 19. So in Virginia. Parramore *v.* Taylor, 11 Gratt. 220; Rosser *v.* Franklin, 6 Gratt. 1. So in Illinois. Crowley *v.* Crowley, 80 Ill. 469; Yoe *v.* McCord, 74 Ill. 33. So in Vermont. Adams *v.* Field, 21 Vt 256; Roberts *v.* Welch, 46 Vt. 164. Contra in New Jersey. Den *v.* Milton, 7 Halst. 70; Combs *v.* Jolly, 2 Green, Ch. 625; Mickle *v.* Matlack, 2 Harr. 86. And in Arkansas. Abraham *v* Wilkins, 17 Ark. 292. And in wills of personalty in Alabama. Ex parte Henry, 24 Ala. 638. The acknowledgment need not be made in language. Allison *v.* Allison, 46 Ill. 61. Where all sign together, as part of one transaction, it may not be material that the signature of the testators is made after that of the witnesses. Sechrest *v.* Edwards, supra; O'Brien *v.* Gallagher, 25 Conn. 229. But in England and in some of the states the rule is strict that the testator's signature must precede in time the subscription of the witnesses. Chase *v.* Kittredge, 11 Allen, 49. See also Chisholm *v.* Ben, 7 B. Mon. 408; Swift *v.* Wiley, 1 B. Mon. 114; Reed *v.* Watson, supra; post, p. 89, note. By the common law, a will of personal property, written in the testator's own hand, without seal or witnesses, is good. Leathers *v.* Greenacre, 53 Me. 561. See also High, Appellant, 2 Dougl. (Mich.) 515; Parker *v.* Brown, 6 Gratt. 554.

[1] Publication, the act, that is, of declaring the instrument to be the last will of the testator, is, in the absence of statute, unnecessary in this country as well as in England. Osborn *v.* Cook, 11 Cush. 532; Adams *v.* Field, 21 Vt. 256; Dean *v.* Dean, 27 Vt. 746; Watson *v.* Pipes, 32 Miss. 451; Verdier *v.* Verdier, 8 Rich. 135; Huff *v.* Huff, 41 Ga. 696. See Beane *v.* Yerby, 12 Gratt. 239; Cilley *v.* Cilley, 34 Me. 162. But, on the other hand, when the testator has not signed the will in the presence of the attesting witnesses (as to which see infra), it is probably universally necessary for him to acknowledge his signature by word or act. In New York, publication and acknowledgment are both made necessary by statute. Each must be distinctly proved: neither alone is deemed to prove the other. Thus, the publication is not of itself sufficient evidence of the acknowledgment. Baskin *v.* Baskin, 36 N. Y. 416; Lewis *v.* Lewis, 11 N. Y. 220. Direct acknowledgment of the signature in words is not necessary; but when there is no direct acknowledgment, the circumstances must unmistakably, or at least clearly, imply such an act. Ib. On the other hand, there is no prescribed form of publication. Any communication of the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will, will satisfy the requirement. Coffin *v.* Coffin, 23 N. Y. 9; Lewis *v.* Lewis, 1 Kern. 226; Brinckerhoff *v.* Remsen, 8 Paige, 488; S. C. 26 Wend. 325. Accordingly, where one of the witnesses, in the presence of the other, asked the testator if he wished the witness to sign or witness the paper as his will, and received an affirmative answer, this was held to be a good publication. Coffin *v.* Coffin, supra. See Tarrant *v.* Ware, 25 N. Y. 425. But some act or declaration should be shown whereby the testator, at the time of the execution, indicated the instrument to be his last will, and desired the witnesses to sign it as such. Bagley *v.* Blackman, 2 Lans. 41; Hunt *v.* Mooltrie, 3 Bradf. 322; Tunison *v.* Tunison, 4 Bradf. 138; Seguine *v.* Seguine, 2 Barb. 385; Rutherford *v.* Rutherford, 1 Den. 33; Brown *v.* De Selding, 4 Sandf. 10. The mere knowledge of the witnesses concerning the nature of the instrument does not satisfy the statute. Gilbert *v.* Knox, 52 N. Y. 125; Mooltrie *v.* Hunt, 3 Bradf. 322; S. C. 26 Barb. 252, and reversed, 23 N. Y. 394. Reading the will before the testator and the witnesses, followed by all signing at the time, is enough. Moore *v.* Moore, 2 Bradf. 261. The act or declaration need not proceed directly from the testator, however; it is enough if the publication is by another on

ticular, in Ross *v.* Ewer (*b*), strenuously insisted on the necessity of a will of freehold lands being published. On the other hand, in Moodie *v.* Reid (*c*), Gibbs, C. J., expressed a decided opinion that publication was not an essential part of a will; not being, as he conceived, necessary to devises by custom at common law, nor made so by the statutes of Hen. 8 and Car. 2; and subsequent judges have virtually adopted the latter opinion, having (as we shall presently see) decided that a will of freehold lands may be duly executed by a testator, without any formal recognition of, or allusion to, the testamentary act; indeed, without his uttering a syllable declaratory of the nature of the instrument.

Another question under the same act was, whether the attesting witnesses ought to see the testator actually sign, or whether his acknowledgment of the signature was sufficient; as to which it was decided, not only that an acknowledgment would suffice, but that it might be made before each witness separately, and need not take place in the simultaneous presence of all. The point, though doubted in some of the early cases (*d*), was decided by Sir J. Jekyl, M. R., in Smith *v.* Codron (*e*), where A. signed and published a will in the presence of two witnesses, then a third person was called in, to whom the testator showed his name, telling him that was his hand, and bidding him witness it, which the witness did in the testator's presence, who, two hours afterwards, * told *81 him that the paper he had subscribed was his will: this was held to be a good execution,[1] and the doctrine was confirmed in a series of subsequent decisions (*f*).[2]

Acknowledgment of signature before witnesses sufficient.

As it was sufficient for the testator to sign before some, and acknowledge the signature before the rest of the witnesses, so by necessary consequence an acknowledgment before all was equally effectual.[3] This was decided in Ellis *v.* Smith (*g*)

Acknowledgment before each witness sufficient.

(*b*) 3 Atk. 156.
(*c*) 7 Taunt. 361. [And see Doe d. Spilsbury *v.* Burdett, 4 Ad. & Ell. 14, 6 M. & Gr. 386, 10 Cl. & Fin. 340.]
(*d*) Cook *v.* Parsons, Pre. Ch. 184, and Dormer *v.* Thurland, 2 P. W. 506.
(*e*) 2 Ves. 455, cit.
(*f*) Stonehouse *v.* Evelyn, 3 P. W. 253; Grayson *v.* Atkinson, 2 Ves. 454; Ellis *v.* Smith, 1 Ves. Jr. 11; Addy *v.* Grix, 8 Ves. 504; Westbeach *v.* Kennedy, 1 Ves. & B. 362; Wright *v.* Wright, 5 M. & Pay. 316, 7 Bing. 457. (*g*) 1 Ves. Jr. 11.

his behalf and authority, as by the scrivener. Gilbert *v.* Knox, supra; Smith *v.* Smith, 2 Lans. 266; Peck *v.* Cary, 27 N. Y. 9. But the agency of the person so acting should clearly appear. Peck *v.* Cary. And the publication, as well as the acknowledgment, should be made before all the witnesses. Seymour *v.* Van Wyck, 2 Seld. 120; Tyler *v.* Mapes, 19 Barb. 448. The testator's assent merely is doubtless sufficiently signified by his signature. Beall *v.* Mann, 5 Ga. 456. The testator must declare the instrument to be his last will also in the following states: Arkansas (Digest, 1874, ch. 135, p. 1012); California (Codes & Stats. 1876, Vol. 1, Title 6, ch. 6, p. 720); Dakotah (Rev. Code, 1874, Title 5, ch. 1, p. 344); New Jersey (Revision, 1709–1877, Vol. 2, p. 1247).

[1] But see Tyler *v.* Mapes, 19 Barb. 448. See Allison *v.* Allison, 46 Ill. 61.

[2] Gaze *v.* Gaze, 3 Curteis, 451; Keigwin *v.* Keigwin, ib. 607; Beane *v.* Yerby, 12 Gratt. 239; Green *v.* Crain, ib. 252; Webb *v.* Fleming, 30 Ga. 808; Seguine *v.* Seguine, 2 Barb. 385; Robinson *v.* Smith, 13 Abb. Pr. 359.

[3] Where a testator, in the interval between the attestation of the first and second witness to his will, inserted some immaterial words,

by Lord Hardwicke, with the assistance of Sir J. Strange, M. R., Willes, C. J., and Parker, C. B. Lord Hardwicke considered the sufficiency of the testator's declaration to have been virtually decided by the cases establishing that the witnesses might attest at different times;

and then acknowledged the execution of the will in the presence of both witnesses, it was held to be a valid execution. Bateman *v.* Mariner, 1 Murph. 176. In New Jersey, a will of real estate, to be valid, must be actually signed in the presence of the subscribing witnesses; a mere acknowledgment of his signature, by the testator, is not sufficient. Combs *v.* Jolly, 3 N. J. Eq. 625; Mickle *v.* Matlack, 2 Harr. 86. An acknowledgment or recognition by the testator, express or implied, in the presence of the attesting witnesses, of the signature of the will, is equivalent to actual signing. Hall *v.* Hall, 17 Pick. 373; Dewey *v.* Dewey, 1 Met. 349; Osborn *v.* Cook, 11 Cush. 532; Beane *v.* Yerby, 12 Gratt. 239; Small *v.* Small, 4 Greenl. 220; Eelbeck *v.* Granberry, 2 Hayw. 232; Ray *v.* Walton, 2 A. K. Marsh. 74; Reynolds *v.* Shirley, 7 Ohio, 363; Adams *v.* Field, 21 Vt. 256. The acknowledgment of a will may be made by the testator, without having the signature before him. Elbeck *v.* Granberry, 2 Hayw. 232. In Welch *v.* Welch, 2 T. B. Mon. 83, it was held that to prove a will devising lands, evidence by one subscribing witness that he signed the testatrix's name and subscribed his own as witness at her request, and in the presence of her and another subscribing witness, and evidence by the other subscribing witness, that he heard her acknowledge it, and subscribed it as a witness at her request, and in her presence, is sufficient. Rash *v.* Parnel, 2 Harrington, 448. See Smith *v.* Jones, 6 Rand. 33; Dudleys *v.* Dudleys, 3 Leigh, 436; Burwell *v.* Corbin, 1 Rand. 131, 468; Beane *v.* Yerby, 12 Gratt. 239; Green *v.* Crain, 12 Gratt. 252. A will subscribed by three attesting witnesses, at the testator's request, and in his presence, he declaring it to be his will, is well attested, within the Gen. Stat. of Mass. c. 92, § 6, although neither of the witnesses saw him sign it or heard him acknowledge his signature thereto, and only one of them saw the testator's name thereon. Dewey *v.* Dewey, 1 Met. 349. The case of Hogan *v.* Grosvenor, 10 Met. 54, was in substance the same as that of Dewey *v.* Dewey, and a verdict in favor of the will was sustained. See Blake *v.* Knight, 3 Curteis, 547. The statutes under which the above cases were decided do not provide in express terms for the making of such acknowledgment. But the statutes of New York and of other states expressly provide for the acknowledgment by the testator of his signature in the presence of the witnesses. See Lewis *v.* Lewis, 13 Barb. 17; Janncey *v.* Thorne, 2 Barb. Ch. 40. So, also, Stat. 1, Vict. c. 26, § 9, provides that the signature of the testator shall be made or *acknowledged* by the testator in the presence of the witnesses. In In re Rawlins, 2 Curteis, 326, the deceased signed her will not in the presence of witnesses, and subsequently produced her will before two witnesses, and said to them, "Sign your names to this paper." This was held not to be a sufficient acknowledgment of her signature under the above section of 1 Vict. c. 26. See In re Warden, 2 Curteis, 334. Under the same section of 1 Vict. c. 26, probate was refused of a paper produced by the deceased to three witnesses, who subscribed their names thereto, two of the witnesses not seeing the signature to the paper, nor knowing that it was signed, the third witness deposing that she saw the signature of the deceased. In re Harrison, 2 Curteis, 863. But see Bennett *v.* Sharp, 33 Eng. L. & Eq. 618. In another case, which was much considered, it appeared that the deceased requested two persons, present at the same time, "to sign a paper for him," which they did in his presence. The paper was so folded, that the witnesses did not see any writing whatever on it; and the deceased did not state what was the nature of the paper in question. On the death of the deceased it was found to be his intended will. The will was refused probate, because the Stat. 1, Vict. c. 26, § 9, had not been complied with. Ilott *v.* Genge, 3 Curteis, 160; Jackson *v.* Jackson, cited ib. See Gaze *v.* Gaze, 3 Curteis, 451; Shaw *v.* Neville, 33 Eng. L. & Eq. 615; Lewis *v.* Lewis, 1 Kern. 220. Still, under this statute it has been held that it is not necessary that the party should say, in express terms, "That is my signature;" it is sufficient if it clearly appears that the signature was existent on the will when it was produced to the witnesses, and was seen by the witnesses when they subscribed the will. Blake *v.* Knight, 3 Curteis, 547; Keigwin *v.* Keigwin, ib. 607; In re Ashmore, ib. 756. In New Jersey, however, by construction of the statute (1714) in that state for devising real estate, which required that the testator should *sign* his name in the presence of the witnesses, it has been held that no mere acknowledgment by the testator, in the presence of the witnesses, of his signing the will, is sufficient. Mickle *v.* Matlack, 2 Harrison, 86, Hornblower, C. J., dissenting; Den *v.* Milton, 7 Halst. 70; Combs *v.* Jolly, 2 Green, Ch. 625. A will is not regarded as properly executed in New York, where neither of the attesting witnesses saw the deceased subscribe his name thereto, and neither heard him acknowledge the signature to be his, or heard him say what the paper was. Lewis *v.* Lewis, 13 Barb. 17. See further Shaw *v.* Neville 33 Eng. L. & Eq. 615; Hall *v.* Hall, 17 Pick. 373, 379, 380; Dewey *v.* Dewey, 1 Met. 349; Smith *v.* Jones, 6 Rand. 33; Dudleys *v.* Dudleys, 3 Leigh, 436; Small *v.* Small, 4 Greenl. 220; Eelbeck *v.* Granberry, 2 Hayw. 232; Burwell *v.* Corbin, 1 Rand. 131, 468; Rosser *v.* Franklin, 6 Gratt. 1; Denton *v.* Franklin, 9 B. Mon. 28; Janncey *v.* Thorne, 2 Barb. Ch. 40.

for, if the testator signed three times, there were three executions, and none of them good.

The next question was, what constituted a sufficient acknowledgment before the witnesses.[1] In Gryle *v.* Gryle (*h*), Lord Hardwicke doubted whether it was enough for the testator to say before the witness, "This is my will," without a resealing (for the instrument in that case had the unnecessary appendage of a seal), or unless the testator had declared it to be his handwriting; but the doubt appears to have vanished in Ellis *v.* Smith (*i*), where the question is stated in general terms to be, whether a testator's declaration before three witnesses, that it is his will, was equivalent to signing; and the conclusion, therefore, of the judges who decided that case in favor of the validity of the will, amounted to an affirmation of the sufficiency of such a declaration.

What amounted to an acknowledgment.

Later adjudications placed the point beyond all doubt by going much farther; these cases having decided that where a testator, who had previously signed his will, merely requested the witness to subscribe the memorandum of attestation, though they neither saw his signature, nor were made acquainted with the nature of the instrument they attested, the will, nevertheless, was duly executed according to the statute (*k*).[2] "When we find," said Tindal, C. J., in British Museum *v.* White, "the testator *knew this instrument to be his will: that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge *in fact*, though not *in words*, to the three witnesses, that the will was his."

Witnesses need not be apprised of the nature of instrument.

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The next statutory requisition is, that the will be "attested and subscribed" by three witnesses.[3] A mark has been decided to

(*h*) 2 Atk. 176.

(*i*) 1 Ves. Jr. 11.

(*k*) British Museum *v.* White, 3 M. & Pay. 689, 6 Bing. 310; Wright *v.* Wright, 5 M. & Pay. 316, 7 Bing. 457; Johnson *v.* Johnson, 1 Cr. & M. 140, [3 Tyrw. 73; Hudson *v.* Parker, 1 Rob. 14, 8 Jur. 786; Gaze *v.* Gaze, 3 Curt. 451, 7 Jur. 803; but see Ilott *v.* Genge and other cases noticed post, with reference to the late Act, under which a stricter acknowledgment is required.]

[1] The acknowledgment may, in New York, precede the signing by the testator. Jackson *v.* Jackson, 39 N. Y. 153.

[2] Chase *v.* Kittredge, 11 Allen, 49; Ela *v.* Edwards, 16 Gray, 91; Harmon *v.* Clark, 13 Gray, 114; Osborn *v.* Cook, 11 Cush. 532; Brown *v.* McAlister, 34 Ind. 375; Dickie *v.* Carter, 42 Ill. 376; Allison *v.* Allison, 46 Ill. 61.

[3] Attesting means more than barely subscribing the name to the paper. It implies knowledge of a publication, and of the facts necessary to a legal publication. Swift *v.* Wiley, 1 B. Mon. 117; Griffith *v.* Griffith, 5 B. Mon. 511. See Gerrish *v.* Nason, 22 Me. 438; Sweet *v.* Boardman, 1 Mass. 258. The Missouri Statute of Wills requires that the subscribing witnesses to a will should attest, not only the act of signing, but the sanity of the testator at the time. Withington *v.* Withington, 7 Mo. 589. So in Illinois it is required by statute, in order to the proof of a will, that the witnesses should state that they believed the testator to be of a sound mind and memory. R. S. 1880, ch. 148, p. 1108. Heyward *v.* Hazard, 1 Bay, 335. The witnesses, in view of the law, are placed around the testator, in order that no fraud may be practised upon him in the execution of the will, and to judge of his capacity. 2 Greenl. Ev. § 691.

What a sufficient signature by the witnesses; —a mark; —initials;

be a sufficient subscription (*l*),[1] but it is never advisable, where it can be avoided (and, now that the art of writing is so common, seldom necessary), to employ marksmen as witnesses. [The initials of the witnesses also amount to a sufficient subscription, if placed for their signatures, as attesting the execution (*m*) ; but not if they are placed in the margin opposite to, and apparently for the purpose only of identifying alterations (*n*). A witness need not sign his own name, if the name actually subscribed be intended to represent his name (*o*) : or if he write a description (without any name) intended to identify him as witness (*p*).

—wrong name;

But if a wrong name be signed with the intention of making it appear that the will was attested by the person to whom that name belongs, instead of the actual witness, the subscription is insufficient (*q*). Putting their seals to the will is not sufficient (*r*). If the witness cannot write, his hand may be guided by another person (*s*),[2] or another person may write the witness's name while the witness holds the top of the pen (*t*) ; in fact,

—sealing;

—guiding the hand.

(*l*) Harrison *v.* Harrison, 8 Ves. 185; Addy *v.* Grix, ib. 504; [Re Amiss, 2 Rob. 116, 7 No. Cas. 274; Re Ashmore, 3 Curt. 756.

(*m*) Re Christian, 2 Rob. 110, 7 No. Cas. 265.

(*n*) Re Martin, 6 No. Cas. 694, 1 Rob. 712; Re Cunningham, 1 Searle & S. 132, 29 L. J., Ch. 71. See the former case mentioned again p. 85. (*o*) Re Olliver, 2 Spinks, 57.

(*p*) Re Sperling, 33 L. J. Prob. 25. Whatever is written, it must be with the intention that it shall represent the writer's name or otherwise identify him. Re Eynon, L. R. 3 P. & D. 93; Re Maddock, ib. 169.

(*q*) Pryor *v.* Pryor, 29 L. J. Prob. 114.

(*r*) Re Byrd, 3 Curt. 117, 1 No. Cas. 490.

(*s*) Harrison *v.* Elvin, 3 Q. B. 117, 2 G. & Dav. 769; Re Frith, 1 Sw. & Tr. 8, 27 L. J. Prob. 6, 4 Jur. N. S. 288.

(*t*) Re Lewis, 31 L. J. Prob. 153. But *primâ facie* not so if the witness can write, Re Kilcher, 6 No. Cas. 15.

[1] Davies *v.* Davies, 9 Q. B. 648; White *v.* British Museum, 6 Bing. 310; Wright *v.* Wright, 7 Bing. 457; Warren *v.* Postlethwaite, 9 Jur. 721; In re Maddock, L. R. 3 P. & D. 169; Osborn *v.* Cook, 11 Cush. 532; Small *v.* Small, 4 Greenl. 220; Lord *v.* Lord, 58 N. H. 7; Jackson *v.* Van Dusen, 5 Johns. 144; Chaffee *v.* Baptist Miss. Con., 10 Paige, 85 (although the New York statute requires that each witness shall subscribe his name); Adams *v.* Chaplin, 1 Hill, Ch. 266; Pridgen *v.* Pridgen, 13 Ired. 259; Den *v.* Milton, 7 Halst. 70. It must, however, be proved to be the mark of the witness. Collins *v.* Nicdols, 1 Harr. & J. 399. Probate was granted of a codicil which had been produced by the testatrix, all in her own handwriting, and with her signature thereto made, to two witnesses present at the same time, who at her request made their marks thereto, although the testatrix wrote the names of the witnesses opposite their respective marks, and, by mistake, gave a wrong surname to one of them. In re Ashmore, 3 Curteis, 756. See 2 Greenl. Ev. § 677; Baker *v.* Dening, 8 Q. B. 94; Harrison *v.* Elvin, 3 Q. B. 117; Doe *v.* Davis, 11 Jur. 182; 1 Greenl. Ev. (4th ed.) § 272; Wigan *v.* Rowland, 21 Eng. L. & Eq. 132. In Virginia it is held that one witness may sign the name of another witness, the latter being present and requesting it. Jesse *v.* Parker, 6 Gratt. 57. So in Kentucky. Upchurch *v.* Upchurch, 16 B. Mon. 102. The contrary was decided in Horton *v.* Johnson, 18 Ga. 396, unless the witness, unable to write, makes his mark. The validity of the attestation depends upon the signing of the name by the authority of the witness, and in his presence, and not (according to the rule laid down in several of the states) upon the fact of his making a mark or doing any other manual act in connection with the signature. Lord *v.* Lord, 58 N. H. 7; Jesse *v.* Parker, 6 Gratt. 57; Upchurch *v.* Upchurch, 16 B. Mon. 102. But the rule is otherwise in some of the courts, ib. The act must, of course, be *animo testandi*. Ib.; In re Maddock, L. R. 3 P. & D. 169; In re Duggins, 39, L. J. P. & M. 24.

[2] Lord *v.* Lord, 58 N. H. 7. But acknowledgment of a previous signature is not a sufficient attestation; though it would be sufficient in most states as to the execution by the testator. Ib.; Chase *v.* Kittredge, 11 Allen, 49.

there seems to be no distinction in these respects between the words "sign" and "subscribe;" any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness, — with, however, these exceptions, that the subscription of the witness is required to be made in the presence of the testator, and must not, as in the case of a testator, be a signature made by some other person for the witness, or by * the witness himself at some other time, and merely acknowledged by him in the presence of the testator (*u*). *83

Difference between signature by witness and by testator.

Where the will has been once attested by a witness, it is not sufficient for him, on a re-execution, to go over his name with a dry pen; he must do some act apparent on the face of the paper (*x*); otherwise it is no more than an acknowledgment.[1] And where a witness to a former execution, on attesting a will for the second time, did not again write her name, but after her name written on the first execution, wrote the name of her residence, "Bristol," Sir H. J. Fust considered that to be no proof of the attestation, and decided that the will was not properly re-executed (*y*). So where a witness to a former execution, on attesting a re-execution of a will, wrote the day of the month against his former signature, and crossed one of the letters in it, not intending that the mark made by crossing the letter should stand for his signature; but supposing that the addition of the date was equivalent to a repetition of the signature, it was held by Sir C. Cresswell that the will was not duly re-executed (*z*). In these cases the attestation was insufficient, because there was no proof that the word "Bristol" in the one case, and the mark across the letter in the other, were intended to represent the witness's signature. They were nothing more than acknowledgments of the former signatures. The signature must be such as is descriptive of the witness, whether by a mark, or by initials, or by his full name (*a*), or by a description without name (*b*); a view which necessarily denies efficacy as a signature to the writing of the date.

Must be an act apparent on the paper,

— and descriptive of the witness.

The signature of the witnesses may be placed in any part of the will;[2] for instance, the will ending on the first side of a sheet of letter paper, the witnesses may sign on the

Position of witness's signature.

(*u*) Moore *v.* King, 3 Curt. 243, 2 No. Cas. 45, 7 Jur. 205; Re Cope, 2 Rob. 335; Re White, 2 No. Cas. 461, 7 Jur. 1045; Re Mead, 1 No. Cas. 456.

(*x*) Playne *v.* Scriven, 1 Rob. 772, 7 No. Cas. 122, 13 Jur. 712; Re Cunningham, 1 Searle & S. 132, 29 L. J. Prob. 71; Re Maddock, L. R. 3 P. & D. 169.

(*y*) Re Trevanion, 2 Rob. 311.

(*z*) Charlton *v.* Hindmarsh, 1 Sw. & Tr. 433, 8 H. L. Ca. 160.

(*a*) Per Lord Chelmsford, 8 H. L. Ca. 171. (*b*) Re Sperling, 33 L. J. Prob. 25.

[1] An indorsement upon the back of a will, four years after the execution of the latter, in which the testator ratifies the contents, is not a re-execution; and hence no attestation to the indorsement will amount to an attestation of the will. Patterson *v.* Ransom, 55 Ind. 402.

[2] Attestation must, in Kentucky, be made at the end of the will; and any unnecessary or unreasonable blank between the testator's signature and the attestation will be fatal. Soward *v.* Soward, 1 Duv. 126. The addition of a certificate of acknowledgment such as is made to deeds, though superfluous, is good so far as the signature of the officer is concerned as one of the witnesses to the exe-

fourth side (*c*); and the will ending on the middle of the third side, and two of the witnesses signing at the end, and another signing in a vacant space on the second side opposite the other two, was held a sufficient attestation by three witnesses under the Statute of Frauds (*d*).

*84 But it must of course be proved that any part * of the will which follows the signatures of the witnesses was written before they signed (*e*).]

A will may be composed of several clauses written at distinct intervals, and one memorandum of attestation subscribed to the last part may apply to the whole, including as well what was long before written as what had been recently added, though the antecedent part bears a different date from, and is complete in itself independently of the latter (*f*). And the same general doctrine applies to a will whose contents are distributed through several sheets of paper, which would be adequately attested by a single memorandum, provided all the detached parts were present when the act of attestation took place; and which fact it seems would be presumed unless the contrary were distinctly proved (*g*), as would also that of the attestation being intended to apply to the whole. The presumption would be somewhat less strong, of course, when each of the several papers has a distinct independent character, as where one is a will and the other a codicil, or where they consist of two separate codicils: [and would

Applicability of attestation to several distinct parts of a will;

— to several testamentary papers;

— to will and codicil.

(*c*) Re Chamney, 1 Rob. 757, 7 No. Cas. 70; Re Braddock, 1 P. D. 433.
(*d*) Roberts *v.* Phillips, 4 Ell. & Bl. 450, 24 L. J. Q. B. 171.
(*e*) Re Jones, 1 No. Cas. 396.] (*f*) Carlton *v.* Griffin, 1 Burr. 549.
(*g*) Bond *v.* Seawell, 3 Burr. 1775.

cution of the will, if the other formalities required of him as a witness were performed. Murray *v.* Murphy, 39 Miss. 214. Under the present statute in England, 1 Vict. c. 26, § 9, it is held not to be sufficient *attestation* for the witnesses to sign *before* the signature of the testator is affixed. Cooper *v.* Bockett, 3 Curteis, 648; In re Olding, 2 Curteis, 865; In re Byrd, 3 ib. 117; In re Cox's will, 1 Jones, 321. But in Swift *v.* Wiley, 1 B. Mon. 117, it was held that the order of time in which the testator and witnesses subscribed their names is not material. So in Connecticut, where witnesses called to witness the execution of a will subscribed their names as witnesses thereto, and the testator afterwards in their presence duly executed the same, all of which was done at one time, and for the purpose of perfecting it as a will, the will was held to be legally executed. O'Brien *v.* Gálagher, 25 Conn. 229. In reference to the meaning and force of the word "subscribed" in the English statute, and the position upon the will in which the subscribing witness's name should appear, the case of Roberts *v.* Phillips, 4 Ellis & B. 450, is important. In that case it appeared that a testator, before 1838, made his will devising lands. The will was written on three sides of a sheet of paper; on the last was an attesting clause subscribed by two witnesses, and the signature of the testator; on the second page was written the name of a fourth person, W. B.; there was nothing on the face of the will to indicate in what capacity "W. B." signed the will. On the trial, which involved the question of the validity of the will, parol evidence of its execution was given, and the jury found that "W. B. signed at the same time as the others, as an attesting witness, and that the others signed at the same time with him," and that "all three attested the will as attesting witnesses." It was held that the same was duly attested so as to pass real estate, under the Statute of Frauds; that it was not necessary that anything should appear on the face of the will to designate W. B. as a witness; and that it was not necessary that the signature of W. B. should be under the signature of the testator. Lord Campbell, C. J., after an elaborate discussion of the subject, remarked: "The mere requisition that the will shall be *subscribed* by the witnesses, we think, is complied with by the witnesses, who saw it executed by the testator, immediately signing their names on any part of it, at his request, with the intention of attesting it." 4 Ellis & B. 459.

fail altogether where the memorandum does not follow the whole. Thus where will and codicil were on different sheets found pinned together, an attestation clause written on the back of the will was not held to be applicable to the codicil without proof that it was so intended, and that the sheets were pinned together at the time of subscription (*h*). So where there is an evident intention that each paper or sheet shall be separately attested; as, where a testator signed five sheets, and the witnesses subscribed the first four, and the fifth sheet contained an attestation clause only, and there was no evidence to show that the witnesses attested the last signature, the will was held not to have been properly executed (*i*); and where two instruments purporting to be a will and codicil were written on different pages of the same sheet of paper, and both were signed by the testatrix, but the first alone was attested, the codicil was rejected (*k*).]

It was held under the devising clause of the Statute of Frauds, that if a testator made a will attested by two witnesses, and afterwards made a codicil also attested by two witnesses, neither the will nor the codicil was adequate to the devise of freehold * lands; for *85 though the attesting witnesses to the respective testamentary papers together made up the requisite number, yet, as the memorandum of attestation subscribed to the codicil was evidently not intended to apply to the will, it could not be so construed (*l*). If, however, evidence were adduced of such actual intention, the attestation to the codicil would apply to both (*m*).

[And in every case the court must be satisfied that the names were written *animo attestandi*; and their position may for this purpose be material: where, for instance, on one page the will was written, signed by the testator, and subscribed by one witness, and on the next page a memorandum or inventory of property was written, to which three names were subscribed, it was held that these names could not be deemed to have been so placed *animo attestandi* (*n*): though it would not necessarily follow that a person did not sign as a witness because he also intended his signature to serve another purpose, *e.g.* his acceptance of the executorship (*o*). Animus attestandi.

Where an executed will was altered, and the witnesses put their initials in the margin opposite the alterations, it was held that the will was not properly re-executed (*q*). But this decision seems questionable, for the initials were intended to represent the signatures, and it

[(*h*) Re Braddock, 1 P. D. 433.
(*i*) Ewens *v.* Franklin, 1 Deane 7, 1 Jur. N. S. 1220; Re Dilkes, L. R. 3 P. & D. 164; Phipps *v.* Hale, ib. 166.
(*k*) Re Taylor, 2 Rob. 411; and see per Lord Campbell, 24 L. J. Q. B. 175; Re Pearse, L. R. 1 P. & D. 382.]
(*l*) Lea *v.* Libb, Carth. 35, 3 Salk. 395.
(*m*) Bond *v.* Seawell, 3 Burr. 1775. [But now the witnesses must be present at the same time.
(*n*) Re Wilson, L. R. 1 P. & D. 269. See also Dunn *v.* Dunn, ib. 277.
(*o*) Griffiths *v.* Griffiths, L. R. 2 P. & D. 300. (*q*) Re Martin, 6 No. Cas. 694.

was proved (extrinsic evidence being admissible on this question (*r*)) that they were written with the intent to attest the will.]

What constituted a sufficient attestation.

No particular form of words was essential to constitute an attestation (*s*).[1] It was not requisite that the memorandum subscribed by the witnesses should mention their having subscribed in the presence of the testator, though such fact, of course, must be clearly and distinctly proved by oral testimony, when the validity of the will is called in question, whether the memorandum of attestation records it or not (*t*). Where the death [or absence] of the witnesses prevents the obtaining actual proof, a compliance with the statutory requisition in all its parts would, it seems, even in the absence of express statement, generally be * presumed (*u*)[2]: [and since the passing of the act 1 Vict. probate has been granted of a will where both the witnesses deposed that the requirements of the act had not been complied with, the court being satisfied by the circumstances that the evidence was mistaken (*x*); and in another case, where the witnesses so deposed, but not positively, their evidence was allowed to be rebutted by that of another person present at the execution, assisted by the attestation clause, whence it appeared

Due execution when presumed.

Even against evidence of the witnesses.

*86

(*r*) Ib.; Dunn *v.* Dunn, L. R. 1 P. & D. 277.

(*s*) Under the act 1 Vict. c. 26, s 9] it is expressly dispensed with.

(*t*) Hands *v.* James, Comyn, 531; Croft *v.* Pawlett, 2 Str. 1109; S. C., 8 Vin. Ab. 128, pl. 4; Brice *v.* Smith, Willes, 1; Rancliff *v.* Parkyns, 6 Dow, 202; [Doe *v.* Davies, 9 Q. B. 648; Hitch *v.* Wells, 10 Beav. 84.]

(*u*) Hands *v.* James; Croft *v.* Pawlett, supra; [Re Seagram, 3 No. Cas. 436; Re Mustow, 4 No. Cas. 289; Re Johnson, 2 Curt. 341; Re Luffman, 5 No. Cas. 183; Re Dickson, 6 ib. 278; Trott *v.* Trott, 29 L. J. Prob. 156, 6 Jur. N. S. 760.

(*x*) Leach *v.* Bates, 6 No. Cas. 699. *A fortiori*, where the adverse evidence of one witness is opposed by the affidavit of the other, deceased, witness; Wright *v.* Rogers, L. R., 1 P. & D. 678.

[1] 2 Greenl. Ev. § 677; Jackson *v.* Christman, 4 Wend. 277; Burgoyne *v.* Showler, 1 Robertson, Eccl. 5. A will without any words of attestation was held good in Bryan *v.* White, 5 Eng. L. & Eq. 579. In Osborn *v.* Cook, 11 Cush. 532, a will was held to be well executed, although there was no attestation clause except the single word "witness" preceding the signatures of the witnesses. See Murphy *v.* Murphy, 24 Mo. 526; Roberts *v.* Phillips, 30 Eng. L. & Eq. 147.

[2] Ela *v.* Edwards, 16 Gray, 91; Nickerson *v.* Buck, 12 Cush. 344; Chase *v.* Kittredge, 11 Allen, 49; Blocher *v.* Hostetter, 2 Grant's Cas. 288. The assent of a testator and a request to attest will be inferred from a reading of the will and subsequent subscription in the presence of the testator and other witnesses. Moore *v.* Moore, 2 Bradf. 261. It is laid down in this country that when the attestation clause contains an assertion of all that the law requires, it is immaterial that the witnesses cannot swear affirmatively to the facts stated therein. Mere lack of memory is not sufficient to rebut the presumption of due publication arising from the attestation clause. Brown *v.* Clark, 77 N. Y. 369; Brinckerhoof *v.* Remsen, 8 Paige, 499; S. C. 26 Wend. 332; In re Kellum, 52 N. Y. 517. So, too, on the death of the witnesses, the proof of the fact of execution begets a presumption that all the details of the fact were such as the law requires, unless the contrary appears on the face of the will. Deupree *v.* Deupree, 45 Ga. 415, 442; Eliot *v.* Eliot, 10 Allen, 357; Ela *v.* Edwards, supra; Barnes *v.* Barnes, 66 Me. 286; Chaffee *v.* Baptist Miss. Con., 10 Paige, 85; Clark *v.* Donnorant, 10 Leigh, 22; Fatheree *v.* Lawrence, 33 Miss. 622. There are, however, cases in which wills have been executed under powers prescribing certain forms, in which it has been held the evidence must show that the forms have been complied with; and then, even though the witnesses be dead, or cannot remember, the presumption of compliance does not arise unless the will itself or the attestation clause so states. Deupree *v.* Deupree, 45 Ga. 415, 442; 1 Redf. Wills, 238, 239.

that the requirements of the statute had been complied with (*y*). But where there was nothing but a formal attestation clause on one side, and the adverse testimony of both witnesses on the other, probate was refused (*z*). And in no case will the presumption of compliance with the statutory requirements be made unless the will appears on the face of it to have been duly executed. If the will is lost, due execution must be proved (*a*) and the testator's written declarations of the fact are insufficient, though accompanied by a document referred to by him as a copy of his will, and representing the will as duly executed (*b*). The presumption of due execution is clearly rebutted where it is sworn by competent persons that the names of the seeming witnesses are fictitious, and are in the testator's own handwriting (*c*).[1]

"Presence" of a testator, what amounts to it.

The will, it will be observed, was [and still is] required to be subscribed by the witnesses in the *presence* of the testator. The design of the legislature, in making this requisition, evidently was, that the testator might have ocular evidence of the identity of the instrument subscribed by the witnesses; and this design has been kept in view by the courts in fixing the signification * of the word "presence." To constitute "presence," in *87 the first place, it was (and, of course, still is) essential that the testator should be mentally capable of recognizing the act which is being performed before him; for, if this power be wanting, his mere corporal presence would not suffice. Thus, if a testator, after having signed and published his will, and before the witnesses subscribe their names, falls into a state of insensibility (whether permanent or temporary) the attestation is insufficient (*d*).

And the testator ought not merely to possess the mental power of recognizing, but be actually conscious of, the transaction in

(*y*) Baylis *v.* Sayer, 3 No. Cas. 22; see also Gove *v.* Gawen, 3 Curt. 151; Blake *v.* Knight, ib. 547; Pennant *v.* Kingscote, ib. 642; Re Hare, ib. 54; Cooper *v.* Bockett, ib. 648, 2 No. Cas. 391, 10 Jur. 931; Brenchley *v.* Still, 2 Rob. 162; Chambers *v.* Queen's Proctor, 2 Curt. 433; Keating *v.* Brooks, 4 No. Cas. 253; Re Noyes, ib. 284; Burgoyne *v.* Showler, 1 Rob. 5; Thomson *v.* Hull, 16 Jur. 1144, 2 Rob. 426; Re Attridge, 6 No. Cas. 597; Bennett *v.* Sharp, 1 Jur. N. S. 456; Foot *v.* Stanton, 1 Deane, 191, 2 Jur. N. S. 380; Farmer *v.* Brock, 1 Deane, 187, 2 Jur. N. S. 670; Re Holgate, 1 Sw. & Tr. 261, 5 Jur. N. S. 251, 29 L. J. Prob. 161; Lloyd *v.* Roberts, 12 Moo. P. C. C. 158; Re Thomas, 1 Sw. & Tr. 255, 28 L. J. Prob. 33; Gwillim *v.* Gwillim, 3 Sw. & Tr. 200, 29 L. J. Prob. 31; Cregreen *v.* Willoughby, 6 Jur. N. S. 590; Re Huckvale, L. R. 1 P. & D. 375; Smith *v.* Smith, ib. 143 (where witness saw testatrix writing, but did not see her signature).

(*z*) Croft *v.* Croft, 4 Sw. & Tr. 10, 34 L. J. Prob. 44.

(*a*) As in Re Gardner, 27 L. J. Prob. 55; Eckersley *v.* Platt, L. R. 1 P. & D. 281. The contents of the will, and its existence at the testator's death, must also be proved, post, Chap. VII. s. 2.

(*b*) Re Ripley, 1 Sw. & Tr. 68.

(*c*) Re Lee, 4 Jur. N. S. 790.]

(*d*) Right *v.* Price, Dougl. 241.

[1] It is not necessary that the witnesses should subscribe the will in each other's presence. Ela *v.* Edwards, 16 Gray, 91; Dewey *v.* Dewey, 1 Met. 349; Chase *v.* Kittredge, 11 Allen, 49, 52; Gaylor's Appeal, 43 Conn. 82; Blanchard *v.* Blanchard, 32 Vt. 62; Willis *v.* Moot, 36 N. Y. 486; Haysradt *v.* Kingman, 22 N. Y. 372; Flinn *v.* Owen, 58 Ill. 111; Webb *v.* Fleming, 30 Ga. 808. Nor is it necessary that the testator's signature should be shown to the witnesses at the time of the acknowledgment of execution. Willis *v.* Moot, supra; Dewey *v.* Dewey, supra; Ela *v.* Edwards, supra.

Mental consciousness essential.

which the witnesses are engaged;[1] for if a will were attested in a secret and clandestine manner, without the knowledge of the testator, the fact of his being in the room in which it was done would not avail (*e*).[2] Nor, on the other hand, would the circumstance of the testator *not* being in the same room invalidate the attestation, if it took place *within his view*. Thus, in Shires *v.* Glasscock (*f*), where, the testator being in extreme illness, the witnesses after he had signed his will withdrew into a gallery, between which and the testator's chamber there was a lobby with glass doors, and the glass broken in some places; in this gallery the witnesses subscribed the will. It was proved that the testator might have seen from his bed, through the lobby and the broken glass window, the table in the gallery where the witnesses subscribed; and this was adjudged to be sufficient; for (it was observed) the statute required attesting in his presence to prevent obtruding another will in place of the true one; it was, therefore, enough if the testator *might* see;[3] it was not necessary that he *should* actually see the signing; because if that were the case, if a man did but turn his back, or look off, it would vitiate a will; here the signing was within view of the testator; he might have seen it, and that was enough.

Sufficient if the testator *might* have seen.

So, in Davy *v.* Smith (*g*), where the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there subscribed their names on a table in the middle of the room and

(*e*) See Longford *v.* Eyre, 1 P. W. 740.
(*f*) 2 Salk. 688, cit. Carth. 81.
(*g*) 3 Salk. 395.

[1] It follows that the witnesses must sign at the request, actual or implied, of the testator. But it is no objection to the signature of witnesses under the laws of New York that the witnesses are requested to sign the will by the draftsman, the testator being present, and approving the act. Gilbert *v.* Knox, 52 N. Y. 125; Peck *v.* Cary, 27 N. Y. 9. No precise form of words, addressed to each of the witnesses at the very time of the attestation, is required. Any communication importing such request, addressed to one of the witnesses in the presence of the other, which by a just interpretation of all the circumstances is intended for both, is sufficient. Coffin *v.* Coffin, 23 N. Y. 9. Further, as to what is meant by the request of the testator to witness and subscribe the will, see Bundy *v.* McKnight, 48 Ind. 502.

[2] In the case of one blind the witnesses must sign where the testator, if able to see, could see them. In re Piercy, 1 Robt. Eccl. 278. It seems that the witnesses in such case should be within the cognizance of testator's remaining senses. Ray *v.* Hill, 3 Strobh. 297. See Neil *v.* Neil, 1 Leigh, 6, 23; Reynolds *v.* Reynolds, 1 Speer, 253.

[3] See Russell *v.* Falls, 3 Harr. & M. 457; Edelen *v.* Hardey, 7 Harr. & J. 61; 4 Kent, 515, 516. The testator need not actually see the witnesses sign the will, but he must be in a position to admit of his seeing them sign. Reynolds *v.* Reynolds, 1 Speers (S. C.) 253. It is sufficient *primâ facie* evidence that the attesting witnesses to a will subscribed it in the presence of the testator, if he were so situated that he might have seen them subscribe it. Dewey *v.* Dewey, 1 Met. 349; Winchilsea *v.* Wauchope, 3 Russell, 443; Tod *v.* Winchelsea, 2 Carr. & P. 488; Neil *v.* Neil, 1 Leigh, 6. An attestation made in the same room with testator is *primâ facie* in his presence. Neil *v.* Neil, 1 Leigh, 6; Howard's Will, 5 T. B. Mon. 199. An attestation not made in the same room is *primâ facie* not an attestation in his presence. Neil *v.* Neil, 1 Leigh, 6; Edelen *v.* Hardey, 7 Harr. & J. 61; 1 Greenl. Ev. § 272. The New York Revised Statutes have dropped the direction in the English statute that the witnesses are to subscribe in the *presence* of the testator, and the doctrine of constructive presence is therefore rejected. 4 Kent, 515; Lyon *v.* Smith, 11 Barb. 124. But in New York each of the attesting witnesses must sign his name at the end of the will at the *request* of the testator. Lewis *v.* Lewis, 13 Barb. 17. This request may be implied as well as expressed. Brown *v.* DeSelding, 4 Sandf. 10; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Doe *v.* Roe, 2 Barb. 200; Seguine *v.* Seguine, ib. 385.

opposite to the door, and both that door, and the door of the room where the testator lay, were open, so that he might have seen them subscribe their names if he would; this was held to be sufficient, though there was no proof that the testator did see them subscribe.[1] And if the witnesses subscribe * their names in the same room *88 where the testator lies, though the curtain of the bed be drawn close, it is a good subscribing, because it is in his power to see them, and what is done shall be construed to be in his presence (*g*).[2]

It is not even necessary that the testator should be in the same house with the witnesses; for, in Casson *v.* Dade (*h*), where a *feme coverte*, having power to make a writing in the nature of a will, ordered such an instrument to be prepared, and went to her attorney's office to execute it; but, being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution, they returned into the office to subscribe it, and the carriage was put back to the window of the office, through which it was sworn by a person in the carriage the testatrix might have seen what passed; Lord Thurlow was of opinion that the will was well executed.

Testator and witnesses need not be in same house.

Upon the same principle it is clear, that the mere contiguity of the places occupied by the testator and the witnesses respectively will not suffice, if the testator's view of the witnesses' proceedings is necessarily obstructed. Thus, in Eccleston *v.* Petty (*i*), where the witnesses proved that the testatrix signed the will in her bed-chamber, and they subscribed it in the hall, and it was not possible from her chamber to see what was done at the table in the hall, there being a passage and eight or ten turning stairs between those places, the will was held not to be duly attested.[3]

Mere contiguity not sufficient if the testator's view be interrupted.

And it was not enough, that in *another* part of the same room the testator might have perceived the witnesses, if in his actual position he could not.[4] And, therefore, in Doe d. Wright *v.* Manifold (*k*), where the testator was in bed in a room from one part of which he might, by inclining his head into

Testator must be capable of seeing in his actual position.

[(*g*) Newton *v.* Clarke, 2 Curt. 320.] (*h*) 1 B. C. C. 99, Dick. 586.
(*i*) Carth. 79, Comb. 156, 1 Show. 89, Ca. t. Holt, 222; [and see Re Colman, 3 Curt. 118; Re Ellis, 2 Curt. 395; Re Newman, 1 Curt. 914.]
(*k*) 1 M. & Sel. 294; [Norton *v.* Bazett, 1 Deane, 259, 3 Jur. N. S. 1084.

[1] See Sturdivant *v.* Birchett, 10 Gratt. 67; Nock *v.* Nock, 10 Gratt. 108.

[2] In Russell *v.* Falls, 3 Harr. & M. 463, 464, which was very fully considered, it was held necessary that the testator, being ill, should have been able to see the attestation without leaving his bed. See Doe *v.* Manifold, 1 M. & S. 294. It is not sufficient that the testator would, by raising himself upon his elbow, have the physical ability to see the subscribing witnesses to his will, if he could not, in fact, see them from the position in which he was lying when they subscribed their names; and more especially if by thus raising himself the testator would endanger his life. Jones *v.* Tuck, 3 Jones, 202. It is not sufficient that the testator was able merely to see the witnesses, if he was not able to see their proceedings in the attestation. Graham *v.* Graham, 10 Ired. 219. See further note 1, next page.

[3] Reynolds *v.* Reynolds, 1 Speer, 253; In re Ellis, 2 Curteis, 395; In re Colman, 3 Curteis, 118; Boldry *v.* Parris, 2 Cush. 433.

[4] Neil *v.* Neil, 1 Leigh, 6; Russell *v.* Falls, 3 Harr. & M. 463. See Howard's Will,

the passage, have seen the witnesses attest the will, but not in the situation in which he was, the attestation was decided not to be good. Lord Ellenborough said: "In favor of attestation it is presumed, that if the testator might see, he did see; but I am afraid, that if we get beyond the rule which requires that the witnesses should be actually within reach of the organs of sight, we shall be giving effect *89 to an attestation out of the devisor's * presence, as to which the rule is, that where the devisor cannot by possibility see the act doing, that is out of his presence." [1]

[If the testator be unable to move without assistance, and have his

5 T. B. Monr. 199; Newton *v.* Clarke, 2 Curteis, 320; Edelen *v.* Hardey, 7 Harr. & J. 61; In re Coleman, 3 Curteis, 118; Moore *v.* Moore, 8 Gratt. 307; Robinson *v.* King, 6 Ga. 539; Hill *v.* Barge, 12 Ala. 687.

[1] Under the statutes of Michigan, the condition and position of the testator when his will is attested, in reference to the act of signing by the witnesses, and their locality when signing must be such that he has knowledge of what is going forward, and is observant of the specific act in progress, and (unless he is blind) the signing of the witnesses must occur where the testator, as he is then situated, may see them sign if he choose. Aikin *v.* Weckerly, 19 Mich. 482. And this is a widely prevailing rule. Chase *v.* Kittredge, 11 Allen, 49; Turner *v.* Cook, 36 Ind. 129; McElfresh *v.* Guard, 32 Ind. 408; Ambre *v.* Weishaar, 74 Ill. 109; In re Downie's Will, 42 Wis. 66; note 2, p. 88. In Kentucky, a literal adherence to the words of the statute requiring that the witnesses "shall subscribe the will with their names in the presence of the testator" is not required, and a substantial conformity with the spirit of the statute is sufficient. Montgomery *v.* Perkins, 2 Met. (Ky.) 448. In Wisconsin, the signature of attesting witnesses made beyond the range of the testator's vision is bad, though a witness, after signing, calls the testator's attention to the act, and the act is approved. In re Downie's Will, 42 Wis. 66. And this appears to be the general rule. But while an acknowledgment of his signature is sufficient as to the testator, it is held under the statutes of Massachusetts, requiring witnesses to attest in the presence of the testator, that the law is not complied with by an acknowledgment on the part of a witness that a signature made in the testator's absence is that of the witness. Chase *v.* Kittredge, 11 Allen, 49. And the learned judge who delivered the opinion in this case, Mr. Justice Gray, shows that this is the English doctrine. Hall *v.* Clark, 3 Mod. 219, 220; Lee *v.* Libb, 1 Show. 69; Dormer *v.* Thurland, 2 P. Wms. 510; Stonehouse *v.* Evelyn, 3 P. Wms. 254; Bac. Abr. Wills, D. 2; 2 Bl. Com. 377; Eccleston *v.* Speke, Carth. 81; S. C. Comb. 158; Onions *v.* Tyrer, 1 P. Wms. 344; Ellis *v.* Smith, 1 Ves. Jr. 10; S. C. 1 Dick. 225; Hands *v.* James, Comyns, 532; Rancliffe *v.* Parkyns, 6 Dow, 202, Lord Eldon. The following decisions under the English act of 1837 (1 Vict. c. 26, § 9) were cited as being to the same effect: Re Allen, 2 Curt. Eccl. 331; Re Simmonds, 1 No. Cas. 409; S. C. 3 Curt. Eccl. 79; Moore *v.* King, ib. 243; S. C. 2 No. Cas. 45; Playne *v.* Scriven, 1 Rob. Eccl. 775; S. C. 7 No. Cas. 122; Re Trevanion, 2 Rob. Eccl. 311. Other English cases were cited to the effect that in England the testator must have signed the will before the witnesses signed. Re Olding, 2 Curt. Eccl. 865; Re Byrd, 3 Curt. Eccl. 117; Cooper *v.* Bockett, ib. 659; Charlton *v.* Hindmarsh, 1 Swab. & T. 433; S. C 8 H. L. Cas. 160; and other cases. This is also true in Massachusetts. Chase *v.* Kittredge, 11 Allen, 49, 63. The Massachusetts rule, as above declared, prevails also in New York. Jackson *v.* Christman, 4 Wend. 282; Peck *v.* Cary, 27 N. Y. 31, 32. And, it seems, in Georgia. Duffie *v.* Corridon, 40 Ga. 122 (witness signing the day before the testator signed not good). And in New Jersey. Mickle *v.* Matlack, 2 Harr. 86, 96, 116. And in North Carolina. Ragland *v.* Huntington, 1 Ired. 561; Graham *v.* Graham, 10 Ired. 219; In re Cox's Will, 1 Jones, 321. And in Kentucky. Swift *v.* Wiley, 1 B. Mon. 117; Upchurch *v.* Upchurch, 16 B. Mon. 102. And in Connecticut. O'Brien *v.* Galagher, 25 Conn. 229. Contra. Sturdivant *v.* Birchett, 10 Gratt. 67; Parramore *v.* Taylor, 11 Gratt. 220; 13 Am. Law. Reg. 741. But an acknowledgment merely would be good under a statute requiring merely that the attesting witness "sign his name as a witness, at the end of the will, at the request of the testator," omitting any requirement of signing in the presence of the testator. Chase *v.* Kittredge, 11 Allen, 49, 61; Ruddon *v.* McDonald, 1 Bradf. 352; Vaughan *v.* Burford, 3 Bradf. 78; Hoysradt *v.* Kingman, 22 N. Y. 372; Vaughan *v.* Vaughan, 13 Am. Law Reg. 735. In Pennsylvania, the witnesses need not subscribe the will at all. Hight *v.* Wilson, 1 Dall. 94; Rohrer *v.* Stehman, 1 Watts, 463. Of course when in *that* state they do sign it is immaterial whether they sign, in point of time, before the testator or afterwards. Miller *v.* McNeill, 35 Penn. St. 217. When the witnesses are dead or out of the state, proof of their handwriting is sufficient evidence of a compliance with the statute. Ela *v.* Edwards, 16 Gray, 91; Nickerson *v.* Buck, 12 Cush. 344; Chase *v.* Kittredge, supra.

face turned from the witnesses, so that it is out of his power to see them, if he so wished, the attestation will be insufficient (*l*); and where the testator is blind, it has been decided that the position of the witnesses must be such, that the testator, if he had had his eyesight, might have been able to see them sign (*m*).] Where a testator is unable to move without assistance; — where he is blind.

Where the evidence fails to show in what part of the room the subscription took place, it would be presumed that the most convenient was the actual spot, and the ordinary position of a table, likely to have been used, would be taken into consideration (*n*).

It is scarcely necessary to add, as a concluding remark on this subject, that the nature of the occasion of the witnesses' absence, whether for the ease or at the solicitation of the testator or otherwise, is wholly immaterial (*o*).

The statute of Car. 2, it will be observed, required the witnesses to be "credible:" which was held to mean such persons as were not disqualified by mental imbecility, interest, or crime, from giving testimony in a court of justice.[1] The disqualification arising from interest has been noticed in a former chapter (*p*). With respect to crime, it will be sufficient to refer the reader to the numerous and valuable treatises on evidence, which are in the hands of the profession. Credibility of witnesses.

A testator may so construct his disposition as to render it necessary to have recourse to some document (as to any other extrinsic matter), in order to elucidate or explain his intention. [The document is then said to be incorporated in the will.] As where a person by his will devises all the lands which were conveyed to him by a certain indenture (specifying the deed), or devises lands to the uses declared by a particular indenture of settlement, it is clear that the indentures so referred to may be consulted for this purpose, without violating the principle of the enactment, which requires an attestation by witnesses, the testator's intention to adopt the contents of such instrument being manifested by a will duly attested (*q*); and it would, it is conceived, be immaterial whether the paper so referred to was in * the testator's handwriting, or *90 Reference to extrinsic documents allowable. Incorporation of document.

(*l*) Tribe *v.* Tribe, 1 Rob. 775, 13 Jur. 793, 7 No. Cas. 132.
(*m*) Re Piercy, 1 Rob. 278, 4 No. Cas. 250.] (*n*) Winchilsea *v.* Wauchope, 3 Russ. 444.
(*o*) Broderick *v.* Broderick, 1 P. W. 239; Machell *v.* Temple, 2 Show. 288.
(*p*) Vide ante, p. 70.
(*q*) See Habergham *v.* Vincent, 2 Ves. Jr. 204; also Molineux *v.* Molineux, Cro. Jac. 144.

[1] Under statutes of Massachusetts, 1783, ch. 25, "credible" witnesses means *competent* at the time of attestation. Hawes *v.* Humphrey, 9 Pick. 350; Haven *v.* Hilliard, 23 Pick. 10: Amory *v.* Fellowes, 5 Mass. 219; Sears *v.* Dillingham, 12 Mass. 358. In New Hampshire also. Eustis *v.* Parker, 1 N. H. 273. So in Kentucky. Gill's Will, 2 Dana, 447. So in South Carolina. Taylor *v.* Taylor, 1 Rich. 531; Workman *v.* Dominick, 3 Strobh. 589. So in Mississippi. Rucker *v.* Lambdin, 12 Smed. & M. 230. See Allison *v.* Allison, 4 Hawks, 141. And in Georgia, Hall *v.* Hall, 18 Ga. 40. This is probably the universal rule. The General Statutes of Massachusetts now require that there shall be three or more *competent* witnesses. Ch. 92, § 6.

Incorporation of unattested document.

in that of any other person, and whether it professed to be testamentary or not, as it founds its claim to be received as part of the will, not on its own independent efficacy, but on the fact of its adoption by the attested will. But whatever be the precise nature of the document referred to, it must be clearly identified as the instrument to which the will points. In Dillon *v.* Harris (*r*), a paper was rejected on account of a defect of identification. The testator had by his will referred to a certain paper, as being in the handwriting of the devisee, and which he stated himself to have placed in the custody of his executors. And it was held, that a paper found in the testator's custody, and which had not been delivered by him to the executors, was not sufficiently identified, though in the devisee's handwriting, as he might have written several papers; and though it was in the testator's custody at his decease, there was no evidence of its having been in his custody when he made his will.

[Questions similar to that raised in the last case have since the act 1 Vict. c. 26, frequently come before the probate court. Three things are necessary: first, that the will should refer to some document as then in existence (*s*); secondly, proof that the document propounded for probate was, in fact, written before the will was made; and, thirdly, proof of the identity of such document with that referred to in the will. As to the first point, a clause which "ratifies and confirms a deed, dated, &c., and made between," &c., answers this requirement and incorporates the deed (*t*). But there should be no ambiguity. A reference to a document as "made or to be made" gives strong ground for concluding that the document had not already been made (*u*). So a reference to persons or things "hereinafter named" (*x*), or to "the annexed schedule" (*y*), is not so clear a reference to any document as then existing as to incorporate writings that follow the signature *91 of the testator and of the * witnesses, although it be proved that, in fact, such writings were in existence before the will was executed; much less if the evidence on this last point is hesitating (*z*). But although the document was written after the execution of the will, it may be incorporated if the testator afterwards executes a codicil, for

(*r*) 4 Bligh, N. S. 329.

[(*s*) Van Straubenzee *v.* Monck, 3 Sw. & Tr. 6, 32 L. J. Prob. 21; Re Sunderland, L. R. 1 P. & D. 198; Re Pascall, ib. 606.

(*t*) Sheldon *v.* Sheldon, 1 Rob. 81, 3 No. Cas. 254, 8 Jur. 877; Bizzey *v.* Flight, 3 Ch. D. 269. But see Re Hubbard, L. R. 1 P. & D 53, and *qu.*; but as the deed referred to was valid *per se*, its rejection from the probate seems to have been immaterial.

(*u*) Re Skair, 5 No. Cas. 57; Re Astell, ib. 489, n. See also Re Hakewill, 1 Deane, 14, 2 Jur. N. S. 168; and Re Countess of Pembroke, 1 Sw. & Tr. 250, 1 Deane, 182, 2 Jur. N. S. 526, is perhaps referable to this ground.

(*x*) Re Watkins, L. R. 1 P. & D. 19; Re Brewis, 33 L. J. Prob. 124; Re Dallow, L. R. 1 P. & D. 180,

(*y*) Singleton *v.* Tomlinson, 3 App. Ca. 413. 414, per Lord Cairns. Moreover the schedule was not annexed but indorsed (being on the fourth side of a sheet of paper on which the will was written), a discrepancy pointed out by Lord Blackburn, ib. 425. But as to this see Re Ash, 1 Deane, 14, 2 Jur. N. S. 526.

(*z*) Ante, note (*y*).

the codicil republishes the will, and makes the will speak from the date of the codicil (*a*). The will must be so worded that, so speaking, it shall refer to the document as then existing (*b*).

With regard to the evidence necessary to prove that the document propounded for probate was in existence at the date of the will, and that it is the same as that which is referred to therein; if the reference is distinct, *e. g.* to date, heading, and other particulars, and if the document propounded agrees in these particulars with the description contained in the will, its previous existence and identity will, in the absence of circumstances or evidence tending to a contrary conclusion, be assumed (*c*). Where the reference is less distinct, yet if it be in terms sufficiently definite to render it capable of identification, extrinsic evidence is admissible, together with such internal evidence as may be found in the document itself, to supply the necessary proof.

Thus, in Allen *v.* Maddock (*d*), an unexecuted will was held to have been incorporated in a duly executed codicil by the heading: "This is a codicil to my last will and testament," no other document having been found to answer to the reference. And where a document headed "Instructions for the will of J. Wood," disposed of the residue "in such manner as I shall direct by my will to be indorsed hereon," and the testator afterwards made a will, which, though not indorsed on the "instructions," was expressed to be made in "pursuance of the instructions for his will," no other instructions being found; it was held that the "instructions" in question were incorporated in the will (*e*). The evidence in the latter case was certainly slight. * It is a circumstance frequently relied on that the document proposed for probate was shown to some person before execution of the will, as the paper therein referred to (*ea*). *92

Although an incorporated document is entitled to probate — *i. e.* to be set out at length therein — there is no necessity for so proving it in order to bring it within the cognizance of the court of construction; for if it is not proved, the court will look at the original document. Thus, in Bizzey *v.* Flight (*f*), where A. made a voluntary settlement which, as to certain bank shares and mortgages, was incomplete, so that the shares still belonged to A. at her death, and she by will

Probate of incorporated documents, — not necessary, to give jurisdiction to the court of construction.

(*a*) Re Hunt, 2 Rob. 622; Re Truro, L. R. 1 P. & D. 201.
(*b*) L. R. 1 P. & D. 204. (*c*) Swete *v.* Pidsley, 6 No. Cas. 190.
(*d*) 11 Moore, P. C. C. 427. See also Re Countess of Durham, 3 Curt. 57, 1 No. Cas. 365, 6 Jur. 176; Re Pewtner, 4 No. Cas. 479; Re Darby, ib. 427, 10 Jur. 164; Jorden *v.* Jorden, 2 No. Cas. 388; Re Dickens, 3 Curt. 60, 1 No. Cas. 398; Re Almosnino, 1 Sw. & Tr. 508, 29 L. J. Prob. 46; Re Willesford, 3 Curt. 77, 1 No. Cas. 404; Re Bacon, 3 No. Cas. 644; Re Mercer, L. R. 2 P. & D. 91; Re Greves, 1 Sw. & Tr. 250, 28 L. J. Prob. 18 (where the evidence of identity failed); but see Re Edwards, 6 No. Cas. 306; Collier *v.* Langebear, 1 No. Cas. 369; Re Sotheron, 2 Curt. 831, 1 No. Cas. 73, would not now be followed.
(*e*) Wood *v.* Goodlake, 4 Monthly Law Mag. 155, 1 No. Cas. 144. Compare Re Pascall, L. R. 1 P. & D. 606; Re Gill, L. R. 2 P. & D. 6.
(*ea*) Re Smartt, 4 No. Cas. 38: Re Bacon, 3 No. Cas. 644.
(*f*) 3 Ch. D. 269. The trusts that were invalid under the settlement being incorporated in and made part of the will, assumed the testamentary character in all respects, and became subject to ademption, &c.

"confirmed the settlement, dated," &c.: the settlement was not proved. Sir C. Hall, V.-C., said: "If a will confirms an instrument which is sufficiently identified, and probate passes leaving in the clause containing the confirmation, the instrument must, I consider, be had regard to as if it were set out in the probate." He held that the effect was as if the testatrix had declared "that the shares specified in the settlement should be held on the following trusts," and had then set out the trusts. So in Quihampton *v.* Going (*g*), where a testator referred to certain entries he had made in his ledger, as explaining his will, Sir G. Jessel, M. R., held that the ledger was incorporated with the will, and, though not admitted to probate, could be looked at by a court of construction, and that the entries therein were for the purposes of distribution of the estate conclusive — *i. e.* the M. R. treated them as part of the will, and not merely as evidence. These cases remove the doubt regarding the competence of the court of construction expressed by Dr. Lushington in Sheldon *v.* Sheldon (*h*).]

*93 * Cases in which there is reference to an existing paper, it is obvious, stand upon quite a different footing from those in which a testator (as often occurred under the old law) attempts to create, by a will duly attested, a power to dispose by a future unattested codicil. To allow such a codicil to become supplementary to the contents of the will itself, would, it is obvious, tend to introduce all the evils against which the Statute of Frauds was directed, and, indeed, give to the will an operation in the testator's lifetime, contrary to the fundamental law of the instrument. Accordingly, where a testator by a will, attested by three witnesses, devised his real estate to trustees, upon trust (subject to certain limitations thereby created) to convey the same to such persons and for such estates as he by deed or will, attested by two witnesses, should appoint; and the testator, professing to exercise this assumed power, executed an instrument attested by two witnesses, which he styled a deed-poll, and thereby carried on the series of limitations commenced in his will: it was decided, after much consideration, that this instrument operated as a codicil to the will, and, consequently, was

Testator cannot by his will empower himself to dispose by an unattested codicil.

(*g*) W. N. 1876, p. 209. See also Singleton *v.* Tomlinson, 3 App. Ca. 404, where probate had been *refused*: but this was not relied on.

(*h*) 1 Rob. 81, 3 No. Cas. 254, 8 Jur. 877. But as the regular practice of the Court of Probate is to require every paper entitled to probate to be proved, and the original (Re Pewtner, 4 No. Cas. 479), or, if it cannot be procured, an authenticated copy (Re Dickens, 3 Curt. 60, 1 No. Cas. 398; Re Howden, 43 L. J. Prob. 26), to be deposited, it is inexpedient to declare trusts of personalty by reference to another instrument. And although where the paper is in the hands of strangers who refuse even to produce it (Re Battersbee, 2 Rob. 439; Re Sibthorpe, L. R 1 P. D. 106) the rule is wholly dispensed with; and where the paper is of excessive length probate has been granted omitting the whole (Re Marquis of Lansdowne, 3 Sw. & Tr. 194, 32 L. J. Prob. 124; Re Dundas, 32 L. J. Prob. 165), or the immaterial parts (Re Countess of Limerick, 2 Rob. 313), — showing that the question is one of convenience; yet it appears by the foregoing cases that special application is generally necessary to procure a relaxation of the rule.

The question of including documents in the probate often arises where a testator has made distinct wills, one of property here, another of property abroad. Generally the former only need be proved here (Re Astor, 1 P. D. 150). But if one confirms the other so as to incorporate it, both will be included, Re Harris, L. R. 2 P. & D. 83; Re Howden, 43 L.J. Prob. 26.]

incapable of affecting the freehold lands, for want of an attestation by three witnesses (*i*).

On the same principle, it was decided, when personal property was disposable by a will not sufficient in point of execution to operate on freehold estates, that a testator could not so convert his real estate into personalty by a will duly attested, as to render it disposable by an unattested codicil, as personal estate (*k*).

[In Stubbs *v.* Sargon (*l*) it was contended, that on the same principle a devise of realty to "the persons who shall be in co-partnership with me at the time of my decease, or to whom * I shall have disposed of my business," was *94 void, as leaving it for the testator by some further act, not authorized by the Statute of Frauds, to select the devisee. But Lord Langdale, and on appeal Lord Cottenham, held the devise good. Lord Cottenham said that Habergham *v.* Vincent (*m*) was different, because there was in that case no disposition of the property, but only a power for the testator himself to dispose of it by instrument not attested according to the Statute of Frauds; but that here the disposition was complete. That the devisee, indeed, was to be ascertained by a description contained in the will, but that such was the case with many unquestionable devises where the devisees were to be ascertained by future natural events — *e. g.* devises to a second or third son, or by the act of a third person — *e. g.* where a father having two sons devises to such one of them as should not become entitled to an estate from a third person. In the latter case, the act of the third person determined who should take the father's estate. But the act was *not testamentary;* if it was, one man would be making another man's will. And if not testamentary when done by a third person, it could not be so when done by the testator himself; otherwise a testator could not devise to such person as, at his death, should be his wife or servant. And Lord Langdale said, if the description was such as to distinguish the devisee from every other person, it was sufficient without entering into the question whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the ordinary course of his affairs, or in the management of his property.

Stubbs *v.* Sargon. Devisee to be ascertained by future event or act.

The question is, therefore, Is the supplementary act testamentary? If it is, the devise is void; if it is not, then, although it is the sole act of the testator, the devise is good.]

The act must not be testamentary.

(*i*) Habergham *v.* Vincent, 2 Ves. Jr. 204, 4 B. C. C. 353; Rose *v.* Cunynghame, 12 Ves. 29; Wilkinson *v.* Adam, 1 V. & B. 422; Whytall *v.* Kay, 2 My. & K. 765; [Countess Ferraris *v.* Marquis of Hertford, 3 Curt. 468, 7 Jur. 262, 2 No. Cas. 230; Briggs *v.* Penny, 3 DeG. & S. 546; Johnson *v.* Ball, 5 DeG. & S. 85. These cases are to be distinguished from Smith *v.* Attersoll, 1 Russ. 266, where the paper was signed by the *trustees*, and operated as an admission of the trusts. In Metham *v.* Duke of Devon, 1 P. W. 530, a testator directed his executors to pay a sum of money as he should by deed appoint; and subsequently, by a deed referring to the will, he made an appointment, which the court held to be valid, on the ground that the deed was a part of the will, and in the nature of a codicil. The report does not state whether the deed was admitted to probate, as of course it ought to have been.]

(*k*) See Sheddon *v.* Goodrich, 8 Ves. 481; Hooper *v.* Goodwin, 18 Ves. 156; Gallini *v.* Noble, 3 Mer. 691. [(*l*) 2 Keen, 255, 3 My. & C. 507. (*m*) 2 Ves. Jr. 204.]

In one instance only, and that founded upon special grounds, not interfering with the principle in question, the freehold estate of a testator was, under the Statute of Frauds, indirectly liable to be affected by an unattested codicil.[1] This occurred where a testator had by a will, duly attested, charged his real estate with legacies; which charge, it was held, extended not merely to the legacies bequeathed by that will, but also to such as were subsequently bequeathed by an unattested codicil (*n*).

General charge of legacies extends to legacies given by unattested codicil.

*95 *This doctrine was considered to be warranted by the rule applicable in the case of a general charge of debts; for, since a testator may, after charging his real estate with debts, increase the burthen on the land to an indefinite extent, by contracting fresh debts, without any further direct act of oneration, it was thought that a charge of legacies ought, upon the same principle, to include legacies given by an unattested codicil; in short, that as a charge of debts extends to all debts which may happen to be owing at the testator's decease, so a charge of legacies extends to all legacies which shall *then* appear to be bequeathed.

If, however, a testator, instead of creating a general charge of legacies (leaving it to the ordinary rule to determine what are such), subjected his freehold estate expressly to such legacies as he should thereafter bequeath by an unattested codicil, *and direct to be paid out of his real estate*, this was considered as amounting, in effect, to the reservation of a power by will to charge the estate by an unattested codicil; and, consequently, the legacies bequeathed by such codicil did not affect the land. It will be perceived that such a case differs from that of a charge of legacies generally, in this respect, that, unless the codicil bequeathing a legacy expressed that the land should be charged

Limit of the rule which extends a general charge to legacies bequeathed by an unattested codicil.

(*n*) Hyde *v.* Hyde, 3 Ch. Rep. 83, 1 Eq. Ca. Ab. 409; Masters *v.* Masters, 1 P. W. 421; S. C. 2 Eq. Ca. Ab. 192, pl. 7; Lord Inchiquin *v.* French, Amb. 33; [Hannis *v.* Packer, ib. 556:] Brudenell *v.* Boughton, 2 Atk. 268; Habergham *v.* Vincent, 2 Ves. Jr. 204; S. C. 4 B. C. C. 353; Buckeridge *v.* Ingram, 2 Ves. Jr. 652; Sheddon *v.* Goodrich, 8 Ves. 481; Wilkinson *v.* Adam, 1 V. & B. 445. [It is remarkable that this singular exception, which later judges have professed not to understand, formed one of the instances by which Lord Cottenham supported his reasoning in Stubbs *v.* Sargon.]

[1] It is clear, that where a testator creates a general charge of legacies upon his lands, in and of the personal estate, by a will properly executed and attested under the Statute of Frauds, and afterwards by a codicil, not duly executed and attested to affect real estate, bequeaths additional legacies, if the personal assets be insufficient to pay the whole, then the legacies by the codicil will be charges upon the real estate, equally with those given by the will. See 1 Rop. Legacies by White, 456, c. 12, § 2. Consistency of principle would require that the testator might, by an unattested codicil, dispose of a part or the whole of his personal estate, exempt from debts and legacies; although such a power, like the former, would enable him by circuity to make the real estate the primary fund to answer those obligations. Ib. 457. But see Ram on Assets, c. 6, § 6, pp. 110, 111: Hooper *v.* Goodwin, 18 Ves. 167. It follows that he may by the like imperfect instrument alter or revoke all or any of the legacies contained in the will, and substitute others. Ib. The rules on this subject are too well established to be disturbed, though it may well be doubted whether they are perfectly consistent with the Statute of Frauds; for, in effect, the testator disposes of his land by an unattested codicil, when he is at liberty to burden it with legacies so given. See 2 Madd. Ch. 602, and cases cited; Dunlap *v.* Dunlap, 4 Desaus. 305, 322. But these distinctions have lost their importance in England, and in all states where wills of personal and of real estate are placed on the same footing.

therewith, it could not be charged; and, therefore, it was not chargeable on the land as legacy merely, but by the special onerating terms of an unattested testamentary instrument (*o*). If the testator had contented himself with charging his real estate with such legacies as he should bequeath by an unattested codicil, this would have been effectual. Thus, in Swift *v.* Nash (*p*), where a testator by his will directed the produce of real estate, which he had devised in trust for sale, to be applied in payment of the legacies which he might bequeath by any codicil or codicils to his will, it was held that an annuity given by an unattested codicil was a charge on the fund. Of course, where a testator by his will charges his lands with the payment of the legacies "*hereinafter*" bequeathed, the charge does not extend to legacies bequeathed by a codicil (*q*).

General charge of legacies to be bequeathed by codicil, valid.

"Hereinafter:" how construed.

*It is to be observed also that a general charge, either of debts or legacies, onerates the land only as an auxiliary fund, the personalty being still primarily liable; which circumstance has been so often mentioned as an ingredient in cases of this nature, as to suggest a doubt whether the rule under consideration would not be repelled by the absence of it (*r*), though, certainly, the analogy to a charge of debts suggests no such limitation of the doctrine; for if a person by his will charges his real estate with his debts, the charge will extend to all the debts which he owes at his decease, whether the personalty be exempted therefrom or not. At all events, it is clear that a testator, after having charged his real estate with legacies, without exempting the personal estate from its primary liability, may, by an unattested codicil, bequeath *any portion* of his personalty exempt from such liability, which, of course, would have the same effect in augmenting the burthen upon the land as an increase in the amount of the legacies (*s*). *96

Whether the doctrine applies where real estate is primarily charged.

In accordance with the suggested limitation of the doctrine to legacies payable out of the general personal estate, it seems to have been decided that, though such legacies once charged, by a will duly attested, might be revoked or modified by an unattested codicil (*t*), yet, that a sum, whether annual or in gross, which was charged specifically and exclusively upon land, was susceptible of no alteration in regard to the subject or object of the devise by means of an unattested codicil; and the circumstance that a certain portion of personalty was combined with the real estate in the charge would not vary the principle. And, therefore,

Sum charged specifically and exclusively upon land not revocable by unattested codicil.

(*o*) Rose *v.* Cunynghame, 12 Ves. 29. (*p*) 2 Kee. 20.
(*q*) Bonner *v.* Bonner, 13 Ves. 379; [Strong *v.* Ingram, 6 Sim. 197; Radburn *v.* Jervis, 3 Beav. 450; Early *v.* Benbow, 2 Coll. 355;] see also Bengough *v.* Edridge, 1 Sim. 173; [Rooke *v.* Worrall, 11 Sim. 216; Fuller *v.* Hooper, 2 Ves. 242; Jauncey *v.* Att.-Gen., 3 Giff. 308.
(*r*) See however per Lord Cairns, L. R. Ch. 587.] (*s*) Coxe *v.* Bassett, 3 Ves. 155.
(*t*) Brudenell *v.* Boughton, 2 Atk. 268; Att.-Gen. *v.* Ward, 3 Ves. 327.

where a testator devised an annuity out of a certain estate, *stock and utensils*, it was held not to be affected by an unattested codicil expressly revoking it (*u*). And even where a testator by a will, duly attested, gave all his real and personal estate to trustees, upon trust, out of the rents of the real and the produce of the personal estate, to pay his debts and funeral and testamentary expenses and legacies, and, *97 in the next place, * to pay two life annuities; and the testator, by a codicil, attested by one witness only, revoked one of the annuities, it was held that such annuity continued a charge upon the real estate (*x*). It seems difficult to say that the annuities were not payable in the first instance out of the personal estate (*y*); and in this point of view the case stands alone (*z*).

But, even where the charge on the land was confessedly auxiliary, yet it seems that if a testator, instead of expressly revoking the legacies bequeathed by his will, attempted by an unattested will to make an entirely new disposition of his freehold and personal estate, as this was operative on the personalty only, the legacies continued to be a charge on the real estate; because the effect of what the testator had done, was merely to withdraw one of the funds on which the legacies were charged, and not the legacies themselves (*a*). And it would be immaterial in such a case that the will contained an express clause of revocation of all former wills (*b*).

[Where a portion of a mixed fund, consisting of personal estate and of the proceeds of realty directed to be sold, was given by attested will, and the gift was revoked by an unattested codicil, it was held that the legatee was entitled to such proportion of the legacy as the realty bore to the personalty (*c*).]

Nor a mixed fund.

(*u*) Beckett *v.* Harden, 4 M. & Sel. 1. [See also Locke *v.* James, 11 M. & W. 901, where a testator devised land charged with 600*l.* a year, "which he gave to" A., and gave the residue of his estate, after paying annuities, &c., to B.; he then erased the "6" and interlined "3," and by ill-attested codicil recognized the alteration. A. distrained, and was held entitled to recover the full sum. In form, perhaps, this was rather an attempt to free the land, than a partial revocation of the annuity; but Parke, B., said that whether the amount had been reduced or not *in equity*, it made no difference *at law*.]

(*x*) Mortimer *v.* West, 2 Sim. 274. (*y*) See Fitzgerald *v.* Field, 1 Russ. 428.

(*z*) See Sheddon *v.* Goodrich, 8 Ves. 500. See also per Lord Cairns in Kermode *v.* Macdonald, L. R. 3 Ch. 584 (where by attested codicil personalty only was expressed to be withdrawn); and Coverdale *v.* Lewis, 30 Beav. 409, where the land was held auxiliary only.

(*a*) Buckeridge *v.* Ingram, 2 Ves. Jr. 652. (*b*) Sheddon *v.* Goodrich, 8 Ves. 499.

[(*c*) Stocker *v.* Harbin, 3 Beav. 479.]

Section II.

As to Personal Estate and Copyholds.

Nuncupative wills[1] were not forbidden by the Statute of Frauds, but were placed under such restrictions as practically abolished them; it being provided (sect. 19) that no nuncupative will should be good, where the estate bequeathed exceeded the value of thirty pounds, that was not proved by the oaths of three witnesses present at the making thereof; nor unless it

Stat. 29 Car. 2, c. 3, s. 19, concerning nuncupative wills.

[1] States in which nuncupative wills may be made: —

Alabama. Code, 1876, Title 4, ch. 2, p. 589.
Arkansas. Digest, 1874, ch. 135, p. 1014.
California. Codes & Stat. 1876, Vol. 1, Title 6, ch. 1, p. 722.
Colorado. Gen. Laws, 1877, ch. 103, p. 929.
Dakota. Rev. Code, 1877, Title 5, ch. 1, p. 343.
Delaware. Rev. Code. 1874, ch. 84, p. 509.
Florida. Bush's Digest, 1872, ch. 4, p. 76.
Georgia. Code, 1873, Title 6, ch. 2, p. 427.
Illinois. R. S. 1880. ch. 148, p. 1111.
Indiana. Stat. 1876, Vol. 2, ch. 3, p. 576.
Iowa. Rev. Code, 1880, Vol. 1, Title 16, ch. 2, p. 607.
Kansas. Comp. Laws, 1879, ch. 117, p. 1009.
Kentucky. Gen. Stat. 1873, ch. 113, p. 834.
Maine. R. S. 1871, ch. 74, p. 565.
Maryland. Rev. Code, 1878, art. 49, p. 421.
Massachusetts. Gen. Stat. 1860, ch. 92, p. 477.
Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1372.
Minnesota. Stat. 1878, ch. 47, p. 568.
Mississippi. Rev. Code, 1871, ch. 54, p. 527.
Missouri. R. S. 1879, Vol. 1, ch. 71, p. 684.
Nebraska. Gen. Stat. 1873, ch. 17, p. 300.
Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 200.
New Hampshire. Gen. Laws, 1878, ch. 193, p. 455.
New Jersey. Revision, 1709–1877, Vol. 2, p. 1245.
New York. R. S. 1875, Vol. 3, Title 1, ch. 6, p. 61.
North Carolina. Battle's Revisal, 1873, ch. 119, p. 849.
Ohio. R. S. 1880, Vol. 2, Title 2, ch. 1, p. 1440.
Oregon. Gen. Laws, 1843–1872, ch. 64, p. 789.
Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1475.
Rhode Island. Gen. Stat. 1872, Title 24, ch 171, p. 374.
South Carolina. R. S. 1873, Title 3, ch. 83, p. 447.
Tennessee. Stat. 1871, Vol. 2, Title 3, ch. 1, p. 999.
Texas. R. S. 1879, Title 99, p. 712.
Utah. Comp. Laws, 1876, Title 14. ch. 1, p. 265.
Vermont. Gen. Stat. 1862, ch. 49, p. 377.
Virginia. Code, 1873, Title 33, ch. 118, p. 910.
West Virginia. R. S. 1878, ch. 201, p. 1169.
Wisconsin. R. S. 1878, ch. 103, p. 651.

States in which only soldiers in actual service, or mariners at sea, can make nuncupative wills: —

Kentucky. Gen. Stat. 1873, ch. 113, p. 834.
Massachusetts. Gen. Stat. 1860, ch. 92, p. 477.
Minnesota. Stat. 1878, ch. 47, p. 568.
New York. R. S. 1875, Title 1, ch. 6, p. 61.
Oregon. Gen. Laws, 1843–1872, ch. 64, p. 789.
Rhode Island. Gen. Stat. 1872, Title 24, ch. 171, p. 374.
Virginia. Code, 1873, Title 33, ch. 118, p. 910.
West Virginia. R. S. 1878, ch. 201, p. 1169.

In California, nuncupative wills can be made only by soldiers in service or sailors at sea, or by a decedent who has been injured and is in immediate expectation of death from injuries received the same day. Cal. Codes & Stats. 1876, Vol. 1, Title 6, ch. 1, p. 722. Also in Dakota, R. C. 1874, Title 5, ch. 1, p. 343.

States in which nuncupative wills are invalid if exceeding the sums named: —

Texas. $30. R. S. 1879, Title 99, p. 912.
South Carolina. $50. R. S. 1873, Title 3, ch. 86, p. 447.
New Jersey. $80. Revision, 1709–1877, Vol. 2, p. 1245.
Indiana. $100. Stat. 1876, Vol. 2, ch. 3, p. 576.
Maine. $100. R. S. 1871, ch. 74, p. 565.
Mississippi. $100. Rev. Code, 1871, ch. 54, p. 527.
New Hampshire. $100. Gen. Stat. 1878, ch. 193, p. 456.
Nebraska. $150. Gen. Stat. 1873, ch. 17, p. 300.
Wisconsin. $150. R. S. 1878, ch. 103, p. 651.
Delaware. $200. Rev. Code, 1874, ch. 84, p. 509.

were proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that *98 such was his will, or to that effect; nor unless such * nuncupative will were made in the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she had been resident for ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling. It was also enacted that after six months passed after the speaking of the pretended testamentary words, no testimony should be received, to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.[1] It was nevertheless provided that any

Missouri. $200. R. S. 1879, Vol. 1, ch. 71, p. 684.

North Carolina. $200. Battle's Revisal, 1873, ch. 119, p. 849.

Vermont. $200. Gen. Stat. 1862, ch. 49, p. 377.

Tennessee. $250. Stat. 1871, Vol. 2, Title 3, ch. 1, p. 999.

Iowa. $300. Rev. Code, 1880, Vol. 1, Title 16, ch. 2, p. 607.

Indiana. $300. Stat. 1876, Vol. 2, ch. 3, p. 576.

Maryland. $300. Rev. Code, 1878, art. 49, p. 421.

Michigan. $300. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1372.

Alabama. $500. Code, 1876, Title 4, ch. 2, p. 589.

Arkansas. $500. Digest, 1874, ch. 135, p. 1014.

California. $1,000. Codes & Stat. 1876, Vol. 1, Title 6, ch. 1, p. 722.

Dakota. $1,000. Rev. Code, 1874, Title 5, ch. 1, p. 343.

Nevada. $1,000. Comp. Laws, 1873, Vol. 1, ch. 37, p. 200.

States in which three witnesses are required for nuncupative wills: —

Florida. Bush's Digest, 1872, ch. 4, p. 76.

Georgia. Code, 1873, Title 6, ch. 2, p. 427.

Maine. R. S. 1871, ch. 74, p. 565.

Maryland. Rev Code, 1878, art. 49, p. 421.

Nebraska. Gen. Stat. 1873, ch. 17, p. 300.

New Hampshire. Gen. Laws, 1878, ch. 193, p. 455.

New Jersey. Revision, 1709–1877, Vol. 2, p. 1245.

South Carolina. R. S. 1873, Title 3, ch. 86, p. 447.

Texas. R. S. 1879, Title 99, p. 712.

Wisconsin. R. S. 1878, ch. 103, p. 651.

States in which two witnesses are required for nuncupative wills: —

Arkansas. Digest, 1874, ch. 135, p. 589.

California. Codes & Stat. 1876, Vol. 1, Title 6, ch. 1, p. 722.

Colorado. Gen. Laws, 1877, ch. 103, p. 929.

Dakota. Rev. Code, 1877, Title 5, ch. 1, p. 343.

Delaware. Rev. Code, 1874, ch. 84, p. 509.

Illinois. R. S. 1880, ch. 148, p. 1111.

Indiana. Stat. 1876, Vol. 2, ch. 3, p. 576.

Iowa. Rev. Code, 1880, Vol. 1, Title 16, ch. 2, p. 607.

Kansas. Comp. Laws, 1879, ch. 117, p. 1009.

Kentucky. Gen. Stat. 1873, ch. 113, p. 834.

Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1372.

Mississippi. Rev. Code, 1871, ch. 54, p. 527.

Missouri. R. S. 1879, Vol. 1, ch. 71, p. 684.

Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 200.

North Carolina. Battle's Revisal, 1873, ch. 119, p. 849.

Ohio. R. S. 1880, Vol. 2, Title 2, ch. 1, p. 1440.

Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1475.

Tennessee. Stat. 1871, Vol. 2, Title 3, ch. 1, p. 999.

Utah. Comp. Laws, 1876, Title, 14 ch. 1, p. 265.

In Vermont, Gen. Stat. 1862, ch. 49, p. 377, a memorandum must be made in writing by some person present.

[1] Great strictness of proof is required in case of a nuncupative will, to show that all the requisites of the law have been complied with. Parsons *v.* Parsons, 2 Greenl. 298; Welling *v.* Owings, 9 Gill, 467; Bronson *v.* Burnett, 1 Chand. (Wis.) 136; Rankin *v.* Rankin, 9 Ired. 156; Woods *v.* Ridley, 27 Miss. 119. Thus it has been held that it must be made when the testator is in such extremity of his last sickness that there is no time or opportunity to make a written will. Yarnall's Will, 4 Rawle, 46; Prince *v.* Hazleton, 20 Johns. 502; Boyer *v.* Frick, 4 Watts & S. 357; Werkheiser *v.* Werkheiser, 6 Watts & S. 184; Reese *v.* Hawthorn, 10 Gratt. 548; Huus *v.* Palmer, 21 Penn. St. 296. A nuncupative will made by a consumptive person, nine days before her death, was held not to be valid, in Yarnall's Will, 4 Rawle, 46. So where it was made the day before

soldier, being in actual military service, or any mariner or seaman, being at sea (which was held to apply to seamen on board merchants' vessels), might dispose of his movables, wages, and personal estate, as before the act.[1] Such wills have been subjected to peculiar regulations by various statutes (*d*).

The enactment which prohibited, or rather, as we have seen, regulated nuncupative wills, was considered not to apply to a will which was reduced into writing during the lifetime and by the direction of the testator; such a will, therefore, was sufficient for the disposition of personal estate, though it had not been signed, and was never actually seen by the testator (*e*).[2] In two in-

What a good execution of a will of personalty.

(*d*) 26 Geo. 3, c. 63; 32 Geo. 3, c. 34, s. 1; 11 Geo. 4. c. 20, ss. 48, 49, 50; and 2 & 3 Will. 4, c. 40, ss. 14 & 15 [which are not affected by 1 Vict. c. 26, see ss. 11 and 12.]

(*e*) See Allen *v.* Manning, 2 Add. 490; Re Taylor, 1 Hagg. 641.

death, O'Neill *v.* Smith, 33 Md. 569. If nuncupative wills can be admitted at all in the case of chronic disorders, which make silent and slow but sure and fatal approaches, it is only in the very last stage and extremity of them. Prince *v.* Hazleton, 20 Johns. 502. Still, the words "last sickness" have not in all cases been held to mean in the very last extremity of life. The rule was somewbat relaxed in Johnston *v.* Glasscock, 2 Ala. 218. It must strictly appear that the testator specially called upon the witnesses to bear witness to the act. Bennett *v.* Jackson, 2 Phillim. 190; Winn *v.* Bob, 3 Leigh, 140; Haus *v.* Palmer, 21 Penn. St. 296; Taylor's Appeal, 47 Penn. St. 31. But see Baker *v.* Dodson, 4 Humph. 342. Where words are drawn from the testator by the person interested to establish them, they will not constitute a good nuncupative will. Brown *v.* Brown, 2 Murph. 350. But see Parsons *v.* Parsons, 2 Greenl. 298. A nuncupative will cannot be established upon proof, by one witness at one time, how the testator desired his property to be disposed of, and upon proof by another witness at a different time, that the testator made the same declaration to him. The requisite number of witnesses must be present at the same time; and the *rogatio testium* must also be at that time. Yarnall's Will, 4 Rawle, 64; Weeden *v.* Bartlett, 6 Munf. 123; Tally *v.* Butterworth, 10 Yerg. 501. Where a nuncupative will was not made at the "habitation" of the deceased, nor where he had resided for "ten" days next preceding, but was authenticated as the law required, it was held in Virginia that it ought to be deemed good, notwithstanding the deceased was very unwell when he left home, if afterwards he became more dangerously ill, and died at the place where the will was made. Marks *v.* Bryant, 4 Hen. & M. 91. The Virginia statute differs slightly in the wording from that of Car. 2. The Virginia act excepts the case "where the deceased is *taken sick from home* and dies," &c. The statute of Car. 2 excepts the case where he is "*surprised* or taken sick," &c. In the act of Virginia (1 Rev. Code, c. 104), respecting nuncupative wills, the word "habitation" means dwelling-house. Nowlin *v.* Scott, 10 Gratt. 64. See further, as to the proof of nuncupative wills, Dorsey *v.* Sheppard, 12 Gill & J. 192; Kelly *v.* Kelly, 9 B. Mon. 553; Burch *v.* Stovall, 27 Miss. 725.

[1] In reference to wills of seamen and those in actual military service, see Florance *v.* Florance, 2 Lee, 87; Zacharias *v.* Collis, 3 Phillim. 176; Ramsay *v.* Calcot, 2 Lee, 322; Euston *v.* Seymour, 2 Curteis, 339; In re Hayes, ib. 338; In re Donaldson, ib. 386; Master *v.* Stone, 2 Lee, 339; Warren *v.* Harding, 2 R. I. 133. A nuncupative will may be made by the captain of a coaster, while on a voyage, and at anchor in the mouth of a bay, and where the tide ebbs and flows. Hubbard *v.* Hubbard, 4 Seld. 196. A mariner at sea, being of sound mind and memory, and under no restraint, during his last sickness and within an hour of his death, was inquired of as to what disposition he wished to make of his property. He replied by declaring, in the presence of four witnesses, that he wanted his wife to have all his personal property, and this was allowed as a good nuncupative will. Hubbard *v.* Hubbard, 12 Barb. 148. And in such case it is not necessary that he should name an executor. Hubbard *v.* Hubbard, 4 Seld. 196.

[2] See Mason *v.* Dunman, 1 Munf. 456; Phœbe *v.* Boggess, 1 Gratt. 129. In order to the validity of a nuncupative will, the statute of New Hampshire requires that three witnesses present must be requested to bear witness to the will of the testator. The words must be spoken by the testator, with the intention thereby to make a final disposition of his property. And therefore verbal directions and instructions for drawing up a written will, although spoken in the presence of the proper number of witnesses required to bear witness thereto, and reduced to writing, and offered for probate according to the statute, do not, in that state, constitute a nuncupative will. Dockum *v.* Robinson, 6 Fost. 372. So in Virginia, it must appear that the deceased, at the time he spoke the alleged testamentary words, had

stances, however, the legislature imposed additional formalities of execution, namely, in regard to estates *pur autre vie*, as to the devise of which (though transmissible as personalty, unless where the heir takes as special occupant) the Statute of Frauds required three witnesses, and stock in the public funds, which, it was provided by certain acts of Parliament, should pass only by wills attested by two witnesses. But these exceptions to the general rule were, in a great measure, rendered nugatory, by the doctrine established by Ripley *v.* Waterworth (*f*), that an executor, taking freeholds *pur autre vie* as special occupant or even in the absence of special occupancy, under the statute of 14 Geo. 2, was bound to deal with them as part of the general personal estate of the deceased lessee, though bequeathed by a will not attested by three witnesses. The same principle would, it is conceived, *99 apply to estates *pur autre vie* and stock * *specifically* bequeathed, which an executor would unquestionably not be allowed to hold in opposition to a specific legatee claiming under an unattested will. Such a question, of course, cannot arise under a will which is subject to the present law, as the statute 1 Vict. has abolished all distinctions in regard to the mode of execution between the various species of property.[1]

Principles adopted by ecclesiastical courts in adjudicating on the validity of wills.

Although the law, until altered by that statute, did not require a will of personal estate to be authenticated by an attestation, or even by the signature of the testator, yet, in deciding on the validity of a will whose antiquity of date (*g*) brings it within that law, the Probate Courts do not confine themselves to the mere proof of the handwriting of the testa-

(*f*) 7 Ves. 425 [and see 18 Ves. 273, 1 Russ. 589, 11 M. & Wels. 323. But where the heir would have taken as special occupant, three witnesses were still required. Marwood *v.* Turner, 3 P. W. 166.

(*g*) In Pechell *v.* Jenkinson, 2 Curt. 273, an undated and unattested codicil was found to a will dated in 1830. The testatrix died in January, 1839. There was no evidence to show when the codicil was made, and it was held that, in such a case where the deceased was as likely to do what she had done before as after 1 Vict. c. 26, the presumption should rather be that it was done before, and was therefore valid. In Re Streaker, 4 Sw. & Tr. 192, 28 L. J. Prob. 50, the like presumption was made regarding unattested alterations. But cf. Benson *v.* Benson, L. R. 2 P. & D. 172.]

the present intention to make his will, and spoke the words with such intention. Winn *v.* Bob. 3 Leigh, 140. See also Gibson *v.* Gibson, Walker, 364; Reese *v.* Hawthorn, 10 Gratt. 548. But it has been held, in some courts, that a paper not completed as a written will may be established as a nuncupative will, where its completion is prevented by the act of God. Mason *v.* Dunman, 1 Munf. 456; Offut *v.* Offut, 3 B. Mon. 162; Boofter *v.* Rogers, 9 Gill, 44; Frierson *v.* Beale, 7 Ga. 438; Parkison *v.* Parkison, 12 Smed. & M. 673; Aurand *v.* Wilt, 9 Barr, 54. See, however, In re Hebden, 20 N. J. Eq. 473; Porter's Appeal, 10 Barr, 254. As to what amounts to the *animus testandi* in the case of a nuncupative will, see Broach *v.* Sing, 57 Miss. 115. A written will cannot be partly revoked by a nuncupative codicil. Brook *v.* Chappell, 35 Wis. 405.

[1] It was held in Mullen *v.* McKelvy, 5 Watts, 399, that the legality of the execution of a will must be judged by the law as it was when it was executed, and not as it was at the death of the testator. See Crofton *v.* Ilsley, 4 Greenl. 134. The contrary is held in Georgia. Sutton *v.* Chenault, 18 Ga. 1. See Hargroves *v.* Redd, 43 Ga. 142. A law passed after the making of a will, and before the death of the testator, was regarded as not affecting the *operation* of the will in Brewster *v.* McCall, 15 Conn. 274. See Carroll *v.* Carroll, 16 How. 275, 281. But this rule has many limitations, and is by no means generally adopted. See Van Kleeck *v.* Dutch Church, 20 Wend. 499; Hoffman *v.* Hoffman, 26 Ala. 535; Green *v.* Dikeman, 18 Barb. 535; Hargroves *v.* Redd, supra; Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterson, ib. 262.

tor (*h*) : the history of the instrument is carefully and diligently scrutinized, and with more or less jealousy in proportion as its contents appear to be conformable to, or irreconcilable with, the moral obligations of the testator, and any previously avowed scheme of testamentary disposition. In tracing such history, the custody in which the instrument is found is, of course, most important. If the will is discovered carefully preserved among the papers of the testator, or has been by him deposited in the hands of a confidential and disinterested friend, there is a strong presumption in its favor; while, on the other hand, should it come out of the custody of a person who is interested in its contents, suspicion is excited, and still more, if (as has sometimes happened) the alleged depositary remains in concealment, contenting himself with transmitting the document anonymously to some party interested in maintaining its validity; under such circumstances, indeed, the Ecclesiastical Courts have invariably rejected the alleged testamentary paper (*i*). Nothing, it is obvious, could be more dangerous than to assume and recognize the validity of a document, thus stamped with every mark of suspicion, on the mere strength of evidence as to the genuineness of the signature of the deceased, seeing with how much skill and success handwriting is frequently imitated; and this danger though * diminished, is not excluded *100 where the entire will (not the signature only) purports to be in the handwriting of the deceased (*k*). Where, however, the evidence of handwriting is in favor of the genuineness of the signature, and there is corroborative evidence, derived from circumstances, showing the probability of such a document having been executed, its validity will be recognized (*l*).

Copyholds were held not to be within the clause of the Statute of Frauds which required wills to be attested by three witnesses; and this seems to have been the result of the narrow construction which that section of the statute received from the courts of judicature, rather than of any restrictive terms in the enactment itself, the language of which, in the opinion of some judges of later times, was sufficiently comprehensive to have warranted its application to copyholds (*m*). It seems to have been thought, however, that as copyholds passed by the surrender and will taken together, and not by the will alone (the will merely declaring the uses of the surrender, and the effect being the same as if the devisee's name had been inserted in the surrender), a will of copyholds was not a devise or bequest of lands or tenements, within the 5th and 6th sections of the statute (*n*). The consequence was, that any instrument which was

Copyholds not within the Statute of Frauds.

(*h*) Machin *v.* Grindon, 2 Lee, 406; Crisp *v.* Walpole, 2 Hagg. 531; and other cases cited 4 Hagg. 224.
(*i*) Rutherford *v.* Maule, 4 Hagg. 213; Vussell *v.* Marriott, 1 Curt. 9.
(*k*) Rutherford *v.* Maule, 4 Hagg. 213. (*l*) [Wood *v.* Goodlake, 1 No. Cas. 144.]
(*m*) See 2 P. W. 258, 1 Ves. 227, 7 East, 322. (*n*) See 7 East, 322.

adequate to the testamentary disposition of personal estate was held to be sufficient for the devise of copyholds.

What constitutes a will of personalty and copyholds.

Accordingly not only did an unattested writing, signed by the testator, operate as an effectual devise of copyholds, but testamentary papers, neither authenticated by the signature, nor even in the handwriting of the testator, were adjudged to be sufficient, if reduced into writing during the life of the testator, by his direction. And though the ground upon which copyholds were held, originally, not to be within the statute, — namely, that the estate passed by the combined operation of the surrender and will, — did not apply to equitable interests, which cannot be the subject of a surrender, yet, the well-known maxim, *equitas sequitur legem*, required that they should be governed by the same rule (*o*). [Equitable interests in customary freeholds passing by surrender (or deed having the effect of a surrender), and admittance, seem to have stood on *101 the same * footing: though on this point the authorities are not quite distinct (*p*).]

As to incomplete papers.

Cases, however, sometimes occurred under the old law, and may possibly arise under the present, in which something more than a mere compliance with legal requirements was made necessary to the efficacy of the will by the testator himself; he having chosen to prescribe to himself a special mode of execution; for in such case, if the testator afterwards neglects to comply with the prescribed formalities, the inference to be drawn from these circumstances is, that he had not fully and definitively resolved on adopting the paper as his will.[1] Thus, if there is found among the papers of a testator a will, written in his own handwriting, and concluding with the usual words "In witness," &c., but to which the testator's signature is not attached, it is clear that such paper, bearing as it does such evident marks of incompleteness, is not entitled to be treated as the final will of the deceased (*q*); though adequate as a will in writing to satisfy the requisitions of the old law. On this ground, too, the prerogative court in several instances refused to grant probate of a paper, which the deceased had signed, and to which he had added a memorandum of attestation: he having died without ever making use of such memorandum, though he had abundant opportunity of doing so. Thus, in Beaty *v.* Beaty (*r*), where the deceased, who died on the 21st of March, 1822,

(*o*) Tuffnell *v.* Page, 2 Atk. 37, 2 P. W. 261, n.; Carey *v.* Askew, 1 Cox, 244; [Wildes *v.* Davies, 1 Sm. & Giff. 475.

(*p*) See Wilson *v.* Dent, 3 Sim. 385, *pro; contra*, Hussey *v.* Grills, Amb. 299, which case is doubted, 2 Scriv. Cop. p. 569; Willan *v.* Lancaster. 3 Russ. 108, seems to have gone on the question, whether the requisites of the power were complied with.]

(*q*) Abbott *v.* Peters, 4 Hagg. 380.

(*r*) 1 Add. 154; see also Walker *v.* Walker, 1 Mer. 503; [Scott *v.* Rhodes, 1 Phillim. 12; Harris *v.* Bedford, 2 Phillim. 177; Stewart *v.* Stewart, 2 Moo. P. C. C. 193.]

[1] See Murry *v.* Murry, 6 Watts, 353; Ex parte Henry, 24 Ala. 638. Instructions for a will may properly be amplified in the will itself; but, if the will contains essential variations from the instructions, it is invalid if such variations were not made known to the testator before execution. Davis *v.* Rogers, 1 Houst. 44.

left a testamentary paper, dated the 6th of June, 1820, signed by him, containing an attestation clause in the following words: "Signed, sealed, and delivered in the presence of," but which clause was not subscribed by any witnesses.[1] A person who had attested a former will of the deceased, proved a conversation with him, in which the deceased said, that he had destroyed the will formerly attested by him, and had made another (meaning, it should seem, the paper in question); Sir J. Nicholl said: "As the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, in his apprehension of it, till that operation was performed, the presumption of law is *against* a testamentary paper with an * attestation *102 clause not subscribed by witnesses."[2] The learned judge proceeded to observe, that "the presumption against an instrument so circumstanced was a slight one,[3] where the instrument, like that before the court, was perfect in all other respects (*s*). Slight as it was, however, it must be rebutted by *some* extrinsic evidence of the testator intending the instrument to operate in its subsisting state, before it could be admitted to probate."[4] In reference to the deceased's conversation with the attesting witness of the former will, the learned judge observed, that the mere vague declarations of testators that they have made their wills, are not always to be implicitly relied on; and can never, standing singly, supply proof of due execution, or, consequently, of what is to be taken in lieu of it. In common parlance, a man may well say, that he has made a will, when he has *written* a testamentary paper, though unfinished (*t*).

Paper rejected on account of an uncompleted form of attestation.

(*s*) See also Doker *v.* Goff, 2 Add. 42.

(*t*) These cases appear to have overruled some early decisions, in which imperfect papers were admitted to probate as wills; unless those decisions can be referred to the principle next adverted to in the text, which seems doubtful, as but little allusion is made in them to the point now so much regarded, — whether the non-completion of the instrument was the consequence of the voluntary neglect of the deceased, or of inevitable accident. See Cobbold *v.* Baas, 4 Ves. 200, n.; Haberfield *v.* Browning, ib. In Roe d. Gilman *v.* Heyhoe, 2 W. Bl. 1114, an instrument which was signed only was held to be a valid will for devising copyholds (having been proved in the Ecclesiastical Court), though in the *testimonium* clause it was referred to as being under the hand and seal of the testator. From the evidence, however, it appeared that the testator had subsequently treated it as his will. [See further on this subject, 1 Wms. Exors. pt. i., bk. ii., c. ii., s. 2.]

[1] Pett *v.* Hake, 3 Curteis, 612. A holograph will, with the name of a testator in the commencement, but not subscribed, with a blank left for the date, and containing an attestation clause, but without witnesses, was held not to be well executed in Waller *v.* Waller, 1 Gratt. 454. See Tilghman *v.* Steuart, 4 Harr. & J. 156; Watts *v.* Public Admr., 4 Wend. 168. An instrument with the requisite number of witnesses, one of whom is decided to be incompetent, may, nevertheless, be proved as a holograph will in North Carolina. Brown *v.* Beaver, 3 Jones, 516. See Outlaw *v.* Hurdle, 1 Jones, 150.

[2] See Scott *v.* Rhodes, 1 Phillim. 19; Harris *v.* Bedford, 2 Phillim. 177; Matthews *v.* Warner, 4 Ves. 186; 5 Ves. 23; Thomas *v.* Wall, 3 Phillim. 23; Robeson *v.* Kea, 4 Dev. 301; Waller *v.* Waller, 1 Gratt. 454; Rochelle *v.* Rochelle, 10 Leigh, 125; Watts *v.* Public Admr., 4 Wend. 168.

[3] Harris *v.* Bedford, Thomas *v.* Wall, supra; Buckle *v.* Buckle, 3 Phillim. 323; In re Jerram, 1 Hagg. 550; Doker *v.* Voff, 2 Add. Eccl. 42.

[4] Harris *v.* Bedford, Beaty *v.* Beaty, supra; In re Hurrill, 1 Hagg. 252; In re Wenlock, 1 Hagg. 551; In re Edmonds, 1 Hagg. 698; Bragge *v.* Dyer, 3 Hagg. 207.

Distinction where the testator is prevented from performing the concluding act of authentication.

Where, however, the testator's design of perfecting the paper is frustrated by sudden death, or insanity, or any other involuntary preventing cause, no inference of the absence of matured testamentary intention arises from the imperfect state of the document, which, therefore, notwithstanding its defect, will be accepted as the will of the deceased, provided it fully discloses his testamentary scheme.[1] As where an attorney had taken down from the deceased's own mouth a statement of his intentions respecting his property, which was read over to, and approved by him, and a fair copy directed to be made, and brought to him the next morning, to be executed as a will; but the testator died in the course of the night. Sir J. Nicholl held the direction to the attorney to make a fair copy, and to bring it the next morning for execution, to be conclusive of the testator having fully made up his mind on the subject of his will; and accordingly pronounced in favor of the testamentary paper (*u*).[2]

What an adequate preventing cause.

In order to warrant the reception of the unfinished *103 paper, it * is not necessary that there should have been a physical impossibility of the testator's completing it before his dissolution; it is enough that the obstacle was such as to account for its being left incomplete, without having recourse to the supposition of an immaturity or change of testamentary intention.[3] Thus, where a person went to the office of his attorney, on the 10th of December, and gave instructions for his will, promising to call and execute the will when prepared, which he never did, though he lived to the 15th; but, as it appeared that the deceased did not afterwards leave his house, the state of his health being such as to render his doing so inconvenient, though not impossible; and as an anxiety, expressed to the attorney, to conceal it from his (the deceased's) wife, supplied a reason for his not sending for the will to be executed at home, the court pronounced in favor of the written instructions taken down by the attorney, on the oral dictation of the deceased (*x*).

(*u*) Huntington *v.* Huntington, 2 Phillim. 213; see also Carey *v.* Askew, 1 Cox, 241.
(*x*) Allen *v.* Manning, 2 Add. 490.

1 Gaskins *v.* Gaskins, 3 Ired. 158. See Rohrer *v.* Stehman, 1 Watts, 442.

2 A paper not completed as a written will may, as has elsewhere been stated (ante, p. 98, note 2), sometimes be established as a nuncupative will. Offut *v.* Offut, 3 B. Mon. 162; Phœbe *v.* Boggess, 1 Gratt. 129; Mason *v.* Dunman, 1 Munf. 456. Still it must appear to contain the final determination of the testator as to the disposition of the estate, and his whole will respecting it. Rochelle *v.* Rochelle, 10 Leigh, 125; Malone *v.* Harper, 2 Stew. & P. 454; Doekum *v.* Robinson, 6 Foster, 372; Winn *v.* Bob, 3 Leigh, 140; Reese *v.* Hawthorn, 10 Gratt. 548.

3 Gaskins *v.* Gaskins, 3 Ired. 158. The cause which excuses a testator from signing his name, when he knows how to sign, must be a physical cause. The existence of such mental cause as delirium incapacitates the testator from completing the will. Jackson *v.* Moore, 14 La. Ann. 213. See further, Asay *v.* Hoover, 5 Barr, 21; Grabill *v.* Barr, ib. 441; Dunlop *v.* Dunlop, 10 Watts, 153; Sticker *v.* Groves, 5 Whart. 386, as to signatures made on behalf of the testator. Though some short time has elapsed between the period when it was in his power to have executed formally such writing and that when he was so incapacitated, yet if such delay proceeded merely from convenience, and not from any hesitancy as to the disposition he wished to make, or any desire to make changes therein, the paper-writing is a good will. Showers *v.* Showers, 27 Penn. St. 485.

But this doctrine in favor of imperfect papers obtains only, where the defect is in regard to some formal or authenticating act, and not where it applies to the contents of the instrument; for, if in its actual state the paper contains only a partial disclosure of the testamentary scheme of the deceased, it necessarily fails of effect, even though its completion was prevented by circumstances beyond his control.[1] And, therefore, where a person while dictating his will to an amanuensis, is stopped by sudden decease, or the rapid declension of his mental or physical powers, such paper cannot be admitted to probate, as containing his entire will, without the most unequivocal testimony that the deceased considered it as finished; and the fact that the paper professes to dispose of the deceased's whole estate is not conclusive as to its completeness, because testators not unfrequently begin with such a universal disposition, and then proceed to bequeath specific portions of their property, by way of exception thereout. And the inference that the alleged will discloses part only of the intended disposition, would be strengthened by the circumstance of its not embracing persons, who, from their intimate relationship to the deceased, and from the contents of a prior revoked will, it was rather to be expected would have been primary objects of his consideration (*y*).

Contents of the paper must be complete.

*In short, the presumption is always against a paper which bears self-evident marks of being unfinished;[2] and it behoves those who assert its testamentary character distinctly to show either that the deceased intended the paper in its actual condition to operate as his will, or that he was prevented by involuntary accident from completing it (*z*).[3] And probate will not be granted of such defective papers, without the consent or citation of the next of kin (*a*). *104

Presumption against unfinished papers.

It ought to be observed, however, that we are not to rank among inchoate or unfinished testamentary papers, one which is shown to have been intended to perform the office of a present will (if the expression may be allowed), though executed for a temporary purpose, as appears by the testator having designated it a "memorandum of an intended will," or "head of in-

Informal paper intended as a present will.

(*y*) Montefiore *v.* Montefiore, 2 Add. 354; see also Griffin *v.* Griffin, 4 Ves. 197, n. This case afforded two sufficient grounds for the rejection of the paper: first, that it was not the whole will; and, secondly, that its completion was not prevented by inevitable circumstances. [But loss of part of a will *once complete* does not necessarily exclude the remainder from probate, Sugden *v.* Lord St. Leonards, 1 P. D. 154.]

(*z*) Reay *v.* Cowcher, 1 Hagg. 75, 2 Hagg. 249; Wood *v.* Medley, 1 Hagg. 661; Re Robinson, ib. 643; Bragge *v.* Dyer, 3 Hagg. 207; Gillow *v.* Bourne, 4 Hagg. 192. As to the contrary presumption in favor of a regularly executed and apparently complete will, *vide* Shadbolt *v.* Waugh, 3 Hagg. 570; Blewitt *v.* Blewitt, 4 Hagg. 410.

(*a*) Re Adams, 3 Hagg. 258.

[1] See Rochelle *v.* Rochelle, 10 Leigh, 125; Murry *v.* Murry, 6 Watts, 353.

[2] Pett *v.* Hake, 3 Curteis, 612; McLean *v.* McLean, 6 Humph. 452.

[3] McLean *v.* McLean, supra. See Public Admr. *v.* Watts, 1 Paige, 347, where Mr. Chancellor Walworth reviews many of the cases on unfinished and incomplete testamentary papers. S. C. 4 Wend. 168.

structions," or "a sketch of an intended will which I intend to make when I get home," &c. And it has frequently occurred that a testator has ultimately adopted as his final will a paper so originally designed as instructions for, or in contemplation of, a more formal testament (*b*).

In all such cases, however, the Ecclesiastical Court required very distinct evidence of a testator eventually adhering to and adopting, as his deliberate will, the preliminary document, in case he afterwards lived long enough to have executed a more complete instrument (*c*). But cases of this kind depend so much upon their particular circumstances, that little is to be learnt from general positions; and the inquirer into the subject is recommended to consult the cases referred to below, a full statement of which the limits of the present work do not allow.[1]

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*105 *SECTION III.

Execution and Attestation of Wills made since the Year 1837.

THE statute 1 Vict. c. 26 (s. 9), provides, "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,[2] 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 (*d*) and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Execution of wills made since the year 1837.

[The provision in this enactment requiring the signature of the testator to be at the "foot or end" of the will (which was evidently intended only to do away with the rule before noticed, that the name of the testator written in the commencement, thus: "I, A. B., do make, &c.," was a sufficient signature), seems at first to have answered the purpose intended; subsequently, however, the Ecclesiastical Courts came to the conclusion that the words "foot or end" were to be construed strictly, and that

Provision requiring the signature to be at the foot or end;

(*b*) Barwick *v.* Mullings, 2 Hagg. 225; Hattatt *v.* Hattatt, 4 Hagg. 211; Torre *v.* Castle, 1 Curt. 303; [1 Wms. Exors. 62 et seq., 5th ed.]

(*c*) Dingle *v.* Dingle, 4 Hagg. 388; Coppin *v.* Dillon, ib. 361. [A subsequent complete will of course supersedes "Instructions for a Will." But sometimes the subsequent will refers to and incorporates the instructions; see Wood *v.* Goodlake, 1 No. Cas. 144.]

(*d*) The word "attest" is omitted from the corresponding Act of the Indian Council, see 5 Moo. P. C. C. 137.

[1] See Popple *v.* Cunison, 1 Add. 377; Sharp *v.* Sharp, 2 Leigh, 249; Mitchell *v.* Mitchell, 2 Hagg. 74; Public Admr. *v.* Watts, 1 Paige, 347; S. C. 4 Wend. 168; Hocker *v.* Hocker, 4 Gratt. 277.

[2] Under the Statute of Missouri, the person signing the name of the testator, at his request, must himself witness it, and state that fact, or the will is void. McGee *v.* Porter, 14 Mo. 611; ante, p. 79, note 1.

if the signature did not immediately follow *under* the dispositive part of the will, and in such a manner that nothing could be written between the signature and the last words, the will was not properly executed (*e*).[1] To obviate the inconveniences arising from these decisions, it was enacted by stat. 15 & 16 Vict. c. 24: —

"1. That where by an act of 1 Vict. (c. 26), it is enacted that no will shall be valid unless 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, every will shall so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at (*f*), or after, or following, or under, or beside, or * opposite to (*g*) the end of the will, that it shall be apparent *106 on the face of the will that the testator intended to give effect, by such his signature, to the writing signed as his will (*h*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately (*i*) after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause (*k*), or of the clause of attestation (*l*), either with or without a blank space intervening, or shall follow, or be after, or under, or beside, the names (*m*) or one of the names of the subscribing witnesses,

— repealed by 15 & 16 Vict. c. 24.

[(*e*) See the decisions on this point collected and observed upon, Sugd. R. P. Statutes.

(*f*) Re Woodley, 33 L. J. Prob. 154.

(*g*) Re Williams, L. R. 1 P. & D. 4, and cases there cited; Re Ainsworth, L. R. 2 P. & D. 151.

(*h*) Re Hammond, 3 Sw. & Tr. 90, 32 L. J. Prob. 200. In Trott *v.* Trott, 29 L. J. Prob. 156, 6 Jur. N. S. 760, the testator's name, occurring as the last words of a holograph will, was held a sufficient signature. In Sweetland *v.* Sweetland, 4 Sw. & Tr. 9, 34 L. J. Prob. 42, the first five sheets were signed and attested, but not the sixth and last, and the whole was rejected.

Parol evidence is admissible to show *quo animo* the testator signed his name. Dunn *v.* Dunn, L. R. 1 P. & D. 277.

(*i*) Page *v.* Donovan, 3 Jur. N. S. 220, where the signature was at the end of a notarial certificate, immediately following the will, and detailing the circumstances under which it was made, and it was held good.

(*k*) Re Mann, 28 L. J. Prob. 19; Re Dinmore, 2 Rob. 641.

(*l*) Re Walker, 2 Sw. & Tr. 354, 31 L. J. Prob. 62; Re Huckvale, L. R. 1 P. & D. 375; Re Casmore, ib. 653; Re Pearn, 1 Prob. D. 70.

(*m*) Re Jones, 34 L. J. Prob. 41; Re Puddephatt, L. R. 2 P. & D. 97; Re Horsford, L. R. 3 P. & D. 211.

[1] If a will be signed several times, the last signature, at least if at the end, is the efficient one, and erasure of this constitutes a revocation. Evans's Appeal, 58 Penn. St. 238. A signature of testatrix followed by appointment of executors and signature of witnesses, and followed again by further provisions, and signature of testatrix is not a signature at the end of the will. McGuire *v.* Kerr, 2 Bradf. 244; Glancy *v.* Glancy, 17 Ohio St. 134; Hays *v.* Harden, 6 Penn. St. 409.

Wills must be signed at the end in

Arkansas. Digest, 1874, ch. 135, p. 1012.

California. Codes and Stat. 1876, Vol. 1, Title 6, ch. 1, p. 720.

Dakota. Rev. Code, 1877, Title 5, ch. 1, p. 344.

Kansas. Comp. Laws, 1879, ch. 117, p. 1001.

Minnesota. Stat. 1878, ch. 47, p. 568.

New York. R. S. 1875, Vol. 3, ch. 6, p. 63.

Ohio. R. S. Vol. 2, ch. 1, p. 1425.

Pennsylvania. Bright. Purd. Digest, 1700–1872. Vol. 2, p. 1474.

In New Hampshire wills must be sealed, Gen. Stat. 1878, ch. 193, p. 445; also in Nevada, Comp. Laws, 1873, Vol. 1, ch. 37, p. 200.

or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature (*n*), or by the circumstance that there shall appear to be sufficient space (*o*) on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature, and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath, or which follows it (*p*): *nor shall it give effect to any disposition or direction inserted after the signature shall be made (*q*).

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"2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction, in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto, in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will."

The wording of this statute may perhaps seem needlessly particular to the reader who has not consulted the decisions which led to its enactment; but it is unnecessary to treat of those decisions here, since the 2d section of the statute renders it almost impossible that the validity of any will should hereafter come to be determined by them.

Alterations introduced by the recent enactments.

The points in which these enactments coincide with the Statute of Frauds have already been noticed, and the decisions thereon have been placed before the reader.

It remains to notice in what respects the law has been placed upon a new footing:—]

(*n*) Re Horsford, L. R. 3 P. & D. 211; Re Williams, L. R. 1 P. & D. 4. If, however, at the time of execution the paper is so folded that no writing is visible, it must be proved that the will was written before the testator signed. Re Hammond, 3 Sw. & Tr. 90, 32 L. J. Prob. 200.

(*o*) Re Williams, L. R. 1 P. & D. 4; Hunt *v.* Hunt, ib. 209; Re Archer, L. R. 2 P. & D. 252.

(*p*) Re Dallow, L. R. 1 P. & D. 189; Re Woods, ib. 556 (in which the appointment of executors followed the signature). But in a few cases the court has been satisfied by the mode of writing or by the context that a part which physically followed the signature belonged properly to that which preceded it. As where a sentence, which want of space prevented being completed at the bottom of a page, was continued, with an asterisk of reference, on a previous page, or at the back, Re Kimpton, 33 L. J. Prob. 153; Re Birt, L. R. 2 P. & D. 214. So where the will was written on the first and third sides, which it filled, and the signature was written crossways on the second (Re Coombs, L. R. 1 P. & D. 302). And where, a lithographed form occupying the first page, the will was written on and filled the second and third, but was signed in the form, this was held good. Re Wotton, L. R. 3 P. & D. 159. In all these cases it was proved that the part in question was written before execution. This proof failed in Re White, 30 L. J. Prob. 55, and the part was rejected.

(*q*) Re Arthur, L. R. 2 P. & D. 273.

1. Wills of real and personal estate are subject to the same rule [as to the ceremonial of execution], and such rule differs from that which previously obtained in regard to either species of property; two witnesses, instead of three, as formerly, are required to a will of freehold land, and two witnesses are also necessary to a will of personal estate or copyholds, which formerly required no attestation. Two witnesses required.

2. [The signature of the testator must be somewhere near the end of the instrument,[1] and so as not to be immediately over, or preceding any of the dispositive parts of the instrument, but it *need not immediately follow or be under any of the dispositive parts; whereas formerly the signature might be in any part of the instrument. *108 Position of testator's signature.

3. The signature of the testator is to be "made" or "acknowledged" (the "signature" and not, as formerly, the "will," being the subject of acknowledgment)][2] in the simultaneous presence of the witnesses (*r*), whereas formerly the signature might be "made" before one, and [the will] acknowledged before the rest, or acknowledged before all the witnesses separately, [without any of them having seen the signature.] Attestation.

4. A form of attestation is expressly dispensed with.

5. The witnesses are not required, as heretofore, to be "credible," and some modification has taken place in regard to the disqualification arising from interest.

[As to the 1st point: no question arises.

As to the 2d point: Lord St. Leonards' Act has left little room for question. The decisions will be found noted to the various clauses of the act in a previous page.

As to the 3d point: the following decisions have been made with regard to acknowledgment: —

(a) The signature to be acknowledged may be made by the testator, or by another for him (*s*). Acknowledgment of signature by testator.

(b) A testator, whether speechless or not, may acknowledge his signature by gestures (*t*).

(c) There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature (*u*), not even though the testator should expressly declare that the paper to be attested by them is his will (*v*).

(*r*) Moore *v.* King, 3 Curt. 243, 2 No. Cas. 45, 7 Jur. 205. As to what is the "presence" of the witnesses, see Smith *v.* Smith, L. R. 1 P. & D. 143; and the cases supra on the "presence" of the testator.

(*s*) Re Regan, 1 Curt. 908.

(*t*) Re Davies, 2 Rob. 337; and see Parker *v.* Parker, Milw. Ir. Eccl. Rep. 545.

(*u*) Re Harrison, 2 Curt. 863; Ilott *v.* Genge, 3 Curt. 160, 4 Moo. P. C. C. 265, 8 Jur. 323; Re Swinford, L. R. 1 P. & D. 631; and see Faulds *v.* Jackson, 6 No. Cas. Supp. 1.

(*v*) Hudson *v.* Parker, 1 Rob. 14, 8 Jur. 786; Shaw *v.* Neville, 1 Jur. N. S. 408; Beckett *v.* Howe, L. R. 2 P. & D. 1, is *contra*: *sed qu.*

[1] See In re Bullock, 3 Curteis, 750; In re Davis, 3 Curteis, 748. The testator's signature must be at the end in New York. Butler *v.* Benson, 1 Barb. 526. So in other states. See ante, p. 105.

[2] Ilott *v.* Genge, 3 Curteis, 160.

(d) When the witnesses either saw or might have seen the signature, an express acknowledgment of the signature itself is not necessary, a mere statement that the paper is his will (*x*), or a direction to *109 them to put their names under his (*y*), or even a * request by the testator (*z*), or by some person in his presence (*a*), to sign the paper, is sufficient.

(e) When the signature is seen or expressly acknowledged it is not material that the witnesses are not told that the instrument is a will (*b*), or are deceived into thinking that it is a deed (*c*).

(f) It is of course sufficient, on a re-execution, merely to acknowledge the signature made on a former execution (*d*).

It follows from what has been above stated that the will must be signed by or for the testator, and his signature must be acknowledged before *either* of the witnesses signs (*e*). The signature must be made or acknowledged in the presence of the witnesses simultaneously, and not at different times (*f*), and they must themselves subscribe their names in the presence of the testator, though not necessarily in the presence of each other (*g*).

Simultaneous presence of witnesses.

As to the 4th point of difference: the clause enacting that no form of attestation shall be necessary, has been much observed upon; but it seems to mean only that no clause need be appended to the will, stating that the requirements of the act have been complied with (*h*); and is not inconsistent with the provision that the witnesses are to "attest," as well as subscribe the will, the word "attest" meaning merely to act as a witness, which might in fact be done without subscription (*i*); although upon the construction of the act it may be that no attestation will satisfy its *110 requirements, except through the outward mark * of subscrip-

Attestation clause is unnecessary.

(*x*) Re Davis, 3 Curt. 748; Re Ashmore, ib. 756, 7 Jur. 1045; Gwillim *v.* Gwillim, 3 Sw. & Tr. 200, 29 L. J. Prob. 31; Re Huckvale, L. R. 1 P. &. D. 375.

(*y*) Re Philpot, 3 No. Cas. 2; Gaze *v.* Gaze, 3 Curt. 451, 7 Jur. 803; and see other cases mentioned by Lord St. Leonards, R. P. Stat. p. 338 et seq. (who seems to think that some of the decisions above cited are conflicting, or the earlier ones overruled by the later ones), and by Wms. Exors. Pt. I., Bk. II., ch. II. s. 2.

(*z*) Keigwin *v.* Keigwin, 3 Curt. 607, 7 Jur. 840.

(*a*) Re Bosanquet, 2 Rob. 577; Faulds *v.* Jackson, 6 No. Cas. Sup. 1; Re Jones, 1 Deane 3, 1 Jur. N. S. 1096; Inglesant *v.* Inglesant, L. R. 3 P. & D. 172. But see Morritt *v.* Douglas, ib. 1.

(*b*) Keigwin *v.* Keigwin, supra; Faulds *v.* Jackson, 6 No. Cas. Sup. 1.

(*c*) Sugd. R. P. Stat. p. 340; but see the observations of Sir H. J. Fust in Willis *v.* Lowe, 5 No. Cas. 432.

(*d*) Re Dewell, 17 Jur. 1130.

(*e*) Re Olding, 2 Curt. 865; Re Byrd, 3 Curt. 117; Cooper *v.* Bockett, ib. 648; Charlton *v.* Hindmarsh, 1 Sw. & Tr. 433, 8 H. L. Ca. 160. See also Re Summers, 7 No. Cas. 562, 14 Jur. 791, 2 Rob. 295, where, however, the testator acknowledged the will (if anything) and not his signature. As to what is sufficient evidence that the testator signed before the witnesses in cases where there is no direct proof that they saw the testator's signature, see Cooper *v.* Bockett, supra; Gwillim *v.* Gwillim, 3 Sw. & Tr. 200, 29 L. J. Prob. 31; Pearson *v.* Pearson, L. R. 2 P. & D. 451; Fischer *v.* Popham, L. R. 3 P. & D. 246.

(*f*) Re Allen, 2 Curt. 331; Re Simmonds, 3 Curt. 79; Moore *v.* King, ib. 243, 2 No. Cas. 45, 7 Jur. 205.

(*g*) Faulds *v.* Jackson, 6 No. Cas. Sup. 1, Sugd. R. P. S. 342. The *dictum contra* in Casement *v.* Fulton, 5 Moo. P. C. C. 140, has not been followed, Re Webb, 1 Deane, 1, 1 Jur. N. S. 1096.

(*h*) Bryan *v.* White, 2 Rob. 315, 14 Jur. 791.

(*i*) Ricketts *v.* Loftus, 4 Y. & C. 519; and see Freshfield *v.* Reed, 9 M. & Wels. 404; Burdett *v.* Spilsbury, 10 Cl. & Fin. 340; Hudson *v.* Parker, 1 Rob. 14, 8 Jur. 788.

tion (*k*). The "subscription," "attestation," and "form of attestation," thus refer to matters essentially different.]

Still, it will be the duty of persons who superintend the execution of wills, not to be content with a bare subscription of the witnesses' names, but to make them subscribe a memorandum of attestation, recording the observance of all the circumstances which the statute makes necessary to constitute a valid execution (*i.e.* that the signature was made, or acknowledged, by the testator in the presence of the witnesses, both being present at the same time, and that they subscribed their names in his presence); for, though such statement in the memorandum of attestation is not conclusive, and does not preclude inquiry into the fact, it would afford a much stronger presumption that the statutory requisition had been complied with, than where it is wanting; [and in the absence of such a memorandum, the witnesses are always called upon by the Court of Probate to make an affidavit that the statute was in fact complied with.] It will not be advisable for a testator, [except where absolutely necessary,] to avail himself of the privilege, which the new act expressly confers (as the Statute of Frauds, according to the construction which it received from the judicature, also did), of acknowledging the signature before the witnesses,[1] instead of signing it in their presence, or of the permission to sign by the hand of another. The latter expedient, indeed, ought to be restricted in practice (though the legislature has not so limited it) to cases of extreme physical weakness, rendering it impossible or difficult for the testator to write his name; in such cases, even the exertion of making a mark might be oppressive. Where a testator is unable to write from ignorance, perhaps a mark is to be preferred to a signature by the hand of another, as being the more usual mode of execution by illiterate persons;[2] for in regard to this and all other particulars, the prudent course is to make the execution of the will conform as much as possible to the testator's ordinary mode of executing instruments. Where the will is signed by a third person on behalf of the testator, the signature, of course, should [though, as we have before seen, it need not necessarily] be in the name of the testator, rather than that of the amanuensis, who should merely be designated in the memorandum of attestation; where it * would be proper (though not necessary) that the peculiar mode of execution should be stated. *111

As to testator's signing by the hand of another.

As to signing by mark or by amanuensis.

As to the 5th point: it will be observed, that in the clause above

(*k*) See per Sir C. Cresswell, Charlton *v.* Hindmarsh, 1 Sw. & Tr. 439, 5 Jur. N. S. 581, 28 L. J. Prob. 132.]

1 See Gaze *v.* Gaze, 3 Curteis, 451; Keigwin *v.* Keigwin, ib. 607.

2 Where the testator, having by paralysis lost the use of his speech and limbs, signed a will with a mark, and it was duly attested, probate was granted, in In re Field, 3 Curteis, 752.

Attesting witnesses not required to be credible.

stated, which regulates the attestation of wills, the legislature has dropped the requisition of credibility, as an ingredient in the qualification of the witnesses; and has, moreover (s. 14), expressly provided, 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.[1]

Persons incompetent to give evidence qualified.

It seems to have been generally considered, that this provision not only qualifies persons who have been rendered infamous by conviction for crime to be attesting witnesses (as it clearly does), but, that it even gives validity to the attesting act of an idiot or lunatic. This, however, seems very questionable. The signature, it will be observed, is required to be made or acknowledged by the testator in the *presence* of the witnesses; which would seem to imply that they should be mentally conscious of the transaction, according to the construction which was given (as we have seen (*l*)) to the same word occurring in the devise clause of the Statute of Frauds, which required that the attesting witnesses should subscribe in the testator's "presence;" such requisition being held not to be satisfied in a case, in which the testator fell into a state of insensibility, before the witnesses had subscribed their names to the memorandum of attestation; and the 14th section of the recent statute seems to be perfectly consistent with such a construction; for that clause does not in terms dispense with all personal qualifications in the witnesses to perform the act; it only removes the legal disqualification, arising out of incompetency to give evidence of the fact in a judicial proceeding, which evidently may coexist with intellectual capacity, as in the case of a person whose credibility of character has been destroyed by conviction for crime, a species of disqualification which was peculiarly inconvenient, as the testator might have been unaware of its existence, so that there was a special reason for its removal, which does not apply to palpable infirmity. Surely, if the legislature intended to enact so novel (not to say absurd) a doctrine, as that the functions of an attesting witness might be performed by any one who could scratch a *112 *paper without the least glimmering of intellectual consciousness, this would have been done in terms more clear and ex-

Doubt whether qualification extends to lunatics, or other persons mentally incapable.

(*l*) Ante, p. 87; [and see the judgment of Dr. Lushington in Hudson *v.* Parker, 1 Rob. 14, 8 Jur. 786.]

1 "Credible witness" means one competent, not disqualified at the time of attestation, to be sworn and to testify in a court of justice. Lord *v.* Lord, 58 N. H. 7; Carlton *v.* Carlton, 40 N. H. 14; Hawes *v.* Humphrey, 9 Pick. 350; Sparhawk *v.* Sparhawk, 10 Allen, 155; ante p. 90. Hence a witness incompetent by reason of interest is not "credible." Lord *v.* Lord, supra. Interest, at common law, to be disqualifying, must be present, certain, and vested. Ib. And the statute of New Hampshire (and the same is generally true), which declares that interest shall not disqualify a witness, is not applicable to the attestation of wills. Ib.

plicit, than by providing that persons incompetent to be admitted as witnesses to prove the execution of a will, should be sufficient attestators — expressions which seem rather to suppose a personal ability on the part of the witnesses to *perform* the act, but a legal disability to *prove* it. Perhaps the point is not very likely to occur in practice; for no testator would think of choosing an idiot (*m*) or lunatic as an attesting witness to his will, unless he were content to have his own sanity called in question. And here it may be observed, that the enlarged license now given, in regard to the qualification of witnesses to wills, will not induce any prudent person to abate one jot of scrupulous anxiety, that the duty of attesting a will be confided to persons, whose character, intelligence, and station in society, afford the strongest presumption in favor of the fairness and proper management of the transaction; and preclude all apprehension in purchasers and others, as to the facility with which the instrument could be supported in a court of justice, against any attempt to impeach it; and now that the requisite number of witnesses is reduced to two, it is the more easy, as well as important, that the selection should be governed by a regard to such considerations. A devise or bequest to an attesting witness still, as under the old law, does not affect the validity of the entire will, but merely invalidates the gift to the witness, whose competeney the legislature has established by destroying his interest; and hence the remarks on this enactment have more properly found a place in a preceding chapter, which treats of the disqualifications of devisees (*n*).

Suggestion as to selection of witnesses.

[By the 21st section it is 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 snch alteration shall not * be apparent, unless such alteration shall be executed in like *113 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" (*o*).]

Alterations to be signed and attested.

(*m*) Supposing such persons to be, technically speaking, competent attesting witnesses, the effect of employing two such witnesses would be to render it necessary to have recourse to the testimony of other persons, for the purpose of proving the circumstances of the execution, which could not, in such case, be done (as it usually is) out of the mouths of the witnesses themselves; and it is to be observed that, although, in the case of a deceased witness, proof of handwriting is sufficient, the presumption being, that the will was duly attested, especially if the facts essential thereto were recorded in a memorandum of attestation, which was subscribed by the deceased; yet it does not follow that any such presumption would arise in the case of a lunatic witness, whose subscription (though his handwriting might be proved), could not be considered as affording any security that attention had been paid to the requisitions of the statute. (*n*) Ante, p. 70.

[(*o*) See Re Wingrove, 15 Jur. 91; Re Hinds, 16 Jur. 1161; Re Treeby, L. R. 3 P. & D. 242.]

The recent enactments, it will be perceived, preclude in reference to all wills to which they apply, many of the questions which arose under the Statute of Frauds. The cases respecting the local position of the testator's signature, and as to the admissibility of an acknowledgment, as a substitute for signing before the witnesses, the necessity of publication, and the qualifications of attesting witnesses, are obviously no longer applicable. The statute has also, by assimilating wills of real and personal estate in regard to the ceremonial of execution, gotten rid of the numerous questions which arose out of attempts by testators to create, by an attested will, a power to dispose of or charge their real estate by an unattested codicil; and hence, that part of the present chapter which treats of these several subjects ranges itself under the mass of legal learning, which recent legislation has rendered, or rather will eventually render, obsolete.

How far doctrines of this chapter extend to wills made since 1837.

The prevention of all questions as to due execution must still mainly depend on the prudence and attention of the practitioner, who will, of course, take care to preclude all doubt as to whether the testator did see the attesting witnesses subscribe, or whether he might have seen them (for this, it will be remembered, is the true point of inquiry), by placing the witnesses and the testator in immediate juxtaposition in the same room during the whole business of the attestation; nor will he for a moment be content to rely on the doctrine to be noticed hereafter, which connects an attested codicil with a prior unattested will or codicil, as a ground for dispensing with a regular clause of attestation to each separate testamentary paper.

Having regard to the necessity [that the signature should now not be above or precede the dispositive part of the will,] it seems *114 advisable, when a testator is *in extremis*, that the first or * only signature should be at the end; for it has sometimes happened that a testator who has begun to sign the several sheets has expired or become insensible before he had reached the last.

Section IV.

Defective Execution supplied by Reference, express or implied.

It remains to be considered in what cases a codicil duly attested communicates the efficacy of its attestation to an unattested will or previous codicil,[1] so as to render effectual any devise or bequest which may be contained in such prior unattested

Whether attestation of codicil ap-

[1] See Ch. VIII.

instrument.[1] It has been repeatedly decided, [in cases not affected by stat. 1 Vict. c. 26,] where the several attested and unattested instruments were written on the same paper, that the latter were rendered valid.

plies to previous will.

1. Before the act 1 Vict. c. 26.

Thus, in De Bathe *v.* Lord Fingal (*p*), where a testator made a will for the purpose (among others) of appointing guardians to his children. This will was attested by one witness only. The testator afterwards executed a codicil to the will, written on the same sheet of paper, and attested by three witnesses, and which was declared to be a codicil to his will thereunto annexed.[2] The attestation was held to apply to the will, so as to constitute it a good testamentary appointment of guardians within the statute of 12 Car. 2, c. 24, which required that the appointment should have been signed in the presence of two witnesses.

Where codicil refers to will and both are written on same paper.

So, in Doe d. Williams *v.* Evans (*q*), where A. made a will professing to devise freehold property, but which was neither signed nor attested, though an attestation clause was drawn out; a fortnight afterwards a codicil was written below this clause on the same sheet of paper, in the following terms: "I, A., make a codicil to the foregoing will, and thereby ordain that my wife B. be entitled to 200*l.* of my property in case she marry." (There was no date.) It was signed by the testator and attested by three witnesses, who simply wrote their names under the word "Witness." The Court of Exchequer held, that the execution and attestation applied to the whole of what was on the paper; and, consequently, that the will was duly attested for the devise of freeholds. The court relied much on Carleton *v.* Griffin (*r*), and on the circumstance of the codicil referring to * the will: *115 Bayley, B., observing, that if the codicil had not referred to the will, he should have thought that it did not set up that instrument.

In the preceding cases the attested codicil referred to the unattested

(*p*) 16 Ves. 167. (*q*) 1 Cr. & Mees. 42, [3 Tyr. 56. (*r*) 1 Burr. 549.]

[1] It appears to be an open question in England whether a codicil can be resorted to in the interpretation of the will, in order to show a contrary intention to that which the will clearly indicates. In re Clarke's Estate, Law Rep. 14 Ch. D. 422 (Court of App). It is apprehended that the general impression in this country is that the codicil may be so used, on the ground that both instruments are to be deemed but one will.

[2] A codicil with three competent witnesses may be a republication of a will, so as to give effect to a devise otherwise void, on account of the devisee being a witness to the original will. Mooers *v.* White, 6 Johns. Ch. 374, 375. In this case the codicil was indorsed and written on the back of the original will, and by the codicil the testator "approved, ratified and confirmed the former last will and testament, except so far as the same was thereby altered;" and he declared the codicil "to be part and parcel of his last will and testament, within written." A will executed under undue influence may be republished and confirmed by a codicil executed afterwards, when the testator is free from such influence. O'Neall *v.* Farr, 1 Rich. 80. The effect of a codicil, ratifying, confirming, and republishing a will, is to give the same force to the will, as if it had been written, executed, and published, at the date of the codicil. Brimmer *v.* Sohier, 1 Cush. 118; Armstrong *v.* Armstrong, 14 B. Mon. 333; Beall *v.* Cunningham, 3 B. Mon. 390. See Van Cortlandt *v.* Kip, 1 Hill, 590; Johnson *v.* Clarkson, 3 Rich. Eq. 305. Hence the attestation of a codicil is an attestation of the will annexed or sufficiently referred to. Brown *v.* Clark, 77 N. Y. 369.

Where both are on same paper but without express reference.

document, but this was not essential where both were written on the same sheet of paper. Thus, in Guest *v.* Willasey (*s*), where a testator, on the back of his will which was duly attested, wrote three codicils of different dates, of which the last alone was attested by three witnesses, *and which did not in terms refer to the preceding codicils*, but merely partially revoked an appointment of executors made by the second codicil, it was held, that the third codicil operated as a republication, not only of such second codicil, but also of the first, between the contents of which and of itself there was no connection.

Remarks upon the preceding cases.

As in all the preceding cases the attested and unattested instruments were contained in the same paper, *possibly* it might have been considered that the memorandum of attestation, appended to the posterior document, was intended to apply to both; but the line of argument adopted by the court in Doe *v.* Evans (where it will be remembered the codicil in terms referred to the will) does not admit of the case being referred to this principle, but rather leads to the conclusion, that the result would have been the same if the unattested will and the attested codicil had been detached,[1] the only effect of their being united in the same paper being to render unnecessary any express reference to the unattested document for the purpose of identifying it. And the observations which fell from the Court of K. B. in Utterton *v.* Robins (*t*) indicate a strong inclination in that court to a similar opinion. [And the point is not now open to question. Thus in Aaron *v.* Aaron (*u*), a testator made a will and two codicils, each on a separate paper. He described the first codicil as a codicil to his will dated &c., and directed it to be annexed to his said will, but it was unattested: by the second the testator recited that he had made and duly executed his will dated &c., and a codicil annexed thereto and dated &c.; he described it as a second codicil to his said will, and directed it to be annexed thereto and to be taken as a second part thereof: this codicil was duly attested, and it was held by Sir K. Bruce, V.-C., *116 that the first codicil was * set up by the second. It could make no difference, he observed, whether the codicil was written on the same paper as the will or not; a codicil was referred to, and there was no dispute what the instrument was.] These authorities show that no reliance is to be placed on the early case of Att.-Gen. *v.* Baines (*x*), where a testator made a will in his own handwriting, but without witnesses, and afterwards made a codicil, wherein he recited and took notice of the will, which codicil was subscribed by four witnesses, and it was treated as clear by the L. C. that the will was inoperative to devise freehold lands.

(*s*) 12 J. B. Moo. 2, [3 Bing. 614.] (*t*) 1 Ad. & Ell. 423, 2 Nev. & M. 821.
[(*u*) 3 De G. & S. 475. See also Allen *v.* Maddock, 11 Moo. P. C. C. 427, stated post, p. 119.] (*x*) Pre. Ch. 270, 3 Ch. Rep. 10.

[1] Harvy *v.* Chouteau, 14 Mo. 587; In re Smith, 2 Curteis, 796.

It should seem, however, that where the attested codicil is detached from and does not refer to the unattested will or previous codicil, it will not have the effect of curing the defective execution of such prior testamentary document.

Where an attested codicil refers to the will but not to a prior unattested codicil.

Thus, in Utterton *v.* Robins (*y*), where a testator, by several unwitnessed memoranda, subsequent to his will (which was duly attested), left a freehold house, which, among other estates, he had acquired since the date of the will, to his daughter, and afterwards made the following codicil, which was duly attested: "I make this a further codicil to my will, which bears date 12th Sep. 1823; I give and devise all real estates, purchased by me since the execution of my said will, to the trustees therein named, their heirs, &c., to the uses and upon the trusts therein expressed concerning the residue of my real estates;" it was certified on a case from Chancery, that the house passed to the trustees and not to the daughter.

In this case the language of the second codicil seemed to repel the supposition, that the testator intended the estates purchased since the execution of the will to pass by the prior codicil; unless, indeed, when he speaks of his "will," he is to be understood (*z*) as referring to all the prior testamentary documents, including the unattested codicil, according to the principle laid down by Sir L. Shadwell in Gordon *v.* Lord Reay (*a*), where a testator, by a second codicil (which was duly attested), after * reciting his will (which was also duly attested) by date, *117 expressly confirmed all his provisions and bequests in it in favor of a certain individual: and the V.-C. was of opinion that this confirmation had the effect of entitling her to the benefit of a charge created on his freehold estates, by a prior unattested codicil, on the ground that the second codicil amounted to a republication (*b*) of the first. "The first codicil," he said, "is part of the will, and if the second codicil is a republication of the will, it is a republication of everything that is part of the will. The second codicil does refer to the will; it ratifies and confirms the will and everything that is part of it."

Whether the "will" includes a codicil added thereto.

[But this decision has been questioned. "It may well be," said Sir G. Jessel, in Burton *v.* Newbery (*c*), "that where you describe a will generally without date, and say, 'I confirm my will,' you might inter-

(*y*) 1 Ad. & Ell. 423, 2 Nev. & M. 821.

[(*z*) Not that he was in fact so understood; the court showed not obscurely that it thought there was no sufficient reference to the will. Besides, the testator had not purchased any real estate since the execution of his "will" in the wider sense.]

(*a*) 5 Sim. 274; see also Crosbie *v.* Macdoual, 4 Ves. 610; [Farrer *v.* St. Catherine's College, L. R. 16 Eq. 19; Green *v.* Tribe, 9 Ch. D. 231; all referred to post, Chap. VII. *ad fin.*, where the comprehensiveness of the word "will" is considered with reference to the subject of revocation and revival. In Green *v.* Tribe, Fry, J., points out the distinction between cases where the narrower sense would operate to revoke a clear gift contained in a previous valid codicil, and where it only fails to set up a previous invalid codicil.]

(*b*) As to republication, see post, Chap. VIII.

[(c) See Piggott *v.* Wilder, 26 Beav. 90, where the reference was to the will of another person. See also Fuller *v.* Hooper, 2 Ves. 242; Jauncey *v.* Att.-Gen., 3 Gif. 308, where the question was whether "legacies herein mentioned" included legacies given by codicil.

pret the word 'will' as including the whole of the testamentary disposition (*d*); but it appears to me that that was not the case in Gordon *v.* Lord Reay. . . . The only reference was to a will bearing date a certain day, that is, as I understand it, to a described instrument, which excludes instruments of subsequent date." On this principle in Burton *v.* Newbery, where a testator made his will, and then made a codicil, which was attested by A. and B., who took benefits under the codicil, and afterwards made another codicil "to his last will dated," &c., which was duly attested, but did not refer to the prior codicil (all these instruments being on separate papers), it was held by the M. R. that the second codicil did not republish the first, and, consequently, that the gifts to A. and B. under the first codicil failed. But this strictness of interpretation may be excluded by the context. Thus in Aaron *v.* Aaron (*e*), where the second codicil referred specifically to the will and first codicil each by its date, and then confirmed the will only, it was argued that this indicated a clear intention to confirm the will exclusively, and the V.-C. admitted that the argument was apposite; but referring to the other terms of the codicils, he said the intention *118 of the second codicil, as collected from the whole of * it, was to confirm the first codicil. It was indeed obvious that the testator intended to leave two codicils.

2. Since 1 Vict. c. 26.

A codicil not duly attested is not now included in the term "codicils" where there are duly attested codicils to satisfy its strict meaning.

Since the stat. 1 Vict. c. 26, there is this further reason against applying Gordon *v.* Lord Reay as an authority for holding an unattested paper to be included under a reference to the "will;" namely, that such a paper is not now, as it formerly was, admissible to probate, and cannot properly be regarded as part of the will or as a codicil to it. If therefore a testator makes several codicils, some of which are, but others are not, duly attested, a subsequent codicil confirming "his will and codicils" confirms only the duly attested codicils.

This point was determined in Croker *v.* Marquis of Hertford (*f*).

Case of Croker *v.* Hertford.

Dr. Lushington delivered the judgment of the privy council, and said, that "the strict and primary sense of the word 'codicil' was a testamentary instrument which would, *per se*, become valid immediately on the death of the testator; that the words of the codicil in the case before him, when so interpreted, were sensible with reference to extrinsic circumstances; for there were codicils duly executed so as to come within the strict and primary sense; therefore, according to the rule of construction stated by Mr. Wigram (*g*), how-

(*d*) 1 Ch. D. 234, 240; Gordon *v.* Lord Reay was treated as an authority (together with Doe *v.* Evans) by K. Bruce, V.-C., in Aaron *v.* Aaron. See also Radburn *v.* Jervis, 3 Beav. 460.

(*e*) 3 De G. & S. 475, stated above, p. 115.

(*f*) 4 Moo P. C. C. 339, 8 Jur. 863, 3 No. Cas. 150, affirming S. C. (nom. Countesa Ferraris *v.* Marquis of Hertford), 3 Curt. 468, 7 Jur. 261, 2 No. Cas. 230.

(*g*) Wigram on Wills, p. 17.

ever capable the words might be of another and popular interpretation, or however strong the intention of the testator, the strict and primary sense must be adhered to." On the same principle, Sir H. J. Fust held (*h*), that codicils not duly attested, though written on the same paper as the will, were not ratified by a codicil of subsequent date which referred only to the will. But, as was implied in the reasons given for those decisions, the case is different where there is no instrument which satisfies the strict meaning of the words of reference. Another rule of construction stated by the same learned writer (*i*) then prevails. For where there is nothing in the context of a will to make it apparent that a testator has used words in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, the court may look into the extrinsic circumstances to see whether the meaning of the words be sensible in any popular or secondary sense, of which with reference to these circumstances they are capable. Accordingly, in * Ingoldby *v.* Ingoldby (*k*), where there was a paper purporting to be a codicil, and subsequently the testator duly executed a codicil not referring to the paper, except by being called "*another* codicil to my will," Sir H. J. Fust held that the first paper, purporting to be a codicil, was thereby rendered valid, and he distinguished the case from Croker *v.* Marquis of Hertford, on the ground that there were not, as in that case, any duly executed codicils to which the last codicil could be held to refer.

Nor in the term "will."

A different rule prevails where there is no duly attested codicil;

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In Allen *v.* Maddock (*l*) the subject was fully discussed by Lord Kingsdown. In that case a will was made and signed in the presence of one witness only. Afterwards the testatrix made a codicil which commenced: "This is a codicil to my last will and testament," and was duly executed. No other will having been found, it was held in P. C., upon parol evidence of the circumstances, that the two papers, as together containing the will and codicil, were entitled to probate. From Lord Kingsdown's judgment, it is clear that the question whether an imperfectly executed paper is made effectual by a later perfectly executed one depends on the question whether the earlier paper is incorporated in the later: in other words, whether the reference be such as with the assistance (if necessary) of parol evidence of the circumstances will be sufficient to identify it. Difficulties will of course sometimes arise upon the evidence (*m*); for instance, a reference by a testator to his last will, or to a first or second codicil, is a reference in its own nature to one instrument to the exclusion of all others, and the

or duly attested will.

To supply defect of execution the defective instrument must be incorporated.

(*h*) Haynes *v.* Hill, 7 No. Cas. 256, 1 Rob. 795, 13 Jur. 1058.
(*i*) Wigram on Wills, Prop. 3.
(*k*) 4 No. Cas. 493. (*l*) 11 Moo. P. C. C. 427, affirming 3 Jur. N. S. 965.
(*m*) See Re Allnutt, 33 L. J. Prob. 86.

description identifies the instrument; but a *general* reference to codicils, of which there may be several, is different, and probably not easy to render effectual by extrinsic evidence. But where the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to the admission of the evidence that by possibility circumstances might have existed in which the instrument referred to could not have been identified. In short, any unattested paper which would have been incorporated in an attested will or codicil executed according to the Statute of Frauds, is now in the same manner incorporated if the will or codicil is executed according
*120 to the requirements of the act 1 Vict. c. 26, but with this * important distinction, that since that act an unattested codicil is not part of the will for any purpose, and consequently is not incorporated or confirmed by a codicil of subsequent date referring only to the will (*n*).

The principle being thus the same under both statutes, it follows that, subject to the distinction just noted, the circumstance of the well-executed instrument being written on the same paper as the imperfectly executed one must still be regarded as materially helping to identify the latter as the document referred to by the former (*o*). And a distinction may fairly be drawn between a case where the later and well-executed instrument contains a reference, more or less particular, to another document, and a case where the later and well-executed instrument contains no *express* reference to any other; in the latter case the mere circumstance of its being on the same paper with others may possibly furnish ground for *implying* a reference to all the others, so as to incorporate and set up all. Such appears to have been the case in Guest *v.* Willasey (*p*), where the third codicil was thus: "I now appoint A. to be my executor in the room of B. above mentioned, with full power to act, &c. Witness my hand." So, in Re Cattrall (*q*), where, underneath his will, a testator wrote and signed some unattested additions; and under these he afterwards wrote some further additions, which were duly signed and attested; it was held by Sir W. P. Wilde that the presumption was that this signature and attestation were intended to apply, and that they gave effect, to all that went before. But this presumption is rebutted by an express reference of narrower scope. Thus a reference to the "will" does not set up an unattested writing, though all three are on the same paper, the unattested writing, as we have seen, not being a part of the will (*r*).

(*n*) See 11 Moo. P. C. C. 455, 461; and as to incorporation, supra, p. 89.
(*o*) Re Terrible, 1 Sw. & Tr. 140. In re Smith, 2 Curt. 796, 1 No. Cas. 1, and Re Claringbull, 3 No. Cas. 1, this circumstance existed; but even without it they are covered by Allen *v.* Maddock and Ingoldby *v.* Ingoldby, supra.
(*p*) 2 Bing. 429, 3 Bing. 614, ante, p. 115.
(*q*) 33 L. J. Prob. 106.
(*r*) Re Willmott, 1 Sw. & Tr. 36; Re Peach, ib. 38. See also Haynes *v.* Hill, 1 Rob. 795, 7 No. Cas. 256, 13 Jur. 1058; Re Phelps, 6 No. Cas. 695; Re Hutton, 5 No. Cas. 598.

An unexecuted alteration in a will is not rendered valid by a codicil ratifying and confirming the will, unless in such * codicil the alteration be specially referred to (*t*), or *121 unless it be proved affirmatively by extrinsic evidence that the alteration was made before the codicil (*u*); and even then, if it appear to be deliberative only, it will not be included in the probate (*x*).]

Unexecuted alterations when rendered valid by subsequent codicil.

(*t*) Lushington *v.* Onslow, 6 No. Cas. 183, 12 Jur. 465. As to presuming when alterations were made, see Ch. VII. s. 2, *ad fin.*

(*u*) See per Sir H. J. Fust, ib.; Re Tegg, 4 No. Cas. 531; Re Wyatt, 2 Sw. & Tr. 494, 31 L. J. Prob. 197.

(*x*) Re Hall, L. R. 2 P. &. D. 256.]

*CHAPTER VII. *122

REVOCATION OF WILLS.

SECTION I.

By Marriage and Birth of Children, or Marriage alone.

Effect of marriage alone under old law;

UNDER the law which existed prior to the act of 1 Vict. c. 26, the marriage of a woman absolutely revoked her will, and that, too, though her testamentary capacity was subsequently restored by the event of her surviving her husband (*a*).[1] [But

— in case of a woman;

a will made by a woman before marriage, and operating as an appointment under a power, was not necessarily revoked

(*a*) Forse and Hembling's case, 4 Rep. 61, And. 181; Cotter *v.* Layer, 2 P. W. 624; Doe *v.* Staple, 2 T. R. 695; see also Hodsden *v.* Lloyd, 2 B. C. C. 533; [Long *v.* Aldred, 3 Add. 48.

[1] Will of *feme sole* revoked by marriage:
Alabama. Code, 1876, Title 4, ch. 2. p. 586.
Arkansas. Digest, 1874, ch. 135, p. 1013.
California. Codes & Stat. 1876, Vol. 1, Title 6, ch. 1, p. 723.
Dakota. Rev. Code, 1877, Title 5, ch. 1, p. 346.
Indiana. Stat. 1876, Vol. 2, ch. 3, p. 572. See Vail *v.* Lindsay, 67 Ind. 528.
Missouri. R. S. 1879, Vol. 1, ch. 71, p. 680.
New York. R. S. 1875, Vol. 3, ch. 6, p. 64. See Brown *v.* Clark, 77 N. Y. 369.
Oregon. Gen. Laws, 1843–1877, cb. 64, p. 788.
Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1477. See Fransen's Will, 26 Penn. St. 202.
Contra in Illinois. In re Tuller, 79 Ill. 99. And in Massachusetts, Church *v.* Crocker, 3 Mass. 17, 21. See Wheeler *v.* Wheeler, 1 R. I. 364.
The rule that by marriage the will of a woman was revoked is sometimes said to have been founded upon the husband's marital rights in her property. If he was excluded from such rights, the will was not revoked. Morton *v.* Onion, 45 Vt. 145. See also In re Carey, 49 Vt. 236. Indeed, by the law of Rhode Island, the marriage of a *feme sole* testatrix operates as only a presumptive revocation of her will. Miller *v.* Phillips, 9 R. I. 141. See Wheeler *v.* Wheeler, 1 R. I. 364. And this presumption may be rebutted by oral declarations of the testatrix after marriage. Ib. It is perhaps a preferable way of putting the ground of revocation at common law to say that a will must be ambulatory during the lifetime of the testator; and as by marriage the testatrix disables herself from making any other will, the will already made would cease to be ambulatory if still valid. Hodsden *v.* Lloyd, 2 Brown, Ch. 534; Brown *v.* Clark, supra. Nor is the rule deemed to be changed in New York by reason of the fact that marriage is no longer a bar to the making of a will by a woman. Brown *v.* Clark. Revocation by marriage under the statute is absolute and not a presumptive intention. Ib. It is also important to observe that the fact that a married woman who had, previously to her marriage, executed a valid will survives her husband does not at common law restore validity to the will. Ib. On the other hand the will of a *feme covert*, made during marriage under a settlement, is not revoked by her surviving her husband. Morwan *v.* Thompson, 3 Hagg. 239; Clough *v.* Clough, 3 Mylne & K. 296. And of course the survivorship of either husband or wife cannot affect the will of a married woman executed under the enabling acts.

by her marriage (*b*); nor was a will so operating and made during the coverture necessarily revoked by the death of the husband (*c*).]

The marriage of a man, however, had no such revoking effect upon his previous testamentary disposition, in regard to either real or personal estate,[1] on the ground, probably, that the law had made for the wife a provision independently of the act of the husband by means of dower; nor did the birth of a child alone revoke a will made after marriage, since a married testator must be supposed to contemplate such event; and the circumstance that the testator left his wife *enceinte* without knowing it, was held not to impart to the posthumous birth any revoking effect (*d*).[2] —in case of a man.

Marriage and the birth of a child conjointly, however, revoked a man's will, whether of real or personal estate,[3] these * circumstances producing such a total change in the testator's situation as to lead to a presumption that he could not intend a disposition of property previously made to continue unchanged.[4] This rule (which was borrowed from the civil law (*e*)) was applied by the ecclesiastical courts to wills of per- *123

Old rule as to revocation by marriage and birth of children.

(*b*) Logan *v.* Bell, 1 C. B. 872; and compare Douglas *v.* Cooper, 3 My. & K. 378.

(*c*) Morwan *v.* Thompson, 3 Hagg. 239; Clough *v.* Clough, 3 My. & K. 296; Du Hourmelin *v.* Sheldon, 19 Beav. 389. But of course if the power be given to the wife "in case she dies in the lifetime of her husband," and in case of her surviving, the property is given to her absolutely, a will made during coverture is inoperative if the wife survives, as the power never arose, Price *v.* Parker, 16 Sim. 198; Trimmell *v.* Fell, 16 Beav. 537; Willock *v.* Noble, L. R. 7 H. L. 580; and will not even raise a case of election, Blaiklock *v.* Grindle, L. R. 7 Eq. 215.] (*d*) Doe *v.* Barford, 4 M. & Sel. 10.

(*e*) The civil law evinced a marked anxiety to guard children from the consequences of negligent omission, or capricious exclusion from the testamentary dispositions of their parents. To exclude a son, it was not sufficient that he was not named in his father's will, but it was necessary *expressly* to disinherit him. "Qui filium in potestate habet, curare debet, ut

[1] Will of man revoked by marriage: —
California. Codes & Stat. 1876, Vol. 1, Title 6, ch. 1, p. 723.
Georgia. Code, 1873, Title 6, ch. 2, p. 427.
Kentucky. Gen. Stat. 1873, ch. 113, p. 834.
Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1477.
Virginia. Code, 1873, ch. 118, p. 910.
West Virginia. R. S. 1878, ch. 201, p. 1169.
Will revoked by the marriage of the "testator": —
California. Codes & Stat. 1876, Vol. 1, Title 6, ch. 1, p. 723.
Dakota. Rev. Code, 1877, Title 5, ch. 1, p. 346.
Georgia. Code, 1873, Title 6, ch. 2, p. 427.
Illinois. R. S. 1880, ch. 39, p. 422.
Nevada. Comp. Laws, 1873, ch. 37, p. 201.
Will of man or woman revoked by his or her marriage: —
Kentucky. Gen. Stat. 1873, ch. 113, p. 834.
North Carolina. Battle's Revisal, 1873, ch. 119, p. 854.
Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1477.
Virginia. Code, 1873, ch. 119, p. 910.
West Virginia. R. S. 1878, ch. 201, p. 1169.

[2] Will revoked by marriage of testator and birth of child: —
Alabama. Code, 1876, Title 4, ch. 2, p. 586.
Arkansas. Digest, 1874, ch. 135, p. 1013.
California. Codes & Stat. 1876, Vol. 1, Title 6, ch. 1, p. 723.
Dakota. Rev. Code, 1877, Title 5, ch. 1, p. 346.
New York. R. S. 1875, Vol. 3, ch. 6, p. 63.
Oregon. Gen. Laws, 1843–1872, ch. 64, p. 788.
Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1466.

[3] The rule stated in the text applies as well to a case where the testator had children by a former wife, who are provided for in the will, as where he was without children at the time it was executed. Havens *v.* Van Den Burgh, 1 Denio, 27.

[4] Brush *v.* Wilkins, 4 Johns. Ch. 506; Warner *v.* Beach, 4 Gray, 162; Bancroft *v.* Ives, 3 Gray, 367; Coates *v.* Hughes, 3 Binn. 498; Walker *v.* Hall, 34 Penn. St. 483; Edwards's Appeal, 47 Penn. St. 144; Havens *v.* Van Den Burgh, 1 Denio, 27; Bloomer *v.* Bloomer, 2 Bradf. Sur. 339; 4 Kent, Com. 527.

sonalty, at an early period (*f*), and was more recently and reluctantly extended to devises of freehold estates, its application to which had been supposed to be precluded by the Statute of Frauds (*g*); but Christopher *v.* Christopher (*h*), which occurred in 1771, and another decision which speedily followed (*i*), closed all controversy on the point. The case of Christopher *v.* Christopher also decided that the revocation was not confined to the case of an unmarried testator; but equally applied, where a married man made a will, then survived his wife, married again, and had issue by his second wife. It was also immaterial that the birth of the child was posthumous, and that the probability of such birth was never disclosed to the testator; as the doctrine does not suppose that, in every particular instance, an intention to revoke actually exists; but it annexes to the will a tacit condition that the party does not intend it to come into *operation, if there should be a total change in the situation of his family (*k*).[1]

Rules of the civil law in regard to filial claims to a provision.

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It has never been decided, whether to produce revocation the children must spring from the subsequent marriage, or it is sufficient that a testator has future children of an existing marriage, survives his wife, and then marries again, but has no children by the second wife. In Gibbons *v.* Caunt (*l*), Sir R. P. Arden, M. R., inclined to the conclusion that the order of the events made no difference, and that the will was equally revoked in either case.

Question whether children must spring from subsequent marriage.

eum hæredem instituat, vel exhæredem eum nominatim faciat. Alioquin, si eum silentio prætereierit, inutiliter testabitur; adeo quidem ut et si vivo patre filius mortuus sit, nemo hæres ex eo testamento existere possit; quia scilicet ab initio non constiterit testamentum." Just. Inst. lib. 2, cap. 13, s. 5. And the rule was extended to the children of a son who was dead, or ceased to be under his father's power; and was further extended by Justinian to *all* the children of a testator, female as well as male, and all the other descendants by the male line. Lib. 2, c. 13, s. 5. And even the arrogation of an independent person, or the adoption of a child under the power of its natural parent (in respect of which the civil law makes special provisions), was a revocation of an antecedent will. "Si quis enim post factum testamentum adoptaverit sibi filium per imperatorem, eum, qui est sui juris aut per prætorem, secundum nostram constitutionem, eum, qui in potestate parentis fuerit, testamentum ejus rumpitur, quasi agnatione sui hæredis." Lib. 2, c. 17, s. 1. The civil law, too, left it open to children to complain, not only that they were omitted in a will, but that they were unjustly disinherited; and the suggestion in such a case was, that the testator was disordered in his senses, though, to support his allegation, it was only necessary to prove that the will was inconsistent with the duty of a parent. See Just Inst. lib. 2, c. 18, De inofficioso testamento. Happily these laws, so hostile to the spirit and genius of our free constitution, have never found a reception in this country, whose sound policy it has been to leave unfettered the power of disposing of property.

(*f*) Overbury *v.* Overbury, 2 Show. 242; Lugg *v.* Lugg, 2 Salk. 592, [1 Ld. Raym. 441, 12 Mod. 236;] Brown *v.* Thompson, 1 Eq. Ab. 413, pl. 15; Eyre *v.* Eyre, 1 P. W. 304 n., and Cas. cit. 2 Ed. 266, 1 Phillim. 478.

(*g*) See Parsons *v.* Lanoe, 1 Ves. 192, [1 Wils. 243, Amb. 557;] Gibbons *v.* Caunt, 4 Ves. 848.

(*h*) Dick. 445, cit. 4 Burr. 2182. (*i*) Spraage *v.* Stone, Amb. 721.

(*k*) Doe *v.* Lancashire, 5 T. R. 49; [Israell *v.* Rodon, 2 Moo. P. C. C. 51; Matson *v.* Magrath, 1 Rob. 680, 6 No. Cas. 709, 13 Jur. 350.]

(*l*) 4 Ves. 848.

1 Revocation of a will cannot be implied by law from the death of the testator's wife and of one of his children, leaving issue, and the birth of another child contemplated in the will. Warner *v.* Beach, 4 Gray, 162.

[Marriage and the birth of issue do not produce revocation [1] of a will made before 1838, where there is a provision made for the wife and children by the will itself (*m*), or, it is conceived, by settlement executed previously to the will. But it follows, from the doctrine before alluded to, viz., that this kind of revocation is the result of a tacit condition annexed to the will, taken in connection with the circumstances as they exist at the date of its execution, that a provision for wife and children, under a settlement executed *after* the will, cannot prevent revocation, as it might have done if the question had been one merely of intention (*n*). Neither will a provision for the wife alone suffice, though made before the will (*o*); and it is not clear that a provision for children alone, though made before the will, would be sufficient for that purpose; for since the revocation by marriage and the birth of children results from a tacit condition annexed to the will, that it shall be so revoked unless both wife and children are provided for, and is not dependent on the testator's intention, no circumstance demonstrative of a contrary intention on his part,[2] such as a provision for children (though the birth of children necessarily supposes marriage), can affect the question. And Kenebel *v.* Scrafton (before referred to) in terms confines the exception to the case where both wife and children are provided for.]

Effect of provision for future wife or children, or both.

According to the opinions of Lord Mansfield (*p*), Lord * Ellenborough (*q*), [and Tindal, C. J. (*r*),] the revocation does not take place where the will disposes of less than the whole estate.[3] Supposing this to be clear (though it has never been positively decided), it would remain to be considered, whether a will which actually, though not professedly, disposes of the testator's entire estate, as where there are particular gifts sufficient to absorb the whole, but no residuary disposition, falls within

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Effect where will disposes partially only.

[(*m*) Kenebel *v.* Scrafton, 2 East, 530. This decision was overlooked by Sir C. Cresswell in Re Cadywold, 1 Sw. & Tr. 34, 27 L. J. Prob. 36, which cannot therefore be taken as an authority.

(*n*) Israell *v.* Rodon, 2 Moo. P. C. C. 51; overruling Talbot *v.* Talbot, 1 Hagg. 705; Johnston *v.* Wells, 2 Hagg. 561, and apparently Ex parte Earl of Ilchester, 7 Ves. 348; see also Matson *v.* Magrath, 1 Rob. 680, 6 No. Cas. 709, 13 Jur. 350.

(*o*) Marston *v.* Roe d. Fox, 8 Ad. & Ell. 14, 2 Nev. & P. 504, which seems to overrule Brown *v.* Thompson, 1 Eq. Ab. 413, pl. 15.]

(*p*) Brady *v.* Cubit, Doug. 31.

(*q*) Kenebel *v.* Scrafton, 2 East, 541.

[(*r*) Marston *v.* Roe d. Fox, 8 Ad. & Ell. 57.]

[1] Brush *v.* Wilkins, 4 Johns. Ch. 510; Yerby *v.* Yerby, 3 Call, 334; Fox *v.* Marston, 1 Curteis, 494; 4 Kent, 523; Havens *v.* Van Den Burgh, 1 Denio, 27. But in Israell *v.* Rodon, 2 Moore, P. C. 51, it was held that marriage and birth of a child do not afford presumptive evidence of intention to revoke, but are in themselves an absolute revocation of a will made previous to marriage, and not in contemplation of it; the rule being that there is a tacit condition annexed to the will, at the time of making it, that it should not have effect, provided the deceased marry and have a child subsequently born. Such tacit condition is applicable to a will of personal as well as real estate, and is annexed to it at the time of making the will, which speaks from that period, and not from the testator's death. The same was held as to real estate in Marston *v.* Fox, 8 Ad. & E. 14. But see Fox *v.* Marston, 1 Curteis, 494. See to the same effect Jacks *v.* Henderson, 1 Desaus. 543, 557.

[2] See Brush *v.* Wilkins, 4 Johns. Ch. 510; Yerby *v.* Yerby, 3 Coll. 334; 4 Kent, 523; Havens *v.* Van Den Burgh. 1 Denio, 27; 2 Greenl. Ev. § 684. But Israell *v.* Rodon, supra, is *contra*.

[3] Havens *v.* Van Den Burgh, 1 Denio, 27; Yerby *v.* Yerby, 3 Call, 337, per Roane, J.

the principle. [Considering, however, that the inquiry is not what the testator intended, but of the fact whether the wife and children be provided for, it can scarcely be doubted that this question would, if it arose, be answered in the affirmative.] In Marston *v.* Roe (*s*), it was contended that the descent of an after-acquired real estate upon the child, in whose favor the will was contended to be revoked, prevented the revocation; but Tindal, C. J., who delivered the judgment of the Court of Exchequer Chamber, expressed a decided opinion against allowing the question of revocation, depending upon a tacit condition annexed to the will, to be influenced by circumstances posterior to its execution; though, as the court considered that what had here descended to the child was a mere legal estate, the case did not raise the point.

Will not revoked in favor of a pre-existing child.

It seems, also, that marriage and the birth of a child or children revoke a will which is subject to the old doctrine, only where the effect of throwing open the property to the disposition of the law, would be to let in such after-born child or children; for, if it would operate for the exclusive benefit of a pre-existing child, the ground for subverting the will fails. Thus in Sheath *v.* York (*t*), where a testator having a son and two daughters, directed his real and personal estate to be sold for payment of his debts and for the benefit of those children. The testator was at that time a widower; he married again, and had issue, one child. The question arose on a bill filed by the creditors for a sale, whether the will was revoked as to the real estate. Sir W. Grant held that it was not.[1] "In all the cases," he said, "the will has been that of a person who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been to let in such after-born heir to take an estate disposed of by a will made before his birth. The condi-
*126 tion implied in these cases was, that the testator, when * he made his will in favor of a stranger, or more remote relation, intended that it should not operate if he should have an heir of his own body. In this case, there is no room for the operation of such a condition, as this testator had children at the date of the will, of whom one was his heir apparent, and was alive at the period of the second marriage, of the birth of the children by that marriage, and of the testator's death. Upon no rational principle, therefore, can this testator be supposed to have intended to revoke his will on account of the birth of other children, those children not deriving any benefit whatever from the revocation, which would have operated only to let in the eldest son to the whole of that estate, which he had by the will divided between the eldest son and the other children of the first marriage."[2]

(*s*) 8 Ad. & Ell. 14.

(*t*) 1 Ves. & B. 390.

[1] But see Havens *v.* Van Den Burgh, 1 Denio, 27.

[2] Under the Pennsylvania Act of 19th April, 1794, marriage or birth of issue amounts to a revocation of a will previously made only so far as regards the widow, or

The reasoning of the M. R. extends only to cases in which the heir is among the pre-existing children; and, it is probable, that the revocation would take effect, notwithstanding the existence of such children, where the consequence of the intestacy would be to cast the estate on one of the subsequently born children (being an eldest or only son), or upon the children of both marriages (all being daughters). Such is the rule in regard to personal estate (this, or at least the children's share of it, being distributable among all the children *pari passu*), a testamentary disposition of which has been decided to be revoked by a subsequent marriage and birth of children, notwithstanding the prior existence of children (*u*).[1] These observations assume, that the effect of the will being revoked by the application of the doctrine in question, will be to produce intestacy; but this is not necessarily the case; for the consequence of the revocation might have been (*x*) to revive a prior uncancelled will, which contained a provision for the wife and children, protecting it from the revocation which the marriage and the birth of children produced on the subsequent will.

Remarks upon Sheath *v.* York.

At one period it appears to have been supposed that, if the child or children, whose birth had revoked or contributed to revoke the will, died in the lifetime of the testator, this event would restore its efficacy,[2] the reasoning being founded on a fancied, but evidently mistaken analogy to the case of a will whose operation has been restored by the destruction of a * subsequent revoking or inconsistent will (*y*). The latter doctrine, however, is obviously a consequence of the ambulatory state of the instrument during the testator's lifetime, and stands upon grounds which do not apply to the class of revocations under consideration; and therefore it has been, in later times, most properly adjudged that a will, once revoked by marriage and the birth of a child, continues revoked, notwithstanding the decease of such child before the will takes effect (*z*).[3]

Death of child in testator's lifetime immaterial.

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[It seems, therefore, that the rule of law is this, that a will executed before the statute 1 Vict. c. 26, is revoked by subsequent marriage and the birth of issue, unless provision is made for them by the will, or by previous settlement; or unless rev-

Rule to be deduced from the cases.

(*u*) Holloway *v.* Clarke, 1 Phillim. 339; [Walker *v.* Walker, 2 Curt. 854;] see also Gibbons *v.* Caunt, 4 Ves. 849; Wright *v.* Netherwood, 2 Salk. by Evans, 593, n.

[(*x*) Not since 1 Vict. c. 26, s. 22.]

(*y*) Wright *v.* Netherwood, 2 Salk. by Evans, 593, n.; 2 Phillim. 266 n.

(*z*) Helyar *v.* Helyar, cit. 1 Phillim. 413; Sullivan *v.* Sullivan, cit. 1 Phillim. 343; Emerson *v.* Boville, 1 Phillim. 342.

child or children, after born, although the subsequent issue is the testator's only child. As to provisions not interfering with the interest of the widow and children, such as the appointment of executors, a power to sell for the payment of debts, &c., the will still remains in force. Coates *v.* Hughes, 3 Binn. 498. And that is the law generally.

[1] See Havens *v.* Van Den Burgh, 1 Denio, 27.

[2] It is provided by statute, in Virginia and Kentucky, that a child born after the will, if the testator had no children before, is a revocation, unless such child dies unmarried or an infant. 4 Kent, 526.

[3] Ash *v.* Ash, 9 Ohio St. 383.

Parol evidence of intention inadmissible.

ocation would produce no benefit to those objects.] It was for a long time a question whether the presumed revocation could be rebutted by parol evidence [of circumstances or declarations showing merely a contrary intention on the part of the testator.] In Brady *v.* Cubit (*a*), Lord Mansfield considered the evidence to be admissible; but his notion was warmly opposed in Goodtitle *v.* Otway (*b*) by Eyre, C. J., who observed that, in cases of revocation by operation of law, the *presumptio juris* is so violent, that it does not admit of circumstances to be set up in evidence to repel it. Lord Kenyon and Buller, J., in Doe *v.* Lancashire (*c*), also strongly expressed their objection to, and disregard of, the parol evidence, which had been adduced to show that the testator intended to make another will excluding the child, whose birth, with the previous marriage, produced the revocation. Sir R. P. Arden, M. R., in Gibbons *v.* Caunt (*d*), said, that he believed they went the length of admitting the evidence, but he did not like it. In Kenebel *v.* Scrafton (*e*), parol evidence of an intention not to revoke was offered; but Lord Loughborough, on sending the case to the Court of K. B., observed, "that the parol evidence did not weigh at all, being only conversations, and not amounting to a republication, a court of law would pay no regard to it:" but the conclusion at which the court arrived on another point rendered it unnecessary to enter into the question of the admissibility of the evidence. This question has now been set at rest by Marston *v.* *128 Roe (*f*), in which the judges, * after an elaborate argument, unanimously decided against the admissibility of the evidence, as being productive of the evils, the prevention of which was the great object of the enactments respecting wills in the Statute of Frauds.[1] This view of the subject, of course, excluded the applicability of the cases in the ecclesiastical courts, where the evidence was long admitted in regard to wills of personal estate (*g*). No question of this nature can occur, under any will made since the year 1837, as the act 1 Vict. c. 26, sect. 18, has provided, "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

Wills made since 1837 absolutely revoked by marriage under 1 Vict. c. 26.

(*a*) Dougl. 31. (*b*) 2 H. Bl. 522.
(*c*) 5 T. R. 61. (*d*) 4 Ves. 848.
(*e*) 5 Ves. 663, 2 East, 530.
(*f*) 8 Ad. & Ell. 14. [This case seems to have been overlooked by Sir E. Sugden in Hall *v.* Hill, 1 D. & War. 114, 115.]
(*g*) See Gibbens *v.* Cross, 2 Ad. 455; Fox *v.* Marston, 1 Curt. 494. [The practice of those courts is now altered in conformity with Marston *v.* Roe; Israell *v.* Rodon, 2 Moo. P. C. C. 51; Matson *v.* Magrath, 1 Rob. 680, 6 No. Cas. 709, 13 Jur. 350.

[1] See Brush *v.* Wilkins, 4 Johns. Ch. 506.

as his or her next of kin under the Statute of Distributions" (*h*)); and (s. 19) that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."[1]

These clauses suggest only two remarks: —

1st, That, unless in the expressly excepted cases, marriage alone will produce absolute and complete revocation, as to both real and personal estate; and that no declaration, however explicit and earnest, of the testator's wish that the will should continue in force after marriage, still less any inference of intention drawn from the contents of the will, and, least of all, evidence collected *aliunde*, will prevent the revocation. Remarks upon the enactment.

2d, That merely the birth of a child, whether provided for by the will or not, will not revoke it; the legislature, while it invested with a revoking efficacy one of the several circumstances formerly requisite to produce revocation, having wholly disregarded the other.

The new rule, though it may sometimes produce inconvenience, has at least the merit of simplicity, and will relieve this branch of testamentary law from the many perplexing distinctions which grew out of the pre-existing doctrine.

*[Wills made before 1838 are still governed by the old law, so far as respects revocation by marriage, and the birth of issue. By sect. 34 of the act 1 Vict. c. 26, it is enacted, that "the act shall not extend to any will made before the 1st January, 1838;" and although (as we shall hereafter see (*i*)), all acts of revocation, *which are apparent on the face of the will*, must, as to wills made before that date, be executed in conformity with the requirements of the new law; yet this section leaves all other modes of revoking such wills — namely, those which do not appear on the face of the will — to the operation of the old law; and, consequently, marriage alone, without the birth of children, will not, at the present day, revoke a will made before 1838 (*k*).][2] *129 Wills made before 1 Vict. c. 26, how revoked since that act.

(*h*) *I.* e., next of kin, as such. Where the limitation in default of appointment was to the donee's children, who happened to be also his next of kin under the statute, the exception was nevertheless held to apply, Re Fitzroy, 1 Sw. & Tr. 133; Re Fenwick, L. R. 1 P. & D. 319. *A fortiori* where the limitation in default is to some only of the statutory next of kin, Re M'Vicar, L. R. 1 P. & D. 671.

[(*i*) Brooke *v.* Kent, 3 Moo. P. C. C. 334, and other cases post, p. 143.

(*k*) Langford *v.* Little, 2 Jo. & Lat. 633; Re Shirley, 2 Curt. 657, overruling a contrary dictum in Hobbs *v.* Knight, 1 Curt. 768.

[1] The long-continued insanity of the testator after the execution of the will, if he were sane when he executed it, affords no presumption of revocation, even though the property devised has in the mean time greatly enhanced in value. Warner *v.* Beach, 4 Gray, 162.

[2] Marriage or the birth of a child after the making a will works a revocation by statute in Georgia, unless a provision is made in the will in contemplation of such event. Denpree *v.* Denpree, 45 Ga. 415. So also in Pennsylvania, though the child be posthumous. Edwards's Appeal, 47 Penn. St. 144. And the same is true in Indiana. Morse *v.* Morse, 42 Ind. 365; Hughes *v.* Hughes, 37 Ind. 183. So at common law in Iowa as to children born after the marriage and will, and before the testator's death. Negus *v.* Negus, 46 Iowa, 487; Fallon *v.* Chidester, ib. 588; McCullum *v.* McKenzie, 26 Iowa, 510. And it is immaterial whether the testator had or had not children when he executed the will. Negus *v.* Negus, supra. The presumption of revocation in Pennsylvania on the birth of a child is not overcome by a provision in the

Section II.

By Burning, Cancelling, Tearing, or Obliterating.

Revocation of will of lands by burning, tearing, cancelling, or obliterating, *under the old law.*

By the 6th section of the Statute of Frauds (*l*) [it is enacted, "that no devise in writing of any lands, tenements or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or] by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent; [but all devises and bequests of lands and tenements shall remain and continue in force

(*l*) 29 Car. 2, c. 3, s. 6; Irish Parl. 7 Will. 3, c. 12, s. 6.

will expressing confidence in the testator's wife, "believing that should a child be born to us, she will do the utmost to rear it to the honor of its parents." Walker *v.* Hall, 34 Penn. St. 483.

Statutes in favor of children of a testator (including posthumous issue) who have not been provided for by his will: —

Alabama. Code, 1876, Title 4, ch. 2, p. 586.

Arkansas. Digest, 1874, ch. 135, p. 1013.

California. Codes and Stat. 1876, Vol. 1, Title, 6, ch. 1, p. 724.

Colorado. Gen. Laws, 1876, ch. 103, p. 931.

Connecticut. Gen. Stat. 1875, ch. 11, p. 370.

Dakota. Rev. Code, 1877, Title 5, ch. 1, p. 347.

Delaware. Rev. Code, 1874, ch. 84, pp. 510, 511.

Georgia. Code, 1873, Title 6, ch. 2, p. 425.

Illinois. R. S. 1880, ch. 39, p. 422.

Indiana. Stat. 1876, Vol. 2, ch. 3, p. 572.

Iowa. Rev. Code, 1880, Vol. 1, Title 16, ch. 2, p. 608.

Kansas. Comp. Laws, 1879, ch. 117, p. 1004.

Kentucky. Gen. Stat. 1873, ch. 113, pp. 836, 837.

Maine. R. S. 1871, ch. 74, p. 564.

Massachusetts. Gen. Stat. 1860, ch. 92, pp. 478, 479.

Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1375.

Minnesota. Stat. 1878, ch. 47, p. 570.

Mississippi. Rev. Code, 1871, ch. 54, pp. 525, 526.

Missouri. R. S. 1880, Vol. 1, ch. 71, p. 681.

Nebraska. Gen. Stat. 1873, ch. 17, p. 304.

Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 201.

New Hampshire. Gen. Laws, 1878, ch. 193, p. 455.

New Jersey. Revision, 1709–1877, Vol. 2, p. 1246. See Wilson *v.* Fritts, 32 N. J. Eq. 59.

New York. R. S. 1875, Vol. 3, ch. 6, p. 64.

North Carolina. Battle's Revisal, 1873, ch. 45, p. 413.

Ohio. R. S. 1880, Vol. 2, ch. 1, p. 1432.

Oregon. Gen. Laws, 1843–1872, ch. 64, pp. 788, 790.

Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1477.

Rhode Island. Gen. Stat. 1872, ch. 171, p. 374.

South Carolina. R. S. 1873, Title 3, ch. 86, p. 444.

Tennessee. Stat. 1871, Vol. 2, Title 3, ch. 1, p. 1011.

Texas. R. S. 1879, Title 99, p. 713.

Utah. Comp. Laws, 1876, ch. 2, p. 272.

Vermont. Gen. Stat. 1862, ch. 49, p. 380.

Virginia. Code, 1873, ch. 118, p. 912.

West Virginia. R. S. 1878, ch. 201, p. 1171.

Wisconsin. R. S. 1878, ch. 103, p. 650.

It has been held under the Massachusetts statute, which declares that any child, &c., of a testator, for whom he has omitted to provide in his will, shall take a share of his estate, as if he had died intestate, "unless it shall appear that such omission was intentional, and not by any mistake or accident," that it is not necessary that it should appear by the will itself that such omission was intentional: the fact may be shown by parol evidence. Wilson *v.* Fosket, 6 Met. 400; Bancroft *v.* Ives, 3 Gray, 367, 369, 370. But under Stat. Mass. 1783, c. 24, the rule as to the admission of parol evidence in such case was otherwise. Dewey, J., 6 Met. 404. The will is to be allowed and approved, notwithstanding such unintentional omission. The party injured by the omission has no interest or right to defeat the probate. Doane *v.* Lake, 32 Me. 268. The above cited pro-

until the same be burnt, cancelled, torn, or obliterated by the testator or his directions in manner aforesaid, or unless the same be altered by some other will," &c., executed as therein mentioned. But the] burning, cancellation,[1] tearing, or obliteration was not required to be attested by witnesses. [As the revocation of a will of personalty was subject only to the restriction (*m*) of not being altered or changed by any words, or by will by word of mouth only, except the same were committed to writing, any of the acts mentioned in the 6th section were of course sufficient to revoke such a will.]

Revocation of wills of personalty.

* The enactment has not been construed so strictly as to exclude *130 all evidence tending to show *quo animo* the act was done, which is a conclusion to be drawn by a court or jury from all the circumstances.[2] The mere physical act of destruc-

Evidence of *animus* admitted.

[(*m*) See sect. 22 of Eng. & Ir. Statute.

vision of the Statutes of Massachusetts was held in Blagge *v.* Miles, 1 Story, C. C. 426, to apply only to cases where the estate is the testator's own property, and not to cases where the testator has only a power of appointment over the estate to dispose of the inheritance. An illegitimate child, unintentionally omitted to be provided for in the will of its mother, is not entitled under the above provision in the statutes of Massachusetts to the share of the mother's estate, which it would have taken, under the laws of that state, if the mother had died intestate. Kent *v.* Barker, 2 Gray, 535. By the New York Revised Statutes, if the will disposes of the whole estate, and the testator afterwards marries, and has issue born in his lifetime, or after his death, and the wife or issue be living *at his death*, the will is deemed to be revoked; unless the issue be provided for by the will, or by a settlement, or unless the will shows an intention not to make any provision. No other evidence to rebut the presumption of such a revocation is to be received. Brush *v.* Wilkins, 4 Johns. Ch. 506. This provision is supplemented by another prescribing the exact extent of the proof necessary to rebut the presumption of a revocation, thus relieving the courts from all difficulty on that embarrassing point. 4 Kent, 527. Provisions for this case, similar to those of New York, exist in other states. After the Virginia Act of 1792, and before the Act of 1794, concerning wills, a man having children, made a will, and devised his whole estate amongst them; after which he married a second wife, by whom he had children, and dying without altering his will, the second marriage and birth of children were held no revocation of the will. Yerby *v.* Yerby, 3 Call, 334. Respecting this case of Yerby *v.* Yerby, Bronson, J., in Havens *v.* Van Den Burgh, 1 Denio, 29, said, that it turned upon its own peculiar circumstances. "The testator had declared that his first children, who were devisees in the will, should not be injured by the second marriage; and in his last illness he refused to alter the will, though he expressed the intention of making some alterations when he got well. Having thus referred to and refused to alter the will, after the change of circumstances from which a change of intention might otherwise have been inferred, the court thought it impossible to presume a revocation." In this case of Havens *v.* Van Den Burgh, it was accordingly held that the rule that the marriage and birth of a child are an implied revocation of a will previously made, disposing of the testator's whole estate, where there is no provision in or out of the will for such new relations, applies as well to a case where the testator had children by a former wife, who are provided for in the will, as where he was without children at the time it was executed.

[1] As to this term, see Warner *v.* Warner, 37 Vt. 356; Evans's Appeal, 58 Penn. St. 238. The cancellation or cutting off a portion of the devises in a will, leaving the testator's signature at the conclusion, or in the body, when no other signing had been intended, with the declaration that the intention was to annul only what was so cancelled, leaves the residue a valid will. Brown's Will, 1 B. Mon. 57. The word "obsolete," written by a testator on the margin of his will, but not signed by him, or by any person for him, in the mode prescribed by the 6th section of the Penn. Act of 8th April, 1833, does not operate as a revocation of the will under the 13th section of that act. Lewis *v.* Lewis, 2 Watts & S. 455. See In re Fary, 9 Eng. L. & Eq. 600. But in Witter *v.* Mott, 2 Conn. 67, the declaration subscribed by the testator on the back of his will, "This will is invalid," was held an express revocation of it, although not attested by any subscribing witness. See Semmes *v.* Semmes, 7 Harr. & J. 388; Johnson *v.* Brailsford, 2 Nott & McC. 272.

[2] Revocation is a question of intention;

tion is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the *animus revocandi* to be wanting.[1] Thus, if a testator inadvertently throws ink upon his will, instead of sand (*m*), or obliterates [or attempts to destroy] it during a fit of insanity (*n*),[2] [or tears it up under the mistaken impression that it is invalid (*o*),] it will remain in full force, notwithstanding such accidental or involuntary [or mistaken] act. So, the destruction of the instrument by a third person in the lifetime, but without the permission or knowledge of the testator, would not affect its validity;[3] *à fortiori*, if the destruction took place after his decease (*p*). In the converse case, however, where there is an intention on the part of the testator to destroy the will, but the act is not completed, the authorities present more matter for consideration.[4]

Revocation by partial tearing.

The early case of Bibb d. Mole *v.* Thomas (*q*) has generally been considered to establish that a very slight act of tearing is sufficient to effect a revocation, if done with such intention; the

(*m*) Per Lord Mansfield, Burtonshaw *v.* Gilbert, Cowp. 52.]
(*n*) Scruby *v.* Fordham, 1 Ad. 74. [Borlase *v.* Borlase, 4 No. Cas. 139; Re Shaw, 1 Curt. 905; Re Downer, 18 Jur. 66; Brunt *v.* Brunt, L. R. 3 P. & D. 37.
(*o*) Giles *v.* Warren, L. R 2 P. & D. 401.]
(*p*) Haines *v.* Haines, 2 Vern. 441. (*q*) 2 W. Bl. 1043.

and evidence is admissible to show the intention of the testator in cancelling a will. Smiley *v* Gambill, 2 Head, 164; Marr *v.* Marr, ib. 303; Burns *v.* Burns, 4 Serg. & R. 295; Smock *v.* Smock, 11 N. J. Eq. 156; Boudinot *v.* Bradford, 2 Yeates, 170; S. C. 2 Dallas, 266; Upfill *v.* Marshall, 3 Curteis, 636; Means *v.* Moore, 3 McCord, 282. The mere act of cancelling is nothing, unless it be done *animo revocandi*. Jackson *v.* Holloway, 7 Johns. 394. See Overall *v.* Overall, Litt. Sel. Cas. 594; 4 Kent, 531, 532. Cancellation of a will, by drawing lines across it, is an equivocal act, and may be explained by circumstances. Bethell *v.* Moore, 2 Dev. & B. 311; Smock *v.* Smock, supra. If, however, the will be found cancelled, the law infers an intentional revocation: for it is *primâ facie* evidence of it, and the inference stands good until it is rebutted. 4 Kent, 532; Jackson *v.* Halloway, 7 Johns. 394; Bethell *v.* Moore, 2 Dev. & B. 311. The slightest degree of cancellation, &c., with intent to revoke, will operate as a revocation, Dan *v.* Brown, 4 Cowen, 483; 4 Kent, 582; Johnson *v.* Brailsford, 2 Nott & McC. 272; Jackson *v.* Betts, 6 Cowen, 377. If a man having two wills in his hand, intending to destroy the one last-made, by mistake destroys that first executed, the law does not require, in order to revive and establish the will intended to be destroyed, such proof as is necessary to give validity to an original will. Burns *v.* Burns, 4 Serg. & R. 295.

1 Dan *v.* Brown, 4 Cowen, 490.

2 It requires the same capacity to revoke a will, as to make one; so where a competent testator makes a will, and the paper is afterwards destroyed by his consent given when he had become *non compos*, the devises are not destroyed; but the will may be set up and established. Allison *v.* Allison, 7 Dana, 94; Idley *v.* Bowen, 11 Wend. 227; Rhodes *v.* Vinson, 9 Gill, 169; Smith *v.* Wait, 4 Barb. 28. So, it is held, of the destruction of a will by the testator upon his death-bed, under threats and complaints, or undue influence affecting his freedom of action. Batton *v.* Watson, 13 Ga. 63.

3 Bennett *v.* Sherrod, 3 Ired. 303. But the failure of a testator who is informed of the loss or destruction of his will, to publish another, has been held to furnish a presumption of intention to revoke the will. Steele *v.* Price, 5 B. Mon. 58. However, this presumption may be rebutted by other evidence, as, *e. g.* by the declarations of the testator himself. Ib.

4 A blind testator directed his will to be destroyed, and supposed that it was so destroyed, when, in fact, no act had been done towards the destruction of it; and this was held to be no revocation or destruction under the statute in Virginia. Boyd *v.* Cook, 3 Leigh, 32; Malone *v.* Hobbs, 1 Robinson, 346. See Hise *v.* Fincher, 10 Ired. 139. But in a case where a testator was ill in bed, and called for his will, and one of the executors and legatees deceived him by handing him an old letter instead, it was held that if, from the rest of the testimony, the jury believed that the testator destroyed that letter, thinking that it was his will, such circumstances would amount in law to a revocation of the will. Pryor *v.* Coggin, 17 Ga. 444. See note 2, p. 131.

facts were as follows: The testator (who had frequently declared himself dissatisfied with his will), being one day in bed near the fire, ordered W., a person who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat creased; he opened and looked at it, then gave it a rip with his hands, so as almost to tear a bit off, then rumpled it together, and threw it on the fire; but it fell off. However it must soon have been burnt, had not W. taken it up, and put it into her pocket. The testator did not see her do so, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer; the testator several times afterwards said that was not, and should not be his will, and bid her destroy it; she said at first, "So I will when you have made another;" but, afterwards, upon his repeated inquiries, she falsely told him that she had destroyed it. She asked him to whom the estate would go when the will was burnt? he answered, to his *sister and her children. The testator afterwards told a *131 person that he had destroyed his will, and should make no other until he had seen his brother J. M., and desired the person would tell his brother so, and that he wanted to see him; he afterwards wrote to his brother, saying, "I have destroyed my will which I made; for, upon serious consideration, I was not easy in my mind about that will;" and desired him to come down, saying, "If I die intestate, it will cause uneasiness." The testator, however, died without making another will. The jury thought this a sufficient revocation, and the court of C. P. was of the same opinion, on a motion for a new trial; De Grey, C. J., observing, that this case fell within two of the specific acts described by the Statute of Frauds; it was both a burning and a tearing; and that throwing it on the fire, with an intent to burn, though it was only very slightly singed and fell off, was sufficient within the statute.[1]

Mere attempt to destroy will not necessarily revocatory.

It is not, however, to be inferred from this case, that the mere intention, or even attempt, of a testator to burn, cancel, tear, or obliterate his will, is sufficient to produce revocation, within the meaning of the Statute of Frauds; for, the legislature having pointed out certain modes by which a will may be revoked, it is not in the power of the judicature, under any circumstances, to dispense with part of its requisitions, and accept the mere intention or endeavor to perform the prescribed act, as a substitute or equivalent for the act itself, though the intention or endeavor may have been frustrated by the improper behavior of a third person.[2]

[1] See White *v.* Casten, 1 Jones, 197; Johnson *v.* Brailsford, 2 Nott & McC. 272. It seems that there is no necessary presumption against a will by reason of the mere fact that the first few lines are missing from cutting and tearing. In re Woodward, L. R. 2 P. & D. 206. But the nature of the words and the circumstances attending their removal or obliteration might clearly indicate an intention to partially or even totally revoke the will. The presumption to be drawn must depend upon the facts apparent or shown in evidence.

[2] Mundy *v.* Mundy, 15 N. J. Eq. 290; Gains *v.* Gains, 2 A. K. Marsh. 190; Jackson *v.* Betts, 9 Cowen, 208; Hise *v.* Fincher, 10 Ired. 139; Clarke *v.* Scripps, 22 Eng L. & Eq. 627. See, however, Pryor *v.* Coggin, 17 Ga. 444; Smiley *v.* Gambill, 2 Head, 164;

Thus, in Doe d. Reed *v.* Harris (*r*), where it appeared by the evidence of the testator's servant, that the testator had thrown the will on the fire, from which it was immediately snatched by a relative who lived with him, when the fire had merely singed the cover. The testator afterwards insisted upon her giving up the will to be burnt, which she promised to do; and, in order to satisfy the testator, threw something into the fire, which was not the will (as she represented it to be), of which the testator appears to have had some suspicion; for, upon the witness expressing her doubt whether the will had been destroyed, the testator said, "I do not care, I will go to L., if I am alive and well, and make another will." The Court of Q. B. held, that the will *132 was not revoked, on the ground that there had been no *actual burning of the instrument. "It is impossible," said Lord Denman, "to say that singeing a cover is burning a will within the meaning of the statute." Patteson, J., said, "To hold that it was so, would be saying, that a strong intention to burn, was a burning. There must be, at all events, a partial burning of the instrument itself; I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the will is."

It was held, however, that the slight burning which occurred in this case, with the attendant circumstances and conduct of the testator, though not sufficient to satisfy the Statute of Frauds, yet had the effect of revoking the will in regard to property to which that statute did not extend, as copyholds (*s*).

Effect where a testator suspends the destroying act before its completion.

But (to return to cases within the statute) it is clear, that if a testator is arrested in his design of destroying the will, by the remonstrance or interference of a third person, or by his own voluntary change of purpose, and thus leaves unfinished the work of destruction which he had commenced, the will is unrevoked;[1] and the degree in which the attempt had been accomplished, would not, it should seem, be very closely scrutinized, if the testator himself had put his own construction upon his somewhat equivocal act, by subsequently treating the will as undestroyed.

(*r*) 6 Ad. & Ell. 209, [2 Nev. & P. 615.] (*s*) Doe d. Reed *v.* Harris, 8 Ad. & Ell. 1.

Blanchard *v.* Blanchard, 32 Vt. 62, as to deception practised upon the testator as to revocation. See also Runkle *v* Gates, 11 Ind. 95. It is laid down in this country that if the maker of a will, with the intention of revoking the instrument by destroying it, burn another paper, mistakenly supposing that to be his will, and believe he has destroyed it, and continue in that belief without any subsequent recognition of it or knowledge of its existence, this is held to amount to a revocation. Smiley *v.* Gambill, 2 Head, 164; Ford *v.* Ford, 7 Humph. 104. Revocation, if prevented by the fraud of a donee will, also, it seems, be considered as effected as to the wrong-doer. Blanchard *v.* Blanchard, 32 Vt. 62. Indeed, it is broadly laid down that if a revocation, as by burning, was interfered with by fraud, without the testator's knowledge, the will does not become valid afterwards on the discovery of the fraud without acts amounting to a new publication. Kent *v.* Mahaffey, 10 Ohio St. 204; Bohanan *v.* Walcot, 1 How. (Miss.) 336; Burns *v.* Burns, 4 Serg. & R. 567. On the other hand a will fraudulently destroyed may be set up again. Voorhees *v.* Voorhees, 39 N. Y. 463. The doctrine was here applied to a case of undue influence.

[1] See Winsor *v.* Pratt, 2 Brod. & B. 652; Bethell *v.* Moore, 2 Dev. & B. 311; Giles *v.* Giles, Cam. & N. 174; Clarke *v.* Scripps, 22 Eng. L. & Eq. 627.

Thus, in *Doe* v. *Perkes* (*t*), where a testator, upon a sudden provocation by one of the devisees, tore his will asunder; and, after being appeased, fitted the pieces together, and expressed his satisfaction that it was no worse, and that no material injury had been done; it was held that the will remained unrevoked. Here (to use the language of a distinguished judge), (*u*) the intention of revoking was itself revoked, before the act was complete. [And in Elms *v.* Elms (*x*), the testator had torn his will nearly through, but the evidence seemed to show that he intended to do more, and was stopped by the remonstrance of a person present, and it was held that the will was not revoked.]

Presumption as to destruction of wills.

In one instance, the Prerogative Court decided in favor of a will, without any distinct proof of its existence after the death of the testator, or of its destruction in his lifetime; there being strong reason, under all the circumstances, for supposing that the testator had unintentionally destroyed it; or, at all events, * that its destruction, whenever effected, was without his concurrence (*y*). The general rule in that court seems to be, that if a will is traced into the testator's possession, and [at his death] either cannot be found (*z*), or is found torn (*a*), the presumption is (in the absence of circumstances tending to a contrary conclusion (*b*)), that he destroyed or tore it *animo revocandi*;[1] but that if the will is traced *133

(*t*) 3 B. & Ald. 489: [and compare Re Colberg, 1 No. Cas. 90, 2 Curt. 832.]

(*u*) *Vide* 6 Ad. & Ell. 215.

[(*x*) 1 Sw. & Tr. 155, 4 Jur. N. S. 341, 27 L. J. Prob. 96. And see Re Cockayne, 1 Dea. 177, 2 Jur. N. S. 454.]

(*y*) Davis *v.* Davis, 2 Ad. 223; [and see Patten *v.* Poulton, 1 Sw. & Tr. 55, 27 L. J. Prob. 41, 4 Jur. N. S. 341.]

(*z*) Lillie *v.* Lillie, 3 Hagg. 184; Wargent *v* Hollings, 4 Hagg. 245; Tagart *v.* Squire, 1 Curt. 289; [Welch *v.* Phillips, 1 Moo. P. C. C. 299; Brown *v.* Brown, 8 Ell. & Bl. 876; Re Shaw, 1 Sw. & Tr. 62; Finch *v.* Finch, L. R. 1 P. & D. 371.]

(*a*) Hare *v.* Nasmyth, 3 Hagg. 192, n.; Lambell *v.* Lambell, ib. 568; [Williams *v.* Jones, 7 No. Cas. 106; Re Lewis, 1 Sw. & Tr. 31, 27 L. J. Prob. 31.

(*b*) As to the evidence required to rebut the presumption, see Saunders *v.* Saunders, 6 No. Cas. 518; Battyl *v.* Lyles, 4 Jur. N. S. 718; Re Gardner, 1 Sw. & Tr. 109, 27 L. J. Prob. 55; Re Ripley, 1 Sw. & Tr. 68, 4 Jur. N. S 342; Re Simpson, 5 Jur. N. S. 1366; Re Pechell, ib. 406; Eckersley *v.* Platt, L. R. 1 P. & D. 281. If declarations made by the testator after the date of the will are adduced to rebut the presumption, the like declarations are admissible in reply. Keen *v.* Keen, L. R. 3 P. & D. 105. As evidence of the *animus* with which an act was done, less weight is of course due to subsequent (Pemberton *v.* Pemberton, 13 Ves. 310; Re Weston, L. R. 1 P. & D. 633) than to contemporaneous (Johnson *v.* Lyford, L. R. 1 P. & D. 546) declarations of the testator. To prove the *act*, such subsequent declarations are wholly inadmissible. Staines *v.* Stewart, 2 Sw. & Tr. 320, 31 L. J. Prob. 10. The will being lost or destroyed, and the *animus revocandi* disproved, probate will be granted of its contents as proved by secondary evidence, *e.g.* draft, copy, or parol testimony: see same cases, and Clarkson *v.* Clarkson, 2 Sw. & Tr. 497, 31 L. J. Prob. 143; Podmore *v.* Whatton, 3 Sw. & Tr. 449; 33 L. J. Prob. 143; Burls *v.* Burls, L. R. 1 P. & D. 472; James *v.* Shrimpton, 1 P. D. 431; Sugden *v.* Lord St. Leonards, 1 P. D. 154. In the last case the contents were proved by a single interested witness. The same case establishes the admissibility, as evidence of contents, of the testator's declarations whensoever made, overruling Quick *v.* Quick, 3 Sw. & Tr. 442, 33 L. J. Prob. 146; and further, that probate may be granted of so much of the will as the evidence ascertains, though the other part is not ascertained.]

[1] Betts *v.* Jackson, 6 Wend. 173; Lively *v.* Harwell, 29 Ga. 509; Holland *v.* Ferris, 2 Bradf. 334; Brown *v.* Brown, 10 Yerg. 84; Minkler *v.* Minkler, 14 Vt. 125; Jones *v.* Murphy, 8 Watts & S. 275; Appling *v.* Eades, 1 Gratt. 286; Rickards *v.* Mumford, 2 Phillim. 23; Weeks *v.* McBeth, 14 Ala. 474. See Jackson *v.* Betts, 9 Cowen, 208; Dan *v.* Brown, 4 Cowen, 483; Jackson *v.* Kniffen, 2 Johns. 31; Lewis *v.* Lewis, 2 Watts & S. 455; Burns *v.* Burns, 4 Serg. & R. 295; Durant *v.* Ashmore, 2 Rich. 184; Smith *v.* Fenner,

out of the deceased's custody, it is incumbent on the party asserting the revocation to prove that the will came again into such custody, or was destroyed by his directions (*c*).[1] [If, after executing his will, the testator becomes insane, and it appears that the will was in his custody as well after as before the time when he became so, it cannot be assumed that he tore or destroyed it while he was sane; the fact must be proved affirmatively (*d*).

Where a pencil instead of a pen is used, the cancellation is not necessarily ineffectual (*e*), but is always *primâ facie* considered deliberative (*f*),[2] and it must be shown that it was intended to be final.]

Obliteration by a pencil.

Effect of partial obliterations.

A revocation by obliteration may be either partial *134 or total.[3] If * the testator draws a pen over part of the will only, a revocation is effected *pro tanto*, and

(*c*) Colvin *v.* Fraser, 2 Hagg. 327; [and see Wynn *v.* Heveningham, 1 Coll. 638, 639.
(*d*) Harris *v.* Berral, 1 Sw. & Tr. 153; Sprigge *v.* Sprigge, L. R. 1 P. & D. 608.
(*e*) Mence *v.* Mence, 18 Ves. 348.
(*f*) Francis *v.* Grover, 5 Hare, 39, and the cases there cited; Re Hall, L. R. 2 P. & D. 256.]

1 Gall. 170; Hildreth *v.* Schillinger, 10 N. J. Eq. 196; Smock *v.* Smock, 11 N. J. Eq. 156; Durant *v.* Ashmore, 2 Richardson, 191; Jones *v.* Murphy, 8 Watts & S. 275. Declarations of the testator as to doubtful acts of revocation are, as we have elsewhere said, admissible in evidence. In re Johnson's Will, supra; Lawyer *v.* Smith, 8 Mich. 411; Collagan *v.* Burns, 57 Me. 449; Patterson *v.* Hickey, 32 Ga. 156. But not to prove a mere oral revocation. Hargroves *v.* Redd, 43 Ga. 142. See Smith *v.* Fenner, 1 Gall. 170. Mere words of revocation, however strong, are without effect. Wittman *v.* Goodhand, 26 Md. 95; Mundy *v.* Mundy, 15 N. J. Eq. 290; Lewis *v.* Lewis, 2 Watts & S. 455; Hylton *v.* Hylton, 1 Gratt. 161; Jones *v.* Moseley, 40 Miss. 261; Jackson *v.* Kniffen, 2 Johns. 31; Kent *v.* Mahaffey, 10 Ohio St. 204. Nor will the existence of an act let in evidence of intention to revoke when the act is not capable by a reasonable interpretation of pointing to a revocation. Thus it is not competent to show that certain erasures were made *animo revocandi* if the erasures are such as not materially to affect the meaning of the will. Clark *v.* Smith, 34 Barb. 140. On the other hand, where there is an unmistakable revocation, parol evidence is no more admissible to remove it than it would be to affect any of the terms of the will as originally drawn; since revocation is itself a testamentary act in its nature, though the statute does not require it to be executed and attested. It is only a *presumptive* revocation that can be overturned by evidence.

[1] Evidence may be given that a lost or destroyed will was lost or destroyed without the knowledge or consent of the testator. Schultz *v.* Schultz, 35 N. Y. 653; In re Johnson's Will, 40 Conn. 587; Newell *v.* Homer, 120 Mass. 277; Davis *v.* Sigourney, 8 Met. 487; Durfee *v.* Durfee, ib. 490, note; Collagan *v.* Burns, 57 Me. 449; Tynan *v.* Paschal, 27 Texas, 286. But one who seeks to set up an alleged lost will has the burden of proving its contents by evidence strong, positive, and free from doubt. Newell *v.* Homer, 120 Mass. 277; Davis *v.* Sigourney, 8 Met. 487; Durfee *v.* Durfee, ib. 490, note; In re Johnson's Will, 40 Conn. 587. And it must appear that the will was in existence, uncancelled and unrevoked, at the time of the death of the testator, in order to control the presumption of revocation which always arises when a will once known to exist is not found at the death of the testator. Newell *v.* Homer, supra; Brown *v.* Brown, 8 El. & B. 876, 886; Eckersley *v.* Platt, L. R. 1 P. & D. 281; Finch *v.* Finch, ib. 371. If the will remained in the custody of the testator, or after its execution he had ready access to it, the fact that it could not be found after his death would raise a presumption that he had destroyed it *animo revocandi*. Schultz *v.* Schultz, supra, Davies, C. J.; Betts *v.* Jackson, 6 Wend. 173; Knapp *v.* Knapp, 10 N. Y. 276; Dawson *v.* Smith, 3 Houst. 92. But this presumption, as the rule implies, does not exist when it appears that, upon the execution of the will, it was deposited by the testator with a custodian, and that the testator did not thereafter have it in his possession or have access to it. Schultz *v.* Schultz, supra. *A fortiori* if the will be found in possession of one interested. Bennett *v.* Sherrod, 3 Ired. 306. Evidence is also admissible to show that the act of tearing off one's signature to a will was done without an intention to revoke; that is, by mistake. Youse *v.* Forman, 5 Bush, 337. So of an apparent but not decisive act of cancellation. Wolf *v.* Bollinger, 62 Ill. 368.

[2] See Stover *v.* Kendall, 1 Coldw. 557.

[3] To write below the attestation of a will, "This will is hereby cancelled and annulled in full this 15th day of March, 1859," is a

the unobliterated portions remain in force (*g*);[1] as where (to put a common case) a testator, after having devised property to several persons, strikes out the name of one of the devisees, by which act he gives to the will the same operation as if that devisee had died in the testator's lifetime. If the estate or interest of the co-devisees was joint, the entire property would vest in the survivor or survivors (*h*); if they were tenants in common, the share of the deceased devisee would lapse, and a partial intestacy be produced (*i*); unless the subject of gift were a pecuniary legacy, or any other article of personal estate, which would fall to the residuary legatee, if there was one; or unless the will was made since the year 1837, in which case the revocation of a specific devise would cast the real estate, which was the subject of such devise, into the hands of the residuary devisee. [If certain words, forming part of a devise, are obliterated, it is to be seen what is the effect of those which remain: if they are sensible *per se*, and do not give any person (apart, of course, from their indirect operation of increasing the residue) a larger estate than he would have taken by the will, or a new estate, the obliteration works a valid partial revocation. This appears to be the effect of Swinton *v.* Bailey (*k*), where a testator who died in 1836 devised certain lands to his "mother, Elizabeth Eley to hold to his said mother, Elizabeth *Eley, her heirs and assigns forever.*" After execution he drew his pen through the words in italics, and above them wrote "Eley." The question was whether the fee-simple was cut down to a life-estate. It was argued that for this purpose something more than revocation was needed, for the life-estate was a new estate, and that the case was in substance one not of obliteration but of alteration, which failed for want of due execution. But it was held that the obliteration, operating simply by way of revocation, had cut down the fee-simple to a life-estate; for the life-estate was clearly less than the estate in fee, and was included in it. "In the eye of the law," said Lord Cairns, "a gift to A., his heirs and assigns, is what it says, a gift to all those persons. No doubt the law says that the estate given to the heirs shall vest in A.; but it is a gift to the heirs * nevertheless." At this day the case is chiefly interesting on *135 account of this dissection of the limitation in fee.]

In order to constitute a revocatory obliteration, it is not essential

(*g*) Sutton *v.* Sutton, Cowp. 812.

[(*h*) Lankins *v.* Larkins, 3 Bos. & P. 16; Short *v.* Smith, 4 East, 419; Humphreys *v.* Taylor, 7 Bac. Ab. Gwil. 363.

(*i*) Per Alvanley, C. J., and Chambre, J., 3 B & P. 21, 22.

(*k*) 1 Ex. D. 110, affirmed in D. P. 48 L. J. Ex 57, reversing the decision of the Exch. Division, where it was held that obliteration, to be effectual under sect. 6, must be of a complete "clause" or sentence. But this is inconsistent with Larkins *v.* Larkins.]

good revocation by cancelling, and the will cannot be revived by evidence of subsequent declarations of the decedent. Warner *v.* Warner, 37 Vt. 356.

[1] See Bigelow *v.* Gillott, 123 Mass. 102; Evans's Appeal, 58 Penn. St. 238; Dixon's Appeal, 55 Penn. St. 424; Stover *v.* Kendall, 1 Coldw. 557; Brown's Will, 1 B. Mon. 56; Matter of Kirkpatrick, 22 N. J. Eq. 463; In re Hall, L.R. 2 P. & D. 256; In re Horsford, L. R. 3 P. & D. 211; In re Treeby, ib. 242; Neate *v.* Pickard, 2 No. Cas. 406.

that every word shall be obliterated; the revocation is complete if enough of the material part be expunged, to show an intention that the devise shall not stand; as where the testator draws his pen across the devisee's name (*l*). But where the name occurred several times in the course of the will, and the testator drew his pen across the name in some instances, and left it standing in others, it was held, that the bequests were not revoked; the V.-C. observing, that as the description, and in some places the name, of the legatee remained uncancelled, the court would not be warranted in holding that the bequests to her were revoked (*m*). But the obliteration, in the envelope of a will, of the words referring to it as the will of the testator, accompanied by expressions written by him, showing that he considered that it was revoked by another will, which, for want of being duly attested, had no such operation, is, of course, not such an obliteration as to have the effect of revoking the will (*n*).[1]

Effect of partial obliteration.

And here it may be observed, that, where the act of cancellation or destruction is connected with the making of another will, so as fairly to raise the inference, that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force.[2] As where a testator, having some time before executed a will, duly attested, to each sheet of which he had affixed a seal, instructed his solicitor to prepare another, and signed the draft prepared from those instructions, and then proceeded to tear off the seals of the old will; when, after all the seals but one had been thus removed, he was informed, that the new will would not be operative upon his lands in its then state, which induced him to desist; and before the new will was complete, the testator died: it was held, that the original will remained unrevoked (*o*).[3]

Effect where cancellation is connected with a new disposition.

(*l*) See Mence *v.* Mence, 18 Ves. 350. (*m*) Martins *v.* Gardiner, 8 Sim. 73.
(*n*) Grantly *v.* Garthwaite, 2 Russ 90.
(*o*) Hyde *v.* Hyde, [1 Eq. Ab. 409,] 3 Ch. Rep. 155: see also Onions *v.* Tyrer, 1 P. W. 343, Pre. Ch. 459; [Burtonshaw *v.* Gilbert, Cowp. 49;] Sutton *v.* Sutton, Cowp. 812; Winsor *v.* Pratt, 5 J. B. Moo. 484, 2 Br. & B. 650; [Perrott *v.* Perrott, 14 East, 440; Scot *v.* Scot, 1 Sw. & Tr. 258; Clarkson *v.* Clarkson, 3 Sw. & Tr. 497, 31 L. J. Prob. 143; Dancer *v.* Crabb, L. R. 3 P. & D. 98.

[1] That the tearing off a seal may work a revocation, though the seal was unnecessary, see Avery *v.* Pixley, 4 Mass. 460; White's Will, 25 N. J. Eq. 501. See also Lambell *v.* Lambell, 3 Hagg. 568; Price *v.* Powell, 3 Hurl. & N. 341; Johnson *v.* Brailsford, 2 Nott. & McC. 272.

[2] A familiar example of deliberative alteration may be seen in changes made in pencil in the written instrument. As has elsewhere been stated, the general presumption and probability are, that where alterations in pencil only are made, and nothing further appears, they are deliberative, when in ink they are final and absolute. Hawkes *v.* Hawkes, 1 Hagg. 321; Edwards *v.* Astley, 1 Hagg. 490; Dickenson *v.* Dickenson, 2 Phill. 173; Francis *v.* Grover, 5 Hare, 39. But a will deliberately cancelled, without accident or mistake, is revoked, though the testator afterwards intends to make a new one, but omits so to do. Semmes *v.* Semmes, 7 Harr. & J. 388.

[3] It is also declared in this country, of a completely executed will, that when a testator does an act in the nature of cancellation or mutilation, with a view to having his will immediately changed or altered, the act of cancellation and reconstruction being intended

*[In like manner, where the later of two inconsistent wills is *136
destroyed on the supposition that the earlier will is thereby revived; if this supposition be (as by the existing law we shall presently see it is) erroneous, the later will remains unrevoked. In this case, as in the former, the act of destruction is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as the condition upon which alone the revocation was intended to operate is in neither case fulfilled, in neither does the *animus revocandi* exist (*p*)].

And the same principle applies to partial alterations;[1] so that, where a testator strikes out the name of a devisee, and at the same time interlines that of another, or substitutes a larger or smaller interest or share for that which he had previously given, if the interlineation is inoperative for want of an attestation, the obliteration will also fail of effect (*q*).[2]

Partial obliteration connected with a new disposition.

[But the mere intention to make at some indefinite future time a new will, is not enough to prevent revocation (*r*)].[3]

Where the later of two inconsistent wills was [lost (*s*) or] cancelled (*t*), or otherwise revoked by the testator in his lifetime, the effect of such revocation clearly was, according to the old law, to restore the prior will to its original position; and such restored will, if not revoked by any subsequent act of the testator, came into operation at his decease;[4]

Effect where a testator having made two inconsistent wills, revokes the later.

(*p*) Powell *v.* Powell, L. R. 1 P. & D. 209, overruling Dickinson *v.* Swatman, 4 Sw. & Tr. 205, 30 L. J. Prob. 84.]

(*q*) Short *v.* Smith, 4 East, 419 (this case however did not raise the precise point); Kirke *v.* Kirke, 4 Russ. 435; [Locke *v.* James, 11 M. & Wels. 901; and see corresponding cases under 1 Vict. c. 26, post, p. 142.

(*r*) Williams *v.* Tyley, Johns. 530, better reported 5 Jur. N. S. 35; Re Mitcheson, 32 L. J. Prob. 202. (*s*) Rainier *v.* Rainier, 1 Jur. 754. (*t*) Goodright *v.* Glazier, 4 Burr. 2512.]

as part of the same transaction, and the reconstruction or republication is not perfected, the act of cancellation or mutilation is to be deemed incomplete, because of the failure of the other essential acts. Youse *v.* Forman, 5 Bush, 337; Stover *v.* Kendall, 1 Cold. 557. So where the testator makes an alteration by erasure and interlineation, or otherwise, without authenticating the same by a new attestation in the presence of witnesses, it will be presumed that the alteration was intended to be dependent upon taking effect as a substitute; and when the alteration fails to take effect the will stands as originally drawn, so far as it is legible after the attempted alteration. Wolf *v.* Bollinger, 62 Ill. 368; Short *v.* Smith, 4 East, 419; Jackson *v.* Holloway, 7 Johns. 394; Laughton *v.* Atkins, 1 Pick. 535. When a will, however, is once properly executed, a mere direction by the testator to destroy it, and a belief on his part that it has in fact been destroyed, will not operate as a revocation. McBride *v.* McBride, 26 Gratt. 476; Mundy *v.* Mundy, 15 N. J. Eq. 290. The direction must be followed by a substantive act of destruction. On the other hand, when an attempt is made, for example, to establish a mere letter as a testamentary act, a request of the writer to destroy the letter leads to the conclusion that his purpose was that that paper at least should not be his will. McBride *v.* McBride, 26 Gratt. 476. And this is equally true, though the letter refer to the formal draft of a will which accords with the letter, if such draft were never executed. Ib. On the other hand, a revocation made upon advice, *e.g.* upon legal advice, cannot be treated as dependent upon the soundness of that advice. Skipwith *v.* Cabell, 19 Gratt. 758; Attorney-General *v.* Lloyd, 3 Atk. 551.

[1] See Overall *v.* Overall, Litt. Sel. Cas. 504.

[2] See Hairston *v.* Hairston, 30 Miss. 276. Where, after one execution of a will of real and personal estate, the scrivener, by direction of the testator, and in the presence of only one of the subscribing witnesses, interlined another legacy, it was held that the alteration did not make the will void. Wheeler *v.* Bent, 7 Pick. 61. See Jackson *v.* Holloway, 7 Johns. 394.

[3] Youse *v.* Forman, 5 Bush, 337.

[4] Boudinot *v.* Bradford, 2 Dallas, 268; Lawson *v.* Morrison, 2 Dallas, 289. See

and the distinction sometimes suggested, between cancelled wills which did, and those which did not, contain express clauses of revocation, in regard to their revoking effect upon an earlier uncancelled will (*u*), was wholly without foundation.[1] The clause of revocation, like every other clause, was ambulatory and silent until the death of the testator called the will into operation (*v*). In the Ecclesiastical Court, however, Sir J. Nicholl laid it down, that the legal presumption was neither adverse to nor in favor of the revival of a former uncancelled, upon the cancellation of a later revocatory, will. The question was, he said, open to decision either way, according to facts and circumstances (*x*).

Sometimes a testator for greater security executes his will in *137 * duplicate, retaining one part and committing the other to the custody of another person (usually an executor or trustee); and questions have not unfrequently arisen as to the effect of his subsequently destroying one of such papers, leaving the duplicate entire. In these cases the presumption generally is, that the testator means by the destruction of one part to revoke the will, but the strength of the presumption depends much upon circumstances. Thus, where (*y*) he cancels that part which is in his own possession (the duplicate being in the custody of *another*), it is very strongly to be presumed, that he does not intend the duplicate to stand, he having destroyed all that was within his reach (*z*). So, if the testator have himself possession of both, the presumption of revocation holds, though weaker (*a*),[2] and even if, having both in his possession, he alters one, and then destroys that which he had altered, there is also the presumption, but weaker still.[3]

Effect of destroying one part of duplicate will.

These several gradations of presumption were stated by Lord Erskine in Pemberton *v.* Pemberton (*b*), the circumstances of which were as follows: Two parts of a will were found in the possession of a testator at his death, the one cancelled, having various alterations in it, and the other not altered or cancelled; and the finding of the jury in three successive trials at law on these facts, and the evidence generally, was that the will was not revoked; and in that conclusion the L. C. finally concurred.

Perhaps, in such a case, the presumption can hardly be said to lean

(*u*) See Roper on Revocation. 94. (*v*) Harwood *v.* Goodright, Cowp. 92.
(*x*) Usticke *v.* Bawden, 2 Ad. 116; [and see Moore *v.* Moore, 1 Phillim. 412; James *v.* Cohen, 3 Curt. 770, 8 Jur. 249.]
(*y*) See Sir Edward Seymour's case, cit. Com. 453, 1 P. W. 346, [2 Vern. 742; and see Colvin *v.* Fraser, 2 Hagg. 266; Rickards *v.* Mumford, 2 Phillim. 23.]
(*z*) Burtonshaw *v.* Gilbert, Cowp. 49; Boughey *v.* Moreton, 3 Hagg. 191, n., [2 Ca. tem. Lee, 532. (*a*) Re Hains, 5 No. Cas. 621.] (*b*) 13 Ves. 310.

Havard *v.* Davis, 2 Binn. 406; 4 Kent, 531; Kirkcudbright *v.* Kirkcudbright, 1 Hagg. 325; James *v.* Marvin, 3 Conn. 576; Bohanon *v.* Walcot, 1 How. (Miss.) 336; 2 Greenl. Ev. § 683; Marsh *v.* Marsh, 3 Jones, 77. It is a familiar principle that, where there are two devises of the same testator, the last operates as a revocation of the first only so far as it is inconsistent with it. As to the residue, the former devise will stand. Brant *v.* Willson, 8 Cowen, 56. See Jackson *v.* Betts, 9 Cowen, 208.

[1] Randall *v.* Beatty, 31 N. J. Eq. 643; Colvin *v.* Warford, 20 Md. 357.
[2] O'Neall *v.* Farr, 1 Rich. 80.
[3] 2 Greenl. Ev. § 682.

in favor of the revocation at all; for the testator having made alterations in one part, and then cancelled the part so altered *only*, the conclusion would rather seem to be, that he merely intended, by the destruction of that part, to get rid of the alterations, and to restore the will to its original state. And it is observable, that in Roberts *v.* Round (*c*), where one of two duplicate wills was found partly mutilated, and the other carefully preserved in the testator's own possession, it was held, that the will remained unrevoked.

The evidence in Pemberton *v.* Pemberton, as to the intent with which the act of cancellation was done, consisted partly of subsequent declarations of the testator, and these tended rather to * favor *138 the revocation than otherwise; but both Lord Eldon and Lord Erskine adverted to the very little weight due to expressions thrown out by testators in conversation with persons respecting their wills.

[As the destruction of one part of a duplicate will is generally a revocation of the will, so an obliteration made in one part will be considered of the same effect as if made in both; for the two parts form together (if such be the intention, which is a question for the jury to decide) but one will, and an obliteration in one part is equivalent to an obliteration in both. (*d*).] Effect of alteration in one duplicate.

The principle on which the destruction of one part of a duplicate will is held to be a revocation, has been extended to a case in which the testator, having expressed the same purpose in both a will and codicil, obliterated it in the codicil alone. Thus in Utterson *v.* Utterson (*e*), a testator, after disposing of the residue of his real and personal property among his children, introduced into the will an interlineation, excepting his son J., to whom he gave one shilling. By a codicil (being the fifth), after expressing his disapprobation of the conduct of this son, he declared it to be his determination that he (the son) should have no more of his property than one shilling. It appeared that the testator subsequently became reconciled to his son, and cancelled the codicil by drawing his pen across it, *but did not strike out the interlineation in his will.* This raised the question, whether the cancelling of the codicil destroyed the effect of the interlined clause in the will, with reference to some copyhold property; for, as to the freeholds, it was admitted that the interlineation was inoperative, for want of an attestation: and in regard to the personalty, the Ecclesiastical Court had held the cancellation of the codicil to have cancelled the excluding clause in the will; and of this opinion was Sir W. Grant, with respect to the copyholds. "Even independently of the parol evidence of reconciliation," he said, "it seems to me, that the act of obliteration speaks as clearly as words could have done a change of intention as to the exclusion, and Effect where same expressions occur in will and codicil, and testator obliterates them in one only.

(*c*) 3 Hagg. 548.

[(*d*) Doe d. Strickland *v.* Strickland, 8 C. B. 724. The second copy or part of the will was made two years after the first; but was found by the jury to have been intended as a duplicate. See also Hubbard *v.* Alexander, 3 Ch. D. 738.] (*e*) 3 V. & B. 122.

not merely as to the mode of effecting it. It is the same as if he had said, 'This codicil no longer speaks my sentiments; I am no longer dissatisfied with my son, and no longer mean to make any distinction between him and my other children'" (*f*).[1]

*139 *Sometimes there is found, among the papers of a testator, a codicil without the will of which it professes to be part; in such cases the question arises, whether or not the destruction of the will (which it is to be presumed, in the absence of proof to the contrary, was the act of the testator) operates impliedly, to revoke the codicil also. This question, of course, depends mainly upon the contents of the several testamentary documents. If the dispositions in the codicil are so complicated with, and dependent upon, those of the will as to be incapable of a separate and independent existence, the destruction of the will necessarily revokes the codicil (*g*); and before 1 Vict. c. 26, the general presumption in the Ecclesiastical Courts was rather in favor of the intention to involve a codicil in the revocation of the will of which it was a part, where a contrary intention could not be collected either from the contents of the codicil itself or from extrinsic evidence (*h*).

Effect of testator destroying will, and leaving codicil undestroyed.

But if the codicil was capable, from the nature of its contents, of subsisting independently of the will, its validity was not affected by the destruction of such will. Thus, where (*i*) a testator having made a will, the contents of which were unknown, the same not being found at his death, subsequently made a codicil in favor of an illegitimate child, born since the date of the will, and its mother, which he entitled "A codicil to my last will, and to be taken as part thereof;" Sir H. Jenner decided, that the codicil was unrevoked, there being nothing to show an intention to revoke it; and the dispositions it contained (which were in favor of those for whom the testator was under a moral obligation to provide, and who were not in existence when the will was executed), being of such a nature as to be capable of taking effect independently of the will.

The act 1 Vict. c. 26, has considerably modified the law relating to the species of revocation which forms the subject of the present section. It [enacts (sect. 20) "that no will or codi-

Revocation by burning, tearing or

(*f*) Here it occurs to remark, that testators should be dissuaded from making or altering their wills (as they are often disposed to do), under the influence of any temporary excitement occasioned by the ill-conduct of a legatee; and, still more, from recording their resentment in their wills, which may have the effect of wounding the feelings of, and casting a stigma on, the offending party long after the transaction which gave occasion to the irritation has been effaced from recollection, or is remembered only to be regretted. [The Probate Court will not readily omit from the probate any such record of displeasure, Re Honywood, L. R. 2 P. & D. 251.] (*g*) Usticke *v.* Bawden, 2 Add. 116.

(*h*) Medlycott *v.* Assheton, 2 Add. 229; Coppin *v.* Dillon, 4 Hagg. 369.

(*i*) Tagart *v.* Squire, 1 Curt. 289.

[1] There is, however, no implied revocation of a will by the fact that the testator, after making a will disinheriting his son by reason of unfriendliness, has afterwards become reconciled to him. Jones *v.* Moseley, 40 Miss. 261.

cil, or any part thereof, shall be revoked otherwise than as * aforesaid (*i. e.* by marriage), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed as a will," 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" [1] and (sect. 21) "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,[2] unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; [3] 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."

*140 otherwise destroying *under the present law.*

Obliterations, &c., in a will to be signed and attested.

[And by sect. 22 it is enacted, "That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution 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.*"]

Revival of revoked wills.

The change, therefore, is that a revocation by cancellation or obliteration is not (as before) placed upon the same footing as a revocation by burning or tearing. Obliteration, [or other alteration which does not wholly efface the will, is no longer effectual unless executed in manner prescribed for the execution of a will].

Points of difference under the new law.

[1] Under this clause of the statute, it has been held that a cancellation of a will is not a revocation thereof, under the words "otherwise destroying" the same. Stephens *v.* Taprell, 2 Curteis, 458. In this case there is a full discussion, by Sir H. Jenner, of the meaning of the language in the above clause of the Act of 1 Vict. c. 26.

[2] In re Rippin, 2 Curteis, 332; In re Ibbetson, ib. 337; In re Brooke, ib. 343; In re Beavan, ib. 369. If a word erased or obliterated is not apparent in the will, it may yet be proved *aliunde* what it was. Soar *v.* Dolman, 3 Curteis, 121; In re Rippin, 2 Curteis, 332; Brooke *v.* Kent, cited ib. and reported 3 Moore, P. C. 334. And the word so proved to have been erased may be inserted in the probate. Ib. This was held in a case where the word *fifty*, being the amount of one of the legacies bequeathed, was obliterated, and the word *thirty* inserted without any new attestation, and the word fifty could not be made out from the paper. Soar *v.* Dolman, and see Brooke *v.* Kent, ubi supra; Greville *v.* Tylee, 7 Moore. P. C. 320. But see Townley *v.* Watson, 3 Curteis, 761, where the construction of the 21st sect. of 1 Vict. c. 26, is discussed by Sir H. J. Fust.

[3] Interlineations are valid when opposite them are the initials of the testator and of the attesting witnesses. In re Blewitt, L. R. 5 P. D. 116. Thus where two years after the testator had executed his will, he made an interlineation in it, and in the margin of it, and opposite the interlineation, he and the subscribing witnesses placed their initials, the interlineation was allowed to form part of the probate. In re Hinds, 24 Eng. L. & Eq. 608.

But it may, of course, still be a question, (1) whether the destruction of a will by a testator in his lifetime [by burning, tearing, or otherwise] is partial or complete; and (2) whether it takes place under circumstances, in regard to the volition of the testator or otherwise, which invest it with a revoking effect; and (3) whether or not it was so connected with an intended new disposition as to be dependent for its operation upon the efficacy thereof (*j*). All such questions the recent statute leaves untouched.

Points of similarity.

*141 [*Thus, with regard to the words, "tearing" and "burning," the decisions under the Statute of Frauds assist the construction of the act 1 Vict. Under the latter act it has been decided that the word "tearing" includes "cutting" (*k*); for it would be absurd to say that a will torn into two pieces was revoked, but that if cut into twenty pieces it was not revoked. The cutting, to be effectual, need not be a cutting up of the whole will; cutting out that part of the will which may be said to be the principal part (*l*), or that part which gives effect to the whole, as the signature of the testator (*m*),[1] or, it is presumed, of the witnesses (*n*), will cause a revocation of the whole will. And where the will is written on several sheets, each signed and witnessed, tearing off the last signature will revoke the whole will, although the prior signatures are left (*o*). It has also been decided by the Court of Exchequer (*p*) that tearing off, *animo revocandi*, the seal of a will (though no seal is necessary to the due execution of a will) constituted a revocation.[2] They said the instrument purported by the attestation clause to be executed under seal, and was published and attested as a sealed instrument, and when the seal was torn off it ceased to be the instrument which the testator purposed to execute and publish. And this authority was followed by Sir W. P. Wood, V.-C., in a case (*q*) where a testator made his will on five sheets of paper, signed the first four, and signed and sealed the fifth, with an attestation clause describing the mode of execution: he afterwards tore off the signature from each of the first four sheets and struck through with his pen the signature on

"Tearing."

When partial tearing effects total revocation;

(*j*) See Powell *v.* Powell, ante, p. 136.

(*k*) Hobbs *v.* Knight, 1 Curt. 768; Re Cooke, 5 No. Cas. 390; and see Clarke *v.* Scripps, 16 Jur. 783, 2 Rob. 563.

(*l*) Williams *v.* Jones, 7 No. Cas. 106.

(*m*) Hobbs *v.* Knight, 1 Curt. 768; Re Gullan, 1 Sw. & Tr. 23, 27 L. J. Prob. 15; Re Lewis, ib. 31, 1 Sw. & Tr. 31; Re Simpson, 5 Jur. N. S. 1366; Bell *v.* Fothergill, L. R. 2 P. & D. 148.

(*n*) Evans *v.* Dallow, 31 L. J. Prob. 128. See also Birkhead *v.* Bowdoin, 2 No. Cas. 66; Hobbs *v.* Knight, 1 Curt. 780, 781; Abraham *v.* Joseph, 5 Jur. N. S. 179. So in a case of total obliteration, Re James, 7 Jur. N. S. 52.

(*o*) Re Gullan, 1 Sw. & Tr. 23, 27 L. J. Prob. 15, 4 Jur. N. S. 196; Gullan *v.* Grove, 26 Beav. 64. Compare Christmas *v.* Whinyates, 32 L. J. Prob. 73 (where the court was satisfied that the tearing was intended to work a partial revocation only).

(*p*) Price *v.* Powell, 3 H. & N. 341. (*q*) Williams *v.* Tyley, Johns. 530.

1 See Clark's Will, 1 Tuck. 445.

2 Avery *v.* Pixley, 4 Mass. 460; White's Will, 25 N. J. Eq. 501; Johnson *v.* Brailsford, 2 Nott & McC. 272; Lambell *v.* Lambell, 3 Hagg. 568.

the last, and, the *animus revocandi* being proved in evidence, it was held that the will was revoked by the tearing. But cutting out a particular clause or the name of a legatee is a revocation *pro tanto* only (*r*). Where a will is found torn, evidence is, of course, admissible to show * that it was done by mistake (*r*) or is merely the effect of wear (*s*); for mere tearing or destruction without intention to revoke is no revocation under the express terms of the act (*t*). The intention without the act is equally ineffectual (*u*). When not. *142

The words "otherwise destroying" are new.[1] They are to be taken to mean a destruction *ejusdem generis* with the modes before mentioned, that is, destruction in the proper sense of the word of the substance or contents of the will, or, at least, complete effacement of the writing, as, by pasting over it a blank paper (*x*); and not a "destroying" in a secondary sense (*y*), as by cancelling or incomplete obliteration. These, unless they prevent the words, as originally written, from being apparent, that is, apparent by looking at the will itself, are plainly excluded by the statute (*z*). Glasses have been used (*a*) for discovering what the words obliterated originally were: but parol evidence is inadmissible (*b*), except in those cases where the obliteration was made for the purpose merely of altering the amount of the gift and not of revoking it; in which case, there being no intention to revoke except for the purpose of substituting a gift of a different amount, if the latter cannot take place by reason of the substituted words not being properly attested, the former gift will now (as under the Statute of Frauds) remain good, and evidence must be admitted to show what the original words were (*c*). The same rule, it is presumed, applies to an erasure of the name of the legatee (*d*); as it appears to do to an erasure of the name of an executor (*e*). Meaning of words "otherwise destroying." Parol evidence admissible in cases of conditional revocation.

(*r*) Re Cooke, supra; Re Lambert, 1 No. Cas. 131; Re Woodward, L. R. 2 P. & D. 206, where seven or eight lines at the beginning had been cut off.
(*r*) Giles *v.* Warren, L. R. 2 P. & D. 401.
(*s*) Bigge *v.* Bigge, 9 Jur. 192, 3 No. Cas. 601, and see 1 Eq. Ca. Ab. 402, pl. 3, marg.
(*t*) Re Tozer, 2 No. Cas. 11, 7 Jur. 134; Re Hannam, 14 Jur. 558; Clarke *v.* Scripps, 16 Jur. 783, 2 Rob. 563. (*u*) Cheese *v.* Lovejoy, 2 P. D. 251; ante, p. 131.
(*x*) Re Horsford, L. R. 3 P. & D. 211.
(*y*) Stephens *v.* Taprell, 2 Curt. 458; Hobbs *v.* Knight, 1 Curt. 779.
(*z*) Re Dyer, 5 Jur. 1016; Re Fary, 15 Jur. 1114; Stephens *v.* Taprell, 2 Curt. 458; Re Beavan, ib. 369; Re Rose, 4 No. Cas. 101; Re Brewster, 29 L. J. Prob. 69, 6 Jur. N. S. 56.
(*a*) Re Ibbetson, 2 Curt. 337; Lushington *v.* Onslow, 6 No. Cas. 187, 12 Jur. 465. As to this see Re Horsford, L. R. 3 P. & D. 211.
(*b*) Townley *v.* Watson, 3 Curt. 761, 8 Jur. 111, 3 No. Cas. 17.
(*c*) Soar *v.* Dolman, 3 Curt. 121, 6 Jur. 512; Brooke *v.* Kent. 3 Moo. P. C. C. 334, 1 No. Cas. 99; Re Ibbetson, 2 Curt. 337; Re Reeve, 13 Jur. 370. If there is no evidence what the words were, probate is decreed in blank, Re James, 1 Sw. & Tr. 238.
(*d*) See Short *v.* Smith, 4 East, 419.
(*e*) Re Parr, 1 Sw. & Tr. 56, 29 L. J. Prob. 70, 6 Jur. N. S. 56; Re Harris, 1 Sw. & Tr. 536, 29 L. J. Prob. 79. See also per Sir W. Grant, 7 Ves. 379; and Hale *v.* Tokelove, 2 Rob. 318, 14 Jur. 817, noticed post; Re M'Cabe, L. R. 3 P. & D. 94; Re Bedford, 5 No. Cas. 188, is contra. *Sed qu.*

[1] Where a will twenty-five years old has been found in a barrel of waste papers after the death of the testatrix, the instrument being partly torn and worn away, the question whether it was destroyed by the testatrix is for the jury; and evidence may be given of

Striking a pen through the gift to a legatee, though not now a sufficient revocation of a legacy, and not to be noticed in the probate, may nevertheless not be altogether without use; for *where the testator has paid a sum in his lifetime to the legatee, it seems that the fact of the gift being struck out in the original will would be received as evidence that the payment was intended to be in satisfaction of the legacy (*f*); and the Court of Probate has sometimes granted a fac-simile probate of the will containing interlineations, or parts of the will struck through; and the Court of Construction has then considered the alterations as made before execution, and therefore effectual. Where this is really so, the duty of the Court of Probate, at all events since the Judicature Act, 1873, would seem to be to grant probate of the will as altered, in the same way as if the alterations had been referred to in the attestation clause (*g*).

Satisfaction proved by obliteration. *143

With respect to a will executed before 1838, the question whether it is revoked or altered by any act apparent on the face of it done on or after that date, as by erasure, obliteration or interlineation, must be determined by reference to the provisions of the act 1 Vict. c. 26 (*h*); but, as has been before noticed, the question whether it is revoked by any act *not apparent on the face of it*, and done on or after that date, must be determined with reference to the law as it stood before the act (*i*).

Distinction as to acts apparent and acts not apparent on the face of a will.

Where obliterations and interlineations appear on the face of a will, and there is no evidence (*k*) to show when they were made, the presumption is that they were made after the execution of the will (*l*);[1] and if there be a codicil to the will, which

Presumption when alteration is made.

(*f*) Twining *v.* Powell, 2 Coll. 262.

(*g*) Gann *v.* Gregory, 3 D. M. & G. 777; Shea *v.* Boschetti, 18 Jur. 614, 23 L. J. Ch. 652.

(*h*) Re Livock, 1 Curt. 906; Hobbs *v.* Knight, ib. 768; Bronke *v.* Kent, 3 Moo. P. C. C. 334, 1 No. Cas. 93; Croker *v.* Marquis of Hertford, 3 Curt. 468, 7 Jur. 262, 4 Moo. P. C. C. 355; and see Andrews *v.* Turner, 3 Q. B. 177. (*i*) Supra, p. 129, and cases in last note.

(*k*) As to the nature of the evidence necessary, see Keigwin *v.* Keigwin, 3 Curt. 607, 7 Jur. 840; Re Jacob, 1 No. Cas. 401; Re Hindmarch, L. R. 1 P. & D. 307; Re Treeby, L. R. 3 P. & D. 242. Generally declarations of the testator are admissible for this purpose, whether made before or at the time of the execution of his will, Doe d. Shallcross *v.* Palmer, 16 Q. B. 747; Re Hardy, 30 L. J. Prob. 142; Re Sykes, L. R. 3 P. & D. 26; Dench *v.* Dench, 2 P. D. 60. But not those made afterwards, Doe d. Shallcross *v.* Palmer, supra; nor is it enough that the alterations bear earlier date than the will, Re Adamson, L. R. 3 P. & D. 253.

(*l*) Cooper *v.* Bockett, 4 Moo. P. C. C. 419, 10 Jur. 931; Simmonds *v.* Rudall, 1 Sim. N. S. 115; Burgoyne *v.* Showler, 1 Rob. 5, 8 Jur. 814, 3 No. Cas. 20; Re Thompson, 3 No. Cas. 441; Gann *v.* Gregory, 3 D. M. & G. 777; Doe d. Shallcross *v.* Palmer, 16 Q. B. 747; Re James, 1 Sw. & Tr. 238; Re White, 30 L. J. Prob. 55, 6 Jur. N. S. 808; Williams *v.* Ashton, 1 J. & H. 115. Where a will is dated before the late act it seems that unattested alterations in it will also be deemed to have been made before that act. Re Streaker, 4 Sw. & Tr. 192, 28 L. J. Prob. 50. And see Banks *v.* Thornton, 11 Hare, 180. But such presumption was not made where the obliteration would have worked a total *revocation*. Benson *v.* Benson, L. R. 2 P. & D. 172.

the declaratinns of the testatrix made after the execution of the will. Lawyer *v.* Smith, 8 Mich. 411. See Patterson *v.* Hickey, 32 Ga. 156.

[1] A contrary rule concerning the presumption as to the time of an obliteration or alteration, in the absence of evidence, was laid down in Wikoff's Appeal, 15 Penn. St. 281, but apparently without examination of the authorities. The rule laid down in the text, that it must be presumed that the alteration, obliteration, or interlineation was

codicil takes no notice of them, the presumption is, that they * were made after the date of the codicil (*m*). And the same *144 presumptions hold regarding mutilation (*n*). But where a will has been drawn with blanks left, *e. g.* for the names of the legatees and the amount of the legacies, which blanks are afterwards filled up, but there is no evidence to show when, the presumption is that the blanks were filled in before execution. And although there may have been no blanks, but the names of the legatees are found interlined, yet if the interlineation only supplies a blank in the sense, and appears to have been written with the same ink and at the same time as the rest of the will, the court will conclude that it was written before execution (*o*). In Birch *v.* Birch (*p*), where some blanks were filled in with black ink and others with red, it was presumed that the additions in black ink were made before execution, but that those in red ink were made after execution, the envelope in which the will was found appearing to have been sealed, opened, and resealed.

(*m*) Lushington *v.* Onslow, 6 No. Cas. 183, 12 Jur. 465; Rowley *v.* Merlin, 6 Jur. N. S. 1165; and compare Re Mills, 11 Jur. 1070.
(*n*) Christmas *v.* Whinyates, 32 L. J. Prob. 73.
(*o*) Re Cadge, L. R. 1 P. & D. 543.
(*p*) 6 No. Cas. 581.

subsequent to the execution of the will (for which Greville *v.* Tylee, 7 Moore, P. C. 320, is a further authority) may rest upon either of two grounds, or indeed upon both of them. According to the current of authority (in opposition to a few decisions, see ante, p. 38. note) proof of a will stands upon a different footing from the proof of a deed; and a substantive burden rests upon the proponent of the former to prove it. If, then, there be any indication of change of purpose on the part of the testator, as by alterations apparently unattested, it devolves upon the proponent relying upon such alterations to show that the will was changed at or before its execution. The will of course is not rendered invalid (except in so far as it may have been made illegible and no satisfactory evidence of the original language is adduced) by the subsequent alteration. Wheeler *v.* Bent, 7 Pick. 61. Cooper *v.* Bockett, 4 Moore, P. C. 419, 452. The other ground for the presumption of subsequent alteration arises from a consideration of the ambulatory nature of wills. Unlike a deed, a will lies dormant and is subject to change at any time during the life of the testator; and as it is common for testators to change their wills after execution, it is deemed a fair presumption that unattested alterations or interlineations were made after the completion of the instrument. Greville *v.* Tylee, 7 Moore, P. C. 320. This presumption, however, which at best has a slender basis, would of course give way to evidence that the will had not been in the testator's possession since its execution. But the first one would still prevail. And as to that ground, it may be remarked that it is held by some of the authorities that in the case of a promissory note containing an apparently material alteration, the burden is upon the plaintiff offering the paper to show that it was altered before execution and delivery. Ely *v.* Ely, 6 Gray, 439; Wilde *v.* Armsby, 6 Cush. 314. See also Simpson *v.* Davis, 119 Mass. 269; Willett *v.* Shepard, 34 Mich. 106: Atwood *v.* Cornwall, 25 Mich. 142. But the authorities are not agreed upon this subject. Bigelow's Bills and Notes, 581. As to alterations of a will by the testator, made after its execution, see further Jackson *v.* Holloway, 7 Johns. 334; Locke *v* James, 11 Mees. & W. 901; Wright *v.* Wright, 5 Ind. 389. It has been said that an alteration in a will made by a person claiming under it, whether material or immaterial, renders it void. Jackson *v.* Malin, 15 Johns. 297, 298, per Platt, J. An immaterial alteration, however, made in a will by a stranger, will not destroy it, Malin *v.* Malin, 1 Wend. 625; and it is clear that a material alteration made by a stranger, without the privity of a party interested, will not have that effect. Where an alteration has been improperly made in a will, by a person not duly authorized to make such alteration or addition, a court of probate will order the interpolated part to be struck out, and the residue of the instrument will be probated. Wood *v.* Wood, 1 Phillim. 357. In states where holograph wills are valid without attestation, any alterations made by the testator in such a will, by striking out or adding, will be valid. Cogbill *v.* Cogbill, 2 Hen. & M. 467.

Effect under 1 Vict. c. 26, where will is destroyed but not the codicil.

The stat. 1 Vict. c. 26 appears not to have done away with the presumption made by the old law that the destruction of a will was an implied revocation of a codicil thereto (*q*). Lord Penzance has indeed held otherwise, on the ground that sect. 20, enacting that "no will *or codicil* shall be revoked otherwise than" by certain specified methods, plainly excludes the method in question (*r*). But, in Sugden *v.* Lord St. Leonards (*s*), a demurrer depending for its validity on this view of the statute, was formally (though without argument) overruled by Sir J. Hannen. It is far from clear that the act forbids a codicil being, to the same extent as before, treated as part of, or accessory to, the will; or that the express mention of "codicil" does more than require, where it is the substantive subject of revocation, that it be revoked by one of *145 the specified methods (*t*). * Perhaps, however, the point is not of much importance. The presumption already stated was never a strong one, even under the old law, and the question whether the codicil was revoked or not always depended, and (supposing the presumption to continue) will still depend, mainly upon the contents of the codicil (*u*), and the effect of the evidence adduced to rebut the presumption (*v*).

Alteration not duly attested by retracing names with dry pen.

Upon the 21st section it has been decided in a case where a testator made some alterations in his will, and he and the attesting witnesses traced over their former signatures with a dry pen, and the witnesses put their initials in the margin opposite to the several alterations, that the alterations were not duly executed (*w*). The initials did no more than identify the alterations, they were not written with the intention of attesting the testator's signature; for it was erroneously supposed that this had been effectually done by tracing the former signatures with a dry pen.

Rule as to revival of a prior will by revocation

The 22nd section abolishes] the rule which gave to the revocation of a posterior will the effect of reviving a prior testamentary instrument, which such posterior will, if it had remained in force, would have revoked: and it is immaterial in such case

(*q*) See per Sir H. Fust, Clogstoun *v.* Walcott, 5 No. Cas. 623, 12 Jur. 422, Re Halliwell, 4 No. Cas. 400, 9 Jur. 1042: followed by Sir C. Cresswell, Grimwood *v.* Cozens, 2 Sw. & Tr. 364, 5 Jur. N. S. 497; Re Dutton, 3 Sw. & Tr. 66, 32 L. J. Prob. 137. In Clogstoun *v.* Walcott, the judge is made to observe, as if it were a new requirement, that the statute expressly requires "an intention to destroy." But the *animus revocandi* was previously required by necessary intendment of law: ("destroy" is here an obvious oversight for "revoke.")

(*r*) Black *v.* Jobling, L. R. 1 P. & D. 685; Re Savage, L. R. 2 P. & D. 78; Re Turner, ib. 403.

(*s*) 1 P. D. 154, 206.

(*t*) Whether under the old law the presumption existed with respect to codicils dealing with freehold land appears never to have been decided. The Statute of Frauds, sect. 6, does not, for this purpose, differ materially from 1 Vict. c. 26, s. 20.

(*u*) So imperative did Lord Penzance consider the act to be, that even where the codicil was unintelligible without the will (the contents of which were unknown), he held himself bound to admit the codicil to probate and leave the question of its operation to the Court of Construction, Re Turner, L. R. 2 P. & D. 403. But since the Judicature Act, 1873, the whole matter must, it would seem, be disposed of in the Probate Division.

(*v*) In Clogstoun *v.* Wolcott and Re Halliwell, the codicils were held not to be revoked. See also Re Ellice, 33 L. J. Prob. 27.

(*w*) Re Cunningham, 1 Searle & S. 132, 29 L. J. Prob. 71.

whether the posterior will owed its revoking efficacy to an express clause of revocation contained in it, or to mere inconsistency of disposition (*x*). [In either case, sect. 22 permits the prior will to be revived by one of two means only: the testator must re-execute the will, or he must make and duly execute a codicil showing an intention to revive the will. Even if he destroys the second will for the express purpose of setting up the first, he fails in his object; for parol evidence of his intention is not admissible in order to give effect to that object (*y*), though it is admissible to prove that the destruction was effected under a mistake, and consequently to prevent the revocation of the destroyed will (*z*).[1]

of a later abolished.

Parol evidence inadmissible to show intention to revive.

*Where a will was found with the signature cut off, but gummed on again, it was held that it was not duly re-executed (*a*). Nor does a codicil show an intention within the meaning of the section to revive the earlier of two wills, by being physically annexed to it. The intention must appear by the contents of the codicil (*b*). And the intention so appearing to revive one will cannot be corrected by parol evidence that the draughtsman made a mistake, and that the testator intended to refer to and revive another (*c*). *146

Revival by re-execution;

—by codicil;

By sect. 34, it is provided that the act "shall not extend to any will made before 1838." Now if the first of two inconsistent wills be made before 1838, and the second be destroyed after that date, does sect. 22 extend to the case so as to prevent revival of the first will? Though revived, it would not be repub-

—where prior will made before 1838.

(*x*) Brown *v.* Brown, 8 Ell. & Bl. 876; Hale *v.* Tokelove, 2 Rob. 318, 14 Jur. 817; Boulcott *v.* Boulcott, 2 Drew. 25.

[(*y*) Major *v.* Williams, 3 Curt. 432, S. C. nom. Major *v.* Iles, 7 Jur. 219.

(*z*) Powell *v.* Powell, L. R. 1 P. & D. 209. And the contents of the destroyed (or lost) will may be proved by parol, Brown *v.* Brown, 8 Ell. & Bl. 876; Wood *v.* Wood, L. R. 1 P. & D. 309. The remarks *contra* in Wharram *v.* Wharram, 3 Sw. & Tr. 301, 33 L. J. Prob. 75, are unfounded, Sugden *v.* Lord St. Leonards, 1 P. D. 239. But such evidence must show clearly that the contents of the second will were such as to revoke the first. It is not enough to prove that the lost will contained the words "this is the last will and testament." Cutto *v.* Gilbert, 9 Moo. P. C. C. 131, cited again with others to the same effect, post, s. 5.

(*a*) Bell *v.* Fothergill, L. R. 2 P. & D. 148. On the question whether such an intention is shown by the contents, see the close of this chapter.

(*b*) Marsh *v.* Marsh, 1 Sw. & Tr. 528, 6 Jur. N. S. 380, 30 L. J. Prob. 77.

(*c*) Walpole *v.* Cholmondely, 7 T. R. 138; Re Chapman, 8 Jur. 908, 1 Rob. 1. But see Quincey *v.* Quincey, 11 Jur. 111, 5 No. Cas. 154. These cases properly come under the head of admission of parol evidence, in aid of the construction of a will; see accordingly Ch. XIII. post, where they are treated of.

[1] A will which the testator has once cancelled or destroyed cannot be set up again by reason of the defective execution of a subsequent will. Banks *v.* Banks, 65 Mo. 432. And this is perhaps true, though the second instrument be a copy of the first. Compare Onions *v.* Tyrer, 2 Vern. 741; Hyde *v.* Hyde, 1 Eq. Cas. Abr. 409. But see 1 Redfield, Wills, 308, where it is said: "It is only where the testator revokes a former will upon the supposition that he has executed a subsequent valid will, which proves invalid, that the act of revocation is held incomplete." Under the statutes of Missouri, and probably by the common law, the expression by the testator of an intention to revive a former well-executed will, upon the destruction of a later one, operates to revive the first. Beaumont *v.* Keim, 50 Mo. 28.

lished (*d*). It would therefore take effect wholly under the old law, and derive no virtue from the new. However, in Dickinson *v.* Swatman (*e*), the argument for revival was considered untenable.

The concluding words of sect. 22, "unless a contrary intention shall *be shown*," deserve notice. Elsewhere in the act, the phrase "unless a contrary intention shall *appear by the will*" frequently occurs. But here the means of proof are not pointed out. An intention, therefore, to revive the whole of a will, which has been first partly and then completely revoked, may be shown by any means allowed by general principles. These principles would exclude parol evidence to explain a written document, *i.e.* a codicil (if that were the means of revival chosen); but would admit it in order to show *quo animo* the bare *act* of re-execution was done (*f*).]

Parol evidence when admissible to determine extent of revival where revocation has been by steps.

Destruction must be in the presence of the testator.

*147 *It is observable that both the Statute of Frauds and the act 1 Vict. require that the destruction should be made in the presence *and* by the direction of the testator: and therefore [a testator cannot revoke his will by authorizing any person to destroy it after his death (*g*): and if in such case the will should be destroyed, its contents might be proved *aliunde* (*h*).]

Section III.

By Alteration of Estate.

Under the old law it was essential to the validity of a devise of freehold lands that the testator should be seised thereof at the making of the will, and that he should continue so seised without interruption until his decease.[1] If, therefore, a testator, sub-

1. Under the old law.

(*d*) R. P. C. Fourth Report, p. 33.
(*e*) 4 Sw. & Tr. 205.
(*f*) See Upfill *v.* Marshall, 7 Jur. 819. On the question whether a "contrary intention" is shown by the contents of a codicil, see the close of this chapter.]
[(*g*) Stockwell *v.* Ritherden, 6 No. Cas. 414, 12 Jur. 779.
(*h*) Re North, 6 Jur. 564.]

[1] In regard to the revocation of specific bequests of personal property by ademption, the general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the death of the testator, remain in specie as described in the will; otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it, as if he should convert the gold chain into a cup or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed. Ashburner *v.* Macguire, 2 Bro. C. C. 89; Walton *v.* Walton, 7 Johns. Ch. 262; White *v.* Winchester, 6 Pick. 48; Hayes *v.* Hayes, 1 Keen, 97; Humphreys *v.* Humphreys, 2 Cox, 184. It must, however, be observed, that the rule of ademption does not apply to *demonstrative* legacies; i.e. to legacies of so much money with reference to a particular fund for payment, as, for instance, legacies given *out* of a particular stock or debt or term. Although the particular fund be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate. Wal-

sequently to his will, by deed aliened lands, which he had disposed of by such will, and, afterwards, acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise, which was necessarily void.[1] The devise of a freehold lease, which was renewed by the testator subsequently to the will, was evidently in this situation (*i*). [But the alteration of a contingent remainder or of a contingent executory interest into a vested remainder by the happening of events on which such remainder was originally limited to vest was not such an alteration as worked a revocation, the will acting on the original interest in its new form (*k*).]

By acquisition of new estate.

Not by change from contingent to vested.

A revocation by alienation may be either partial or total.[2] A simple case of partial revocation occurs where a testator, having devised lands in fee, demises the same lands to a lessee for lives or for years, either at a rent or not, in which case the lease revokes or subverts the devise *pro tanto*, by withdrawing the demised

Partial alienations.

(*i*) Marwood *v.* Turner, 3 P. W. 163.

[(*k*) Jackson *v.* Hurlock, 2 Ed. 263; stated on this point, ante, p. 48, n.]

ton *v.* Walton, 7 Johns. Ch. 262. If a debt specifically bequeathed be received by the testator, the legacy is adeemed; because the subject is extinguished, and nothing remains to which the words of the will can apply. Badrick *v.* Stevens, 3 Bro. C. C. 358, 1 Rop. Leg. 17; Rider *v.* Wager, 2 P. Wms. 328, 331; Barker *v.* Rayner, 5 Madd. 208; Tipton *v.* Tipton, 1 Coldw. 252; Walton *v.* Walton, supra. So a partial receipt by the testator of the debt specifically bequeathed will operate as an ademption *pro tanto*. Ashburner *v.* Macguire, supra; Fryer *v.* Morris, 9 Ves. 360; Hoke *v.* Herman, 21 Penn. St. 301. So where stock is specifically bequeathed, and it does not exist or exists only in part at the testator's death, the legacy will be either totally or partially adeemed, as the case may be. Ashburner *v.* Macguire, supra; White *v.* Winchester, supra. Where a testator bequeathed a certain amount of stock in a particular bank, he being the owner, at the time of making his will, of the exact amount of stock bequeathed, it was held to be a specific legacy, and a sale of it before his death was decided to be an ademption. White *v.* Winchester, supra. The mere change, however, by a testator, of the form of an investment appointed by his will by virtue of a power does not operate as an ademption of the legacy. The fund does not cease to be the fund subject to the power by being invested in a different security. In re Johnstone's settlement, L. R. 14 Ch. D. 162, doubting Gale *v.* Gale, 21 Beav. 349. See also post, p. 155; Walton *v.* Walton, 7 Johns. Ch. 265; Brown *v.* M'Guire, 1 Beat. 358. Of course there is no ademption where the change has been made without the authority of the testator. Shaftsbury *v.* Shaftsbury, 2 Vern. 747. Ademption of a *general* legacy by reason of advancements is presumed only where the sum given is equal to or greater than the legacy, and is not contingent, and is *ejusdem generis* with the legacy, and nothing appears to show that it is to be treated as additional. Clendening *v.* Clymer, 17 Ind. 155. The doctrine of ademption by advancements, it should be observed, has no application to specific legacies or to devises of land, Weston *v.* Johnson, 48 Ind. 1; or to residuary legacies, Clendening *v.* Clymer, 17 Ind. 155. See Gray *v.* Bailey, 42 Ind. 349.

[1] The English common-law doctrine concerning revocation by alteration of estate went to an extreme which Lord Mansfield, while considering himself bound by it, once declared to be absurd and even shocking. Doe *v.* Pott, 2 Doug. 709. See Goodtitle *v.* Otway, 7 T. R. 395; Woolery *v.* Woolery, 48 Ind. 523, 525. Under the Stat. of 1 Vict. c. 26, all that appears to be requisite is that the testator at the time of his death shall be seised of substantially the same estate as that of which he was seised at the time he made the will. Woolery *v.* Woolery, supra. And this is the general law in this country.

[2] A will is not revoked *in toto* by a subsequent deed unless the deed conveys all the estate devised. Wells *v.* Wells, 35 Miss. 638; Brown *v.* Thorndike, 15 Pick. 388; Hawes *v.* Humphrey, 9 Pick. 350; Brush *v.* Brush, 11 Ohio, 287; Carter *v.* Thomas, 4 Greenl. 341; Skerrett *v.* Burd, 1 Whart. 246; M'Rainy *v.* Clark, 2 Tayl. 278; McTaggart *v.* Thompson, 14 Penn. St. 149. But if all the estate devised be sold, the gift by will is revoked, whether it was general or specific, and whether of real or of personal estate. McNaughton *v.* McNaughton, 34 N. Y. 201. The same is true in case the testator sell so great a part of the estate devised that it is impossible to give effect to the particular disposition of the will. In re Cooper, 4 Barr,

interest from its operation (*l*), but the devise is no further disturbed; and, consequently, the devisee would, even under the old law, still take the inheritance, subject to the term, and, as incidental thereto, the *148 rent, if any, reserved by the * lease (*m*). So, if a testator, after devising lands in fee, conveys them by deed to the use of himself for life, with remainder to the use of his wife for life, as a jointure, without disposing of or in any manner assuming to convey the inheritance, the conveyance would revoke the devise *pro tanto*, and the reversion in fee, expectant on the decease of the testator's wife, would pass under it to the devisee. In both the preceding examples, it will be perceived that the conveyance is not only partial in its object, but in its operation; it does not for a moment disturb the testator's seisin of [or his estate in] the inheritance, and, therefore, can have no revoking effect beyond the estate which it substantially alienates and vests in another person.[1] Consistently with this principle, it is clear that (*n*) where a testator by his will charges his lands with an annuity, and afterwards demises them for a term of years at rack rent, the devise is revoked so far as to deprive the devisee of his legal power of distress while the tenancy lasts (*o*), but no further; and the annuitant would be entitled in equity, during the suspension of his power of distress, to have the rent, or an adequate portion of it, applied in satisfaction of the annuity.

Revocation by conveyances in fee-simple.

Where, however, the conveyance subsequent to the devise, though made for a partial purpose, embraces the entire fee-simple, or the whole estate of freehold which is the subject of the devise, the rule, under the old law (with some considerable exceptions presently noticed), is, that the conveyance, though limited in its purpose, and though it instantly revests the estate in the testator, produces a total revocation.[2] Thus, if a testator on his marriage, in order to secure a jointure rent-charge to his intended wife, conveys lands (which he had by a will made before 1838 devised in fee) to the use of trustees for a term of years, for securing the jointure, and then

(*l*) Hodgkinson *v.* Wood, Cro. Car. 23; Parker *v.* Lamb, 2 Vern. 495, 3 B. P. C. Toml. 12.

[(*m*) *A fortiori*, since 1 Vict. c. 26, Barrs *v.* Lea, 33 L. J. Ch. 437, where on a mining lease it was unsuccessfully argued that certain sums payable half yearly were not rent but purchase-money for the minerals, though payable by instalments: as to which, see further Brook *v.* Badley, L. R. 4 Eq. 106; and compare Re Mary Smith, L. R. 10 Ch. 79.]

(*n*) Parker *v.* Lamb, 3 B. P. C. Toml 12.

(*o*) This shows the advantage of limiting a term to trustees for securing the annuity, which would entitle them, as the immediate reversioners, to the rent.

88. A conveyance by deed of trust of property devised will not revoke the will by the law of Virginia. Hughes *v.* Hughes, 2 Munf. 209. So in Pennsylvania, Clingan *v.* Mitcheltree, 31 Penn. St. 25. So in Alabama, Stubbs *v.* Houston, 33 Ala. 555. So, it seems, in Indiana, Woolery *v.* Woolery, 48 Ind. 523, 526.

[1] See Brydges *v.* Duchess of Chandos, 2 Ves. (Sumn. ed.) 417, and note (*b*); Livingston *v.* Livingston, 3 Johns. Ch. 155.

[2] 4 Kent, 228; Adams *v.* Winne, 7 Paige, 97; Bosley *v.* Bosley, 14 How. 390; Bowen *v.* Johnson, 6 Ind. 110. If the testator conveys the estate devised, though he takes it back again by the same instrument, or otherwise, it is a revocation in law and in equity; even though he did not intend to revoke his will. Walton *v.* Walton, 7 Johns. Ch. 258.

goes on to limit the fee-simple to the use of himself in fee, the latter limitation will revoke the devise *in toto* (*p*).

*149 *This doctrine, however, does not apply to copyholds. Thus, where A., who was seised in fee of freehold and copyhold estates, devised them by his will (made before 1838), and subsequently conveyed the freeholds to the use of himself for life, with remainder to the intent that B., his intended wife, should receive an annuity of 300*l.* for her life, by way of jointure, and subject thereto to trustees for ninety-nine years, upon trusts for securing the jointure, and subject thereto to the use of A., his heirs and assigns forever. At the same time the testator surrendered his copyhold lands to the same uses; and it was held that the devise (though clearly revoked, as to the freeholds, by the conveyance of them) was not, as to the copyholds, affected by the surrender beyond the particular estates; on the ground that, according to the doctrine of Thrustout *v.* Cunningham (*q*), the fee-simple of the testator was not disturbed or interrupted by the surrender of the ultimate inheritance to the use of himself (*r*).

As to conveyances of copyholds.

Where the conveyance of a freehold estate has no limited or definite object, or is made for a mistaken or unnecessary purpose, and though its whole effect is instantly to revest the property in the testator himself, who is *in* of his old estate, yet the momentary interruption of the testator's seisin, thus occasioned, produces a complete and total revocation of the previous devise. Thus if a testator, seised in fee of Blackacre, having by a will made before the year 1838, devised such land by name, or all his lands generally, to B. in fee, afterwards by lease and release, or any other assurance, conveys Blackacre to the use of himself for life, remainder to the use of his own right heirs, the conveyance, though it makes no actual change in the testator's estate, will revoke the devise *in toto* (*s*).

Conveyances for a mistaken or unnecessary purpose.

But where the momentary interruption of the testator's seisin is occasioned, not by any act of the testator himself, but by the tortious act of a stranger, the devise, even under the old law, was not affected. As where a testator was disseised subsequently to the making of his will, and afterwards re-entered, the entry restored the original seisin, and by relation the disseisee was considered to have been seised *ab initio*, so that his devise remain unrevoked (*t*.)

Tortious eviction.

*150 *But if the disseisee were out of possession at the time of making his will, or at his death, the devise would be inoperative (*u*).

(*p*) Goodtitle *v.* Otway, 2 H. Bl. 516, 1 B. & P. 576, 7 T. R. 399, 2 Ves. Jr. 606, n.; Cave *v.* Holford, 3 Ves. 650. 7 B. P. C. Toml. 593; see also Vawser *v.* Jeffrey, 16 Ves. 519, 2 Sw. 268; [Briggs *v.* Watt, 2 Jur. N. S. 1041; Walker *v.* Armstrong, 21 Beav. 284, 8 D. M. & G. 531: Power *v.* Power, 9 Ir. Ch. Rep. 178.]

(*q*) 2 W. Bl. 1046, Fea. C. R. 68.

(*r*) Vawser *v.* Jeffery, 3 B. & Ald. 462, 3 Russ. 479.

(*s*) Burgoigne *v.* Fox, 1 Atk. 575. See also Darley *v.* Darley, 3 Wils. 6, Amb. 653, S. C. nom. Darley *v.* Langworthy, 3 B. P. C. Toml. 359; Harmood *v.* Oglander, 8 Ves. 106; [Sparrow *v.* Hardcastle, 3 Atk. 798.]

(*t*) Bunter *v.* Coke, 1 Salk. 237; Att.-Gen. *v.* Vigor, 8 Ves. 282.

[(*u*) Vin. Ab. Dev. R. (6), pl. 1.]

So, where a man made his will, devising lands, and then exchanged those lands for others, and died; if the exchange were vacated subsequently to the testator's death in consequence of a defect in the title, or in the aliening capacity of the other party, this did not revive the devise (*x*).

Exchanges.

As equity follows the law, the same general principles which governed the revocation of devises of legal estates were held to apply to devises of equitable interests. The devise of such an interest, therefore, was liable to be revoked by a conveyance similar to that which would have revoked a devise at law. Thus in Earl of Lincoln's case (*y*), where a testator devised lands, then mortgaged them in fee, and afterwards, in contemplation of marriage, conveyed the devised lands to the use of himself and his heirs, until the intended marriage, and after such marriage to other uses, though the marriage did not take effect, yet the devise was held to be revoked. So, in Lock *v.* Foote (*z*), where A. devised estates, of which he had only the equitable fee, and afterwards agreed to sell part of the estates, and to remove an objection to the title advanced by the purchaser (but which was not well founded), he suffered a recovery of the whole; it was held that, though the recovery was an equitable one, and the particular purpose for which it was suffered was mentioned in the recovery deed, and though the uses thereby declared of the property not intended to be sold were precisely the same as those which subsisted before the recovery, which was expressed to be in restoration and confirmation of those limitations, the devise was revoked.

Revocation of devises of equitable interests by conveyance.

The rule that a conveyance in fee of freehold lands, executed for a partial purpose, revokes a will made before the year 1838 admits of two exceptions. The first is in the case of a partition between tenants in common, or coparceners, which, by whatever kind of assurance effected, does not, even at law, revoke a prior devise, provided the conveyance be confined to the object of the partition, merely assuring to the testator in the lands allotted to him in severalty an estate precisely correspondent to that which he previously had in his undivided share (*a*).[1] [The *151 * manner in which the partition is made might, however, have revoked the devise; as if a testator hav-

Partition no revocation.

Manner of partition may cause revocation.

(*x*) Att.-Gen. *v.* Vigor, 8 Ves. 256.

(*y*) Show. P. C. 154, 1 Eq. Ab. 411, pl. 11; [in the latter report, the mortgage is stated to have been previous to the will, but this makes no difference in the principle established by the case.] See also Pollen *v.* Huband, 1 Eq. Ab. 412, 7 B. P. C. Toml. 433.

(*z*) 5 Sim. 618.

(*a*) Luther *v.* Kidby, 3 P. W. 169, n., 8 Vin. Ab. 148, pl. 30; Risley *v.* Baltinglass, T. Raym. 240; Webb *v.* Temple, 1 Freem. 542; [Barton *v.* Croxall, Taml. 164. In Grant *v.* Bridger, L. R. 3 Eq. 347, it was attempted to bring within these authorities a case where commoners, after devise, joined with the owners of the soil in conveying the land to trustees, and took back shares of the land in severalty, but, of course, unsuccessfully.

1 See Brydges *v.* Duchess of Chandos, 2 Ves. 417; Barton *v.* Croxall, Taml. 164. A testator devised his moiety of an estate, and then made partition. The estate was then conveyed as to one part to a trustee to the use of the testator in fee; and a mortgage

ing an undivided share of lands in A. and B. devise all lands in A., and upon partition lands in B. only are allotted to him; in such case nothing passed by the devise (*b*).]

The other and more considerable exception is, where a testator, subsequently to his will, makes a mortgage of the devised lands, which, it is said, revokes the will in equity, *pro tanto* only (*c*).[1] Mortgages.

To designate a mortgage a revocation *pro tanto*, however, was inaccurate, and tended to create an erroneous impression of its actual effect on the rights of the persons claiming through the testator; for the phrase might seem to import, that the transaction was viewed in the light of an intentional withdrawal by the testator of his bounty to the extent of the mortgage, in which case, the devisee would have taken the property *cum onere*, as against not only the mortgagee creditor, but also as against the testator's own representatives, in the same manner as if the testator had created the charge by his will; but this was not the case, for unless a contrary intention appeared, the devisee, it is well known, was entitled to have the estate disencumbered out of the personal estate of the testator not specifically bequeathed (*d*). It was a perversion of language, therefore, to call a mortgage a revocation *pro tanto;* in short, the term is very inaptly applied to any cases in which the devise is defeated by the testator's subsequent disposition by deed of the devised property, which are all examples of ademption, rather than of revocation. Mortgage inaccurately termed a revocation *pro tanto*.

In applying the doctrine, that a mortgage effects a partial revocation only, it is immaterial whether the testator had the legal estate, or was equitable owner only (*e*); whether the mortgage conveyance was made by fine, or any other mode of assurance (*f*); whether the mortgagee were the devisee himself (*g*), or a stranger; * and whether the estate of the mortgagee were to vest in possession immediately on its execution, or not until the death of the mortgagor (*h*). *152

(*b*) Knollys *v.* Alcock, 5 Ves. 648, 7 Ves. 558. Compare Phillips *v.* Turner, 17 Beav. 194.]
(*c*) Hall *v.* Dench, [1 Vern. 329, 342; But in] 2 Ch. Rep. 54 [the ground of the decision is stated to be that the will was republished;] Perkins *v.* Walker, 1 Vern. 97.
(*d*) Warner *v.* Hawes, 3 B. P. C. Toml. 21. [*Secus* since 17 & 18 Vict. c. 113.
(*e*) Jackson *v.* Parker, Amb. 687.]
(*f*) Rider *v.* Wager, 2 P. W. 334; Jackson *v.* Parker, Amb. 687.
(*g*) Peach *v.* Phillips, Dick. 538; Baxter *v.* Dyer, 5 Ves. 656, overruling Harkness *v.* Bayley, Pre. Ch. 514.
(*h*) Cro. Car. 23.

term, created by the co-tenant on his moiety was assigned to attend the inheritance, and this was held not to be a revocation of the will. Barton *v.* Croxall, Taml. 164. Partition is considered a special case. Each party can compel the other to make it. See Att.-Gen. *v.* Vigor, 8 Ves. 281; Ward *v.* Moore, 4 Madd. 368; Rawlins *v.* Burgis, 2 Ves. & B. 382. The act of partition therefore furnishes no evidence of an intention to revoke. No other change in the estate, by statute or operation of law, will work a revocation or ademption. Walton *v.* Walton, 7 Johns. Ch. 265, 266; Partridge *v.* Partridge, Cas. temp. Talb. 226; Brown *v.* M'Guire, 1 Beat. 358. See also Basan *v.* Brandon, 8 Sim. 171. Where the change was made without the knowledge of the testator, see Ashburner *v.* Macguire, 2 Bro. C. C. 108.

[1] 4 Kent, 530. Where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him, and passes to the legatee at his death; so as to enable him to call on the executor to redeem, and deliver it to him. Ashburner *v.* Macguire, 2 Bro. C. C. 89.

Upon the same principle, a conveyance in trust to sell for the payment of debts, was held, under the old law, not absolutely to revoke a previous devise of the property so conveyed (*i*),[1] even though it were accompanied by a declaration that the surplus proceeds of the sale should be held in trust for the grantor, his executors and administrators [provided, however, that such conveyance had for its object the payment of debts only; the insertion of a further trust, as the payment of an annuity to the wife of the grantor, would have worked a revocation (*k*).] Bankruptcy also left a testator's will unrevoked, as to any surplus remaining after satisfaction of the claims of creditors (*l*).

Conveyance upon trust for sale.

Bankruptcy.

A mortgage for less than the testator's whole estate, of course, does not, even at law, produce revocation *ultra* the estate to which it extends. Thus, where a testator, after devising freehold lands by a will made before 1838, for an estate in fee, demises them by way of mortgage for one thousand years, the inheritance, subject to the mortgage term, passes by the devise, along with the equity of redemption in the term.

Mortgages by demise.

But if the partition or mortgage conveyance contain ulterior limitations by which the testator's ownership is varied or modified, it works an absolute and entire revocation. As in the often-cited case of Tickner *v.* Tickner (*m*), where by a deed of partition between two coheirs of gavelkind lands (one of whom had previously made a will devising his share), the lands allotted to the testator were limited *to such uses as he should by deed or will appoint*, and in default of appointment to him in fee; it was held that by this new limitation of the use, the previous devise of the property was revoked.

Deed of partition or mortgage, with ulterior limitations.

So, in the case of Kenyon *v.* Sutton (*n*), where a testator executed a conveyance in trust for the payment of his debts, and it was declared that, after payment of his debts, the trustees should convey (not to him simply in fee), *but to such uses as he should by deed or will appoint*, and in default, to him in fee, the devise was held to be wholly revoked.

Effect of ulterior limitations in mortgage deeds.

Again, in Harmood *v.* Oglander (*o*), where A. being owner in *153 * fee of fee farm rents subject to certain marriage articles, whereby he had agreed to settle them in strict settlement with reversion to himself in fee, made his will, by which he devised the rents: and subsequently, on borrowing 5,500*l.* from B. by lease and release, for securing the repayment and barring all estates-tail, &c., conveyed the fee farm rents in question to C., his heirs and assigns, to

(*i*) Vernon *v.* Jones, 2 Freem. 117, [Pre. Ch. 32, 2 Vern. 241;] Earl Temple *v.* Duchess of Chandos, 3 Ves. 685.
(*k*) Hodges *v.* Green, 4 Russ. 28.]
(*l*) Charman *v.* Charman, 14 Ves. 580.
(*m*) Cit. 1 Wils. 309, and 3 Atk. 742-745, 750.
(*n*) Cit. 2 Ves. Jr. 601.
(*o*) 6 Ves. 199, 8 Ves. 106. [See Briggs *v.* Watt, 2 Jur. N. S. 1041; Power *v.* Power, 9 Ir. Ch. Rep. 178.]

[1] Jones *v.* Hartley, 2 Whart. 103.

the intent that a common recovery might be suffered; and it was declared that such recovery should inure to the use of B. (the mortgagee) for 1,000 years, subject to redemption, remainder to the testator for life, with remainder to F. his wife for life, with remainder to himself in fee. The recovery (which, it will be observed, was unnecessary) was never suffered; but Sir R. P. Arden, M. R., and afterwards Lord Eldon, on appeal, expressed a decided opinion that the devise was revoked, the testator having subjected the property to ulterior limitations beyond the purpose of a mere mortgage; "and considering," his Lordship observed, in reference to the authorities, "how very little, in addition to that mere purpose, will revoke." It is clear that if in this case the limitations had been simply to the mortgagee for the term, and subject thereto, to the use of the mortgagor himself in fee, the will would have been revoked, precisely as if without any mortgage the fee had been so limited.

So in Hodges *v.* Green (*p*), where a testator seised in fee, conveyed certain real estates to trustees, upon trust by sale or mortgage to raise certain mortgage and other debts, and the trustees were to stand possessed of the surplus, in trust for the grantor, his executors and administrators, as personal estate; and it was provided, that, until a sale, the trustees should apply the rents in payment, first, of the interest on a mortgage debt, and, secondly, of an annuity to the grantor's wife for her separate use; Sir J. Leach, M. R., held that the will was revoked, not (as had been contended) on account of the direction that the residue of the moneys arising from the sale should be personal estate, which did not vary the operation of the deed, but on account of the annuity, which might continue after the testator's death.

What words introduced into the proviso for redemption amount to an indication of intention to change the equitable ownership, so as to revoke a previous devise by the mortgagor, is not clear. The cases abundantly demonstrate that such an intention will not be inferred from equivocal expressions, affording conjecture merely. The deed must distinctly and explicitly show that the * estate is to be reconveyed to uses different from those which previously subsisted, — a doctrine which seems to agree with the rule establishing, that the interests of a husband and wife joining in a mortgage of lands held *jure uxoris*, are not liable to be varied by the inaccurate terms in which the reconveyance is directed to be made (*q*). What expressions newly modify equity of redemption. *154

Thus in Brain *v.* Brain (*r*), where A. subsequently to his will, by a conveyance by way of security, in consideration of 800*l.* advanced by B., conveyed lands to trustees in fee, upon trust to permit him (A.) to

(*p*) 4 Russ 28.
(*q*) Innes *v.* Jackson, 16 Ves. 356. 1 Bli. 104; [Ruscombe *v.* Hare, 6 Dow, 1, 2 Bli. N. S. 192; Clarke *v.* Burgh, 2 Coll. 221; Hipkin *v.* Wilson, 3 De G. & S. 738.]
(*r*) 6 Madd. 221.

enjoy until default of payment; and upon payment of principal and interest, upon trust to reconvey unto and to the use of A., the testator, his heirs and assigns, or unto and to the use of such other person or persons, and for such estate and estates, and to and for such lawful trusts, intents and purposes, as A., his heirs or assigns, by any deed or deeds, instrument or instruments, in writing under his or their hand or respective hands, should direct, limit, or appoint, clear of all intermediate incumbrances, and, in default of payment, the trustees were empowered to sell; Sir J. Leach, V. C., held, that this was a revocation *pro tanto* only. "The true question," his Honor observed, "is, whether, by the addition of the words which follow the direction to reconvey to the devisor and his heirs, he does, in fact, acquire any new estate or power, or whether these subsequent words do not leave him with the same estate, and the same powers, as he would have had if they had not been used. It is plain, that he who has a right to call upon trustees to convey to himself and his heirs, has a right, by any instrument under his hand, to direct the same trustees to convey to the use of any other person, or for any estates and interests, at his pleasure. The authority to make such direction by any deed or instrument under his hand, is the necessary consequence of this conversion of his legal estate into an equitable interest; and the subsequent words are the mere 'expressio eorum quæ tacite insunt.' I am of opinion, therefore, that the conveyance in question, being by way of security for money, is a revocation *pro tanto* only." The V. C. remarked, that in Tickner *v.* Tickner, a new power to appoint to uses was acquired, and that the facts in Kenyon *v.* Sutton were not accurately known (*s*).

*155 *Though an absolute conveyance by a person having the equitable ownership only, does, we have seen, under the old law revoke a prior devise, by analogy to the rule which makes a similar conveyance of the legal estate a revocation at law, yet when the testator merely clothes his equitable title with the legal estate, by taking a conveyance of the latter to himself, or merely changes the trustee, as this produces no alteration in the beneficial ownership, which is the subject of the devise, it leaves such devise unaffected.[1]

Mere conveyance of legal estate no revocation in equity.

Thus where (*t*) W., by his will and codicil, devised certain lands which he had contracted to purchase, and afterwards caused the purchased estate to be conveyed to trustees in fee, in trust for himself and

[(*s*) And see Youde *v.* Jones, 14 Sim. 162.]

(*t*) Fullarton *v.* Watts, cit. Doug. 718. See also Parsons *v.* Freeman, 3 Atk. 741, 1 Wils. 308; Dingwell *v.* Askew, 1 Cox, 427; Clough *v.* Clough, 3 My. & K. 296.

1 See ante, p. 147, note. So where there has been a fourfold increase of the testator's property during his insanity for forty years, from a period soon after the making of his will until his death, so as greatly to change the proportion between the specific legacies given to some children and the shares of other children who were made residuary legatees, no revocation is effected thereby. Warner *v.* Beach, 4 Gray, 162. See Verdier *v.* Verdier, 8 Rich. 135. Mere advance or diminution in value of property disposed of by will has no revoking effect. Scoby *v.* Sweatt, 28 Tex. 713.

his heirs, it was adjudged that this was no revocation; for before the completion of the purchase, the vendor was but a trustee for the purchaser, and the completion of the purchase was but *taking the estate home;* [and so if he had actually taken a conveyance to himself (*u*).]

If, however, the conveyance does more than vest the legal estate in the testator, and newly modifies his ownership, revocation will, of course, be produced, as it would if the equitable interest separately had been so modified.[1] This question often arose, and, of course, under a will made before 1838, may still arise, where a testator contracted to purchase lands, and in the interval between the contract and the conveyance devised them. In such case, it is clear, that if the conveyance be made to the testator, to the usual limitations for preventing dower, viz. to such uses as he shall appoint, and in default, to the use of himself for life, remainder to a trustee for himself during life, with remainder to him (the purchaser), in fee, the devise will be revoked (*y*). And the same effect is produced where the conveyance is simply to such uses as the devisor shall appoint, and in default of appointment to him in fee (*z*).

Contra, if deed modifies the equitable ownership.

So it has been decided, that where (*a*) a testator purchased an estate under a parol contract, which was rendered binding by part performance, then devised it, and afterwards took a conveyance (according to the old method of excluding dower) to the use of himself and a trustee jointly in fee, the devise was * revoked; the conveyance in such case *156 going beyond the mere purpose of clothing the equitable title with the legal ownership, and making an alteration in the quality of the estate.

Effect of conveyance upon a purchaser's devise after contract.

If the contract points out the nature of the limitations which are to be inserted in such conveyance, *and the conveyance is made in conformity thereto*, it is clear that such conveyance (operating as it then does only to turn the equitable into legal estates) will not revoke the devise; but it should seem, that the merely providing that the estate shall be conveyed to the purchaser in fee, or to such other uses as he shall direct, would not prevent the revoking operation of a conveyance to the ordinary uses for preventing dower; for as words to this effect, when inserted in a proviso for redemption in a mortgage, are (we have seen) merely equivalent to a direction to convey to the mortgagor the fee,

No revocation if conveyance be in conformity with contract.

[(*u*) Seaman *v.* Woods, 24 Beav. 372.]

(*y*) Rawlins *v.* Burgis, 2 V. & B. 382; [Plowden *v.* Hyde, 2 Sim. N. S. 171, 2 D. M. & G. 684; Schroder *v.* Schroder, Kay, 578.]

(*z*) Tickner *v.* Tickner, cit. 1 Wils. 311, 3 Atk. 742; Parsons *v.* Freeman, 3 Atk. 741.

(*a*) Ward *v.* Moore, 4 Mad. 368.

1 See Ballard *v.* Carter, 5 Pick. 112, 117, 118; Brigham *v.* Winchester, 1 Met. 390; Swift *v.* Edson, 5 Conn. 531. If a testator, after devising a mortgage, forecloses or takes a release of the equity of redemption, it is a revocation of the devise. Ballard *v.* Carter, supra.

it seems difficult, consistently, to ascribe to them greater potency in a contract. And it is clear (*b*), that no such effect would be produced by a stipulation that the vendor shall convey to the purchaser, his heirs, *appointees*, or assigns; for even supposing that the introduction of the word "appointees" implies that the conveyance should contain a power of appointment (in which case a revocation would not have resulted from the mere insertion in the conveyance of such a power), yet the limitation to the testator for life, with remainder to the dower trustee for the life of, and in trust for, the testator, amounts to a new modification of the equitable ownership, and is, for that reason, a revocation of the devise.

Plowden *v.* Hyde. Clothing the equitable estate with the legal, no revocation.

[The doctrine, that merely clothing the equitable estate with the legal title is no revocation, is well illustrated by Plowden *v.* Hyde (*c*), where an estate, which had been conveyed to the testator to the usual uses to bar dower, was by him appointed and conveyed to a mortgagee in fee, subject to a proviso that on payment of the mortgage money the mortgagee would reconvey the estate to the testator, "his heirs, appointees, or assigns, or to such other person or persons, to such uses, and in such manner as he or they should direct." Subsequently to the mortgage, the testator made his will, devising the mortgaged property; and then, having paid off the mortgage debt, the estate was reconveyed to him, to uses to bar dower in the same manner as on the purchase.

Sir R. Kindersley, V. C., thought that, after the mortgage, the *157 testator had in equity a clear *fee-simple estate, and the legal estate not having been reconveyed to him in fee-simple his will was consequently revoked. But this decision was reversed by Sir J. K. Bruce and Lord Cranworth, L.JJ., on the ground before noticed, that an equity of redemption (unless the contrary is distinctly provided) attaches on the estate of the mortgagor, with all the same rights, restrictions and qualifications to which his legal estate had previously been subject. When, therefore, the mortgagor paid off the mortgage, and took a reconveyance of the property to the same uses to which it had stood limited before the mortgage, he was, in fact, only doing that which is described as clothing the equitable with the legal estate. It follows from this decision, that if the reconveyance had been simply to the testator and his heirs, his will would have been revoked.

Immaterial whether seisin is changed or not.

In the case just stated Lord Cranworth suggested that a will was revoked by subsequent conveyance only when the *seisin* was changed; and added, that if an estate were limited to such uses as A. should appoint, and in default to A. in fee, and A., after making his will and devising the estate, had made an appointment, so as to take an estate with the ordinary uses to bar dower, he

(*b*) Bullin *v.* Fletcher, 1 Kee. 369, 2 My. & Cr. 432.
[(*c*) 2 Sim. N. S. 171, 2 D. M. & G. 684.

knew of no authority deciding that this would be a revocation of the will (*d*). But in Langford *v.* Little (*e*), which was not cited, Sir E. Sugden had decided that in such a case a will *was* revoked. He said, "A change of estate is sufficient to operate a revocation, and it is not necessary that the seisin should be changed. The doctrine rather is, that although nothing but the seisin is changed or transferred, and there is no disposition of the ownership, or but a partial one, yet the will is revoked, and the use, although the old one, cannot pass by the prior will."

In Poole *v.* Coates (*f*), a testatrix, being entitled to an undivided moiety of lands held on a lease for lives containing a covenant for perpetual renewal, made her will devising the moiety, and subsequently joined with the two other persons entitled to the other moiety in procuring a renewed lease to be granted to herself and them as joint-tenants: Sir E. Sugden, C., decided that her will was not revoked in equity. He said, the * effect of a lease with a covenant for perpetual renewal *158 is, in equity, to give the tenant a perpetual interest; that, therefore, if in the case before him there had been a mere simple renewal, though it would have been a revocation at law, it would have had no such effect in equity; but it was argued, that the case went a step further, the renewal being made to the testatrix and two other persons, and, therefore, there was such a change in the estate which the testatrix had as amounted in equity to a revocation; but the mere change of the legal estate, unaccompanied by any alteration of the equitable ownership, would not effect a revocation. A lease of the entire estate to a trustee for the testatrix would have been no revocation, for she would have had the same equitable estate after the renewal as she had before; so a renewal partly to herself, and partly *to a trustee for her, could not be considered as a revocation, for the very same reason.* The mere circumstance that the very same equitable estate which formerly subsisted, had been since *partially clothed* with the legal estate, could not produce such a modification as to work a revocation. The learned judge said that he did not intend to impeach the authority of Rawlins *v.* Burgis, Ward *v.* Moore, and similar cases. But did Ward *v.* Moore differ in substance? The owner of the equitable estate became a joint-tenant of the legal estate, thereby merely partially clothing himself with the legal title: yet it was held a revocation; and in truth this is all that is done in every case of a conveyance to uses to bar dower. In equity the owner of the equitable estate still remains absolute owner; he has only clothed himself with a legal power of appointment, a life-estate, and a remainder in fee.]

Poole *v.* Coates, as to renewable leaseholds, is opposed to other cases.

(*d*) See 2 D. M. & G. 695.

(*e*) 2 J. & Lat. 613; and see Walker *v.* Armstrong, 21 Beav. 284, 8 D. M. & G. 531.

(*f*) 2 Dr. & War. 493, 1 Con. & L. 531. It may be collected that Sir E. Sugden never approved the decision in Rawlins *v.* Burgis. Apart from authority, his own opinion, which he followed on a slight distinction in Poole *v.* Coates, may be thought the more reasonable.]

As to conveyances in execution of marriage articles.

The same general doctrines are, of course, applicable to equitable interests created by marriage articles; hence the question, whether a conveyance, made in pursuance of such articles, revokes a devise, made in the interval between the articles and the conveyance, disposing of the equitable interest derived under the articles, depends entirely, under the old law, upon the fact, whether the conveyance merely carries into effect the articles which created the equitable interest in question, or newly modifies the ownership (*g*).

But it is to be observed, that where, by the articles, the intended *159 settlor covenants to convey the lands to certain uses, and *subject thereto to the use of himself in fee, this does not sever the equitable from the legal ownership, in regard to such ultimate fee, so as to support a devise made intermediately between the articles and the conveyance, since such severance could only be produced through the medium of an obligation attaching on the covenantor to convey the reversion in fee to himself; and there seems to be no title in any third person to call for such a conveyance, for a man cannot have a legal estate in trust for himself. Upon the principle of this reasoning, Lord Eldon, in Harmood *v.* Oglander (*h*), [dissented from] the case of Williams *v.* Owens (*i*), where the contrary doctrine was advanced by Sir R. P. Arden, who appears to have confounded the case of a covenant to convey, with that of an actual conveyance, by means of which, of course, the grantor may effect a severance of the legal and equitable ownership, by vesting the legal inheritance in the trustee for himself. The learned judge entertained the notion, that the articles imposed on the covenantor an obligation to convey the fee, which fully accounts for (and, had it been correct, would have justified) the conclusion at which he arrived. The argument upon which Lord Eldon impugned the case of Williams *v.* Owens, would seem to involve the conclusion, that an agreement by a testator to convey an estate in fee to himself, would, for every purpose, be null and void; but the principle has not been followed to this full extent, for in Vawser *v.* Jeffery (*k*), both Sir W. Grant and Lord Eldon were of opinion, that, if a surrender of copyholds to certain limitations (which have been already stated) would have revoked the will at law, the covenant to make such surrender revoked it in equity. And though the assumption upon which this position was based, namely, that the surrender, if made pursuant to the covenant, would have been a revocation at law, was in the subsequent stages of the case decided to be unfounded, yet this circumstance does not necessarily affect the doctrine in question. There is some difference, however, in the line of reasoning pursued by these great contemporary judges: Sir W. Grant, adopting the notion of his

Effect of covenant to convey to the use of covenantor.

(*g*) Parsons *v.* Freeman, 3 Atk. 761; Brydges *v.* Duke of Chandos, 2 Ves. Jr. 417, 7 B. P. C. Toml. 505.
(*h*) 8 Ves. 127. (*i*) 2 Ves. Jr. 595 (*k*) 16 Ves. 519, 2 Sw. 268.

predecessor (Sir R. P. Arden), held, that the covenantor was bound to convey the fee-simple to himself, according to his covenant; while Lord Eldon puts the doctrine rather upon the ground of intention: "It is contended," he said, "that if the widow had applied to this court, to have the covenant *executed, the court need not have directed any *160 such acts as would raise this question. My present opinion is, that I must consider the testator to have died with the intention which he expresses in this covenant, unless it can be shown that he intended otherwise to execute his purpose of providing a jointure." Lord Eldon's observations show, that he considered the case as allied in principle to those (discussed in the next section) in which an ineffectual attempt to convey the devised lands has been held to revoke: though this view of it entirely differs from that of the Court of K. B., in Wright *v.* Littler (*l*), who thought that a void deed of covenant was not a revocation, as it was not binding on the testator, and expressed no intention to make a present disposition; and Lord Mansfield expressly lays it down, that covenants have never been allowed to be a revocation, unless where the covenantee has a right to specific performance, — a principle which it seems very difficult to refute. In that case, however, the instrument in question was not a deed of covenant, but an unsealed paper, by which the testator "covenanted and agreed" that the lands in question should go and be given to certain persons, and the question was, whether it was testamentary: the court decided in the negative, and that the paper was not a revocation of a previous will. Of course, a covenant to execute a conveyance, which, if made, would not revoke the will at law, will be inoperative to revoke it in equity (*m*).

Another obvious case of revocation in equity occurs where the testator devises lands, and then, subsequently to the will, contracts for the sale of them;[1] such a contract, if once obligatory on the testator, will revoke the devise (*n*),[2] though it should happen to be rescinded after the testator's decease (*o*), and also, by the better opinion, even though such transaction should have taken place in his lifetime (*p*), supposing, of course, the will to be subject to the old law. Notwithstanding the contract for sale, the legal estate passes under the devise,[3] and the devisee is bound to convey it to the purchaser, in pursuance of the contract. If the devise, which might thus, in event, become operative upon the legal inheritance, would have

Effect of contract for sale after devise.

(*l*) 3 Burr. 1244, 1 W. Bl. 345; [Patch *v.* Shore, 2 Dr. & Sm. 589.]
(*m*) Vawser *v.* Jeffery, 3 Russ. 479.
(*n*) Mayer *v.* Gowland, Dick. 563.
(*o*) Tebbot *v.* Voules, 6 Sim. 40.
(*p*) See Knollys *v.* Alcock, 7 Ves. 558, 566; Bennett *v.* Earl of Tankerville, 19 Ves. 170; [Curre *v.* Bowyer, 5 Beav. 6.]

[1] If, however, a testator execute a will in favor of A. in *execution* of a binding contract, the will is irrevocable; and if he fail to so execute the will, equity will grant relief to the other party in respect of the benefit obtained by the party refusing to perform his contract. Anding *v.* Davis, 38 Miss. 574; Bell *v.* Hewitt, 24 Ind 280. See ante, p. 18, note. So, too, revocation of a trust created by will, where the means for executing the trust are by the testator put into the trustee's hands, cannot be effected. Padfield *v.* Padfield, 72 Ill. 322.

[2] Donohoe *v.* Lea, 1 Swan, 119.

[3] See Hull *v.* Bray, Coxe, 212.

the effect of tying up the property in a manner incompatible with the convenient execution of the contract, as by creating limitations *161 in favor of * minors or unborn persons, the testator should immediately after the sale execute a codicil, devising the property to trustees, for the purpose of carrying the contract into effect. [But if the contract is rescinded or abandoned, either before or after the testator's decease, there is no purchaser to convey to; and, the will being revoked, the devisee is a trustee for the heir (*q*). So, where a testator devised an estate and then contracted to sell it, but no conveyance was executed, and afterwards the testator repurchased the estate, it was held that the will, once revoked in equity, was not set up again (*r*).]

Marriage articles.

Ante-nuptial articles for a settlement have, of course, the same revoking event in equity, upon a previous devise of the property agreed to be settled, as a contract to sell (*s*).[1]

Effect of settling share of devised lands on one of devisees.

And here it may be observed, that, where a testator who has devised his real estate among his children, in undivided shares, afterwards, upon the marriage of one of such children, conveys or covenants to convey to uses, for the benefit of that child, an *aliquot* share, equal to that which he had devised to the child (no doubt intending to substitute it for the share so devised), such settlement or covenant does not revoke the devise of that share *in toto*, there being nothing to identify or connect the devised with the settled share; but it revokes the devise of all the shares *pro tanto*, letting in the advanced child to participate equally with the others in the remaining shares, not affected by the settlement. Thus, in Rider *v.* Wager (*t*), where a testator by his will gave one moiety of his real and personal estate to his elder daughter, and the other moiety to the younger daughter, and afterwards, upon the marriage of the elder with A., covenanted to settle one moiety of all his real estate to the use of himself for life, with remainder to A. and his intended wife for their lives, remainder to the younger children of the marriage in tail, remainder to A. in fee; it was held, that this covenant revoked the will in equity as to one moiety of the testator's real estate, and that the other moiety passed under the devise in the will to the two daughters, and this was thought to be rendered still more clear by the republishing effect of a codicil which had been executed by the testator after the articles.[2]

[(*q*) See Tebbott *v.* Voules, supra.
(*r*) Andrew *v.* Andrew, 8 D. M. & G. 336. See observations on this case Sug. R. P. S. p. 361.]
(*s*) See Cotter *v.* Layer, 2 P. W. 624; Vawser *v.* Jeffery, 16 Ves. 519; 2 Sw. 268.
(*t*) 2 P. W. 334: [but must not this case be considered as depending solely on the republication ?]

[1] On the other hand, the fact that a wife has abandoned her husband, and been divorced therefor at his suit, does not, it is held, amount to a revocation of an ante-nuptial provision by will in her favor made in positive and unequivocal terms. Charlton *v.* Miller, 27 Ohio St. 298.

[2] See Langdon *v.* Astor, 3 Duer, 477; S. C.

*The revocation of devises by an alteration of estate is placed on an entirely new footing by the stat. 1 Vict. c. 26, which provides (sect. 23), that no conveyance or other act made or done subsequently to the execution of a will of or relating 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. *162

Stat. 1 Vict. c. 26.

Devises not to be revoked as to testator's disposable interest at decease, by conveyance or like act.

In regard to wills, the date of which or of any codicil thereto brings them within this section, a subsequent conveyance of the devised property will not produce revocation, except so far as it substantially alienates the estate, and withdraws it from the operation of the devise by vesting the property in another. If a testator, after devising an estate, sells and conveys it to a third person, of course the devise is still (as formerly) rendered inoperative, and the devisee can have no claim to the proceeds of the sale, even though the will should have directed the conversion of the property, and the proceeds can be traced into an investment (*u*). Where the testator contracts to sell the devised estate, and dies without having executed a conveyance to the purchaser, the devise remains in force as to the legal estate and no further, this being all the interest which the testator has power to dispose of at his decease, and the conversion, as between the real and personal representatives, being completely effected, [and the estate of the vendor being in contemplation of equity, "disposed of"] by the contract (supposing it to be a binding one), the devisee takes only the legal estate,

Remarks upon the enactment.

Will is revoked by contract to sell,

(*u*) See Arnald *v.* Arnald, 1 B. C. C. 401.

16 N. Y. 9. That a deed to a child may be treated as an advancement, see Wagner's Appeal, 38 Penn. St. 122; Hatch *v.* Straight, 3 Conn. 31. In regard to personal estate, the rule is that where a father gives a legacy to a child, it must be understood as a *portion*, although not so described in the will, because it is a provision by a parent for his child; and if the father afterwards advances a portion for that child, as upon marriage, it will be a complete ademption of the legacy, not only in cases where the advancements are larger than, or equal to, the testamentary portions, but also in cases where the sums advanced are less than the sums bequeathed; for it will not be intended, unless proved, that the father designed two portions to one child. Hartop *v.* Whitmore, 1 P. Wms. 681; Clarke *v.* Burgoine, 1 Dick. 353; Pye, Ex parte, 18 Ves. 158; Lawrence *v.* Lindsay, 68 N. Y. 108. The above rule of presumptive ademption, however, is subject to many qualifications; and the presumption may be destroyed or confirmed by the introduction of parol evidence of a different intention by the testator. Langdon *v.* Astor, 16 N. Y. 9; Rogers *v.* French, 19 Ga. 216; Miner *v.* Atherton, 35 Penn. St. 528. The same presumption does not arise in the case of a stranger. Powell *v.* Cleaver, 2 Bro. C. C. 388. Nor where the bequest is of a share in the residue. Smith *v.* Strong, 4 Bro. C. C. 369; Freemantle *v.* Banks, 5 Ves. 79. Nor where the advancement is not of the same character with the bequest or legacy. Swoope's Appeal, 27 Penn. St. 58; Dugan *v.* Hollins, 4 Md. Ch. 139. If, after advancements, a will be made, the intention of the testator as to such advancements is matter of fact determinable from the will itself, and from extrinsic matters or testimony to show whether money or goods were intended as advancements. Watson *v.* Watson, 6 Watts, 254; Wright's Appeal, 89 Penn. St. 67; Bacon *v.* Gossett, 13 Allen, 334. And, in the absence of direct evidence accompanying a gift, the question of advancement must be determined upon a consideration of the surrounding facts. Wright's Appeal, supra; Knabb's Estate, 30 Leg. Int. 361. A debt due by a son-in-law cannot be converted by proof of a testator's subsequent parol declarations into an advancement to his daughter.

and the purchase-money constitutes part of the testator's personal estate (*x*).[1]

— or by other conversion, whether voluntary or compulsory,

[And this rule applies equally to cases of conversion by operation of law; as, by act of parliament (*y*), or by an order for sale pronounced by a court of competent jurisdiction (*z*), or by compulsory sale under the Lands Clauses *163 and similar acts (*a*), * or by sale under a *power* given by the testator to a mortgagee (*b*). But, of course, an unauthorized sale (as if the real estate of an insane person, not so found, is sold by persons assuming to act for him) will not work conversion, although the sale is confirmed by the court *after* the owner's death (*c*). And

— unless the proceeds are to be reinvested to same uses.

the converting effect of a sale under an act of parliament or under an order of court is neutralized if the statute (*d*) or order (*e*) directs a reinvestment in land to be settled to the same uses; in which case, it should seem, the will would operate on the substituted land. So, if land were sold under the common power of sale in a settlement containing a similar direction for reinvestment; though some doubt may seem to be thrown on this by Gale *v.* Gale. Gale *v.* Gale (*f*), where an estate stood settled in trust for A. and his wife successively for life, with remainder as A.

[(*x*) Farrar *v.* Earl of Winterton, 5 Beav. 1; Moore *v.* Raisbeck, 12 Sim. 123. These decisions confirmed the author's previous opinion, see 1st ed. p. 148, where he cites Knollys *v.* Shepherd (ante, p. 56) to show that, even under the old law, a devise of land which the testator had *previously* contracted to sell passed the legal estate only. But the devisee is entitled to the rent until completion. Watts *v.* Watts, L. R. 17 Eq. 217.

(*y*) Frewen *v.* Frewen, L. R. 10 Ch. 610; Richards *v.* Att.-Gen., 6 Moo. P. C. C. 381; Cadman *v.* Cadman, L. R. 13 Eq. 470.

(*z*) Steed *v.* Preece, L. R. 18 Eq. 192, questioning Jermy *v.* Preston, 13 Sim. 356 (as to which see n. (*e*), infra), and Cooke *v.* Dealey, 22 Beav. 196. See also Arnold *v.* Dixon, L. R. 19 Eq. 113.

(*a*) Ex parte Hawkins, 13 Sim. 569; Re Manchester and Southport Railway, 19 Beav. 365; Ex parte Flamank, 1 Sim. N. S. 260. Notice to treat and agreeing on the price are together equivalent to a contract for sale, and work a conversion, Ex parte Hawkins, Ex parte Flamank, supra; Harding *v.* Metropolitan Railway, L. R. 7 Ch. 154; Watts *v.* Watts, L. R. 17 Eq. 217. But notice to treat, without more, has no such effect, Haynes *v.* Haynes, 1 Dr. & Sm. 426; nor a notice followed by vendor's unaccepted statement of price, Re Arnold, 32 Beav. 591; nor an agreement as to price per acre without defining the land, Ex parte Walker, 1 Drew. 508. Where an option to purchase at a specified price was given to A., and after the testator's death the land was bought by a railway company for double that price, A. was held entitled to the difference, Cant's estate, 4 De G. & Jo. 503. See also Ex parte Hardy, 30 Beav. 206.]

(*b*) Wright *v.* Rose, 2 S. & St. 323; Bourne *v.* Bourne, 2 Hare, 35. In both these cases no sale was made until after the testator's death, and *therefore* it was held there was no conversion — *quoad* the surplus. Compare Jones *v.* Davies, 8 Ch. D. 216.

(*c*) See per Wood, V.-C., Taylor *v.* Taylor, 10 Hare, 478, 479.

(*d*) As where the land of persons under disability is sold under the Partition Act, 1868, Foster *v.* Foster, 1 Ch. D. 588; Kelland *v.* Fulford, 6 Ch D. 491; Mildmay *v.* Quicke, ib. 553; or under the Lands Clauses and cognate acts, Midland Railway *v.* Oswin, 1 Coll. 80; Re Taylor, 9 Hare, 596; Re Horner, 5 De G. & S. 483; Re Stewart, 1 Sm & Gif. 32; Re Harrop, 3 Drew, 726. The Lunacy Regulation Act, 1853, directs (ss. 124, 135) that money arising by sale under that act of land belonging to lunatic tenant in fee shall devolve as realty. Re Mary Smith, L. R. 10 Ch. 79.

(*e*) Fellow *v.* Jermyn, W. N. 1877, p. 95. The land sold was in strict settlement, and the reinvestment (of surplus after answering charges) was necessary to prevent the money vesting absolutely in the first tenant in tail. Jermy *v.* Preston, 13 Sim. 356, 366, appears to have proceeded on a similar ground. And as to the propriety of reinvestment where the estate is settled, see 4 D. M. & G. 766, per K. Bruce, L. J. (*f*) 21 Beav. 349.

Wright's Appeal, 89 Penn. St. 67; Yunt's Appeal, 13 Penn. St. 575. It may be added that advancement always implies that the donor has parted with his title to thing advanced. Manning *v.* Manning, 13 Rich. 410.

[1] See Donohoe *v.* Lea, 1 Swan, 119.

should by deed or will appoint, and in default of appointment over: the trustees had power to sell, and the proceeds were to be reinvested in land to be settled to the same uses. By his will A. appointed the estate to the children of B., and devised all other his real estate not thereinbefore specifically disposed of to his wife. Afterwards the trustees sold the estate, and then A. died; and it was held by Sir J. Romilly, M. R., that the appointed property was adeemed by the subsequent sale, that the appointment had no effect either on the purchase-money (which had not yet * been reinvested) nor on the new *164 estate to be purchased with it, but that the right to these passed by the residuary devise (*g*). He said it must be treated as a new estate and a new power in relation to it. Having regard to the direction that the new estate should be settled to the old uses (which, of course, included the power of appointment), it would be difficult to distinguish this case in principle from one where A. had the estate and not a power only. But the decision is questioned by Lord St. Leonards, who says it was the old power that remained over the new estate (*h*).

It is now scarcely possible for any residuum of interest remaining in the testator at his death to escape from the previous devise. In Lowndes *v.* Norton (*i*), when a testator devised an estate to trustees during the life of his daughter, without impeachment of waste, for her separate use, and soon afterwards conveyed the same estate to a different trustee for the life of the same daughter (but not making her or the trustee unimpeachable for waste), with several successive remainders for life, each without impeachment of waste, with reversion to himself in fee; it was argued that the right to the timber remained in the testator at the time of his death, and, notwithstanding the deed, passed by the devise to the daughter, who was consequently unimpeachable for waste: but it was held by K. Bruce and Turner, L.JJ., that this was an argument not warranted in fact (presumably because the right in question was in fact disposed of by the deed to the tenants for life in remainder), and that the estates given by the devise had been completely abolished by the deed.

Devise to A. for life exempt from waste, followed by a conveyance to A. for life not so exempt.

How a specific bequest of leaseholds is affected, under this section, by the subsequent acquisition of the fee was considered in Cox *v.* Bennett (*k*), where a testator having bequeathed "his houses at T., held on lease from B.," to X., and the residue of his real and personal estate to Y., afterwards pur-

Bequest of term how affected by purchase of the fee.

(*g*) As to this see post, Ch. XX. s. 5.

(*h*) R. P. S. 375, n., and Pow. 308, 8th ed. In Re De Beauvoir, 2 D. F. & J. 5, 29 L. J. Ch. 567, where the sale was under the L. C. Act, and A. had the *estate* in reversion, the point did not arise; for by his will the settled estate and "all other his real estate" were included in the same devise. (*i*) 33 L. J. Ch. 583.

(*k*) L. R. 6 Eq. 422. See also Struthers *v.* Struthers, 5 W. R. 809. Both these cases appear to require the further support of s. 3, which enables a testator to dispose of all real estate to which he may be entitled at the time of his death, and of s. 24, which enacts that every will shall be construed with reference to the real and personal estate comprised in it to

*165 chased and * took a conveyance to himself of the reversion in fee.

It was held by Sir G. Giffard, V.-C., that the entire interest in the houses passed by the specific gift to X. He said, "the clause in the statute (*i. e.* sect. 23) says that the will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death; and there is nothing in the will to confine its operation to the interest which the testator had at the date of the will:" the reference to the lease was merely a method of describing the property.

Sect. 23 does not apply to wills made before 1838.

The section now under consideration does not apply to wills made before 1st January, 1838. Such wills are revocable by alteration of estate, although the alteration should be effected on or after that day (*l*).]

Section IV.

By void Conveyances.

Attempt to convey revokes a devise, where.

An instrument purporting to be a conveyance, but incapable of taking effect as such, may, nevertheless, operate to revoke a previous devise, on the principle, as it should seem, that the attempted act of conveyance is inconsistent with the testamentary disposition, and, therefore, though ineffectual to vest the property in the alienee, it produces a revocation of the devise. The rule obtains wherever the failure of the conveyance arises either from the incapacity of the grantee, or from the want of some ceremony which is essential to the efficacy of the instrument.[1] Thus, in Beard *v.* Beard (*m*), Lord Hardwicke decided, that a deed of gift by the testator to his wife of personal estate, which he had previously bequeathed by his will, revoked the bequest; though the deed was inoperative under the rule of the common law, which incapacitates a woman from taking property so disposed of, as the donee of her husband. So it has been often ruled, from a very early period, that a feoffment without livery of seisin, and a bargain and sale without inrolment, revoke a previous devise of the lands thus ineffectually attempted to be alienated (*n*). And

take effect as if it had been executed immediately before the testator's death: for s. 23 says only that no subsequent act shall *prevent* the will operating, implying that but for the subsequent act the will would have operated on the interest in question; which it would not have done without the aid of ss. 3, 24.

(*l*) Langford *v.* Little, 2 Jo. & Lat. 613.] (*m*) 3 Atk. 72.

(*n*) See Montague *v.* Jefferies, Moor, 429, pl. 599. See also 3 Atk. 73, 1 W. Bl. 349, 2 Sw. 274.

1 A conveyance inoperative for want of completion, or incapacity in the grantee, may amount to a revocation, if it shows the intention of the testator to revoke his will. Walton *v.* Walton, 7 Johns. Ch. 269.

the rule has been considered as applying to a * common recovery, *166
rendered void by the misnomer of the tenant to the *præcipe* (*o*), and to an instrument purporting to be an appointment under a power, which at the time was not in the testator (*p*). It is true, that in the last case, the court was of opinion, that the instrument, if void as an appointment, might take effect as a grant of the reversion; but Lord Kenyon, C. J., unreservedly stated, that, "even supposing it was an inadequate conveyance for the purpose for which it was intended, still if it demonstrate an intention to revoke the will, it amounts, in point of law, to a revocation." And, in Vawser *v.* Jeffery (*q*), Lord Eldon treated it as clear, that an attempt by a testator to convey a copyhold estate by deed, would revoke a previous devise of that estate.

It has been held, however, that a conveyance to charitable uses, which was void under the statute 9 Geo. 2, c. 36, on account of the grantor dying within twelve months after its execution, did not affect a prior devise, on the ground, it is presumed (for the reasons are not stated), that the event of the grantor surviving the year, was an implied condition annexed to the deed, and this failing, the intended conveyance was to be considered as a nullity, the effect being the same as if the grantor had expressly made his conveyance dependent on such a contingency (*r*). So it has been decided, that a deed executed by one who is under a personal incapacity to make the attempted disposition, has no revoking effect on a prior devise; for as the principle proceeds upon intention, ability to perform the act seems to be a necessary ingredient, for without such ability there can be no disposing mind. Thus, where a *feme coverte*, who had a power to appoint real estate by will only, and had also the fee-simple in default of appointment, made a will in pursuance of the power, and subsequently executed a deed purporting to convey the lands, it was held that the deed was inoperative to revoke the testamentary appointment (*s*). But if a *feme coverte*, who has a power of appointing by deed or will, makes a will in exercise thereof, and afterwards, by deed, in execution of her alternative power, directs her trustees to convey to her, which they accordingly do, of course the testamentary appointment is revoked (*t*).

Qualifications of the rule.

* It seems clear, that a conveyance which is void at law on *167
account of fraud or covin, is not a revocation: but a different rule obtains, in regard to deeds which are valid at law, though impeachable in equity. The existence of this distinction, indeed, was long *vexata quæstio*, but all controversy on the point seems to be closed by the case of Simpson *v.*

Deeds of conveyance void on account of fraud revoke a will,—where.

(*o*) Doe *v.* Bishop of Llandaff, 2 B. & P. N. R. 491. [The point, however, was not actually decided in this case.]
(*p*) Shove *v.* Pinke, 5 T. R. 124, 310.
(*q*) 2 Sw. 274.
(*r*) Matthews *v.* Venables, 9 J. B. Moo. 286, 2 Bing. 136.
(*s*) Eilbeck *v.* Wood, 1 Russ. 564.
(*t*) Lawrence *v.* Wallis, 2 B. C. C. 319.

Walker (*u*); in which it was decided by Sir L. Shadwell, V.-C., in conformity to the decision of Lord Hardwicke in Hick *v.* Mors (*x*), and that of Lord Alvanley in Hawes *v.* Wyatt (*y*), and a dictum of Lord Eldon (*z*), and in opposition to a determination of Lord Thurlow (*a*), that a deed obtained under circumstances which rendered it void in equity, but which was valid at law, *did* revoke a previous devise.

Rule as to wills since 1837.

A question of this nature, however, cannot arise in regard to wills made since 1837, for as, under the recent enactment, even an actual conveyance does not produce revocation, except so far as it may, by alienating the testator's interest, leave the devise nothing to operate upon, it is obvious, that a void or attempted conveyance cannot, under any circumstances, have, as such, a revoking effect (*b*).

Section V.

By a subsequent Revoking or Inconsistent Will, Codicil or Writing.

Before 1838.

In considering this head of Revocation, as applicable to wills made before the year 1838, freehold and personal estate must be distinguished. The Statute of Frauds (*c*) enacts, "that no

Devises of lands, how to be revoked.

devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing or other writing declaring the same, (or by burning, &c.); but all devises and bequests of lands and tenements shall remain and continue in force (until the same be burnt, &c.); or unless the same be altered by some other will or codicil in

*168 writing, or other writing of the devisor, signed in the * presence of three or four witnesses declaring the same."[1] The same

Bequests of personalty, how to be revoked.

statute (sect. 22) provides, "that no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be

(*u*) 5 Sim. 1.
(*y*) 2 Cox, 263, 3 B. C. C. 156. See also 7 Ves. 374.
(*z*) 8 Ves. 283.
(*x*) Amb. 215.
(*a*) Hawes *v.* Wyatt, supra.
[(*b*) Ford *v.* De Pontès, 30 Beav. 572. acc. And distinguish between a void conveyance inoperative as such to produce revocation, and a writing duly executed and "declaring an intention to revoke," which takes effect under 1 Vict. c. 26, s. 20. See post, p. 170.
(*c*) 29 Car. 2, c. 3, s. 6, Ir. Parl. 7 Will. 3, c. 12, s. 6.]

[1] This, in substance, is the language of the statute law of almost every part of the United States, 4 Kent, 520, 521, note (c); Belden *v.* Carter, 4 Day, 66; Witter *v.* Mott, 2 Conn. 67; Card *v.* Grinman, 5 Conn. 164; Brown *v.* Thorndike, 15 Pick. 388; Ray *v.* Walton, 2 A. K. Marsh. 73; Ex parte Ilchester, 7 Ves. (Sumn. ed.) 348, note (*c*); Boudinot *v.* Bradford, 2 Dall. 268; S. C. 2 Yeates, 170; Lawson *v.* Morrison, 2 Dall. 289; Burns *v.* Burns, 4 Serg. & R. 297. The statutes of the several states generally contain specific rules for the revocation of wills, both real and personal estate, conforming in most cases (of revocation by a subsequent instrument) to the requirements for the exe-

altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least."

Unless these enactments had placed the revocation of wills under positive restrictions, they might have been revoked in the same manner as before, there being no necessary implication that what is required to constitute a valid execution of an instrument is essential to its revocation; on which principle it was held before the Statute of Frauds, that a will required to be in writing by the statute of 34 Hen. 8, c. 5, might be revoked by parol (*d*).

Difference between devising and revoking clauses of Statute of Frauds.

Though the Statute of Frauds required that a will which revoked a devise of freehold lands should be attested by the same number of witnesses as a will devising such lands, yet, in some particulars, the prescribed ceremonial differed in the respective instances. Thus, a devising will was required to be subscribed by the witnesses in the testator's presence, which a revoking will was not, and a revoking will was required to be signed by the testator in the presence of the witnesses, while a devising will needed not to be signed in their presence; each, therefore, had a circumstance not common to both. This difference, however (which probably occurred without design), has been attended with little practical effect; for it seldom happens that a testamentary instrument is executed for the mere purpose of revoking a previous will, and if it contain a new disposition, any revoking clause therein will be a nullity, whether the substituted devise takes effect or not, though for widely different reasons in the respective cases. If the devise with which the clause in question is associated be effective, it reduces the latter to silence by rendering it unnecessary, the new devise itself producing the revocation; so that the efficacy of the will as a revoking instrument cannot, in such a case, become a subject of consideration. If, on the other hand, the new devise be ineffectual on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause becomes inoperative *on the principle before noticed, that the revocation is conditional and dependent on the efficacy of the attempted new disposition, and that failing, the revocation also fails; the purpose to revoke being consid-

Revocation connected with new disposition.

No revocation, where devise intended to be substituted fails.

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(*d*) Cranvel *v.* Sanders, Cro. Jac. 497. See also Ex parte Earl of Ilchester, 7 Ves. 348; Richardson *v.* Barry, 3 Hagg. 249.

cution of wills. An instrument purporting to be a will, but not properly witnessed, will not operate as a revocation of a prior properly executed will, though it contain a clause of revocation and profess to dispose of the property differently from the will. Reese *v.* Court of Probate, 9 R. I. 434. So an instrument which is to take effect only on the happening of an event which does not transpire has no effect to revoke a prior validly executed will. Hamilton's Estate, 74 Penn. St. 69; Rudy *v.* Ulrich, 69 Penn. St. 177. The fair effect of a revoking clause in the later instrument is that the clause was intended to operate only in case the writing took effect as a will. Ib.

ered to be, not a distinct independent intention, but subservient to the purpose of making a new disposition of the property; the testator meaning to do the one so far only as he succeeds in effecting the same (*e*).[1] But it seems, that, if the second devise fails, not from the infirmity of the instrument, but from the incapacity of the devisee, the prior devise is revoked (*f*).[2]

Revocation of wills of personalty.

With respect to the revocation of wills of personal estate, it is to be observed that questions concerning it most commonly occur in the ecclesiastical courts, which, of course, no less than the temporal courts, are bound by the 22d section of the Statute of Frauds, excluding parol revocations. Accordingly, it was ruled by Sir J. Nicholl, that evidence could not be received of the testator's intention orally announced, to adopt the prior of two wills, both of which were found at his decease uncancelled, though it appeared that most of the bequests in the posterior will had lapsed (*g*). But the enactment in question is not considered to preclude the reception of evidence of acts of a testator in his lifetime concerning his testamentary papers; still less does it exclude inquiry into the state in which such papers were found at his decease. And it is to be observed, also, that the requisition of the statute is satisfied by the intention to revoke being reduced into writing in the lifetime, and by the direction, of the testator, though not authenticated by his signature. And on this principle it was decided, that, where a person, at the testatrix's request, addressed a letter to another person having the custody of her will, requesting him to destroy it, this was a sufficient revocation, though the will was not destroyed in compliance with the request (*h*).[3]

Revocation depending on completeness of revoking will.

Revocation often depends on the completeness of *170 the posterior * of two testamentary instruments. In such cases the ecclesiastical courts try the validity of the propounded paper by the principles which have been adverted to in a former chapter, to which it will be sufficient to

(*e*) Eggleston *v.* Speke, 3 Mod. 258, Carth. 79, 1 Show. 89; Onions *v.* Tyrer, 2 Vern. 741, Pre. Ch. 459, 1 P. W. 343; [Short *v.* Smith, 4 East, 419.] See also Ex parte Earl of Ilchester, 7 Ves. 348; Kirke *v.* Kirke, 4 Russ. 435; [Locke *v.* James, 11 M. & W. 901. Compare] Richardson *v.* Barry, 3 Hagg. 249.

(*f*) Frenche's Case, 8 Vin. Ab. Dev. O. pl. 4; Roper *v.* Constable, 2 Eq. Cas. Ab. 359, pl. 9; S. C. nom. Roper *v.* Radcliffe, 5 B. P. C. Toml. 360, 10 Mod. 233; [Tupper *v.* Tupper, 1 K. & J. 665; Quinn *v.* Butler, L. R. 6 Eq. 225. See also Re Gentry, L. R. 3 P. & D. 80, where an express revoking clause was held absolute, though accompanied by a desire that an instrument, referred to as a will but which in fact was a valid deed, should stand as the will —which it could not do.]

(*g*) Daniel *v.* Nockolds, 3 Hagg. 777.

(*h*) Walcott *v.* Ouchterlony, 1 Curt. 580. [And see Re Ravenscroft, 18 L. J. Ch. 501; Meredyth *v.* Maunsell, Milw. Ir. Eccl. Rep. 132.]

[1] Laughton *v.* Atkins, 1 Pick. 535, 543; Reid *v.* Borland, 14 Mass. 208. See Bethell *v.* Moore, 2 Dev. & B. 311; Clark *v.* Eborn, 2 Murph. 235.

[2] Price *v.* Maxwell, 28 Penn. St. 23, 39; Jones *v.* Murphy, 8 Watts. & S. 300. Where a testator by a codicil revokes a devise or legacy, and grounds such revocation on the assumption of a fact which proves not to exist, the revocation is regarded as contingent upon the existence of such fact and does not take effect. Dunham *v.* Averill, 45 Conn. 61. See ante, p.

[3] See Boyd *v.* Cook, 3 Leigh, 32.

refer (*i*), with the additional observation, that the presumption is always strongly adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform dispositive acts; and this presumption is stronger in proportion to the less perfect state of, and the small progress made in, such instrument. To establish such a paper, there must be the fullest proof of capacity, volition, final intention, and involuntary interruption (*k*).[1]

Question how affected by recent act.

In regard to wills made since the year 1837, however, it can never be a question, whether an informal or apparently unfinished testamentary paper has a revoking operation, for the statute 1 Vict. c. 26, s. 20, has placed a revoking will [or writing (*l*)] upon precisely the same footing, in regard to the ceremonial of execution, as a disposing will; and when that ceremonial has been observed, it can never be said that the will is informal or unfinished.

A will or codicil may operate as a revocation of a prior testamentary instrument by the effect either of an express clause of revocation, or of an inconsistent disposition of the previously devised property.[2]

Distinction between revocation of a gift and of so much of will as contains the gift.

[Express revocation may, it seems, be produced in two different modes, having different effects. Thus, if there be a bequest by will to several persons as tenants in common, and by codicil the testator revoke the bequest to one of them, his share will not accrue to the others (*m*). This is the ordinary mode. But if the testator revoke *so much of his will* as contains the gift to one of such persons, here, if the words that remain are sensible *per se*, and amount without further alteration to a gift of the whole subject to the others, these will take the whole, the will being read as if the revoked words had never been in it. Harris * *v.* Davis (*n*) *171 affords an example of the latter mode. In that case there was first a gift to A. and B. in common; then, in a subsequent part of

(*i*) Ante, p. 101. (*k*) Blewitt *v.* Blewitt, 4 Hagg. 410; Gillow *v.* Bourne, ib. 192.

[(*l*) The writing must "declare an intention to revoke," but need not be testamentary. And unless testamentary it will not be admitted to probate. Re Fraser, L. R. 2 P. & D. 40. See also Re Hicks, L. R. 1 P. & D. 683; Re Durance, L. R. 2 P. & D. 406. Such a writing may be executed by a married woman. Hawksley *v.* Barrow, L. R. 1 P. & D. 147.

[(*m*) Cresswell *v.* Cheslyn, 2 Ed. 123; Humble *v.* Shore, 7 Hare, 247. Compare Shaw *v.* McMahon, 4 D. & War. 431, as to which see post, Ch. X., Ch. XXIII., Ch. XXXII., s. 3.

(*n*) 1 Coll. 416.

[1] See Idley *v.* Bowen, 11 Wend. 227; Allison *v.* Allison, 7 Dana, 94.

[2] A will may be revoked by implication by the publication of a later testament inconsistent with it. But the mere fact that a new will is made does not revoke the prior one, since it may relate to other property. Smith *v.* McChesney, 15 N. J. Eq. 359. A legacy bequeathed to a granddaughter, by a codicil, "in lieu" of a devise in the will to her mother, who had since deceased, is a revocation of the original devise to the mother. Brownell *v.* De Wolf, 3 Mason, 456. The republication of a former inconsistent will is a revocation of a subsequent will. Havard *v.* Davis, 2 Binn. 406. Where a testator executed a second will, supposing at the time that his first will was lost, and he subsequently found the first, and destroyed the second, declaring that he preferred the first, the latter may legally be admitted to probate. Marsh *v.* Marsh, 3 Jones, 77. Cutto *v.* Gilbert, 9 Moore, P. C. 131. As to inconsistent wills see also Simmons *v.* Simmons, 26 Barb. 68; Brant *v.* Willson, 8 Cowen, 56; Nelson *v.* McGiffert, 3 Barb. Ch. 158; In re Fisher, 4 Wis. 254.

the will a direction that C. should take a share with A. and B.; and afterwards a codicil revoking "that part written in the will which left" the share to C.: and it was held that A. and B. took the whole. The frame of the will was peculiar, and lent itself easily to this construction. If the words that are left require (as they generally would) some further alteration or addition to make them sensible, the construction will not be made (*o*).]

Intention to revoke, whether present or future.

In order that an express clause of revocation may be effectual, it must indicate an actual and present intention to revoke the will; and if the testator's expressions are declaratory only of a future design, they will not be sufficient (*p*)[1]; and in an early case, before the Statute of Frauds, a distinction is taken between the effect of a testator saying "I will revoke my will made at P.," which refers to a future act, and when he says, "My will made at P. shall not stand," which is a present resolution, the latter being, it was considered, an actual revocation, and the former not (*q*).[2]

Mere intention to revoke by a future act inoperative.

Of course a mere intimation by a testator of his intention to make by a future act a new disposition, does not effect an actual present revocation. Thus where A. (*r*) made a will, disposing of his real and personal property, and afterwards, the residuary legatee of the personalty being dead, and A. having acquired other real property, he made another will whereby he devised the newly acquired property, and then wrote as follows: "As to the rest of my real and personal estate I intend to dispose of the same by a codicil to this my will hereafter to be made:" it was contended that this clause, though inoperative as a disposition, indicated an intention to revoke the prior will; but Lord Ellenborough and Lawrence, J., held that it was not a revocation. They considered the cases before the statute to be applicable, and that the testator merely intended to dispose of the subsequently acquired real estate, and the property which had lapsed by the death of the residuary legatee: and that, even if this had imported an intent to revoke by making a different disposition in future, it would not, according to the authorities, have amounted to a revocation, unless the court could ascertain what the difference was.

Express clause of revocation restrained by construction.

*172 *[And even an express clause of absolute and present revocation of all former wills may be reduced to total or partial silence, either by showing that the clause

(*o*) Sykes *v.* Sykes, L. R. 4 Eq. 200.]
(*p*) Cleobury *v.* Beckett, 14 Beav. 588.]
(*q*) Burton *v.* Gowell, Cro. El. 306.
(*r*) Thomas *v.* Evans, 2 East, 488. See also Griffin *v.* Griffin, 4 Ves. 197, n.

[1] Ray *v.* Walton, 2 A. K. Marsh. 71.

[2] In Brown *v.* Thorndike, 15 Pick. 388, a testator wrote on his will, "It is my intention at some future time to alter the tenor of the above will, or rather to make another will; therefore be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect." This was considered as a present revocation of a will of personal estate. This was before the Revised Statutes of Massachusetts. See Witter *v.* Mott, 2 Conn. 67.

was inserted by mistake (*s*), or that it is unreasonable to give unrestrained effect to the words; as in cases where, by one testamentary paper, a person exercises a power of appointment, and then by subsequent instrument either exercises another and distinct power (*t*), or deals with his own property, and not with the subject of the former power (*u*): in these cases it has been held that the former appointment is not revoked.]

Revocation by inconsistency of disposition.

It was decided at an early period, that, in order to revoke a will, it is not sufficient that the existence of a subsequent will should have been found by a jury; it must be found to be different from the former (*x*), and even the latter finding will not avail, if it be added that the nature of such difference is unknown to the jurors (*y*).[1] [And an instrument stating itself to be the testator's last will does not necessarily operate to revoke a prior will, either as regards real (*z*) or personal estate (*a*).]

The most simple and obvious case of revocation by inconsistency of disposition is that of a testator having devised lands to a person in fee, and then by a subsequent will or codicil devising the same lands to another in fee; in such case the latter devise would operate as a complete revocation of the former (*b*).[2] And here the learned reader cannot fail to perceive in the difference of construction which has obtained, where two devises in fee of the same land are found in one and the same will, and where they are found in several distinct wills, the greater anxiety * evinced to reconcile the several parts of *173 the same testamentary paper, than to reconcile several distinct

[(*s*) Powell *v.* Mouchett, 6 Madd. 216; Re Oswald, L. R. 3 P. & D. 162; and cases cited ante, p. 78, n. (*j*).

(*t*) Re Meredith, 29 L. J. Prob. 155. The parol evidence read at the bar in this case of course formed no ingredient in its decision. See also Re Merritt, 1 Sw. & Tr. 112, 4 Jur. N. S. 1192; Re Joys, 30 L. J. Prob. 169. It is otherwise if the testator by the second instrument again refers to the same power, though he fails thereby to dispose of the whole subject. Re Enstace, L. R. 3 P. & D. 183.

(*u*) Hughes *v.* Turner, 4 Hagg. Eccl. 52; Denny *v.* Barton, 2 Phillim. 575.]

(*x*) Seymor *v.* Nosworthy, Hard. 374; Show. P. C. 146. [If the subsequent will is lost or destroyed, parol evidence is admissible to prove its contents. Brown *v.* Brown, 8 Ell. & Bl. 876.]

(*y*) Goodright *v.* Harwood, 3 Wils. 497, 2 W. Bl. 987, Cowp. 87, 7 B. P. C. Toml. 489. [So in the case of a revocable appointment by deed where the contents of a subsequent appointment are unknown. Rawlins *v.* Rikards, 28 Beav. 370.

(*z*) Freeman *v.* Freeman, 5 D. M. & G 704.

(*a*) Cutto *v.* Gilbert, 9 Moo. P. C. C. R. 131; Richards *v.* Queen's Proctor, 18 Jur. 540, Lemage *v.* Goodban, L. R. 1 P. & D. 57; Re De la Saussaye, L. R. 3 P. & D. 42; Re Petchell, ib. 153.]

(*b*) 3 Mod. 206, [Litt. s. 168; Re Hough's Estate, 15 Jur. 943, 20 L. J. Ch. 422; Evans *v.* Evans, 17 Sim. 107.

[1] Evidence that a subsequent will had been made by the testator and had been stolen from him, without any proof of its contents, together with proof of his declarations, after the will was stolen, that he would die intestate, and leave his property to be distributed according to the statute, was held not to be sufficient evidence of the revocation of a former will, in Hylton *v.* Hylton, 1 Gratt. 161. See Nelson *v.* McGiffert, 3 Barb. Ch. 158. But see Jones *v.* Murphy, 8 Watts. & S. 275, where it was held that in case of spoliation or fraud, in reference to the suppression or destruction of a second will, it was not necessary to show its contents, or in what respect it revoked the first, as must be done in ordinary cases.

[2] Brant *v.* Willson, 8 Cowen, 56.

papers of different dates, though constituting, in the whole, one will. In the former case, the devisees (as hereafter shown) take concurrently in order to avoid making one part of the will contradict and subvert another; and in the latter case no hesitation seems to have been felt in holding the second devise to be revocatory of the first. And the distinction seems to be reasonable; for though it may be very unlikely that a testator should wholly change the object of the devise in the short interval between his passing from one part of the will to the other, there is no such improbability that, in the longer lapse of time between the execution of two testamentary papers of different dates, such a change of purpose should have occurred.

Gift of residue by will revoked by similar gift in codicil.

Earl of Hardwicke *v.* Douglas.

[So if the residue of personal estate be given by will to A., and by codicil to B., the former gift is revoked (*c*). And this was so held in Earl of Hardwicke *v.* Douglas (*d*), though the gift by codicil was of personal estate "not hereinbefore or by my will or any other codicil disposed of." The words were construed to mean "not hereinbefore or by my will disposed of by way of particular legacies," thus leaving something for the gift to operate upon: literally construed they left nothing. Again, in Kermode *v.* Macdonald (*e*), where a testator by her will bequeathed specific and pecuniary legacies, and gave the residue of her personal estate to A., and then by codicil gave "all her personal estate" to B.; it was held, that "all her personal estate" meant the whole of the personal estate which by her will the testatrix had divided into two portions, the legacies and the residue, and that the will was therefore wholly revoked.

Gift of particular residue not revoked by codicil giving the general residue.

But where a testator bequeathed portions of "his money in the funds" to several legatees, and "the surplus of his money in the funds" to be distributed by his executors among the legatees, and then by codicil, after bequeathing some specific chattels, gave "the surplus remaining after the aforesaid legacies are paid" to the children of A.; Sir J. K. Bruce, V.-C., held that the gift of surplus money in the funds was not revoked by the residuary gift contained in the codicil, which was so expressed as to embrace other property (*f*).

*174 *Under the old law] where a testator at different periods of his life made various testamentary papers, some of which he destroyed, and others he left undestroyed, each purporting to contain his last will, this character belonged exclusively to such one of the uncancelled papers as was executed next before his decease (*g*); and in order to ascertain the time of the execu-

Rule where several wills are subsisting at death.

(*c*) Fownes-Luttrell *v.* Clarke, W. N. 1876, pp. 168, 249.

(*d*) 7 Cl. & Fin. 795, West, P. C. 555, per Lords Brougham and Lyndhurst, reversing Douglas *v.* Leake, 5 L. J. N. S. Ch. 25; coram Lord Cottenham, who in D. P. retained his opinion. Compare Lee *v.* Delane, 4 Do G. & S. 1.

(*e*) L. R. 1 Eq. 457, 3 Ch. 584.

(*f*) Inglefield *v* Coghlan, 2 Coll. 247.]

(*g*) See Goodright *v.* Glazier, 4 Burr. 2512; Harwood *v.* Goodright, Cowp. 92. [This rule is of course inapplicable to the present state of the law. See 1 Vict. c. 26, s. 22.]

tion of the respective papers, recourse may be had to evidence, derived either from their own contents, or from extrinsic sources. Sometimes the water-mark, showing the date of the manufacture of the paper on which a will is written affords decisive proof of its posteriority to another will, the period of whose execution can be ascertained by other means (*h*).

As to contradictory wills of uncertain date:

If, from the absence of date and of every other kind of evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are necessarily held to be void, and the heir as to the realty, and the next of kin as to the personalty, are let in; but this unsatisfactory expedient is never resorted to, until all attempts to educe from the several papers a scheme of disposition consistent with both have been tried in vain (*i*).

— to be reconciled if possible,

And even where the times of the actual execution of the respective papers are known, so that, if they are inconsistent, there can be no difficulty in determining which is to be preferred, the courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper (*k*); supposing, of course, that such latter paper contains no express clause of revocation,[1] [or other clear indication of a contrary intention (*l*).]

As where a testator made a will devising his lands to trustees, for two hundred years, to pay his debts, and afterwards, by another will, devised the same lands to other trustees for three hundred years, to discharge some particular specialty debts mentioned in a deed executed after the first will, and all incumbrances affecting the property; Lord Talbot held, that the first term of two hundred years was not revoked, as the two terms were not inconsistent, the testator's intention in creating the term of three hundred years being merely for the purpose of * giving priority in payment to the specialty debts, and *175 the charges affecting the estate (*m*).

— provided that the subsequent document is a codicil, or an incomplete will.

The inclination to such a construction as would preserve, either wholly or in part, the contents of the prior document, however, exists only, either when the subsequent document is inadequate to the disposition of the entire property, so that the consequence of rejecting the prior document would be to produce partial intestacy (*n*); or else where the posterior

(*h*) The writer, however, understands that paper, made near the close of a year, sometimes (like literary publications) bears the date of the year following.

(*i*) See Phipps *v.* Earl of Anglesea, 7 B. P. C. Toml. 443.

[(*k*) Richards *v.* Queen's Proctor, 18 Jur. 540.

(*l*) Plenty *v.* West, 6 C. B. 201, 16 Beav. 173; Dempsey *v.* Lawson, 2 P. D. 98.]

(*m*) Weld *v.* Acton, 2 Eq. Ca. Ab. 777, pl. 26. [The word "deed," occurring four times in this report, seems a mistake for "will," though the report might be made consistent by reading "demise," for "devise;" and see Coward *v.* Marshal, Cro. El. 721.

(*n*) See Freeman *v.* Freeman, Kay, 479, 5 D. M. & G. 704. In Plenty *v.* West, 1 Rob. 264, 4 No. Cas. 103, 9 Jur. 458, Sir H. J. Fust would not, even in such cases, recognize the existence of the inclination as regards personalty; but see Cookson *v.* Hancock, 1 Kee. 817,

[1] Richards *v.* Queen's Proctor, 28 Eng. L. & Eq. 610; Price *v.* Maxwell, 28 Penn. St. 23, 38.

paper is styled a codicil (*o*) : for the office of a codicil being to vary or add to and not wholly supplant a previous will, such a designation of the instrument seems to demand that some part, at least, of the will, whose existence it supposes and recognizes, should, if possible, be sustained. [If the subsequent instrument does not profess to be a codicil and is adequate to the disposition of the entire property, there is no such *à priori* improbability that it was intended wholly to supplant the prior instrument. The case then rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first. Thus, in Henfrey *v.* Henfrey (*p*), where a testator by will gave his household effects and other benefits to his wife, and all the residue of his estate and effects to A., and appointed him executor, and then by subsequent will left all he possessed "containing furniture, books, &c." to his wife, but did not appoint an executor, the first will, including the appointment of the executor, was held to be wholly revoked. "Containing" was read "inclusive of."]

*176 * Numerous are the questions which have arisen in regard to the extent to which a codicil affects the disposition of a will or antecedent codicil, and which are commonly occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the prior testamentary paper.[1]

Codicil not to disturb will more than absolutely necessary.

In dealing with such cases it is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil,[2] as will appear from the following adjudications, which have been selected

2 My. & Cr. 606; Lemage *v.* Goodban, L. R. 1 P. & D. 57; Birks *v.* Birks, 4 Sw. & Tr. 23, 34 L. J. Prob. 90.

(*o*) Re Howard, L. R. 1 P. & D. 636; Robertson *v.* Powell, 2 H. & C. 762.]

[(*p*) 2 Curt. 468, Moo. P. C. C. 29, 6 Jur. 355. And see Cottrell *v.* Cottrell, L. R. 2 P. & D. 397. By the civil law the appointment of an executor was a complete disposition of the personal estate; and in some early cases in the Ecclesiastical Courts the mere appointment of a different executor in a subsequent paper, purporting to be a distinct will, was held to be a revocation of a prior will and appointment. Whitehead *v.* Jennings and Burt *v.* Burt, cit. 1 Phillim. 412. But such new appointment was afterwards decided not to be conclusive. Richards *v.* Queen's Proctor, 18 Jur. 540; Birks *v.* Birks, 4 Sw. & Tr. 23, 34 L. J. Prob. 90. And it seems doubtful whether even the appointment by subsequent will of a "sole" executor amounts *per se* to a revocation of the first. See, for revocation, Re Lowe, 3 Sw. & Tr. 478, 33 L. J. Prob. 155; Re Baily, L. R. 1 P. & D. 628. *Contra*, Geaves *v.* Price, 2 Sw. & Tr. 71, 32 L. J. Prob. 113; Re Leese, 2 Sw. & Tr. 442, 31 L. J. Prob. 169; Re Morgan, L. R. 1 P. & D. 323.]

[1] See Pickering *v.* Langdon, 22 Me. 430; Homer *v.* Shelton, 2 Met. 202.

[2] A codicil is no revocation of a will, except in the precise degree in which it is inconsistent with it, unless there be words of revocation. Brant *v.* Willson, 8 Cow. 56; Bradley *v.* Gibbs, 2 Jones, Eq. 13; Boyd *v.* Latham, Busb. 365. See Pierpont *v.* Patrick, 53 N. Y. 591; Pickering *v.* Langdon, 22 Me. 430; Homer *v.* Shelton, 2 Met. 202; Bosley *v.* Bosley, 14 How. 390; Kane *v.* Astor, 5 Sandf. 467; Nelson *v.* McGiffert, 3 Barb. Ch. 158. And this though it professes an intent to make a different disposition of the whole estate. 2 Greenl. Ev. § 681; Harwood *v.* Goodright, Cowp. 87; Cleoburey *v.* Beckett, and Cleoburey *v.* Turner, 14 Beav. 583; Willaims *v.* Evans, 1 C. & M. 12. An intention expressed by a testator, in a codicil to his will, to make an alteration in the will in one particular, negatives by implication any intention to alter it in any other respect. Quincy *v.* Rogers, 9 Cush. 291; Vaughan *v.* Bunch, 53 Miss. 513. Thus, a testator, by his last will and testament, gave to A., B., and C. a legacy of $2,000 each, and also to each an equal share

from a large mass of cases (*q*), that might be cited in illustration of the principle.[1]

Thus, where a testator by his will devises lands to A. in fee, and by a codicil devises the same lands in fee to the first son of B. who shall attain the age of twenty-one years and shall assume the testator's name, the first devise will be revoked only *quoad* the interest comprised in the executory devise in the codicil; so that, until B. has a son who attains his majority and assumes the testator's name, the property will pass to A. under the devise in the will (*r*).

So, where a testator devises lands to A. subject to a charge in favor of B., and then by a codicil revokes the devise to A. of the land, which he gives to another, without noticing the charge, the land remains subject to the charge in the hands of the substituted devisee (*s*).

Charge not revoked by revocation of devise of land charged.

* So, where a testator by his will devised his estates to C. B. for life without impeachment of waste, and by a codicil directed his trustees to let, until tenant for life married, the lessees to be impeachable of waste, and the rents to be accumulated and laid out in lands to be settled to the same uses; it was *177

Examples of non-revocation by codicil.

(*q*) Cases as to the combined effect of a will and several codicils are frequently not only very long, but are too special to be of much use as general authorities. Doe d. Hearle *v.* Hicks, 8 Bing. 475, [1 Cl. & Fin. 20;] [Hicks *v.* Doe, 1 You. & J. 470; Alexander *v.* Alexander, 2 Jur. N. S. 898, 6 D. M. & G. 593; Agnew *v.* Pope, 1 De G. & J. 49; Patch *v.* Graves, 3 Drew. 348.] The question whether a codicil was wholly or partially revocatory, was much discussed in Cookson *v.* Hancock, 1 Kee. 817, 2 My. & C. 606. [See also Schofield *v.* Cahuac, 4 De G. & S. 533; Lord Lovat *v.* Duchess of Leeds, 2 Dr. & Sm. 62. A question often arises whether the whole or only a part of a series of limitations is revoked by a codicil, as to which see Philipps *v* Allen, 7 Sim. 446; Murray *v.* Johnston, 3 D. & War. 143; Fry *v.* Fry, 9 Jur. 894; Twining *v.* Powell, 2 Coll. 262; Sandford *v.* Sandford, 1 De G. & S. 67; Ives *v.* Ives, 4 Y. & C. 34; Daly *v.* Daly, 2 J. & Lat. 753; Morrison *v.* Morrison, 2 Y. & C. C. C. 652; Boulcott *v.* Boulcott, 2 Drew. 25, 35: Wells *v.* Wells, 17 Jur. 1020; Alt *v.* Gregory, 8 D. M. & G. 221; Robertson *v.* Powell, 2 H. & C. 762. Where the residue was given to executors by will, and a codicil directed that A. should also be executor, and that the will should take effect as if his name had been inserted therein as executor, A. was held not entitled to a share of residue. Hillersdon *v.* Grove, 21 Beav. 518; and see Gibson's Trusts, 2 J. & H. 656, stated post.]

(*r*) Duffield *v.* Duffield, 3 Bli. N. S. 261, [1 D. & Cl. 268, 395, Sug Law of Prop. 216; and see Doe d. Evers *v.* Ward, 16 Jur. 709, 21 L. J. Q. B. 145; Re Colshead, 2 De G. & J. 690; Norman *v.* Kynaston, 29 Beav. 96, 3 D. F. & G. 29, with which compare Nevill *v.* Boddam, 28 Beav. 554, where there was an express clause of revocation.]

(*s*) Beckett *v.* Harden, 4 M. & Sel. 1; [Young *v.* Hassard, 1 Dr. & War. 638; Fry *v.* Fry, 9 Jur. 894; and compare Ravens *v.* Taylor, 4 Beav. 425; Hinchcliffe *v.* Hinchcliffe, 2 Dr. & Sm. 96.]

with others named in the residue of his estate; and by a codicil, which recited that his intention in respect to the legacies to A., B., and C., was not carried into effect by his will, he provided as follows: "I therefore, in this particular, declare my will to be, that the sum of $6,000 shall be taken by" A., B., and C., "or those of them who shall survive me, they to share alike; but if all these persons shall die in my lifetime, then the said sum shall sink into the residue of my estate. I declare this provision for said legatees to be in lieu of, and as a substitute for, that made in their behalf by the aforewritten will, and this writing shall be taken as a codicil thereto, hereby ratifying said will in all other particulars." It was held that this codicil did not revoke the residuary gift in the will to A., B., and C Quincy *v.* Rogers, supra.

[1] Rodgers *v.* Rodgers, 6 Heisk. 489; Brown *v.* Cannon, 3 Head, 357. A bequest to C. L., in case he outlived L. L., to whom the use of it, during her life, had previously been given, of "such part of the personal estate as may then remain," which was made in a codicil, was construed as conveying all the personal estate that remained after the decease of L. L., without regard to the disposition which had been made of it in the original will, and as not limited to such personal property as remained otherwise undisposed of by the original will, in Holley *v.* Larrabee, 28 Vt 274.

contended that this was inconsistent with, and therefore revoked, the devise for life without impeachment of waste; but Sir W. Grant, M. R., held, that there was no inconsistency, and nothing to take the timber from the tenant for life (*t*).

General expression in codicil confined to its meaning in the will.

Again, where a testator by his will bequeathed as follows: "As to my leasehold house in S., and my household goods and furniture there and at S., and as to all my plate, linen, china-ware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estate," he gave the same to A. By a codicil he revoked the bequest of the residue of his personal estate to A., and gave the same to B. It was held, that the revocation was confined to the "residue," and did not extend to either the leasehold house and furniture, or the other enumerated articles, namely, the plate, &c. (*u*). [And where by his will a testator devised tithes, and then devised all his real estates of what nature or kind soever, and by codicil devised in a different manner all his real estates of what nature or kind soever, Sir L. Shadwell, V. C., held that the second gift in the will did not, but that the gift in the codicil did, include the tithes; the Court of Q. B., however, differed from him on the last point, holding that the words "real estates" in the codicil were to be interpreted in the same manner as in the will (*x*).

Gift in codicil "instead of" gift in will.

Again, in Doe d. Murch *v.* Marchant (*y*), where by will an estate was devised to A. in fee, and by codicil "instead of" that devise the estate was given to A. for life, with alternative contingent remainders to her children and her collateral relations, which failed; A. was held entitled to the fee: "instead of the devise in the will" being read "instead of so much of it only as was incompatible with the codicil," and the codicil not disposing of the ultimate fee. And where a trust fund, which by will was given to the children of A. living at a stated period, with a power of advance-
*178 ment in the trustees, was by codicil, * "in lieu of such disposition," given to the children of A. living at a different period, and in other respects the will was confirmed; it was held that the power of advancement was not revoked (*ya*). But though the expression "instead of" need not mean total substitution, it naturally implies some substitution; as was held — still in favor of non-revocation — in Barclay *v.* Maskelyne (*z*), where the will gave legacies to the six children of A., naming them, and the codicil revoked the legacies "to the children of A., and in lieu thereof" gave a sum amongst "the children of A., to wit" (naming five of them); and it was held that the legacy

(*t*) Lushington *v.* Boldero, G. Coop. 216. [See also Green *v.* Britten, 1 D. J. & S. 649.]
(*u*) Clarke *v.* Butler, 1 Mer. 304; [see also Barclay *v.* Maskelyne, 5 Jur. N. S. 12; Hinchcliffe *v.* Hinchcliffe, 2 Dr. & Sm. 96.
(*x*) Evans *v.* Evans, 17 Sim. 86; Williams *v.* Evans, 1 Ell. & Bl. 727.
(*y*) 6 M. & Gr 813, 7 Scott, N. R. 644. See the case more fully stated Ch. VIII., on the question of republication.
(*ya*) Hill *v.* Walker, 4 K. & J. 168; see also Butler *v.* Greenwood, 22 Beav. 303.
(*z*) 5 Jur. N. S. 12.

to the sixth was not revoked, because nothing was substituted for her.

Specific gift in will not revoked by general gift in codicil.

Again, in Re Arrowsmith's Trust (*a*), where by will a testator bequeathed a specific fund to his nephews and nieces, and after the death of his wife gave them all his remaining property; he then by codicil bequeathed certain legacies (one of them to be paid at his wife's death), and gave "all his real and personal estate" to his wife for her life: it was held that the specific gift to the nephews and nieces was not disturbed, and that the codicil was meant only to remove the doubt which might arise on the will whether the wife was to take the residue for life.

Case where held change of trustee merely and no revocation of trusts.

Where a testator directed his trustees, to whom he had given all his property, to carry on his business for ten years, and then to sell and hold the proceeds upon trust, as to one moiety for his daughter and her children, and as to the other moiety for the children of his son, and by a codicil revoked that part of his will which empowered his trustees to sell, and instead thereof authorized his daughter to take possession of his property and to dispose thereof at her discretion; it was held, that this was not an absolute gift to the daughter, but only constituted her a trustee in place of the trustee named in the will (*b*).

Revocation as to one office does not extend to other offices.

Where a person is appointed to more than one of the offices of guardian, executor, and trustee, a revocation by codicil of his appointment to one of the offices, is not a revocation of the appointment to any other office (*c*); unless the context shows, as *by directing "trustees" to pay *179 debts and legacies, that the several offices (of trustee and executor) are to be filled by the same persons (*d*); nor is a legacy to a trustee, as a mark of respect, revoked by the appointment of another trustee in his place (*e*).]

Estates A. and B. are devised to the same uses: revocation as to A. does not affect B.

It may be observed, that where a testator, in order to avoid repetition, has by his will declared his intention respecting a property (say Whiteacre), then being devised by him, to be similar to what he had before expressed concerning another property (say Blackacre) antecedently given, and he afterwards by a codicil, or by obliteration, or otherwise, revokes the devise of Blackacre, such revocation does not affect the devise of Whiteacre. Thus, in Darley *v.* Langworthy (*f*), where a testator by

(*a*) 2 D. F. & J. 474.

(*b*) Newman *v.* Lade, 1 Y. & C. C. C. 680; and see Barry *v.* Crundall, 7 Sim. 430; Froggatt *v.* Wardell, 3 De G. & S. 685; and compare Schofield *v.* Cahuac, 4 De G. & S. 533.

(*c*) Ex parte Park, 14 Sim. 89; Fry *v.* Fry, 9 Jur. 894; Graham *v.* Graham, 16 Beav. 550; Cartwright *v.* Shepbeard, 17 Beav. 301; Worley *v.* Worley, 18 Beav. 58; and see Hare *v.* Hare, 5 Beav. 629. (*d*) Barrett *v.* Wilkins, 5 Jur. N. S. 687.

(*e*) Burgess *v.* Burgess, 1 Coll. 367. See also Bubb *v.* Yelverton, L. R. 13 Eq. 131.]

(*f*) 3 B. P. C. Toml. 359, reversing Lord Camden's decree in Darley *v.* Darley, Amb. 653; see also Lord Sidney Beauclerk *v.* Mead, 2 Atk. 167; [Salter *v.* Fary, 12 L. J. Ch. 411; Martineau *v.* Briggs, 21 W. R. 620, 23 W. R. 889 (in D. P.); Bridges *v.* Strachan, 8 Ch. D. 558.]

his will devised a certain estate to certain limitations, and then proceeded to annex thereto another estate, declaring that the same should go unto and be enjoyed by the possessor of the other estate, and not be separated therefrom, and subsequently, by an act in his lifetime, he revoked the devise of the principal estate, the property so annexed was held not to be affected, but went according to the uses declared of the principal estate by the will.

So, where a testator by his will bequeathed a specific fund to his residuary legatee after named, and then bequeathed the residue to A., and by a codicil revoked the bequest of the residue, it was held that this was no revocation of the specific bequest (*g*). [And where a testator bequeathed several pecuniary legacies, including one to A., and the residue to his before-mentioned legatees in proportion to their pecuniary legacies; and by codicil executed after A.'s death gave A.'s pecuniary legacy to B., but was silent as to the residue: it was held that B. was not entitled to A.'s share of residue (*h*).]

Again, where a testator by his will devised certain freehold property (on failure of the objects of a preceding devise) to trustees to be sold, and directed the produce to be applied upon the trusts thereinafter expressed concerning his residuary personal estate; he then be-
*180 queathed his residuary personal estate *upon certain trusts, and afterwards, by a codicil duly attested for devising freehold estates, revoked the residuary bequest, and disposed of the personalty in a different manner: Sir J. Leach, M. R., held, that by this alteration in the disposition of the personal estate, the devise of the realty was not affected; the effect being the same as if the testator had in terms applied the trusts in question to the produce of the freehold estate, in which case it is obvious that the revocation by the codicil of the residuary gift of the personal estate by the will, would have been no revocation of the disposition of the produce of the freehold estate; and his Honor observed, it could make no difference in principle, that the testator saves himself the trouble of repeating those trusts, intents and purposes, by compendious words of reference (*i*). [This construction, however, does not seem to apply where plate, pictures, &c., are directed to go along with a mansion-house (*k*).]

Rule different as to heir-looms.

If the devise of the principal estate is not simply revoked, but is modified only, it is not too hastily to be concluded, that the construction adopted in the class of cases just stated would apply, however forcibly the reasoning in some of them, and especially that of the M. R. in the last case, might seem to conduct to such a conclusion; for a different construction prevailed in Lord Carrington *v.* Payne (*l*), where a testator devised his real estate

Distinction, where the first devise is modified only.

(*g*) Roach *v.* Haynes, 6 Ves. 153.
(*i*) Francis *v.* Collier, 4 Russ. 331.
(*l*) 5 Ves. 404.
[(*h*) In re Gibson's Trusts, 2 J. & H. 656.]
[(*k*) Evans *v.* Evans, 17 Sim. 108.]

to trustees to be conveyed to certain uses, and bequeathed personal estate to be laid out in land to be settled to such uses and upon such trusts, &c., as he had declared concerning his real estate. By a codicil he revoked so much of his will as directed the settlement of his real estate to those limitations, and devised it to other limitations, the effect being merely to change the order in which some of the devisees were to take. Sir R. P. Arden, M. R., held, that the bequest of the personalty was not revoked. He considered that though the devisor had used the expression "revoke," yet the codicil was not a revocation as to the union of the estates, but merely an alteration in the order of the limitations to be inserted in the settlement (of both properties); and that it was no more than if the devisor had with his own hand inserted the name of one devisee before another, and then republished his will. Unless Lord Carrington *v.* Payne can be referred to the distinction above suggested, which is very doubtful, it seems to be untenable.

*It is to be collected from Holder *v.* Howell(*m*), that *181 where a testator in a codicil recites that an inconvenient consequence may result from a devise in his will, as that in a particular event the devisee or legatee would be unprovided for contrary to his intention, and then, instead of confining himself to simply effecting the declared purpose of the codicil, he proceeds to revoke the whole devise, giving the land again to the same trustees upon certain trusts which he particularizes, and which are the same as the former trusts, with the exception of the matter expressly intended for correction, *and of one other of the trusts, which he wholly omits:* this omission, though probably undesigned, cannot be supplied. The principle of this case seems to be inconsistent with, and it may, therefore, be considered as overruling, the earlier case of Matthews *v.* Bowman (*n*), where a testator, having devised the residue of his estate to his daughters as tenants in common, by a codicil made for a particular purpose re-devised it to them, omitting the words of severance, and it was held, that the legatees were tenants in common.

Absolute revocation held not restrained by recital.

Another principle of construction is, that where the will contains a clear and unambiguous disposition of property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil.[1]

Clear gift in will not revoked by doubtful expressions in codicil.

Thus, in Goblet *v.* Beechey (*o*), where a testator by his will gave a specific chattel to A.; afterwards by a codicil he gave a number of articles of a different kind, and of much less value, to B., and in enumerating those articles introduced an imperfectly

(*m*) 8 Ves. 97; [and see Cole *v.* Wade, 16 Ves. 46; Viscount Holmesdale *v.* West, L. R. 3 Eq. 486, on app. (but this point not touched), L. R. 4 H. L. 543]

(*n*) 3 Anst. 727, a reporter of very doubtful authority, [and see Re Lewis, 14 Jur. 514, 7 No. Cas. 436.]

(*o*) 3 Sim. 24, 2 R. & My. 624; [compare Baldwin *v.* Baldwin, 22 Beav. 413.

[1] Joiner *v.* Joiner, 2 Jones, Eq. 68.

written word, which might be supposed to designate the chattel previously given to A.: it was held, that the bequest to A. was not thereby revoked.

Cases where revocation not implied from ambiguous expressions.

[In Gordon *v.* Hoffman (*p*), a legacy of 3,000*l.* was given by will, and by codicil a legacy of 4,000*l.* "in addition to the legacy of 2,000*l.* given by my will; the mention of the legacy of 3,000*l.* as being only of 2,000*l.* was held not to reduce it to the latter amount. Again, in Bunny *v.* Bunny (*q*), a testatrix by her will gave to the seven children of J. B. a legacy *182 of 200*l.* * each, and other interests; by a first codicil she revoked the legacies of 200*l.* each to the children of J. B. and all other benefits given them by her will, and in lieu thereof gave only the legacy of 200*l.* each to A., B., C., D., and E., five of the children of J. B. By a second codicil she revoked all the legacies she had left in her *will* to J. B.'s children; and by a third codicil she revoked the legacy of 200*l.* by a previous codicil to her said will given to A. The question was, whether the legacies given by the first codicil to the plaintiffs B., C., D. and E. were revoked by the second codicil; which depended on what the testatrix meant by the word "will" in the second codicil. The word might mean all the previous unrevoked testamentary papers (*r*): but if that was what the testatrix meant, it was not easy to account for the subsequent revocation (by the third codicil) of a supposed existing gift to A. in the first codicil. It was true that if she meant the will only without the codicil, then she was doing what was unnecessary, as the legacies in the will had already been revoked by the first codicil; nevertheless it was held, that the former interpretation best answered the apparent meaning of the testatrix, and that the legacies to B., C., D. and E. were not revoked. And this construction was aided by the third codicil, which revoked the legacy given to A. by a previous codicil, showing that the testatrix considered that A., and consequently the plaintiffs also, had at that time legacies left by the previous testamentary papers. And in Cleobury *v.* Beckett (*s*), where legacies were given in a codicil to a class of persons "except A., who is not intended to take any benefit under my will or this codicil;" it was held by Sir J. Romilly, M. R., that these words did not operate as a revocation of an express gift by the will to A. He observed that such words were extremely ambiguous, and did not seem to him to import a distinct and present revocation of the devise in the will.] [1]

(*p*) 7 Sim. 29; and Mann *v.* Fuller, Kay, 624.
(*q*) 3 Beav. 109; and see Farrer *v.* St. Catharine's College, L. R. 16 Eq. 19; Pratt *v.* Pratt, 14 Sim. 129; Sawrey *v.* Rumney, 5 De G. & S. 698; Stokes *v.* Heron, 12 Cl. & Fin. 161.
(*r*) See above p. 117, and below p. 189.
(*s*) 14 Beav. 583; see also Agnew *v.* Pope, 1 De G. & J. 49.]

[1] Parol evidence of an intention to revoke, or to add to, or to substitute something else for, a will is admissible if it be doubtful upon the face of the will what was the intention of the testator. Jenner *v.* Finch, Law Rep. 5 P. D. 106; Thorne *v.* Rooke, 2 Curt. 799; Methuen *v.* Methuen, 2 Phillim. 416; Greenough *v.* Martin, 2 Add. 239, 243. See Dempsey *v.* Lawson, Law Rep. 2 P. D. 98, where the point had been left undecided. It was

But an intention to revoke, though expressed in loose and untechnical language, or in terms capable *per se* of a limited interpretation, must nevertheless prevail, if it can be clearly collected from the whole will(*t*). [On this principle, it is not necessary that the gift to be revoked should be accurately referred to(*u*), or that the legatee by the will should be actually named in the codicil(*x*).]

Intention to revoke may be indicated by informal expressions.

*And here, it may be observed, that where a testator by a codicil revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact, which turns out to be false, the revocation does not take effect; being, it is considered, conditional, and dependent on a contingency which fails. *183

Revocations founded on mistake.

Thus, in Campbell *v.* French (*y*), where a testator, having by will bequeathed to the two grandchildren of his late sister 500*l.* each, by a codicil declared that he revoked the legacies bequeathed by his will to such grandchildren, "they being all dead," and the fact appearing to be that they were living, Lord Loughborough held, that the legacies were not revoked.[1]

So, in Doe d. Evans *v.* Evans (*z*), where a testatrix by her will dated July, 1819, devised lands to A. for life, with remainder to his first and other sons in tail, with remainder to his daughters in tail; and by a codicil, dated in 1829, after reciting the above devise, *and that A. had died without leaving issue*, she devised the lands to B. The fact was that A. died in 1827, leaving a posthumous child, whose birth was not known to the testatrix when she made her codicil, but she afterwards became acquainted with it. The court considered that this was a conditional revocation; and the fact being contrary to what the testatrix supposed, the devise in the will remained in force.

Had the testator in the preceding cases, instead of making the death of the devisee or legatee under the circumstances described the ground or reason of the revocation, founded such revocation on his advice or belief only of the fact, it is conceived that the result would have been different. A distinction of this nature seems to be warranted by Att.-Gen. *v.* Lloyd (*a*), where a testator, by a will made before the passing of the

Distinction where the fact itself, and where the advice or belief of the fact, is the ground of revocation.

(*t*) Read *v.* Backhouse, 2 R. & My. 546.
[(*u*) Pilcher *v.* Hole, 7 Sim. 208; Carrington *v.* Payne, 5 Ves. 423.
(*x*) Ellis *v.* Bartrum, 25 Beav. 107.]
(*y*) 3 Ves. 321. (*z*) 2 Per. & D. 378, [10 Ad. & Ell. 228.]
(*a*) 3 Atk. 552, 1 Ves. 32; [and see the observations of Lord Eldon, 1 Mer. 148, 149. In Thomas *v.* Howell, L. R. 18 Eq. 198, 209, a testator by will bequeathed certain charity legacies, and by codicil, "presuming and believing that the rental of his estate would produce

decided in Jenner *v.* Ffinch, supra, that under the Wills Act of 1Vict. ch. 26, § 20, no express words of revocation were necessary, —that revocation by implication was sufficient. See Dempsey *v.* Lawson, supra.

[1] But the mistake in such a case cannot be shown *dehors* the will, —it must appear on the face of the will, and it must also appear what the will of the testator would have been but for the mistake. Gifford *v.* Dyer, 2 R. I. 99.

statute of 9 Geo. 2, c. 36 (*b*), devised lands and bequeathed personalty to be laid out in lands for charitable uses. By a codicil
*184 posterior * to the act [he recited that he was in doubt whether the devise would be good or not, and that he was desirous of confirming it, nevertheless if the estate was not well devised, then he gave it to B. Afterwards he made a second codicil] by which, after reciting that *being advised* the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised his personal estate could be given, he did by such codicil give his personal estate to the charitable uses before mentioned; and he did thereby give his real estate to B. Though the testator's notion as to the invalidity of the devise in the will was erroneous (*c*), it was held that the devise to B. took effect.[1] [Lord Hardwicke said the testator had put it on the advice he had received, which was a fact within his own knowledge, and he had grounded it on that advice and not on the reality of the law. If he had intended a new devise only if the will was void he would have left it on the first codicil.]

So, where a testatrix by her will bequeathed 300*l.* among such of the children as should be living of E., and by a codicil proceeded as follows: "I give to my brother's son C. the 300*l.* designed for E.'s children, as I know not whether any of them are alive, and if they are well provided for," Sir R. P. Arden, M. R., held C. to be entitled, though the children of E. were living. He observed, that "it was argued, and with some ground, that if it rested upon her not knowing whether they were living, there would be some reason to contend that it fell within the case (so often cited from Cicero de Oratore) of 'pater credens filium suum esse mortuum alterum instituit hæredem; filio domi redeunte hujus institutionis vis est nulla:' but the testatrix goes further, that she doubted if they were living whether they might not be well provided for, and she totally deprives them of that provision. The court will not inquire whether they are well provided for or not (*d*)."

[The rule that revocation expressly grounded on a mistaken assumption of fact is inoperative is further exemplified by Barclay *v.* Maskelyne (*e*), where a gift by will to A. was referred to in a codicil as a gift to B., and as lapsed by the death of B., whereupon the subject of gift was otherwise disposed of by the codicil; and it was held that the gift to A. was not revoked.

*185 In Allen *v.* Bewsey (*f*), a testator devised an estate as * copy-

from 16,000*l.* to 18,000*l.*" he doubled those legacies. The income of his whole estate fell short of 16,000*l.*, and Malins. V. C., held that the additional bequest failed as being founded on a mistake. The V. C. said, Att.-Gen. *v.* Lloyd was a peculiar case, and added, he thought the decision would now be the other way. *Sed qu.*: it was recognized by the Court of Appeal in Ireland, Newton *v.* Newton, 12 Ir. Ch. Rep. 118; and is not opposed to the V. C.'s decision if the words which he had to construe are (as they appear to be) equivalent to "upon the assumption, which I believe to be correct, that &c.," making the bequest clearly conditional.]

(*b*) See Ch. IX., s. 1, post. (*c*) Willett *v.* Sandford, 1 Ves. 178, 186.
(*d*) Att.-Gen. *v.* Ward, 3 Ves. 327. [(*e*) Johns. 124. (*f*) 7 Ch. D. 453, 464.]

[1] Skipwith *v.* Cabell, 19 Gratt. 758.

hold; by codicil reciting that he had since discovered that the estate was freehold, he confirmed the devise. It turned out that the estate was copyhold, and it appears to have been argued that the confirmation was conditional, — that the devise was meant to stand *because* (and not unless) the estate was freehold and was in effect revoked: but it was held without difficulty that the intention was to confirm the devise whether the estate was freehold or copyhold, and that there was no revocation.]

Whether legacies by codicil are on the same terms as those given by will.

It is often a question whether a legacy bequeathed by a codicil is payable out of the same fund, or is subject to the same restrictions, as a legacy bequeathed to the same person by the will. If the second legacy is expressly given upon the same conditions, &c., of course the affirmative does not admit of doubt (*g*); and [the same construction prevails] where the legacy by codicil is expressed to be in addition to (*h*), [or in substitution for (*i*),] the legacy given by the will. [But it seems that where a legacy is given to A. for life, with remainder over, another legacy given to A. in addition to the legacy before mentioned, will be construed an absolute gift to him; and it is only where the original legacy is absolute or defeasible on certain terms in the party to whom the additional legacy is given, that the second gift is held to be on similar terms. In no case has it been held that the latter gift is to go to parties entitled under the subsequent limitations of the former gift (*k*).]

When legacies by codicil are payable out of same fund as legacies by will.

The intention to assimilate the respective legacies or classes of legacies has in some instances been traced, though less distinctly indicated than in the cases mentioned above. As in Leacroft *v.* Maynard (*l*), where a testator devised his real estate in trust to sell and apply the produce in paying (among other legacies) *50*l.* to each trustee, to the Found- *186 ling Hospital 2,000*l.*, and to the hospitals of L. and S. 1,000*l.* each. Afterwards, by a codicil he revoked the devise and legacy to one of the trustees, and substituted another trustee, to whom he gave a legacy of 50*l.* He also revoked the legacies to the three

(*g*) Lloyd *v.* Branton, 3 Mer. 108; see also Cooper *v.* Day, ib. 154; [Corporation of Gloucester *v.* Wood, 3 Hare, 131, 1 H. L. Ca. 272.]

(*h*) Crowder *v.* Clowes, 2 Ves. Jr. 449; [Russell *v.* Dickson, 2 D. & War. 138; Day *v.* Croft, 4 Beav. 561; Burrell *v.* Earl of Egremont, 7 Beav. 223; Cator *v.* Cator, 14 Beav. 463; Warwick *v.* Hawkins, 5 De G. & S. 481; Duffield *v.* Currie, 29 Beav. 284; but the context may prevent an additional legacy from being paid precisely in the same manner as the original. Overend *v.* Gurney, 7 Sim. 128; King *v.* Tootel, 25 Beav. 23.

(*i*) Cooper *v.* Day, 3 Mer. 154; Russell *v.* Dickson, 2 D. & War. 133; Martin *v.* Drinkwater, 2 Beav. 215; Bristow *v.* Bristow, 5 Beav. 289; Earl of Shaftesbury *v.* Duke of Marlborough, 7 Sim. 237; Fenton *v.* Farington, 2 Jur. N. S. 1120; Knowles *v.* Sadler, W. N. 1879, p. 20. But express terms, annexed to a legacy given by codicil "instead of" one given by will, excluded the substitutional construction in Haley *v.* Bannister, 23 Beav. 336. As to whether legacies are cumulative or the one instead of the other, see Wilson *v.* O'Leary, L. R. 7 Ch. 448, and the cases there cited.

(*k*) Re More's Trust, 10 Hare, 171; Mann *v.* Fuller, Kay, 624.]

(*l*) 1 Ves. Jr. 279, [3 B. C. C. 233;] see also Brudenell *v.* Boughton, 2 Atk. 268; [Bonner *v.* Bonner, 13 Ves. 379; Williams *v.* Hughes, 24 Beav. 474.

hospitals, and gave 1,500*l.* to the Foundling, 500*l.* to the Infirmary of N., and a sum to be distributed among the poor of S. It was unsuccessfully contended for the charities, that the legacies given by the codicil were not, like those of the will, charged on the land, and were therefore valid. Lord Thurlow seems to have thought, that the necessity which this would have occasioned of holding, that the legacy to the new trustee must also come out of the personalty, formed a conclusive argument against the construction. [But it seems that even without this ground the decision must have been the same (*m*).]

So, in Fitzgerald *v.* Field (*n*), where a testator gave his personal and freehold estates to trustees, upon trust, with the money arising from his personal estate, and in aid thereof, by sale or mortgage of part of the freeholds, to pay certain annuities and legacies. By a codicil he revoked this bequest and devise, and gave the real and personal estate to other trustees upon the trusts in his will and codicil mentioned. He then bequeathed an annuity to A. for life, *with the payment of which he charged the residue of his said lands*, and with a power of distress. Lord Gifford, M. R., held, that, whatever might be the construction if the codicil stood alone, it was evident, looking at the will and codicil together, the intention of the testator was, that all his personal estate should be applied in the first instance to the payment of annuities and legacies. [But this does not apply where the residue is by the will given to the legatees in proportion to the legacies "herein," or "by the will" bequeathed to them, and by codicil additional legacies are given to some of the legatees; the proportion in which the residue is to be divided here remains unaltered (*o*).]

Whether legacy given by codicil is exempt from duty like those of will.

Whether a legacy bequeathed by a codicil is to participate in an exemption from duty created by the will in favor of the legacies in general given by the will (*p*), or of some particular *187 * legacy for which the legacy in the codicil is substituted, has often been a point of dispute. Even in the latter case, it seems the intention to exempt the substi-

[(*m*) Johnstone *v.* Earl of Harrowby, 1 D. F. & J. 183; Re Smith, 2 J. & H. 594.]

(*n*) 1 Russ. 428.

[(*o*) Hall *v.* Severne, 9 Sim. 515; see Sherer *v.* Bishop, 4 B. C. C. 55.]

(*p*) *What expressions exempt legacy or annuity from duty.* The following expressions have been held to exempt the legatees from payment of duty. A direction to executors to make payment of all the legacies *without any deduction* (Barksdale *v.* Gilliat, 1 Sw. 562); or to pay the annuities and legacies *clear of property tax and all expenses whatsoever attending the same* (Courtoy *v.* Vincent, T. & R. 433); [or *free from any charge or liability in respect thereof*, although in the same will there was a bequest *free from any duty*, Warbrick *v.* Varley, 30 Beav. 241;] or a gift of real and personal estate to executors in trust, to pay to J. D. for life an annuity of 46*l. clear of all deductions whatsoever*; though it was contended that the words excluding deduction referred to the payment of the land tax, being applicable to the annuity only as a charge on real estate. Dawkins *v.* Tatham, 2 Sim. 492.

Again, where the direction was that annuities should be paid to the legatees *without any deduction or abatement out of the same on any account or pretence whatsoever*; and the argument for the exemption was considered to be strengthened by the fact that there were no other deductions to which the annuitants were liable. Smith *v.* Anderson, 4 Russ. 352. So, where the legacies were to be paid *free from all expense*. Gosden *v.* Dotterill, 1 My. & K. 56. Again, where the annuity was to be paid out of land *clear of all taxes and deductions whatsoever*. Stowe *v.* Davenport, 5 B. & Ad. 359, [2 Nev. & M. 835.] So, where an annuity or

tuted legacy must be distinctly indicated, there being no necessary inference that the legacy * bequeathed by the codicil is *188 to stand *pari passu* in all respects with the legacy for which it is substituted. Thus, where the legacies bequeathed by a will were to be paid free from legacy duty, and the testator by a codicil bequeathed to the husband of one of the legatees who had died an equal legacy, "instead of" the legacy given by the will to the deceased wife; it was held by Lord Eldon, affirming a decree of Sir J. Leach, V. C., that the legacy given by the codicil was an independent, distinct, substantive bequest; and, therefore, was not within the exemption (*q*).

So, where a testator by his will gave to A. and B. an annuity of 300*l.*, equally to be divided between them, during their joint lives, *free from all taxes and stamp duties*, and after the death of one of them, to the

clear yearly sum of 500*l.* was charged on a certain farm, and was to be paid half-yearly *clear of all taxes and outgoings*. Louch *v.* Peters, 1 My. & K. 489. So, where a testator devised to J. M. for his life one annuity or *clear* yearly sum of 100*l.* charged upon his estates at C., which estates he then devised in trust to raise the annuity, *and the costs, charges, and expenses attending the raising and paying the same;* and then in trust for A. for life, with remainder over. Gude *v.* Mumford, 2 Y. & C. 448. The preceding cases have overruled Hales *v.* Freeman, 4 J. B. Moo. 21, 1 Br. & B. 391, where, however, the question whether the legacy was liable to duty was never raised. And it should seem (notwithstanding the cases of Burrows *v.* Cottrell, 3 Sim. 375 — where, indeed, the question was not raised), [Sanders *v.* Kiddell, 7 Sim. 536, and Marris *v.* Burton, 11 Sim. 161), that a gift of a *clear* sum or annuity, involves an exemption from duty, Harper *v.* Morley, 2 Jur. 653; Ford *v.* Ruxton, 1 Coll. 403; Bailey *v.* Boult, 14 Beav. 595; Haynes *v.* Haynes, 3 D. M. & G. 590; Re Cole's Will, L. R. 8 Eq. 271; and see Hodgworth *v.* Crawley, 2 Atk. 376. A distinction has, indeed, been taken between this simple case and the case of a direction to trustees to set apart a sum of money sufficient to produce a *clear* yearly sum, where the trust of the *corpus* is for persons in succession, Sanders *v.* Kiddell; Marris *v.* Burton; Bailey *v.* Boult; and it was actually decided in Pridie *v.* Field, 19 Beav. 499, that in such a case the word "clear" did not mean free of duty. See also Banks *v.* Braithwaite, 32 L. J. Ch. 35. But this distinction does not seem to be tenable on principle, Wilks *v.* Groom, 2 Jur. N. S. 798; Harper *v.* Morley, ubi supra.]

But where a testatrix gave her real and personal estate upon trust to pay off the debts of her late husband, it was held that the legacy duty was to be borne by the legatee-creditors, though it was contended that the testatrix's object would not be completely effected without paying the duty out of the general estate; but the C. J. observed that the entire debt had been paid, and the legacy duty was a burthen imposed on the legatee after he had received the legacy. Foster *v.* Ley, 2 Scott, 438, [2 Bing. N. C. 269.

A direction in a will that the legacy duty on the legacies "*herein*" given shall be paid out of his estate does not extend to legacies given by codicil, even though the codicil is directed to be taken as part of the will, Early *v.* Benbow, 2 Coll. 355; and see (as to "herein") Radburn *v.* Jervis, 3 Beav. 450; Fuller *v.* Hooper, 2 Ves. 242; Jauncey *v.* Att.-Gen., 3 Giff. 308; *secus* where legacies generally are given duty free, Byne *v.* Currey, 2 Cr. & Mees. 603, 4 Tyr. 479; see also Williams *v.* Hughes, 24 Beav. 474.

A direction to pay "legacies" free of duty will not generally include the proceeds of realty directed to be sold, White *v.* Lake, L. R. 6 Eq. 188; but probably would include legacies payable out of such proceeds, see Hodges *v.* Grant, L. R. 4 Eq. 140. "Legacy," "legatee," may however be explained by the context to refer to realty, post, Ch. XXII. s. 6.

As to exemption from property-tax. Property-tax is a charge on the person, and therefore a gift of an annuity *to be paid without any deduction* (Abadam *v.* Abadam, 33 Beav. 475), or *free from legacy duty and other deductions* (Lethbridge *v.* Thurlow, 15 Beav. 339; Sadler *v.* Rickards, 4 K. & J. 302), does not exempt from the tax unless the testator has elsewhere shown that he considers income tax to be a "deduction," Turner *v.* Mullineux, 1 J. & H. 334. But a gift of an annuity *without any deduction on account of any taxes*, &c. (Festing *v.* Taylor, 3 B. & S. 235), or a direction to trustees to pay *all taxes affecting the hereditaments given to* the devisee (Lord Lovat *v.* Duchess of Leeds, 2 Dr. & Sm. 62), exempts the annuitant or devisee from income tax as between himself and the testator's estate: and the exemption does not contravene the income-tax acts, ib. Wall *v.* Wall, 15 Sim. 513, appears to be overruled.]

(*q*) Chatteris *v.* Young, 2 Russ. 183; see also S. C. 6 Mad. 30, where the bequests are inaccurately stated.

survivor during her life, and after the death of the survivor, over to C. for life. By a codicil the testator revoked the annuity of 300*l.*, and gave A. and B. a clear annuity of 100*l.* each, with benefit of survivorship. It was held, that the gift by the codicil was independent of the gift in the will, and, therefore the annuities were not exempt from the duty (*r*).

It is clear, however, that if a testator by his will gives a legacy free from duty, and by a codicil, after reciting his intention of increasing the legacy, revokes it, bequeathing in lieu thereof a larger sum to the same legatees upon the same trusts, &c., the latter is also exempt (*s*).

Implied revocation by the effect of a codicil reviving an earlier will.

Sometimes a codicil has the effect of impliedly revoking the posterior of two wills, by expressly referring to and recognizing the prior one as the actual and subsisting will of the testator. Thus, if a testator makes a will in the year 1830, and at a subsequent period (say in 1840) makes another will inconsistent with the former, but without destroying such former will, and he afterwards makes a codicil which he declares to be a codicil to his will of 1830, this would set up the will so referred to, in *189 * opposition to the posterior will (*t*)[1]; and parol evidence that the testator actually intended to refer to the will of 1840 would be inadmissible (*u*). An inaccuracy in regard to the date of the will referred to would not prevent the application of this doctrine, unless the mistake were such as to render it doubtful which of the two wills the testator had in view (*v*). And it seems to have been considered, in the Ecclesiastical Court at least, that the fact of the codicil being written on the same piece of paper as the prior will (though it does not in terms refer to such will), sufficiently indicates an intention to treat that as the subsisting will especially if (as happened in the case referred to) the posterior will was out of the testator's custody, so that he had no opportunity of cancelling it (*x*). [But in a case (*y*) where the reference was to "my last will dated," &c. (giving the date of the first will), it was held that the will which was really the last was meant, and that the date was a mistake.]

In applying the doctrine that a reference in a codicil to the prior of two wills as the actual will of the testator sets it up against a

(*r*) Burrows *v.* Cottrell, 3 Sim. 375.
(*s*) Cooper *v.* Day, 3 Mer. 154. [See also Fisher *v.* Brierley, 30 Beav. 267.]
(*t*) Lord Walpole *v.* Earl of Orford, 3 Ves. 402; S. C. nom. Lord Walpole *v.* Lord Cholmondeley, 7 T. R. 138; [Payne *v.* Trappes, 11 Jur. 854, 1 Rob. 583; Re Chapman, 8 Jur. 902, 1 Rob. 1.]
(*u*) Crosbie *v.* Macdoual, 4 Ves. 610; [Payne *v.* Trappes, supra.]
(*v*) Jansen *v.* Jansen, cit. 1 Ad. 39.
(*x*) Rogers *v.* Pittis, 1 Ad. 30; see also Lord C. B. Eyre's judgment in Barnes *v.* Crowe, 1 Ves. Jr. 488; Guest *v.* Willasey, 12 J. B. Moo. 2, [2 Bing. 429.
(*y*) Re Ince, 3 P. D. 111; and see Thompson *v.* Hempenstall, 1 Rob. 783, 13 Jur. 814, where the internal evidence was sufficient to correct the mistake as to date.]

[1] See Brown *v.* Clark, 77 N. Y. 369.

posterior will, it is necessary to bear in mind, that every codicil is a constituent part of the will to which it belongs; for in a general and comprehensive sense a will consists of the aggregate contents of all the papers through which it is dispersed; and, therefore, where a testator in a codicil refers to and confirms a revoked will, it is not necessarily to be inferred that he means to set up the will (using the word in its special and more restricted sense) in contradistinction to, and in exclusion of, any intermediate codicil or codicils which he may have engrafted on it. He is rather to be considered as confirming the will with every codicil which may belong to it; and, accordingly in a case (*z*) where a person made his will, and afterwards executed several codicils thereto, containing partial alterations of, and additions to the will; and by a further codicil, *referring to the will by date*, he changed one of the trustees and executors, and in all other respects * expressly confirmed the will, this confirmation of the will was held not to revive the parts of it which were altered or revoked by the preceding codicils: Sir R. P. Arden, M. R., observing, that if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it.

Republication of will by codicil, without referring to intermediate codicil, does not revoke latter.

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[But the doctrine of Burton *v.* Newbery (*a*) is, that where by codicil a "will" is referred to by date, it is a reference to that instrument alone exclusive of any intermediate codicil. And Crosbie *v.* Macdoual is treated as a case where the intermediate codicil was not revoked, rather than as one where it was actively confirmed (*b*). According to this, the direct action of the latest codicil is upon the instrument called a will, and on that only. The codicil is left untouched, and operates by its own inherent force, if it has any; and the ultimate result is, that the will is confirmed as modified by the codicil (*c*). If that is the correct view of the case, it will not govern one where the intermediate codicil has previously been revoked with the will to which it belonged, and where, therefore, it has no force except such, if any, as may be supplied by the subsequent codicil: and Burton *v.* Newbery deciding that a mere reference by date to an unrevoked will does not set up an invalid codicil to that will, goes far to decide also that in the case supposed the intermediate codicil would not be reinstated. However, Sir R. P. Arden's language, which has been adopted by later judges (*d*), implies a more intimate connec-

Does it revive the latter if previously revoked?

(*z*) Crosbie *v* Macdoual, 4 Ves. 610; see also Gordon *v.* Lord Reay, 5 Sim. 274, stated ante, p. 116; [Wade *v.* Nazer, 12 Jur. 188, 6 No. Cas. 46, 1 Rob. 627; Re De la Saussaye, L. R. 3 P. & D. 42; Green *v.* Tribe, 9 Ch. D. 231.] [(*a*) 1 Ch. D. 234, ante, p. 117.

(*b*) The M. R. is even reported to have said that Crosbie *v.* Macdoual "*goes to* this, that a mere reference to an instrument with a date is not a reference to the subsequent instrument," p. 240.

(*c*) Where the first of two inconsistent wills is set up, the *modus operandi* would be similar, though the ultimate result (viz. the unavoidable revocation of the second will) is different.

(*d*) Sir J. Hannen, in Re De la Saussaye, L. R. 3 P. & D. 42, and Sir E. Fry, Green *v.* Tribe, 9 Ch. D. 238.

tion between will and codicil, and a more active operation upon the latter by an instrument referring to and confirming the will, though described by its date, than Sir G. Jessel would appear to admit or approve. Where, however, a testator referring to his will by date revokes it, the case is different, because there the principle applies that a clear disposition is not to be revoked except by clear words (*e*).]

In one case in the Ecclesiastical Court it was held, that the mere fact of the testator ratifying his will and certain specified codicils, did not of itself amount to an implied revocation of other codicils not so *191 specified (*f*). But, in another case, the court * arrived at a different conclusion, on a comparison of the contents of all the instruments, and looking at the conduct of the testatrix in relation to them (*g*).

Such questions may occur even in regard to wills made since the year 1837; for though the 22d section of the recent statute (*h*), prevents the revival of a revoked will, except by re-execution, or by "a codicil showing an intention to revive the same," and, therefore, no such effect would follow from the *mere* revocation of a posterior revoking will; yet it still holds, according to the doctrine of Lord Orford's case, that a recognition in a codicil of the earlier of two inconsistent and undestroyed wills, by date or otherwise, as the will on which the codicil is founded, shows an intention to revive such earlier will (*i*). [It has been decided, however, that if the earlier and revoked will has been destroyed by the testator or by his authority, it cannot be thus revived, though its contents might be satisfactorily proved from other sources: on the ground that the will being non-existent as well in fact as in law, this would be to make a new will without the formalities required by sect. 9 of the statute (*k*). And the reference to the earlier will being insufficient to effect its revival, is insufficient also, of itself, to effect the revocation of the later will (*l*); on the principle alluded to at the commencement of this section that an instrument inoperative to effect its direct

Doctrine as applied to wills under the new law.

Recognition in a codicil of a revoked will may revive it;

but such will, in order to be revived, must be in existence.

(*e*) Per Fry, J., 9 Ch. D. 237, citing Farrer *v.* St. Catharine's College, L. R. 16 Eq. 19.]

(*f*) Smith *v.* Cunningham, 1 Ad. 448.

(*g*) Greenough *v.* Martin, 2 Ad. 239. [And see Re Reynolds, L. R. 3 P. & D. 35.

(*h*) Ante, pp. 140, 145.

(*i*) Payne *v.* Trappes, 11 Jur. 854, 1 Rob. 583; Re Chapman, 8 Jur. 902, 1 Rob. 1; Re M'Cabe, 31 L. J. Prob. 190; Re Reynolds, L. R. 3 P. & D. 35; Sir J. Wilde has expressed a contrary opinion; see his judgment, Re Steele, L. R. 1 P. & D. 575; *sed qu.* the statute is there not quite accurately represented.

(*k*) Hale *v.* Tokelove, 2 Rob. 318, 14 Jur. 817; Newton *v.* Newton, 12 Ir. Ch. Rep. 118; Rogers *v.* Goodenough, 2 Sw. & Tr. 342, 31 L. J. Prob. 49. "I limit this, in my judgment, to cases where the will has been destroyed by the testator or by some person in his presence and by his authority. I say nothing as to what would be the effect if the instrument had been destroyed without his knowledge; that question may arise another day." Per Creswell, J., in Rogers *v.* Goodenough.

(*l*) Rogers *v.* Goodenough, 2 S. W. & Tr. 342, 31 L. J. Prob. 49. But see Hale *v.* Tokelove, 2 Rob. 318, 14 Jur. 817; Newton *v.* Newton, Law Times, Oct. 26, 1861, reversed on app. 12 Ir. Ch. Rep. 118; in both of which cases the codicil, besides reference to the earlier (destroyed) will, contained an express confirmation thereof, and great stress was laid on this circumstance by the court. *Sed qu.*

purpose (viz. revivor) does not give effect to an intention (viz. revocation) of which nothing is known but by that purpose (*m*).

The latter part of sect. 22 provides, that "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 *192 shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown. Now if partial revocation of a will — as, of a devise of Blackacre to A. in fee — has been caused by a codicil devising Blackacre to B. in fee; and if this codicil has itself been afterwards included in the final revocation of the will, and the "will" is then revived; the devise of Blackacre remains revoked unless a contrary intention is shown. The will is restored as modified by the codicil, but by a short statutory method, without having recourse to the codicil, concerning which the statute is silent; and it may still be a question what becomes of the codicil. In Neate *v.* Pickard (*n*) a will and codicil were revoked by marriage, and afterwards by another codicil the testator confirmed his "last will" without referring to the date; and it was held that both were revived. At the date of the second codicil there were several alterations (unexecuted it would seem) on the face of the will, and it was further held that the will was revived in its altered condition.]

(*m*) Ex p. Earl of Ilchester, 7 Ves. 377-8; Powell *v.* Powell, L. R. 1 P. & D. 209.
(*n*) 2 No. Cas. 406. See also Re M'Cabe, 31 L. J. Prob. 190; Re Reynolds, L. R. 3 P. & D. 35, in neither of which, however, was sect. 22 mentioned.]

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*CHAPTER VIII.

REPUBLICATION.

Republication, what.

Express republication.

REPUBLICATION is of two kinds, express and constructive. Express republication occurs where a testator repeats those ceremonies which are essential to constitute a valid execution, with the avowed design of republishing the will.[1] Under the Statute of Frauds, to republish a devise of freehold estate required an attestation by three witnesses; while, on the other hand, a will might have been republished with respect to copyholds and personalty without any attestation. It is not often necessary, however, to inquire as to the republication of wills of personal estate (*a*), inasmuch as a residuary bequest, even under the old law, embraced all that species of property of which the testator died possessed; so that republication (which merely causes the will to speak and operate from the period of its being republished) had no effect in enlarging the operation of such a bequest.

Constructive republication by codicil.

Constructive republication takes place where a testator, for some other purpose, makes a codicil to his will; in which case the effect of the codicil, if not neutralized by internal evidence of a contrary intention, is to republish the will.[2] By this means, under the old law, lands of inheritance acquired since the

(*a*) As to the republication of wills of personalty, *vide* Long *v.* Aldred, 3 Ad. 48; Miller *v.* Brown, 2 Hagg. 209.

[1] Love *v.* Johnston, 12 Ired. 355. In Pennsylvania a will may be republished by parol. Jones *v.* Hartley, 2 Whart. 103; Geddis's Appeal, 9 Watts, 284. Such republication must there be proved by two witnesses; and the identity of the will spoken of by the testator with that produced must be satisfactorily shown. But it is not necessary that the will should be present at the time of republication, nor that the subscribing witnesses should prove the republication; nor need the declarations be made at the same time to the witnesses. And where evidence of such republication, by two or more competent witnesses, is offered, it is error to refuse to allow it to go to the jury. Geddis's Appeal, 9 Watts, 284. Generally, however, an attested will cannot be republished by parol. Love *v.* Johnston 12 Ired. 355. A *re-execution* of a will and codicils has no other effect than a republication. Although the will and codicils are declared to be the last will and testament of the testator, the re-execution could not annul the prior executions of the instruments, or alter or vary the effect of the instruments, any further than as a republication, and, therefore, would not make the will or codicils speak as from the date of the republication so as to revive a legacy which had been revoked, adeemed, or satisfied. Powys *v.* Mansfield, 3 Mylne & C. 359; Drinkwater *v.* Falconer, 2 Ves. Sr. 623; Crosbie *v* McDouall, 4 Ves. 611; Brooker *v.* Allen, 2 Russ. & M. 270; Langdon *v.* Astor, 16 N. Y. 9.

[2] Hence, by virtue of a codicil, lands acquired after the execution of the will and before the execution of the codicil pass by the will. Brown *v.* Clark, 77 N. Y. 369; Van Cortlandt *v.* Kip, 1 Hill, 590; S. C. 7 Hill, 346; Brownel *v.* De Wolf, 3 Mason, 486; Langdon *v.* Astor, 16 N. Y. 9; Powys *v.* Mansfield, 3 Mylne & C. 359. See Musser *v.* Curry, 3 Wash. C. C. 481; Witter *v.* Mott, 2 Conn. 67; Jackson *v.* Potter, 9 Johns. 312; Love *v.* Johnston, 12 Ired. 355; Murray *v.*

execution of the will were often brought within the operation of any general or residuary devise contained in such will, and that, too, though the codicil expressed no intention to republish, and though it was not annexed to, or declared to be a part of, and did not in terms confirm the will, and whether the codicil related to real estate or personalty only; the result being precisely the same as if the general or residuary devise had been incorporated into the codicil itself (*b*).[1] And the

(*b*) Acherley *v.* Vernon, Com. 381, 2 Eq. Ab. 769, pl. 1, 3 B. P. C. Toml. 85; Potter *v.* Potter, 1 Ves. 437; Piggott *v.* Waller, 7 Ves. 98; Goodtitle *v.* Meredith, 2 M. & Sel. 5; Guest *v.* Willasey, 12 J. B. Moo. 2, [2 Bing. 429, 3 Bing. 614; Skinner *v.* Ogle, 4 No. Cas. 74; 9 Jur. 432; Re Earl's Trust, 4 K. & J. 673;] see also Doe *v.* Davy, Cowp. 158; Gibson *v.* Montfort, 1 Ves. 485.

Oliver, 6 Ired. Eq. 55; Sawyer *v.* Sawyer, 7 Jones, 134; Battle *v.* Speight, 10 Ired. 459; Jones *v.* Hartley, 2 Whart. 103; Wallace *v.* Blair, 1 Grant, Cas. 75; Reynolds *v* Shireley, 7 Ohio, Pt. 2, 39; Pringle *v.* M'Pherson, 2 Brev. 279; Pringle *v.* M'Pherson, 2 Desaus. 524; Cogdell *v.* Cogdell, 3 Desaus. 346; Dunlap *v.* Dunlap, 4 Desaus. 305. But where a codicil, in its dispositive part, is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing the will, so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital. Monypenny *v.* Bristow, 2 Russ. & M. 117. See Haven *v.* Foster, 14 Pick. 541. To give a codicil the effect to republish a will so as to pass estates acquired between the date of the will and the date of the codicil, the words of the will must be of such a character as, if used at the date of the republication, would include the estate in controversy. If the language of the original will be such as, if used at the date of the republication, would not include the after-purchased estate in its terms or description; or if the act of republication be accompanied with other provisions indicating that it was the intent of the testator to limit the operation of the will, as republished, to the same estate, which was given, and would legally pass by the original will: then, notwithstanding such republication, the devise will not include the after-purchased estate; because although there exists the power to devise, yet the intent is wanting; and as both do not concur, the after-purchased estate does not pass. Haven *v.* Foster, 14 Pick. 541. Since the provisions of Stat. 1 Vict. c. 26, § 24, and similar provisions in some of the states, making the devise operate on all the real estate of the testator at his death, the republication of a will made since those acts went into operation, by which it is merely made to speak from a subsequent date, is divested of much of its importance in that particular. See York *v.* Walker, 12 Mees. & W. 591; Ashley *v.* Waugh, 4 Jur. 572. In other respects the efficacy of a codicil as a republication of the will remains untouched. Thus, a will executed under undue influence may be republished and confirmed by a codicil executed afterwards, when the testator is free from such influence. O'Neall *v.* Farr, 1 Rich. 80. See 1 Williams, Ex. (6th Am. ed.) 225. So if a married woman make a will, being, at that time, intestable in law; still, if surviving, she republishes that will, subsequently to the death of her husband, it is a good will. Braham *v.* Burchell, 3 Addams, 243. Where, from an alteration in the circumstances of the testator, or other cause, a will is revoked by implication, yet if the testator refer to it in an instrument itself duly attested, the will is republished. Brady *v.* Cubitt, 1 Doug. 31.

[1] A codicil duly executed will operate as a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will, whether the will be described in such codicil or not. Brown *v.* Clark, 77 N. Y. 369; Utterton *v.* Robins, 1 Adol. & E. 423; Miles *v.* Boyden, 3 Pick. 216; Brownell *v.* De Wolf, 3 Mason, 486; Haven *v.* Foster, 14 Pick. 543. See Richardson *v.* Richardson, Dud. Eq. 184; Van Cortlandt *v.* Kip, 1 Hill, 590; Dunlap *v.* Dunlap, 4 Desaus. 305, 321; Armstrong *v.* Armstrong, 14 B. Mon. 333. A codicil referring inaccurately to a will may republish it. See Jansen *v.* Jansen, cited by Sir John Nicholl, in Rogers *v.* Pittis, 1 Addams, 38; St. Helens *v.* Exeter, 3 Phillim. 461, in note to Fawcett *v.* Jones. A codicil will refer to the last in date of several wills, if no express date is named. Crosbie *v.* Macdoual, 4 Ves. 615. In Bagwell *v.* Elliott, 2 Rand. 190, a will was reacknowledged by the testator, and regularly attested before witnesses some time after its original execution, and the court decided that the time of publication was not necessarily fixed by the date of the will, and proof was admissible that it was published on a day subsequent to the date thereof; although it had been previously admitted to probate, without any particular notice that it was published on a different day from its date. If, however, it appears on the face of the codicil that it was not the intention of the testator to republish, the ordinary presumption arising from the existence of the codicil will be rebutted. Strathmore *v.* Bowes, 7 T. R. 482; S. C. nom. Bowes *v.* Bowes, 2 Bos. & P. 500; Hughes *v.* Turner, 3 Mylne & K. 666; Smith *v.* Dearmer, 3 Younge & J. 278; Neff's Appeal, 48 Penn. St. 501; Kendall *v.* Kendall, 5 Munf. 272.

*194 same principle applied to a devise of * estates within a certain locality; thus, if a testator devised all his lands in the county of Kent, and after the execution of his will purchased other lands in that county, and then made a codicil attested by three witnesses, the intermediately acquired lands (not being otherwise disposed of by such codicil) passed under the will (*c*).

Immaterial that codicil devises part of lands acquired since execution of will.

The circumstance of the testator having by the codicil expressly devised *part* of his estates purchased since the execution of the will, to the uses therein declared concerning his residuary real estate, does not exclude the rest of such after-purchased estates from the operation of the same residuary devise, brought down, by the republishing effect of the codicil, to the date of such codicil (*d*). Indeed, when we admit that the effect of the republication is to make the will speak from the date of the codicil, it follows that an express devise in the codicil of particular lands, acquired since the execution of the will, to the residuary devisee, could no more exclude the other newly acquired lands from the residuary devise, so republished, than a devise of particular lands in the will itself could prevent other lands, then belonging to the testator, from passing under such residuary clause.

On the same principle, an express devise for life of the intermediately acquired estate, to the person who is residuary devisee in fee in the will, would not prevent the reversion in fee in the same lands from passing under such devise to the same devisee, by force of the republication (*e*). [In Doe d. Murch *v.* Marchant (*f*), where a testatrix devised and bequeathed all her real and personal estate, in an event which happened, to B. J. absolutely, and afterwards made a codicil, "to be annexed to" her will, by which she noticed that the event had happened, and that she had become entitled to other real and personal estate "which was not comprehended in my said will, but which also with my other estates and property I now intend to dispose of for the benefit of B. J. (save only the bequests hereinafter made) for her life, with such limitations and in such manner as hereinafter expressed, *instead of* the devise and bequest contained in my said will, with a view the better to secure the same to her:" the testatrix then be-

*195 queathed some legacies, and devised all her real * and the residue of her personal estate in trust for B. J. for life, with remainder to the children of B. J. living at the death of B. J., or failing them, to the brothers of B. J. then living; but did not dispose of the ultimate fee. B. J. died leaving neither child nor brother surviving her; and all the estates limited by the codicil being thus ex-

(*c*) Beckford *v.* Parnecott, Cro. El. 493; Barnes *v.* Crowe, 1 Ves. Jr. 486, 4 B. C. C. 2; [Yarnold *v.* Wallis, 4 Y. & C. 160; Doe d. York *v.* Walker, 12 M. & Wels. 591, and see 1 Wms. Saunders, 278, n.]

(*d*) Coppin *v.* Fernyhough, 2 B. C. C. 291; Hulme *v.* Heygate, 1 Mer. 285.

(*e*) Williams *v.* Goodtitle, 10 B. & C. 895, 5 Man. & Ry. 757.

[(*f*) 6 M. & Gr. 813; 7 Scott, N. R. 644.]

hausted, the question was whether the will was republished by the codicil, so as to include the after-purchased land in the devise of the fee-simple to B. J., or whether the devise in the codicil, being expressly made "instead of the devise" in the will, must be considered as a revocation of it and as a substitution of that contained in the codicil. It was held that the words "instead of the devise" might well be interpreted to mean "instead of so much only of the devise in the will as was incompatible with the codicil," and that the disposition of the fee in the will, being thus unaltered by the codicil, must be considered as republished and as operating as well upon the after-purchased lands as on the other real estate.]

Perhaps in scarcely any instance has the republishing operation of a codicil been carried to so great a length as in Rowley *v.* Eyton (*g*), where after-acquired lands, expressly devised by the codicil to the residuary devisee of the will, were held to be subject to a general charge of debts created by the will. The testator, after charging his real and personal estate with the payment of his debts, devised the residue of his real and personal estate to his son E.; and having subsequently purchased several copyhold estates, by a codicil, attested by three witnesses, devised them to his said son in fee. Sir W. Grant, M. R., held that the codicil was a republication of the will, so as to make the after-purchased lands subject to the devise for payment of debts; the learned Judge evidently assuming that if the specific devise had been in the will, the lands comprised therein would have been subject to the charge (*h*). Perhaps it is not quite clear that the decision would have been the same if the codicil had devised the lands in question to any other person than the residuary devisee in the will.

Republication negatived by contents of codicil itself.

But of course the operation of a codicil to extend the devise in a will made before 1838 to intermediately acquired lands may be negatived by the contents of the codicil itself indicating a contrary intention; for though the republication takes place without positive intention, yet it can never operate in spite of * such intention. If, therefore, it can be collected from *196 the codicil, that the testator had in his contemplation the identical property which was the subject of disposition in the will, and that only, the intermediately acquired lands will not pass under the residuary devise in the will.[1] The leading case of this class is Bowes *v.* Bowes (*i*), which was as follows: G. B., in 1749, made a will devising all his lands and hereditaments (with certain exceptions) to his wife, and five other persons in fee, upon certain trusts. In 1754 he bought and became seised of an undivided part of a freehold property.

(*g*) 2 Mer. 128.
(*h*) On this point, see [Maskell *v.* Farrington, 3 D. J. & S. 338.]
(*i*) 7 T. R. 482, 2 B. & P. 500; Hughes *v.* Turner, 3 My. & K. 666; [Hughes *v.* Hosking, 11 Moo. P. C. C. 1.]

[1] Haven *v.* Foster, 14 Pick. 541; York *v.* Waller, 12 Mees. & W. 591.

In 1758, by a codicil duly attested, reciting that he had by his will devised all his lands and hereditaments to his wife and the other persons (naming them), upon trust, he thereby revoked all the above devises, so far as related to two of the trustees; and he thereby gave and devised *his said* lands, tenements, and hereditaments to the remaining trustees (naming them), their heirs and assigns, upon the same trusts and purposes as he had devised the same by his will; at the same time revoking the legacies he had given to the removed trustees. And the testator concluded with declaring the codicil to be part of his will. The House of Lords, in conformity to the unanimous opinion of all the judges, held that the will was not republished so as to pass lands acquired between the will and codicil, on the ground that the word "said" confined the operation of the codicil to the lands which had actually been devised by the will. Lord Thurlow alone dissented; the ground of his argument being, that the testator, when he recited his having devised all his lands, supposed his after-purchased lands would pass; and that the words "my said lands" referred to what he had supposed he had conveyed. Lord Eldon, however, showed that the House ought to decide the question, as if the testator actually did know that the will had not passed the after-purchased lands; that when in the codicil he referred to the will as having passed all his lands, he did no more than recite his former devise; but that when he came to the operative part of the codicil he changed the tense of the verb; and though in the former part he said, "whereas I have devised," &c.: yet in the latter he said, "I do hereby revoke, and I do hereby give and devise." If, therefore, by the former words, "all my freehold and copyhold lands," the testator were understood to include all the *197 after-purchased lands, by the latter words of the codicil he * must be understood to be revoking a devise of these lands, which he had not at the time the will was made; for his expressions of revocation were co-extensive with the expressions of devise; these expressions, therefore, unless explained by the context, would be unintelligible; but the word "said" clearly showed that they were both intended to be confined to the lands which the testator possessed at the time of the will; and this construction rendered them consistent.

So, in Parker *v.* Briscoe (*k*), where a testator having by his will devised his real estate, and subsequently acquired other lands by descent, but erroneously supposing them to have passed to him and his sons in strict settlement by the will of the last owner, he by a codicil altered certain limitations in his will, for the express purpose of preventing the union of his own estates with the estates supposed to be devised; the court concurred in the argument that the language of the codicil negatived the application of the devise in the will to the property in question.

(*k*) 3 J. B. Moo. 24, [8 Taunt. 699.]

Again, in Monypenny *v.* Bristow (*l*), where a testator having by his will, after certain particular devises, devised all the residue of his real estate to his brothers A., B., and C., by a codicil, reciting that he was desirous of making a more liberal provision for his wife, and that she might enjoy the whole of his real estates for her life, gave certain lands to his wife, which by his will he had given to his brothers, and then devised a certain property, and all other the real estate, *which by his will he had given to his brothers*, in trust (*inter alia*) for his wife for life, and subject thereto, upon the trust declared by his will; it was held by Sir J. Leach, M. R., and afterwards, on appeal, by Lord Brougham, C., that, notwithstanding the generality of the testator's recited intention respecting his wife, the terms of the dispositive part of the codicil prevented its operating to republish the residuary devise in the will, so as to comprise two freehold houses which the testator had, since its execution, acquired.

The case of Ashley *v.* Waugh (*m*) seems to present the extreme point to which the doctrine in question has been carried. By his will the testator devised all his real estate to A. and B. upon trust for sale. By a codicil, after reciting this devise, he revoked the appointment of A., and appointed C. to be a trustee * and executor of *198 his "said" will; and Lord Cottenham thought that this case came within the principle of Bowes *v.* Bowes, or, at all events, that it was not so clear that lands intermediately acquired passed under the general devise in the will, by the republishing effect of the codicil, as that a purchaser ought to be compelled to take the title (*n*).

[On the other hand, in Doe d. York *v.* Walker (*na*), the testator, by his will made before 1838, devised all the lands "of which I am seised or possessed," &c. at B., to two trustees upon certain trusts; by codicil, in the year 1838, reciting the devise to his trustees upon trust, and that he had determined to appoint J. C. as an additional trustee, he gave and devised all his lands, &c., situate at B. aforesaid, "*and described and devised* in my said recited will," to the use of J. C. in fee upon the trusts of his will, and he directed that his will should be read and construed in the same manner, and should have the same operation and effect in all respects as if J. C. had been named and appointed a trustee thereof in addition to the other trustees, *and in all other respects he ratified and confirmed his said will.* Parke, B., in giving judgment, said that if the codicil had not contained the last words, the court would most probably have considered that the case

Case of Doe *v.* Walker.

(*l*) 2 R. & My. 117; see also Smith *v.* Dearmer, 3 Y. & Jerv. 278; compare Williams *v.* Goodtitle, 10 B. & Cr. 895, [5 Man. & Ry. 757. The report of the case in B. & Cr. is not correct.]

(*m*) 4 Jur. 572.

[(*na*) The rule that a purchaser will not be compelled to take a doubtful title is no longer observed, Alexander *v.* Mills, L. R. 6 Ch. 124; except, perhaps, in cases of doubtful construction, ib.

(*n*) 12 M. & Wels. 591; see also per Abinger, C. B. 4 Y. & C. 166, 167; and per Stuart, V. C., Langdale *v.* Briggs, 3 Sm. & G. 246, 252, affirmed, 8 D. M. & G. 391.

fell within the authority of Bowes *v.* Bowes, and the other cases of a similar kind which we have before noticed, but that the true construction of the last words was, that the testator thereby ratified and confirmed his will in all other respects than those in which he had altered it by the previous provisions in his codicil, and consequently he might be considered as having made a new will of the date of the codicil exactly the same as the old will, with the alterations contained in the codicil. The result was that lands at B., which the testator had purchased after the date of his codicil, passed by the devise (*o*).]

Effect of republication upon specific devises, under old law.

Hitherto, republication has been viewed only as affecting general devises. In regard to specific devises, the principle, that the will speaks from the date of the republication, is to be received with more caution and reserve. It is *199 clear, however, * that the devise of a particular property republished by the re-execution of the will, or the execution of a codicil, will, even under the old law, comprise a new estate in that property intermediately acquired by the testator, and falling within the terms of the republished devise. As where a testator, by a will made before 1838, devised a leasehold estate for lives, afterwards renewed the lease, and then republished the will, it was held that the renewed lease passed under the devise (*p*). So, where a testator has by such a will devised certain freehold lands, which devise is revoked by a conveyance of the lands to particular uses, with the ultimate limitation to the use of the testator himself in fee, after which the testator makes a codicil to his will, duly attested, but without devising or mentioning the lands in question, the estate which reverted to the testator on the execution of the revoking conveyance, passes by the effect of the republication, under the devise (*q*.)

Does not shift specific devise to a different property.

Republication by codicil or otherwise, however, did not under the old law extend a specific gift in the will to property which that gift was not originally intended to embrace, though answering to the same description. Thus, if a testator by a will, made before the year 1838, devised his estate called Blackacre, or bequeathed his horse called Bob, and afterwards sold the estate or horse and bought another of the same name, a subsequent codicil, made before the year 1838, did not by its republishing force make the devise or bequest extend to the new purchase. So it has been repeatedly held that a legacy to a child, which has been adeemed or satisfied by a subsequent advancement to the legatee, is not revived by a constructive republication of the will by means of a codicil, such codicil not indicating an intention to revive the legacy, though containing

(*o*) 1 Vict. c. 26, s. 34. For the purpose of the question now under consideration the case was the same as if the lands purchased after the date of the codicil had been purchased between the dates of the will and codicil.]

(*p*) Carte *v.* Carte, 3 Atk. 180; see also Alford *v.* Earle, 2 Vern. 209.

(*q*) Jackson *v.* Hurlock, 2 Ed. 263.

an express confirmation of the will in the usnal general terms (*r*).[1] The case of Holmes *v.* Coghill (*s*) seems to afford a further illustration of the principle. There the testator having, under his marriage settlement (subject to an estate for life in himself and an estate tail limited to his sons in strict settlement), a power to charge 2,000*l.* npon certain estates, executed that power by will duly attested. Afterwards he and his eldest son suffered a common * recovery, and limited the lands to uses discharged *200 from the power. By the same instrument they limited to the testator a power by will to charge the 2,000*l.* on other lands. Subsequently, he executed a codicil, duly attested, to his will. It was contended that this codicil, by republishing the will, rendered it a good execution of the new power. But Sir W. Grant, though he admitted the general principle as to republication, held that this was not a good execution of the power. "It speaks," said he, "only of the power given by the marriage settlement, which was as much gone as if it never had existed. There is no way in which the will can be made to speak of the new power, for a new consideration affecting different estates" (*u*). [So, if the will refer expressly to the date of its own execution (*x*), or to a particular custom then existing (*y*), a codicil will not so republish it as to make it speak of the later date, or of an altered custom.]

—nor an appointment to a new power.

The same principle, of course, applies to the *objects* of gift; it is clear, therefore, that a codicil did not, and does not (for here the new and old law coincide), by its republishing operation, revive a devise or bequest, the object of which has previously died in the testator's lifetime. Thus, if a testator devises lands to his nephew John, who dies in the testator's lifetime, and he afterwards has another nephew of the same name, the republication of the will would be inoperative to carry the property to the second nephew John (*z*). The case of Perkins *v.* Micklethwaite (*a*), indeed, may seem at first sight to contradict this position, for in that case a legacy originally designed for a son of the testator, who died after the execution of the will, was held to belong, by the effect of the codicil, to a subsequently born son of the same name; but the express terms of the codicil appear to have warranted

Republication does not revive a devise or bequest lapsed by death of the devisee or legatee.

(*r*) Izard *v.* Hurst, 2 Freem. 224, [2 Eq. Ca. Ab. 769;] Monck *v.* Lord Monck, 1 Ba. & Be. 298; Booker *v.* Allen, 2 R. & My. 270; Powys *v.* Mansfield, 3 My. & Cr. 376; see also Drinkwater *v* Falconer, 2 Ves. 623; Crosbie *v.* Macdoual, 4 Ves. 610; [Cowper *v.* Mantell, 22 Beav. 223.]

(*s*) 7 Ves. 499; S. C. 12 Ves. 206; [see also Jowett *v.* Board, 16 Sim. 352.

(*u*) See accordingly Cowper *v.* Mantell, 22 Beav. 223; Du Hourmelin *v.* Sheldon, 19 Beav. 389; Hope *v.* Hope, 5 Gif. 13. Cf. Gale *v.* Gale, 21 Beav. 349; ante, p. 163. Under the act 1 Vict. c. 26, s. 24, the power, if general, may be exercised although not in existence at the time the will was made; Cofield *v.* Pollard, 3 Jur. N. S. 1203; and post, Ch. X. *ad fin.*

(*x*) Stillwell *v.* Mellersh, 20 L. J. Ch. 356.

(*y*) Doe d. Biddulph *v.* Hole, 16 Q. B. 848.]

(*z*) See 2 Ves. 626; see also Doe *v.* Kett, 4 T. R. 601.

(*a*) 1 P. W. 275.

[1] See Langdon *v.* Astor, 16 N. Y. 9; Paine *v.* Parsons, 14 Pick. 318.

the construction, since it gave to the latter a legacy, *over and above what the testator had given him by his will.*

Republication does not cure defect of expression in will.

The effect of republication can never extend further than to give the words of the will the same force and operation as they would have had if the will had been executed at the time of republication;[1] it cannot invest with a devising efficacy *201 expressions * which originally had none; and, therefore, where (*b*) a testator, who was devisee in tail of certain lands, in allusion to them, said, "which, though I could now legally dispose of, I mean fully to confirm to the devisees in remainder," and afterwards suffered a common recovery of the lands, to the use of himself for life, remainder to such uses as he, by deed, will, or codicil, should appoint. He then executed a codicil, whereby he expressly confirmed the will; and it was contended, that the effect of the whole was to pass the estates in question to the remainder-men; but the court of K. B. held, that the will contained no devise, the expressions rather importing an intention to *leave the property alone*, than to dispose of it, and that the codicil could not alter the construction.

Whether, under old law, republication brings property comprised in a lapsed specific devise witbin residuary devise in will.

Though it is quite clear, as we have seen, that republication has no effect in restoring the operation of a specific devise, which has failed by the decease of its object in the testator's lifetime, yet it was somewhat doubtful under the old law, whether lands, of which a devise in fee had so lapsed, passed by a residuary devise in the republished will. This seems to depend on the point whether, if the specific devisee had been dead when the will was made, the residuary devise would have comprised the lands expressed to be given to the person so deceased; for, if it would not, then the lands, the devise of which subsequently lapses, could not, by the effect of the republication, pass under the residuary devise; because republication merely makes the will speak from its own date, and cannot bring within the scope of a devise in the will any subject which it would not have comprehended, in case the circumstances under which the republication takes place had existed at the period of the original execution of the will. In short, the inquiry is no other than simply this, whether, under wills made before 1838, a residuary devise includes particular lands, the devise of which is void *ab initio*.

The [only] authority on the point [appears to be] Doe *v.* Sheffield (*c*), where the court of K. B. treated it as clear, that where a testator devised certain lands to the sisters of A., and the residue of his lands, *not thereinbefore disposed of*, to B., and it turned out that all the sisters of A. were dead when the will was made, the lands in question

(*b*) Lane *v.* Wilkins, 10 East, 241.

(*c*) 13 East, 526.

[1] A codicil properly attested may be a republication of a will so as to give effect to a devise otherwise void on account of the devisee being a witness to the original will. Mooers *v.* White, 6 Johns. Ch. 375.

passed by the residuary clause. The real facts of the case, however, as eventually ascertained, did not raise the question (*d*).

* Although in the case just stated, the extension of a resid- *202
uary clause to lands comprised in a specific or particular devise in fee, which is void *ab initio*, appears rather to have been assumed than discussed, and though, if the matter were *res integra*, there might be ground to contend that a residuary devise, being in its nature specific, ought not to extend to any interest in real estate, which the will purports to dispose of; yet, considering how imperfectly this principle has been adhered to, the probability is, that a residuary clause would be held (in accordance with the notion of the judges who decided Doe *v.* Sheffield) to take in all that is not effectually disposed of, according to circumstances existing at the making of the will (*f*); and, consequently, that in the case of the lapse of a particular devise in fee, succeeded by the republication of the will, a residuary clause in the republished will would operate on the lands comprised in the lapsed devise. The point, however, cannot be considered as settled, and possibly now may never arise, as it cannot occur under a will made since the year 1837; the recent act having (sect. 25) expressly and (as preventing all such questions) most beneficially extended a residuary devise to all property comprised in lapsed or void devises.

Suggested conclusion from Doe *v.* Sheffield.

If the residuary devise itself has lapsed, of course the republication of the will is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue, as where it embraces the entirety. Thus, if a testator devise the residue of his lands to A., B., and C., as tenants in common in fee, and A. dies, and then the testator makes a codicil to his will, by the effect of which the will is republished, he would nevertheless die intestate as to one third, since the subsisting devise, which originally embraced two thirds only, could never, by the mere effect of the republication, be expanded into a gift of the entirety (*g*). [And where by codicil the testator revoked the share of one tenant in common, and directed that it should "fall into the residue and be disposed of accordingly," it was held that these special words did not contain any gift to the * others, or distinguish the case from one *203
of mere revocation of the share (*h*).]

Lapse of residuary devise as to aliquot share.

[(*d*) Williams *v.* Goodtitle, as reported 10 B. & Cr. 895, appears to be an authority that a residuary devise passed lands, a previous devise of which in the same will or codicil was void; but the report 5 Man. & Ry. 757, shows that no such question arose; lands were devised to trustees for *a term of years*, (not in fee as might be supposed from the report in B. & Cr.) upon charitable trusts; and as the reversion on the term, supposing it a valid term, would have passed under the devise of the residue, it followed, of course, that the term being void, the residuary devisee took an estate in possession; the sole question was, whether the will was republished, so as to pass after-acquired lands.

(*f*) See however Ch. XX. s. 1, post; and Smith *v.* Lomas, 33 L. J. Ch. 578.

(*g*) See Skrymsher *v.* Northcote, 1 Sw. 566; Re Wood's Will, 29 Beav. 236.

[(*h*) Humble *v.* Shore, 7 Hare, 247, 1 H. & M. 551, n. See for the case of mere revocation, Cresswell *v.* Cheslyn, 2 Ed. 123.]

Republication, how far affected by the act 1 Vict. c. 26.

The doctrine of republication has lost much of its interest under the stat. 1 Vict. c. 26, not, indeed, by the effect of the provision which dispenses with publication as part of the ceremonial of execution (though this may seem to render the term *re*-publication scarcely appropriate (*i*)), but by the operation of the enactment, which makes the will speak, in regard to the subjects of disposition, from the death of the testator: and more especially of the provision, which extends a general or residuary devise to all the real estate to which the testator may happen to be entitled at his decease. This, of course, will render it unnecessary, in regard to wills made since 1837, to have recourse to the doctrine which makes a codicil, by means of its republishing force, extend a general devise in a will to after-acquired real estate.

It is to be remembered, however, that, with respect to the *objects* of gift, the statute leaves the pre-existing law untouched; though, considering how slight an effect is produced by a republishing codicil in this respect (for we have seen that it does not revive a lapsed gift), this forms no very large exception to the remark, as to the diminished practical interest of the doctrine of republication, in connection with the new law.

Effect of republication of will by codicil made since 1837.

However, where a will made *before* is republished by a codicil made *on* or *since* the 1st of January, 1838, or by re-execution, in the manner prescribed by the new law, the effect of such republication will be most important; it will not, as heretofore, merely extend any general or residuary devise in such will to intermediately acquired real estate, but will, unless a contrary intention be indicated, bring within its operation all the real estate to which the testator may be entitled at his decease, and make the will speak, in regard to the property comprised in it, from that period; in short, the codicil (the contents not forbidding), or the re-execution, will have the effect of subjecting the will for all purposes to the operation of the new act, the 34th section having expressly provided, that every will re-executed, or republished, or revived by any codicil, shall, for the purposes of the act, be deemed to be made at the time at which the same shall be so re-executed, republished or revived (*k*).

*204 * [Where a will made since the act is so worded as to exclude after-acquired lands from a general devise, a codicil republishing the will has no more effect in altering the effect of the general devise, than it would have had if both instruments had been subject to the old law (*l*).

A singular question was raised in Dunn *v.* Dunn (*m*), namely, —

(*i*) But see sect. 34.

[(*k*) See Winter *v.* Winter, 5 Hare, 306; Doe d. York *v.* Walker, 12 M. & Wels. 591; Andrews *v.* Turner, 3 Q. B. 177: Skinner *v.* Ogle, 4 No. Cas. 74, 9 Jur. 432; Brooke *v.* Kent, 3 Moo. P. C. C. 334.

(*l*) Re Farrer, 8 Ir. Com. L. Rep. 370. (*m*) L. R. 1 P. & D. 277.

whether a legacy bequeathed by will dated before 1838, would fail, if after that date the will was re-executed in the presence of two witnesses, of whom the legatee was one. The contention appears to have been that this must be so, because the will was now to be deemed, for the purposes of the act, to have been made at the time of re-execution. Sir J. Wilde said it would be a case of great hardship, but did not decide the question. Should the question recur, it will probably be found unnecessary to hold that the legacy is defeated: for though the re-execution is "a new making of the will" (*n*), the old making of it, under which the legacy is claimed, is not thereby merged or abolished.]

It remains only to be observed, that a codicil or re-execution may still, as formerly, operate to revive a will which has been revoked by marriage, or by a subsequent will, or otherwise; but the remarks on this subject have been anticipated in a former chapter (*o*), to which the reader is referred.

(*n*) 3 Q. B. 178, 12 M. & Wels. 600. (*o*) Ante, p. 188.]

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*CHAPTER IX.

RESTRAINTS ON THE TESTAMENTARY POWER.

SECTION I.

Gifts to Superstitious and Charitable Uses.

[ABOUT the period of the Reformation, statutes were passed to defeat or prevent dispositions of property to purposes which were then accounted superstitious. Thus the statute 1 Edw. 6, c. 14, after premising that great cause of superstition and error in Christian religion was the fantasying of vain opinions concerning purgatory and masses satisfactory for the dead, declared *the king entitled* to all real (*a*) and certain corporate personal (*b*) property *theretofore* disposed of for the perpetual finding of a priest, or maintenance of any anniversary or obit *or other like thing*, or of any light or lamp in any church or chapel. This statute affects previous dispositions only. But by the earlier statute 23 Hen. 8, c. 10, all uses *thereafter* declared of *land* (except for terms of not more than 20 years) to the intent to have obits perpetual, or the continual service of a priest or other like uses, were *made void.* But there is no statute making superstitious uses void generally (*c*): and the latter statute does not relate to personalty.] Superstitious uses, which are not within the letter of these statutes [and whether they seek to affect land or personal estate] are nevertheless void by the general policy of the law; and, in such cases, if charity be not the object, but the design of the bequest be to secure a benefit to the testator himself (as, to say masses for his soul, &c.), the testator's own representative (who would be entitled if there was no such gift), and not the crown, would be let in (*d*).

Superstitious uses, what.

[(*a*) Sects. 5, 6.] See Att.-Gen. *v.* Vivian, 1 Russ. 226; [Att.-Gen. *v.* Fishmongers' Company, 2 Beav. 151, 5 My. & Cr. 11. (*b*) Sect. 7.

(*c*) Per Sir W. Grant, Cary *v.* Abbot, 7 Ves. 495.]

(*d*) West *v.* Shuttleworth, 2 My. & K. 684. [See also Re Blundell's Trusts, 30 Beav. 360, better reported 31 L. J. Ch. 52; Heath *v.* Chapman, 2 Drew. 417; Att.-Gen. *v.* Fishmongers' Company, 2 Beav. 151, 5 M. & Cr. 11. See also an analogous Chinese superstition, Yeap *v.* Ong, L. R. 6 P. C. 396. Including the souls of others with his own in the sup-

*It has been decided that devisees may be compelled to disclose whether they take subject to a secret trust of this nature (*e*). *206

Secret trusts.

A most extraordinary decision was made on these statutes shortly before the Revolution. It was held by Lord Keeper North that a bequest to Mr. Baxter, of 600*l.* to be distributed among sixty pious ejected ministers, [(given, "because I know many of them to be pious and good men, and in great want,")] and legacies also to Mr. Baxter, one of them to be laid out in his book entitled "A Call to the Unconverted," were void, as superstitious (*f*); but the decree was reversed by the Lords Commissioners.

It is clear that not only is a bequest to the poor ministers of Protestant dissenters good, but one having for its object the propagation of their religious opinions is also valid; provided that such opinions, although at variance with the doctrines of the Established Church, are not contrary to law (*g*); [thus bequests *to an Unitarian chapel (*h*), or for the benefit of poor Irvingite ministers (*i*), or to the minister of a specified Baptist chapel (*j*) are valid.][1] *207

Protestant dissenters.

posed benefit will not save the bequest, see s. cc.] In West *v.* Shuttleworth there was a residuary bequest, and yet the void pecuniary legacies were held to belong to the next of kin. On this point, see Shanley *v.* Baker, 4 Ves. 732; [and observe that in West *v.* Shuttleworth, the residuary legatees made no claim to the void legacies, and in fact supported the bequest of them. If the superstitious use had charity for its object, it would be executed *cy-près*, see Cary *v.* Abbot, 7 Ves. 495, and per Lord Eldon, 19 Ves. 487. But it is not clear that any use (except of the kind mentioned in the stat. 1 Edw. 6) would now be held void solely as being superstitious. In Thornton *v.* Howe, 31 Beav. 14, Lord Romilly held that even a trust for propagating the sacred writings of Joanna Southcote would be enforced by the court. Those writings aver that Joanna Southcote was with child by the Holy Ghost, &c., &c., delusions almost identical with those which in Smith *v.* Tebbitt, L. R. 1 P. & D. 398, were held to render a woman possessed by them incapable of making a will.]

(*e*) King *v.* Lady Portington, 1 Salk. 162, 1 Eq. Ca. Ab. 96. pl. 6; see further as to superstitious uses, Duke Char. Uses, 106, 4 Rep. 104, Cro. Jac. 51, 1 Eq. Ca. Ab. 95, pl. 1, et seq., and Shelf. Ch. Us. 89, where the cases, early and modern, are collected. [In Read *v.* Hodgens, 7 Ir. Eq. Rep. 17, it was decided that a bequest in *Ireland* for masses for the testator's soul was valid: *sed qu.*]

(*f*) Att.-Gen. *v.* Baxter, 1 Eq. Ca. Ab. 96, pl. 9, 1 Vern. 248, 2 ib. 105, [1 Ves. 537,] 7 Ves. 76.

(*g*) Att.-Gen. *v.* Hickman, 2 Eq. Ca. Ab. 193; West *v.* Shuttleworth, 2 My. & K. 684; [and see statutes 18 & 19 Vict. c. 81, ss. 2, 3, and c. 86, s. 2.] In Doe *v.* Hawthorn, 2 B. & Ald. 96, Abbott, J., afterwards Lord Tenterden, said, that the trust there in question of a chapel for the use of a congregation of Protestants "assembling under the patronage of the trustees of the late Countess of Huntingdon's College," was either a superstitious use within 23 Hen. 8, c. 10, or a charitable use within 9 Geo. 2, c. 36. But as to the former alternative it is notorious that the Court of Chancery unhesitatingly entertains suits for carrying into effect trusts of places of worship belonging to Protestant Dissenters. The principles on which it deals with such trusts are stated with great fulness and perspicuity by Lord Eldon, in Att.-Gen. *v.* Pearson, 3 Mer. 353, which bears more immediately on the position of [Unitarians, as to whom see now 7 & 8 Vict. c. 45, and of whom Lord Campbell said, 2 H. L. Ca. 863, that he had no doubt they would now on most occasions be considered as Protestant Dissenters.

(*h*) Shrewsbury *v.* Hornbury, 5 Hare, 406; Re Barnett, 29 L. J. Ch. 871.

(*i*) Att.-Gen. *v.* Lawes, 8 Hare, 32.

(*j*) Att.-Gen. *v.* Cock, 2 Ves. 273.]

[1] In this country, where all religious denominations stand upon an equality (Jackson *v.* Phillips, 14 Allen, 549, 554), the principal question in the case of gifts not of land is the question of certainty of the subject or the object. If that is sufficiently certain to enable the court to provide for the execution of the trust, and the gift is otherwise good, the gift will be upheld. Religious charitable societies appear indeed to stand upon no different footing from other charities. If the testator neither specify how much of his

Before the statute 2 & 3 Will. 4, c. 115, bequests for the propagation of the Roman Catholic religion were unlawful (*k*); but sect. 1 of that act, after noticing the acts in favor of Protestant dissenters, and a Scotch act imposing penalties on Roman

Stat. 2 & 3 Will. 4, c. 115.

(*k*) Cary *v.* Abbot, 7 Ves. 490; see also 4 Ves. 433, 6 Ves. 566, 1 Ba. & Be. 145; [Gates *v.* Jones, cit. 2 Vern. 266.

estate he desires to give to a charity, nor furnishes the means of ascertaining the sum through a delegated discretion or otherwise, the legal result is that he has given nothing at all, and his next of kin are entitled to the fund. And the same conclusion may be derived from the consideration that there is no donee of the gift; by which is meant a donee to take the legal interest in the fund, and apply the gift in furtherance of the testator's intention. Beekman *v.* Bonsor, 23 N. Y. 298. The fact, however, that a charitable bequest, otherwise valid, cannot take effect immediately for want of proper objects or trustees, or of enabling acts of the legislature or of the executive, will not defeat it. Missionary Soc. *v.* Chapman, 128 Mass. 265; Fellows *v.* Miner, 119 Mass. 541; Sanderson *v.* White, 18 Pick. 328, 336; Odell *v.* Odell, 10 Allen, 1, 8; Baker *v.* Clarke Institution, 110 Mass. 88, 91. Thus, when land is devised to a charity and no trustee is named, the heir takes in trust for the charity, or equity will appoint a trustee. Missionary Soc. *v.* Chapman, supra; Bartlett *v.* Nye, 4 Met. 378; Washburn *v.* Sewall, 9 Met. 280; North Adams Univ. Soc. *v.* Fitch, 8 Gray, 421; Winslow *v.* Cummings, 3 Cush. 358; Brown *v.* Kelsey, 2 Cush. 243; Bliss *v.* American Bible Soc., 2 Allen, 334. In Fellows *v.* Miner, supra, it is laid down not only that the courts will not allow a valid charitable trust to fail for want of a trustee, but that, if the trust is to be executed out of the state, the courts may appoint a trustee within the state to receive the bequest, or may order the fund, or the income thereof from time to time, to be paid to a trustee in the place where the trust is to be executed. Gray, C. J., referring to Washburn *v.* Sewall, 9 Met. 280; Attorney-General *v.* London, 3 Brown, Ch. 171; S. C. 1 Ves. Jr. 243; Mayor of Lyons *v.* East India Co., 1 Moore P. C. 175, 295-297; Attorney-General *v.* Sturge, 19 Beav. 597; Chamberlain *v.* Chamberlain, 43 N. Y. 424. In case of a legacy for charitable purposes to an association which has ceased to exist, giving way to another association having the same object, equity may give the fund to the latter association in trust (or to any person as trustee), to carry out the objects of the testator: but the latter association cannot take the gift absolutely as legatee. Bliss *v.* American Bible Soc., 2 Allen, 334. But the doctrine that a trust shall never fail for want of a trustee, since equity will supply the defect, is true only of a valid trust; and, in order to be valid in this country, the trust must be so constituted that a title can vest in some person, natural or artificial, by force of the gift itself. A charitable donation, precise and definite in its purpose, though void at law because the beneficiaries are not precisely ascertained, is thus constituted if there be a competent trustee to take the fund and effectuate the charity. Downing *v.* Marshall, 23 N. Y. 366, 382; Beekman *v.* Bonsor, ib. 298; Williams *v.* Williams, 4 Seld. 525; Owens *v.* Missionary Soc., 4 Kern. 380. It is laid down in New York that a bequest to a voluntary, unincorporated association, without stating the objects of the gift, is not a gift to a charity, though the name of the association indicates that its object is charity. Owens *v.* Missionary Soc., 14 N. Y. 380, Selden, J. The chief ground, however, of the invalidity of the gift in such a case appears to be the incapacity of the donee for want of incorporation. So that it must fail in that state even though a charitable purpose be defined, the rule being well settled in New York, contrary to that which more generally prevails, that a voluntary, unincorporated association has no legal capacity to receive a donation even for a purpose denominated charitable. Downing *v.* Marshall, 23 N. Y. 366; Sherwood *v.* American Bible Soc., 1 Keyes, 561. See White *v.* Howard, 46 N. Y. 144. Elsewhere unincorporated societies may take when duly organized by the choice of officers and the keeping of written minutes in the nature of a record, so as to be capable of identification. King *v.* Parker, 9 Cush. 71, 82; Earle *v.* Wood, 8 Cush. 430; Washburn *v.* Sewall, 9 Met. 280; Tucker *v.* Seaman's Aid Soc., 7 Met. 188, 200; In re Ticknor, 13 Mich. 44. Generally speaking, if a remainder be limited by devise to a corporation not in existence, the gift is void, though such a corporation should afterwards be created during the particular estate, because it is *potentia remota*. Zeisweiss *v.* James, 63 Penn. St. 465; Cholmley's Case, 1 Coke, 564. See White *v.* Howard, 46 N. Y. 144. Still if the purpose for which the devise over in remainder was made be a valid charitable use, which can be enforced and administered in a court of equity, it will not be allowed to fail for want of a trustee. M'Girr *v.* Aaron, 1 Penn. 49. Such a use may be vague and indefinite, so that no particular person may have such an interest in it as will give him a right to demand the execution of it; still that forms no objection if a competent trustee be named, clothed with discretionary power to carry out the purposes of the donor. Zeisweiss *v.* James, supra. See Witman *v.* Lex, 17 Serg. & R. 93. Indeed, for the sake of upholding the testator's intention, the rule in these cases is, that when it appears from the will that the donee is to come into being in the future, or to become qualified to take upon the happening of some future event, a present bequest will not be presumed; nor

Catholics; and reciting, that notwithstanding the provisions of various acts passed for the relief of his Majesty's Roman Catholic subjects, doubts had been entertained whether it were lawful for his Majesty's subjects professing the Roman Catholic religion in *Scotland* to acquire and hold as real estate the property necessary for religious worship, education, and charitable purposes, and that it was expedient to remove all doubts respecting the right of his Majesty's subjects professing the Roman Catholic religion in *England* and *Wales* to acquire and hold property necessary for religious worship, education, and charitable purposes, enacts, "That his Majesty's subjects professing the Roman Catholic religion, *in respect of their schools, places for religious worship, education, and charitable purposes in Great Britain*, and the property held therewith, and the persons employed in or about the same, shall, in respect thereof, be subject to the same laws as the Protestant dissenters are subject to in *England* in respect to their schools and places for religious worship, education, and charitable purposes, and not further or otherwise." By sect. 3, the act is not to extend to any suit actually pending, or commenced, or any property then in litigation, in any court in Great Britain (*l*).

Roman Catholics placed on same footing as Protestant dissenters in respect of their schools, &c.

It has been held, that the act is retrospective, *i.e.* that it applies to the will of a testator who died before its passing (*m*); and also, that it authorizes a bequest for the promotion of the Roman Catholic religion,[1] as it places persons of this persuasion on the same footing as Protestant dissenters, the diffusion of whose religious tenets (as already observed) may be the subject of a valid trust. It is settled, however, that the Roman Catholic Relief Act has no effect in rendering valid gifts to superstitious uses, as legacies to priests for offering masses for the repose of the testator's * soul, &c. (*n*); [nor, it is presumed, would it render *208

Bequest for propagation of Roman Catholic religion.

(*l*) See also 23 & 24 Vict. c. 134.]

(*m*) Bradshaw *v.* Tasker, 2 My & K. 221; [and see Re Michel's Trusts, 28 Beav. 32; but Sir E. Sugden questioned this decision, 1 D. & War. 380.]

(*n*) West *v.* Shuttleworth, 2 My. & K. 684. [Re Blundell's Trusts, 30 Beav. 360; Heath *v.* Chapman, 2 Drew, 417.

will such a bequest be presumed unless there is not the least circumstance from which to collect the testator's intention of any thing else than an immediate devise to take effect *in præsenti*. Burrill *v.* Boardman, 43 N. Y. 254, where it was said of a bequest to a corporation to be created, that every circumstance which concurred in giving the bounty an executory character, would be regarded; and the gift in question was upheld. Hence, the gift of a fund to trustees, to be paid after their incorporation, "to employ a preacher of the Universalist denomination" is good. Cory Society *v.* Beatty, 28 N. J. Eq. 570. Again, the donee and the subject of the gift may be sufficiently ascertained, and yet the trust fail for uncertainty of personal objects; since the donee may be only a trustee, and the beneficiaries may be too uncertain. White *v.* Howard, 46 N. Y. 144; Wilderman *v.* Baltimore, 8 Md. 551; Needles *v.* Martin, 33 Md. 609.

[1] A devise to a Roman Catholic priest, who might succeed the devisee in a certain place to be entailed to him and to his successors in trust, &c., was held to be intended *in ease of the congregation*, and for its sole benefit, though for the maintenance of the priest; and upon the incorporation of the congregation it was decided that it legally held the estate devised. M'Girr *v.* Aaron, 1 Penn. 49. See Browers *v.* Fromm, Add. 362; Trustees of Bishops' Fund *v.* Eagle Bank, 7 Conn. 476.

valid such a trust as that which was the subject of discussion in De Themines *v.* De Bonneval (*o*), namely, for printing and publishing a book which taught that the Pope had in all ecclesiastical matters a supremacy which was paramount even to the authority of the temporal sovereign. The case arose before the statute referred to, but Sir J. Leach rested his decision entirely on the ground that to allow such a publication was against public policy.

Public policy.

Jews also are now by statute 9 & 10 Vict. c. 59, placed on the same footing as Protestant dissenters (*p*).]

Jews.

Charity has been defined to be a general public use (*q*).[1] In order to

(*o*) 5 Russ. 288.

(*p*) The cases relating to Jews before this act were, Da Costa *v.* De Pas, Amb. 228, 1 Dick. 258, 2 Ves. 274, 276, 7 Ves. 76, 2 Sw. 487, 2 J. & W. 308; and Straus *v.* Goldsmid, 8 Sim. 614. The only difference between 2 & 3 Will. 4, c. 115, s. 1, and 9 & 10 Vict. c. 59. s. 2, is the omission from the latter enactment of the words, "and the persons employed in or about the same:" which appears immaterial to the purposes of this Treatise. This enactment also has been held to be retrospective. Re Michel's Trusts, 28 Beav. 32.]

(*q*) Amb. 651.

[1] Sherwood *v.* American Bible Soc., 1 Keyes, 561; Jackson *v.* Phillips, 14 Allen, 539; Ommanney *v.* Butcher, 1 Tur. & R. 260. A devise of property in trust "solely for benevolent purposes" in the discretion of the trustee is not a charitable gift, and is void. Chamberlain *v.* Stearns, 111 Mass. 267; Adye *v.* Smith, 44 Conn. 60. See Williams *v.* Kershaw, 5 Clark & F. 111; S. C. 5 L. J. N S. Ch. 84; Norris *v.* Thomson, 4 C. E. Green, 307; S. C. 5 C. E. Green, 489. But the word "benevolent" when coupled with "charitable" or any equivalent word, or used in such connection, or applied to such public institutions, as to manifest an intention to make it synonymous with "charitable" may have effect according to the intention. Chamberlain *v.* Stearns, supra; Saltonstall *v.* Sanders, 11 Allen, 446; Rotch *v.* Emerson, 105 Mass. 431, 434; Hill *v.* Burns, 2 Wils. & S. 80; Crichton *v.* Grierson, 3 Bligh, N. S. 424; Miller *v.* Rowan, 5 Clark & F. 99. To give a bequest the character of a gift to a public charity, there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons. Old South Soc. *v.* Crocker, 119 Mass. 1; Going *v.* Emery, 16 Pick. 107, 119; Saltonstall *v.* Sanders, 11 Allen, 446. A definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of a gift as recipients of its benefits cannot constitute a public charity. Old South Soc. *v.* Crocker, supra; Attorney-General *v.* Federal St. Meeting House, 3 Gray, 1, 49; Parker *v.* May, 5 Cush. 336. *Contra* where the recipients are not definitely pointed out. Thus, a gift to A. "in trust, to be used purely and solely for charitable purposes — for the greatest relief of human suffering, human wants, and for the good of the greatest number," is charitable. Everett *v.* Carr, 59 Me. 325, on authority of Saltonstall *v.* Saunders, 11 Allen, 446; Johnston *v.* Swann, 3 Madd. 457; Drew *v.* Wakefield, 54 Me. 291; Swasey *v.* American Bible Soc., 57 Me. 523; Wells *v.* Doane, 3 Gray, 201; Baker *v.* Sutton, 1 Keene, 226; Whicker *v.* Hume, 14 Beav. 509; Horde *v.* Suffolk, 2 My. & K. 59; Jackson *v.* Phillips, 14 Allen, 556. Further, as to what constitutes a charity, see among the great number and variety of cases, Drury *v.* Natick, 10 Allen, 169, 176–182; McDonald *v.* Mass. Hospital, 120 Mass. 432; Birchard *v.* Scott, 39 Conn. 63; Treat's Appeal, 30 Conn. 113; White *v.* Fisk, 22 Conn. 31; Brown *v.* Baptist Soc., 9 R. I. 177; Chapin *v.* School District, 35 N. H. 445; McAllister *v.* McAllister, 46 Vt. 272; Wetmore *v.* Parker, 52 N. Y. 450; Donohugh's Appeal, 86 Penn. St. 306; Bethlehem *v.* Persev. Co., 81 Penn. St. 445; American Tract Soc. *v.* Atwater, 30 Ohio St. 77; Miller *v.* Teachout, 24 Ohio St. 525; Maynard *v.* Woodard, 36 Mich. 423; Hatheway *v.* Sackett, 32 Mich. 97; County Commrs. *v.* Rogers, 55 Ind. 297; Newson *v.* Starke, 46 Ga. 88; Hornberger *v.* Hornberger, 12 Heisk. 635; Roy *v.* Rowzie, 25 Gratt. 599; Ould *v.* Washington Hospital, 95 U. S. 303. The *purpose* should be definite; though a charitable trust, deemed somewhat vague and indefinite, was enforced in Drew *v.* Wakefield, 54 Me. 291, on authority of Mitford *v.* Reynolds, 1 Phill. (Eng.) 185; Nash *v.* Morley, 5 Beav. 177; Attorney-General *v.* Comber, 2 Sim. & S. 93; Whicker *v.* Hume, 7 H. L. Cas. 124; Shotwell *v.* Mott, 2 Sandf. Ch. 46; Going *v.* Emery, 16 Pick. 107. In Maryland, though a competent trustee be named, a gift "for the relief and support of indigent and necessitous poor persons who may from time to time reside within the limits, as now known of the 12th ward of said city" is deemed void as being vague and indefinite. Wildeman *v.* Baltimore, 8 Md. 551; Needles *v.* Martin, supra. In the latter case a trust in favor of "free colored persons in Baltimore city" was held void for

ascertain what are charitable purposes, recourse is usually had to the preamble of the statute 43 Eliz. c. 4, which enumerates various kinds of charity: viz. the relief of aged,[1] impotent, and poor people (*r*), maintenance of sick and maimed soldiers and mariners, schools of learning (*s*), free schools and scholars in universities;[2] repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives (*t*); and aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes.[3] What are charitable uses. Stat. 43 Eliz. c. 4.

Charity is not confined to the objects comprised in this enumeration;[4] it extends to all cases within the spirit and intendment of the statute.[5] Thus, gifts (*u*), for the erection of water-works for the use of the inhabitants of a town (*x*);[6] to be applied for the "good" of a place (*y*), [or for "charities and other public purposes *in" *209 a parish (*z*)], or for the general improvement of a town (*a*), or for the establishment of a life-boat (*b*), or of a botanical garden (*c*)[7] to the trustees and for the benefit of the British Museum (*d*); [to the Royal, the Geographical, and the Humane Societies (*e*)]; to the widows

[(*r*) Nash *v.* Morley, 5 Beav. 177. (*s*) Att.-Gen. *v.* Nash, 3 B. C. C. 587.

(*t*) Does not include prisoners for crime, as poachers, Thrupp *v.* Collett, 26 Beav. 125. A bequest for such a purpose is against public policy and void.

(*u*) It makes no difference that the fund is raised by tax on the inhabitants of the town; the purpose alone is the criterion. Att.-Gen. *v.* Eastlake, 11 Hare, 205.]

(*x*) Jones *v.* Williams, Amb. 651.

(*y*) Att.-Gen. *v.* Earl of Lonsdale, 1 Sim. 105; [Att.-Gen. *v.* Webster, L. R. 20 Eq. 483.

(*z*) Dolan *v.* Macdermot, L. R. 5 Eq. 60, 3 Ch. 676.]

(*a*) Howse *v.* Chapman, 4 Ves. 542; Att.-Gen. *v.* Heelis, 2 S. & St. 67; [Mitford *v.* Reynolds, 1 Phill. 185.]

(*b*) Johnston *v.* Swann, 3 Mad. 457.

(c) Townley *v.* Bedwell, 6 Ves. 194; [but it is not clear that it would have been so decided unless the testator had signified his expectation that the garden would be a public benefit.]

(*d*) British Museum *v.* White, 2 S. & St. 595.

[(*e*) Beaumont *v.* Oliveira, L. R. 6 Eq. 534, 4 Ch. 309.]

the same reason. A charitable gift is deemed good though the use to be made of it is left to the discretion of the trustee. Thus, a gift of money to trustees "to be by them applied for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropic purposes, at their discretion" is a valid charitable bequest. Rotch *v.* Emerson, 105 Mass. 431. A city or town may take and hold gifts for appropriate charitable uses. Drury *v.* Natick, 10 Allen, 169; Webb *v.* Neal, 5 Allen, 575; Vidal *v.* Girard, 2 How. 190; Perin *v.* Carey, 24 How. 505. In gifts to charitable uses, the law makes a distinction between those parts of the writing which declare the gift and its purposes, and those which direct the mode of its administration. Thus, where a vested estate is distinctly given, and there are annexed to it conditions, limitations, powers, trusts (including trusts for accumulation), or other restraints relative to its use, management, or disposal, that are not allowed by law, it is these restraints, and the estates limited on them, that are void, and not the principal or vested estate. Philadelphia *v.* Girard, 45 Penn. St. 9.

[1] See Fellows *v.* Miner, 119 Mass. 541; Gooch *v.* Assoc. for Aged Females, 109 Mass. 558.

[2] Frankfield *v.* Armfield, 2 Sneed, 305; Cresson's Appeal, 30 Penn. St. 437.

[3] See the enumeration of cases of charity in Jackson *v.* Phillips, 14 Allen, 549.

[4] Ib.

[5] See the definition of a charity given in Price *v.* Maxwell, 28 Penn. St. 35.

[6] Or drainage works. Henry County *v.* Winnebago Drainage Co., 52 Ill. 454. Or a town-house. Coggeshall *v.* Pelton, 7 Johns. Ch. 292.

[7] See Rotch *v.* Emerson, 105 Mass. 433.

and orphans (*f*),[1] or the poor inhabitants (*g*) of a parish ("poor" being construed those not receiving parochial relief (*h*)); to the churchwardens in aid of the poor's rate (*i*); to the widows and children of seamen belonging to a port (*k*); [to "poor credible industrious persons, residing at A., with two children or upwards, or above fifty years of age, maimed or otherwise unable to get a living" (*l*); for preaching a sermon, keeping the chimes of the church in repair, playing certain psalms, and paying the singers in church (*m*); for building an organ gallery in a church (*n*), or repairing and ornamenting a chancel (*o*), or repairing a memorial window and mural monuments in a church (*p*); for endowing or erecting a hospital (*q*);[2] to a society formed principally for teaching poor children and nursing the sick (*r*);[3] to found prizes for essays (*s*); to deserving literary men who have been unsuccessful (*t*); for letting out land to the poor at a low rent (*u*); for the increase and encouragement of good servants (*x*); for the benefit of ministers of any denomination of Christians (*y*);[4] or for the

*210 * benefit, advancement, and propagation of *education and learning* in every part of the world (*z*); for establishing and upholding an institution for the investigation and cure of diseases of quadrupeds

(*f*) Att.-Gen. *v.* Comber, 2 S. & St. 93; [Thompson *v.* Corby, 27 Beav. 649.]
(*g*) Att.-Gen. *v.* Clarke, Amb. 422, also 14 Ves. 364.
(*h*) Bishop of Hereford *v.* Adams, 7 Ves. 324; Att.-Gen. *v.* Wilkinson, 1 Beav. 372; [and see Att.-Gen. *v.* Bovill, 1 Phill. 762; Att.-Gen. *v.* Corporation of Exeter, 2 Russ. 45.] As to a gift to the inhabitants of a place, see Rogers *v.* Thomas, 2 Kee. 8.
(*i*) Doe *v.* Howell, 2 B. & Ad. 744.
(*k*) Powell *v.* Att.-Gen., 3 Mer. 48.
[(*l*) Russell *v.* Kellett, 3 Sm. & Gif. 264. It was held first, that the gift pointed to individuals, and some having died before payment, that there could be no execution *cy-près;* but secondly, that the gifts were charitable, and did not pass to the representatives of those who, though they survived the testatrix, died before payment. See Mahon *v.* Savage, 1 Sch. & L. 111, stated post, Ch. XXIX.
(*m*) Turner *v.* Ogden, 1 Cox, 316; see also Durour *v.* Mottenx, 1 Ves. 320.
(*n*) Adnam *v.* Cole, 6 Beav. 353.
(*o*) Hoare *v.* Osborne, L. R. 1 Eq. 585.
(*p*) Hoare *v.* Osborne, supra; Re Rigley's Trust, 36 L. J. Ch. 147.
(*q*) Pelham *v.* Anderson, 2 Ed. 296, 1 B. C. C. 444; Att.-Gen. *v.* Kell, 2 Beav. 575.
(*r*) Cocks *v.* Manners, L. R. 12 Eq. 574.
(*s*) Farrer *v.* St. Catharine's College, L. R. 16 Eq. 19.
(*t*) Thompson *v.* Thompson, 1 Coll. 395.
(*u*) Crafton *v.* Frith, 15 Jur. 737, 20 L. J. Ch. 198.
(*x*) Loscombe *v.* Wintringham, 13 Beav. 87.
(*y*) Att.-Gen. *v.* Hickman, 2 Eq. Abr. 193; Att.-Gen. *v.* Gladstone, 13 Sim. 7; Att.-Gen. *v.* Cock, 2 Ves. 273; Att.-Gen. *v.* Lawes, 8 Hare, 32; Shrewsbury *v.* Hornby, 5 Hare, 406; Grieves *v.* Case, 4 B. C. C. 67, 2 Cox, 301, 1 Ves. Jr. 548; Milbank *v.* Lamhert, 28 Beav. 206; Thornber *v.* Wilson, 3 Drew. 245, 4 Drew. 350; *secus* if it he to the person *now* minister, *semb.* ib. 351.
(*z*) Whicker *v.* Hume, 14 Beav. 509, 1 D. M. & G. 506, 7 H. L. Cas. 124. "Learning" was taken to mean "heing taught:" not "knowledge," which would have been too indefinite.

[1] De Bruler *v.* Ferguson, 54 Ind. 549; County Commrs. *v.* Rogers, 55 Ind. 297; Moore *v.* Moore, 4 Dana, 354; Fink *v.* Fink, 12 La. An. 301.

[2] McDonald *v.* Mass. Hospital, 120 Mass. 432.

[3] So of a gift for the "education and tuition of worthy, indigent females." Dodge *v.* Williams, 46 Wis. 70. Or of pious, indigent young men, preparing for the ministry. M'Cord *v.* Ochiltree, 8 Blackf. 15. Or of poor children. Heuser *v.* Harris, 42 Ill. 425; Newson *v.* Starke, 46 Ga. 88.

[4] See Going *v.* Emery, 16 Pick. 107; Brown *v.* Kelsey, 2 Cush. 243; Sohier *v.* St. Paul's Church, 12 Met. 250; Shapleigh *v.* Pilsbury, 1 Greenl. 271; Universalist Soc. *v.* Kimball, 34 Me. 424; Brown *v.* Concord, 33 N. H. 296; Dublin Case, 38 N. H. 459.

and birds useful to man, and for maintaining a lecturer thereon (*a*); and gifts in aid of the public revenue of the state (*b*); and finally, gifts for any purpose which is either for the public or general benefit of a place (*c*), or tends towards public religious instruction or edification (*d*)], have been respectively held to be charitable. [And in this respect the court makes no distinction between one sort of religion, or one sect and another. Their promotion or advancement are all equally "charitable," provided their doctrines are not subversive of all religion, or all morality (*e*).] It is evident from the preceding examples, that, to constitute a charity in the legal sense, the poor need not be (though they commonly are) its sole or especial objects; on which principle, Sir J. Leach treated a school for the education of gentlemen's sons, as a "school of learning" within the statute 43 Eliz. (*f*).

[A gift to procure masses for the soul of the testator and others is not charitable (*g*); nor is a gift to a convent of nuns whose sole object is the sanctifying their own souls, and not performing any external duty of a charitable nature (*h*); nor a gift for the erection or repair of a monument, vault, or tomb (*i*), * whether it be to the memory or for the interment of the donor alone (*j*), or of himself and his family and relations (*k*), unless it forms part of the fabric or ornament of the church (*l*). Again, bequests for purposes of benevolence (*m*), or benevolence and liberal-

What are not charitable uses.

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(*a*) London University *v.* Yarrow, 23 Beav. 159, 1 De G. & J. 72. And see Marsh *v.* Means, 3 Jur. N. S. 790.

(*b*) Thellusson *v.* Woodford, 4 Ves. 227; Nightingale *v.* Goulbourn, 5 Hare, 484; 2 Phill. 594; Newland *v.* Att.-Gen., 3 Mer. 684; Ashton *v.* Lord Langdale, 4 De G. & S. 402.

(*c*) Per Lord Cottenham in Att.-Gen. *v.* Aspinal, 2 My. & Cr. 622, 623; Att.-Gen. *v.* Corporation of Shrewsbury, 6 Beav. 220; Att.-Gen. *v.* Corporation of Carlisle, 2 Sim. 437; British Museum *v.* White, 2 S. & St. 596.]

(*d*) Att.-Gen. *v.* City of London, 1 Ves. Jr. 243; Powerscourt *v.* Powerscourt, 1 Moll. 616; [Baker *v.* Sutton, 1 Keen, 232; Att.-Gen. *v.* Stepney, 10 Ves. 22; Townshend *v.* Carus, 3 Hare, 257; Lloyd *v.* Lloyd, 2 Sim. N. S. 266; Wilkinson *v.* Lindgren, L. R. 5 Ch. 570; Cocks *v.* Manners, L. R. 12 Eq. 585, per Wickens, V. C.

(*e*) Per Romilly, M. R., Thornton *v.* Howe, 31 Beav. 19, 20. In Briggs *v.* Hartley, 14 Jur. 683, 19 L. J. Ch. 416, a legacy for the best essay on the Sufficiency of Natural Theology when treated as a science, was held inconsistent with Christianity, and void. But this would probably not be followed. In Pare *v.* Clegg, 29 Beav. 589, the doctrines of Robert Owen (as to which see also Russell *v.* Jackson, 10 Hare, 214), were held by Romilly, M. R., to be visionary and irrational, but not illegal as being irreligious or immoral. The court is sometimes compelled to declare good as a charitable bequest what it deems of very doubtful public utility, per Lord Selborne, L. R. 16 Eq. 24.]

(*f*) Att.-Gen. *v.* Earl of Lonsdale, 1 Sim. 109.

[(*g*) See the cases cited, n. (*d*), ante, p. 205.

(*h*) Cocks *v.* Manners, L. R. 12 Eq. 574.

(*i*) Hoare *v.* Osborne, L. R. 1 Eq. 585; Re Rigley's Trust, 36 L. J. Ch. 147.]

(*j*) Mellick *v.* President of the Asylum, Jac. 180; [Adnam *v.* Cole, 6 Beav. 353; Lloyd *v.* Lloyd, 2 Sim. N. S. 255; Willis *v.* Brown, 2 Jur. 987; Trimmer *v.* Danby, 25 L. J. Ch. 424.]

(*k*) See [Gravenor *v.* Hallum, Amb. 643;] Doe d. Thompson *v.* Pitcher, 3 M. & Sel. 407, 2 Marsh. 61, 6 Taunt. 359; [Rickards *v.* Robson, 31 Beav. 244; Fowler *v.* Fowler, 33 Beav. 616; Hoare *v.* Osborne, L. R. 1 Eq. 585: Re Rigley's Trust, 36 L. J. Ch. 147; Fisk *v.* Att.-Gen., L. R. 4 Eq. 521; Dawson *v.* Small, L. R. 18 Eq. 114.] Lord Ellenborough suggested (3 M. & Sel. 407) that although repairing a donor's own tomb was not a charitable purpose, it was otherwise where the tomb was for his family. But the statute had been complied with, [and the later cases admit no such distinction. These cases also show that a trust for the perpetual repair of a tomb, not being charitable, is void as a perpetuity.

(*l*) Ante, p. 209.

(*m*) James *v.* Allen, 3 Mer. 17; Re Jarman's Estate, 8 Ch. D. 584.

ity (*n*), or general utility (*o*), or for pious purposes (*p*), are not charitable bequests; and a gift to one of the chartered companies of the city of London to increase their stock of corn, which they are (or were) compelled to keep for the London market, is not charitable, since it is in effect a gift to the company absolutely (*q*). A devise of lands upon trust to distribute the rents on certain days amongst several specified families according to their circumstances, as in the opinion of the trustees they might need assistance, has been held not to be a devise for a charitable purpose, but a trust for the families named, and good for so long as the rule against perpetuities would allow. How long that was, was not decided (*r*).]

Liley *v.* Hey.

In Ommanney *v.* Butcher (*s*) the testatrix declared as to certain money that she wished it to be given in private charity. Sir T. Plumer, M. R., held that the words did not create a trust which could be carried into effect. The charities recognized by the court were public in their nature, and such as the court could see to the execution of; but here the disposition was confined to private charity. Assisting individuals in distress was private charity; but such a purpose could not be executed by the court or the crown (*t*). [So a gift to found a private * museum (*u*), or in aid of a subscription library (*x*), or of a friendly society (*y*), or for the benefit of an orphan school kept by an individual substantially at his own expense (*z*), is not charitable.

Bequests to be given in private charity bad.

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A gift to an institution having a charitable object specified in the gift, or to the governors of such an institution (*a*), or to the minister of a chapel *and his successors* (*b*), will generally be deemed a gift for

(*n*) Morice *v.* Bishop of Durham, 9 Ves. 399, 10 Ves. 532; *contra* by the law of Scotland, Millar *v.* Rowan, 5 Cl. & Fin. 99.

(*o*) Kendall *v.* Granger, 5 Beav. 300.

(*p*) Heath *v.* Chapman, 2 Drew. 417. The trust was for masses "and other pious uses:" and it was further held that even if the latter could, standing alone, be supported as "such pious uses as were charitable," yet they were vitiated by being connected with the direction for masses.

(*q*) Att.-Gen. *v.* Haberdashers' Company, 1 My. & K. 420.

(*r*) Liley *v.* Hey, 1 Hare, 580. But see Gillam *v.* Taylor, L. R. 16 Eq. 581; and further as to gifts to poor relations, post, 213.]

(*s*) T. & R. 260. [And see Nash *v.* Morley, 5 Beav. 177.

(*t*) Lord Langdale, M. R., thought a bequest "for the relief of domestic distress, and assisting indigent but deserving individuals," a good charitable bequest. Kendall *v.* Granger, 5 Beav. 303.

(*u*) Thomson *v.* Shakespear, Johns. 612, 1 D. F. & J. 399.

(*x*) Carne *v.* Long, 29 L. J. ch. 503, 2 D. F. & J. 75.

(*y*) Re Clark's Trust, 1 Ch. D. 497; also Re Dutton, 4 Ex. D. 54 (Mechanics' Institute).

(*z*) Clark *v.* Taylor, 1 Drew. 642.

(*a*) Per Lord St. Leonards, Incorporated Society *v.* Richards, 1 D. & War. 294; and per Lord Hatherley, Att.-Gen. *v.* Sidney Sussex Coll., L. R. 4 Ch. 730; Re Maguire, L. R. 9 Eq. 632.

(*b*) Grieves *v.* Case, 4 B. C. C. 67, 2 Cox, 301, 1 Ves. Jr. 548; Thornber *v.* Wilson, 3 Drew. 245, 4 Drew. 351. See also Smart *v.* Prujean, 6 Ves. 567; and Cocks *v.* Manners, L. R. 12 Eq. 574. In the last case the gift to the convent, though held not charitable, was still treated as a trust for the purposes of the institution; not involving a perpetuity, but capable of being performed by the existing members spending the gift as they pleased (as to which, see Brown *v.* Dale, 9 Ch. D. 78: and cf. Thomson *v.* Shakespear, Carne *v.* Long, Re Clark's Trust, supra, which were void for perpetuity). In Aston *v.* Wood, L. R. 6 Eq. 419, a legacy "to the trustees of Zion Chapel, to be apportioned according to statement appending," no such statement forthcoming, was held to fall into the residue. The express reference to a trust to be declared appears to have rebutted any presumption in favor of the chapel.]

the specified charitable object or chapel.] But a gift will not be deemed charitable merely from the nature of the professional character of the devisee, or on account of the testator having accompanied the gift with an expression of his expectation, that the devisee would discharge the duties incidental to such character, however intimately those duties may concern the welfare of others, as this merely denotes the motive of the gift, and not that the devisee is to take otherwise than beneficially. Thus, in Doe d. Phillips *v.* Aldridge (*c*), where the devise was to the Rev. A. A., a dissenting minister (described as preacher at the meeting-house of L.) for life, the testator adding, "And I further expect that he will, with the help of God, after my decease, without delay, settle and forward everything in his power, to promote and carry on the work of God at L. aforesaid, both in his lifetime and after his decease;" it was contended, that the devise to A. A. was void, as charitable, being not in his individual capacity, but in the character of preacher, and in confidence that he would discharge the duties of that station. But the court held that it was not charitable, and thought the point too clear for discussion.

Bequest not necessarily charitable on account of professional or official character of legatee.

*Again, in Doe d. Toone *v.* Copestake (*d*), where an estate *213 was devised to trustees, to be applied by them and the officiating minister of the congregation or assembly of the people called Methodists assembling at L., and as they should from time to time think fit to apply the same; it was held, that the devise was not charitable, the application being left to the trustees still more indefinitely than it was in Bishop of Durham *v.* Morice, [and it was not argued that the trust was restricted to charitable purposes merely because the Methodist minister was appointed a trustee (*e*).[1]

(*c*) 4 T. R. 264. (*d*) 6 East, 328.

[(*e*) In the two cases last stated it was only decided that the devisees could recover at law the property devised, the trust (if any) not being charitable; whether they took beneficially, or whether as trustees for the heir-at-law, the trust being void for uncertainty, it was not within the province of the court to determine.

1 Where a bequest is for a purpose of liberality or benevolence, or private charity not amounting to a "charitable use," and is of a nature so general and undefined as to be incapable of being executed by the court, it fails altogether, and the heir-at-law or the next of kin, as the case may be, becomes entitled to the property, as in the case of bequests void by the statute. See Ellis *v.* Selby, 1 Mylne & C. 286; 2 Story, Eq. Jur. § 1156; Baptist Assoc. *v.* Hart, 4 Wheat. 1, 33, 39, 43–45; Owens *v.* Missionary Society, 4 Kern. 380; Price *v.* Maxwell, 28 Penn. St. 23. In Delaware, a devise of money arising from land, to the trustees of a church, for the education of poor children of the members of such church is void. State *v.* Wiltbank, 2 Harrington, 18; State *v.* Walter, ib. 151. A direction in a will, that the executors thereof should distribute $2,000 among needy, poor, and respectable widows, and pay $1,000 towards the support of the Roman Catholic Chapel, in a certain place, has been held in Virginia too vague to be carried into effect, the statute of Elizabeth not being in force in that state. Gallego *v.* Att.-Gen., 3 Leigh, 450. So of a bequest "to the Baptist Association, that for ordinary meets at Philadelphia annually; to be a perpetual fund for the education of youths of the Baptist denomination," &c., the association not being a corporate body. Baptist Assoc. *v.* Hart, 4 Wheat. 1. A similar decision was made in Connecticut, respecting a devise of a farm to "the Yearly Meeting of people called Quakers, in aid of the charitable fund of the boarding school established by the Friends of Providence." Greene *v.* Dennis, 6 Conn. 293. See Wilderman *v.* Baltimore, 8 Md. 551. A devise to the trustees of Brookhaven, a corporate body, capable of taking and holding land, in trust to pay the rents and profits to

Legacy may be charitable though payable at once to individuals.

A legacy payable once for all may be charitable as well as one given for the creation of a perpetual trust; as, a legacy to the widows and orphans of a named place (*f*), or to six honest and sober clergymen that are not provided with a living of 40*l.* (*g*); which could not in their nature have proceeded from motives of personal bounty to particular individuals.

A legacy to "poor relations" is not charitable;

But a legacy payable once for all to poor relations (which includes none more remote than the statutory next of kin (*h*)) is not charitable (*i*). If it were, only such as were actually poor in contemplation of the court could take (*k*); there might be many comparatively poor relations, yet none of them would take, and the legacy would be applied *cy-près*, or (if the doctrine of *cy-près* were thought inapplicable (*l*)) would wholly fail; either of which results would probably be a surprise to a testator who had intended to benefit his "poor relations."

*214 * But the gift of a fund for the perpetual benefit of poor relations has frequently been supported as a charitable trust (*m*).

unless intended as a perpetual provision.

If otherwise it would be void for uncertainty, since it would be impossible to confine a trust for relations whensoever existing to next of kin by statute. It would also be void as

(*f*) Att.-Gen. *v.* Comber, 2 S. & St. 93; see also Russell *v.* Kellett, 3 Sm. & Gif. 264.

(*g*) Att.-Gen. *v.* Glegg, Amb. 584. But see Thomas *v.* Howell, L. R. 18 Eq. 198, 209, where it is said that the legacy to sixty poor clergymen in Att.-Gen. *v.* Baxter (stated ante, p. 206), was held not to be charitable. Lord Hardwicke's note of the decision is that it was good, "as if a legacy of those sixty individuals" (7 Ves. 176); but that appears to be in answer to the argument (1 Vern. 219) that "to suffer them to take by such a devise was almost to make a corporation of them, and would keep them in a perpetual schism." Elsewhere (1 Ves. 536) he says of the case, "The court held the *charitable use* was not contrary to law." If Baxter had declined to select, would the gift have been void for uncertainty?

(*h*) See Ch. XXIX.

(*i*) Brunsden *v.* Woolredge, Amb. 507, where by will dated 1757 (see R. L. 1764, A fo. 536), land was given to poor relations, which, if a charity, would have been void by 36 Geo. 2, c. 9 (1736). See also Widmore *v.* Woodroffe, Amb. 636 (stated post, Chap. XXIX.), where the L. C.'s arguments from uncertainty and from degrees of poverty assume that it was not a charity. (*k*) Att.-Gen. *v.* Duke of Northumberland, 7 Ch. D. 745.

(*l*) As to *cy-près*, see below.

(*m*) Isaac *v.* Defriez, 17 Ves. 373, n.; White *v.* White, 7 Ves. 423; Att.-Gen. *v.* Price, 17 Ves. 371; Gillam *v.* Taylor, L. R. 16 Eq. 581; Att.-Gen. *v.* Duke of Northumberland, 7 Ch. D. 745. See also this distinction made in Brunsden *v.* Woolredge, Amb. 508.

the regular minister, or other ruling officer, for the time being, of a Baptist Church, which was not, nor were its officers, a corporate body, was held void at law, in Jackson *v.* Hammond, 2 Caines's Cas. 337. So a bequest to an unincorporated female society in another state, composed in part of married women, for charitable purposes, is void. Washburn *v.* Sewall, 9 Met. 280; Bartlett *v.* Nye, 4 Met. 378. A devise to an association for religious purposes, unincorporated at the testator's death, but since incorporated, is good in Pennsylvania. Zimmerman *v.* Anders, 6 Watts & S. 218. A testator in South Carolina, by will duly executed, bequeathed "unto the Methodist Church at Darlington Court House" (an unincorporated society), "and the preachers of said church, and the Pedee Mission, $8,000, to be selected by the trustees of said church out of my papers, the said $8,000 to be put at interest forever, and the interest to be paid annually, and to be distributed by said trustees, according to the several necessities of said church, preachers, and mission;" and it was held that the bequest was valid. Gibson *v.* M'Call, 1 Richardson, 174. See Witman *v.* Lex, 17 Serg. & R. 88. In Gass *v.* Wilhite, 2 Dana, 170, it was held that the legislature of the state of Kentucky, in which state the constitution guarantees freedom and equality to all religions, cannot denounce as a superstitious use any use or trust made for the benefit of any religious society; and that the trust and use created by the "covenant," or article of agreement, of the members of the society called Shakers are valid in law.

a perpetuity, though this is not a recognized ground for varying the construction.

And in the case of a simple legacy the context may show that charity and not kinship is the prevailing consideration; as seems to have been the case in Mahon *v.* Savage (*n*), where the bequest was to "poor relations or such other objects of charity as the testator should mention," and Lord Redesdale held it to be a charitable bequest and not transmissible to representatives. Mahon *v.* Savage.

The court does not take upon itself to frame schemes for the disposal of money for any other than charitable purposes. All moneys, therefore, not bequeathed in charity must have some definite object, or must devolve as undisposed of (*o*), except in cases where it may be held that the trustee takes absolutely. The general consideration of such gifts will be reserved for a subsequent chapter, as more properly falling under the head of gifts void for uncertainty; but it must be here noticed, that where the bequest is for charitable purposes, and also for purposes of an indefinite nature not charitable, and no apportionment of the bequest is made by the will, so that the whole might be applied for either purpose, the whole bequest is void. A distinction not now recognized was indeed formerly taken, that such a bequest was good, if there were trustees named, to whose discretion the testator had committed the carrying out of his intentions, and with whom, therefore, the court would not interfere (*p*). Such a distinction will be found inconsistent with the decisions presently noticed; and it seems now established, that the court will only recognize the validity of trusts which it can either itself execute or can control when in process of being executed by trustees (*q*). All indefinite trusts void unless for charity. Bequests for charitable and other indefinite purposes void altogether.

Thus,] in Vesey *v.* Jamson (*r*), where a testator gave the residue * of his estate to his executors, upon trust to apply and *215 dispose of the same in or towards such charitable uses or purposes, person or persons, or otherwise, as he might by any codicil, or by memorandum in his own handwriting, appoint, and as the laws of the land would admit of; and, in default, upon trust to pay and apply the same in or towards such charitable or public purposes, as the laws of the land would admit of; or to any person or persons, and in such shares, manner and form as his (the testator's) executors, or the survivor of them, or the executors or administrators of such survivor, should in their or his discretion, will, and pleasure, think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit. Sir J. Leach, V. C., observed, that

(*n*) 1 Sch. & L. 111.
(*o*) Morice *v.* Bishop of Durham, 9 Ves. 399, 10 Ves. 522; James *v.* Allen, 3 Mer. 17.
(*p*) Waldo *v.* Cayley, 16 Ves. 206; Horde *v.* Earl of Suffolk, 2 My. & K. 59; the latter case, though decided after Vesey *v.* Jamson, did not notice it; and see the observations of Cottenham, C., 1 My. & Cr. 293.
(*q*) Nash *v.* Morley, 5 Beav. 182.] (*r*) 1 S. & St. 69.

the testator had not fixed upon any part of the property a trust for a charitable use, and the court could not, therefore, devote any part of it to charity; he had given it to the trustees expressly upon trust, and they could not, therefore, hold it for their own benefit; the purposes of the trust being so general and undefined, they must fail altogether, and the next of kin become entitled.

So, in Ellis *v.* Selby (*s*), where a bequest for such charitable *or other* purposes as the trustees and the survivors or survivor of them, his executors or administrators, should think fit, without being accountable to any person or persons whomsoever for such their disposition thereof, was held not to be a bequest absolutely devoting the property to charity; Sir L. Shadwell, V. C., said, "Here the testator has expressly drawn a distinction between charitable purposes and other purposes; and I must, therefore, take it that he meant either charitable purposes or purposes not charitable; but whether the purposes not charitable were to be purposes which might give a beneficial interest to the trustees, or some other purposes, the testator has nowhere made clear. It is uncertain whether the trust was to be for charitable purposes or for purposes not charitable. Then it is nothing more than if he had given an estate to A. or to B., which would be void; and my opinion is, that the gift of this portion of the personal estate is void for uncertainty."

So in Williams *v.* Kershaw (*t*), the testator directed his trustees to apply the residue of his personal estate to and for such benevolent, charitable and religious purposes as they in their discretion should
*216 think most advantageous and beneficial. It was *decided by Lord Cottenham, when M. R., that the gift was void for uncertainty.

[And in Kendall *v.* Granger (*u*), where the trustees were directed to dispose of the residue for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, in such mode and proportions as their own discretion might suggest, irresponsible to any person or persons whatsoever; Lord Langdale, M. R., decided that the gift was void for uncertainty. He said that to make the bequest valid, it must be obligatory on the trustees to apply the *whole* (*x*) of it in charity; it was not a question whether the trustees *might* apply the fund to a charitable purpose, but whether by the words of the will they were bound to do so. To make the bequest valid it must be obligatory on them; he thought there were older cases, showing that where charitable purposes were mentioned, the court would have taken care that the application should have been made to those purposes, but he was bound by the later decisions.

(*s*) 7 Sim. 352, [affirmed 1 My. & Cr. 286.]
[(*t*) 5 L. J. N. S. Ch. 84,] 5 Cl. & Fin. 111.
(*u*) 5 Beav. 303. See also Thomson *v.* Shakespear, John. 612, 1 D. F. & J. 399; Re Jarman's Estate, 8 Ch. D. 584. (*x*) See James *v.* Allen, 3 Mer. 17.

Nor will the addition of an ascertained object to the charitable and the indefinite objects save the trust: for consistently with the will the whole might still be applied to the indefinite object. Thus, in Down *v.* Worrall (*y*), where the trust was for charitable *or pious* uses at the discretion of the trustees or otherwise for the benefit of the testator's sister and her children; one of the trustees died while part of the fund was still unappointed (*z*), and Sir J. Leach, M. R., held that the unappointed part was undisposed of and belonged to the next of kin.

Such being the rule, the terms of the trust will first be closely examined to see whether, though not the most correct or most appropriate for describing only a charitable object, they ought not in fair construction to be so confined. Thus, in Dolan *v.* Macdermot (*a*), where the trust was to lay out "in such charities and *other public* purposes as lawfully might be in the parish of T.," as the trustees should think proper, it was held that the words "other public purposes" meant purposes *ejusdem generis*, *i.e.* charitable, and that they were used only as filling up a description of purposes which, although charitable within the stat. Eliz. (and in * that sense included in "charities") were not *217 within the popular meaning of the word "charities."

Charity held the sole purpose, notwithstanding doubtful expressions.

Again, in Pocock *v.* Att.-Gen. (*b*), where a testator, after giving several charitable legacies out of a particular fund, directed the residue of it "to be given by his executors to such charitable institutions as he should by any future codicil give the same, and in default of any such gift, then to be distributed by his executors at their discretion;" the testator made no further codicil, and it was held that the direction in favor of charity ran through the whole sentence: that the testator intended to choose the charitable institutions himself, but that if he failed to do so his executors were to choose them.

The foregoing cases, where the gifts were held void for uncertainty, must be distinguished from those where the bequest is for a charitable purpose, and for another ascertained object; for here, even though the amount to be devoted to each object be not specified, and the apportionment be left to the discretion of trustees, yet the trust is such that the court can control the execution of it so far as to see that the trustees appropriate no part of the benefit to themselves; whereas in the former cases the non-charitable object (which may absorb the whole) is so indefinite as to be wholly beyond the control of

Distinction where the gift is for charitable and other *ascertained* objects, though apportionment left to trustees.

(*y*) 1 My. & K. 561. That "pious" uses are not charitable, see Heath *v.* Chapman, 2 Drew. 417.

(*z*) No question was raised regarding the appointed part, but according to the cases, the bequest was void as to the whole.

(*a*) L. R. 5 Eq. 60, 3 Ch. 676. Consult Ellis *v.* Selby as to the effect of omitting the word "public."

(*b*) 3 Ch. D. 342. Cf. Wheeler *v.* Sheer, Mos. 288, cit. 1 Mer. 91, 97.]

the court; and to hold that such a gift is valid, would be in effect to hold the trustees entitled for their own benefit.[1]

Trustees declining to apportion, donees take equally.

The objects among whom the trustees are to apportion the testator's bounty being sufficiently definite, are not to be disappointed by the trustees refusing to exercise their power or dying before doing so. In such event, the court will divide the fund equally among the several objects, upon the principle that equality is equity.

Thus, in Att.-Gen. *v.* Doyley (*c*), where a testator directed his trustees and the survivor, and the heirs of such survivor, to dispose of his property to such of his relations of his mother's side as were most deserving, *and* for such charitable purposes as they should also think most proper: one of the trustees declined to act, and Sir J. Jekyll, M. R., directed that one half of the property should go to the testator's relatives on the mother's side, and the other half to charitable uses.

So, in Salusbury *v.* Denton (*d*), where a testator bequeathed a *218 fund to be at the disposal of his widow by her will, therewith * to apply a part to the foundation of a charity school or such other charitable endowment for the poor of O. as she might prefer, and under such restrictions as she might prescribe; and the remainder to be at her disposal among the testator's relatives as she might direct: the widow having died without exercising her power of apportioning the fund, it was held by Sir W. P. Wood, V. C., that the gift was not void, but that the court would divide the fund in equal moieties.

In Adnam *v.* Cole (*e*), where a testator bequeathed the residue of his personal estate (consisting partly of leasehold property) to trustees upon trust to lay out the same in building such a monument to his memory as they should think fit, and in building an organ gallery in the parish church, it was held by Lord Langdale, M. R., that the trustees had not rightly exercised their discretion in applying the whole to the monument, and he referred it to the Master to ascertain in what proportion the residue ought to be divided between the two objects.

This case, it will be observed, differs from the preceding, in the mode of division adopted by the court; the specific nature of the objects enabling the court to apportion the fund between them without resorting to the expedient of cutting the knot by equal division. But the case is equally an authority against holding the bequest void for uncertainty (*f*).

(*c*) 4 Vin. Abr. 485, 2 Eq. Cas. Ab. 194, 7 Ves. 58, n. (*d*) 3 K. & J. 529.

(*e*) 6 Beav. 363. The trust for building the organ gallery failed of course under 9 Geo. 2, c. 36, so far as it depended on the leaseholds.

(*f*) In like manner, if there are several charitable objects, and the share of each is undefined, the court will direct inquiries to ascertain the proportion due to each, Re Rigley's Trust, 36 L. J. Ch. 147; or, if that, from the nature of the gift, is impracticable, will make equal division among the charities, Hoare *v.* Osborne, L. R. 1 Eq. 585.

1 Where a testator gives to A. an estate or rents, in trust to make certain payments to charities, and refers to the matter of a surplus, and does not specifically bequeath the same, if there should be an increase in the profits of the estate, A. will be entitled, after

And if, instead of a trust for a charitable *and* another definite object, there be a trust for a charitable *or* another definite object, as trustees shall appoint, there would be an implied trust for both in default of appointment (*g*).]

Policy of early times in regard to charity.

The policy of early times strongly favored gifts, even of land, to charitable purposes. Thus, not only was no restraint imposed on such dispositions by the early statutes of wills, but the act of 43 Eliz. c. 4,[1] as construed by the courts, tended greatly to facilitate gifts of this nature, such act having been held to authorize testamentary appointments to corporations for charitable uses (*h*), and even to enlarge the devising capacity of testators, by rendering valid devises to those uses by a tenant in tail (*i*); * and also by a copyholder, without a previous surrender to the use of the will (*k*), though it was admitted that the statute did not extend to the removal of personal disabilities, such as infancy, lunacy, and the like (*l*). *219

To the same policy we may ascribe that rule of construction presently considered, by the effect of which property once devoted to charity was never allowed to be diverted into any other channel, by the failure or uncertainty of the particular objects. At the commencement of the eighteenth century, however, the tide of public opinion appears to have

(*g*) Brown *v.* Higgs, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; Fordyce *v.* Bridges, 2 Phill. 497. But see Thompson *v.* Thompson, 1 Coll. 399, 8 Jur. 839.

[(*h*) Flood's Case, Hob. 136. But see 1 D. & War. 303, 4, 5.]

(*i*) Att.-Gen. *v.* Rye, 2 Vern. 453; Att.-Gen. *v.* Burdett, ib. 755. See also 3 Ch. Rep. 154.

(*k*) Rivett's case, Moore, 890, pl. 1253, 3 Ch. Rep. 220.

(*l*) See Collinson's case, Hob. 136.

making the specific payments required by the will, to take the surplus. Beverley *v.* Att.-Gen., 6 H. L. Cas. 310; Att.-Gen. *v.* Windsor, 8 H. L. Cas. 405. See Att.-Gen. *v.* Trinity Church, 9 Allen, 422.

[1] The recent publications of the Commissioners of the Public Records in England establish in the most satisfactory and conclusive manner that cases of charities, where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to and acted upon and enforced in chancery, long before the statute of 43 Elizabeth. And since the case of Vidal *v.* Philadelphia, 2 How. 128, it may be regarded as settled that chancery has an original and necessary jurisdiction in respect to bequests and devises in trust to persons competent to take for charitable purposes, when the general object of the charity is specific and certain, and not contrary to any positive rule of law. See Wade *v.* Amer. Colonization Soc., 7 Smed. & M. 695; Potter *v.* Chapin, 6 Paige, 639; Moore *v.* Moore, 4 Dana, 357; 2 Story, Eq. Jur. § 1142, et seq.; Dashiell *v.* Att.-Gen., 5 Harr. & J. 392; Gallego *v.* Att-Gen., 3 Leigh, 450; Janey *v.* Latane, 4 Leigh, 327; Baptist Association *v.* Hart, 4 Wheat. 1; Vidal *v.* Mayor of Philadelphia, 2 How. 128. The statute 43 Eliz. c. 4, was repealed in Virginia in 1792. Gallego *v.* Att.-Gen., 3 Leigh, 450; Janey *v.* Latane, 4 Leigh, 327. This statute, 43 Eliz. c. 4, forms, in principle and substance, a part of the law of Massachusetts. Going *v.* Emery, 16 Pick. 107; Bartlett *v.* King, 12 Mass. 537; Sanderson *v.* White, 18 Pick. 328; Burbank *v.* Whitney, 24 Pick. 146; Bartlett *v.* Nye, 4 Met. 378; Washburn *v.* Sewall, 9 Met. 280; Winslow *v.* Cummings, 3 Cush. 358. So of Pennsylvania, Witman *v* Lex, 17 Serg. & R. 88; Mayor, &c. of Philadelphia *v.* Elliott, 3 Rawle, 170; Zimmerman *v.* Anders, 6 Serg. & W. 218. But it has probably not been re-enacted in terms in any of the United States. It is not in force in Maryland. Dashiell *v.* Att.-Gen., 5 Harr. & J. 392; Wilderman *v.* Baltimore, 8 Md. 551. And it has been abrogated in New York. Andrew *v.* New York Bible Soc., 4 Sandf. 156; Ayres *v.* Methodist Church, 3 Sandf. 351; Owens *v.* Missionary Soc., 4 Kern. 380. Whether it is in force in Mississippi, *quære?* Wade *v.* Amer. Colonization Society, 7 Smed. & M. 663.

flowed in an opposite direction, and the legislature deemed it necessary to impose further restrictions on gifts to charitable objects; from the nature of which it may be presumed that the practice of disposing by will of lands to charity had antecedently prevailed to such an extent as to threaten public inconvenience. It appears to have been considered, that this disposition would be sufficiently counteracted by preventing persons from aliening more of their lands than they chose to part with in their own lifetime; the supposition evidently being, that men were in little danger of being perniciously generous at the sacrifice of their own personal enjoyment, and when uninfluenced by the near prospect of death. Accordingly, the stat. of 9 Geo. 2, c. 36 (usually, but rather inaccurately, called the Statute of Mortmain[1]), enacted that, from and after 24th June, 1736, no hereditaments, or personal estate (*m*) to be laid out in the purchase of hereditaments, should be given, conveyed, or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable uses whatsoever (*n*), unless such gift or settlement of hereditaments or personal estate (other than stocks in the public funds) be made by deed indented (*o*), sealed and delivered in the presence of two credible witnesses (*p*), twelve calendar months before the death of the donor, including *the days of the execution and death, and enrolled (*r*) in Chancery within six calendar months after the execution, and unless such stocks be transferred six calendar months before the death, and unless the same be made to take effect in possession (*s*) for the charitable use, and be without any power of revocation, reservation (*t*), trust, &c. for the benefit of the donor, or of any persons claiming under him.

Stat. 9 Geo. 2, c. 36.

No hereditaments, or personal estate to be laid out in the purchase of hereditaments, to be disposed of or charged for any charitable use, other than by indenture enrolled in Chancery, &c.

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[(*m*) A voluntary covenant to pay a sum to a charity after covenantor's death is void under this act, so far as it would affect chattel real assets, Jeffries *v.* Alexander, 8 H. L. Ca. 594, and see S. C. as to validity of "devices to evade the statute," and as to the object of the act; and Fox *v.* Lownds, L. R. 19 Eq. 453. As to subscription fund, and as to parol declaration of trust, see Girdlestone *v.* Creed, 10 Hare, 480.

(*n*) A conveyance of land to church-wardens and overseers of a parish to build a poor house, under 59 Geo. 3, c. 12, is not within the act. Burnaby *v.* Barsby, 4 H. & N. 690.

(*o*) The deed need no longer be indented, 24 Vict. c. 9, s. 1.

(*p*) In Wickham *v.* M. of Bath, L. R. 1 Eq. 17, it was held that the witnesses must not only be present, but subscribe the attestation clause.

(*r*) As to copyholds and cases where the conveyance to trustees is by one deed, and the declaration of trust by another, see 24 Vict. c. 9, ss. 2, 4; 25 Vict. c. 17, ss. 1, 3, 4. A deed conveying to a charity land already in mortmain does not require enrolment. Ashton *v.* Jones, 28 Beav. 460.

(*s*) I. e., giving the right to possession. Fisher *v.* Brierley, 10 H. L. Ca. 159. As to actual retention of possession by the donor, not expressly authorized by the deed, furnishing evidence of a secret reservation, see S. C. and Way *v.* East, 2 Drew. 44. A lease for years to take effect in possession within one year is good, 26 & 27 Vict. c. 106.]

(*t*) This does not preclude the donor from reserving to himself the power of regulating the charity. 2 Cox, 301. See also 1 Mer. 327. [And by 24 Vict. c. 9, s. 1, certain restrictive covenants and other provisions are now permissible.

1 The Mortmain Statutes were never in force in Wisconsin. Dodge *v.* Williams, 46 Wis. 70.

[The 2d section provides, that purchases for valuable consideration shall not be avoided by the death of the grantor within the twelve months, leaving, however, such purchases subject to the other conditions imposed by the act (*u*). The 3d section declares all gifts, conveyances, settlements, of any hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any hereditaments, &c., not perfected according to the act, void. The 4th section excepts from the operation of the act the two universities of Oxford and Cambridge, and the colleges thereof, and the scholars upon the foundation of the colleges of Eton, Winchester, or Westminster. The 5th section puts a restriction, since removed (*x*), on the number of advowsons to be held by any such college. The 6th section excepts Scotland from the act.] Exception.

The act extends to leaseholds and money secured on mortgage, whether in fee or for years (*y*), [or by deposit of title-deeds (*z*), and to arrears of interest on any such mortgage (*a*)]: and even to judgment debts, so far as they operate as a charge on real estate (*b*). And where a testator had bequeathed his personal * estate upon trusts for a charity, and afterwards contracted to sell real estate, it was held that his lien on the property for the purchase-money was "an interest in land" within the meaning of the statute, and accordingly could not pass with the rest of his personal estate (*c*). What species of property within the statute. *221

Again, where A., being entitled to certain sums of money which were to be raised by the execution of a trust for sale of real estate, bequeathed all his personal estate to B., who survived A., and afterwards died, having bequeathed the residue of her personal estate to charity; it was contended, that, as the period for raising the sums in question had arrived in the lifetime of B., (though they were not actually raised until after her decease), it was a breach of duty in the trustees not to raise them, and this neglect ought not to invalidate the gift, especially as the charities had no right to elect to take it as land; but Sir J. Leach, V. C., held, that these sums, constituting an interest in land at the testatrix's death, could not legally be given to the charities (*d*). [And it makes no difference, as sometimes supposed (*e*), whether B. (in the above case) was alone entitled to the whole proceeds of the land directed to be sold, and entitled, therefore, Sum charged on land for testator, and not yet raised.

(*u*) On this section see Price *v.* Hathaway, 6 Mad. 304; Milbank *v.* Lambert, 28 Beav. 236; and 9 Geo. 4, c. 85; 24 Vict. c. 9, ss. 1, 3, 4; 25 Vict. c. 17, ss. 2, 5; 27 Vict. c. 13, s. 4; 29 & 30 Vict. c. 57. (*x*) 45 Geo. 3, c. 101.]

(*y*) Att.-Gen. *v.* Graves, Amb. 155; Att.-Gen. *v.* Caldwell, ib. 635; Att.-Gen. *v.* Meyrick, 2 Ves. 44; Att.-Gen. *v.* Earl of Winchelsea, 3 B. C. C. 373; [S. C. nom. Att.-Gen. *v.* Hurst, 2 Cox, 364;] White *v.* Evans. 4 Ves. 21; Currie *v.* Pye, 17 Ves. 462. [See s. 3 of the Act, and Toppin *v.* Lomas, 16 C. B. 159.]

(*z*) Alexander *v.* Brame, 30 Beav. 153; Lucas *v.* Jones, L. R. 4 Eq. 73.

(*a*) Ib.

(*b*) Collinson *v.* Pater, 2 R. & My. 344. [And see Jeffries *v.* Alexander, 8 H. L. Ca. 594.]

(*c*) Harrison *v.* Harrison, 1 R. & My. 71. [See also Shepheard *v.* Beetham, 6 Ch. D. 597 (lien for premium payable on grant of lease).] (*d*) Att.-Gen. *v.* Harley, 5 Mad. 321.

[(*e*) Marsh *v.* Att.-Gen., 2 J. & H. 61; Lucas *v.* Jones, L. R. 4 Eq. 73.

to take the land unconverted; or whether he was entitled only to a share of the proceeds, or to a sum payable thereout. In either case, if the real estate has not in fact been sold before B.'s death, his interest is then an interest in land and within the statute (*f*). "It may very well be," said Lord Cairns, "that no one of the several persons entitled to the proceeds could insist upon entering on the land, or taking the land, or enjoying the land *quà* land, but the interest of each one of them is, in my opinion, an interest in land" (*g*).]

If the pecuniary gift is partly charged upon land and partly personal, it will be void *pro tanto*. And therefore, where a testator devised a freehold estate to be sold, and the produce applied, together with so much of the personal estate as should be necessary, to secure an annuity of 30*l*. for the life of A., and * after his death, the principal to go to a charity; the freehold estate not being sufficient to raise the money, it was held that the bequest was good as to the residue, which was to be raised out of the personal estate (*f*).

Legacy, partly real and partly personal, void *pro tanto*.

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[By the older authorities the act was held to] extend to every description of property savoring of the realty; as, the privilege by a grant from the crown of laying chains in the river Thames for mooring ships (*g*); canal shares (*h*); and money secured by assignment of turnpike tolls (*i*), or of the poor's rate and county rates (*k*). [These authorities were followed in comparatively recent times by similar decisions regarding money secured by mortgage of the rates imposed on the occupiers of houses by improvement commissioners (*l*), or by mortgage of railway (*m*), harbor (*n*), dock (*o*), or canal (*p*), tolls all which are commonly called debentures (*q*). All these were held within the plain words of the act, "charges or incumbrances affecting hereditaments."

Property savoring of realty.

Early decisions respecting canal shares and debentures.

But "the current of modern decisions is against the older cases, and while there is to be discovered an inclination formerly to carry the pro-

(*f*) Conversely where a testator, having a reversionary interest in personalty, which during the life of the tenant for life (who survived him) was subject to a power of investment in real securities, but which was never so invested, bequeathed it to a charity, the bequest was held valid. The actual condition of the fund when it fell in was the criterion. Re Beaumont's Trusts, 32 Beav. 191.

(*g*) Brook *v.* Badley, L. R. 3 Ch. 672. See also Aspinall *v.* Bourne, 29 Beav. 462; Cadbury *v.* Smith, L. R. 9 Eq. 43. Thus Shadbolt *v.* Thorton, 17 Sim. 49, is overruled.]

(*f*) Waite *v.* Wehh, 6 Mad. 71. (*g*) Negus *v.* Coulter, Amb. 367.

(*h*) Howse *v.* Chapman, 4 Ves. 542; [Tomlinson *v.* Tomlinson, 9 Beav. 459.]

(*i*) Knapp *v.* Williams, 4 Ves. 430, n.; [Ashton *v.* Lord Langdale, 4 De G. & S. 402.]

(*k*) Finch *v.* Squire, 10 Ves. 41.

[(*l*) Thornton *v.* Kempson, Kay, 592; Chandler *v.* Howell, 4 Ch. D. 651: see also Howse *v.* Chapman, 4 Ves. 542 (where, however, the form of security is not given); Toppin *v.* Lomas, 16 C. B. 159 (Westminster Improvement bonds having the benefit of a general mortgage of lands); Cluff *v.* Cluff, 2 Ch. D. 222 (consol. stock of Metrop. Bd. of Works).

(*m*) Ashton *v.* Lord Langdale, supra. (*n*) Ion *v.* Ashton, 28 Beav. 379.

(*o*) Alexander *v.* Brame, 30 Beav. 153. (*p*) Re Langham's Trust, 10 Hare, 446.

(*q*) If the debenture was in form a bond or promissory note for money borrowed on the credit of the undertaking, but not by assignment of the tolls or of the undertaking, it was held not within the act. Myers *v.* Perigal, 16 Sim. 533; and per Wood, V. C., Re Langham's Trust, supra; and Bunting *v.* Marriott, 19 Beav. 163 (Tothill Fields Improvement).

visions of the act beyond the legislature, the tendency of modern decisions has been the other way" (*r*). And it is now settled that shares in all joint-stock companies or partnerships, whether incorporated or not (*s*), having power to hold land for trading purposes (*t*), where such land is vested in the corporation or in individuals (as the case may be), in trust only to use the land for the purpose of profit as part of the stock in trade, even though the undertaking be based entirely upon the holding of land, as in the cases of railway, dock, * market, gas, canal, mining, *223 and land-jobbing companies, and also, of course, where the holding of land is only incidental to the business, as in the case of banking and assurance companies, are exempted from the operation of the act (*u*). The exemption does not depend on the clause frequently inserted in acts and deeds of settlement declaring shares to be personal estate and transmissible as such (*x*), nor on the nature of the business (*y*), but on the nature of the individual shareholder's interest. "The true way to test it," said Lord St. Leonards, in Myers *v.* Perigal (*z*), "would be to assume that there is real estate in the company vested in the proper persons under the provisions of the partnership deed. Could any of the partners enter upon the lands, or claim any portion of the real estate for his private purposes? Or, if there was a house upon the land, could any two or more of the members enter upon the occupation of such house? I apprehend they clearly could not; they would have no right to step upon the land; their whole interest in the property of the company is with reference to the shares bought, which represent their proportions of the profits. No incumbrancer of an individual member of the company would have any such right. In short, a member has no higher interest in the real estate of the company than that of an ordinary partner seeking his share of the profits, out of whatever property those profits might be found to have resulted." And the fact that by the dissolution of a company the shareholders may become specifically interested in the real property is to be considered as a remote event, and no more avoiding a bequest of a share to a charity than a like bequest of a simple-contract debt would be avoided, because

Shares in Joint Stock Companies not within the act.

(*r*) Per Lord St. Leonards, 2 D. M. & G. 619.

(*s*) As to companies or partnerships not incorporated, see Myers *v.* Perigal, 11 C. B. 90, 2 D. M. & G. 599; Watson *v.* Spratley, 10 Exch. 222 (case on the Stat. of Frauds); Hayter *v.* Tucker, 4 K. & J. 243; and the authorities cited in those cases.

(*t*) See 10 & 11 Vict. c. 78.

[(*u*) Att.-Gen. *v.* Giles, 5 L. J. N. S. Ch. 44; Sparling *v.* Parker, 9 Beav. 450; Walker *v.* Milne, 11 Beav. 507; Thompson *v.* Thompson, 1 Coll. 381; Hilton *v.* Giraud, 1 De G. & S. 183; Ashton *v.* Lord Langdale, 4 De G. & S. 402; Myers *v.* Perigal, 16 Sim. 533; Re Langham's Trust, 10 Hare, 446; Edwards *v.* Hall, 11 Hare, 1, 6 D. M. & G. 74; Bennett *v.* Blair, 15 C. B. (N. S.) 518 (corn-exchange); Hayter *v.* Tucker, 4 K. & J. 243 (cost-book mine); Entwistle *v.* Davis, L. R. 4 Eq. 272 (land company); overruling Ware *v.* Cumberlege, 20 Beav. 503, and Glynn *v.* Morris, 27 Beav. 218. Shares in a railway company, whose line is leased to another company at a rent, are on the same footing. Linley *v.* Taylor, 1 Giff. 67, 2 D. F. & J. 84.

(*x*) 10 Hare, 449. A deed would of course be insufficient for the purpose. Baxter *v.* Brown, 7 M. & Gr. 216. Besides personalty, unless "pure," is within the act.

(*y*) Entwistle *v.* Davis, L. R. 4 Eq. 272, stated below.

(*z*) 2 D. M. & G. 620.

it might ultimately become a judgment debt, and thus a charge upon realty (*a*).

*224 *This doctrine was fully adopted in Entwistle *v.* Davis (*b*), where shares in land companies established, one for the purpose of buying, improving, letting and selling land, the other for raising by subscription a fund out of which every member should receive the amount or value of his share for the erecting or purchase of a dwelling-house, or other real or leasehold estate (giving satisfactory mortgage security for the advance), were held by Sir W. P. Wood not to be within the statute. In neither case could a shareholder claim any portion of the land which was held by the company for the purposes of its business.

If, in the case of the second company, an option had been given to every shareholder of taking a plot of land, the V. C. thought something might have been said. And if the land of a company or partnership be vested in any person in trust, not for the purposes of the undertaking generally, but for the individual shareholders or partners in proportion to their shares, then such shares are an interest in land within the meaning of the act Geo. 2, for then the individual shareholder would have power to call upon the trustee, not merely for his share of the profits, but for part of the very land itself, which, in the cases previously considered, he could not do (*c*).

The current of decision regarding debentures has also been reversed.

Railway debentures, &c. Later decisions.

The course taken was this. It was held in Q. B. that a mortgage by a railway company by assignment of the "undertaking" and tolls would not support ejectment against the company. Coleridge, J., said it was a pure question of construction; that the word "undertaking" was ambiguous; it might possibly include the land; but if it did, the instrument gave the mortgagee power, if he took possession, to put an end to the undertaking: which was a monstrous and improbable supposition (*d*). This was followed by Turner and Cairns, L.JJ., who decided that all that the mortgagee could touch under such an instrument, was the profits of the undertaking; that the undertaking was made over to him as a

*225 going concern, and *plainly with a view to its continuance, and not so as to give him any power to break it up or interfere with

(*a*) See 5 Beav. 442, 2 D. M. & G. 620, 7 ib. 525, 10 Exch. 222, 245, L. R. 4 Eq. 276. Whether shares of the nature now under consideration are goods and chattels within the Bankrupt Act, see Ex p. Vauxhall Bridge Company 1 Gl. & J. 101, and Re Lancaster Canal Company, Dilworth's case, Mont. & Bli. 94. On the nature of shares as qualification for the county vote, see Baxter *v.* Brown, 7 M. & Gr. 198; Bulmer *v.* Norris, 9 C. B. N. S. 19. Shares in an incorporated company held not an interest in land within s. 4 of Stat. of Frauds, Bradley *v.* Holdsworth, 3 M. & Wels. 422; nor within s. 17, Duncuft *v.* Albrecht, 12 Sim. 189. So (as to s. 4) shares in a cost-book mine, Hayter *v.* Tucker, 4 K. & J. 243; Watson *v.* Spratley, 10 Exch. 222; Powell *v.* Jessop, 18 C. B. 337; Walker *v.* Bartlett, ib. 845. Shares in the Chelsea Water-works Co. were held (before 1 Vict. c. 26) to pass by unattested codicil. Bligh *v.* Brent, 2 Y. & C. 268.

(*b*) L. R. 4 Eq. 272.

(*c*) Per Wood, V. C., Hayter *v.* Tucker, 4 K. & J. 251.

(*d*) Doe d. Myatt *v.* St. Helen's Railway, 2 Q. B. 364.

its management (*e*). The two decisions are perhaps not identical; the former being that the land did not pass, the latter that, if it did, it was only as an ingredient in a going concern. From these decisions, however, it was concluded in Attree *v.* Hawe (*f*), that money secured by such debentures was not *such* a charge on hereditaments as was within the act: for the mortgagee having "no power to take the land, or enter on the land, or in any way to interfere with the ownership, possession, or dominion of the statutory owners and managers," the gift of money so secured to charitable uses was not within the mischief against which the act was directed: "the mischief, and the sole mischief," aimed at being, it was said, the making land inalienable.

Attree *v.* Hawe.

Railway debentures not within the act.

It will be remembered that Lord Hardwicke very distinctly denied that this was an accurate definition of the objects of the act (*g*). It was an object mentioned in the title to the act: but only there, and the title was no part of the act. It will also be remembered that the mere absence of power "to take the land or to enter on the land" does not necessarily take a case out of the act (*h*). However, the decision in Attree *v.* Hawe is convenient, and must be taken to have finally settled the law with regard to railway debentures: for although the subject of gift in that case was debenture stock, no distinction appears to have been intended or to be possible on that account; since the holder of such stock has by statute "all the rights and powers of a mortgagee of the undertaking," except the right to require payment of his principal. The principle of the decision is applicable to the debentures of all public bodies with parliamentary powers and duties to be exercised for the public benefit, as harbor, dock, canal, and waterworks companies (*i*), and public bodies constituted for the improvement of towns.

Remarks on Attree *v.* Hawe.

Debentures of other companies.

Growing crops, which pass under a devise of the land on * which they are growing, and clearly, therefore, savor of realty, are within the act (*ia*). But rent, when due, is in the nature of fruit fallen: it is severed from the land, and the right of distress is not an interest in land, but merely a right to enter and enforce payment of the debt by seizure of the chat-

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Growing crops.

Arrears of rent.

(*e*) Gardner *v.* London, Chatham and Dover Railway, L. R. 2 Ch. 201.

(*f*) 9 Ch. D. 337. See also Re Mitchell's Estate, 6 Ch. D. 655; Walker *v.* Milne, 11 Beav. 507.

(*g*) Att.-Gen. *v.* Lord Weymouth, Amb. 22. "That which a man fancies to be a discovery of a new and correct reading (of a statute) which has escaped the attention of eminent men in time past, will often, on more mature consideration, be found not to have been overlooked by them, but rejected for some sufficient reason." Per Lord St. Leonards, 1. D. & War. 326.

(*h*) Ante, p. 221.

(*i*) Holdsworth *v.* Davenport, 3 Ch. D. 185; Walker *v.* Milne. 11 Beav. 507. The cases of Ashton *v.* Lord Langdale, 4 De G. & S. 402 (railway debentures), and Chandler *v.* Howell, 4 Ch. D. 651 (mortgage of "works," &c. by improvement commissioners), must be considered overruled.

(*ia*) Symonds *v.* Marine Society, 2 Giff. 325.

tels there found. Arrears of rent may, therefore, be bequeathed to a charity (*k*). So may tenant's fixtures, which, on the determination of his lease, the testator might carry away with him (*l*).]

Tenant's fixtures.

Where lands are devised in trust for a charity, the trust not only is itself void, but vitiates the devise of the legal estate on which it is ingrafted (*m*); and therefore, in such cases, the heir may recover at law; except where there are other trusts not charitable (*n*); [or where the trust is secret, that is, where the devisee has verbally promised to hold in trust for a charity (*o*); in either of which excepted cases the devise carries the estate to the trustee,] and the heir (*p*) must prosecute his claim in equity.

Charitable trust vitiates the legal estates.

Where the conveying of land to a charity is enjoined as a condition *subsequent*, as where the devise is to A., on condition that he shall convey Whiteacre (part of the devised estate) to a charity, the condition alone is void, and the devise is absolute (*q*).

Though the statute does not in terms apply to the proceeds of land directed to be sold, yet it is settled by construction, that a fund of this nature is within its spirit and meaning (*r*), on the ground, it should seem, that the legatee *might* have elected to take it as land (*s*); and a legacy payable out of such a fund of course shares the same fate (*t*). The act, however, does expressly embrace the converse case of money being directed to be laid out in land (*u*), and the prohibition applies not only where the investment in land is expressly directed by the will, but also * where it results from the nature and regulations of the charity itself (*v*).

Bequest of proceeds of real estates to charity illegal.

So, of bequest of money to be laid out in land.

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A recommendation to trustees to purchase land is imperative, and, consequently, has the same invalidating effect as a trust which is mandatory in terms (*x*).[1] But, if an option be given to the trustees to lay out the money in land, or upon

Recommendation to purchase held to be mandatory.

(*k*) Edwards *v.* Hall, 11 Hare, 6, 6 D. M. & G. 74; Brook *v.* Badley, L. R. 4 Eq. 106 (a mining "rent"); Thomas *v.* Howell, L. R. 18 Eq. 203. (*l*) Johnston *v.* Swann, 3 Mad. 467.]

(*m*) Adlington *v.* Cann, 3 Atk. 155; Doe d. Burdett *v.* Wrighte, 2 B. & Ald. 710; [Pilkington *v.* Boughey, 12 Sim. 114; Cramp *v.* Playfoot, 4 K. & J. 479.]

(*n*) Willett *v.* Sandford, 1 Ves. 186; see also Doe *v.* Copestake, 6 East, 328; Doe *v.* Pitcher, 6 Taunt. 359; [Arnold *v.* Chapman, 1 Ves. 108; Young *v.* Grove, 4 C. B. 668; Doe d. Chidgey *v.* Harris, 16 M. & Wels. 517; Wright *v.* Wilkin, 31 L. J. Q. B. 196.

(*o*) Sweeting *v.* Sweeting, 3 N. R. 240. As to secret trusts, post, p. 233.]

(*p*) But if the devise were of particular lands in fee, and the will contained a residuary devise, the failure of the former would, under a will made since 1837, let in the residuary devisee, not the heir. (*q*) Poor *v.* Miall, 6 Mad. 32.

[(*r*) Att.-Gen. *v.* Lord Weymouth, Amb. 20]; Curtis *v.* Hutton, 14 Ves. 537; Trustees of British Museum *v.* White, 2 S. & St. 595.

[(*s*) It is an interest in land, per Lord Cairns, L. R. 3 Ch. 674.]

(*t*) Page *v.* Leapingwell, 18 Ves. 463.

(*u*) Att.-Gen. *v.* Heartwell, 2 Ed. 234: Pritchard *v.* Arbouin, 3 Russ. 458.

(*v*) Widmore *v.* Woodroffe, Amb. 636; Middleton *v.* Clitherow, 3 Ves. 734. [And see Denton *v.* Manners, 25 Beav. 38, 2 De G. & J. 675.]

(*x*) Att.-Gen. *v.* Davies, 9 Ves. 546; Kirkband *v.* Hudson, 7 Pri. 212; [Pilkington *v.* Boughey, 12 Sim. 114.]

[1] See 2 Story, Eq. Jur. §§ 1068–1074; Hart *v.* Hart, 2 Desaus. 57; Van Dyck *v.* Van Beuren, 1 Caines, 84; Farwell *v.* Jacobs, 4 Mass. 634; Bolling *v.* Bolling, 5 Munf. 334;

government or personal security (*y*), [or, generally, to execute the trust in either of two ways, the one lawful, the other not (*z*), or, if the regulations of the charity be such that the money bequeathed might, if the act were out of the way, be applied either in one way or the other (*a*), the bequest is valid. Thus, in Lewis *v.* Allenby (*b*), a bequest of residue, comprising pure and impure personalty, to trustees for division among such charities in London or elsewhere in England as they in their discretion should think proper, was upheld on the ground that the trustees had power to name the charities, and could properly exercise it as to the impure personalty only in favor of such charities as were exempted from the act.] It was attempted to bring within the scope of this principle a direction to invest on such mortgage securities as the trustees should approve, which, it was contended, authorized the trustees to lay out the fund on mortgages of personal chattels, or on Irish or Scotch real securities (some of which the testator was already possessed of); but Lord Langdale, considering that the reasoning savored too much of refinement, held the bequest to be void (*c*).

Where trustees have an option to invest in land or other security, the bequest is good.

So, if investment in land is the ultimate destination of the money, the bequest will not be protected by the circumstance of * provision being made for its suspension during *228 an indefinite period; and, therefore, a gift of personal estate, to be laid out in the purchase of lands, has been repeatedly held to be void, although the trustees were empowered to invest the money in the funds until an eligible purchase could be made (*d*); [neither will a direction to purchase, though accompanied by a legal alternative direction for the application of the money in case the purchase cannot be conveniently made, give the trustees such a discretion as to take the bequest out of the statute, where there is no impediment to the primary trust but the statute (*e*).] These determina-

Where the purchase of land is the ultimate object, the trust is had.

Even though there be an option "in case land cannot be conveniently purchased.

(*y*) Soresby *v.* Hollins, Amb. 211, [9 Mod. 221; Widmore *v.* Governors of Queen Anne's Bounty, 1 B. C. C. 13 n.; Att.-Gen. *v.* Parsons, 8 Ves. 186;] Curtis *v.* Hutton, 14 Ves. 537; [Edwards *v.* Hall, 11 Hare, 11, 12, 6 D. M. & G. 89; Dent *v.* Allcroft, 30 Beav. 335; Salusbury *v.* Denton, 3 K. & J. 529; Graham *v.* Paternoster, 31 Beav. 30; Wilkinson *v.* Barber, L. R. 14 Eq. 96; Morley *v.* Croxon, 8 Ch. D. 156.

(*z*) Mayor of Faversham *v.* Ryder, 18 Beav. 318, 5 D. M. & G. 350; Baldwin *v.* Baldwin, 22 Beav. 419; London University *v.* Yarrow, 1 De G. & J. 72; Sinnett *v.* Herbert, L. R. 7 Ch. 243; Lewis *v.* Allenby, L. R. 10 Eq. 668.

(*a*) Church Building Society *v.* Barlow, 3 D. M. & G. 120; Carter *v.* Green, 3 K. & J. 591; Denton *v.* Manners, 2 De G. & J. 675, 682. Unless the purpose of the gift be expressly confined by the will to the illegal object: see last case. If the will be expressly worded to include the illegal as well as the legal objects, it would seem that there must be an apportionment, Re Rigley's Trusts, 36 L. J. Ch. 147; Hoare *v.* Osborne, L. R. 1 Eq. 585, and the share apportioned to the illegal object would be undisposed of. (*b*) L. R. 10 Eq. 668.]

(*c*) Baker *v.* Sutton, 1 Kee. 224. [Cf. London University *v.* Yarrow, supra, where a choice between London and Dublin was expressly given.]

(*d*) Grieves *v.* Case, 4 B. C. C. 67, Dick. 251, [1 Ves. Jr. 548, 2 Cox, 301;] English *v.* Orde, Duke, Ch. Uses, 432; Pritchard *v.* Arbouin, 3 Russ. 458; [Mann *v.* Burlingham, 1 Kee. 235. (e) Att.-Gen. *v.* Hodgson, 15 Sim. 146.]

Sydnor *v.* Sydnors, 2 Munf. 263; Pierson *v.* Garnet, 2 Bro. C. C. (Perkins's ed.) 47, note (*a*) and cases cited; S. C. ib. 231, note (*c*).

tions have clearly overruled Grimmett *v.* Grimmett (*f*); and it seems somewhat difficult to reconcile with them the more recent case of Att.-Gen. *v.* Goddard (*g*), where a testatrix, after bequeathing 1,000*l.* Indian annuities to trustees for charitable purposes, added, "as money is of more uncertain value than land, I do also give them power to make such purchase as they shall think best for perpetuating the gift;" Sir T. Plumer, M. R., hesitatingly held the bequest to be valid, though he admitted it to be doubtful whether the clause in the will did not amount to a direction to purchase land, and whether the discretion extended to anything further than the selection of the estate.

It is clear that where the will is silent as to the purchase or acquisition of land, and the charitable trust or purpose is of a nature which admits of its being fully and conveniently executed without such purchase or acquisition, the legacy is good. Thus, where the testator bequeathed 2,800*l.* three per cent. reduced annuities, and directed the dividends to be applied "for and towards establishing a school," Lord Loughborough said, that this did not include the purchase or renting of land: the master might teach in his own house, or in the church (*h*). So, in another case, the bequest of personalty, "to be a perpetual endowment and maintenance of two schools," was considered, by Richards, C. B., to be so far good; though it was rendered void by the addition of a recommendation to purchase land (*i*). And even where the interest of the bequeathed fund was directed to be applied in "providing a proper school-house," Sir J. Leach, V. C., thought *229 that, as the intention might be executed by hiring a house, without the necessity of purchasing land, the bequest was valid; and that, too, though the will contained expressions showing that the testator contemplated the perpetuity of the charity (*k*). So, where the trustees were expressly directed to apply the income of a charity fund in the purchase or rental of an appropriate building (*l*).

Legacy valid where the purchase of land is not essential to the trust.

Gift of *income* to establish a school;

— to endow one;

— to provide a school-house.

[Much reliance was in these cases placed on the circumstance that the purposes of the will were to be answered out of the annual income as it arose, leaving the principal untouched. Where a legacy was given towards "establishing" a school near the Angel Inn at E., *provided a further sum could be raised in aid thereof if found necessary;* Sir G. Turner, V. C., said that the first words indicated an intention to occupy a site in the neighborhood referred to; and that the latter words

Contra where purchase of land intended.

Capital, to establish a school;

(*f*) Amb. 210.
(*g*) T. & R. 348.
(*h*) Att.-Gen. *v.* Williams, 4 B. C. C. 526, [2 Cox, 387;] see also Att.-Gen. *v.* Jordan, Highmore on Mortmain, 225. [Also Martin *v.* Wellstead, 23 L. J. Ch. 927; Hartshorne *v.* Nicholson, 26 Beav. 58.]
(*i*) Kirkbank *v.* Hudson, 7 Price 221.
(*k*) Johnston *v.* Swann, 3 Mad. 457; [and see Crafton *v.* Frith, 15 Jur. 737, 20 L. J. Ch. 198.]
(*l*) Davenport *v.* Mortimer, 3 Jur. 287 (V. C. Shadwell).

removed all doubt, showing that the establishment of the school was not to be by a succession of small payments, but by the immediate expenditure of a sum of money. He thought it clear that the intention was that land should be purchased (*m*).

So, in Dunn *v.* Bownas (*n*), where a testator bequeathed a sum of money to the mayor and corporation of N., in trust for the purpose of "establishing" a hospital for twelve poor widows, with a monthly allowance of twenty shillings to each, the surplus to be applied in providing for them coals, clothing, or other necessaries; and he declared that the bequest was to be carried into effect at the death of his sisters, or during their lives if they should think proper, in which case they should be allowed to name the first inmates, Sir W. P. Wood, V. C., held that the only way in which the trust could be executed was to buy a house with part of the fund, and that the reference to "surplus income" was not sufficient to alter this plain conclusion. — a hospital;

And in Tatham *v.* Drummond (*o*), a bequest of money to be applied towards the "establishment" of slaughter-houses in the neighborhood of London was held void by Lord Westbury, who thought it could not be doubted that if there were no Statute of Mortmain, a bequest to "establish" a charity such as a school or a hospital in any parish or district would be carried into effect * by the purchase of land and the erection of buildings thereon; and he adopted Lord Loughborough's rule (*p*) that the court would not alter its conception of the purposes of a testator merely because they happened to fall within the prohibitions of the statute. — a slaughter house; *230

So a bequest to "found" a chapel (*q*) is *prima facie* void. — to found a chapel.

But a bequest to "endow" churches and chapels in populous districts (*r*), or to "support" a school at A. (*s*), or to "found a charitable endowment" (*t*), is good. A bequest to establish an "institution" may also be good if the purpose of the institution as described does not require the purchase of land (*u*).] Legacy to endow churches, schools, &c. good. "Institution."

It has been much questioned whether a bequest of money, to be applied in the "erection" of a school-house or other building, for charitable purposes, is bad, as involving a trust to purchase. Lord Hardwicke considered that if the trustees could get a piece of

[(*m*) Att.-Gen. *v.* Hull, 9 Hare, 647; and see Att.-Gen. *v.* Hodgson, 15 Sim. 146; Longstaff *v.* Renneson, 1 Drew. 28; Re Clancy 16 Beav. 295. (*n*) 1 K. & J. 596.
(*o*) 4 D. J. & S. 484, reversing Wood, V. C., 33 L. J. Ch. 438.
(*p*) Att.-Gen. *v.* Williams, 2 Cox, 387.
(*q*) Hopkins *v.* Phillips, 3 Giff. 182.
(*r*) Edwards *v.* Hall, 11 Hare, 1, 6 D. M. & G. 74.
(*s*) Morley *v.* Croxon, 8 Ch. D. 156; Kirkbank *v.* Hudson, 7 Pri. 221, per Richards, C. B., supra.
(*t*) Salusbury *v.* Denton, 3 K. &. J. 529.
(*u*) Baldwin *v.* Baldwin, 22 Beav. 413 (trusts to provide annuities for indigent persons, with directions for the management of the "institution"). And see per Lord Cranworth, London University *v.* Yarrow, 1 De. G. & J. 81, but *qu.*, for that was a hospital for animals.]

Legacy to be applied in erecting or building, bad.

ground given to them, so that land need not be purchased, the gift was good (*x*); but the contrary is now settled (*y*): [and to make such a bequest valid, the testator must either point to land already in mortmain; or he must forbid the purchase of land (*z*). Thus, in Mather *v.* Scott (*a*), where a testator bequeathed a legacy to trustees, with a request that they would entreat the lord of the manor to grant land for building almshouses, Lord Langdale, M. R., held that the language of the bequest was not sufficiently expressed to exclude a purchase, and therefore the gift failed.]

Legacy on condition that legatee provides land, void.

And it is equally clear that a legacy [on condition that the legatee provide land for effecting the testator's object, is void, as being in truth a purchase of the land from the legatee (*b*).] And it would not avail that charity legatees, by whom a fund is directed to be laid out in the erection of buildings, possess and offer to appropriate for the purpose land already in mortmain, unless the bequest were so framed as not to admit of a *231 new *purchase being made for the occasion (*c*); [nor is a bequest to build made valid by a *proviso* that the legacy shall not be paid until the building has been commenced (*d*).

Bequest to build good, if the will forbids the purchase of land.

But if the testator has expressly forbidden a purchase, though he declares his expectation or desire that land will be provided from other sources (*e*), or if the direction is to build "when and so soon as land shall at any time be given for the purpose" (*f*), the bequest is valid: for the statute does not forbid the dedication of land to charity by act *inter vivos;* on the contrary, it expressly regulates the manner of doing so, and there is nothing to invalidate a bequest of money for building upon land so provided. And a direction to the trustees to have due regard to the application of the fund being consistent with the laws then in force, has been held to refer to the mortmain laws, and to be equivalent to forbidding the purchase of land (*g*).] If the testator shows

(*x*) Vaughan *v.* Farrer, 2 Ves. 182; Att.-Gen. *v.* Bowles, ib. 547, [3 Atk. 806.]

(*y*) Foy *v.* Foy, 1 Cox, 163; [Pelham *v.* Anderson, 2 Ed. 296, 1 B. C. C. 444, n.;] Att.-Gen. *v.* Nash, 3 B. C. C. 588; Att.-Gen. *v.* Whitchurch, 3 Ves. 144; Chapman *v.* Brown, 6 ib. 404; Att.-Gen. *v.* Parsons, 8 ib. 186; Att.-Gen. *v.* Davies, 9 Ves. 535; Pritchard *v.* Arbouin, 3 Russ. 458; [Att.-Gen. *v.* Hodgson, 15 Sim. 146; Smith *v.* Oliver, 11 Beav. 481.

(*z*) Att.-Gen. *v.* Davies, 9 Ves. 544; Pratt *v.* Harvey, L. R. 12 Eq. 544.

(*a*) 2 Kee. 172.

(*b*) Att.-Gen. *v.* Davies, 9 Ves. 535; and see Dunn *v.* Bownas, 1 K. & J. 602.]

(*c*) Giblett *v.* Hobson, 5 Sim. 651, 3 My. & K. 517; [Re Watmough's Trusts, L. R. 8 Eq. 272; Cox *v.* Davie, 7 Ch. D. 204.] In Giblett *v.* Hobson, Lord Brougham held that circumstances *dehors* the will might be investigated for the purpose of getting at the intention [*i.e.* evidence of "surrounding circumstances," according to the general rule; see Ch. XIII.

(*d*) Pratt *v.* Harvey, L. R. 12 Eq. 544, correcting the dictum of Alderson, B., Dixon *v.* Butler, 3 Y. & C. 677.

(*e*) Philpott *v.* St. George's Hospital, 6 H. L. Ca. 338, reversing 21 Beav. 134, and overruling Trye *v.* Corporation of Gloucester, 14 Beav. 173. See also Cawood *v.* Thompson, 1 Sm. & Gif. 409.

(*f*) This was assumed in Chamberlayne *v.* Brockett, L. R. 8 Ch. 206, and is according to Lord Cranworth's judgment in Philpott *v.* St. George's Hospital, 6 H. L. Ca. 357. If the gift itself were made to depend on such a contingency, it would be void for remoteness, L. R. 8 Ch. 208, n., 212.

(*g*) Dent *v.* Allcroft, 30 Beav. 335.]

that he means the gift to take effect, whether land be provided or not, the legacy is valid (*h*).

The bequest of a sum of money to be applied in the erection of buildings on land which is already devoted to charitable purposes (*i*), or in the repair and improvement of buildings appropriated to charity (*k*), is unquestionably valid, as by such gifts no additional land is thrown into mortmain (*l*). [But, as before stated, a reference to land already in mortmain must be found in the will. A bequest to build a parsonage house at C. "in manner as I have already promised the same," was held to refer to a transaction by which a site had already been appropriated for the purpose, and so by implication to the site itself (*m*). So a bequest * to build a parsonage house in connection with B. church was upheld, on the ground that a site had in fact (*though this was not noticed in the will*) been appropriated to the purpose, and that the trustees would not have been justified in purchasing any other land for the purpose (*z*). And a bequest to help enlarge the parish church at M. was held good as impliedly referring to the glebe or churchyard (*a*). But a bequest "to erect a new chapel at H. instead of the one now in use when such an erection shall take place," was held not to be a reference to the site on which the old chapel stood (*b*).]

Improvement of land already in mortmain allowed.

Reference to land in mortmain must be found in the will.

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A legacy to be applied in the liquidation of a subsisting incumbrance on real estate, which is already subject to charitable uses, appears to have been considered as not falling within the same principle as a legacy to build on land so subject, but as appropriating to charity a new interest in land. Thus, a bequest of a sum of money, to be applied in paying off a mortgage debt on a meeting-house, cannot be supported (*c*); and it matters not that the incumbrance is equitable only (*d*).

Legacy to be applied in discharging an incumbrance on charity property invalid.

Where a legacy, which, standing alone, would be valid, is founded upon and derives its purpose and object from an illegal devise, it is necessarily involved in the failure of such devise. Thus, if a testator, after devising certain messuages to be

Legacy founded on a devise which fails, void.

(*h*) Henshaw *v.* Atkinson, 3 Mad. 306. [But the decision did not depend on that. Per Lord Cranworth, 6 H. L. Ca. 359.]

(*i*) Glubb *v.* Att.-Gen., Amb. 373; Brodie *v.* Duke of Chandos, 1 B. C. C. 144, n.; Att.-Gen. *v.* Bishop of Oxford, ib.; Att.-Gen. *v.* Parsons, 8 Ves. 186; Att.-Gen. *v.* Munby, 1 Mer. 327; [Shaw *v.* Pickthall, Dan. 92; Fisher *v.* Brierly, 1 D. F. & J. 643.]

(*k*) Harris *v.* Barnes, Amb. 651; Att.-Gen. *v.* Bishop of Chester, 1 B. C. C. 444.

(*l*) As to the evidence required in these cases, that the land on which the expenditure is to be made has been effectually devoted to charity, *vide* Ingleby *v.* Dobson, 4 Russ. 342; [Shaw *v.* Pickthall, Dan. 92.

(*m*) Sewell *v.* Crewe-Read, L. R. 3 Eq. 60.

(*z*) Cresswell *v.* Cresswell, L. R. 6 Eq. 69.

(*a*) Re Hawkin's Trusts, 33 Beav. 570.

(*b*) Re Watmough's Trusts, L. R. 8 Eq. 272, dissenting from Booth *v.* Carter, L. R. 3 Eq. 757, which is *contra*.]

(*c*) Corbyn *v.* French, 4 Ves. 418. [But debts incurred in respect of a meeting-house are not always a lien on it; and where they are not so, a bequest to enable the debtor to pay them is of course valid. Bunting *v.* Marriott, 19 Beav. 163.]

(*d*) Waterbouse *v.* Holmes, 12 Sim. 162.

converted into almshouses, bequeaths the interest of a sum of money to the occupiers of such houses — as the devise is clearly void, the legacy is equally so (*e*). Or, if a testator devises a messuage to be used as a school-house for the education of poor children, and bequeaths a fund to trustees, with a direction to apply the income in keeping the school-house in repair, and providing a master, the statute, by invalidating the devise of the house, deprives the pecuniary legacy of its object, which consequently fails (*f*); and in some other instances, presenting not quite so simple and obvious an application of the principle,

*233 *a bequest, valid in itself, has been held to fail, from the impracticability of the general scheme, of which it forms a part (*g*).

It is to be observed, that if a legacy, which is directed to be laid out in land, is actually paid (the party paying it not availing himself of the statute), and the trustee lays it out accordingly, the court will not execute the trust (*h*). [But if lands be devised in trust for charity, and have been held and applied accordingly for a long series of years, it will be presumed against the heir, that all proper means have since been taken to dedicate the property effectually to the charity (*i*).]

Equity will not execute trust though the legacy has been paid.

Contra after lapse of time.

The statute cannot be evaded by a secret trust, and the heir may compel a devisee to disclose any promise which he may have made to the testator to devote the land to charity (*k*). And such promise, if denied by the devisee, may be proved by evidence *aliunde* (*l*). The trust, by whatever means established, invalidates the devise. This doctrine evidently assumes that the trust, if legal, would have been binding on the conscience of, and might have been enforced against, the devisee; and this ground failing, the rule does not apply. As where a testator, after devising lands by a will duly attested, declares a trust in favor of charity by an unattested paper or by parol, the statute law, which affords to the devisee a valid defence against any claim on the part of the charity, of course equally defends him against the claim of the

Secret trust for charity.

Effect where trust is declared by separate unattested paper.

(*e*) Att.-Gen. *v.* Goulding, 2 B. C. C. 428; Att.-Gen. *v.* Whitchurch, 3 Ves. 141; Limbrey *v.* Gurr, 6 Mad. 151; Price *v.* Hathaway, ib. 304; [Smith *v.* Oliver, 11 Beav. 481; Att.-Gen. *v.* Hodgson, 15 Sim. 146; Cox *v.* Davie, 7 Ch. D. 204.]

(*f*) Att.-Gen. *v.* Hinxman, 2 J. & W. 270. In cases the converse of this, namely, where the valid gift is the primary one, and the invalid gift is ancillary and subordinate to it, the former, of course, is not affected by the illegality of the latter, Blandford *v.* Fackerell, 4 B. C. C. 394, 2 Ves. Jr. 238; [Att.-Gen. *v.* Stepney, 10 Ves. 22.]

(*g*) Grieves *v.* Case, 2 Cox, 301, 4 B. C. C. 67.

(*h*) Att.-Gen. *v.* Acland, 1 R. & My. 243. But the legacy, if paid in mistake, might, it is presumed, be recovered back by the party paying it. It seems that where a legatee is called upon to refund, he is not, in general, liable to interest. (Gittins *v.* Steele, 1 Sw. 199.)

[(*i*) Att.-Gen. *v.* Moor, 20 Beav. 119; and see Att.-Gen. *v.* Drummond, 1 D. & War. 380.]

(*k*) Boson *v.* Statham, 1 Ed. 508; Muckleston *v.* Brown, 6 Ves. 52; Martin *v.* Hatton, cit. ib. 61; Stickland *v.* Aldridge, 9 Ves. 516; Paine *v.* Hall, 18 Ves. 475. [So if land be conveyed to trustees for a charitable purpose by deed in other respects conforming to the act, a secret understanding with the grantor to reserve the benefit to himself for his life, will, if proved, invalidate the conveyance. Way *v.* East, 2 Drew. 44; Fisher *v.* Brierly, 1 D. F. & J. 643, in which, however, the evidence failed to show any such understanding.]

(*l*) Edwards *v.* Pike, 1 Cox, 17, 1 Ed. 267.

heir, founded on the charitable trust (*m*). The case would be different, however, if the devisee had induced the testator to give him the estate absolutely, under an assurance that the unattested paper was a sufficient declaration of the trust for a charity (*n*), [or under a promise, either express or by silence implied, that if the estate were devised to him he would perform the trust (*o*).

Verbal promise by devisee.

* And generally it is immaterial whether the promise be made before or after the execution of the will. "The only distinction between a will made on the faith of a previous promise and a will followed by a promise is this — If on the faith of a promise by A. a gift is made to A. and B. the promise is fastened on to the gift to both, for B. cannot profit by A.'s fraud (*p*). But if the will is first made in favor of A. and B., and the secret trust is then communicated only to A., the gift will be fixed with a trust with respect to A., but not so as regards B.; because in this case the gift to B. is not obtained by the procurement of A., and is not tainted with any fraud in procuring the execution of the will" (*q*). In the former case the whole beneficial interest results to the heir; and the ground upon which the entirety, and not a moiety only, so results, namely, A.'s fraud, is as pertinent where upon the face of the will A. and B. are made tenants in common as where they are made joint tenants. In a case of the second kind, where upon the will A. and B. were tenants in common, it was held by Sir W. P. Wood, in conformity with his dictum cited above, that B. retained the beneficial interest in a moiety, and that only the trust of A.'s moiety resulted to the heir (*r*). It is said, however, that a (subsequent) communication to A. might affect B. if a joint tenant, which would not affect him if he were tenant in common (*s*). But this point has not been clearly decided, nor the ground of the distinction stated. In both cases the trust is founded on the promise, and the promise is proved against A. alone. Supposing that B., though joint tenant under the will, is not bound by the trust proved against A., it would seem that this trust, though void, is a severance of the joint tenancy in equity, and that B. is beneficially entitled to a moiety only.] *234

Where devise is to several, and trust established against one only.

Marshalling assets is the adoption of this principle: that where there are two funds and two parties, one of whom has a claim exclusively upon one fund, and the other the liberty of resorting to either, the court will send the latter party primarily to

Assets not marshalled in favor of charity.

(*m*) Adlington *v.* Cann, 3 Atk. 141, 9 Ves. 519; [Wallgrave *v.* Tebbs, 2 K. & J. 313; Lomax *v.* Ripley, 3 Sm. & Giff. 48; Jones *v.* Badley, L. R. 3 Ch. 362.]

(*n*) See Adlington *v.* Cann, 3 Atk. 152.

[(*o*) Russell *v.* Jackson, 10 Hare, 204; Moss *v.* Cooper, 1 J. & H. 352; Springett *v.* Jennings, L. R. 10 Eq. 488; cf. M'Cormick *v.* Grogan, L. R. 4 H. L. 82.

(*p*) Russell *v.* Jackson, 10 Hare, 204 (joint tenants).

(*q*) Per Wood, V. C. in Moss *v.* Cooper, 1 J. & H. 352. (*r*) Tee *v.* Ferris, 2 K. & J. 357.

(*s*) Rowbotham *v.* Dunnett, 8 Ch. D. 437, per Malins, V. C. The head-note overstates the dictum. In Jones *v.* Badley, L. R. 3 Eq. 635, where the devise was to A. and B. as joint tenants, Lord Romilly declared both to be trustees; but the point was not taken.]

that fund from which the former is excluded; or, if he should have
*235 actually resorted to their common fund, will allow the * other to stand in his place to that extent. The application of this principle has been denied to charities; and, accordingly, where property which *cannot*, is combined, in the same gift, with funds which *can*, be bequeathed for charitable purposes, and the disposition embraces several objects or purposes, some charitable and others not, the courts hold that the purposes not charitable cannot be thrown exclusively upon that part of the subject of disposition which is incapable by law of being devoted to charity, in order to let in the charitable purposes upon the remainder (*t*).

Thus, if a testator give his real and personal estate to trustees, upon trust to sell and pay his debts and legacies, and to apply the residue for charitable purposes, the court will not throw the debts and legacies exclusively on the proceeds of the real estate, and the mortgage securities and leaseholds, in order that the charitable bequest may take effect so far as possible; nor, on the other hand, will it direct the debts and legacies to come out of the pure personalty for the purpose of defeating the charitable residuary bequest to the utmost possible extent. Steering a middle course, equity directs the debts and legacies to come out of the whole estate, real and personal, *pro ratâ;* for instance, supposing the real funds (including the leaseholds and mortgage securities) to constitute two fifths of the entire property, then two fifths of these charges would be satisfied out of such real funds, and the remaining three fifths out of the pure personalty (*u*); and, after bearing the charges in these several proportions, the former would belong to the heir or next of kin (as the case might be), and the latter to the charity-residuary legatee. And, by parity of reasoning, if a testator bequeath pecuniary legacies to charities, and leave a general residue to others, consisting partly of leaseholds or real securities, and partly of pure personalty, the legacies will be void *pro tanto*, *i. e.* in the proportion which the funds
*236 savoring of realty bear * to the entire property, though the pure personalty should be sufficient to pay all the legacies. The proper course, in such case, is to pay the debts and funeral and testamentary expenses (being all the prior charges to which the general residue was liable), in the first instance, out of the whole property, *pro ratâ* (*x*), and then to provide for the pecuniary legacies in like manner;

(*t*) Mogg *v.* Hodges, 2 Ves. 52, [1 Cox, 9;] Att.-Gen. *v.* Tyndall, 2 Ed. 207, Amb. 614; Foster *v.* Blagden, Amb. 704; Middleton *v.* Spicer, 1 B. C. C. 201; Att.-Gen. *v.* Earl of Winchelsea, 3 B. C. C. 373; Makeham *v.* Hooper, 4 ib. 153; Hobson *v.* Blackburn, 1 Kee. 273; [Williams *v.* Kershaw, 5 L. J. N. S. Ch. 84, 5 Cl. & Fin. 111.]

(*u*) Howse *v.* Chapman, 4 Ves. 542; Paice *v.* Archbishop of Canterbury, 14 Ves. 372; Curtis *v.* Hutton, ib. 537; Currie *v.* Pye, 17 Ves. 464; Crosbie *v.* Mayor of Liverpool, 1. R. & M. 761, n.; see also Fourdrin *v.* Gowdey, 3 My. & K. 397; [Johnson *v.* Woods, 2 Beav. 409; Att.-Gen. *v.* Southgate, 12 Sim. 77; and that too, though the purely personal part of the residue was alone disposed of by the will for the charitable purposes, and the remaining part was left undisposed of. Edwards *v.* Hall, 11 Hare, 22. Lapsed or void specific legacies form part of this general fund. Scott *v.* Forristall, 10 W. R. 37.

(*x*) In making the apportionment, the respective values of the real and personal estates are to be taken as at the time of the death of the testator, and not as at the time of appor-

the effect of which is that the charity legacies, so far as this ratable apportionment throws them upon the leaseholds and real securities, are void (*y*). Thus, every charitable legacy bequeathed by any testator whose will does not contain the usual clause directing such legacies to be paid exclusively out of the pure personalty, and the general residue of whose property consists partly of leaseholds or real securities, is void *pro tanto*. General conclusion.

[The effect of this doctrine may sometimes be to render the whole legacy void. Thus, in Cherry *v.* Mott (*z*), the testator directed his executors to purchase of the governors of Christ's Hospital a presentation to that charity for a boy, the son of a freeman of the borough of Hertford; the purchase-money to be paid out of his personal estate. The testator's personal estate not being all pure personalty, Sir C. Pepys, M. R., was of opinion that the bequest never could take effect; for if the executors had agreed for the purchase at a given sum, that sum must have been raised proportionably out of the two sorts of personalty, and the gift of so much as it was necessary to raise out of the personalty savoring of the realty, would have been void, and consequently the full purchase-money never could be raised; and the testator's intended gift failed by reason of the impossibility of making the purchase.

Where the testator has directed a charity legacy to be paid out of his pure personalty, which, however, is all exhausted by his specialty creditors, the charity may stand in the place of the creditors on the real estate (*a*). In such a case, it is the testator himself who has marshalled (so to speak) his own assets, and the court only prevents the arrangement made by him from being defeated by accidental circumstances. The efficacy of such a direction to make a charity legacy payable in full, out of the * pure personalty in priority to other legacies, was established by Lord Truro in Robinson *v.* Geldart (*b*). As between the charity and the other legatees, he said the case was analogous to that of a demonstrative legacy. But this was by way of illustration only, and not of definition: the direction does no more than regulate the priority of the legatees *inter se;* it does not exempt the charitable legacy from contribution to the payment of debts, funeral and testamentary expenses, as it would do if it made the legacy strictly demonstrative. These prior Testator may himself marshal his assets. *237

tionment, Calvert *v.* Armitage, 1 H. & M. 446, overruling Robinson *v.* London Hospital, 10 Hare, 29.

(*y*) Philanthropic Society *v.* Kemp, 4 Beav. 581; Sturge *v.* Dimsdale, 6 Beav. 462; Cherry *v.* Mott, 1 My. & Cr. 123; Briggs *v.* Chamberlain, 18 Jur. 56.

(*z*) 1 My. & Cr. 123. (*a*) Att.-Gen. *v.* Lord Mountmorris, 1 Dick. 379.

(*b*) 3 Mac. & G. 735; and see Nickisson *v.* Cockill, 3 D. J. & S. 622, 635; Beaumont *v.* Oliveira, L. R. 4 Ch. 309. In Sturge *v.* Dimsdale, 6 Beav. 462, Lord Langdale had doubted the sufficiency of such a direction, and in Philanthropic Society *v.* Kemp, 4 Beav. 581, had decided that it was insufficient to counteract in favor of the charities some special words which he thought expressly regulated the order in which the several portions of the personal estate were to be applied in payment of debts and legacies. But as to this see Miles *v.* Harrison, L. R. 9 Ch. 321.

charges will still come ratably, and, in the first place, out of the pure and impure personalty (*c*). Therefore, in order to make charitable legacies effectual as far as possible, the debts, funeral and testamentary expenses should be expressly and exclusively charged on the personalty savoring of realty (*d*).

Express marshalling where the charitable bequest is residuary.

And where the charitable legacies are themselves residuary, this is the most appropriate form of direction with regard also to the payment of other legacies (*e*). But of course it matters not what the form is if it sufficiently shows the testator's intention. Thus, in Wills *v.* Bourne (*f*), where a testator directed his debts, legacies, and funeral and testamentary expenses to be paid out of his real estate, and, so far as that was deficient, out of his personal estate, and bequeathed the residue of his personal estate to certain charities, declaring that "only such part of his estate should be comprised in the residue as might by law be bequeathed for charitable purposes:" it was held by Lord Selborne that the testator had thereby excluded impure personalty from the residue; and that it followed by necessary implication that the realty and impure personalty must be applied for those purposes (*debts as well* as legacies) which were to be satisfied before a residue was arrived at.

So, in Miles *v.* Harrison (*g*), where a testator directed that his *238 personal estate should be * converted, and that out of the proceeds his debts and legacies should be paid, and gave the residue to three charities in equal shares, with a direction to pay the charitable legacies out of the pure personalty, "which shall be reserved by my trustees for that purpose," it was held that the debts and other legacies were thrown wholly on the impure personalty. Lord Cairns observed, that although the testator intended creditors and those other legatees to have the security of his whole personal estate, yet that, as between them and the charities, those who had the two funds should go first on that which the charities could not take.

Again, the pure personalty may be the subject of a specific bequest to a charity, in which case it will be entitled to the privileges and exemptions that belong to a legacy of that character (*h*).

In Miles *v.* Harrison, there was also a particular pecuniary bequest to another charity, unaided by any direction concerning its payment; and the further question arose whether this legacy, which could in no part be satisfied out of the impure personalty, was not also debarred

(*c*) Tempest *v.* Tempest, 7 D. M. & G. 470; Beaumont *v.* Oliveira, L. R. 4 Ch. 309.
(*d*) See Williams' Executors, p. 1234, 5th ed.
(*e*) As in Janncey *v.* Att.-Gen., 3 Giff. 308; or in the more sweeping form used in Wigg *v.* Nicholl, L. R. 14 Eq. 92, that "the estate shall he so marshalled and administered as to give the fullest possible effect to" the charity legacies. See also Gaskin *v.* Rogers, L. R. 2 Eq. 284; Re Fitzgerald, W. N. 1877, p. 216.
(*f*) L. R. 16 Eq. 487.
(*g*) L R. 9 Ch. 317; cf. Lewis *v.* Boetefeur, W. N. 1878, p. 21, 1879, p. 11.
(*h*) Shepheard *v.* Beetham, 6 Ch. D. 597. "A legacy is not the less specific for being general," per Lord Cottenham, 1 My. & Cr. 117.]

from the pure personalty by the direction reserving the latter for payment of the residuary bequest. "If, *as I assume*," said Lord Cairns, "the gift of the residue amounts to a direction that the personal estate shall be marshalled, a direction of that kind cannot operate to defeat *in toto* the pecuniary legacy to the charity: that legacy will stand as if nothing at all had been said about marshalling in the residuary gift; for the essence of marshalling is that it puts those only to marshal who have got two funds, and this charitable legatee has only one."]

Effect where land is charged as an auxiliary fund.

Where a charitable legacy is charged on real estate as an auxiliary fund in aid of the personalty (and such, it will be hereafter seen, is always the effect of a mere general charge), the legacy will be valid or not, and either wholly or in part, according to the event of the personalty proving sufficient for its complete liquidation or not.

As the validity of a charity legacy depends on its not being to come out of a real fund, the point of construction whether the legacy is payable out of personal or real estate, is sometimes warmly contested on this account; and in the consideration of this question, it scarcely need be observed, no disposition has * been manifested by the courts to strain the rules of construction in favor of charity (*e*). * 239

Judicial treatment of act of 9 Geo. 2, c. 36.

Never, indeed, was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature, than the statute 9 Geo. 2. This is abundantly evident from the general tone of the adjudications; but the two points in which it is most strikingly displayed are, first, the holding a gift to charity of the proceeds of the sale of real estate to be absolutely void, instead of giving to the charity legatee the option to take it as money, according to the rule formerly adopted in the case of a similar gift to an alien (*f*); and secondly, the refusal of equity to marshal assets in favor of a charity, in conformity to its general principle; that principle being evidently founded on an anxiety to carry out, as far as possible, the intentions of testators. In this solitary case, the intention has been allowed to be subverted by a mere slip or omission of the testator, which the court had the power of easily correcting by an arrangement of the funds (*i*).

It will be observed that the act expressly allows gifts to the two English Universities and their colleges, and the three colleges of

(*e*) See Leacroft *v.* Maynard, 1 Ves. Jr. 279, ante, p. 185. But where a testator shows by his will that he uses the term "personal estate" as contradistinguished from "leaseholds," occurring in the same bequest, and he afterwards by a codicil directs a charitable legacy to be payable out of his "personal" estate, the expression is considered as used in the same restricted and peculiar sense as in his will; and the legacy is payable out of the pure personalty, and is therefore good. Wilson *v.* Thomas, 3 My. & K. 579.

(*f*) Ante, p. 69. [However the disherison of the heir, against which the statute is directed, is equally produced whether the land is sold or not.]

(*i*) As to the policy of the stat. of 9 Geo. 2, c. 36, [see a note by the author in previous editions, urging a relaxation of its prohibitions. But *contra* see Jeffries *v.* Alexander, 8 H. L. Ca. 594, 648; and per Lord Romilly, 20 Beav. 508, L. R. 4 Eq. 111.]

Exception in favor of two English Universities, and Eton, Winchester, and Westminster.

Eton, Winchester, and Westminster (*k*). It has never been decided whether the proviso extends to colleges founded since the act, as Downing College, Cambridge. Lord Northington considered that it was confined to colleges antecedently established (*l*); but Lord Loughborough appears to have dissented from this opinion (*m*). It is clear that the statute does not authorize a devise to a college in trust for other charitable objects (*n*); but it seems not to be essential that the trust should embrace the whole college; a trust for the benefit of particular members would be within the proviso; and therefore a devise to the Master and Fellows of Christ's College, in trust that they and

*240 *their successors should apply the rents for some undergraduate student, has been held to be good (*o*). But the devise must be for collegiate or academical purposes; and a gift to the college, to the intent that an individual member (the senior fellow for the time being) should live in the testator's house, and entertain the poor, and distribute medicine and books among them, was held to be void on this principle (*p*). Lord Loughborough appears to have thought, that, if a devise of real estate to a college was refused by the college, as of course it may be, whether the devise be upon trust or otherwise (*q*), it might, as the lands were originally devised to a valid purpose, be executed *cy-près* (*r*).

Exception in respect of Scotland.

The exception made by the act in respect of property in Scotland has been held to apply only to the locality of the lands destined to the trust; precluding, therefore, the devise of lands in England to a Scottish charity, but admitting of English personalty being bequeathed to be laid out in lands in Scotland, so far as is consistent with the Scotch law, which permits the destination of real estate to *some* kinds of charity (*s*). It has been held that the circumstances of the charity being Scotch, and Scotchmen only being eligible as trustees of it, do not conclusively show that the purchase is to be of lands in Scotland, so as to take the bequest out of the statute (*t*).

Purchase of lands in Ireland.

So, of course, a bequest of money to be laid out in lands in Ireland, for charitable purposes, will be good (*u*). [But by a modern statute (*x*) it is enacted, that any donation, devise, or bequest, whereby any *estate* in lands, tenements, or hereditaments in Ireland is conveyed or created for a charitable purpose, must be exe-

(*k*) For an instance of such a devise, see 3 Ves. 641. (*l*) 1 Ed. 16.
(*m*) See Att.-Gen. *v.* Bowyer, 3 Ves. 728.
(*n*) Att.-Gen. *v.* Tancred, 1 Ed. 15, 1 W. Bl. 90, Amb. 351; see also Blandford *v.* Fackerell, 4 B. C. C. 394, 2 Ves. Jr. 238; Att.-Gen. *v.* Munby, 1 Mer. 327.
(*o*) Att.-Gen. *v.* Tancred, 1 Ed. 10. (*p*) Att.-Gen. *v.* Whorwood, 1 Ves. 534.
(*q*) See 2 Kee. 163. [(*r*) Att.-Gen. *v.* Andrew. 3 Ves. 633.]
(*s*) Oliphant *v.* Hendrie, 1 B. C. C. 571; Curtis *v.* Hutton, 14 Ves. 537; Mackintosh *v.* Townsend, 16 Ves. 330. [And the English rule arising out of the act against marshalling in favor of charities does not exist in Scotland. See Macdonald *v.* Macdonald, L. R. 14 Eq. 60.]
(*t*) Att.-Gen. *v.* Mill, 4 Russ. 328, 5 Bli. N. S. 593, 2 D. & Cl. 393, [Sugd. Law of Prop. 419.]
(*u*) See Campbell *v.* Earl of Radnor, 1 B. C. C. 272; Baker *v.* Sutton, 1 Kee. 234; Att.-Gen. *v.* Power, 1 Ba. & Be. 154.
[(*x*) 7 & 8 Vict. c. 97, s. 16. A deed must also be registered within the same period. Ib.]

cuted three calendar months before the death of the donor. This enactment does not, however, appear to extend to bequests of money to be laid out in land.]

The statute 9 Geo. 2, c. 36, does not extend to the British colonies; in its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for the purposes of local policy, complicated with local *establishments, and incapable, without great incongruity in the effect, of being transferred, as it stands, into the code of any other country (*z*). British Colonies. *241

By the custom of London resident freemen might devise land in mortmain [(*a*). By the general act *De religiosis* (*b*) the custom would have been abolished, but that afterwards there came a general confirmation of the customs of London by statute (*c*). There is no saving of any custom in the stat. of George, any more than there was in the stat. *De religiosis;* and as there has been no subsequent confirmation of the customs of London (*d*), it follows, according to Lord Coke, that the statute of George is binding on the city of London (*e*). An express power given to a charitable corporation by stat. 6 Ann. to take and hold land by devise without license in mortmain has been held to be taken away by the stat. 9 Geo. 2 (*f*).] At all events it is clear that the custom of London applies only to lands in London (*g*). Custom of London.

The legislature has, in several instances, relaxed in favor of particular objects the restriction on disposing of land to charitable purposes. Thus, by the Land Tax Redemption Act (42 Geo. 3, c. 116, s. 50), money may, by will or otherwise, be given to be applied in the redemption of the land tax on hereditaments settled to charitable uses. So, the stat. 43 Geo. 3, c. 107, authorizes the devise of lands to the governors of Queen Anne's Bounty; and again, the stat. 43 Geo. 3, c. 108, empowers persons, by will executed three months before death, to devise lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.* (*h*), for erecting, rebuilding, repairing, purchasing, or *providing any church or chapel where the liturgy of the Church of England may be used, or any mansion-house for the residence of the minister, Statutes allowing land to be devoted to particular charities. *242

(*z*) Per Sir W. Grant, M. R., in Att.-Gen. *v.* Stewart, 2 Mer. 141; [see also Att.-Gen. *v.* Giles, 5 L. J. N. S. Ch. 44; Whicker *v.* Hume, 1 D. M. & G. 506, 14 Beav. 509, 7 H. L. Ca. 124; Mayor of Lyons *v.* East Indian Company, 1 Moo. P. C. C. 298. So of course as to lands in a foreign country, where there is no law corresponding to stat. 9 Geo. 2, c. 36; Beaumont *v.* Oliveira, L. R. 6 Eq. 537.

(*a*) 8 Rep. 129 a. (*b*) 7 Ed. 1, c. 1, ante, Ch. V.

(*c*) Per Lord Coke, 2 Bulst. 190. And local customs are expressly saved by the stat. 23 Hen. 8, c. 10, s. 5.

(*d*) The latest confirmation by statute appears to be 2 W. & M. sess. 1, c. 8, s. 3.

(*e*) See also per Sir R. P. Arden, M. R., Highmore on Mortmain, p. 127; and see generally as to these customs the authorities cited in Reg. *v.* Mayor, &c., of London, 13 Q. B. 1.

(*f*) Luckraft *v.* Pridham, 6 Ch. D. 205. (*g*) Middleton *v.* Cater, 4 B. C. C. 409.

(*h*) By s. 2, if the devise exceed the limit, the excess only is void, and the specific five acres may be allotted by the L. C. In Sinnett *v.* Herbert, L. R. 7 Ch. 232, a gift comprising pure and impure personalty, for building or endowing a church, was held to carry 500*l.* worth of the impure personalty, besides all the pure personalty, on the ground that the 500*l.* being

or any outbuildings, offices, churchyard (*f*), or glebe, for the same respectively; but no glebe, containing upwards of fifty acres, is to be augmented above one acre (*g*); [and the promotion of these or similar objects has been further encouraged by an act (*h*) legalizing the devise of lands to or in trust for (*i*) the Ecclesiastical Commissioners, in aid of the endowment and erection of district churches. Again, the Public Parks, Schools, and Museums Act, 1871, authorizes gifts by will, made twelve calendar months before, and inrolled in the books of the Charity Commissioners within six calendar months after, the testator's death, of limited portions of land for any of the objects mentioned in the title to the act (*k*).] The Statute of Mortmain has also been repealed *pro tanto* in favor of the British Museum (*l*), [the Department of Science and Art (*m*),] the Bath Infirmary (*n*), Greenwich Hospital (*o*), the Foundling (*p*), Westminster (*q*), Middlesex (*r*), and St. George's Hospitals (*s*), the Royal Naval Asylum (*t*), the Seaman's Hospital Society (*u*), and of some other public institutions (*x*). [But it must be borne in mind that an act of parliament which confers on a charitable corporation the right to purchase, take, hold, receive, or enjoy lands, does not enable it to *acquire* land otherwise than in the mode prescribed by the stat. Geo. 2, c. 36, the effect of the clause being equivalent only to a license from the Crown to hold in mortmain (*y*), and not therefore enabling it to take by devise.]

Act of Parliament when only equivalent to license from the Crown.

all which could properly be spent in building (see Re Ireland's will, 12 L. J. Ch. 381), it must be assumed that the trustees would apply all the rest for the other purposes. As under this act one may devise, so he may convey, reserving a life-estate. Per Sir G. Turner, L. J., Fisher *v.* Brierly, 1 D. F. & J. 664. But the act does not authorize a gift of money, even within the limit of 500*l.*, to arise by sale of land, Church Building Society *v.* Coles, 1 K. & J. 145, 5 D. M. & G. 324.

(*f*) A bequest for maintenance of a family vault in a churchyard cannot be supported as one for repair of a churchyard under this act, Re Rigley's Trusts, 36 L. J. Ch. 147.]

(*g*) See also 55 Geo. 3, c. 147, and 58 Geo. 3, c. 45, s. 33.

[(*h*) 6 & 7 Vict. c. 37, s. 22. (*i*) Baldwin *v.* Baldwin, 22 Beav. 425.

(*k*) 34 Vict. c. 13. The acts 4 & 5 Vict. c. 38 (school sites), 31 & 32 Vict. c. 44 (sites for religious, educational, literary, &c., purposes), and the Elementary Education Act, 1873, s. 13, subs. 3, exclude gifts by will. The act 8 & 9 Vict. c. 43, empowered municipal corporations to take by devise sites for museums, &c., and also (as was held in Harrison *v.* Corporation of Southampton, 2 Sm. & G. 387) money to be laid out in such sites; but was repealed by the Public Libraries Act, 1850.] (*l*) See stat. 5 Geo. 4, c. 39.

[(*m*) 38 & 39 Vict. c. 68. This act does not expressly refer to 9 Geo. 2, c. 36; and, according to a suggestion of James, L. J. (6 Ch. D. 212), the case is therefore not taken out of the stat. Geo. 2. *Sed qu.*]

(*n*) 19 Geo. 3, c. 23; see Makeham *v.* Hooper, 4 B. C. C. 153.

(*o*) 10 Geo. 4, c. 25, s. 37. (*p*) 13 Geo. 2, c. 29. [(*q*) 6 Geo. 4, c. 20 (loc. and pers.).

(*r*) 6 Will. 4, c. 7 (loc. and pers.).] (*s*) 4 Will. 4, c. 38 (loc. and pers.).

(*t*) 51 Geo. 3, c. 105. (*u*) 3 & 4 Will. 4, c. 9, s. 1. (*x*) See Shelf. Char. Uses, 49.

[(*y*) Mogg *v.* Hodges, 2 Ves. 52; British Museum *v.* White, 2 S. & St. 595; Nethersole *v.* Indigent Blind School, L. R. 11 Eq. 1; Chester *v.* Chester, L. R. 12 Eq. 444. This appears to have been overlooked in the late edition (1865) of Chitty's Statutes, where several charitable institutions are stated to be exempted, by special enactment, from the operation of the act of Geo. 2, though they are in fact only empowered *to hold* land; see, for instance, the acts establishing the *Company of Surgeons and Barbers* and the *Marine Society*. A power *to take* land *by will* is, of course, sufficient, Perring *v.* Trail, L. R. 18 Eq. 88. (The Westminster Hospital. So the Middlesex and St. George's Hospitals.) See and consider with reference to this point, 13 & 14 Vict. c. 94, s. 23, enabling owners of impropriated tithes to annex the same to the parsonages, &c., of the parishes where they arise. Denton *v.* Manners, 25 Beav. 38, 2 De G. & J. 675.]

* The act 9 Geo. 2 leaves the disposition of pure personalty *243
wholly unrestrained, except where directed to be invested in real estate; so that with this qualification a man may dispose of his whole personal estate (*z*) to charitable purposes capable of enduring forever, in despite of the claims of his nearest kindred; and dispositions so made are strongly favored in point of construction (*a*); for by a rule peculiar to gifts of this nature, if the donor declare his intention in favor of charity indefinitely, without any specification of objects, or in favor of defined objects, which happen to fail, from whatever cause; although, in such cases, the particular mode of application contemplated by the testator is uncertain or impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate objects, be carried into effect. Thus, in the case of a gift to the poor in general (*b*), or to charitable uses generally (*c*), or for the advancement of religion, expressed in the most vague and indefinite terms (*d*); or to such charitable uses as the testator's executor shall appoint, and the testator revokes the appointment of the executor (*e*); [or the executor renounces probate (in which case he cannot claim to exercise his discretion) (*f*);] or to such charitable uses as A. shall appoint, and A. dies in the lifetime of the testator (*g*), or neglects or refuses to appoint (*h*), or to such charitable uses as the testator himself shall appoint [or has appointed], and he dies without making an appointment (*i*), [or the instrument of * appointment cannot be found (*k*);] or where *244
the testator makes a disposition in favor of an object which has no existence (*l*), or which is void in law (*m*), or has become impossible (*n*); or bequeaths to the trustees of a charity who refuse to accept (*o*); or to a particular charity by a description equally applicable to more

Bequest of pure personalty to charitable purposes not restrained.

Such bequests executed *cy-près*, when.

(*z*) Anon., Freem. Ch. Ca. 262; Baylis *v.* Att.-Gen., 2 Atk. 239; Da Costa *v.* De Pas, Amb. 228, cit. 7 Ves. 76, 3 Mad. 457.

(*a*) 7 Ves. 490.

(*b*) Att.-Gen. *v.* Matthews, 2 Lev. 167; S. C. nom. Frier *v.* Peacock, Finch, 245; Att.-Gen. *v.* Rance, cit. Amb. 422.

(*c*) Clifford *v.* Francis, Freem. Ch. Ca. 330; Att.-Gen. *v.* Herrick, Amb. 712.

(*d*) Powerscourt *v.* Powerscourt, 1 Mol. 616.

(*e*) White *v.* White, 1 B. C. C. 12.

[(*f*) Att.-Gen. *v.* Fletcher, 5 L. J. N. S. Ch. 75.]

(*g*) Moggridge *v.* Thackwell, 1 Ves. Jr. 464, 3 B. C. C. 517, 7 Ves. 36, 13 Ves. 416. In this case, and in Mills *v.* Farmer, 1 Mer. 55, Lord Eldon went very fully into the general doctrine.

[(*h*) Att.-Gen. *v.* Boultbee, 2 Ves. Jr. 380, 3 Ves. 220.]

(*i*) Freem. Ch. Ca. 261; Mills *v.* Farmer, 1 Mer. 55; [Commissioners of Ch. Don *v.* Sullivan, 1 D. & War. 501.]

(*k*) Att.-Gen. *v.* Syderfen, 1 Vern. 224, 7 Ves. 43, n.

(*l*) Att.-Gen. *v.* City of London, 3 B. C. C. 171; [Loscombe *v.* Wintringham, 13 Beav. 87;] but see Att.-Gen. *v.* Oglander, 3 B. C. C. 166.

(*m*) Att.-Gen. *v.* Whorwood, 1 Ves. 534; Da Costa *v.* De Pas, Amb. 228, 2 Ves. 276, 376, 2 Sw. 487. See 2 J. & W. 308, n.; Cary *v.* Abbot, 7 Ves. 490; [Att.-Gen. *v.* Vint, 3 De G. & S. 704;] but see Att.-Gen. *v.* Goulding, 2 B. C. C. 428.

(*n*) Att.-Gen. *v.* Guise, 2 Vern. 266; [Hayter *v* Trego, 5 Russ. 113; Att.-Gen. *v.* Ironmongers' Company, Cr. & Ph. 208, 10 Cl. & Fin. 908; Att.-Gen. *v* Glyn, 12 Sim. 84; Martin *v.* Margham, 14 ib. 230; Incorporated Society *v.* Price, 1 J. & Lat. 498.]

(*o*) Att.-Gen. *v.* Andrew, 3 Ves. 633; [Denyer *v.* Druce, Taml. 32; Reeve *v.* Att.-Gen., 3 Hare, 191.]

than one (and it is wholly uncertain which was intended (*p*)); [or having evinced his intention to give a certain sum in charity, leaves blanks in his will for the names of the charities and the proportion to be allotted to each (*q*);] in these and all such cases, though the bequest would, upon the ordinary principles which govern the construction of testamentary dispositions, be void for uncertainty, yet the purpose being charity, the Crown as *parens patriæ*, or the Court of Chancery, will execute it *cy-près*.

Although there is a residuary bequest.

[Nor is the rule displaced or superseded by a residuary bequest to other charitable uses contained in the same will. The legacy does not fall into the residue; for the doctrine is that it fails in the mode only and not in substance; and *cy-près* means the nearest to that which has so failed, not the nearest to the testator's other charitable purposes (*r*). But if the testator expressly provides that, in case the particular mode of application directed by him should fail, the legacy shall fall into the residue, it should seem that the rule is excluded (*s*). For however exceptional, it is a rule of construction, and must yield to a contrary intention.

But not if contrary intention appears by the will.

And such contrary intention may, though (considering the length to which the doctrine has been carried (*t*)), not very readily, be collected by construction from the very terms of the gift; which may so strictly define the purpose as to render it * incapable of execution otherwise than in the mode pointed out by the will. The mode is then of the substance, and if it cannot be pursued the legacy will fail altogether.

*245

Gift to particular charity.

Thus in Att.-Gen. *v.* Bishop of Oxford (*u*) the bequest was "to build a church at W. where the chapel now is;" the bishop (who was patron and parson) would not let it be built there, and the churchwardens suggested that "the old chapel should be repaired, the living augmented, &c.," while the next of kin insisted that a new church must be built and the surplus divided among them: but Lord Kenyon observed that if the bishop objected he could not interfere; that as to repairing, &c., he could not do that; the intention must be implicitly followed, or nothing could be done. So in Corbyn *v.* French (*x*) the legacy was to the trustees of a chapel to discharge a mortgage thereon: the mortgage had been already paid off; and Lord Alvanley held the legacy void by the stat. Geo. 2, c. 36; but he also held that if it had not been so, it would have been void because the object intended could not be effected, and there was no ground to apply it to any other purpose.

(*p*) Simon *v.* Barber, 5 Russ. 112; [Bennet *v.* Hayter, 2 Beav. 81; Re Clergy Society, 2 K. & J. 615.

(*q*) Pieschel *v.* Paris, 2 S. & St. 384; *secus*, of course, if the total amount applicable to charity be left in blank. Hartshorne *v.* Nicholson, 26 Beav. 58.

(*r*) Mayor of Lyons *v.* Adv.-Gen. of Bengal, 1 App. Ca. 91.

(*s*) See Mayor of Lyons *v.* Adv.-Gen. of Bengal, 1 App. Ca. 111, 115 (the Lucknow Fund).

(*t*) See Lord Eldon's judgment, Moggridge *v.* Thackwell, 7 Ves. 68.

(*u*) 1 B. C. C. 444, n, and cited 4 Ves. 432, also 2 Ves. Jr. 388, 3 Ves. 646.

(*x*) 4 Ves. 431.

Again, in Cherry *v.* Mott (*y*), where a testator desired that, if his personal estate should be sufficient for the purpose, a presentation to Christ's Hospital should be bought for the son of a freeman of H.; the personal estate proved insufficient. Sir C. Pepys, M. R., said "This legacy is conditional. There is no gift if the personal estate be not sufficient to fulfil the contract." He added, "Another objection is that this is a gift for a particular purpose which cannot take effect by reason of the refusal of the governors, and that it therefore fails altogether." After citing Att.-Gen. *v.* Bishop of Oxford, and Lord Alvanley's view of the doctrine, he referred to the more extended sense in which it was understood by Lord Eldon, and concluded, "In this case, however, there is no gift except in the direction to do that which cannot be effected. It is not within the principle of those cases in which the court executes a general purpose *cy-près*, the particular mode being impossible." Cherry *v.* Mott.

This case has been referred to as standing on special ground as a conditional legacy. But as the condition required only that the estate should suffice for the particular mode, the appellation of "conditional" appears not to mark any difference in * kind, but only *246 the cogency of the terms to indicate that the mode was of the substance of the gift.

Lord Alvanley said he thought the legacy in Corbyn *v.* French (supposing it not illegal), as well as the legacy in Att.-Gen. *v.* Bishop of Oxford, might each have been applied in repairing the particular building, though not for any other purpose (*z*). But partial exclusion of the rule is scarcely less significant than total exclusion. For the rule is that where the substantial intention is charity, but the particular mode cannot be carried into effect, the court (or the Crown) supplies *another* mode (*a*): which other mode need not bear any absolute resemblance to that intended by the testator; only it must first be ascertained that none can be found nearer to it (*b*). Thus a trust for redemption of British slaves in Barbary having, after a long continuance, failed for want of objects, was executed by Lord Cottenham in favor of charity schools in England and Wales (*c*). This must be borne in mind in considering the cases that remain to be noticed. Partial exclusion of the *cy-près* doctrine. *Cy-près* does not imply an absolute resemblance.

In Clark *v.* Taylor (*d*), a legacy was bequeathed "to the treasurer of the female orphan school at G., patronized by Mrs. E., for the

(*y*) 1 My. & C. 123.
(*z*) See also New *v.* Bonaker, L. R. 4 Eq. 655, where a legacy to be applied for a charitable purpose in a foreign country having been refused by the government of that country, apparently on grounds of public policy, it was not argued that it should be applied *cy-près* in this country. Cf. Att.-Gen. *v.* City of London, 3 B. C. C. 171.
(*a*) Per Lord Eldon, 7 Ves. 69. See also per Grant, M. R., 9 Ves. 405.
(*b*) Per Lord Cottenham, Cr. & Ph. 227. Originally the rule seems to have been wholly unqualified; for, according to Wilmot, C. J. (Opin. 32, 33), "the court thought one kind of charity would embalm a testator's memory as well as another."
(*c*) Att.-Gen. *v.* Ironmongers' Company, Cr. & Ph. 208, 10 Cl. & Fin. 908.
(*d*) 1 Drew. 642.

Cases of "lapse." Clark v. Taylor.

benefit of that charity;" the school had been established and maintained by Mrs. E. at her own expense, without treasurer or other official, and still subsisted at the testator's death; but afterwards, and before payment of the legacy, was discontinued; Sir R. Kindersley, V. C., said there was a recognized distinction between a gift showing a general charitable purpose, and pointing out the mode in which it was to be carried into effect, and a gift to a particular institution; that here the institution being *a mere private school* maintained by the beneficence of Mrs. E., he could not say the legacy was to go to any other institution.

In Russell *v.* Kellett (*e*), some of the poor persons for whom the gift was intended having survived the testator, but died before payment, it was held by Sir J. Stuart, V. C., that their *247 * legacies lapsed. He said the doctrine of *cy-près* meant that some other object could be found in a reasonable degree nearly answering the object mentioned by the testator, but that here was such a singular and particular definition of the objects as made it impossible to find any other so nearly resembling them as to justify the application of the doctrine.

Russell v. Kellett.

In Marsh *v.* Means (*f*), a testator gave a legacy, payable after the death of his wife, for continuing a certain publication (which had been published by The Association for Promoting Humanity to Animals) according to principles stated in one of its numbers, viz. to expose cruelty to animals, to diffuse moral and religious information, &c. At the date of the will the publication had been discontinued, and the association itself was extinct; and it was held by Sir W. P. Wood, V. C., that this was not a bequest for promoting these principles, but for continuing the publication of this particular book, which brought the case within Clark *v.* Taylor, so that the doctrine of *cy-près* was not applicable, and the gift lapsed by extinction of the object.

Marsh v. Means.

Again, in Fisk *v.* Att.-Gen. (*g*), where a legacy was given "to the Ladies' Benevolent Society at L. as part of its ordinary funds," and before the testator's death the society ceased to exist, Sir. W. P. Wood, V. C., said it has been expressly decided by Clark *v.* Taylor and Russell *v.* Kellett, that when a gift was made by will to a charity which had expired, it was as much a lapse as a gift to an individual who had expired; and that though the point might some day require further consideration, he could not interfere with the settled authorities. Whether the charitable object fails before or after the testator's death, it is thus equally lapse within the meaning of this decision; whereas in Hayter *v.* Trego (*h*), where the bequest was to "the D. asylum for female penitents," which was dissolved after the testator's

Fisk v. Att.-Gen.

(*e*) 3 Sm. & Gif. 264, ante, 209.
(*f*) 5 W. R. 815, also reported (but obscurely) 3 Jur. N. S. 790.
(*g*) L. R. 4 Eq. 521. See also Langford *v.* Gowland, 3 Gif. 617.
(*h*) 5 Russ. 113.

death, it was assumed that the legacy was to be applied *cy-près*, the only question argued being whether this should be done by the Crown or by the court.

Considering that in Clark *v.* Taylor, the institution was "a mere private school"; that Russell *v.* Kellett depended on an erroneous view of the doctrine of *cy-près* (*i*); that Marsh *v.* Means and Fisk *v.* Att.-Gen. were decided on the authority of *Clark *v.* Taylor and Russell *v.* Kellett, which were followed (on the latter occasion at least) with hesitation, it cannot be considered that the suggested rule of lapse is very strongly supported, at least in those cases where the bequest is to an institution established for charitable purposes which plainly appear in its name (*k*). Remarks on the cases. *248

It is admitted that there is a distinction where there never was any such institution as that named by the testator; for in that case it is clear he could not have intended to benefit a particular institution, and the legacy will be applied *cy-près* (*l*). So if the bequest is to the institution merely as the instrument for executing the testator's charitable intent, which he fully describes, the failure of the institution will not involve the failure of the charitable trust (*m*). Distinction, where the named charity never existed, — or is a mere trustee,

There is another sort of case less easily distinguishable from Fisk *v.* Att.-Gen.; that is, where the gift is in terms to a particular institution by a description equally applicable to more than one. It cannot here be presumed that the testator did not intend to select one in particular; for he may have known, and, considering the terms of the bequest, probably did know, only one answering the description; yet, as it cannot be ascertained which, the particular purpose fails; nevertheless it is clear that the legacy will be applied *cy-près* (*n*).] — or there are several charities equally answering the description.

Where the testator's object is sufficiently defined, and is capable of being carried into effect, it will not be departed from upon a notion of more extended utility (*o*).

[Cherry *v.* Mott (*p*) shows that there may be a conditional legacy to a charity as well as for any other purpose, and that if the condition is not fulfilled the legacy fails in substance. And if the condition is such that it need not be performed within the limits allowed by the rule against perpetuity, the gift is void (*q*). Such cases must be distinguished from those where the intention is to give a fund to charity at once, though there may be an indefinite sus- Conditional legacy to charity.

(*i*) Langford *v.* Gowland, before the same judge, is probably referable to the same ground.
(*k*) See per Sugden, C., 1 D. & War. 294. But see L. R. 8 Ch. 211.
(*l*) Loscombe *v.* Wintringham, 13 Beav. 87; Re Maguire, L. R. 9 Eq. 632.
(*m*) Marsh *v.* Att.-Gen., 2 J. & H. 61; see also cases cited ante, p. 244, n. (*o*).
(*n*) Bennet *v.* Hayter, 2 Beav. 81; Re Clergy Society, 2 K. & J. 615.]
(*o*) Att.-Gen. *v.* Whiteley, 11 Ves. 241.
[(*p*) 1 My. & C. 132.
(*q*) See Chamberlayne *v.* Brockett, L. R. 8 Ch. 208 n., 212.

pense or abeyance in its actual application. If the particular purposes may be answered, though not immediately, the fund will be re-
*249 tained — how long does not clearly appear; * but if those purposes turn out on inquiry to be impracticable, then the fund will be applied *cy-près*. And during such retention there is no resulting trust for heir or next-of-kin (*r*).]

Where the Crown and where the court administers charity.

With respect to the particular cases in which the Crown, and those in which the court undertakes this office, the distinction seems to be, that where the bequest is by the intervention of trustees, [even though those trustees die in the testator's lifetime or refuse to act,] it devolves upon the court (*s*); but where the object is charity without a trust interposed, the direction must be by the sign-manual of the Sovereign (*t*).[1] In a case (*u*) where there was a bequest to a voluntary charitable society, which existed when the will was made, and also at the death of the testator, but was dissolved before his assets could be administered, it was held that the execution devolved on the court. Both the Crown and the court, however, in the exercise of their discretion, alike act upon the principle of adhering as closely as possible to the spirit of the donor's expressed or presumed intention (*x*).

Where the court will pay legacies to a charity without a scheme.

Where a pecuniary legacy is bequeathed absolutely to a corporation existing for only charitable purposes, the court will direct payment, without requiring that a scheme be settled by itself for its appropriation (*y*). And the same rule obtains where a legacy is given to the treasurer or other officer of a charitable institution, though not a corporation, to become part of the general funds of that institution (*z*). But where the legacy is to be applied, not as part of the general funds of the institution, but for certain permanent charitable trusts, which the testator has pointed out, the court will take upon itself to insure the accomplishment of the testator's object by a scheme of its own (*a*). [Where the legacy is to a foreign charity the court will direct it to be paid to the persons appointed by the testator to receive it, and will not take upon itself to settle a scheme (*b*). Nevertheless the court
*250 has jurisdiction to secure a * legacy given for charitable purposes by a subject of the Crown, whether in or out of this country, and

Foreign charity.

(*r*) Att.-Gen. *v.* Oglander, 3 B. C. C. 166; Abbott *v.* Fraser, L. R. 6 P. C. 96; Chamberlayne *v.* Brockett, L. R. 8 Ch. 206, and the cases there cited.

(*s*) Moggridge *v.* Thackwell, 7 Ves. 36; Paice *v.* Archbishop of Canterbury, 14 Ves. 364; Att.-Gen. *v.* Gladstone, 13 Sim. 7; Reeve *v.* Att.-Gen., 3 Hare, 191.]

(*t*) Att.-Gen. *v.* Fletcher, 5 L. J. N. S. Ch. 75, Pepys, M. R.; Denyer *v.* Druce, Taml. 32.

(*u*) Hayter *v.* Trego, 5 Russ. 113. [(*x*) 7 Ves. 87.]

(*y*) Society for the Propagation of the Gospel in Foreign Parts *v.* Att.-Gen., 3 Russ. 142; [Walsh *v.* Gladstone, 1 Phill. 290.]

(*z*) See Wellbeloved *v.* Jones, 1 S. & St. 43; [Re Barnett, 29 L. J. Ch. 871.]

(*a*) Ib.

[(*b*) Collyer *v.* Burnett, Taml. 79; Mitford *v.* Reynolds, 1 Phill. 194. See Mayor of Lyons *v.* East India Company, 1 Moo. P. C. C. 293.

[1] See 2 Kent, Com. 288, 289; 4 Kent, Com. 598, 599; 2 Story, Eq. §§ 1190 *et seq.*

will sometimes order the fund to be carried to a separate account in court, and the dividends only paid over to the person named in the will, subject to an account of the mode of its application (*c*). The legality of the charity is to be determined by the law of the country where it is to be applied (*d*).]

It seems that the court discourages the investment of the funds of the charity in the purchase of land, under the 2d section of the statute 9 Geo. 2 (*e*).

Cy-près doctrine not applied to cases within the stat. 9 Geo. 2, c. 36.

It remains to be noticed, that the *cy-près* doctrine does not apply to bequests which are made void by the statute in question, and therefore a bequest of money to be laid out in land is not executed *cy-près*, *i.e.* applied to an allowed charitable purpose.[1] [But an express gift over, in case the charitable gift cannot by law take effect, is valid (*f*).]

A gift over, in case a gift to charity be void, is good.

Section II.

Rule against Perpetuities.

The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in, or dominion over property, will be obvious, if we consider, for a moment, what would be the state

(c) Att.-Gen. *v.* Lepine, 2 Sw. 181; Att.-Gen. *v.* Sturge, 19 Beav. 597.
(*d*) New *v.* Bonaker, L. R. 4 Eq. 655.] (*e*) Att.-Gen. *v.* Wilson, 2 Kee. 683.
[(*f*) Att.-Gen. *v.* Tancred, 1 Ed. 10, 1 W. Bl. 90, Amb. 354; De Themines *v.* De Bonneval, 5 Russ. 288; Robinson *v.* Robinson, 19 Beav. 494; Carter *v.* Green, 3 K. & J. 591; Warren *v.* Rudall, 4 K. & J. 618; and per Lord Eldon, Sibley *v.* Perry, 7 Ves. 522; overruling Att.-Gen. *v.* Tyndall, 2 Ed. 207. The grounds of the decision in Att.-Gen. *v.* Hodgson, 15 Sim. 150, show that it is not an authority against the validity of such a gift over. But as to those grounds, see Warren *v.* Rudall, 4 K. & J. 603, stated post, Ch. L.]

[1] The English doctrine of *cy-près* has often been condemned in this country. Beekman *v.* Bonsor, 23 N. Y. 298, 308; Williams *v.* Williams, 4 Seld. 527; Owens *v.* Miss. Soc., 14 N. Y. 380; Att.-Gen. *v.* Dutch Reformed Church, 36 N. Y. 452. But it should be remembered that the *cy-près* doctrine as applied in England to charities has two branches; the first having relation to cases in which a charitable gift of a testator is executed by the king's sign-manual, and the second to cases arising under the general jurisdiction of chancery. It is the first class of cases which has brought the subject of *cy-près* into disrepute in America. Whenever a bequest was made to a particular charitable use which was illegal, or whenever a bequest was made to charitable uses generally, without provision for a trust and wanting a donee of any power of appointment at the testator's death; the king then, by sign-manual, designated an object for the bequest. The result sometimes was a gift in direct opposition to the declared intention of the testator. This was simply an exercise of royal prerogative, and not a judicial proceeding. Hence it has well been said that "The *cy-près* doctrine of England is not, or should not be, a judicial doctrine except in one case; and that is where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed. In such a case a court of equity may substitute or sanction any other mode that may be lawful and suitable, and will effectuate the declared intention of the donor, and not arbitrarily and in the dark, presuming on his weakness or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intention of the testator." Moore *v.* Moore, 4 Dana, 366, Robertson, C. J.; Jackson *v.* Phillips, 14 Allen, 539, 576–590. This will explain *some* of the cases at least in which it has been declared that the doctrine of *cy-près* must be rejected (see *e. g.* Methodist Church *v.* Remington, 1 Watts, 226). They are cases which in England would come within the class over which the king has assumed the power of appointment; a prerogative which, it is hardly necessary to say, has not reached this country. Jackson *v.* Phillips, supra; Grimes *v.* Harmon, 35 Ind. 198.

of a community in which a considerable proportion of the land and capital was locked up.[1] That free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of

Policy of rule against perpetuities.

[1] In Alabama (Code, 1876, Title 3, ch. 1, p. 572), "Lands may be conveyed so as to avoid perpetuities;" but conveyances to other than wife and children, or children only, cannot extend beyond three lives in being at the date of the conveyance and ten years thereafter. In Georgia (Code, 1873, Title 5, ch. 3, p. 393), limitations of estates may extend through any number of lives in being at the time when the limitations commence and twenty-one years, and the usual period of gestation added thereafter. In Indiana (Stat. 1876, Vol. 1, ch. 82, p. 369), the absolute power of aliening lands shall not be suspended by any limitation or condition whatever contained in any grant, conveyance, or devise, for a longer period than during the existence of a life, or any number of lives, in being at the creation of the estate conveyed, granted, devised, and therein specified, with the exception that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined before they attain their full age. In Iowa (R. S. 1880, Vol. 1, Title 13, ch. 3, p. 521), every disposition of property is void which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for twenty-one years thereafter. In Maryland (Rev. Code, 1878, Art. 49, p. 419), no will, testament, or codicil shall be effectual to create any interest or perpetuity, or make any limitation or appoint any uses not now permitted by the constitution or laws of that state. In Mississippi (Rev. Code, 1871, ch. 52, p. 499), estates in fee-tail are prohibited; and every estate which shall be created an estate in fee-tail shall be an estate in fee-simple: *provided*, that any person may make a conveyance, or a devise of lands, to a succession of donees then living, not exceeding two; and to the heirs of the body of the remainderman, and in default thereof to the right heirs of the donor, in fee-simple. In New York (R. S. 1875, Vol. 2, ch. 1, pp. 1101, 1102), the absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age. This statute has been re-enacted *verbatim* in Michigan (Comp. Laws, 1871, Vol. 2, ch. 147, p. 1326), in Minnesota (Stat. 1878, ch. 45, p. 561), and in Dakotah (Rev. Code, 1877, ch. 2, p. 261). The statute of New York finds exemplification in a recent case, in which it was contended, in the construction of a will drawn without technical accuracy, that a gift over, after the deaths "respectively" of four persons named, should be treated as a gift over after the deaths of such persons "severally." But the court held that the context would not permit such an exchange of words. The clause in question was as follows: "I give and devise and bequeath all the rest, residue, and remainder of my estate, both real and personal, to my executors hereinafter named, or the survivors or survivor of them, upon the following trusts, namely: To pay the income, rents, issues, and profits thereof to my brothers R. P. and W. P., and to my sisters F. M. and N. C., equally, share and share alike during the joint lives of my said brothers and sisters, then to divide the said real and personal estate equally among the children of my said brothers and sisters, *respectively*: the said children to take the parent's share. And I hereby expressly declare that in case either of my said brothers or sisters shall die, leaving the others surviving, then the income herein intended for the one or the other so dying shall be paid to the issue or representative of the one or the other so dying." The court observed that the construction contended for would require a division of the whole property upon the death of one of the beneficiaries while the evident meaning was that all should enjoy the income of the whole during their lives. Colton *v.* Fox, 67 N. Y. 348. In Vermont (Gen. Stat. 1862, Const. p. 25, § 36), the legislature shall regulate entails in such a manner as to avoid perpetuities. In Wisconsin (R. S. 1878, ch. 95, p. 615), the absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate, except when real estate is given, granted, or devised to literary or charitable corporations which shall have been organized under the laws of this state, for their sole use and benefit, and except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age. The law extends to realty only. Dodge *v.* Williams, 46 Wis. 70.

the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity; and those restrictions, which were intended by the donors to guard the objects *of their bounty against the effects of their own im- *251 providence, or originated in more exceptional motives (*g*), would be baneful to all. It was soon perceived, therefore, that when increased facilities were given to the alienation of property, and modes of disposition unknown to the common law arose, from the introduction of springing uses and executory devises, which no act of the owner of the preceding estate could defeat, it was necessary to confine the power of creating these interests within such limits as would be adequate to the exigencies of families, without transgressing the bounds prescribed by a sound public policy. This was effected, not by legislative interference, but by the courts of judicature, who, in this instance, appear to have trodden very closely on the line which divides the judicial from the legislative functions.[1]

Origin of the rule.

(*g*) Perhaps these restrictions most frequently spring from the desire to exert a posthumous control over that which can be no longer enjoyed. "Te teneam moriens," is the dying lord's apostrophe to his manor, for which he is forging these fetters, that seem hy restricting the dominion of others, to extend his own.

[1] It is no objection to a grant or devise to a charitable use that it creates a perpetuity. Yard's Appeal, 64 Penn. St. 95; Holmes *v.* Mead, 52 N. Y. 332, 340; Williams *v.* Williams, 8 N. Y. 525; Dexter *v.* Gardner, 7 Allen, 243; Odell *v.* Odell, 10 Allen, 6; Perin *v.* Carey, 24 How. 465; Ould *v.* Washington Hospital, 95 U. S. 303; Magdalene College *v.* Att.-Gen., 6 H. L. 205; and a great number of other cases, English and American. Indeed, a gift to a charity *to be created* is not void within the rule concerning perpetuities, provided no perpetuity be created in a prior taker by the devise. Ould *v.* Washington Hospital, 95 U. S. 303; Jocelyn *v.* Nott, 44 Conn. 55; Burrill *v.* Boardman, 43 N. Y. 254; Dodger *v.* Williams, 46 Wis. 70; Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99; Sanderson *v.* White, 18 Pick. 328. As to the question of capacity, a distinction is taken between a devise *in præsenti* to one incapable of taking, and a devise *in futuro* to an artificial being, to be created and enabled to take. Where lands are granted to pious uses before there is a grantee competent to take, the fee will lie in abeyance, vesting when the grantee comes into existence. Ould *v.* Washington Hospital, supra; Pawlet *v.* Clark, 9 Cranch, 292. A present gift to a charity (not void for uncertainty) to come into existence, though at an uncertain time, if there be no gift in the first instance or perpetuity in a prior taker, is good. Ould *v.* Washington Hospital. Hence, a bequest of a fund to trustees for the purpose of establishing a bishop in foreign territory is valid. Att.-Gen. *v.* Chester, 1 Brown, C. C. 444. So of a sum left to build and endow a church. Sennet *v.* Herbert, Law Rep. 7 Ch. 237. So of a fund to be devoted to the erection of almshouses, so soon as land should be given for the purpose. Chamberlayne *v.* Brockett, Law Rep. 8 Ch. 206. Nor is the case different by reason of the fact that the trustee of the fund is required to approve of the object claiming the charity before transferring the fund. Ould *v.* Washington Hospital, supra; Philpott *v.* St. George's Hospital, 6 H. L. Cas. 359. It matters not, further, that the fund is not given for the purpose of founding the charity, or establishing the object of the bequest: it is equally valid, though it is to be paid over upon the event of the acts of third persons, such as an act of the legislature granting a charter of incorporation. Ib.; Inglis *v.* Sailors' Snug Harbor, supra. But as to cases not exempt from the operation of the perpetuity law, and as to charities to be created after a period too remote, it matters not whether the estate be limited by way of legal settlement or under cover of a trust: in any case if the power of alienation be suspended beyond the period allowed by law, the limitation is obnoxious to the rule against perpetuities. Goldsborough *v.* Martin, 41 Md. 488, 501; Wells *v.* Heath, 10 Gray, 25. And if the gift is made in the first instance to an individual and then over, upon a contingency that may not happen within the prescribed limit, to a charity, the gift to the charity is void, not because the charity could not take at the remote period, but because it tends to create a perpetuity in the individual who is the first taker, by making the estate inalienable by him beyond the period allowed by law. Company of Pewterers *v.* Christ's Hospital, 1 Vern. 161; Commissioners of

Perpetuities how regarded by the early judges.

The early judges had an extreme repugnance to every disposition of property that savored of a perpetuity, but the expressions which occasionally fell from them, demonstrative of this feeling, did not afford a specific definition of the monster which the law was stated "to abhor." The effect, however, was to throw such a general suspicion over all executory limitations, as to render the validity of every gift of this nature questionable, until it had been the subject of adjudication. The *onus probandi* (so to speak) was regarded as lying on those who had to sustain the future gift; and the course which the decisions have taken, has been to affirm the validity of one executory disposition after another, until the rule has settled down to an analogy to the ordinary limitations in strict settlement, *i.e.* to the allowance of a life or any number of lives in being, and twenty-one years afterwards (*h*).

Period for which the vesting of estates may be suspended.

But though the new modifications of estate consequent on the introduction of uses, first drew attention to the necessity of imposing some restraint of this nature, they did not wholly create that necessity; for, if uses had never existed, some such restriction would have been requisite on executory and future interests in personal estate, analogous to that rule of the common law concerning remainders, which precluded (and still precludes) the giving to an unborn person an estate for life, with remainder *252 * to his issue (*ha*), or, as it was rather quaintly expressed, the creating of a possibility upon a possibility.

A life or lives in being, and twenty-one years.

It was long (*i*) an undetermined point, whether the period of twenty-one years, which a testator or settlor was permitted to add to a life or lives in being, was an absolute term, or was intended merely to afford an opportunity of postponing the interest of an unborn object of gift until his or her majority.[1] This question was finally set at rest in Cadell *v.* Palmer (*k*), in which the

(*h*) In the writer's edition of Pewell on Devises (vol. 1, p. 389, n.), the pregress of this rule is fully traced.

(*ha*) Somerville *v.* Lethbridge, 6 T. R. 213; Beard *v.* Westcott, 5 Taunt. 393; Hayes *v.* Hayes, 4 Russ. 311; [see also 2 D. M. & G. 170.] But see post.

(*i*) See Beard *v.* Westcott, 5 Taunt. 395, 5 B. & Ald. 801, T. & R. 25.

(*k*) 7 Bli. 202, [1 Cl. & Fin. 372, 10 Bing. 140, 1 Sim. 173, nom. Bengeugh *v.* Edridge.

Donation *v.* De Clifford, 1 Dru. & W. 254. Within the same class fall cases of gifts of an annuity to A. and his heirs, or of personal property to A. and the heirs of his body and then over to a charity, in which the gifts over have been held void as too remote. Att.-Gen. *v.* Gill, 2 P. Wms. 369; Att.-Gen. *v.* Hall, W. Kel. 13; Gray, J., in Odell *v.* Odell, 10 Allen, 1, 7. Charitable gifts appear not to be supported in Maryland if within the perpetuity law, unless there is a donee or trustee capable of taking the gift in succession. Dashiell *v.* Att.-Gen., 5 Har. & J. 392; S. C. 6 Har. & J. 1. See Needles *v.* Martin, 33 Md. 609; see also Methodist Ep. Church *v.* Warren, 28 Md. 338, 618.

[1] See Van Vechten *v.* Van Vechten, 8 Paige, 104; Mainwaring *v.* Baxter, 5 Ves. (Sumner's ed.) 460, Perkins's note (*a*); Lorrillard *v.* Coster, 5 Paige, 172; S. C. 14 Wend. 265; Hawley *v.* James, 5 Paige, 318; S. C. 16 Wend. 61; Butler *v.* Butler, 1 Hoff. 344; Hone *v.* Van Schaick, 20 Wend. 364; 4 Kent, 271, *et seq.* An executory devise, like other estates, must vest during the period established by the law against perpetuities. Nightingale *v.* Burrell, 15 Pick. 104; Hawley *v.* Northampton, 8 Mass. 3, 37, 38; Brattle Square Church *v.* Grant, 3 Gray, 142, 152, 153; Fisk *v.* Keene, 35 Me. 349.

House of Lords decided in favor of an executory limitation in a will to take effect at the period of twenty years after lives in being (*l*). Bayley, B., after an elaborate examination of the authorities, declared the unanimous opinion of the judges to be, that the true limit of the rule against perpetuities was "*a life or lives in being, and twenty-one years, without reference to the infancy of any person whatever.*" This important case, however, would still have left a subject for controversy, if the House had contented itself with simply adjudicating in the case before it; but, with a laudable anxiety to close the door to all future discussion, it was proposed to the judges to consider, whether a limitation by way of executory devise is void as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, *together with the number of months equal to the ordinary or longest period of gestation;* but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère.* The judges declared their unanimous opinion on this point to be, that such a limitation would be void as too remote, they considering twenty-one years as the limit, and the period of gestation *to be allowed in those cases only in which the gestation exists.*[1]

Term of twenty-one years allowed absolutely, not merely in reference to infancy;

but not the period of gestation.

A possible addition of the period of gestation to a life and twenty-one years, occurs in the ordinary case of a devise or * bequest to A. (*a male*) for life, and after his death to such of his children as shall attain the age of twenty-one years, or, indeed, in the case of a devise or bequest simply to the children of A. (a male), who shall attain majority, though not preceded by a life interest; in either case A. may survive the testator, and die leaving a wife *enceinte*, and, as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of twenty-one years beyond a life in being, with the addition, it might be, of nine or ten months; and if, to either of these hypothetical cases, we add the circumstance that A. the parent, were (as of course he might be) an infant *en ventre sa mère* at the testator's decease, there would be gained a double period for gestation (namely), one at the commencement, and another at an *253

(*l*) See as to this case Sugd. Law of Prop. 314. It will be observed that the term of twenty years only was taken in this case. It may have been thought that, as the execution of the ultimate trust involved a conveyance by the trustees to certain uses, a time should be allowed, sufficient in any possible case for completing that conveyance. According to the then law, it might have been necessary to suffer a recovery, which could only be done in term time. At the present time, it would appear unnecessary to make an allowance, even of a day, as there does not seem to be any conveyance which could not be perfected in a day.]

[1] Brattle Sq. Church *v.* Grant, 3 Gray, 152; and cases supra and infra, through the present section. In New York and in some other states, as in Michigan, the period of limitation is two lives in being. See note on p. 278 (bottom paging). But the invalidity of the limitation over does not affect the prior gift. Woodruff *v.* Cook, 61 N. Y. 638.

intermediate part of the period of postponement. To treat the period of gestation, however, as an adjunct to the lives is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child *en ventre sa mère* is considered as a life in being.

Vesting cannot be postponed for a gross term exceeding twenty-one years.

Where the vesting of a gift to unborn persons is postponed for a fixed term exceeding twenty-one years, the gift is unquestionably void, although not preceded by a life; for the fact of the testator not having availed himself of the allowance of a life does not enable him to take a larger number of years. Thus, in Palmer *v.* Holford (*m*) where a testator bequeathed a sum of stock upon trust to raise an accumulated fund, and to transfer such fund unto all and every the child and children of his son C. T. H., who should be living at the expiration of twenty-eight years, to be computed from the testator's decease, except an eldest or only son; and in case no such child should be then living, then to the children then living of J. S., another son; and in default of such child to J. S., if living, and so on to the children of two daughters whom he named, with the like substitution of those daughters; Sir J. Leach, M. R., said: "The expressed intention of the testator is that all the children of his son C. T. H., other than an eldest son, should take who were living at the expiration of twenty-eight years, and that no person should take before that period. If C. T. H. had such children *254 born to him at any time within seven years from the * testator's death, then the vesting of the interests of such children who were unborn at the death of the testator would have been suspended for more than twenty-one years, and the gift, therefore, is too remote and void; and the gifts over not being to take effect until after the same period, which is too remote, are necessarily void also" (*n*).

The principle of the above case clearly applies where any the most inconsiderable addition is made to the term of twenty-one years; therefore a gift, the vesting of which is postponed for twenty-one years and a day, is void.

Period to be computed from the testator's death.

[In deciding the question of remoteness, the state of circumstances at the date of the testator's death, and not their state at the date of the will, is to be regarded. Thus, if a testator bequeaths money in trust for A. for life, and after his death for such of his children as shall attain the age of twenty-five, which latter trust would be void if the testator were to die before A.; yet if A. should die before the testator leaving children, of whatever age, the

(*m*) 4 Russ. 403; [and see Speakman *v.* Speakman, 8 Hare, 180.

(*n*) It will be perceived that all the gifts over, including the gift to J. S. himself, were held void, though the vesting of that gift being subject to the contingency of J. S. being alive at the expiration of the twenty-eight years, was necessarily confined to a life in being: this was in accordance with the general rule hereafter noticed, that every gift, limited after a gift void for remoteness, is also void.

trust will be good, since it must of necessity vest or fail within lives in being, viz. the lives of the children (*o*).][1]

To the test of the rule settled by Cadell *v.* Palmer, every gift of real or personal estate, by will or otherwise, must be brought. The application of such test instantly shows that an executory limitation to arise on an indefinite failure of issue of any person living or dead, is void for remoteness (*p*)[2] though it is to be observed that in this and all other cases, if the executory devise is [in defeasance of or immediately] subsequent to an estate tail, it will be good, because the power which resides in the owner of that estate to destroy all [defeating or] posterior limitations, executory as well as vested, takes the case out of the mischief of, and consequently out of the rule against, * perpetuities (*q*). Thus if a person, by deed or will, creates *255 an estate tail, and annexes to it a proviso divesting the estate in favor of another in case the devisee, or his issue in tail, should at any time thereafter neglect to assume the name and bear the arms of the testator, or in case another property should at any future time devolve to him or them, or on any other such event; this executory

An executory devise to arise on an indefinite failure of issue, void,

— unless engrafted on an estate tail.

(*o*) Vanderplank *v.* King, 3 Hare, 17; Faulkner *v.* Daniel, ih. 216; Williams *v.* Teale, 6 Hare, 251; Peard *v.* Kekewich, 15 Beav. 173; Southern *v.* Wollaston, 16 Beav. 166, 276; Cattlin *v.* Brown, 11 Hare, 382. The point is now never contested, see *e.g.* 3 Ch. D. 645. The doubts once entertained (10 Hare, 112) in consequence of what appeared to be a contrary decision in Harris *v.* Davis, 1 Coll. 416 (where however the question was not presented in this view), must be considered as removed.]

(*p*) Badger *v.* Lloyd, 1 Salk. 232; Moore *v.* Parker, 1 Ld. Raym. 37; Lady Lanesborough *v.* Fox, Ca. t. Talb. 262; [Lepine *v.* Ferrard, 2 R. & My. 378; Carter *v.* Bentall, 2 Beav. 551; Harding *v.* Nott, 7 E. & B. 650.] But remember stat. 1 Vict. c. 26, s. 29, as to wills made since 1837.

(*q*) Gulliver *v.* Ashby, 4 Burr. 1929; [Att.-Gen. *v.* Miller, 3 Atk. 111; as to a charge subsequent to an estate tail, Goodwin *v.* Clark, 1 Lev. 35; Faulkner *v.* Daniel, 3 Hare, 199; Morse *v.* Ormonde, 1 Russ. 382; Bristow *v.* Boothby, 2 S. & St. 465.]

[1] So if by a reasonable and natural interpretation of the will the rule of perpetuity can be escaped, the courts will respect the intention and desire of the testator. See, *e.g.*, Simpson *v.* Cook, 24 Minn. 180, where a suspension of the power of alienation until the testator's youngest of five children, under a statute limiting suspension of alienation to two lives, should reach majority was construed to refer to the youngest of his children living at his death. Butler *v.* Butler, 3 Barb. Ch. 304; Burke *v.* Valentine, 52 Barb. 412, 425.

[2] See Brashear *v.* Macey, 3 J. J. Marsh, 91; Adams *v.* Chaplin, 1 Hill, Ch. 265; Allen *v.* Parham, 5 Munf. 457; Lynch *v.* Hill, 6 Munf. 114; Rice *v.* Satterwhite, 1 Dev. & B. Eq. 69; Mazyck *v.* Vanderhorst, Bailey, Eq. 48; Postell *v.* Postell, Bailey, Eq. 390; Morgan *v.* Morgan, 5 Day, 517; Paterson *v.* Ellis, 11 Wend. 259; Miller *v.* Macomb, 26 Wend. 229; Hall *v.* Chaffee, 14 N. H. 215; Fisk *v.* Keene, 35 Me. 349; Brattle Square Church *v.* Grant, 3 Gray, 142; Tator *v.* Tator, 4 Barb. 431; Conklin *v.* Conklin, 3 Sandf. Ch. 64; Ingersoll's Appeal, 86 Penn. St. 240. This subject is considered more at length in Ch. XLI. But it may be here remarked that while it is universally conceded that a gift over upon an indefinite failure of issue is void as creating a perpetuity, the courts are far from agreed as to the question when such a gift must be deemed to have been intended. In some cases the courts, impressed with a desire to uphold the will, or proceeding upon statutes, have held that a gift over in case A. (the prior taker) "die without issue," should be construed to mean "without issue living at his death." Tyson *v.* Blake, 22 N. Y. 558; Goodell *v.* Hibbard, 32 Mich. 47, 55. In other cases, while such an expression as "die without issue" has been conceded to mean an indefinite failure of issue, a distinction has sometimes been taken in favor of a provision over in case A. die without "leaving" issue; or "leaving surviving issue" (Fosdick *v.* Cornell, 1 Johns. 440; Anderson *v.* Jackson, 16 Johns. 382. But see Burrough *v.* Foster, 6 R. I. 534), and many other distinctions have been taken, as will be seen in Ch. XLI. The subject has been regulated by statutes to some extent in many states.

limitation, though it would have been clearly void, if engrafted on an estate in fee-simple, is good as applied to an estate tail (*r*).

[But to bring the case within this saving the event must be one which will necessarily happen, if at all, at or before the determination of the previous estate tail; otherwise there will or may be an interval during which the executory devise will be indestructible, and the limitation will consequently be void *ab initio* (*s*).

Difference between an executory devise and a remainder.

But the remoteness of the event upon which a remainder after an estate tail is to vest is immaterial, since it is always barrable as long as the estate tail continues; and if, being unbarred, it is not vested when the latter determines, it fails for want of a particular estate. Thus, in Jack *v.* Fetherston (*t*), estates were limited by settlement to T. S. W. for life, with remainder to his first and other sons in tail male, and for default of such issue male, and in case of issue female only of T. S. W., to T. S. W. in fee, and in case of *failure of issue* of T. S. W., then further limitations were made. It was argued that the ultimate limitations being deferred till a general failure of issue of T. S. W., while previous estates were limited to his issue male only, were too remote; but Bushe, C. J., said that this objection was in some degree founded on a misapprehension of Mr. Fearne's meaning, and in not distinguishing *the limitation* from *the event:* the event might be such that it might happen either before or after the future estate was to vest, and yet the possibility it might happen after did not affect the nature of the limitation. So that the remoteness of the event is immaterial, if the estate is not too remote.

Jack *v.* Fetherston.

A remainder may be good though limited upon an event too remote.

Cole *v.* Sewell.

In Cole *v.* Sewell (*u*) the same question arose as *256 to the validity * of estates limited by deed to take effect in case of a general failure of issue by way of remainder after previous estates tail limited to some only of such issue. Lord St. Leonards (then L. C. Ir.) said: "As to the question of remoteness, at this time of day I was very much surprised to hear it pressed upon the court, because it is now perfectly settled that where a limitation is to take effect as a remainder, remoteness is out of the question: for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries, or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event, upon which the contingency depends, happen so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as

(*r*) Nicolls *v.* Sheffield, 2 B. C. C. 215; Carr *v.* Earl of Erroll, 6 East, 58; Earl of Scarborough *v.* Doe d. Saville, 3 Ad. & Ell. 897.

[(*s*) Bankes *v.* Holme, stated below.

(*t*) 2 Huds. & Br. 320.

(*u*) 4 D. & War. 1, corrected by the judge himself, and differing in some material passages from 2 Con. & L. 344.]

to perpetuity, which is a comparatively modern rule (I mean of recent introduction, when speaking of the laws of this country), was not known, so that, while contingent remainders were the only species of executory estate then known, and uses, and springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavored to avoid remote possibilities: but since the establishment of the rule as to perpetuities, this has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting, or secondary use, not depending on an estate tail, and if it is so limited that it may go beyond a life or lives in being and twenty-one years and a few months, equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect, if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen before or at the instant the preceding estate is determined, and the limitation will fail, or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder. If the remainder over had been regularly in default of issue male of the daughters, it would have taken effect when and if that failure happened. Now the remainder over is in default of issue generally, but it can only take effect when and if there is a failure of issue male, that is, upon the regular determination of the previous estate; there is no distinction in the point of * perpetuity between the limitations, *257 either only can take effect at the same period. The simple distinction is, that although the event happen, the latter gift — depending upon the contingency — may never take effect; but that introduces no question of remoteness." In a subsequent part of his judgment, after citing a passage from Coke Litt. 378, which speaks of a remainder depending on the contingency of one man dying before another as being "a common possibility," he continued: "The concluding words show that in those early times they were looking to the period when the contingency might arise. The effect, however, of the modern rule against perpetuities has been to render this doctrine obsolete, although it has rendered void successive life-estates to successive unborn classes of issue. In Nicolls *v.* Sheffield (*x*), the court held that a proviso for shifting an estate after an estate tail was valid; and Lord Kenyon would not listen to an argument founded on remoteness, because the limitation over might at any time be barred by the previous tenant in tail." He therefore held the remainder good. This decision was affirmed in D. P. (*y*). Lord Cottenham observed: "It is said that this last limitation is too remote, because, there being no previous limitation to issue generally, there might be a failure of all the prior

(*x*) 2 B. C. C. 215. (*y*) 2 H. L. Ca. 186.

limitations and yet issue, as in the case of a son of a daughter, might exist, so that this last limitation would not take effect. But if this be a remainder it would be barrable (*z*), and the objection therefore would not arise." He then went on to show that the limitation in question was a remainder limited on a contingency, and *therefore* good.

So in Doe d. Winter *v.* Perratt (*a*), where the devise was to I. C. in tail male, with remainder to the first male heir of the branch of R. C.'s family who lived at H., the branch of R. C.'s family who lived at H. might have consisted for an indefinite time of females only: so that the gift to the first male heir who should come into existence was too remote, had it not been limited by way of contingent remainder; but being so limited, no doubt of its validity was expressed on this ground; the only question was, who was meant by "first male heir."

Doe *v.* Perratt.

The judgment of Lord St. Leonards in Cole *v.* Sewell has
*258 * been criticised (*b*), as if it had asserted that contingent remainders were in no case subject to the rule against perpetuities, being sufficiently restricted by the rule which requires them to vest, if at all, at or before the determination of the particular estate. But this does not appear to have been his real meaning. He nowhere says that the event upon which the preceding particular estate (upon which the contingent remainder is to depend) is limited to *determine* need not be within the limits allowed by the rule. On the contrary, he says, "The modern rule against perpetuities has rendered void successive life estates to successive unborn classes of issue" (*c*), and (as he has since remarked (*d*)) he relied on the previous estate tail. The rule here referred to prevents the existence of a particular estate which, by enduring to a too remote period, might support a too remote contingent remainder; while in the case before him the estate tail removed all question of perpetuity. The event upon which the particular estate is to determine need not be, and in Cole *v.* Sewell was not, the same as the event upon which the contingent remainder is to arise: and the L. C.'s judgment is directed only to show that where the former event is not obnoxious to the rule against perpetuity, the remoteness of the latter event is immaterial. It is quite consistent with the very words of his judgment, and is required indeed by the general tenor of it, to hold with Sir W. P. Wood (*e*) that "a contingent remainder cannot be limited as depending on the termination of a particular estate whose determination will not necessarily take place within the period allowed by

Remarks on Cole *v.* Sewell.

(*z*) This must be taken to mean "always barrable," which would not *always* have been the case with an executory limitation, *e. g.* when the estates tail had determined, see Bankes *v.* Holme, infra, p. 261.
(*a*) 9 Cl. & Fin. 606.
(*b*) See Appendix A.
(*c*) See above, p. 257, and 2 D. M. & G. 170.
(*d*) Law of Prop. p. 120.
(*e*) 11 Hare, 374, 375.

law;" and that "a perfectly accurate statement of the law is made in the able argument of Mr. Preston in Mogg *v.* Mogg (*f*), where he says 'a gift to an unborn child for life is good if it stops there, but if a remainder is added to his children or issue as purchasers it is not good, unless there be a limitation of the time within which it is to take effect:'" thus connecting, if not identifying, the rule against perpetuities with the rule which prohibits the limitation of successive estates to successive unborn classes of issue (*g*).]

*A term of years (like any other estate) may be made expectant by way of remainder on an estate tail; but sometimes it happens that the term is so limited as to render it hard to say whether it is ulterior or precedent to the estate tail. If the term is precedent to the estate tail, of course it cannot be defeated by the acts of the tenant in tail (*h*): and in such case, if the trusts of the term are not to arise until the failure of issue under the entail, those trusts are necessarily void. As in Case *v.* Drosier (*i*), where a testator devised his estates at M. and T. to trustees for 500 years, upon the trusts after declared, and he then devised the M. estate, subject to the term, to A. for life, with remainder to his sons and daughters in tail, in strict settlement, in the usual manner, with remainder to B. and his sons and daughters, in like manner. He then devised the T. estate in a similar manner, except that B. was put in the place of A. And the testator declared the trusts of the term of 500 years to be, for the purpose (among others) of raising portions for two granddaughters, payable at twenty-one, *and further portions in case either A. or B. should die without issue,* and all which were to sink in case they died under age and unmarried. Lord Langdale, M. R., thought that the words "without issue" meant without issue who were objects of the prior limitations; but as this might be a remote event, and as there were no means by which the charges would be barred, the trusts could not be supported. "They depend," he observed, "on a term, and that term is precedent to the estates tail, so that after a recovery by a tenant in tail, there would remain a term and a trust to be performed; a trust which could not be defeated, and a term which cannot be destroyed." *259

Term of years, whether ulterior or precedent to estate tail.

[Of course it is not the mere limitation of an estate tail, — as, to the first son of A., who never has a son, — but the vesting of it in the devisee, which protects the trusts of the subsequent term. On the death of A. without having had a son the trusts will be good or bad, or (if

(*f*) 1 Mer. 664.

(*g*) See Gilbert, Uses, n. by Sugd. p. 260. Mr. Joshua Williams treats the two rules as independent, and denies the validity of such successive limitations, although restricted as suggested by Mr. Preston. He gives a specimen of such limitations which he considers to be unprecedented, and therefore invalid, Law of R. P. 264; Appendix F., 9th ed. But see Cadell *v.* Palmer, stated on this point, post, p. 379.]

(*h*) Eales *v.* Conn, 4 Sim. 65.

(*i*) 2 Kee. 764, [affirmed by Lord Cottenham, 5 My. & Cr. 246. See Sykes *v.* Sykes, L. R. 13 Eq. 56, acc.;] and see Hayes's Introd. vol. 1, p. 135, vol. 2, p. 170, n., 5th ed.

severable), some good and some bad, according as they are within or without the limits set by the rule against perpetuity (*k*).]

Executory limitation, whether precedent or subsequent.

The question, whether an executory limitation was *260 precedent * or subsequent to an estate tail, was much discussed in Doe d. Lumley *v.* Earl of Scarborough (*l*), where lands were devised to A. for life, with remainder to his first and other sons in tail, remainders over, with a proviso, that if the earldom of S. should descend upon A. or any of his sons, within the period of certain lives, or within the term of twenty-one years after the decease of the survivor, his or their estate should cease, and the lands remain over as if he or they were dead without issue. The eldest son of A. suffered a common recovery, and A. joined in the conveyance for the purpose of making a tenant to the *præcipe*. The earldom afterwards devolved upon A. It was held in the Exchequer Chamber (*m*) (reversing a decision in B. R.), that the executory limitation was barred; the court being of opinion, that this was a mere proviso for the cesser of the old estates created by the will to which it applied, so as to accelerate and let in the enjoyment of the remainders over, and not (as had been considered in the court below) the creation of any *new* estate. The judges in B. R. were of opinion that the proviso operated, not by way of determining or defeating the estate tail of the son of A., but antecedently to that estate, by preventing the estate tail from ever taking effect; and that the persons entitled in remainder had two distinct estates, one of which was antecedent, and the other posterior to the estate tail, and consequently, that the former could not be affected by the recovery.

Whether a remainder, which is destructible, can be void for remoteness.

The same species of reasoning by which a remainder or an executory limitation, to arise on the determination of an estate tail, is supported, might seem to have applied to a contingent remainder, which was formerly liable to be destroyed by the act of the owner of the preceding estate of freehold, no estate being interposed for its preservation; but the writer is not aware of any authority for the application of the doctrine to such cases. If therefore freehold lands, of which the legal inheritance was in the testator, was devised to A. for life, with remainder to his eldest son who should be living at his decease, for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease: although A. in his lifetime might have destroyed all the remainders, and the eldest son, after his (A.'s) decease, might have destroyed the ultimate remainder in fee devised to his children, without being amenable either at law or in equity to the persons whose estates were thus destroyed, such ultimate remainder would, nevertheless,

[(*k*) Tregonwell *v.* Sydenham, 3 Dow, 194, where all the trusts were held void, except the trust to raise the money, and the money was held to result to the heir. See as to the last point, Ch. XVIII. s. 2.]

(*l*) 3 Ad. & Ell. 2, 4 Nev. & M. 724.

(*m*) 3 Ad. & Ell. 897.

have *been void for remoteness (*n*) on the ground that the *261
destruction in these cases was effected by what the law called a tortious or wrongful act (though it was a wrong without a remedy), the perpetration of which was not to be presumed. [And now the stat. 8 & 9 Vict. c. 106, s. 8, which has deprived the owner of the previous estate of freehold of the power of destroying the contingent remainders depending on it, has also deprived those remainders of any validity they might have derived from their destructibility.

Effect of 8 & 9 Vict. c. 106.

The devise of an estate in *reversion* may, it seems, be void for remoteness when a devise of an estate in *remainder* would not. A reversion is, in fact, a present interest, since it carries the services and rent (if any) during the subsistence of the particular estate (*o*); and a devise of it, therefore, contingently on a future event is, like a similar devise of any other estate in possession, an executory limitation which need not vest *eo instanti* that the particular estate determines, and is void if the event be too remote. Thus, in Bankes *v.* Holme (*p*), where a settlor, having the reversion in fee expectant on a failure of issue male of his sons and issue general of his daughters, devised it on the contingency of there being no child or children of his wife by him begotten, or (as eventually happened) of there being such, but all of them dying without issue; it was held, that the devise was too remote and void (*q*). If the devise in this case had been such as to create a remainder in fee, such remainder could only have taken effect in case the general failure of issue had happened simultaneously with the determination of the estates tail to the sons and daughters (*r*), and up to that time would have been barrable, and therefore not too remote. The devise of the reversion on the other hand, though barrable during the subsistence of the estates tail, would not necessarily have always been barrable, since, taking effect as it did by way of executory devise, it must, if held valid, have awaited the time when the issue general failed; an indefinitely long period might thus elapse between the determination of the estates tail and the failure of issue general, during which the reversion would have descended in fee to the testator's heir, who could not have *barred the executory gift, and the rules against perpetuity *262
would have been infringed (*s*).

A devise of a reversion may be void when a similar devise of a remainder would be good.

Contingent remainders of copyholds were governed by the same

[(*n*) Or by the rule already noticed which forbids the giving of an estate for life to an unborn person, with remainder by purchase to his issue.

(*o*) Preston on Merger, 246; Badger *v.* Lloyd, 1 Ld. Raym. 523; Bac. Uses, 45, 46, cited Sand. Uses, ch. 2, v. 2.

(*p*) 1 Russ. 394, n.; Sugd. Law of Prop. 351; and see Doe *v.* Fonnereau, Dougl. 486.

(*q*) But the devise might have been supported on a distinct ground: the testator referred to the settlement, and, though he misrecited it, he manifestly intended to devise his reversion, whatever it was. See Ch. XL. s. III. 5.

(*r*) The case would then have been similar to Cole *v.* Sewell.

(*s*) Bristow *v.* Boothby, 2 S. & St. 465; and see Morse *v.* Ormonde, 1 Russ. 382.

How far same rule applicable to copyholds.

rules as contingent remainders of freeholds, except that the former were not liable to destruction by the owner of the previous estate (*t*). The statute 8 & 9 Vict. c. 106, by depriving the owner of a previous estate in freeholds of this power, has removed the only point of difference between contingent remainders in lands of those tenures (*u*).

A different rule applies to contingent limitations by way of remainder in equitable interests.

Contingent remainders (or, more properly, executory interests) of trust or equitable estates are not governed by the same rule as contingent remainders of legal estates; for they do not necessarily vest or fail upon the determination of the previous estate, but await the happening of the contingency on which they are limited (*x*), and are therefore invalid if that contingency be too remote (*y*). But, like executory devises, they are good after an estate tail, if limited on an event which must necessarily happen at or before the determination of that estate, *e. g.* a trust for a class to be ascertained at or before such determination (*z*).

What is the ground of the decision in Cole *v.* Sewell.

These considerations bear upon an observation which has been made (*a*) on the doctrine advanced in Cole *v.* Sewell (and the same would apply to Doe *v.* Perratt), to the effect that a contingent remainder limited after an estate tail is not void on account of the remoteness of the contingency on which it is to arise. It is said that it was not necessary to the decision to lay down any such rule, since the remainder was preceded by estates tail, the owners of which might have barred it, and remoteness was thus obviated. But supposing this to have been the ground of the decision, it must have applied equally had the contingent remainder, together with the estates tail, been equitable and not legal interests: for the remainder would then also have been barrable by the owners of the estates tail: and yet if those estates had determined without being barred, the contingent remainder, — since it would not have failed, but would have waited for the happening of the event upon which it was limited (a period of indefinite duration), — must clearly have been obnoxious to the rule against perpetuities, and therefore void *ab initio*.

It is absolutely necessary therefore to assign some reason for the *263 * validity of the contingent remainders limited on a remote contingency in the cases of Cole *v.* Sewell and Doe *v.* Perratt, besides that of their being barrable along with the previous estates tail.

The question whether a contingent remainder

The validity of remainders limited on a remote contingency does not appear to be affected by the act 8 & 9 Vict. c. 106, s. 8. Under that act contingent remainders which would previously have failed through the determination by forfeiture,

(*t*) Pickersgill *v.* Grey, 30 Beav. 352; so of estates *pur autre vie*, ib.
(*u*) Fearne, C. R. 320.
(*x*) Hopkins *v.* Hopkins, Ca. t Talb. 44, 1 Atk. 581; Chapman *v.* Blisset, Ca. t. Talb. 150.
(*y*) Monypenny *v.* Dering, 7 Hare, 568, 590.
(*z*) Heasman *v.* Pearse, L. R. 7 Ch. 275. (*a*) See Appendix A.]

surrender or merger of the previous vested estate of freehold by which they were supported, are to take effect, notwithstanding such determination, in the same manner *in all respects as if such determination had not happened;* that is to say, such remainders will still fail in any case where they would formerly have failed if the previous estate had determined by any other than one of the modes mentioned in the act; and consequently when the previous estate determines by any of these modes, the contingent remainders depending thereon will be preserved only until the time when the previous estate, if it had not been determined by one of these modes, would have determined in any other manner, and the contingent remainder must then take effect or fail. Neither is a remainder limited on a remote contingency affected by the stat. 40 & 41 Vict. c. 33, which enacts that every contingent remainder thereafter created, which would have been valid as a springing use or executory devise, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect as if the remainder had originally been created as an executory devise: for if the remainder had been originally limited as an executory devise, to take effect on the remote contingency, it would not have been valid.]

is void is not affected by 8 & 9 Vict. c. 106,

—nor by 40 & 41 Vict. c. 33.

The most frequent instances of the transgression of the rule against perpetuities occur in devises or bequests to classes, comprising either individuals who may not come into existence at all during a life in being and twenty-one years afterwards, or persons who may not be *in esse* at the death of the testator, and the vesting of whose shares is postponed beyond majority. In the former case, the rule is fatally violated, even though the gift to the unborn objects is so framed as to confer on them vested interests immediately on their birth.

Most frequently occurring cases of remote gifts.

An example of the latter kind is supplied by Dodd *v.* Wake (*b*), * where a testator bequeathed a sum of 3,000*l.* unto and amongst the children of his daughter M. M., "who shall be living at the time the eldest shall live to attain the age of twenty-four years, and the issue of such of the children of his said daughter, as may then happen to be dead leaving issue," *per stirpes.* M. M. had three children living at the testator's death; but the question was, whether the bequest was not void for remoteness, inasmuch as all these children might die under twenty-four, and then the legacy could not vest in any child, until the expiration of twenty-four years and upwards after the testator's decease. Sir L. Shadwell said:

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Gifts to an unborn class, to vest after majority.

(*b*) 8 Sim. 616; [and see Boughton *v.* James, 1 Coll. 26, 1 H. L. Ca. 406; Griffith *v.* Blunt, 4 Beav. 264. But a gift to a class at a prescribed age includes none born after the eldest has attained the age; if, therefore, he does so in testator's lifetime, the gift is good, whatever the age prescribed. Picken *v.* Matthews, 10 Ch. D. 264.]

"The testator appears clearly to have intended, that only those children of his daughter should take who should be alive when the eldest child for the time being should attain the age of twenty-four, and, therefore, the bequest is void for remoteness."

Distinction in regard to remainders.

It is proper to remark that, in the class of cases under consideration, a limitation which would as an executory devise be void for remoteness, may be good as a contingent remainder, on account of the necessity, which the rules applicable to contingent remainders impose, of its vesting, if at all, at the instant of the determination of the preceding estate for life. Such an estate, therefore, if limited to a person who was in existence at the death of the testator, necessarily restricts the devise within proper bounds. Thus if lands of which the testator had the legal inheritance be devised to A. for life, with remainder in fee to the children of A. who shall attain the age of twenty-two, the devise in remainder will be good, because if at the death of A. no child has attained the vesting age, the remainder will fail under the doctrine in question(*c*); and if any child has attained that age the devise will take effect in favor of such child to the exclusion of any child or children afterwards attaining the prescribed age(*d*).

Rule different with respect to equitable interests.

[With respect, however, to equitable interests (and though the authorities extend only to equitable interests by way of remainder in personalty, they must, it is conceived, equally apply to trusts of inheritance (*e*)), a different rule prevails; as already stated, they await the happening of the event upon which they are limited, notwithstanding the determination *265 of the particular * estate. They are therefore void when that event is too remote; and] the fact that *some* of the objects eventually composing the class were actually born within the period allowed by the rule of law, will not render the gift valid, *quoad* those objects. Thus, in Leake *v.* Robinson(*f*), where certain stock and moneys were bequeathed to W. R. R. for life, and after his decease, to the child or children of the said W. R. R. who, being a son or sons, *should attain the age of twenty-five*, or being a daughter or daughters, attain that age, or be married with consent; and in case the said W. R. R. should happen to die without leaving issue living at the time of his decease, or leaving such, they should all die before any of them should attain twenty-five, if sons, and if daughters, before they should attain such age, or be married as aforesaid, then to the brothers and sisters of the said W. R. R., on their attaining twenty-five, if a brother

Gift of personal estate to a *class* which *may* comprise objects too remote, void as to all.

(*c*) Fearne, C. R. 4. [Festing *v.* Allen, 12 M. & Wels. 279; Alexander *v.* Alexander, 16 C. B. 59.

(*d*) Brackenbury *v.* Gibbons, 2 Ch. D. 417. See further as to contingent remainders of this kind since 40 & 41 Vict. c. 33, post, Ch. XXVI.

(*e*) See Blagrove *v.* Hancock, 16 Sim. 371; Walker *v.* Mower, 16 Beav. 365, where, however, the trust was executory.] (*f*) 2 Mer. 363.

or brothers, and if a sister or sisters, on such age or marriage as aforesaid. It appeared that five of the brothers and sisters of W. R. R. were born before the testator's death, and it was contended, therefore, that the bequest, though confessedly void as to those born afterwards, was good as to these objects; for that no case had gone the length of deciding, that persons who are capable of taking under a will, should not take, merely because they are joined in a bequest with others who are incapable; but Sir W. Grant, M. R., held, that the bequest was void as to the whole, observing, with his usual felicity: "The bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favor of the whole class, I will make his bequests what he never intended them to be, viz. a series of particular legacies to particular individuals; or, what he has as little in his contemplation, distinct bequests, in each instance, to different classes, namely, to grandchildren living at his death, and to grandchildren born after his death." (*g*).[1]

* And even if all the members of the class had happened to be *266 born during the life of the tenant for life, or even in the lifetime of the testator himself, the gift would nevertheless have been absolutely void, as it is an invariable rule that regard is had to possible not actual events, and the fact that the gift *might* have included objects too remote is fatal to its validity, irrespectively of the event.[2]

Gift to a class including a named person.

Where the testator has combined with the remote class a living person in such a manner as to constitute him a member of the class, the gift to him cannot be distinguished from, and therefore shares the fate of, the gift to the other intended objects with which it stands blended and associated (*h*). [This conclu-

[(*g*) The books abound with cases in which the decision in Leake *v.* Robinson has been followed; it will be sufficient to refer to some of them, Judd *v.* Judd, 3 Sim. 525; Newman *v.* Newman, 10 Sim. 51; Comport *v.* Austen, 12 Sim. 218; Ring *v.* Hardwick, 2 Beav. 352; Bull *v.* Pritchard, 1 Russ. 213, 5 Hare, 567; Vawdry *v.* Geddes, 1 R. & My. 203; Southern *v.* Wollaston, 16 Beav. 166; Merlin *v.* Blagrave, 25 Beav. 125; Pickford *v.* Brown, 2 K. & J. 426; Read *v.* Gooding, 21 Beav. 478, 4 D. M. & G. 510; Rowland *v.* Tawney, 26 Beav. 67; Smith *v.* Smith, L. R. 5 Ch. 342, referred to below.]

(*h*) Porter *v.* Fox, 6 Sim. 485.

[1] See Caldwell *v.* Willis, 57 Miss. 555.

[2] The same principle prevails in this country, that, in applying the rule against perpetuities, regard is to be had to possible, not to actual, events; and the fact that the limitation might have included objects too remote is fatal. Donohue *v.* McNichol, 61 Penn. St 73; Brattle Sq. Church *v.* Grant, 3 Gray, 142. 153; Sears *v.* Russell, 8 Gray, 86, 97; Whelan *v.* Reilly, 3 W. Va. 597; Amory *v.* Lord, 5 Seld. 403; Hawley *v* James, 16 Wend 61, 120. The gift must be framed so as to take effect *ex necessitate* within the period allowed. Sears *v.* Putnam, 102 Mass. 5; Loring *v.* Blake, 98 Mass 253; Brattle Sq. Church *v.* Grant, 3 Gray, 142. The fact, however, that the testator has given an estate to trustees which may come within the prohibition of perpetuities is not fatal, if the *cestuis que trust* have the right to terminate the trust and alienate before the period of remoteness begins. Lovering *v.* Worthington, 106 Mass 86; Bowditch *v.* Andrew, 8 Allen, 339; Otis *v* McLellan, 13 Allen, 339. And this appears to be true though the termination of the trust may require the consent of the trustees. Lovering *v.* Worthington, supra.

sion was questioned by a learned judge (*i*), who thought the gift to the living person, when associated with a gift to a "class" (all to take as tenants in common), ought not to fail any more than it would if it had been associated with a gift to other named individuals to take with him as tenants in common. But the conclusion seems inevitable: for in the former case the share of the living person could not be ascertained but by reference to the number of members ultimately included in the class; and this could not be known within due limits. This it was that made the living person one of the class, subject to all the conditions that appertained to that character. Leake *v.* Robinson shows that it is not the description of the legatees as children or grandchildren that constitutes them a class, but the mode and conditions of the gift. Sir W. Grant there observed (*j*), that supposing the distinction made (as was there attempted) between persons capable and persons incapable, there was still the difficulty of adjusting the proportions in which the capable children were to take, and in determining the manner and the period of ascertaining those proportions.

Void as to some only, where the amount of each share is ascertained within legal limits.

Storrs *v.* Benbow.

Where this difficulty does not exist, the rule in Leake *v.* Robinson does not generally apply. Thus in Storrs *v.* Benbow (*k*), where the testator bequeathed 500*l.* to each child that might be born to either of the children of either of his brothers, it was decided by Lord Cranworth that the gift was valid as to the children of nephews who were born in the testator's lifetime, and void as to the children of the other nephews. He said it was a mistake to compare the case with Leake *v.* Robinson. The legacy given to one of the former set of children could not be bad because there was a legacy given under a similar description to a person who would not be able to take because the gift was too remote.

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Void in part only where shares ascertainable within the period.

Griffith *v.* Pownall.

Again, in Griffith *v.* Pownall (*l*), A. had a power to appoint among all the children of B., begotten and to be begotten, and their issue; and in default to the children equally. All the children that B. ever had (six in number) were born at the time of the creation of the power, and A. appointed that the share which each child of B., begotten and to be begotten, was entitled to in default of appointment, should be held in trust for that child for life, and after its death for its children. Sir L. Shadwell, V. C., held the appointment valid. He said that, if the gift be of the bulk of the property amongst a set of persons collectively, some of whom are within the rule of law as to perpetuity, but the rest of them are not, the gift is void *in toto*. That in the case before him the gift was not of the bulk of the fund,

[(*i*) Per Stuart, V. C., James *v.* Lord Wynford, 1 Sm. & Gif. 58, 59. If the gift were in joint tenancy, would the whole fund accrue to the individual? (*j*) 2 Mer. 390.
(*k*) 3 D. M. & G. 390. See also Wilkinson *v.* Duncan, 30 Beav. 111, as to the legacies of 2,000*l.*; as to the residue, the case was like Leake *v.* Robinson.
(*l*) 13 Sim. 393.

but the testator merely directed how the share of each daughter should go after her death. If there had been a seventh or eighth daughter, the gift would have been bad as to their children; nevertheless the gift to the elder children would have been good.

The distinction was disregarded in Greenwood *v.* Roberts (*m*), where the testator bequeathed personal property upon trust, among other things to pay his brother Thomas an annuity of 200*l.* a year, and after his decease to pay the same to and amongst *such of his children as might be then living* in equal shares during their respective lives, and at the decease of any of them, he ordered, that so much of the principal or capital stock as had been adequate to the payment of the annuity to which the child so dying had been entitled during his or her life, should be sold, and the produce thereof divided equally amongst the children of him or her so dying, when they should severally attain the age of twenty-one years; he gave them vested interests therein; and further directed that if any of the children of his brother Thomas should at his (Thomas's) death be dead and have left issue, such issue should be entitled among them to the same sum as they would eventually have been entitled to had their parents survived Thomas. Thomas survived the testator, and left a son Richard, who was alive at the death of the testator; but it was held by Sir J. Romilly, M. R., that the * children of Richard could not take. *268 He said, "The gift is, in the first instance, distinctly to a class, namely, to such of the children of his brother Thomas as may be then living, and Richard takes a life interest in that bequest solely in his character of one of those children. The gift over after the decease of those children is not confined to such of the children of his brother as should be alive at the testator's decease, and nothing points to Richard more than any other child of Thomas, who might be born after the death of the testator. I am of opinion that I must, upon the expression used by the testator, treat 'the children of him or her so dying' as another class, and that I cannot, because the testator has directed that on the death of Thomas the fund is to be equally divided between such of his children as shall be then alive, treat the bequest as if it had been a separate set of bequests to each of such children as eventually constituted the class; and therefore, in my opinion, he has given this annuity to a class to be ascertained at a future period, and after the death of each of the persons constituting that class *to another class*, some of whom are prohibited by law from taking, by reason of the rule against perpetuities. If I am correct in this view, the rule in Leake *v.* Robinson must apply. I am of opinion that Richard is neither mentioned nor individually described in the will as a person taking (to use Lord Cottenham's expression, in Roberts *v.* Roberts (*m*)) a separate and individual portion of the annuity bequeathed to Thomas, but that he takes it as one of a class, and that his children intended by the tes-

Greenwood *v.* Roberts, *contra.*

(*m*) 15 Beav. 92. (*m*) 2 Phill. 534.

tator to take after his decease, are persons forming part of a class, some of whom are precluded from taking, and consequently that the gift over after his decease is void."

Remarks on Greenwood v. Roberts.

But Leake *v.* Robinson appears not to justify the use here made of the word "class." The grandchildren were not all of one class; there were as many separate classes of grandchildren as there were children of Thomas, and although to save repetition the gifts to all these classes were included in one set of words, the gift to each of them was wholly independent of the gifts to the others, its amount having been finally ascertained at the death of Thomas, when the number of his children who survived him or predeceased him leaving issue was known. A number of persons are popularly said to form a class when they can be designated by some general name, as "children," "grandchildren," "nephews;" but in legal * language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons. Thus a bequest of 1,000*l.* to the children of A., the eldest child to take one moiety, the younger children the other moiety, is, in ordinary language, a gift to one class of persons, namely, children; in the legal acceptation of the words it is a gift partly to an individual, namely the eldest child of A., and partly to a class, namely, his younger children. On the other hand, a gift to A., B., and C., and the children of D., share and share alike, may, legally speaking, be a gift to a class (*n*), but yet these persons would not in the ordinary acceptation of the term form a class. Moreover, under a gift to a class, if any of the class take, they take the whole; the subject of gift can never, therefore, be partly disposed of and partly undisposed of; this shows that the grandchildren in Greenwood *v.* Roberts did not take as a class, for supposing the gift valid, the children of one child of Thomas would have taken part of the fund, while another part would have been undisposed of if another child of Thomas had no children.

What constitutes a gift to a class.

*269

The principle of Griffiths *v.* Pownall prevailed in Cattlin *v.* Brown (*o*), where a testator entitled to the equity of redemption in lands, subject to a mortgage in fee, devised them to T. B. C. for life, with remainder to all and every his child and children

Cattlin v. Brown. Gift held void in part only.

(*n*) Porter *v.* Fox, 6 Sim. 485; see also Clark *v.* Phillips, 17 Jur. 886; Re Stanhope's Trusts, 27 Beav. 201; Knapping *v.* Tomlinson, 34 L. J. Ch. 7; Aspinall *v.* Duckworth, 35 Beav. 307. Re Ann Wood's Will, 31 Beav 323 (as to the lapsed share), and Drakeford *v.* Drakeford, 33 Beav. 46 are contra: *sed. qu.*, and as to the last-named case see 9 Jur. N. S., Pt. 2. 301. In Re Chaplin's Trusts, 33 L. J. Ch 183, it was admitted by Wood, V. C., that naming some of a class did not make it less a class; yet he held that the named person having died before the testator his share lapsed: which seems contradictory.

(*o*) 11 Hare, 372. See also Vanderplank *v.* King, 3 Hare, 1.

during their natural lives if more than one; and after the decease of any or either of such child or children then the part or share of him, her, or them so dying was given to his, her, or their child or children lawfully begotten, or to be begotten, and to his, her, or their heirs as tenants in common. T. B. C. left several children, some born in the testator's lifetime, some after his death; and it was held by Sir W. P. Wood, V. C., that the shares of the children born in the lifetime of the testator were well given to their children though the gift to the other * grandchildren failed. He thought Greenwood *v.* Roberts was distinguishable because "the children of the brother who were born and *in esse* at the death of the testator, might all have been dead at the death of the brother, and the case therefore fell within the rule in Leake *v.* Robinson. It was a gift to a class, and all the members of the class might be persons without the limits. The children born at the testator's death might take no interest whatever. On this ground the decision in Greenwood *v.* Roberts was no doubt perfectly right." And he intimated that the case before him might have been similar if the devise had been to the sons of T. B. C. living at his decease, with remainder to their sons in fee. *270

Explanation of Greenwood *v.* Roberts by Wood, V. C.

Sir R. Kindersley said (*p*) he was unable to see the distinction here referred to: it appeared to him that in Cattlin *v.* Brown precisely the same observation would arise, and that it would be equally true that all the children of T. B. C. that were born and *in esse* at the death of the testator might die in the lifetime of T. B. C. He did not see how the observation or the ground of distinction applied; and it struck him that the same reason which was given in support of Greenwood *v.* Roberts would have required Cattlin *v.* Brown to be decided in the same way. It must also be observed that the M. R. himself declared (*q*) that the gift to grandchildren in the latter case would undoubtedly have been good if the class was to be ascertained at the death of Thomas; and he referred his decision to the clause which substituted the issue of any child of Thomas who should die before Thomas, in the place and to take the share of their parent, and to the fact that such issue took no vested interests until they attained twenty-one, so that if the children of Thomas who were living at the date of the will died before Thomas and left children who died under twenty-one leaving remoter issue, it would not be until these remoter issue attained twenty-one that the class would be ascertained, or the number of shares ascertained into which the fund would be divisible, and this would be too remote. This was a new ground. It was not taken in the case itself; doubtless because the substitution clause said nothing about the age of twenty-one. But if this clause is to be understood as so referring to the previous gift to grandchildren in

Remarks thereon by Kindersley, V. C.

Explanation of Greenwood *v.* Roberts by Romilly, M. R.

Remarks thereon.

(*p*) Knapping *v.* Tomlinson, 34 L. J. Ch. 3.
(*q*) See Webster *v.* Boddington, 26 Beav. 136.

remainder, as to import into itself the mention of that age, so *271 also must it be deemed to import the declaration that the * interests given were "vested." Besides, the intermediate interest was given for the benefit of the grandchildren during minority.

The distinction already noticed as having been taken by Sir W. Wood regarding Greenwood *v.* Roberts, was disregarded by him in Wilson *v.* Wilson (*r*). The bequest there was of a sum of money upon trust to pay the income to the testator's wife during her life, and after her death in trust for the then present and future children of I. L. *who should be living at the death of the testator's wife*, and who should attain the age of twenty-one or marry, in equal shares; and the testator directed that the shares of each daughter should be settled upon trust for her for life, and after her death for her children. Sir W. Wood decided that the trust in favor of a child of a daughter who was living at the death of the testator was valid. He said, "I can conceive no ground why in respect of a child of I. L. *in esse* at the time of the testator's decease there should not be a direction that her share should be settled on her children. In Porter *v.* Fox (*s*) and that class of cases the difficulty arises from their being a gift to a class of persons some of whom can take whilst others cannot. In these cases it cannot be ascertained what is the share of each, and hence the gift is held void as to all. Here, however, the children of each child of I. L. form a separate class, and the share of each class is separately ascertainable."

Wilson *v.* Wilson. Gift held void in part only.

Cattlin *v.* Brown was followed by Sir R. Kindersley in Knapping *v.* Tomlinson (*t*), where the devise was identical in its terms with that in the former case. The V. C. reviewed all the cases, and expressed his entire concurrence with Sir W. Wood's decision. Sir J. Romilly, having also declared (*u*) his approval of that decision, and having referred his own decision in Greenwood *v.* Roberts to grounds which, at all events, remove it from apparent opposition to the other authorities (*x*), it must be taken as settled that where the shares of all the separate stocks can be ascertained within legal limits, as in those authorities, the rule in Leake *v.* Robinson is not applicable so as to defeat limitations, otherwise valid, of the separate shares.

Knapping *v.* Tomlinson. Gift held void in part only.

Neither does the rule extend to cases where, in the event of the death of any of the original class, another class is substituted in his place. Thus, if a fund is bequeathed to the children of A. (a person living at the testator's death), and *272 if any of them * should die before the period of distribution (*e. g.* before attaining the age of twenty-

Where the remote gift is substitutional that alone fails.

(*r*) 4 Jur. N. S. 1076, 28 L. J. Ch. 95.
(*s*) 6 Sim 485.
(*t*) 34 L. J. Ch. 3, 10 Jur. N. S. 626.
(*u*) In Webster *v* Boddington, 26 Beav. 137, 138.
(*x*) Arnold *v.* Congreve, 1 R. & My. 205 (where the point was not taken) is overruled.

one) his share is given to his issue, to vest in them at twenty-one; here the substituted gift to issue of a child born after the testator's death is obviously too remote, and the child's share remains undisturbed; but the substituted gift to issue of a child born in the testator's lifetime is valid, for the fund is, in any event, to be divided into as many shares as there are members of the original class, *i. e.* children of A.; as in Wilson *v.* Wilson, the issue of each child of A. forms a separate class, whose share is separately ascertainable (*y*).

On the other hand, if the gift to the issue is not substitutional but original and concurrent with that to children, as, if the bequest be to such of the children of A. as attain twenty-one, and the issue who attain twenty-one of such of the children of A. as die under twenty-one, *per stirpes*. Here they all form but one class, the share of no one of whom can be finally ascertained without reference to the shares of all the others. And as some of this class may obviously not be ascertained within a life in being and twenty-one years, the whole gift fails (*z*). It is true that, according to the terms of the gift, the minimum share of each would be ascertained within a life in being (*i. e.* the life of A.) and twenty-one years after. But the maximum would remain uncertain until it was seen whether the issue of any child dying under age and leaving issue did or did not attain twenty-one, which would clearly be beyond the legal period.] Otherwise, where it is concurrent.

The doctrine that the validity of a gift is to be tried by possible not actual events is, of course, applicable no less to gifts to individuals than to gifts to classes. If, therefore, the devise * or bequest be in favor of an unborn person, who may not answer the required description within a life and twenty-one years, it will be void, although a person should happen to answer the description within such period. Thus, if a testator give real or personal estate to an unborn person, who shall thereafter happen to acquire some personal qualification, which is attainable at any period of life, and is not *necessarily* confined to minority, as in the case of a gift to the first son of A. who shall obtain a commission in the army, take a degree at the university, *273

(*y*) Packer *v.* Scott, 33 Beav. 511, appears to be a case of this kind; but the report is very imperfect. The question whether a gift is original or substitutional is not peculiar to the subject of remoteness. It is dealt with, post, Ch. XXX. s. 3. See also Ch. XLIX. s. 1. One example will here be useful. In Stuart *v.* Cockerell, L. R 5 Ch. 713, the bequest was to S. for life, remainder to his eldest son for life, remainder to E. for life, and after the death of the survivor of the tenants for life "to the children of S. share and share alike if more than one, and if but one, then to such one child and the child or children of such of the children of S. as shall be then dead, according to the Statute of Distribution; but in case there shall be no child or grandchild of S. then living, then" over. At the death of the testatrix S. had no child. Without the gift over this would have been a vested gift to the children of S., with a substitutional gift to grandchildren (Re Bennett's Trusts, 3 K. & J. 280; Baldwin *v.* Rogers, 3 D. M. & G. 649); but the gift over was held to show that no children of S., except such as were living at the period of distribution, were objects of the gift, and that the children then living and the children of such of the children as were then dead formed one class.

(*z*) Smith *v.* Smith, L R. 5 Ch 342; Stuart *v.* Cockerell, supra; Seaman *v.* Wood, 22 Beav. 591; Webster *v.* Boddington, 26 Beav. 128; Hale *v.* Hale, 3 Ch. D. 643; Bentinck *v.* Duke of Portland, 7 Ch. D. 693. In Re Moseley's Trusts, L. R. 11 Eq. 499, 502, it was overlooked that issue as well as children were required to attain twenty-one: this made the whole gift void.

or marry (*a*), it is conceived that the gift would be void, even though A. should happen to have a son who should answer the required qualification before the age of twenty-one.

[Thus, in Lord Dungannon *v.* Smith (*b*), where a testator devised leaseholds in trust for his grandson A. for life, and after his death "to permit such person who for the time being would take by descent as heir male of the body of his said grandson to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years" absolutely, with a gift over "if no such person should live to attain" that age. The eldest son of A. attained twenty-one in his father's lifetime, and claimed the property as having, in event, vested within legal limits. He contended that the devise might be read as containing separate gifts, to the eldest son, if he attained twenty-one, if not, to the first other heir male who should attain that age; but it was held otherwise, for there was no gift to the eldest son, except as one of a set or series of persons, any one of whom might come within the description, whether he was within the limit or not, and there was no authority for moulding or splitting the bequest in the manner proposed. The case was considered to be analogous to Leake *v.* Robinson.

Lord Dungannon *v.* Smith.

Again, in Hodson *v.* Ball (*c*), a gift over of a share of any child of the testator, in case of failure of its issue at any time during the life of the child's husband or wife, was held void; since the husband *274 or wife might be a person not born at the * testator's death, and might survive the child more than twenty-one years, and the gift over would thus take effect after the expiration of a life and twenty-one years.

Again, where freehold lands are limited in strict settlement, and leasehold or other personal property is vested in trustees, upon corresponding trusts, but so as not to vest absolutely in *any* tenant in tail till he shall attain the age of twenty-one years, but on his death under age to devolve as the freeholds, this trust, so far as it is limited in favor of tenants in tail, is void, since by the death of successive tenants in tail under age and leaving issue the vesting of the leaseholds might be deferred beyond the period allowed by law. Care should therefore be taken that the vesting is only deferred till some tenant in tail *by purchase* attains the age of twenty-one years (*d*). Similarly in all cases where

Vesting of personal property given in strict settlement must not be deferred till *any* tenant in tail attains twenty-one.

(*a*) To these may be added the case of a gift to the first son of A. who shall be in holy orders (as in Proctor *v.* Bishop of Bath and Wells, 2 H. Bl. 358), for although such orders are never conferred on any one under the age of twenty-three, yet A. may have a son who is qualified and takes orders in his lifetime.

(*b*) 12 Cl. & Fin. 546, 10 Jur 721, Sug. Law of Prop. 342, and see Ibbetson *v.* Ibbetson, 10 Sim. 495, 5 My. & Cr. 26; Wainman *v.* Field, Kay, 507; also Merlin *v* Blagrave, 25 Beav. 125; and cf Harvey *v.* Harvey, 5 Beav 134.

(*c*) 14 Sim 558. See also Lett *v.* Randall, 3 S M. & G. 83; Buchanan *v.* Harrison, 1 J. & H. 665; Re Merricks' Trusts, L. R. 1 Eq 551.

(*d*) This is the common form, Davidson's Common Forms, p. 216. If the clause stops

under a deed or will a strict settlement is created, and (as is usually done) power is given to the trustees during the minority of any person entitled under the settlement to manage and let the property and receive the rents and profits (*e*), or to cut timber and sell it (*f*), and invest the moneys arising thereby in the purchase of other lands to be settled to the same uses, the exercise of these powers must be carefully restricted to the period of the minorities of tenants in tail *by purchase*, else the powers will be altogether void (*g*).

*The invalidity of such trusts admits, however, of one ex- *275

short with the proviso against absolute vesting, and omits the concluding gift over, remoteness is avoided without help of the words "by purchase." For then there is no gift of the personalty except in the primary trust, and under this trust it vests absolutely in the first tenant in tail by purchase: and the proviso, being but an accessory to that, must be construed also to relate only to tenant in tail by purchase, Christie *v.* Gosling, L. R. 1 H. L 279; Martelli *v.* Holloway, L. R. 5 H. L 532. According to this construction, however, the intention to keep the two species of property together as long as possible fails. The concluding gift over is required to effectuate this intention, and as this gift contains trusts for tenants in tail taking by descent, the rule of construction established in Christie *v.* Gosling is inapplicable, and the words "by purchase" are needed to obviate remoteness; see Gosling *v.* Gosling, 1 D. J. & S. 16. See further on this subject, post, Ch. XLIV. s. 3.

(*e*) Lade *v.* Holford, 1 W. Bl. 428, Amb. 479, Fearne, C. R. 530, n.; Browne *v.* Stoughton, 14 Sim. 369; Scarisbrick *v.* Skelmersdale, 17 Sim. 187; Turvin *v.* Newcombe, 3 K. & J. 16; Floyer *v.* Bankes, L. R. 8 Eq. 115 (where, however, the powers were annexed to an anterior term). (*f*) Ferrand *v.* Wilson, 4 Hare, 373.

(*g*) *Observations on Browne* v. *Stoughton.* — Mr. Lewis, in the supplement to his work on Perpetuities, doubts the correctness of the decision in Browne *v.* Stoughton, conceiving that such trusts are, like executory limitations engrafted on an estate tail, barrable along with the estate tail, and therefore not void for remoteness. But the trustees clearly have an actual estate in the lands, which estate is not subsequent or collateral, but anterior to the estate tail, and the trusts declared cannot therefore be affected by any act of the tenant in tail. This is clear from Marshall *v.* Holloway, where there was no term anterior to the estate tail, nor was the destination of the accumulated fund (if made) too remote, being identical with that of the general personalty, the gift of which was held good. The sole ground of the determination therefore was, that the trust for accumulation could not be split or severed, so as to place part before the first estate tail (which would be neither too remote nor barrable), and part after (which would be too remote if it were not barrable). The whole was an entire limitation, and must stand or fall together. "The other was the better view, but the point is now well settled." Sug. Law of Prop. 349. If in Browne *v.* Stoughton the trust had been barrable along with the estate tail some startling results would follow. Suppose, for instance, that instead of an accumulation being directed during minority, it had been directed during the first twenty-one years after the testator's death to raise money for payment of legacies, it must follow that the tenant in tail, if of full age, could bar the trust, and deprive the legatees of their legacies. Browne *v.* Stoughton cannot therefore be distinguished from Lord Southampton *v.* Marquis of Hertford, 2 V. & B. 54, on the ground that, in the latter, a term was created anterior to the estate tail; indeed Lord Eldon, in Marshall *v.* Holloway, 2 Sw. 445, expressly said that that made no difference. See also 3 Jur. N. S. pt. ii. 181. Mr. Sanders went even further than Mr. Lewis; in an opinion (Sanders on Uses, 5th ed. p. 203, n.) he says, with respect to Lord Southampton *v.* Marquis of Hertford: "It is not easy to discover the ground of the decision, but it is to be observed that the term of 1,000 years preceded the limitations in tail; and it seems to be inferred that a recovery by tenant in tail, subject to the term, did not destroy the preceding trusts of the term. If this be the case, there is a great fallacy in the inference; for the trusts of a term created for the purposes of a settlement, must follow the ultimate devolution of the inheritance, and not the inheritance the trusts of the term. A recovery by tenant in tail would acquire the fee-simple, and render the term attendant on the inheritance discharged of the trusts for accumulation." But Case *v.* Drosier (ante, p. 259) shows that Mr. Sanders' opinion does not represent the accepted view of the law on this point. In Meller *v.* Stanley, 2 D. J. & S. 183, where one having freeholds for lives devised his real and personal estate to trustees, and directed them to keep up the policies on the existing lives (which he had insured), and from time to time to renew the lease and insure the new lives; and subject as aforesaid he gave the property to A. for life, remainder to his first and other sons in tail, &c.: Turner, L. J., said he was not satisfied that the trust could (as was contended) be held valid as to renewal on the dropping of existing lives, and invalid (for remoteness) as to others; he thought, however, it was valid as to all, since there must necessarily be a person who within the lawful period would have absolute command over the estate and consequently over the trust.

ception, namely, where the fund arising therefrom is to be applied in discharge of incumbrances affecting the estate (*h*), for then they only prescribe a particular mode of paying the incumbrances, which, in case of a mortgage, the incumbrancer himself might adopt by entering into receipt of the rents and profits, and may at any time be put an end to, either by the owner paying the incumbrance, or the incumbrancer enforcing his claim against the corpus of the property; thus there is no restraint on alienation. As the payment of all the debts of a testator can now be enforced out of his real as well as his personal estate, there seems, on the principle above noticed, no reason at the present day to doubt the validity of a trust for the accumulation for any period, however long, of the income of all or any part of a testator's property, whether real or personal, for the purpose of paying his debts (*i*).]

Rule against perpetuities does not apply to accumulations for payment of debts.

*276 * A testator is in less danger of transgressing the perpetuity rule, whilst providing for his own children and grandchildren, than when the objects of his bounty are the children and grandchildren of another, since, in the former case, he has only to avoid postponing the vesting of the grandchildren's shares beyond their ages of twenty-one years, and then the fact of the gift extending to after-born grandchildren would not invalidate it, because all the children of the testator must be *in esse* at his decease, and *their* children must be born in *their* lifetime, so that they necessarily come into existence during a life in being. On the other hand, a gift embracing the whole range of the unborn grandchildren of another living person would be clearly void, though the shares should be made to vest at majority or even at birth, for the grandfather might have children born after the testator's decease; and as the gift would extend to the children of such after-born children, it would be absolutely void for remoteness, and that, too, according to the principle already laid down, without regard to the fact of there being any such child or not.

As to provisions for grandchildren.

Of course a testator may so frame and mould his disposition as to make its validity depend on subsequent events; or, in other words, avail himself of the course of circumstances posterior to the making of his will, in order to get as wide a range of postponement as possible; for instance, he may convert the intended estate tail of a person then unborn, into an estate for life in case of his happening to come *in esse* in his (the testator's) lifetime. In all cases of failure under circumstances of this nature, the deficiency is one not of power but of expression; and the question in every instance is, whether the testator has clearly shown an intention to

Testator *may* mould his disposition according to subsequent events.

(*h*) Lord Southampton *v.* Marquis of Hertford, 2 V. & B. 54, see p. 65; Bateman *v.* Hotchkin, 10 Beav. 426; Briggs *v.* Earl of Oxford, 1 D. M. & G. 363, and see Bacon *v.* Proctor, T. & R. 40. In the two first cited cases there was a preceding term, so that it is absolutely necessary to refer them to this special ground. See also Gilbertson *v.* Richards, 5 H. & N. 453.

(*i*) Tewart *v.* Lawson, L. R. 18 Eq. 490.]

take the most ample range or period of postponement, which subsequent circumstances admit of. A point of this kind was much canvassed under the will of Lord Vere (*k*), * who bequeathed to trustees all his household goods, furniture, pictures, books, linen, &c., upon trust to permit his wife to have the use of them during her life, and, upon her death, to permit his son A. B. to have the use of the same goods, &c., for his life, and, upon the decease of the survivor of his (the testator's) wife and son, in trust for such person as should *from time to time* be Lord Vere, it being his will that the goods, &c., after the decease of his wife, should from time to time go and be held and enjoyed with the title of the family, as far as the rules of law and equity would permit. At the death of the testator, the title of Lord Vere descended upon his son, the legatee for life, upon whose decease it descended to his son (the testator's grandson, who was also living at the death of the testator), and, upon the death of the grandson, it descended to the testator's great-grandson, who was born after the death of the testator. The chief struggle was between the personal representatives of the grandson and those of the great-grandson. As the former was born in the testator's lifetime, it was clear, that he *might* have been made legatee for life, with remainder absolutely to the person next in succession, and the question, therefore, was, whether the will authorized such a construction. Sir J. Leach, V. C., before whom the case was originally brought, decided in the affirmative; his Honor observed: "He gives to such person as shall from time to time be Lord Vere, because his purpose is, that the enjoyment shall be continued with the title of the family, as far as the rules of law and equity will permit; in other words he gives to such person as shall from time to time be Lord Vere, with a declaration that each Lord Vere, in succession, shall take the use and enjoyment until there be a Lord Vere who cannot, by the rules of law and equity, be confined to the use and enjoyment only (*l*). This

*277 Tollemache *v.* Earl of Coventry.

Devise to a person who *might* not answer a certain qualification within allowed period, held void, irrespectively of event.

(*k*) Lord Deerhurst *v.* Duke of St. Albans, 5 Mad. 232; S. C. in D. P. nom. Tollemache *v.* Earl of Coventry, 2 Cl. & Fin. 611; 8 Bli. 547; compare this case with Tregonwell *v.* Sydenham, 3 Dow, 194, where a testator, after devising lands (subject to certain terms for years which he created for the purposes thereinafter mentioned) to A. for life, remainder to his first and other sons in tail male, with remainder to the eldest daughter of A. in tail general, with remainders over, directed that when a certain sum of money should be raised out of the rents of his lands under a term of sixty years,* the same should be settled to the use for life of the person who happened then to be entitled in possession under the limitation in his will, with remainder (in effect) to his issue in strict settlement. When the time arrived for laying out the money, it happened that the person entitled in possession under the limitation in question was not *in esse* at the testator's death, and therefore could not be made tenant for life with remainder to his issue; but the grounds on which Lords [Redesdale and] Eldon rested the decision of the house show that if the person entitled in possession had happened to be a person *in esse* at the testator's death, the trust for laying out the money would in their opinion have been legal. See the will stated at length, post, Ch. XVIII. s. 2.

(*l*) In order to render the several positions in the text consistent with the actual rule of law, we must add in each instance, "*with remainder to the next successor;*" for the legal prohibition is not to the giving a life-interest to an unborn person, but to the engrafting on

* This was before the Thellusson Act, post, s. 3.

declaration, therefore, is nothing more than a legal qualification of the prior general description of his legatees, and the effect is the same as if the will had been in the following form: 'Upon trust for such person as shall from time to time be Lord Vere, it being my intention that the absolute interest shall not vest in any Lord Vere, who
*278 may, by the rules of law and equity, be * limited to the use and enjoyment only' (*m*). In this view of the case, there is a direct gift, and nothing executory. By the rules of law and equity, every person living at the death of the testator, who should become Lord Vere, might be limited to the use and enjoyment only (*m*). The son and grandson of the testator were living at his death, and both, therefore, limited to the use and enjoyment only (*m*); but the child who succeeded the grandson as Lord Vere and Duke of St. Albans, was not living at the death of the testator, and could not, therefore, by the rules of law and equity, be limited to the use and enjoyment only (*m*). He took, therefore, an absolute interest, which is now vested in his personal representative."

[This judgment was affirmed by Lord Lyndhurst, but was reversed in D. P. on the advice of Lord Brougham, C. He admitted that the testator might lawfully have limited the chattels to go according to the decree of the V. C. if he had used the proper words; but first he said there was no authority for putting that construction on the words used; and secondly he took a new objection, founded on the bequest being an attempted annexation of chattels to an honor; which he described as an attempt to create a new species of limitation in succession, unknown to the law, to spring up with the person, *i. e.* to the Lords Vere whoever they might be; and he mentioned certain contingencies, especially a possible abeyance of the honor, which, in his opinion, showed that there might be no one to answer that description within the allowed period: and although none of those contingencies had happened, the soundness of the limitations could not depend on the event.

Lord St. Leonards has criticised this judgment (*n*), and has adduced authorities to show that chattels may be limited to go along with an honor; and with regard to the question of construction (which is of the greater interest here), he distinguishes between a compendious limitation to several persons successively, where the legal limit can clearly be marked, as in Lord Vere's will, and a limitation like that in Lord Dungannon *v.* Smith, where only one person was to take, and it depended on the event whether the person who lived to answer the description would or would not come *in esse* within the legal period. He thought Tregonwell *v.* Sydenham a grave authority for giving effect to such a limitation as that in Lord Vere's will as far as the events would allow, keeping within the legal boundary.]

such life-interest a remainder over to the issue of such person, or any other unborn person. *Vide* some remarks on this point, post, p. 279.

(*m*) See last note. [(*n*) Law of Prop. 336.]

*If the objects of a future gift are within the line *279
prescribed by the rule against perpetuities, of course
it is immaterial what is the nature of the interest which such
gift confers (*o*). It would be very absurd that persons should be competent to take an estate in fee in land, or an absolute interest in personalty, and nevertheless be incapable of taking a temporary or terminable interest (for the larger includes the less), and yet it would not be difficult to cite dicta, nay, even to adduce a decision (*p*), propounding the doctrine, that a life-interest cannot be given to an unborn person. The fallacy has probably arisen from the terms in which the general rule has been ordinarily laid down, namely, that you cannot give an estate for life to an unborn person, with remainder to his issue, which has been read as two distinct propositions, the one affirming the invalidity of a limitation for life to an unborn person, and the other the invalidity of a limitation to the issue; though, in fact, all that is meant to be averred is, that a limitation to the children or issue of an unborn person, [following a gift to such unborn person,] is bad, as it clearly is, since such children or issue may not come *in esse* until more than twenty-one years after a life in being (*q*). [Taken as containing two separate propositions, the rule is not true in either of its branches, for a *legal* remainder immediately expectant on a vested estate of freehold may be limited, not only to an unborn person, child of a living person, but to any unborn person whatever, since, in order to take, such unborn person must, as we have seen (*r*), come *in esse* during the subsistence of the previous estate, that is, of a vested estate for life or in tail, otherwise the contingent remainder to him will fail. Indeed it is clear from Cadell *v.* Palmer (*s*) that even a long succession of estates for life to unborn persons and their issues is valid, if subjected to the restriction, that in order to take they must come into existence during lives in being and twenty-one years afterwards. In that case a direction to limit successive estates for life to every person who, being in the line of the heirs male of C. B., should come into existence during the period of the lives of twenty-eight * living persons and twenty years *280
after the decease of the survivor of them was held valid. Under this devise it was possible that five successive generations, all unborn at the decease of the testator, should have taken estates for life, and

Gift to unborn person for life valid.

As to successive limitations to unborn persons who *must* come *in esse* within the allowed period.

(*o*) Cotton *v.* Heath, 1 Roll. Ab. 612, pl. 3; Marlborough *v.* Godolphin, 1 Ed. 415; Doe d. Tooley *v.* Gunnis, 4 Taunt. 313; Doe d. Liversage *v.* Vaughan, 1 D. & Ry. 52, 5 B. & Ald. 464; Ashley *v.* Ashley, 6 Sim. 358; Denn *v.* Page, 3 T. R. 87, n.; Hay *v.* Earl of Coventry, 3 T. R. 83; Foster *v.* Romney, 11 East, 594; Bennett *v.* Lowe, 5 M. & Pay. 485, 7 Bing. 535; Routledge *v.* Dorril, 2 Ves. Jr. 366; [Burley *v.* Evelyn, 16 Sim. 290; Hampton *v.* Holman, 5 Ch. D. 183; and see Fearne, C. R. 503.]

(*p*) Hayes *v.* Hayes, 4 Russ. 311; [see as to this case, 6 Hare, 250, 1 Coll. 37, 5 Ch. D. 188.

(*q*) See 11 Hare. 375.

(*r*) See Doe d. Winter *v.* Perratt, 9 Cl. & Fin. 606, and ante, p. 257; and remember the distinction there taken between legal and equitable limitations.

(*s*) Ante, p. 252.

also (under further gifts in the will not noticed here) that after the decease of the last of the five generations, a sixth generation might have taken an estate tail with remainders over. So where there was a gift to issue of A. (a living person), to vest on a remote event, and a gift over to B. if there should be no issue of A. who should survive the testator and A., the gift over was held valid, the word "survive" importing that the issue here spoken of were not all issue or all included in the previous gift, but such as should be born in the lifetime of the persons whom they were to survive, namely, the testator or A. (*t*).

These considerations would seem to settle] a point which has not, it is believed, been the subject of positive decision, namely, whether a devise which either from the nature of the subject of gift, as in the case of a life estate, or from the nature of the qualification superadded to the devisee, as in the instance of a gift to children living at the death of the testator, can never extend beyond the period allowed by the rule of law, is good though limited to arise upon an event which might, abstractedly considered, happen after that period, as an indefinite failure of issue; in other words, whether a bequest, in a will made before 1838, if A. shall die without issue, to B. if then living, is to be regarded in precisely the same light as a gift, in case A. shall die without issue living B. Upon principle it is difficult to perceive any solid difference between the two cases; and the opinion of Mr. Fearne (*u*) seems to have been in favor of the validity of the former limitation, though none of the cases cited by this distinguished writer go directly to the point. In Oakes *v.* Chalfont (*x*), which is his leading authority, the words "for want of such issue" evidently pointed at the children who were the objects of the preceding gift, and the bequest over was therefore clearly good, as a simple substituted gift. [Sir Ll. Kenyon, in Jee *v.* Audley (*y*), expressly states such a limitation to be good.] Sir W. Grant, though at one time he expressed doubts on the subject (*z*), [seems latterly to have been of the same opinion (*a*), and the authority of
*281 Lord Brougham is on the same side (*b*).] The * question is now of somewhat diminished interest, [since it generally arises on a gift "in default of issue," which words, in wills made since 1837, are not generally to be construed as referring to an indefinite failure of issue; but it is still of some importance, because it may arise on a gift limited to take effect on any other event which, abstractedly considered, is too remote.]

As a gift for life to an unborn person is valid, so it is clear is a remainder expectant on such gift, provided it be made to take

(*t*) Gee *v.* Liddell, L. R. 2 Eq. 341. See also Lachlan *v.* Reynolds, 9 Hare, 796.]
(*u*) C. R. 488, 500, Butler's note.
(*x*) Pollex. 38.
[(*y*) 1 Cox, 326.]
(*z*) Barlow *v.* Salter, 17 Ves. 483; see Sugd. Gilb. Uses, 277, n.
[(*a*) Massey *v.* Hudson, 2 Mer. 133.
(*b*) Campbell *v.* Harding, 2 R. & My. 406.]

effect in favor of persons who are competent objects of gift (*c*); though here also a fallacy prevails; for it is not uncommon to find it stated in unqualified terms, that, though you may give a life-interest to an unborn person, every ulterior gift is necessarily and absolutely void; and some countenance to this doctrine is to be found in the judgment, as reported, of an able judge (*d*), though the adjudication itself, rightly considered, lends no support to any such doctrine, as the ulterior gift, which was there pronounced to be void, was nothing more than a declaration that the property should go according to the Statute of Distribution; so that the claim of the next of kin, who was held to be entitled, was perfectly consistent with the will, unless, indeed, it applied to the next of kin at the death of the unborn legatee for life, which would have been clearly void, as embracing persons who would not have been ascertainable until more than twenty-one years after a life in being; but for this construction there seems to have been no ground.

As to gifts in remainder expectant on estate for life to unborn person.

[But the absolute interest, however parcelled out, must be so limited as necessarily to *vest* (if at all) within the legal period. Thus, if a devise be made to an unborn person for life, and in case he should die without issue living at his death, or under the age of twenty-two years, then to B., this remainder is void, since it depends on the termination of a particular estate by an event which may not happen within a life in being and twenty-one years. It has been suggested that an interest to arise on such an event in an ascertained person is now good, because by a modern statute (*e*) contingent interests may be disposed of at law (*f*); and the suggestion finds support in principle in a decision of Sir J. Stuart, who, in Avern *v.* Lloyd (*g*), — where personalty was bequeathed to the issue of A., a living person, share and share alike, for their * lives, and *282 for the survivors and survivor, and after the decease of the survivor, to the executors, administrators and assigns of the survivor, — held the ulterior limitation valid, on the ground that "each of the tenants for life had as much right to alien his contingent right to the absolute interest as to alien his life-estate."

An interest which does not vest within the period is void, though alienable.

Now the rule against perpetuity has always in terms required the *vesting* of estates within the prescribed limit. The first instance of an executory gift void for remoteness given by Mr. Fearne (*h*) is a devise to A. and his heirs, and if A. die without heir, then to B.; which, according to the suggestion, would now be good. The rule as it affected equitable interests, whether in real or personal estate, was in corresponding terms: yet these were always alienable. It is submitted that the statute referred to has not made any change in the rule, and that

[(*c*) Routledge *v.* Dorril, 2 Ves. Jr. 366; Evans *v.* Walker, 3 Ch. D. 211.]
(*d*) See Cooke *v.* Bowler, 2 Kee. 53.
[(*e*) 8 & 9 Vict. c. 106, s. 6.
(*f*) Gilbertson *v.* Richards, 4 H. & N. 277, 5 ib. 453.
(*g*) L. R. 5 Eq. 383.
(*h*) C. R. p. 445.

the law is as laid down by Sir R. Malins, V. C., in a case (*i*) where a testator having under his ante-nuptial settlement an exclusive power of appointing land to his issue, appointed it by his will to his son A. in fee, but if the son should have no child who should attain twenty-one, then to the testator's grandson B. in fee. The V. C. held that the gift over was void for remoteness.

That the old rule is unchanged also as regards remainders is shown by the dictum already cited of Sir W. Wood, who long after the passing of the statute said that "a contingent remainder cannot be limited as depending on the termination of a particular estate whose determination will not necessarily take place within the period allowed by law" (*k*).

That the right of alienation is not sufficient of itself to exclude the rule is further shown by Curtis *v.* Lukin (*l*), where certain property was bequeathed in trust to accumulate the income for sixty years, and to apply part of the fund so formed for the benefit of class A. and pay the rest to class B.; both classes would be ascertained within lawful limits, but the proportions in which the fund would be divisible between them depended on contingencies which could not be ascertained until the end of the term of sixty years. It was contended that, inasmuch as the beneficiaries as soon as ascertained had full power to dispose of the fund and stop further accumulation, the case was not * obnoxious to the rule against perpetuity; but Lord Langdale held that, although among themselves they might make a title to the fund, yet each of them would be uncertain as to the amount of his share, and therefore that the trust could not be sustained. And it was not suggested that the power which each undoubtedly possessed to alien his contingent share protected the case from the rule.]

Curtis *v.* Lukin.

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Where a devise is void for remoteness, all limitations ulterior to or expectant on such remote devise are also void, though the object of the prior devise should never come into existence. Thus, in the often-cited case of Proctor *v.* Bishop of Bath and Wells (*m*), where there was a devise to the first or other son of T. P. that should be bred a clergyman *and be in holy orders*, and to his heirs and assigns; *but if the said T. P. should have no such sons*, then to T. M. his heirs and assigns. T. P. died without ever having had any son. As by the canons of the Church no person can be admitted into deacon's orders before the age of twenty-three, or be ordained priest before twenty-four, it was clear that this qualification postponed the devisee's interest until he attained the age of twenty-three at the

Limitations ulterior to a remote devise, void;

(*i*) Re Brown & Sibly, 3 Ch. D. 156. See also observations by the same judge (L. R. 7 Eq. 369) on Avern *v.* Lloyd, supra, and on Ashley *v.* Ashley, 6 Sim. 358, where the question of remoteness was not mooted.
(*k*) 11 Hare, 374.
(*l*) 5 Beav. 147.]
(*m*) 2 H. Bl. 358; see also Palmer *v.* Holford, ante, p. 253.

least. The Court of C. P., therefore, held the first devise to be void for remoteness, and that the devise over, as it depended on the same contingency, was also void; observing, that there was no instance of a limitation after a prior devise, which was void for the contingency's being too remote, being let in to take effect.

So, in Robinson *v.* Hardcastle (*n*), where, on the marriage of James Dunn with Dorothy Wright, lands were limited to himself for life, remainder to such of the children of the marriage and in such proportions as he should appoint, remainder to the first and other sons in tail, with remainders over. James Dunn, by will, appointed the estate to the eldest son of the marriage for life, remainder to trustees to preserve contingent remainders, remainder to his (the son's) first and other sons in tail, remainder to the daughters in tail, as tenants in common, remainder as to part, to testator's daughter in fee; and as to other part, to the use of another daughter in fee. The appointment to the children of the testator's son being clearly too remote (the son being unborn at the time of the execution of the deed creating the power), it was contended, that the effect was the same as if it had never been inserted in the will, and that the remainder in fee was * accelerated: but Buller, J., observed, that if a subsequent *284 limitation depended upon a prior estate which was void, the subsequent one must fall with it; to support the opposite argument, the testator must be considered as intending that if the first use was bad, the subsequent limitation should take place, which would be extraordinary indeed. The court accordingly certified (it being a case from Chancery) that the devise over was void.

Ulterior remainder not accelerated.

The same principle was followed in Cambridge *v.* Rous (*o*), where personal property was bequeathed to A. for life, and after her decease to her children, *when they should attain the age of twenty-seven*, and in the event of her having no *such* children, over; and Sir W. Grant, M. R., held the trust for the children to be too remote, and that the limitation over, therefore, was also void.

[Again, in Beard *v.* Westcott (*p*), a testator devised lands to his grandson, J. J. B., for 99 years, determinable with his life, remainder to his first son (unborn) for 99 years, determinable with his life, remainder (in effect) to his first son for a like term, and so on; and in case there should be no issue male of the said J. J. B., nor issue of such issue male at the time of his death, or in case there should be issue male at that time, and they should all die before they should respectively attain twenty-one without lawful issue male, then there were similar limitations over to X. and his issue. On a case from Chancery the Court of C. P. held that the several gifts after the gift to the unborn son of J. J. B. were void. They also held, that if the event

Beard *v.* Westcott.

(*n*) 2 B. C. C. 22, 2 T. R. 241, 380, 781.
(*o*) 8 Ves. 12. The case is here stated without the alternative bequest.
[(*p*) 5 Taunt. 393, 5 B. & Ald. 801, T. & R. 25.

mentioned (*q*) arose, the gift over would take effect, the event in question being (as it clearly was) within the legal limits of perpetuity. The decision on the latter point was not acquiesced in, and a case was sent to the Court of K. B., who held that the gift over was void, and Lord Eldon affirmed that decision. "Not," said Lord St. Leonards (*r*), "because it was not within the line of perpetuity, but expressly on the ground that the limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitations would, if they had been alive, have been capable of enjoying the estate, and that he did not intend that the estate *285 should wait for *persons to take in a given event, where the person to take (that is, to take in the interim) was actually in existence, but could not take. This shows," he continued, "that where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid."].[1]

Distinction where the gift over is to arise on a *double* contingency.

But care should be taken to distinguish between cases such as the preceding, and those in which the gift over is to arise on an *alternative* event, one branch of which is within, and the other is *not* within, the prescribed limits; so that the gift over will be valid, or not, according to the event (*s*)[2]. [Thus, in Longhead *v.* Phelps (*t*), where trusts were declared of a term, in case of the death of A. without leaving issue male, or in case such issue male should die without issue, the court held it clear that the first contingency having happened the trusts of the term were valid without reference to the other contingency.]

In Leake *v.* Robinson (*u*), too, certain stock and moneys were be-

(*q*) That is, the second event mentioned in the proviso. There could be no question as to the validity of the first event; that was clearly good within all the authorities next stated, and, J. J. B. being still alive at the time, it had not become impossible, but the court of K. B. seems to have altogether ignored it.

(*r*) In Monypenny *v.* Dering, 2 D. M. & G. 182. And see Sug. Gilb. Uses, 270.]

(*s*) See same principle applied to a different species of case. Tregonwell *v.* Sydenham, 3 Dow, 194, ante, p. 276, n.

[(*t*) 2 W. Bl. 704. Crompe *v.* Barrow, 4 Ves. 681, is commonly cited to the same point. But in that case there was no question of remoteness, the appointor's son C. B. being the child of a former marriage, *i.e.* born before the creation of the power. If otherwise, the alternative gift over, if C. B. should die and leave no child surviving him (which was held good), would in fact have been too remote; for the vesting would have been suspended until the death of an unborn person. It is probable that a similar explanation may be given of Re Lord Sondes' Will, 2 Sm. & Gif. 290, *sc.* that Charlotte Palmer was living at the creation of the powers.]

(*u*) 2 Mer. 363.

[1] See Re Thatcher's Trusts, 26 Beav. 365; Cambridge *v.* Rous, 25 Beav. 409.

[2] Armstrong *v.* Armstrong, 14 B. Mon. 333; Fowler *v.* Depau, 26 Barb. 224; Dunlap *v.* Dunlap, 4 Desaus. 305. In the case of a gift over upon an alternative contingency, if one of the alternatives be not too remote, and the event transpires so as to make the gift over available if deemed valid, such gift will be supported notwithstanding the fact that the other alternative gift is too remote. Jackson *v.* Phillips, 14 Allen, 539, 572; Ackerman *v.* Vreeland, 14 N. J. Eq. 23; Minter *v.* Wraith, 13 Sim. 52; Post *v.* Hover, 33 N. Y. 593; Schettler *v.* Smith, 41 N. Y. 328. So also of two separable trusts, or of a trust separable into two parts, one of which contravenes the perpetuity law and the other does not, the latter may be upheld, though the former cannot be. Post *v.* Hover, supra.

queathed to W. R. R. for life, and, after his decease, to the child or children of the said W. R. R. who, being a son or sons, *should attain the age of twenty-five*, or, being a daughter or daughters, should attain that age or be married with consent; and in case the said W. R. R. should happen to die *without leaving issue living at the time of his decease*, or, *leaving such, they should all die before any of them should attain twenty-five* if sons, and if daughters, before they should attain such age or be married as aforesaid, then to the brothers and sisters of W. R. R. on their attaining twenty-five if a brother or brothers, and if a sister or sisters, on such age or marriage as aforesaid. W. R. R. died without leaving issue, and it was not contended, that, *in the circumstances which had happened*, the bequest over to the brothers and sisters was void, in reference to the event on which it was limited; though it was held, that as the bequest to the brothers and sisters included all who were living at the death of * W. R. R. (*x*), it was clearly void from the remoteness of the bequest itself. Had W. R. R. left any issue, *the event* also would have been too remote. *286

Other instances of alternative limitations good or not *in event.*

[In Goring *v.* Howard (*y*), there was a bequest of personal property upon trust for the testator's grandson G. G., and his brothers and sisters equally for their lives, and after the decease of any of the grandchildren to pay his or her share to his or her issue, *if any*, till they attained the age of twenty-five, and then to transfer to them their parent's share equally; and in case any of the grandchildren should die without leaving issue at his or her decease and without having obtained a vested interest, then the share of the grandchild so dying to go to the survivor or survivors, and to be payable and transferable as before mentioned; G. G. died a bachelor, and his brothers and sisters were held entitled to his share of income for their lives, in the alternative that had happened of no child of G. G. being alive at his decease, though the gift to such a child, had there been one, would have been too remote.

So in Monypenny *v.* Dering (*z*), where there was a devise in trust for P. M. for life, and after his decease in trust for his first son for life, and after the decease of such first son, "upon trust for the first son of the body of such first son and the heirs male of his body, and in default of such issue upon trust for all and every other the son and sons of the body of the said P. M., severally and successively according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue, and *in default of issue of the body of P. M., or in case of his not leaving any at his decease*, upon trust for T. M. for life," with remainders over. Lord St. Leonards held that the limitation to the unborn son of an unborn son of P. M., being itself void, invalidated the remainders depending upon it; but that the remainder

(*x*) *Vide* ante, p. 265.
[(*y*) 16 Sim. 395; and see Minter *v.* Wraith, 13 Sim. 52.
(*z*) 2 D. M. & G. 145. See also Cambridge *v.* Rous, 25 Beav. 409.

to T. M., and the subsequent remainders, were good in the alternative event which had happened of P. M. *not leaving any issue at his decease.*

Alternative limitations need not be separately *expressed.*

And where the alternative limitations are distinct and separate in their nature, it makes no difference that they are not each separately expressed in different clauses, but involved in words which apply equally to, and include within them, both limitations. This point was decided in Doe *v.* Challis (*a*), *287 where J. D. *devised four houses in trust for his daughter Elizabeth for life, and after her decease to such of her children as being sons should attain the age of twenty-three years, or being daughters should attain the age of twenty-one years, equally as tenants in common in fee; and in case all the children of Elizabeth should die, if a son or sons, under the age of twenty-three years, or, if a daughter or daughters, under the age of twenty-one, *or if she should have none*, then he devised the property in trust for his son John and his daughters Sarah and Anne equally for their respective lives, and at their respective deaths he devised the share of the one dying to his or her children who being sons should attain twenty-three, or being daughters should attain twenty-one, as tenants in common in fee; and in case of the death of his son or either of his daughters *without leaving a child who being a son should attain twenty-three, or being a daughter should attain twenty-one*, he devised the third share of the one so dying to the children of the others in the same manner as before. Elizabeth died in 1838 without ever having had a child, and in 1847 Anne died without ever having had a child. Two questions were raised; first, whether the gift over on the death of Elizabeth was good; and, secondly, whether the gift over on the death of Anne was good. The Court of Q. B. decided both questions in the affirmative. As to the first, they held (in accordance with the authorities before stated), that if Elizabeth had had a child, although he did not attain the prescribed age, the gift over would have been void for remoteness, but that in the event which happened of her never having had a child the gift took effect as an alternative contingent remainder. As to the second, the court decided that here also the gift over took effect, although the event of *her never having had any children* was not actually expressed, being of opinion, upon the authority of Jones *v.* Westcomb (*b*) and similar cases, that wherever there was a gift over on a class dying within a particular age, it took effect if that class never came into existence. In the Exchequer Chamber the decision on the second point was reversed, the court, without denying the authority of Jones *v.* Westcomb, applying the same principle to the splitting of one set of words into two contingencies, that Sir W. Grant, in Leake *v.* Robinson, applied to the splitting of a class. Alderson, B., who delivered the judgment of the court, said: "The true meaning of the devise is, in every event which can happen

(*a*) 18 Q. B. 224, 231. (*b*) Eq. Ca. Abr. 245. See Ch. L.

in which Anne dies *leaving no children if male who attain *288
twenty-three, or if female who attain twenty-one, I give the estate over. That is what he says, and that is what he means. He includes all those events in one clause. Some are legal, some are illegal. How is the court to sever these events, which the testator has expressly joined together, without making a new will? The principle seems, therefore, to be against splitting such a devise when we are considering the question whether it is a legal one. Now this question, it is conceded, must be determined as on reading the will at the instant of the testator's death. Do the cases cited affect this principle? On looking over them we find in all of them that *the devise in any event was legal*, and that it was competent for the testator to make it."

Apart from the question of perpetuity, it was admitted that Jones *v.* Westcomb was full and sufficient authority for construing the will as was done in the Court of Q. B.; so that the sound rule which requires a will to be construed without reference to the consequences as regards remoteness was actually transgressed in order to defeat the intention. On appeal to D. P., the case of Leake *v.* Robinson was declared to be inapplicable, and the decision of the Exchequer Chamber was reversed (*c*). "No case," said Wightman, J., "or authority has been cited to show that where a devise over includes two contingencies, which are in their nature divisible, and one of which can operate as a remainder, they may not be divided, though included in one expression; and our opinion does not at all conflict with the authority of Jee *v.* Audley, and Proctor *v.* Bishop of Bath and Wells, in neither of which cases was it possible for the limitation over to operate as a remainder."]

As the law does not permit to be done indirectly what cannot be effected in a direct manner, the rule which forbids the giving of an estate to the issue of an unborn person [in remainder on the life of his parent], equally invalidates a clause in a settlement or will, containing limitations to existing persons for life, with remainder to their issue in tail, empowering trustees, on the birth of each tenant in tail, to revoke the uses, and limit an estate for life to such infant, *with remainder to his issue* (*d*).[1]

Clause empowering trustees to postpone absolute ownership, void.

(*c*) Nom. Evers *v.* Challis, 7 H. L. Ca. 531. Re Thatcher's Trusts, 26 Beav. 365, appears to be contrary: but it was before the decision of D. P. in Doe *v.* Challis, and was decided on the authority of Beard *v.* Westcott.]

(*d*) Duke of Marlborough *v.* Earl Godolphin, 1 Ed. 404. The author of this futile device for evading the rule against perpetuities, was no other than the great John Churchill, the first Duke of Marlborough. Lord Northington's judgment in this case well deserves the reader's perusal.

[1] See Fonda *v.* Penfield, 56 Barb. 503; Barnum *v.* Barnum, 26 Md. 119. It makes no difference in the applications of the rule against perpetuities whether the estate is limited by way of legal settlement or under cover of a trust. Goldsborough *v.* Martin, 41 Md. 488, 501; Deford *v.* Deford, 36 Md. 168. But a power to change trustees does not come within the principle. Clark *v.* Platt, 30 Conn. 282. Every power the direct object of which is to create a perpetuity is void. The only exceptions to this rule arise out of the distinction between general and limited or special powers. But in every case the *execution* of the power being distinct from the power itself, must conform to the requirements of the rule against

*289 It has been already observed, that, in the case of * appointments, testamentary or otherwise, under powers of selection or distribution in favor of *defined* classes of objects, the appointees must be persons competent to have taken directly under the deed or will creating the power (*e*).[1] The test, therefore, by which the validity of every such gift must be tried is, to read it as inserted in the deed or will creating the power, in the place of the power. Attention is often called to this doctrine in practice, where a power having been reserved by an ante-nuptial settlement, to one or both of the marrying parties, to appoint an estate or fund among the issue generally of the marriage, the donee wishes to exercise it by making a settlement of the property on the children of the marriage for life, with remainder to their children or issue; this, it is obvious, cannot be done; for, as the grandchildren of the marrying persons could not have been made objects of gift immediately under the limitations of the settlement, since they do not (like children) necessarily come *in esse* during the lives of either of the parties then in being, they cannot take under the appointment founded on such settlement (*f*). In order to bring the appointment within the prescribed limit, it must be confined to such issue as shall be born in the lifetime of the marrying parties, or one of them, or of some other person living at the time of the execution of the settlement, and during the period (as the case of Cadell *v.* Palmer allows us to say) of *290 twenty-one years afterwards, unless the * vesting is postponed (as it commonly is) to majority, which would absorb the twenty-one years; and even in regard to the children of the marriage, the

Appointee under a *special* power must be competent to have taken immediately from the donor.

(e) Robinson *v.* Hardcastle, 2 T. R. 241, 380, 781.

(*f*) Bristow *v.* Warde, 2 Ves. Jr. 336; see also Robinson *v.* Hardcastle, 2 T. R. 241, 380, 781; [Re Brown & Sibly, 3 Ch. D. 156.] It frequently happens, that a parent, having a power of appointment, is desirous, on the marriage of a child, one of the objects of the power, to make a settlement in favor of such child, and also of the intended husband or wife, and the issue of the marriage. The purpose may be accomplished, if the child is of age and the power authorizes an appointment by deed, by making an absolute appointment in favor of the child; who then, by the same (or more usually by a separate) deed, settles the appointed property upon the several objects of the intended marriage; and in such case it is conceived, that, even if it could be shown that the appointment was made with the express previous understanding that it should be followed by such a settlement, the validity of the appointment would not be affected; though equity certainly is very jealous of all such transactions, and if there is any previous contract for benefiting the donee himself, even though only extending to a loan of the appointed sum, the appointment would clearly be bad. Of course it is desirable, even in making such a settlement as is above suggested, to avoid showing that it was the result of a previous arrangement betweeen the appointor and appointee. If the marrying child is a minor, the appointment might be made in favor of any other child, being adult, who would then make the intended settlement. Where the power in question is exercisable by will only, the donee's desire to embrace the issue of the appointee, or any other persons who are not objects of the power of course cannot be attained by any such means; and the nearest approach which can be made to the scheme is, in the first instance, to appoint the property to the child absolutely, and then, to enjoin him to execute the desired settlement of the appointed property; and, as an inducement to his doing so, to make it the condition of some *other* benefit which he is to derive under the will.

perpetuities. And when a power is itself valid, the donee in executing it may in certain cases go beyond the proper boundary, the excess alone being void. But this is only where the excess is definite and ascertained, or can be rendered so, so as to permit a separation. Barnum *v.* Barnum, 26 Md. 119, 172.

[1] Fonda *v.* Penfield, 56 Barb. 503; Barnum *v.* Barnum, 26 Md. 119.

vesting of the shares must not be postponed beyond the decease of the surviving parent, and the attainment of majority [or beyond the period of twenty-one years from the decease of the surviving parent.]

Effect of power and appointment, or one of them, embracing too wide a range of objects.

[So too, although] a power does in terms authorize an appointment to issue only who are born within due limits [yet] an appointment to a more extensive range of issue would be [totally void if made to the whole as a class to take as tenants in common, for the shares of the issue who are within the line could not be ascertained (*g*). But] in the converse case, viz. that of the power embracing issue generally, and the appointment being duly restricted to issue within the prescribed boundary, there can be no doubt that the appointment would be good (*h*). If the power and appointment *both* embrace too wide a range of objects, and the appointment is made to the children or issue as a class, it will, according to the general principle before adverted to, be void *in toto;* as well as to members of the class who are within, as to those who are not within, the line (*i*).

Appointment giving testamentary power to an unborn child is void.

[Again, although under a special power a life-estate may (as we have seen) be limited to a child unborn at the time of the creation of the power, the limitation to such child of a power to appoint by will would be void, since it would tie up the property until the death of the unborn child (*k*). But a power so limited to appoint by deed or will would be valid, since it confers an absolute and immediate power of disposition (*l*).

Under *general* powers time is computed from the appointment.

Unless the power is testamentary only.

The reason why the test above alluded to is not applicable to appointments under general powers is, that such powers are in point of alienation equivalent to absolute ownership: the donee can at any moment dispose of the property as he pleases. But this reason fails where the power, though general in its objects, is to be exercised by will only. In such a case the power of disposition is suspended during the life of the donee, and appointments made by virtue of it are therefore to be tested in the same way as appointments under a special power (*m*).]

As to validity of indefinite powers of sale.

*At one period it was much doubted whether a power of sale introduced into a deed or will containing limitations in strict settlement, and which was not in terms restricted in its exercise to the period allowed by law, was valid. *291

[(*g*) Where there is no question of remoteness, and the shares of objects can be ascertained, the appointment is good *pro tanto*, see Sugd. Pow. 507, 8th ed.; Re Farncombe's Trusts, 9 Ch. D. 652.

(*h*) Attenborough *v.* Attenborough, 1 K. & J. 296.]

(*i*) Routledge *v.* Dorril, 2 Ves. Jr. 357; [Thomas *v.* Thomas, 14 Sim. 234.

(*k*) Wollaston *v.* King, L. R. 8 Eq. 165; Morgan *v.* Grouow, L. R. 16 Eq. 1. Apart from remoteness, such a limitation would be within the original power. Slark *v.* Dakyns, L. R. 10 Ch. 35.

(*l*) Re Meredith's Trusts, 3 Ch. D. 759.

(*m*) Re Powell's Trust, 39 L. J. Ch. 188.]

The affirmative has now been decided in several instances (*n*); and in Boyce *v.* Hanning (*o*), the same rule was applied where the indefinite power occurred in a settlement containing limitations to A. for life, with remainder, subject to a jointure rent-charge, to the children of A. *in fee*, with a cross executory limitation, in case of any of the children dying under age and without issue. These cases seem to have dispelled the alarm which was created by Lord Eldon's remarks in Ware *v.* Polhill (*p*); and it is observable, that in several of the cases referred to, the validity of the power was considered to be so clear that a title derived under it was forced upon the acceptance of a purchaser. In practice it often occurs that a sale is made under a will, which empowers the testator's trustees and the survivor and the heirs of the survivor to sell his real estate (most commonly his copyholds, in order to avoid the necessity of the trustees being admitted previously to a sale), without any restriction in point of time. In the early case of Holder *v.* Preston (*q*), the court of K. B. granted a *mandamus* to compel the lord of a manor to admit the purchaser of copyholds, claiming under the bargain and sale of trustees of a will, whose power was wholly unrestricted, and the validity of which does not appear to have been called in question.

The rule against perpetuities does not hold where the grounds of the rule do not apply.

[In fact, such a power does not prevent alienation, but facilitates it; and when, by the coming of age of a tenant in fee or in tail, it is no longer needed, it naturally ceases. The principle that the rule against perpetuities does not apply where the reason of the rule is wanting is further exemplified by Christ's Hospital *v.* Grainger (*r*) [1] where money was in 1624 bequeathed to the corporation of Reading, to be by them invested in land, the rents of which were to be applied to certain charitable purposes, and in case of default in duly applying the rents, *292 there was a limitation over for the benefit of Christ's * Hospital; the limitation over was in 1848, after a lapse of more than 200 years, held to take effect; the property having been originally well devoted to charitable purposes, and having thus become inalienable,

(*n*) Biddle *v.* Perkins, 4 Sim. 135; Powis *v.* Capron, ib. 138, n.; [Wallis *v.* Freestone, 10 Sim. 225;] Waring *v.* Coventry, 1 My. & K. 249, stated 9 Jarm. Conv. 458; and see 1 Hayes's Introd. 5th ed. 497; [Cole *v.* Sewell, 4 D. & War. 32; Lantsbery *v.* Collier, 2 K. & J. 709.]

(*o*) 2 Cr. & J. 334; [see also Wood *v.* White, 4 My. & Cr. 482; Nelson *v.* Callow, 15 Sim. 353.]

(*p*) 11 Ves. 257; as to which see some observations, 1 Jarm. Pow. 248, n.

(*q*) 2 Wills. 400. The prudent draughtsman, however, will not allow his confidence in the validity of indefinite powers of sale to induce him to omit an express restriction, confining the power to the period prescribed by the rule against perpetuities.

[(*r*) 16 Sim. 83, 1 M. & Gord. 460.

1 Society for Prop. of Gospel *v.* Att.-Gen., 3 Russ. 142; McDonogh *v.* Murdoch, 15 How. 367. An estate is no more perpetual in two successive charities than in one charity: and so the law against perpetuities and remoteness has no application, and there is nothing to restrain the donor from affixing such limitations and contingencies, in point of time, to his charitable gift as he pleases. Gray, J., in Odell *v.* Odell, 10 Allen, 1, 9.

the gift over created no restriction on alienation, and did not come within the reason of the rule against perpetuities (*s*).]

It is, of course, no objection to the validity of a devise, that it postpones the possession beyond the limits prescribed for the vesting of estates; for, in such a case, the doctrine under consideration has no other effect than to vacate the postponement, and thereby accelerate the possession.[1] Thus where (*t*) lands were devised to trustees and their heirs, in trust for A. for life, remainder in trust for B. for life, remainder unto and among all and every the issue, child and children of B. as should be living at the time of the decease of the survivors of A. and B., to be divided, share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, &c., and if only one, then the whole to such only or surviving child in fee upon attaining the said age; it was contended that the gift to the children was too remote; but the Court of C. P., on a case from Chancery, certified, that the children living at the death of the survivor took "*equitable* estates in fee" (the court, it should seem by the terms of the certificate, having lost sight of its incapacity as a court of law to recognize equitable interests).

Effect of possession only being too remote.

It is often, however, a matter of no inconsiderable difficulty from the ambiguity of the testator's language to determine whether the postponement applies to the vesting or only to the enjoyment; and if the original gift is followed by a clause disposing of the shares of objects dying under the specified age, a further and still more perplexing question arises, namely, whether the vesting is originally deferred until the prescribed age, or the shares are immediately vested, with a liability to be divested; in other words, whether the specified age is the period of vesting or the period of the shares becoming absolute, in case of the objects dying before such age. This question, which is fully discussed in a future chapter (*u*), is most important in * refer- *293

Question whether specified age is the period of vesting, or of shares becoming absolute.

(*s*) Charitable trusts are the only perpetuities which an individual is permitted to create, Carne *v.* Long, 2 D. F. & J. 75; Att.-Gen. *v.* Webster, L. R. 20 Eq. 483; Re Dutton, 4 Ex. D. 54.]

(*t*) Farmer *v.* Francis, 9 J. B. Moo. 310, 2 Bing. 151; see also Murray *v.* Addenbrook, 4 Russ. 407; [Jackson *v.* Majoribanks, 12 Sim. 93; Milroy *v.* Milroy, 14 Sim. 38; Greet *v.* Greet, 5 Beav. 123; Harrison *v.* Grimwood, 12 Beav. 192; Gosling *v.* Gosling, Johns. 265.]

(*u*) As these cases are dealt with on the ordinary and general principles of interpretation, which are unsparingly applied without regard to consequences, and the fact of any proposed construction rendering the intended gift void for remoteness is not allowed to exert any influence, it is obvious that the cases referred to in the text have no peculiar connection with the subject of the present section, but belong rather to Ch. XXV., which treats of the vesting of estates, where, accordingly, they will be found. *Vide* Doe d. Roake *v.* Nowell, 1 M. & Sel. 327, 5 Dow, 202; and other cases, post; also Vawdry *v.* Geddes, 1 R. & My. 203; Blease *v.* Burgh, 2 Beav. 221.

[1] Loring *v.* Blake, 98 Mass. 253, 259; Otis *v.* McLellan, 13 Allen, 339; Yard's Appeal, 64 Penn. St. 95. The rule against perpetuities regards the title to property, not the possession. Loring *v.* Blake, 98 Mass. 253. It has been suggested as doubtful if a provision for the care of a private tomb for an indefinite length of time be not void within the law of perpetuity. Giles *v.* Boston Fatherless Soc., 10 Allen, 355, 357.

ence to the application of the rule against perpetuities, for if the shares are immediately vested, and the remoteness affects only the clauses of accruer, or other the gifts engrafted on or limited in derogation of the original gift, the effect of the rule is, not to invalidate such original gift, but to render it absolute, by relieving it from the clauses which qualified or divested the interests of its objects.

Rules of construction not to be strained to render gift valid.

It is clear that in order to render a gift to a class of persons valid the court will not depart from the established rule of construction which fixes its range of objects; for though it is probable that the testator, if interrogated on the point, would have consented to restrict the class for the purpose of bringing it within due limits, yet, as the will intimates no such intention, its judicial expositor is not warranted in so dealing with its contents.

Jee v. Audley.

As in Jee *v.* Audley (*v*), where a testator bequeathed 1,000*l.* to be placed out at interest, which interest he gave to his wife during her life; and at her death he gave the 1,000*l.* to his niece Mary Hall, *and the issue of her body* lawfully begotten and to be begotten; and *in default of such issue*, he gave it to be equally divided between the daughters *then living* of John Jee and Elizabeth Jee his wife. It was objected that the limitation to the daughters of John and Elizabeth Jee was void, as being too remote, being to take effect on a general failure of issue of Mary Hall, and was not confined to the daughters living at the death of the testator. On the other side, it was said, that, though the late cases had decided that, on a gift to children generally, such children as should be living at the time of the distribution of the fund would be let in, yet it would be very hard to adhere to such a rule of construction so rigidly as to defeat the evident intention of the testator in this case, especially as there was no real possibility of J. and E. Jee having children after the testator's death, they being then seventy years old; and if there were two ways of construing words, that should be adopted which would give effect to the disposition *294 made by the * testator; that the cases which had decided that after-born children should take, proceeded on the implied intention of the testator, and never meant to give effect to words which would totally defeat such intention. But Sir Lloyd Kenyon, M. R., observed, that it had been decided by several cases, that, in bequests to children, all those born before the interest vested in possession were entitled. "This," he continued, "being a settled principle, I shall not strain to serve an intention, at the expense of removing the landmarks of the law. It is of infinite importance to abide by decided cases, and perhaps more so on this subject than any other. The general principles which apply to this case are not disputed; limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and twenty-one years and nine or ten months afterwards.

(*v*) 1 Cox, 324. [See also Sayer's Trusts, L. R. 6 Eq. 319.

This has been sanctioned by the opinion of judges of all times, from the time of the Duke of Norfolk's case to the present; it is grown reverend by age, and is not now to be broken in upon. I am desired to do in this case something which I do not feel myself at liberty to do, namely, to suppose it impossible for persons at so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case, it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience, to give a latitude to such sort of conjecture. Another thing pressed upon me is, to decide upon the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it were good in its creation, and if it were not, I cannot make it so. Then, must this limitation, if at all, necessarily take place within the limits prescribed by law? The words are, 'in default of such issue, I give the said 1,000*l.* to be equally divided between the daughters *then* living of John Jee and Elizabeth his wife.' If it had been to 'daughters now living,' or 'who should be living at the time of my death,' it would have been very good; but, as it stands, this limitation may take in after-born daughters; this point is clearly settled by Ellison *v.* Airy, *and the effect of law on such limitation cannot make any difference in construing such intention.* If, then, this will extended to after-born daughters, is it within the rule of law? most certainly not; because John and Elizabeth Jee might have children born ten years after the testator's death, and then * Mary Hill might die without issue, fifty years afterwards; in which case it would transgress the rule prescribed." *295

But though the courts will not violate the established rules of construction for the sake of bringing a gift within legal limits (*x*); yet an anxiety to prevent a testator's dispositive scheme from proving abortive, on account of its remoteness, is plainly discoverable throughout the cases (*y*). To this anxiety we may ascribe the rule, which recent cases seem to establish, that where a testator has by his will made an absolute bequest in favor of unborn persons, and has afterwards by a codicil revoked such bequest, and in lieu thereof given to the same legatees life interests only, with remainder to their children (which substituted bequest of course would be void as to the children), the codicil may be rejected, and the legatees take the interests originally given them by the will (*z*).

Clauses illegally modifying previous absolute gifts rejected.

And this rejection of qualifying clauses, ineffectually attempted to be engrafted on a previous absolute gift, equally obtains where the whole is contained in the same testamentary paper, and in spite, too, of the principle hereafter discussed, which pre-

(*x*) L. R. 7 Ch. 283, 11 Hare, 375, 376.

(*y*) *E.g.* post, Ch. XL. s. 1. And as to cases of *ambiguity*, where one construction will produce remoteness and the other not, see L. R. 5 H. L. 548.]

(*z*) Arnold *v.* Congreve, 1 R. & My. 209.

fers the posterior of two inconsistent clauses; it being considered (for this is the ground upon which alone the construction can be defended), that the testator intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one (*a*). As in Carver *v.* Bowles (*b*), where a testatrix, having under her marriage settlement a power of selection in favor of her children, appointed the settled fund to her five children, two sons and three daughters, absolutely in equal shares; and then proceeded to declare that the one fifth so appointed to each of her daughters, she did thereby, so far as she lawfully might or could, order and appoint should be held upon trusts for the daughter for her separate and inalienable use for life; and after her decease for her children, and in default of children subject to her general power of appointment, and in default of appointment, for her next of kin. Sir J. Leach, M. R., held, that the words of the appointment were sufficient to vest the shares absolutely in the *296 daughters; that the attempt to * restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests which he appointed to his daughters to their separate use, and to restrain them from anticipation or alienation (*c*).

So, in Kampf *v.* Jones (*d*), where a testatrix having under a settlement a power of selection over a fund in favor of her children or more remote issue, by her will appointed it to her five children in equal shares; and directed that the share of one of those children, a daughter, should be considered a vested interest in her upon attaining twenty-one or marrying with consent; but she directed that the share should be vested in trustees upon trust for the daughter for life, and after her death, for her issue. Lord Langdale, M. R., held, on the authority of the last case, that the absolute gift ought to have effect, subject to the limitations which were within the power, and free from the others.

It is to be presumed (though the fact is not distinctly stated), that the daughter to whom a life-interest was appointed was not in existence at the time of the execution of the settlement, on which ground the appointment to her issue would have been too remote.

Again, in Ring *v.* Hardwick (*e*), where a testator gave his residuary personal estate to trustees, upon trust to pay the income to his wife during widowhood, and after her death or second marriage, upon trust

[(*a*) On the question whether the prior gift is absolute or not see Whittel *v.* Dudin, 2 J. & W. 279, and other cases cited post, Ch. XXVI. And see and consider Doe d. Blomfield *v.* Eyre, 5 C. B 713, cited in that Ch.]

(*b*) 2 R. & My. 306; see also Church *v.* Kemble, 5 Sim. 525.

(*c*) The M. R. therefore thought that this restriction took effect; [but it is now settled that it is void as tending to a perpetuity and will be rejected, Fry *v.* Capper, Kay, 163; Armitage *v.* Coates, 35 Beav. 1; Re Teague's Settlement, L. R. 10 Eq. 564; Re Cunynghame's Settlement, L. R. 11 Eq. 324.]

(*d*) 2 Kee. 756.

(*e*) 2 Beav. 352; [see also Blacket *v.* Lamb, 14 Beav. 482; Harvey *v.* Stracey, 1 Drew. 73; Fry *v.* Capper, Kay, 163; Stephens *v.* Gadsden, 20 Beav. 463; Gerrard *v.* Butler, ib. 541; Courtier *v.* Oram, 21 Beav. 91; Re Lord Sondes' Will, 2 Sm. & Gif. 416.]

to make a division of all his said personal estate between his four children, namely, his two sons A. and B., and his two daughters C. and D., with directions concerning the accumulation of the income, in augmentation of the principal. The testator then, after directing 2,000*l.* to be taken out of his sons' shares to augment the shares of his said two daughters, and after bequeathing the shares of his sons who should die unmarried and without issue before their shares became payable to his two daughters, if living at the decease or marriage of his wife, proceeded to declare, that as touching and concerning the shares of his personal estate, which, with the augmentations, * would become the property of his daughters, his will was that the same should immediately upon the decease or second marriage of his wife, be invested upon security; and as to the share of C., upon trust to permit her to receive the income during her life, and after her decease, to divide the capital between all the children of C., *to become vested in such children respectively at the age of twenty-five years;* and if any such children should die under that age, their shares to be divided amongst the survivors of such children who should live to attain that age; and if only one such child should live to attain that age, then that the whole of such share and augmentation should belong to such only child upon attaining that age; and if C. should die without leaving any child who should live to attain twenty-five, then over. The testator then declared similar trusts of the share of D.; and the will provided, that in case of the death of C. or D. before the children of either should have attained twenty-five, it should be lawful for the trustees to raise any part of the share of such children for their advancement. Lord Langdale, M. R., was of opinion that the gift to the children of C. was void for remoteness, as he did not concur in the argument, which had been much pressed at the bar, that the children took vested interests, subject to be divested in case they should die under the age of twenty-five (*f*). It was true, that, in the clause for advancement, the word "shares" was used, but it meant the shares given to the children who should attain twenty-five. He thought, however (and this is the material point in regard to the subject under discussion), that the prior words of division among the testator's children amounted to an absolute gift to the daughter in the first instance, and that such absolute gift being followed by restrictions which were void, the absolute gift remained in force.[1]

Gift absolute, notwithstanding subsequent modifying clause.

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Upon the same principle, there is always a disinclination in the courts to apply those liberal rules of construction, which, in favor of the apparent intention, as collected from the context, operate to raise devises by implication, in the absence of

As to implying estates which would be too remote.

(*f*) As to this, *vide* p. 292.

[1] Sears *v.* Putnam, 102 Mass. 5, 9; Sears *v.* Russell, 8 Gray, 86, 100; Wells *v.* Heath, 391; Lovering *v.* Worthington, 106 Mass 86; Brattle Square Church *v.* Grant, 3 Gray, 142; Philadelphia *v.* Girard, 45 Penn. St. 9; Goldsborough *v.* Martin, 41 Md. 488; In re Brown & Sibly's Contract, L. R. 3 Ch. D. 156.

words of positive gift, where the effect of such implication would be to impute to the testator a scheme of disposition at variance with the principle of law which regulates and restricts the period of vesting (*g*).

The most striking illustration, however, of the anxiety of the *298 courts to prevent the total disappointment of the testator's * intention by the operation of the rule against perpetuities, is afforded by the doctrine of *cy-près* or approximation (as it is called). This doctrine applies where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, in which case, as such limitations are clearly incapable of taking effect in the manner intended (the remainder to the issue being, as we have seen, absolutely void), the doctrine in question gives to the parent the estate tail that was designed for the issue[1]; which estate tail (unless barred by the parent or his issue being tenant in tail for the time being) will comprise, in its devolution by descent, all the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue, is considered as the main and paramount design, to which the mere mode of their taking is subordinate, and the latter is therefore sacrificed (*h*). The first clear (*i*) authority for the doctrine is Nicholl *v.* Nicholl (*k*), where the devise was "to the second son of W. Nicholl (who at the death of the testator had no son) *for his life*, and after his death, or in case he should inherit the paternal estate by the death of his elder brother, to *his second son* lawfully to be begotten *and his heirs male*, remainder to the third and other sons of W. Nicholl successively, according to priority of

Doctrine of *cy-près*.

Unborn tenant for life made tenant in tail under the *cy-près* doctrine.

(*g*) Chapman *v.* Brown, 3 Burr. 1626, post, note (*i*).

[(*h*) See acc. per Jessel, M. R., Hampton *v.* Holman, 5 Ch. D. 190.]

(*i*) The case of Humberston *v.* Humberston, 1 P. W. 332, has usually been considered as a leading authority for the doctrine. A testator directed trustees to convey lands to M. H. for life, and then to his first son for life, and so to the first son of that first son for life, &c. This trust was executed by a strict settlement, making the sons born before the death of the testator tenants for life, and those born afterwards tenants in tail. The trust, however, being executory, the court was authorized to mould the limitations so as to bring them within the established limits, independently of the doctrine in question. See Mortimer *v.* West, 2 Sim. 282. [So in Lyddon *v.* Ellison, 19 Beav. 565, where the property was personal, and the *cy-près* doctrine therefore inapplicable.] Chapman d. Oliver *v.* Brown, 3 Burr. 1626, 3 B. P. C. Toml. 269, cited Butl. Fea. C. R. 207, n., is also distinguishable (though the doctrine was much discussed), as there was an express devise in tail to the unborn son, and the only question was, whether words ought not to be supplied which would have given the estate tail to the son of such son, and thereby rendered the devise void. This was refused, and, consequently, the devise was held to be good. [In Mortimer *v.* West, supra, the first takers (who were born in testator's lifetime) were held entitled to estates tail by force of the gift over on failure of their issue (construed to mean a general failure): the *cy-près* doctrine was not applied: and (it may be added) it never has been applied so as to give an *immediate* estate tail to a person born in the testator's lifetime, who, by the will, is expressly made devisee for life, with remainder to his (unborn) son for life. There is no reason why the unborn son should not take the estate for life as it is given to him. If the ulterior gifts require an estate tail in the parent, it may be by way of remainder after the son's life-estate, as suggested by Rolt, L. J., Forsbrook *v.* Forsbrook, L. R., 3 Ch. 99.]

(*k*) 2 W. Bl. 1159. [See post, p. 300, n. (*r*).]

[1] Parfitt *v.* Hember, L. R. 4 Eq. 443; Monypenny *v.* Dering, 16 M. & W. 418; s. c. 2 De G. M. & G. 145; Allyn *v.* Mather, 9 Conn. 114; Gibson *v.* McNeely, 11 Ohio St. 131; Vanderplank *v.* King, 3 Hare, 1; Malcolm *v.* Malcolm, 3 Cush. 472. But see St. Amour *v.* Rivard, 2 Mich. 294.

birth, in tail male, remainder over." The C. P., on a case sent from chancery, certified that the estate would vest in the second son (when born) of W. Nicholl * by executory devise; and that in *299 order to effectuate the general intention of the testator, he would take *an estate in tail male*, determinable on the accession of the paternal estate.

So, in Robinson *v.* Hardcastle (*l*), where, on the marriage of A. and B., lands were limited to A. for life, remainder to such of the children of the marriage as A. should appoint, and, in default, over. A. by will appointed to his son for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of such son successively in tail male, with remainder to his daughters as tenants in common in tail. Buller, J., expressed an opinion that the son, by the application of the *cy-près* doctrine, took an estate tail; but the court was not called upon to decide the point.

The case, however, which has carried this doctrine farther than any other is Pitt *v.* Jackson (*m*), where, by a settlement on the marriage of P. W., certain moneys were directed to be laid out in the purchase of lands, to be settled to the use of P. W. for life, without impeachment of waste, with remainder to his intended wife for life, remainder to the use of the children of the marriage, subject to such powers, limitations and provisos as P. W. by deed or will should appoint, with remainders over. By will P. W. appointed trust moneys to be laid out in real estate, to be conveyed in trust for his daughter M., during her life, for her separate use, remainder to trustees to support contingent remainders, remainder *to all and every the child and children of his said daughter, as tenants in common in tail*, with remainders over. Sir Lloyd Kenyon, M. R., declared the appointment to be invalid, and that the whole of the share appointed to the daughter for her separate use was to effectuate the testator's general intention, to be considered to vest in her an estate tail. Pitt *v.* Jackson.

In this case, the nature of the estate appointed to the children differed widely from the mode of its devolution under an estate tail, which this doctrine gave to their parent. In all the preceding cases, the first and other sons were to take *successively;* here, all the children, female as well as male, were to take *concurrently*. The authority of Pitt *v.* Jackson [has been often doubted]; even the eminent judge who decided it, on a subsequent occasion, admitted that it went to the outside of the rules * of construction, adding, however, that still he did not *300 think it was wrong (*n*). Lord Eldon, in quoting this observation (*o*), intimated that it was not proper to go one step Remarks on Pitt *v.* Jackson. Doubted, but confirmed.

(*l*) 2 T. R. 241, 380, 781. [See also Parfitt *v.* Hember, L. R. 4 Eq. 443.]
(*m*) 2 B. C. C. 51, cited 2 Ves. Jr. 349; see also Smith *v.* Lord Camelford, 2 Ves. Jr. 698; [and Stackpoole *v.* Stackpoole, 4 D. & War. 320, where (as in Pitt *v.* Jackson) the doctrine was held applicable to a testamentary appointment.]
(*n*) 1 East, 451. (*o*) 7 Ves. 390.

further; for those cases, in order to serve the general intent and the particular intent, destroyed both. [However, Pitt *v.* Jackson was approved by Lord St. Leonards (*p*), and was followed by Sir J. Wigram, V. C., under precisely similar circumstances in Vanderplank *v.* King (*q*).

The *mode* of provision may be changed, but no new persons provided for.

But although the mode and form of the provision intended by the will may be altered by the application of this rule of construction, no person or line of persons may be introduced for whom no provision whatever was intended. Therefore, in Monypenny *v.* Dering, already stated (*r*), it was held by Lord St. Leonards that the first son of P. M. could not be held to take an estate tail, because such an estate would in regular succession, and after failure of the eldest son and his issue, descend to the second and other sons of such first son, for whom the will made no provision.

The *cy-près* doctrine may be applied to some only of a class.

In Vanderplank *v.* King (*s*), the question arose, whether the *cy-près* doctrine could be applied to some of a class and not to others. The testator devised lands to his daughter (who was living at his decease) for her life, with remainder to all her children (as it was decided) as tenants in common for their lives, with remainder to the grandchildren *per stirpes* in tail, with cross remainders between the grandchildren of each stock, and also (as it was held) between each stock of grandchildren. The testator's daughter had several children living at his death, to whom alone estates for life with remainder to their issue could be legally limited; one child named Matilda was born after the testator's decease, the remainder to whose issue was void for remoteness, and Sir J. Wigram, V. C., decided that the *cy-près* doctrine was to be applied to the share of Matilda, and that she took an estate tail, but that it was not necessary similarly to modify the estates limited in the shares of the *301 other children; * Matilda in fact was made to stand in the same position as a single child of hers would have done, under the will and apart from the perpetuity rule, she being dead.

Doctrine of *cy-près* not confined to first set of limitations.

The doctrine in question is not confined to the first set of limitations requiring modification, but is extended to all that follow; thus, in Hopkins *v.* Hopkins (*t*), a testator devised lands in trust for I. H. for life, with remainder to S. H., son of S. H. for life, with remainder to the first and other sons of I. H. successively in tail male, and for want of such issue, in case I. H.

[(*p*) 4 D. & War. 320, 2 D. M. & G 173. (*q*) 3 Hare, 1.

(*r*) 2 D. M. & G. 145, and in Ex. 16 M. & W. 418; ante, p. 286. In Nicholl *v.* Nicholl, ante, p. 298, the will included none of the descendants of the second son of W. N., except the second son of that second son and the heirs male of his body: whereas the decision included them all, and among them, of course, the first son of the second son of W. N., whose exclusion from the will appears to have been designed. The case is therefore overruled, so far, at least, as it favors a doctrine contrary to Monypenny *v.* Dering.

(*s*) 3 Hare, 1. See also Peyton *v.* Lambert, 8 Ir. Com. Law. Rep. 485.

(*t*) Co. Lit. 272, a, Butler's note 1, vii. 2, 1 Atk. 581.]

should have any other son or sons, then in trust for all and every of such other son and sons respectively and successively for their respective lives, with like remainders to their several sons successively and respectively as were thereinbefore limited to the issue male of the said S. H., with remainders over. S. H. died in the testator's lifetime without issue, and I. H. never had any other son, so that it was necessary to apply the *cy-près* doctrine to the limitations to his other sons for life, with remainder to their issue, the remainder to such issue being too remote; and as the remainders over were held good, it is clear that it was considered that not only the second but the third and every other son of I. H. would, under the doctrine in question, have taken an estate tail.]

It has been decided in relation to the doctrine in question, first, That it does not apply to limitations of personal estate (*u*), [nor of a mixed fund (*x*);] secondly, That it is inapplicable where an attempt is simply made to limit a succession of life-estates to the issue of an unborn person, either for a definite or indefinite series of generations (*y*); and, thirdly, That the doctrine is not applicable where the limitation to the children of the unborn persons gives them an estate in fee-*simple*. The last point was decided in Bristow *v.* Warde (*z*), where money directed to be laid out in land was, by the trusts of certain articles, and a settlement executed in pursuance of those articles, made subject to a power of appointment by the husband, in favor of the * children of the marriage; and he appointed portions of the fund to certain of the children for life, and after their decease, among their children, as they should appoint; it was held to be real estate, and that the husband's appointment (which, if valid, would have the effect of vesting absolute interests in the grandchildren equally, in default of appointment by the children), was void as to the grandchildren, and could not, as Lord Loughborough was of opinion, be executed *cy-près* (*a*).[1]

Limits imposed on the doctrine.

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(*u*) Routledge *v.* Dorril, 2 Ves. Jr. 365. [But see Mackworth *v.* Hinxman, 2 Kee. 658, where the general intent was to limit personalty so that it should go along with an honor, the successive life-estates being only the mode: and see Re Johnson's Trusts, L. R. 2 Eq. 716.

(*x*) Boughton *v.* James, 1 Coll. 44, 1 H. L. Ca. 406.]

(*y*) Somerville *v.* Lethbridge, 6 T. R. 213; Seaward *v.* Willock, 5 East, 198; Beard *v.* Westcott, 5 Taunt. 393, 5 B. & Ald. 801, T. & R. 25. [See, however, per Rolt, L. J., Forsbrook *v.* Forsbrook, L. R. 3 Ch. 99.]

(*z*) 2 Ves. Jr. 336; [and see Hale *v.* Pew, 25 Beav. 335; and it is not admitted in construing a deed, Brudenell *v.* Elwes, 7 Ves. 390.

(*a*) See further, as to the doctrine of *cy-près*, Sugd. Pow.; Fearne, C. R. by Butl.

[1] In the case of a devise to trustees for the testator's children and their heirs, it has been held in Kentucky that a provision that the land shall "not be sold under any pretext," in connection with a gift over to the survivors of the estate of any of the said children who should die without issue, does not create a perpetuity; that it is merely a restriction on the power of alienation on the part of the life tenants, intended to secure the remainder to the descendants of the testator. Best *v.* Conn, 10 Bush, 36.

Section III.

For what Period Income may be accumulated.

Old rule fixing extent of prospective accumulation of income.

Formerly the rule that fixed the period for which the vesting of property might be suspended, regulated also the power of deferring its enjoyment; it being then permitted to a settlor or testator to create an accumulating trust absorbing the entire income during the full period for which the vesting might be postponed, and whether it was or was not so postponed.[1] And no inconvenience appears to have been felt in allowing so wide a range of accumulation, few persons having availed themselves of the

[1] This rule prevails in Massachusetts. Odell *v.* Odell, 10 Allen, 1. See also Fosdick *v.* Fosdick, 6 Allen, 43; Hooper *v.* Hooper, 9 Cush. 122; Lovering *v.* Worthington, 106 Mass. 86, 89; Thorndike *v.* Lovering, 15 Gray, 391; Craig *v.* Craig, 3 Barb. Ch. 76; Killam *v.* Allen, 52 Barb. 605; Dutch Reform Church *v.* Brandow, 52 Barb. 228; White *v.* Howard, 52 Barb. 294; Hillyard *v.* Miller, 10 Penn. St. 326; Kimball *v.* Crocker, 53 Maine, 263. As to the New York rule, see Manice *v.* Manice, 43 N. Y. 303, 376; Haxtun *v.* Corse, 2 Barb. Ch. 518; Kilpatrick *v.* Johnson, 15 N. Y. 322. In New York, Michigan, Minnesota, and Louisiana, the common-law rules in relation to accumulations are changed by statutes, which are substantially the same in each of those states. 1 Perry Trusts, § 398. As to Alabama and Pennsylvania, see 1 Perry Trusts, § 398; Brown *v.* Williamson, 36 Penn. St. 338. In Kimball *v.* Crocker, 53 Maine, 263, a provision directing an accumulation of interest for twenty-five years was held to be invalid. Appleton, C. J., said that where the accumulation was for a gross number of years, the rule against perpetuities prohibited more than twenty-one years. "Wherever lives in being do not form part of the time in suspension or postponement, the only period under the rule against perpetuities is twenty-one years absolute." But the learned judge added that a void trust for the accumulation of income does not invalidate a bequest. A will might be void in part and valid as to the residue. "In the present case, the direction to accumulate is void. The will is not defeated so far as relates to the trusts arising under the will, or as to the legacy" therein given. See Williams *v.* Williams, 4 Selden, 526, 539; Hawley *v.* James, 5 Paige, 318. It was held in Odell *v.* Odell, 10 Allen, 1, that a bequest of an annual sum, out of the income from real estate, for fifty years to trustees, to be invested by them and accumulated during this time, and then applied to establish a *charity*, is a valid bequest, even if the accumulation cannot be allowed for so long a period. In this case the will contained the following bequest: I give to the trustees of the Salem Savings Bank in trust one hundred dollars annually for fifty years, to be paid to them by my executors, to be safely invested by said trustees, the interest to be added to the principal by them semi-annually. At the expiration of fifty years, the sum which shall be accumulated shall be appropriated by a society of ladies from all the Protestant religious societies in Salem to provide and sustain a home for respectable, destitute, aged, native-born American men and women. The above annual payment shall be made from the income of my real estate, which real estate shall be held in trust by my executors until the last payment shall have been made to the trustees of the Salem Savings Bank, then my real estate shall be divided equally among the grandchildren of my late brother James. And it was held that this was a valid bequest. The authorities upon the point were cited and reviewed by Mr. Justice Gray, but no conclusion was arrived at in regard to what would be the legal limit of accumulation for a charity. Odell *v.* Odell, 10 Allen, 9–13. But in Hillyard *v.* Miller, 10 Penn. St. 326, it was held that trusts created by a devise for accumulation beyond the period attained for the vesting of an executory limitation are absolutely void, although the fund thus to be created is directed to be ultimately applied to the foundation and support of a charity. The laws of Pennsylvania allow accumulations in two cases only, or rather in favor of one class of persons possessed of two qualifications. 1. They must be minors. 2. They must be such persons as, if not minors when the deed or will goes into effect, will be entitled to take the rents and profits from which the accumulations are to arise. Washington's Estate, 75 Penn. St. 102. Any attempt to direct such accumulations into other channels renders the deed or will void *pro tanto*, and the rents or profits so appropriated pass to these who would have been entitled thereto if such accumulation had not been directed. Ib.

permission to a mischievous extent, until Mr. Thellusson made the extraordinary and well-known disposition of his immense property (*b*), by the operation of which, every child and more remote descendant born or rather procreated in his lifetime (and which included every individual of those descendants towards whom personal knowledge and intercourse might have been supposed to induce a particular affection), were excluded from enjoyment, for the purpose of swelling, to a princely magnitude, the fortune of some remote and unascertained scions of the stock. The necessity then became apparent of preventing by legislation the repetition of a scheme fraught with so much mischief and hardship. This led to the stat. 39 & 40 Geo. 3, c. 98, which, after reciting that it was expedient that all dispositions of real or personal estate, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof was postponed, should be made subject to the restrictions thereinafter contained, proceeded to enact, "that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise soever, settle or dispose of any real or personal property, so and in such manner, that the rents, issues, profits or produce thereof shall be wholly or partially accumulated, *for any longer term than* the life or lives of any such grantor or grantors, settlor or settlors, *or* the term of twenty-one years from the death of any such grantor, settlor, devisor or testator, *or* during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the time of the death of such grantor, devisor or testator, *or* during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case, where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property, so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed." Sect. 2 provides, "that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood, upon any lands or tenements, but that

Stat. 39 & 40 Geo. 3, c. 98.

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Accumulation restrained, unless for life of settlor, or for twenty-one years, or during minority, &c.

Act not to extend to provisions for debts, or portions for children;

(*b*) 4 Ves. 227.

all such provisions and directions shall and may be made and given as if this act had not passed." By sect. 3 [since repealed (*c*)] the act is not to extend to heritable property in Scotland (*d*), nor, by sect. 4, to wills made before the act, unless the testator should be living and of sound mind for twelve calendar months from its passing.[1]

— nor to Scotland; nor to prior wills, unless &c.;

— nor to Ireland.

[This statute, having been passed just before the Irish Act of Union came into operation, does not extend to Ireland (*e*).

How the period of twenty-one years is to be calculated;

*304 * The period of twenty-one years from the testator's death is to be calculated exclusively of the day of his death (*f*), and must be a period immediately following his death. Thus, if the accumulation be fixed to commence at a time subsequent to the testator's death, it will necessarily cease when twenty-one years from his death have elapsed, though it may have been in operation only one or two years (*g*). And a testator or settlor is not at liberty to take more than one of the several periods of accumulation mentioned in the statute; for instance, he cannot direct an accumulation for a term of twenty-one years from his decease, and also during the minority of a person entitled under the limitations (*h*).]

— one of the periods only can be taken.

The clause which would seem to afford the widest range of accumulation is that which authorizes it during the minority of any person, who would, if of full age, be entitled, under the trusts, to the income; and who, it will be remembered, might, under the rule of law discussed in the last section, be any person coming into existence during a life in being at the testator's decease. [It has been thought,] however, that this seemingly important clause is rendered inoperative by the construction put upon it in Haley *v.* Bannister (*i*), where the testator had directed certain sums of stock in the public funds to be purchased by his executors, and the dividends accumulated until one of the children of his daughter, born, or to be born, should attain the age of twenty-one, when the whole was to be transferred to

As to accumulation during the minority of an unborn person entitled under the trusts.

Haley *v.* Bannister.

[(c) 11 & 12 Vict. c. 36, s. 41.]

(*d*) But a direction to invest accumulations in lands in Scotland did not bring the case within s. 3. Macpherson *v.* Stewart, 28 L. J. Ch. 177.

(*e*) Ellis *v.* Maxwell, 12 Beav. 104; Heywood *v.* Heywood, 29 Beav. 9. English leaseholds, though personal estate, are governed by the *lex loci*, and, though belonging to a domiciled Irishman, are [subject to the act, Freke *v.* Lord Carbery, L. R. 16 Eq. 461; *vide* ante, p. 4, n.

(*f*) Gorst *v.* Lowndes, 11 Sim. 434; Lester *v.* Garland, 15 Ves. 248.

(*g*) Shaw *v.* Rhodes, 1 My. & Cr. 154; Webb *v.* Webb, 2 Beav. 493; Att.-Gen. *v.* Poulden, 3 Hare, 555; Nettleton *v.* Stephenson, 3 De G. & S. 366.

(*h*) Wilson *v.* Wilson, 1 Sim. N. S. 288; Rosslyn's Trust, 16 Sim. 391; Ellis *v* Maxwell, 3 Beav. 595.]

(*i*) 4 Mad. 275.

1 Accumulations under a will of the income of personal property for any number of lives in being, and for twenty-one years longer, are not forbidden in Michigan; nor are provisions restraining the alienation of personalty for such period. Toms *v.* Williams, 41 Mich. 552.

such child, and any other child or children who might be then living; the will contained a residuary clause. Sir J. Leach, V. C., said, "The statute prevents an accumulation of interest *during the minority of an unborn child;* but as to the principal the law remains as before the statute. The excess of accumulation prohibited by the statute would form part of the residue."

[By the words "during the minority of an unborn child," the V. C. must, it is conceived, have meant "until an unborn child should come of age," which was the case before him: his decision in this view could only be that the *whole* of such period could not be taken, not that the part commencing with the birth of the child could not be taken alone. However, Lord Langdale, M. R., * in Ellis *v.* Maxwell (*k*) observed, "If the accumu- *305 lation is permitted only during the minority of a person entitled under the uses of the will, and no time is allowed either before the minority commences or after it has ceased, it does not seem that anything is added to the permission to accumulate during the minority of a person living at the death of the testator. But taking the words as they are, they do not appear to permit accumulation during a minority and a time to elapse between the death of the testator and the commencement of the minority;" and after noticing Longdon *v.* Simson, and Haley *v.* Bannister, he continued: "These cases prevent me from considering, that upon the construction of the act the accumulation would be lawful during the minority of any grandchild born after the death of the testator." The case, like Longdon *v.* Simson, and Haley *v.* Bannister, involved an accumulation not only during the minority of an unborn person, but also until he should be born; and though it has been said (*l*), that in Haley *v.* Bannister, Sir J. Leach held that the statute referred only to the minority or successive minorities of persons in existence at the time the will came into effect, and that the same point was affirmed and *extended* in Ellis *v.* Maxwell, yet it is clear that the point was not touched by the actual decision in either of those cases, which fell under the ordinary rule that only one of the periods allowed by the statute can be taken. The construction put upon the statute by the dicta cited above virtually strikes out of the act the clause in question, and] seems to place in some peril the accumulating trusts ordinarily introduced into provisions for the maintenance during minority of persons unborn at the testator's decease, which direct the unapplied surplus income from time to time to be added to the principal. Such trusts, however, are distinguishable from the bequest in Haley *v.* Bannister, in this, that they extend only to the unapplied surplus, and not to the entire income (*m*), and therefore, approach more closely to the prin-

Observations of Lord Langdale on Haley *v.* Bannister.

Observations of Sir J. Romilly.

Its effect upon trusts which, after providing for maintenance, direct accumulation of surplus income.

[(*k*) 3 Beav. 596. (*l*) Bryan *v.* Collins, 16 Beav. 17.
(*m*) But the act expressly includes partial accumulations.]

ciple of the rule of law, which accumulates the income of minors after providing for maintenance; though they differ from that rule in regard to the ultimate destination of the accumulated fund, which the law gives to the minor himself, but which the express trust commonly attaches to the principal fund; though even this difference is considerably narrowed, where the trustees possess (as they commonly do and *306 always ought to do) a power of * applying the accumulated fund at any subsequent period of minority, which clause would certainly afford a strong argument for taking the trusts in question out of the principle of Haley *v.* Bannister, if [the doctrine sometimes deduced from] that case can be supported. Indeed, considering the extreme inconvenience of holding the ordinary accumulating maintenance trusts in favor of unborn persons to be invalid, the courts would no doubt struggle to avoid such a conclusion.[1]

Trusts embracing too wide an accumulation good *pro tanto*.

It is well settled that a trust for accumulation exceeding the statutory limit is good *pro tanto*. Thus, where a testator directed that the profits of certain canal shares should be invested, the interest arising to be applied to the education of the children of A. and B. (who had no child at the death of the testator), and on their attaining twenty-one to be divided among them; Sir W. Grant, M. R., held, that the accumulation was good for twenty-one years from the death of the testator, though void for the subsequent period (*n*).

The act does not impliedly make valid trusts for accumulation previously bad.

Accumulation for payment of testator's debts valid, though to endure longer than a life and twenty-one years;

[But a trust for accumulation which not only exceeds the statutory limits, but also the period allowed by the rule against perpetuities, is, like any other such limitation, void *in toto*, even though it be for a purpose excepted from the operation of the act; for the act does not by the exceptions contained in it impliedly make valid what was previously invalid (*o*). But, as before noticed (*p*), accumulation for payment of the debts of the testator does not contravene the rule against perpetuities, and is therefore good, though its duration be unlimited (*q*). And a direction to accumulate until a certain sum be reached, though not in terms limited in duration, and though the accumulations may not amount to the stated sum within the necessary limits of time, is nevertheless good if the total amount to be raised is so disposed of as necessarily to vest absolutely

(*n*) Longdon *v.* Simson, 12 Ves. 395; see also Griffiths *v.* Vere, 9 Ves. 127; Palmer *v.* Holford, 4 Russ. 403; [Re Rosslyn's Trust, 16 Sim. 391, and cases in this section, *passim*.

(*o*) Lord Southampton *v.* Marquis of Hertford, 2 V. & B. 54; Marshall *v.* Holloway, 2 Sw. 432; Browne *v.* Stoughton, 14 Sim. 369; (as to which cases see ante, p. 274;) Searisbrick *v.* Skelmersdale, 17 Sim. 187; Boughton *v.* James, 1 Coll. 26, 1 H. L. Ca. 406; Turvin *v.* Newcome, 3 K. & J. 16. (*p*) Ante, p. 275.

(*q*) Lord Southampton *v.* Marquis of Hertford, 2 V. & B. 54, see p. 65; Baeon *v.* Proctor, T. & R. 40; Bateman *v.* Hotchkin, 10 Beav. 426.

[1] See Washington Estate, 75 Penn. St. 102, 107, a decision under the Act of Pennsylvania (1853) restraining the power of accumulation.

in some person or persons within those limits, since those persons might at any moment after the vesting stop the accumulations and dispose of the fund (*r*). But an accumulation for the payment of debts of a stranger does not come within the reason of the rule which * protects a similar provision for payment of the testator's own debts, and is therefore valid by the common law only for the period of a life in being and twenty-one years after. The act leaves this rule untouched, sect. 2, excepting from the operation of the first section "all provisions for payment of debts of any grantor, settlor or devisor, *or other person or persons*" (*s*). And this has been held to include not only debts due at the testator's death, but future debts accruing within the period last mentioned (*t*). But the accumulation must be designed and intended *bonâ fide* as a provision for payment of debts. Where a testator directed the income of residue or a sufficient part of it to be applied for the benefit of his son, and the surplus to be accumulated and added to capital, and after the son's death the whole to be divided among the son's children; but if the son should die without issue, the testator bequeathed a moiety of the fund to B.; B. afterwards became indebted to the testator, who then by codicil declared that B. should not be obliged to pay the debt unless and until he became possessed of the moiety, which, in that case, was to be set off against the debt. B. eventually became entitled to the moiety, but it was held that the testator was not thinking of the debt when he directed the accumulation, and that it was not protected by sect. 2 (*u*). And if creditors avail themselves of their legal rights, and get their debts paid in a different way, as by resorting to the *corpus*, the accumulation cannot, even if the will so direct, be continued beyond the period allowed by sect. 1 of the act, in order to recoup the persons to whom, subject to the trust for accumulation, the estate is devised (*x*).

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— but if for payment of the debts of another, good only if within that limit;

— rule not affected by the act.

The exception in the act respecting accumulations for the purpose "of raising portions for any child or children (*y*) of any grantor, settlor, or devisor, or any child or children of any person taking any interest under such conveyance, settlement, or devise," has created great difficulty. And first, what is a portion within this exception?

Construction of the exception as to accumulation for children's portions.

In Beech *v.* Lord St. Vincent (*z*), lands were devised to A. for life, with remainder to his first and other sons in tail, with remainders over, and 2,000*l.* per annum was directed to be accumulated for twenty-one years during the life of A., and so much * longer as A. had any younger children; the accumulations to be held on cer- *308

(*r*) Oddie *v.* Brown, 4 De G. & J. 179. And see Williams *v.* Lewis, 6 H. L. Ca. 1013.
(*s*) 2 D. M. & G. 498. (*t*) Varlo *v.* Faden, 27 Beav. 255, 1 D. F. & J. 211.
(*u*) Mathews *v.* Keble, L. R. 3 Ch. 691.
(*x*) Tewart *v.* Lawson, L. R. 18 Eq. 490.
(*y*) This means legitimate children. Shaw *v.* Rhodes, 1 M. & Cr. 159.
(*z*) 3 De G. & S. 678, 3 Jur. N. S. 762.

tain trusts for such younger children. It was twice held that this was an accumulation for raising portions within the exception in the statute.

Barrington v. Liddell.

And in Barrington *v.* Liddell (*a*), where lands had been settled on the marriage of A. in the usual way, with a term of years for securing (in the events that happened) the sum of 40,000*l.* for younger children's portions; and afterwards a testator bequeathed a sum of 15,000*l.* in trust to be accumulated during the life of A., until it reached the sum of 40,000*l.*, and then to be applied in satisfaction of the portions; and he gave another sum for building a mansion-house on the settled estate; Lord St. Leonards held, that this was clearly within the exception, and that the accumulation might continue after the expiration of twenty-one years, computed from the testator's death. A provision for raising or satisfying portions charged or created by a previous instrument is, therefore, within the exception in the statute (*b*).

Gift of general estate augmented by accumulation is not a portion.

On the other hand, it has been decided that an accumulation of the whole of a testator's estate (*c*), or of the residue, comprising the bulk, of it (*d*), and a gift of the augmented fund, comprising both capital and accumulations, is not protected by the exception. "A direction to accumulate all a person's property," said Lord Cranworth (*e*), "to be handed over to some child or children when they attain twenty-one can never be said to be a direction for raising portions for the child or children: it is not raising a portion at all; it is giving everything. 'Portion' ordinarily means a part or share, and though I do not know that a gift of the whole might not in some circumstances come under the term of a gift of a portion, yet I do not think it comes within the meaning of a portion in this clause of the act, which points to the raising of something out of something else for the benefit of some children or class of children. . . . If every direction for accumulation for a child was a portion, the intention of the legislature, which was to prevent accumulations, such accumulations being most frequently directed for the benefit of children, would be entirely defeated."

Again, in Burt *v.* Sturt (*f*), where legacies were given to all *309 *the testator's children, and the residue was directed to be accumulated during the lives of the children and of the survivor of them, and after the decease of the survivor the whole was to be divided between the grandchildren of the testator then living, Sir W. P. Wood V.-C., said it was simply a scheme of the testator for the purpose of accumulating his property into one mass, and handing it over in that mass at the remote period of the death of the survivor of a number of

(*a*) 2 D. M. & G. 480.
(*b*) But (as appears by Beech *v.* Lord St. Vincent and other cases, and notwithstanding Halford *v.* Stains, 16 Sim. 496) not exclusively so.
(*c*) Wildes *v.* Davies, 1 Sm. & Gif. 475.
(*d*) Eyre *v.* Marsden, 2 Kee. 573; Bourne *v.* Buckton, 2 Sim. N. S. 91; Edwards *v.* Tuck, 3 D. M. & G. 40; Mathews *v.* Keble, L. R. 3 Ch. 691.
(*e*) Edwards *v.* Tuck, 3 D. M. & G. 58.
(*f*) 10 Hare, 415. See also Drewett *v.* Pollard, 27 Beav. 196.

persons whom he had mentioned, not to any given child or children, but to two or three or possibly one favored individual; it did not seem to him that in any sense or upon any rational construction he could call that the raising of a portion for children: in truth it was only the Thellusson scheme arranged in a somewhat less complicated and less extensive shape.

In Jones *v.* Maggs (*g*), where a legacy of 200*l.* was directed to be accumulated until the child of A. (who then had one child) should attain twenty-one, and on that event to be divided, with its accumulations, among the children of A. who should be then living, and the residue of the personal estate was given to the parent, Sir G. Turner, V.-C., held that the legacy was not a portion, though in a certain sense it was raisable out of the property of the parent; otherwise every legacy given to a child of a residuary legatee must be so construed and the act would be wholly defeated. This decision was much influenced by the V.-C.'s opinion, now exploded, that to bring the case within the exception, the parent must take an interest in the very fund directed to be accumulated; and no distinction was noticed between the accumulation of the entirety or bulk of an estate and of a mere pecuniary legacy. The effect upon the act of a contrary decision was certainly overstated.

Whether same rule applies to pecuniary legacy so augmented, Jones *v.* Maggs.

On the other hand, Sir J. Stuart, V.-C., distinguished between a gift of the whole of a testator's estate, augmented by accumulation, and a gift of a pecuniary legacy so augmented (*h*). And in Middleton *v.* Losh (*i*), where a testatrix bequeathed 50,000*l.* to trustees upon trust to invest, and apply a competent part of the income towards the maintenance and support of her son W., and to accumulate the remainder, and after his decease upon trust to divide the capital and accumulations between the children of W., and in case of the death of W. without issue the * capital and accumulations to sink into the residue of her personal estate; he decided that the accumulation was valid as a provision for portions, relying mainly on "the just principles of construction" adopted by Lord St. Leonards in Barrington *v.* Liddell. *310

Middleton *v.* Losh.

The question chiefly discussed in that case was not what is a portion, but what interest must be given to the parent (*k*). And although the subject of gift was, as in Middleton *v.* Losh, a pecuniary legacy augmented by accumulation, and although it must be admitted that whether the testator has or has not directed the legacy to be taken in satisfaction of portions already charged on the estate of another person, the result *quoad* the testator's own estate is the same, yet the presence of such a direction brings the case literally within the words of the act,

(*g*) 9 Hare, 605. (*h*) Wildes *v.* Davies, 1 Sm. & Gif. 475.
(*i*) 1 Sm. & Gif. 61. See also St. Paul *v.* Heath, 13 L. T. N. S. 270; and the observations on Middleton *v.* Losh, in 10 Hare, 426.
(*k*) See this insisted on, 2 Dr. & Sm. 61.

and distinguishes it too widely from Middleton *v.* Losh to permit its being regarded as an authority for the decision in the latter case. A similar direction would equally bring within the letter of the act a case where (as in Edwards *v.* Tuck) the subject of gift was not a pecuniary legacy only but the bulk of the testator's estate. But there is no actual decision to that effect.

Legacy to accumulate in trust for one for life and afterwards for his children, not a portion.

A trust to accumulate a legacy during a stated period, and at the expiration of it, to pay the income to A. for life, and afterwards to divide the capital among the children of A., is plainly not a provision for raising portions for children, but only a legacy in trust for a parent for life, and after his death for his children (*l*). And it cannot be material to the construction of the statute that the testator has or has not called the children's shares of an accumulated fund their "portions" (*m*).

Accumulation valid or not according to the purpose whereto *in event* it is applicable.

It will have been seen that, in Middleton *v.* Losh, the aggregate fund was not necessarily to go to the children of W., but if all his issue died in his lifetime it was to fall into the residue, so that it was not in all events a fund for portions. But the validity of the accumulation may well depend on the event: as in Re Clulow's Trusts (*n*), where a fund was directed to be accumulated, and was given to the children of the testator's son (who took an interest under the devise); but if there should be no children, to such persons as the parent should by will appoint: Sir W. P. Wood, V.-C., said that if there had been children, this might have been upheld as a provision for their portions; but as *311 there were and could be none, and the testamentary power * of appointment was clearly no "portion" for the parent, the V.-C. held that the direction to accumulate was within sect. 1 of the act, and invalid after the lapse of twenty-one years from the testator's death.

What interest the parent must take under the devise.

The next question is, what is the interest which a parent, not being the grantor, settlor or devisor, must take under the conveyance, settlement or devise, in order to render valid an accumulation for portions for his children? May it be an interest of any kind, or must it be an interest in the *identical* property from which the income directed to be accumulated arises? and must it be a substantial interest, or will a merely nominal interest suffice? In Barrington *v.* Liddell (*o*), Lord St. Leonards read the word "devise" in the act as meaning "will," and held, that the interest need not be one in the very fund to be accumulated, and that the legacy for building a mansion-house on the estate of which the parent was tenant for life, gave him a sufficient interest within the act. And as to *quan-*

(*l*) Watt *v.* Wood, 2 Dr. & Sm. 56.
(*m*) See per Kindersley, V.-C., Bourne *v.* Buckton, 2 Sim. N. S. 96.
(*n*) 1 J. & H. 639.
(*o*) 2 D. M. & G. 480, stated above. Morgan *v.* Morgan, 15 Jur. 319, 20 L. J. Ch. 109, appears to decide that a specific legacy to the parent will not render valid an accumulation of a general legacy to the child. But the case is obscure.

tum, the L. C. cited, with apparent approbation, the opinion expressed by Lords Lyndhurst and Brougham (*p*), and approved by Lord Cranworth (*q*), that any interest, however minute, was sufficient. But, according to Lord Langdale (*r*), it would seem that, where accumulation is directed for the benefit of children of several parents, if any one parent takes no interest, the whole direction fails.

Destination of the income released from accumulation.

The destination of the income which the statute releases from accumulation has occasioned much debate. The law on this point, however, may now it is conceived be stated as follows: —

1. Where there is a present gift in possession, and the direction to accumulate is engrafted upon that gift, the statute, by discharging the property from the superadded trust, has the effect of entitling the donee or successive donees to the immediate income, as if the prior gift had stood alone (*s*)[1].

2. Where the vesting of a contingent interest (*t*), or the *possession of a vested interest (*u*) is postponed till the expiration of the period of accumulation, the statute, by stopping the accumulation, does not accelerate the vesting in the one case, or the possession in the other; but where the property is not a residue carries the income in the case of personal property to the residuary legatee (*x*); and in the case of real property, to the residuary devisee, or heir, according as the will does or does not come within the statute 1 Vict. c. 26 (*y*). Where the residue is not given absolutely, but only for life or some other limited interest, the income forms part of the *capital* of the residue, so that the person having such limited interest is only entitled to the income of such income (*z*).[2] *312

(*p*) Evans *v.* Hellier, 5 Cl. & Fin. 126.

(*q*) Edwards *v.* Tuck, 3 D. M. & G. 40. Wood, V.-C., appears to have been of the same opinion, Burt *v.* Sturt, 10 Hare, 423.

(*r*) Eyre *v.* Marsden, 2 Kee. 573.

(*s*) Trickey *v.* Trickey, 3 My. & K. 560; Combe *v.* Hughes, 34 Beav. 127, 2 D. J. & S. 657. An absolute donee may, at majority, stop accumulation directed for his *sole* benefit and require immediate payment. Gosling *v.* Gosling, Johns. 265. *Secus*, if any other person may by possibility be interested. Gott *v.* Nairne, 3 Ch. D. 278; Harbin *v.* Masterman, L. R. 12 Eq. 559.

(*t*) Jones *v.* Maggs, 10 Hare, 605.

(*u*) Macdonald *v.* Bryce, 2 Kee. 276; Eyre *v.* Marsden, ib. 574; Ellis *v.* Maxwell, 3 Beav. 597; Nettleton *v.* Stephenson, 3 De G. & S. 366; Lord Barrington *v.* Liddell, 10 Hare, 429; Weatherall *v.* Thornburgh, 8 Ch. D. 261. Where accumulation is directed for a stated period, "or so much of it as the law will allow," and the gift is to take effect at the expiration of the stated period (without more) acceleration is excluded by the will itself. Talbot *v.* Jevers, L. R. 20 Eq. 255.

(*x*) Ellis *v.* Maxwell, 3 Beav. 587; Att.-Gen. *v.* Poulden, 3 Hare, 555; Jones *v.* Maggs, 9 Hare, 605.

(*y*) Nettleton *v.* Stephenson, 3 De G. & S. 366; Smith *v.* Lomas, 33 L. J. Ch. 578; Green *v.* Gascoyne, 4 D. J. & S. 565. See also Re Clulow's Trust, 1 J. & H. 639, where the accumulation being in the nature of a charge on real estate sank for the benefit of the estate. Cf. Simmons *v.* Pitt, L. R. 8 Ch. 978, where a *previously existing* charge was directed to be accumulated and the next of kin took the excess.

(*z*) Crawley *v.* Crawley, 7 Sim. 427; Morgan *v.* Morgan, 4 De G. & S. 175, 176, 20 L. J. Ch. 441.

[1] See Haxtun *v.* Corse, 2 Barb. Ch. 506; Craig *v.* Craig, 3 Barb. Ch. 76; Hawley *v.* James, 5 Paige, 318; Williams *v.* Williams, 4 Seld. 525; Kilpatrick *v.* Johnson, 15 N. Y. 322; Phelps *v.* Pond, 23 N. Y. 69; Philadelphia *v.* Girard, 45 Penn. St. 1; Combe *v.* Hughes, 11 Jur. N. S. 194.

[2] Hull *v.* Hull, 24 N. Y. 647.

Where it is residue that is directed to be accumulated, the income of such residue, when the accumulation is stopped, will, in obedience to a well-settled principle (*a*), devolve in the case of personal property to the next of kin (*b*), in the case of real property to the heir (*c*), and in the case of a mixed fund to the next of kin and heir respectively (*d*).

3. The income of the accumulations follows the same rule; therefore if the accumulations arise from personal property not being a residue, the income falls into the *capital* of the residue (*e*), so that a tenant for life would only be entitled to the income of such income; and where residuary personalty is directed to be accumulated, the income of the accumulations, of course, goes to the next of kin. Where the *313 accumulations arise from residuary *real estate, the accumulations of rents and profits seem to preserve their character of realty, so that the heir is entitled to the income of such accumulations (*f*); and it would, of course, follow, that where the accumulations arose from real estate other than residuary, the residuary devisee would, under the present law, be entitled. In Ellis *v.* Maxwell (*g*), where the rents of the testator's real estate were directed to *form part of his personal* estate, and the personal estate was directed to be accumulated, it was held that the income of the accumulations went to the residuary legatees. The case turned on the special words of the will.

Nature of the interest which devolves to the heir.

The interest which, by the operation of the statute, results to the heir, will be either a chattel interest, and pass on his death to his executors or administrators (*h*), or an estate of freehold; in the latter case it will devolve upon his heir, if he die before 1838 (*i*); if after 1837, upon his personal representatives (*k*).]

Trusts whose *effect* is to produce accumulation held to be within the statute.

In applying the statutory provision against accumulation, regard is had to the substance and effect, and not to the form and mere language of an instrument; for, if property be disposed of in such manner as [either in all events, or on a contingency which happens (*l*)] to produce an accumulation of income, for a period exceeding what the statute authorizes, it

(*a*) Skrymsher *v.* Northcote, 1 Sw. 566.

(*b*) Macdonald *v.* Bryce, 2 Kee. 276; Pride *v.* Fooks, 2 Beav. 437; Elborne *v.* Goode, 14 Sim. 165; Wilson *v.* Wilson, 1 Sim. N. S. 288; Bourne *v.* Buckton, 2 ib. 91; Oddie *v.* Brown, 4 De G. & J. 179; Weatherall *v.* Thornburgh, 8 Ch. D. 261 (crown entitled in default of next of kin).

(c) Halford *v.* Stains, 16 Sim. 488; Wildes *v.* Davies, 1 Sm. & Gif. 475; Weatherall *v.* Thornburgh, supra (crown in default of heir).

(*d*) Eyre *v.* Marsden, 2 Kee. 564, 4 My. & Cr. 431; Edwards *v.* Tuck, 3 D. M. & G. 40; Burt *v.* Sturt, 10 Hare, 415.

(*e*) Crawley *v.* Crawley, 7 Sim. 427; O'Neil *v.* Lucas, 2 Kee. 316; Morgan *v.* Morgan, 4 De G. & S. 175, 20 L. J. Ch. 441.

(*f*) Eyre *v.* Marsden, 2 Kee. 577; this appears still more plainly from Fitch *v.* Weber, 6 Hare, 145, and other similar cases noticed post, which show that the next of kin can take nothing but what is personalty *at the time of the testator's death.*

(*g*) 12 Beav. 104. (*h*) Sewell *v.* Denny, 10 Beav. 315.

(*i*) Halford *v.* Stains, 16 Sim. 488; in Barrett *v.* Buck, 12 Jur. 771, the personal representative of the heir was held to take, but as his right was not disputed, the case is scarcely an authority.

(*k*) 1 Vict. c. 26, s. 6. (*l*) Mathews *v.* Keble, L. R. 3 Ch. 691.

will not avail that there is an absence of any trust expressly and in terms directed to this object.

As to accumulation under a residuary bequest in favor of unborn persons at majority.

An obvious case of this nature is that of a bequest of a general residue to a class of persons (some of them unborn at the testator's decease) whose shares are not to vest until the age of twenty-one years; for it is to be observed, that as a residuary bequest, to take effect in future, carries not only the bulk or *corpus* of the property, but also the intermediate income, it follows that the statute is infringed whenever the vesting, or even the distribution, is postponed until a period or event which occurs more than twenty-one years after the testator's decease, without any express application of the income accruing in the interval. [Sir L. Shadwell was indeed of opinion that the statute did not affect accumulation which arose from the nature of the gift, but operated merely to strike out of the will so much of a direction * to accumulate as exceeded the prescribed limits (*m*); his opinion, however, is clearly opposed to the other authorities upon this question, including one of the highest court of appeal (*n*). There is a plain distinction between such a case and the cases where the property being *vested* in an infant the accumulation is to be assumed to be the act of the court (*o*). *314

Where there is a contingent legacy to A. to vest upon a certain event, and an accumulation is directed in the mean time, and if the event does not happen the legacy and accumulations are given over to B., and at the end of a period greater than twenty-one years (say thirty years) from the testator's death, the happening of the event is first ascertained to be impossible, so that the gift to B. then takes effect in possession, it has been held by Sir J. K. Bruce, V.-C. (*p*), that B. is to have all the intermediate *income* of the original and accumulated fund between the end of the twenty-one years and the happening of the event; Sir J. Romilly, however, in a similar case (*q*), intending to follow this decision, decided that B. is to have *simple interest* on the amount of that fund during the same period.

Whether insurances on lives form a mode of accumulation within the act.

In Bassil *v.* Lister (*r*), Sir G. Turner, V.-C., decided that a direction in a will to apply a sufficient part of the income of the testator's property in keeping up certain policies which he had effected on the lives of his children in their names, and which in case of their marriage he directed to be settled on their wives and children, was not a trust for accumulation within

(*m*) Elborne *v.* Goode, 14 Sim. 165; Corporation of Bridgnorth *v.* Collins, 15 Sim. 538.
(*n*) Evans *v.* Hellier, 5 Cl. & Fin. 114; S. C. nom. Shaw *v.* Rhodes, 1 My. & Cr. 135; Macdonald *v.* Bryce, 2 Kee. 276; Morgan *v.* Morgan, 20 L. J. Ch. 111, 15 Jur. 319; Tench *v.* Cheese, 6 D. M. & G. 641; Macpherson *v.* Stewart, 28 L. J. Ch. 177; and see Bective *v.* Hodgson, 10 H. L. Ca. 664, 668.
(*o*) See per Wood, L. J., Mathews *v.* Keble, L. R. 3 Ch. 696; per Lord Cranworth, V.-C., Wilson *v.* Wilson, 1 Sim. N. S. 297.
(*p*) Morgan *v.* Morgan, 20 L. J. Ch. 111, 441, 15 Jur. 319.
(*q*) Bryan *v.* Collins, 16 Beav. 14.
(*r*) 9 Hare, 177. And see Meller *v.* Stanley, 2 D. J. & S. 183.

the statute, and was therefore valid beyond the period of twenty-one years from his death. He observed: "It was said in argument that the payment of the income to the Insurance Company was itself an accumulation; that the company were recipients of the income for the purpose of accumulation; that what was done was the same thing as if the rents were paid to an individual, to accumulate in his hands, and to be paid over at the death of the life insured; and the case was presented to the court in many similar points of view; but I do not see how
*315 the payment of the * premiums to the Insurance Company out of the income is an accumulation of the income. The premiums, when paid to the Insurance Company, become part of their general funds, subject to all their expenses; and although it is true that the funds in the hands of the companies do generally produce accumulations, it is impossible to say what accumulations arise from any particular premium. It was said that it was an accumulation as to the estate, because the estate receives back a certain sum upon the death of the party whose life was insured; but what the estate receives back is not the accumulation of the income, but a sum payable by the office by contract with the testator; and is this an accumulation within the meaning of the statute? The history of the statute goes far to show that it is not, and I think the language of the enactment confirms that view. The enactment is, that no person shall settle or dispose of real or personal estate, so and in such manner that the rents, profits, income or produce shall be accumulated beyond the prescribed periods; and these are words which admit of a clear, plain common-sense interpretation, as referring to the accumulation of rents, profits and income, *quà* rents, profits and income. Why is the court to put a strained construction upon them, and cut down the undoubted right which existed before the statute, beyond what the language of the statute, in its ordinary interpretation, imports? It is said that the court ought to do so, because the spirit and intent of the statute was to prevent accumulations and the suspension of the beneficial enjoyment; but this argument appears to me to beg the question; for it assumes that what the petitioner here calls an accumulation suspending the beneficial enjoyment, was an accumulation intended to be prevented by the statute. Much reliance was placed in the argument upon the mischief which might ensue from policies of insurance being resorted to for the purpose of evading the statute, if the dispositions of this will were upheld, but I entertain no apprehension of any such mischief; I think that settlors and testators, who contemplate accumulations, are far too keen-sighted to incur the risks to which such a course of proceeding would be exposed. On the other hand I see enormous mischiefs which would arise from the construction for which the petitioner contends. The case before us is but one instance of the difficulties to which such a construction would lead. If it be supported what is to become of partnership agreements for long terms of years, where certain sums are to be drawn out annually,

and the remaining profits are to *accumulate and be divided *316
at the end of the terms? What is to be done with policies of insurance on the lives of debtors (*s*)? And how is the case of a settlement of policies of insurance, with stock transferred in trust to pay premiums out of the dividends, to be dealt with?"

The V.-C. seems here to argue that because of the mode of accumulation adopted the statute did not apply; but the terms of the statute are general, that no person shall "by deed or deeds, &c., or *otherwise howsoever*, settle or *dispose* of his property so and in such manner" that the income thereof shall be accumulated; it can scarcely therefore be said that the act does not apply because a particular mode of accumulation is resorted to (*t*). To exclude the act, it must be denied that there is any accumulation of income whatever; but it could not be denied, nor did the learned judge attempt to deny, that effecting an insurance was one mode of accumulation. This answers the objection, that, "though the funds of the company might be accumulated, it would be impossible to say what part of such funds arose from any particular premiums;" an objection which affects only the mode of accumulation. The testator's estate instead of getting back the total amount of premiums with compound interest, a sum varying in amount according to the period during which the premiums have been paid, gets back a *sum certain*, whatever that period may be. This sum is not less the result of an accumulation because it is of certain amount.

The decision was also rested on the ground that the sum paid back was in pursuance of a *contract*, and therefore not within the statute; this seems to beg the question, since, if there be an accumulation, the statute must reach it, whether it arise under a contract or by will: for its terms are general; and a person can no more contract that his income shall be accumulated beyond the prescribed limits, than he could direct by will that it should be so accumulated; indeed, if the statute does not extend to contracts, it does not touch any accumulation made by marriage settlement, for every such settlement is a contract. The question what would become of partnership agreements for long terms of years, by which a certain sum is to be drawn out and accumulated annually, may, perhaps, be answered by another question, namely, supposing such agreements not to be affected *by the act in question, what would become of them when con- *317
sidered with respect to the rule against perpetuities? an ordinary trust for accumulation, extending over a long term of years (that is, as the V.-C. must have meant, more than twenty-one years) would be void altogether as transgressing the rule against perpetuities (*u*); one of two things, therefore, is clear, either such agreements are not valid, or, if they are valid, they are governed by rules which do not

(*s*) The statute expressly excepts provisions for the payment of debts of *any* person, see 2 D. M. & G. 498.
(*t*) And see the observations of Lord Cranworth, 6 D. M. & G. 462.
(*u*) Palmer *v.* Holford, ante, p. 253.

hold good with regard to ordinary trusts, and, in either case, no argument can be drawn from this source in support of the decision in Bassil *v.* Lister. Probably, the partnership agreements in question would be held good on the principle of the decision in Bateman *v.* Hotchkin(*x*), before noticed, that an accumulation which is capable at any moment of being put an end to (*y*), can infringe neither the statutory rule against accumulation, nor the common-law rule against perpetuities. Lastly, as to the question what would become of settlements of policies of assurance with trusts for keeping them on foot by payment of the premiums, the answer seems to be, that they are either cases where security is given for a debt, or cases of settlement on a marriage, in which one of the settlors is the person during whose life the accumulation is to be made, both of which classes are within the exceptions of the statute under which a direct trust for accumulation would be good; and it is conceived that there is no authority for saying that any other settlement of policies of assurance is good, where a direct trust for accumulation would not also be good.

It will be observed, that the remarks of the learned judge are irrespective of the fact, that the policies were effected in the testator's lifetime; his decision was, that insurance is not a mode of accumulation affected by the statute, and it would, therefore, have been the same, if the policies had been effected after the testator's death. By giving small conditional legacies, a testator could easily procure persons, after his death, to allow policies to be effected on their lives, in their names, and to assign them to the testator's trustees, than which an easier and cheaper mode of accumulation could not be devised.]

(*x*) Ante, p. 275. (*y*) See Downs *v.* Collins, 6 Hare, 418.]

*CHAPTER X. *318

FROM WHAT PERIOD A WILL SPEAKS.

For some purposes a will is considered to speak from its date or execution (*a*), and for others from the death of the testator: the former being the period of the inception, and the latter that of the consummation of the instrument.[1] In determining to which of these the language points, it is necessary to distinguish between wills that are subject to the act 1 Vict. c. 26, and those which are regulated by the pre-existing law. From what period a will speaks.

First, with regard to wills made before the act.

It may be stated, as a general rule, that wherever a testator refers to an actually existing state of things, his language is referential to the date of the will, and not to his death, as this is then a prospective event.[2] Such, it is clear, is the construction of the word "now," or any other expressions pointing at present time.[3] Expressions of present time refer to date of will.

Thus, a devise to the descendants *now living*, of A. has been held to comprise the descendants living at the date of the will, exclusive of such as come into existence between that period and the death of the testator (*b*), and who would, but for this "Now," how construed.

(*a*) In this chapter, and indeed throughout the present work, the date and the period of execution are assumed to be identical; which, it is obvious, may not be the case, and then the question would arise — which is to predominate? It is conceived that, for some purposes, the date, and for others the time of execution, would do so. In regard to the will's capacity of operation on real estate (supposing, of course, the will to be subject to the old law), the period of the actual execution would be the material fact; but in regard to points of construction, the effect would sometimes, perhaps generally, depend on the date, or the time of *apparent* execution: for instance, if a testator dated his will 1st January, 1830, and executed it on the 1st June in the same year, a bequest in such will of "all the consols now standing in my name," possibly might be held to pass the consols only of which he was possessed on 1st January, and not what he had acquired between the date and execution, and which he held on 1st June. [See Randfield *v.* Randfield, 8 H. L. Ca. 225.]

(*b*) Crossley *v.* Clare, Amb. 397, 3 Sw. 320, n. See also Att.-Gen. *v.* Bury, 1 Eq. Ca. Ab. 201, pl. 12, 8 Vin. Abr. 328, pl. 2; Abney *v.* Miller, 2 Atk. 593; Blundell *v.* Dunn, cit. 1 Mad. 433; see also All Souls' College *v.* Codrington, 1 P. W. 597; but see Rowland *v.* Gorsuch, 2 Cox, 187.

[1] It is a general rule that a will speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicates the contrary intention. Canfield *v.* Bostwick, 21 Conn. 550; Gold *v.* Judson, Ib. 616.

[2] Everett *v.* Carr, 59 Me. 325, 332; Gold *v.* Judson, 21 Conn. 616; Board of Education *v.* Ladd, 26 Ohio St. 210; Morse *v.* Mason, 11 Allen, 36; Quinn *v.* Hardenbrook, 54 N. Y. 83; Ross *v.* Ross, 12 B. Mon. 437; Butler *v.* Butler, 3 Barb. Ch. 304; Eells *v.* Lynch, 8 Bosw. 465; Anshutz *v.* Miller, 81 Penn. St. 212.

[3] See, *e.g.* Hutchinson *v.* Barrow, 6 Hurl. & N. 583.

*319 restrictive addition, have been let in (*c*); and the same * construction has obtained, even where the word "now" is combined with a term which could not have full effect, according to its technical import, unless used prospectively, as in the case of a devise to the heir male of the body of A. "now living," under which the heir apparent of A. living at the date of the will has been held to be entitled; so that the word "heir" was made to surrender its primary and proper signification, in order to give effect to the word "now," with which it stood associated (*d*).[1]

Verbs in present tense.

On the same principle verbs in the present tense have a similar effect in restricting a devise or bequest to the subjects or objects existing at the date of the will, though in some of the cases considerable reluctance appears to have been manifested to carry out this principle, where its effect would be inconveniently to narrow the scope of the will, by excluding any who might be presumed to be intended objects of the testator's bounty.[2]

Thus, in Wilde *v.* Holtzmeyer (*e*), Sir R. P. Arden, M. R., expressed an opinion that a bequest of "all the property *I am* possessed of" would, if unrestrained by the context, extend to all the testator's personal estate at his death.

So, in Bridgman *v.* Dove (*f*), it was held that a charge of all the debts I *have* contracted since 1735, extended to all debts owing by the testatrix at her decease, including those she contracted after the period referred to; [and in Bland *v.* Lamb (*g*), the words "I may have forgot many things, if such there is, it is to be thrown into the lump for the benefit of the legatees," were held by Lord Eldon to carry the residue at the testator's death.]

Again, in Ringrose *v.* Bramham (*h*), Sir L. Kenyon, M. R., held that a bequest of 50*l.* "to A.'s children, to every child he *hath* by his wife B.," to be paid to them as they should come of age, spoke at the time the will took effect, so as to let in all the children then living. The circumstances of the case, however, though not expressly adverted to by his Honor, perhaps aided the construction. The testator had directed a sum of money to be placed in the hands of a person until the

(*c*) As to the construction of gifts to classes, *vide* Ch. XI. on Lapse, Ch. XXX. on Devises to Children,

(*d*) James *v.* Richardson, T. Jon. 99, 1 Eq. Ca. Ab. 214, pl. 11, 1 Vent. 334, 2 Lev. 232, Raym. 330, 3 Keb. 832, Poll. 457; [Burchett *v.* Durdant, on same will, Skin. 205, 2 Vent. 311, Carth. 154.]

(*e*) 5 Ves. 816.

(*f*) 3 Atk. 201.

[(*g*) 2 J. & W. 399.]

(*h*) 2 Cox, 384.

[1] See Heard *v* Horton, 1 Denio, 165; Simms *v.* Garrot, 1 Dev. & B. Eq. 393.

[2] A gift of certain personal property, and "all the balance of my property of every description, real and personal" to S. does not in Virginia pass after-acquired real estate. Gibson *v.* Carrell, 13 Gratt. 136. As to the distinction between realty and personalty, and as to after-acquired property generally, see supra, p. 326, and note. A clause in the will of a husband, giving power in his wife to make a will of the property given her by him, must be presumed to have been intended to take effect from its date, in the absence of any indication in the will to the contrary; and the consequence is, that the wife may execute a valid will of the property in the lifetime of her husband, if she survive him. Nor need she re-execute it on his death. Thorndike *v.* Reynolds, 22 Gratt. 21.

children came of age, which exceeded the sum which would have been necessary for the purpose if the legacy were confined to the children then in existence. In regard to gifts to children, indeed, an anxiety to include as wide a range of objects as possible has so powerfully influenced * the construction, that such *320 cases are to be regarded as *sui generis*. To this anxiety is also to be ascribed the rule, which constitutes another exception to the doctrine under consideration, that a gift to children "begotten" extends to children born after the date of the will; and a gift to children "*to be* begotten" includes those antecedently in existence (*i*).[1]

Gifts to children.

To return, however, to the general subject, it may be stated that where a testator, in a will which is regulated by the old law, refers to a specific subject of gift, he is considered (*j*) as pointing at the state of facts while he is penning the instrument, and not at the time of his decease, even though he may not have used the word "now," or any other adverb emphatically denoting present time. The doctrine relating to the ademption of specific bequests stands upon this principle. Thus, if a testator, before the year 1838, having a leasehold messuage, or a sum of 1,000*l.* consols, bequeathed "all that my messuage in A.," or "all that sum of 1,000*l.* consols standing in my name," he is considered as referring to the house or the stock belonging to him when he made his will; and, therefore, if he subsequently disposes of such house or stock, the bequest fails, though he may at his decease happen to be possessed of a messuage or a sum of stock answering to the description in the will (*k*). [And the rule was the same where the testator having stock in his possession at the date of his will bequeathed it as "all my stock," and afterwards sold the stock and bought new, or added to the old: in the one case the bequest failed altogether, and in the other comprised only the old stock (*l*).]

Doctrine as to specific bequests.

(*i*) Co. Litt. 20 b.; [see as to this, post, Ch. XXX.

(*j*) Unless he expressly refer to the state of facts at his death; as, by bequeathing all his horses, or all his stock, belonging to him at his death: this would be a specific bequest, though not liable to ademption, Bothamley *v.* Sherson, L. R. 20 Eq. 304. A gift of property "to which I am entitled under the will of A." was held to pass money afterwards received by the testator under that will and invested in his own name, it being still traceable, Morgan *v.* Thomas, 6 Ch. D. 176. (*k*) Pattison *v.* Pattison, 1 My. & K. 12.

(*l*) Cockran *v.* Cockran, 14 Sim. 248. See also per Wood, V.-C., Goodlad *v.* Burnett, 1 K. & J. 347.]

[1] An immediate gift to children *simpliciter*, without additional description, means a gift to the children in existence at the death of the testator, if there be any at that time. Shotts *v.* Poe, 47 Md. 513; Benson *v.* Wright, 4 Md. Ch. 278. So, too, it is a general rule that a bequest or devise to the "heirs" or the "heirs at law" of a testator will be construed as referring to those who are such at the time of the testator's death, unless a different intention is plainly manifested by the will. Minot *v.* Tappan, 122 Mass. 535; Abbott *v.* Bradstreet, 3 Allen, 587; Buzby's Appeal, 61 Penn. St. 111. The rule, however, will always yield to the expression of a different intention. Morse *v.* Mason, 11 Allen, 36; Buzby's Appeal, supra; Clarke's Estate, 82 Penn. St. 528. Thus, where it clearly appears that the testator intended his heirs or next of kin at the death of a tenant or legatee for life, such intent will prevail. Buzby's Appeal, supra. Nor will the use of the word "then" as introductory to the gift over after the death of the legatee or tenant for life prevent the general rule from applying, unless it be so used as to clearly indicate that the next of kin or heirs living at the death of the life tenant or legatee are intended. Minot *v.* Tappan, supra. Holloway *v.* Holloway, 5 Ves. 399; Ware *v.* Rowland, 2 Phill. (Eng.) 635.

Effect of renewal upon bequest of leaseholds.

And a new estate in leasehold property, acquired by a subsequent renewal of the lease or otherwise, is no less out of the reach of a specific disposition of such property, as ordinarily expressed, than an interest in any other property answering to the same locality; it being considered that the testator, when referring to the property in question, had in his contemplation exclusively the specific interest in it of which he was possessed when he made his will, though he has not in terms referred to such interest, but has used *321 expressions descriptive of the *corpus* of the property: as in * the case of a bequest of "all my tithes and ecclesiastical dues at W."(*la*); or "the perpetual advowson and disposal of the living or rectory of W. for ever, together with the tithes of all sorts thereof"(*m*); or "all my leasehold estates in the parish of C."(*n*). In all such cases the renewal of the lease under the old law revoked the bequest, or rather, to speak more accurately, withdrew from its operation the property which was the subject of disposition: in short, effected what is technically called an ademption.

But though the general principle has long been settled, yet questions often arose in consequence of the context of the will affording ground to contend, that the testator intended any after-acquired interest of which he might become possessed by renewal, to pass under the bequest.

Renewed lease passes where benefit of renewal is included.

The renewed lease will pass where the testator includes in the bequest the right of renewal as an accessory to the immediate subject of disposition. And [where the lease of which a bequest is made is vested in a trustee for the testator and is renewed by the trustee, the gift of the property comprised in the lease being in fact a gift of the equitable interest which includes the benefit of renewal, the trust of any renewed term granted to the trustee would pass under such bequest (*o*). And the same principle applies to the case of a lease for lives with a covenant for perpetual renewal(*p*).]

Where (*q*) a testator, who was by his marriage settlement under an obligation to renew the lease of certain property which had been thereby settled, and the beneficial interest whereof was, in default of issue of the marriage, vested in himself, by his will bequeathed the property, describing it as his manor, &c. in L. held by lease from the Dean and Chapter of Windsor, to the trustees of his marriage settlement, upon certain trusts, including among others a trust to perform the covenants contained as well in the then lease as in any future leases thereafter to be obtained: Lord Eldon (affirming a decree of Sir J. Leach, V.-C.)

(*la*) Rudstone *v.* Anderson, 2 Ves. 418.
(*m*) Hone *v.* Medcraft, 1 B. C. C. 261.
(*n*) Coppin *v.* Fernyhough, 2 B. C. C. 291.
[(*o*) Carte *v.* Carte, 3 Atk. 174; Slatter *v.* Noton, 16 Ves. 200.
(*p*) See Poole *v.* Coates, 2 D. & War. 493, 1 Con. & L. 531, stated ante, p. 157.]
(*q*) Colgrave *v.* Manby, 2 Russ. 238; see also 6 Mad. 72.

was of opinion that, regard being had to the language of the settlement and will, the testator must be considered as dealing with his whole interest and the obligations which existed, and that the devise passed all future renewals as well as the term which then subsisted. From the judgment of the V.-C., in this case, it would * appear that *322 he had fallen in with the notion of Lord Hardwicke, in Carte *v.* Carte (*r*), that a bequest of the testator's interest in leaseholds referred to his interest at the time of his decease. Lord Eldon, though he affirmed the decree, lent no countenance to any such doctrine; which, indeed, is directly encountered by Slatter *v.* Noton (*s*), where a bequest by a lessee of her dwelling-house, and all her estate, term, and interest therein, was held not to include a term of years subsequently acquired by the renewal of the lease. It has been decided, however, by Lord Eldon (*t*), that a bequest of leaseholds "for all the residue of the term and interest I shall have to come therein at my decease," does not refer merely to the residue which might, at the testator's decease, happen to be unexpired of the term which existed at the making of the will (as considered by Sir Wm. Grant, whose decree his Lordship reversed), but comprises an interest subsequently acquired by renewal. And this seems to accord with the doctrine of Churchman *v.* Ireland (*u*), where a devise of all and singular the effects, real and personal, "which I shall die possessed of," was held to refer not merely to the lands then belonging to the testator of which he should die seised, but to all property which the testator might acquire after the execution of his will (*x*).[1]

Whether word referred to present or future interest.

The learned reader will, no doubt, perceive the difference between cases in which a bequest of a term of years is adeemed by the renewal of the lease, and those in which the devise of a freehold estate is revoked by the effect of a conveyance revesting the estate in the testator but occasioning an interruption of his seisin (*y*). The ademption in the former case is not, like the revocation in the latter, the consequence of a technical rule of law, acting independently of volition, but is simply the effect of the absence of apparent intention to include the future interest. Accordingly it has been decided, that where a testator, after bequeathing, by a will made before 1838, a chattel lease, assigned it to a trustee for himself, the transaction had no revoking effect upon the prior bequest as to the equitable interest which remained in the testator (*z*),

Difference between freeholds and leaseholds in regard to revoking effect of conveyances.

(*r*) 3 Atk. 174. (*s*) 16 Ves. 197. [(*t*) James *v.* Dean, 11 Ves. 383, and 15 Ves. 236.]
(*u*) 1 R. & My. 250, overruling Back *v.* Kett, Jac. 534.
(*x*) See also Thellusson *v.* Woodford, 13 Ves. 209, 1 Dow, 249; [and Hance *v.* Truwhitt, 2 J. & H. 216, where the words were "whereof I am or shall or may be seised."]
(*y*) *Vide ante*, p. 147. (*z*) See Woodhouse *v.* Okill, 8 Sim. 115.

[1] Where there is no gift to the objects, except in a direction to divide the subject among them upon the happening of a particular event, only such can take as answer the description at the period of division, unless a contrary intention can be collected from the will. Tebbs *v.* Duval, 17 Gratt. 349; Leake *v.* Robinson, 2 Mer. 363; Jones *v.* Mackilwain, 1 Russ. 220.

though the legal estate, which was assigned to the trustee, was of course thereby withdrawn from its operation. Still less does the
*323 merely taking an assignment of the legal *estate (which is the converse case) revoke the bequest (*a*); such an act, indeed, we have seen does not amount to revocation even of a devise of real estate (*b*); though of course, even in the case of a *chattel* lease, the legal estate would not pass by the bequest, unless it contained expressions adequate to comprise any future estate in the property. [Lands held under renewed leases for lives, as we have before seen, fell (previously to 1 Vict. c. 26) under a different rule from those held under renewed leases for years, and could not in any case have passed under a will made before renewal, though such will professed in terms to devise every future interest in the lands (*c*).]

Construction of words referring to an existing individual.

The same principle which governs the construction of expressions descriptive of a specific *subject* of disposition, applies also to the *objects* of gift. Thus, if a testator give an estate or a sum of money to his son John, the gift will take effect in favor of his son of this name (if any) at the date of the will, and of him only.[1] If, therefore, such son should die in the testator's lifetime, and he should afterwards have another son of the same name who should survive him, such after-born son would not be an object of the gift. [Similarly, a gift to the child with which the testator's wife was pregnant, which child was still-born, was held not to take effect in favor of another child of which the testator's wife was pregnant at the time of his death, though the result was that all the testator's property was devised away, and the last-mentioned child left unprovided for (*d*).] And the same rule would seem to obtain if the devisee or legatee were described with reference to his filial character only, without any other designation (*e*), as in the case of a gift to "my son" simply, which would apply, it is conceived, to the son (if any) living at the date of the will, to the exclusion of any after-born son, though such after-born son should, by reason of the decease of the then existing son, happen to be the only person answering the description at the death of the testator.

Gifts to wife how construed;

A question of this nature [may arise on wills made before 1838, containing a gift to the wife of the testator (*f*), and on all wills containing a gift to the wife of another person,
*324 under] * which, on the principle just stated, the individual standing in the conjugal relation at the date

(*a*) Clough *v.* Clough, 3 My. & K. 296. (*b*) Ante, p. 155.
[(*c*) Marwood *v.* Turner, 3 P. W. 163. (*d*) Foster *v.* Cook, 3 B. C. C. 346.]
(*e*) This position, however, is advanced with some diffidence, seeing the strong anxiety of the courts to extend, as much as possible, gifts to children; [see Perkins *v.* Micklethwaite, ante, p. 200; and Thompson *v.* Thompson, and King *v.* Bennett, post, Ch. XXX. s. 7.
(*f*) Under 1 Vict. c. 26, s. 18, the will would be revoked by a second marriage, and the question could not arise. See Pratt *v.* Mathew, 22 Beav. 334.]

[1] See Anshutz *v.* Miller, 81 Penn. St. 212, gift to testator's widow; Butler *v.* Butler, 3 Barb. Ch. 304.

of the will, would take, exclusively of any other person who might happen to answer the description at the death of the testator (*g*). Accordingly, by early writers it is laid down (*h*), that if one devise land to the wife of J. S., and J. S. die, and she take to husband J. D., and then the devisor die, she shall take the land; and yet she is not the wife of J. S. when the devisor dies, nor shall she take it as his wife: but the intent is, that she who *was* the wife of J. S. at the time of the making the will should have it, and the person is clear by the description.

But if J. S. had had no wife at the date of the will, it is very doubtful whether a person subsequently becoming such in the testator's lifetime could have claimed under the devise, unless the description were applicable to her at the testator's death; she ought, it is conceived, to answer the description at *one* of these periods.

The distinctions upon the subject deducible from general principles, and the authorities just referred to, appear to be the following: First, that a devise or bequest to the wife of A., who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under *all* circumstances confined to her; but that, secondly, if A. have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator (*i*); and, thirdly, if there be no such person either at the date of the will, or at the death of the testator, it applies to the woman who shall first answer the description of wife at any subsequent period. general propositions;

There seems to be no ground, upon principle, for varying the construction, where the gift to the wife is by way of remainder after the death of the husband; the rule being, that the devise of an estate in remainder, to a person in a certain character, and by reference simply and exclusively to that character, vests in the person sustaining it at the death of the testator. The consequence would be, that in case the person who was wife at the death of the testator, or who subsequently became such, died in the lifetime of her husband the tenant for life, no after-taken wife *surviving him would be entitled under the devise; since it would be impossible, consistently with the principle in question, to hold that it remained contingent until the death of the husband, or that it shifted from time to time to the several persons upon whom the character of wife successively devolved (*k*). The doctrine here con- whether gifts in remainder are distinguishable. *325

(*g*) Niblock *v.* Garratt, 1 R. & My. 629; [Bryan's Trust, 2 Sim. N. S. 103; Franks *v.* Brooker, 27 Beav. 635.]

(*h*) 10 Mod. 371; 8 Vin. Abr. 309, tit. Dev. T. b. pl. 2; Plow. 344, a.

[(*i*) See Lloyd *v.* Davies, 14 C. B. 76; and analogous cases, Ch. XXX *ad fin.*]

[(*k*) Radford *v.* Willis, L. R. 7 Ch. 7, and see Boreham *v.* Bignall, 8 Hare, 131, where however the words were special.] See also Driver d. Frank *v.* Frank, 3 M. & Sel. 25, 8 Taunt. 468.

tended for, however, may appear to be encountered by Peppin *v.* Bickford (*l*), where a testator gave to his nephew A. 6,000*l.* to be raised out of his estate, and which he directed should not be paid or payable until the day of his marriage, when it was to be laid out in the purchase of land, to be settled and conveyed to the said A. and his assigns for life, and after his decease, *to and upon the wife of A. for life*, and after her decease, then unto and upon the first son of A. on the body of such wife to be begotten, in tail male, remainder to the other sons successively in tail male, remainder to the daughters as tenants in common in tail, remainder to the testator's brother-in-law B. in fee. A. was unmarried at the date of the will and the death of the testator. He subsequently married a lady, who died in his lifetime without issue. He afterwards married again, and the second wife claimed to be included in the trusts, contending that the estates were to be settled on any after-taken wife of A. and his issue by such wife, in case his first wife should die without issue; and the court so decided. Lord Loughborough said: "If the wife had died within a month after the marriage, there could have been no issue to take the provision: and the legacy of 6,000*l.*, except as to the life-interest of the nephew, would have lapsed (*qu.* failed?). It is impossible to ascribe such an intention to the testator" (*m*).

Remarks upon Peppin *v.* Bickford.

In this case, the construction must, it is conceived, be referred to the special circumstances of the trust being executory, which authorized the court to give it a liberal construction, and that, by restricting the trust in favor of the wife to the first person standing in that relation, the limitation to the issue would have been restricted to *her* children, which could hardly be the intention of the testator, who was the husband's relation (*n*).

Gift to servants means servants at date of will.

[On the same principle, a gift to the testator's servants, simply, without adding a condition, "that shall be in his service at his decease," will take effect in favor of the servants *326 at the date of *the will, even though they subsequently quit the testator's service, to the exclusion of those who subsequently enter his service (*o*).]

As to general devises and bequests.

Under the old law, where a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respective portions of property to the full extent of his capacity; and, accordingly, such a gift, in regard to the real estate, was read as a gift of the property belonging to the testator at the time of the execution of his will (he being incapable of devising any other), and as to the personalty, as a disposition

(*l*) 3 Ves. 570. (*m*) See also Allanson *v.* Clitheroe, 1 Ves. 24, Belt's Sup. 24.
[(*n*) Re Lyne's Trust, L. R. 8 Eq. 65; Longworth *v.* Bellamy, 40 L. J. Ch. 513.
(*o*) Parker *v.* Marchant, 1 Y. & C. C. C. 290. If the condition be added it must be strictly complied with. Previous dismissal, though wrongful, intercepts the gift. Darlow *v.* Edwards, 1 H. & C. 547. See also Re Hartley's Trust, W. N., 4 May, 1878, where on the master's illness his establishment was broken up.]

of what he might happen to possess at the period of his decease.[1] And the reluctance of the courts to confine a general bequest of personalty to what the testator possessed at the date of the will sometimes, we have seen (*p*), prevailed against the force of words which might seem so to restrict it. The same principle also was applicable to a general bequest of any particular species of personal property, as of "my furniture and effects," which accordingly was said to embrace property of this description belonging to the testator at his death (*q*).[2]

The will also was held to speak from the death of the testator in reference to gifts to classes, or fluctuating bodies of persons; as to children or descendants, which applied to the persons answering the description at the death of the testator, irrespectively of those to whom the description was applicable at the date of the will, but who subsequently died in the testator's lifetime.

Gifts to classes.

Secondly, it remains to consider how far the preceding doctrines apply to wills which, being made or republished since the year 1837, are regulated by the act 1 Vict. c. 26, which provides (s. 24), "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."[3]

As to wills under stat. 1 Vict. c. 26, s. 24.

Will in reference to the estate to speak from the death.

This enactment must be viewed in connection with sect. 3,

(*p*) *Vide ante*, p. 319.

(*q*) 1 Eq. Ca. Ab. 200, pl. 12. [See also Banks *v.* Thornton, 11 Hare, 176, where a bequest of "all the residue of my property which consists of stock" was held to include all stock in the testator's possession at his death.

[1] Van Kleeck *v.* Dutch Church, 20 Wend. 457; Canfield *v.* Bostwick, 21 Conn. 550; Gold *v.* Judson, ib. 616; Philadelphia *v.* Davis, 1 Whart. 490; Loveren *v.* Lamprey, 2 Foster, 434, 442; Kuhn *v.* Webster, 12 Gray, 3; Haven *v.* Foster, 14 Pick. 534; Wait *v.* Belding, 24 Pick. 136; Lanning *v.* Cole, 2 Halst. Ch. 102. See Gilmer *v.* Gilmer, 42 Ala. 9; Raines *v.* Barker, 13 Gratt. 128; Gibson *v.* Carrell, ib. 136; Clements *v.* Kyles, ib. 468; Wagstaff *v.* Wagstaff, L. R. 8 Eq. 229; Delacherois *v.* Delacherois, 11 H. L. Cas. 62.

[2] See Warner *v.* Swearingen, 6 Dana, 195.

[3] States in which after-acquired property may pass by will: —

Alabama. Code, 1876, Title 4, ch. 2, p. 586.
California. Codes & Stat. 1876, Vol. 1, Title 6, ch. 1, p. 724.
Colorado. Gen. Laws, 1874, ch. 103, p. 929.
Connecticut. Gen. Stat. 1875, ch. 11, p. 368.
Dakotah. Rev. Code, 1877, Title 5, ch. 1, p. 348.
Delaware. Rev. Code, 1874, ch. 84, p. 513.
Georgia. Code, 1873, Title 6, ch. 2, p. 425.
Illinois. R. S. 1880, ch. 148, p. 1108.
Indiana. Stat. 1876, Vol. 2, ch. 3, p. 571.
Iowa. Rev. Code, 1880, Title 16, Vol. 1, ch. 2, p. 607.
Kansas. Comp. Laws, 1879, ch. 117, p. 1007.
Kentucky. Gen. Stat. 1873, ch. 113, p. 832. See Walton *v.* Walton, 7 J. J. Marsh. 58.
Maine. R. S. 1871, ch. 74, p. 564.
Maryland. Rev. Code, 1878, Art. 49, p. 421. See Carroll *v.* Carroll, 16 How. 275; Johns *v.* Hodges, 33 Md. 515.
Massachusetts. Gen. Stat. 1860, ch. 92, p. 476.
Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1372.
Minnesota. Stat. 1878, ch. 47, p. 567.
Mississippi. Rev. Code, 1871, ch. 54, p. 525.
Missouri. R. S. 1879, Vol. 1, ch. 71, p. 679. See Liggat *v.* Hart, 23 Mo. 127; Applegate *v.* Smith, 31 Mo. 166.
Nebraska. Gen. Stat. 1873, ch. 17, p. 300.
Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 202.
New Hampshire. Gen. Laws, 1878, ch. 193, p. 455.
New Jersey. Revision, 1709–1877, Vol. 2, p. 1248.
New York. R. S. 1875, Vol. 3, ch. 6, p. 58.
North Carolina. Battle's Revisal, 1873, ch. 119, p. 847. See Battle *v.* Speight, 9 Ired. 288.
Ohio. R. S. 1880, Vol. 2, ch. 1, p. 1436.

which enables testators to dispose of all the real and personal estate to which they may be entitled at the time of their death,
*327 * which, if not so disposed of, would devolve to their general real and personal representatives. Had the latter clause stood alone, it might have been a question whether the legislature,

See Smith *v.* Jones, 4 Ohio, 116; Board of Education *v.* Ladd, 26 Ohio St. 210.

Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1476. See Clarke's Estate, 82 Penn. St. 528; Cresson's Appeal, 76 Penn. St. 19.

Rhode Island. Gen. Stat. 1872, ch. 171, p. 373.

South Carolina. R. S. 1873, ch. 85, p. 440.

Tennessee. Stat. 1871, Vol. 2, ch. 1, p. 999.

Texas. R. S. 1879, Title 99, p. 712.

Utah. Comp. Laws, 1876, ch. 2, p. 271.

Vermont. Gen. Stat. 1862, ch. 49, p. 377.

Virginia. Code, 1873, ch. 118, p. 911. See Smith *v.* Edrington, 8 Cranch, 66; Allen *v.* Harrison, 3 Call, 251; Hyer *v.* Shobe, 2 Munf. 200.

West Virginia. R. S. 1878, ch. 201, p. 1170.

Wisconsin. R. S. 1878, ch. 103, p. 649.

Contra in Florida. Bush's Digest, 1872, ch. 4, p. 75.

In Massachusetts, "any estate, right, or interest in lands acquired by the testator, after the making of his will, shall pass thereby, in like manner as if possessed at the time of making the will, if such shall clearly and manifestly appear by the will to have been the intention of the testator." Gen. Stat. Mass. ch. 92, § 4. In New York, the provision is, that "every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death." 3 New York Rev. Stat. p. 58, § 7. In construing the similar statute of New Hampshire, the court in Loveren *v.* Lamprey, 2 Foster, 434, refer to the decisions upon those general expressions in a will, which have always been held to pass after-acquired personal property, and suggest that the same expressions used in reference to real estate since the statute would pass such real estate acquired after making the will. Ib. 444. The effect of the English statute, and of statutes of the same purport, is to substitute a new and distinct intent in place of the one previously considered to exist, — an intent to give the after-acquired estate, — unless there be evidence in the will that such was not the purpose of the testator. See, *e. g.*, Roney *v.* Stiltz, 5 Whart. 381. Still, the question is one of the testator's actual intention when that can be ascertained from the will; Cole *v.* Scott, 16 Sim. 259; S. C. 1 Macn. & G. 518; Hutchinson *v.* Barrow, 6 Hurl. & N. 583; In re Midland Ry. Co., 34 Beav. 525; Garrison *v.* Garrison, 5 Dutch. 153. And the statutes of the states differ upon this subject. See further Brimmer *v.* Sohier, 1 Cush. 118; Blaney *v.* Blaney, ib. 107; Brigham *v.* Winchester, 1 Met. 390; Wait *v.* Belding, 24 Pick. 136; Winchester *v.* Forster, 3 Cush. 366; Hill *v.* Bacon, 106 Mass. 578; Hosea *v.* Jacobs, 98 Mass. 65; Jones *v.* Shewmaker, 35 Ga. 151; Gibbon *v.* Gibbon, 40 Ga. 562; Gable *v.* Daub, 40 Penn. St. 217; Smith *v.* Hutchinson, 63 Me, 83; Meserve *v.* Meserve, ib. 518; McGavock *v.* Pugsley, 12 Heisk. 689; Thorndike *v.* Reynolds, 22 Gratt. 21; Henderson *v.* Ryan, 27 Texas, 673; Wedgwood *v.* Denton, L. R. 12 Eq. 290; Castle *v.* Fox, L. R. 11 Eq. 542; Cox *v.* Bennett, L R. 6 Eq. 422; Miles *v.* Miles, L. R. 1 Eq. 462. The statute of Massachusetts has been construed in several instances to apply to a will made before the act took effect, where the death of the testator occurs afterwards, and this construction is there understood not to give the statute a retroactive effect. Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterston, ib. 262. Such also is the construction of the statute of New Hampshire; Loveren *v.* Lamprey, 2 Foster, 434; Perkins *v.* George, 45 N. H. 453; Wakefield *v.* Phelps, 37 N. H. 295; and of New York, Parker *v.* Bogardus, 5 N. Y. 309; Lynes *v.* Townsend, 33 N. Y. 558; Youngs *v.* Youngs, 45 N. Y. 254; Quinn *v.* Hardenbrook, 54 N. Y. 83; Green *v.* Dikeman, 18 Barb. 535; Ellison *v.* Miller, 11 Barb. 332; Pond *v.* Bergh, 10 Paige, 140; De Peyster *v.* Clendining, 8 Paige, 295; Bishop *v.* Bishop, 4 Hill, 138; and of Virginia: Smith *v.* Edrington, 8 Cranch, 66. The statute of Maryland, above referred to, has been held not to apply to wills made before it took effect, though the testator died afterwards. Carroll *v.* Carroll, 16 How. 275. So of the Pennsylvania statute; Mullock *v.* Souder, 5 Watts & S. 198; and that of Connecticut, Brewster *v.* McCall, 15 Conn. 274; and of North Carolina; Battle *v.* Speight, 9 Ired. 288. Under the original of the provisions of the Act of Massachusetts above cited, the court in Cushing *v.* Aylwin, supra, said that the object of the statute was to do away with an inflexible rule of the old law, theretofore in force, which had been found to operate injuriously, often defeating the intention of the testator clearly expressed; and it was thought there was no good reason why the statute should not apply as well to wills made before as to those made after the act, when the will had not taken effect before that time by the death of the testator. The court declared that the Legislature had constitutional power to enact such a law, and thought that such was the intention. The language was general, and not restricted to wills made after the statute. Wilde, J. See also Pray *v.* Waterston, 12 Met. 262; Brimmer *v.* Sohier, 1 Cush. 118.

by merely enabling testators to dispose of after-acquired real estate, had so far varied and enlarged the construction of a general devise as to make it extend beyond the real estate belonging to the testator when he made his will, to which the established rules of construction, no less than the principle which forbade the devise of after-acquired real estate, previously restricted it. Any such question is, of course, now precluded; for by the combined effect of the 3d and 24th sections of the statute, it is evident that a general devise of real estate (*r*), [or of the testator's real estates in a given county or parish (*s*),] will operate on all the property of that description, to which the testator may happen to be entitled at his decease; and though it seems to have become usual in practice, to extend the devise in express terms to the real estate belonging to the testator at his death, yet this must be considered as a measure of excessive caution, and not as springing from, or sanctioning, any serious doubt as to the construction. Indeed, to hold that a general devise is still confined to real estate belonging to the testator at the date of his will would most inconveniently narrow, and go far towards rendering nugatory, the enactment which declares the will to speak in regard to the estate (real as well as personal) comprised in it from the death of the testator. [But a general devise of lands in a particular place will, of course, not include lands subsequently purchased, where the will expressly disposes of the latter; the contrary intention spoken of in the act is then clearly shown (*t*).]

General devise of real estate now extends to property at death.

General devise, of lands in particular place.

The application of the new principle of construction to specific bequests, however, is attended with more difficulty. [It has given rise to much litigation, and will probably give rise to more] before its precise limits and effect are fully established. The cases immediately in the contemplation of the legislature, probably, were (1) that of a specific bequest of a renewed leasehold property (*u*), which, we have seen, under the old law, did not apply to the new estate acquired by a renewal of the lease subsequently to the will; (2) the case of a bequest of [all the testator's stock * of a given description (which we have already seen did not include any additional stock of the same description purchased by the testator after the date of his will); and perhaps also (3) the case of a bequest of] a specific sum of stock in the funds, which, upon the same principle, did not extend to substituted stock subsequently acquired by the testator, though of precisely similar amount. *328

Application of s. 24 to specific gifts;

The applicability of the new enactment to the first case cannot be

(*r*) O'Toole *v.* Brown, 3 Ell. & Bl. 572; Jepson *v.* Key, 2 H. & C. 873.
(*s*) Doe d. York *v.* Walker, 12 M. & Wels. 591.
(*t*) Re Farrer, 8 Ir. Com. L. Rep. 370.
(*u*) See 4th report of the R. P. C. pp. 23, 24, where this is the only case of specific bequest adverted to in connection with this subject; all the other cases there contemplated being devises expressed in general terms.

to renewed lease; to after-purchased reversion in fee;

questioned [and its application has been extended to cases where, after making his will disposing of the demised property, the lessee has bought the reversion in fee: the newly acquired interest passes by the will, notwithstanding a reference (commonly found in such cases) to the term for which the property is at the time held; this being considered only a mode of describing the property, and not as equivalent to saying, "I give my present interest and nothing else" (*x*). The latter meaning would equally exclude a renewed term (*y*).

to specific gift of stock, of undefined amount;

It is also clear that the second case is within the rule. Thus, in Goodlad *v.* Burnett (*z*), where the testatrix gave "her New Three-and-a-quarter per Cent. Annuities" to trustees, upon the trusts therein mentioned; and, after making her will, purchased a considerable quantity of that stock in addition to what she possessed at the time of making her will, it was held by Sir W. P. Wood, V.-C., that the whole was included in the bequest. He thought the Wills Act must have some sense given to it as regarded personal estate: before that act, there was no doubt that, as regarded the general personal estate, the will in most cases spoke from the death, but not in all; and the present was one in which the bequest would have been confined to the stock in the testatrix's possession at the time of making her will (*a*). It was precisely such a case to which the act would seem to have application; the only question was, did a con-

*329 trary * intention appear by the will? There was nothing to indicate such an intention, except the mere circumstance of the testatrix having described the stock as "*my* Three-and-a-quarter per Cents;" and where, as here, the bequest was generic, — of that which might be increased or diminished, that circumstance was insufficient.

to a devise of "lands of C." so as to include after-acquired lands of C.;

The same principle has been applied to a devise of land. Thus in Strevens *v.* Bayley (*b*), where the testatrix devised to the plaintiff "the lands of Curramore," and devised all the residue of her real estate to the defendant. The townland of Curramore had originally been held in undivided moieties, and there had been a partition under which the testatrix was, at the date of her will, entitled to one portion in severalty; and after

(*x*) Struthers *v.* Struthers, 5 W. R. 809; Miles *v.* Miles, L. R. 1 Eq. 462; Cox *v.* Bennett, L. R. 6 Eq. 422. Sect. 23 of the Act was also relied on, as to which *vide ante*, p. 164, n. In Emuss *v.* Smith, 2 De G. & S. 722, it was held that a devise of "all my freehold estate at Brickhouse Lane which I purchased of B." by a testator who had before making his will purchased of B. an estate in that lane, partly freehold and partly leasehold, did not pass the reversion in fee afterwards purchased from C. of the part theretofore leasehold. As to the bequest of the garden, formerly leasehold, at Falsam Pits, this is not referred to either in the argument or the judgment. Only, according to the note of the decree, p. 738, it was declared to have been adeemed by the subsequent conveyance of the fee. But the later decisions make this questionable.

(*y*) See Wedgwood *v.* Denton, L. R. 12 Eq. 290, 295, 296.

(*z*) 1 K. & J. 341. See also Drake *v.* Martin, 23 Beav. 89; Trinder *v.* Trinder, L. R. 1 Eq. 695; and per Jessel, M. R., L. R. 20 Eq. 312.

(*a*) Compare Banks *v.* Thornton, 11 Hare, 176.

(*b*) 8 Ir. Law Rep. N. S. 410.]

the date of her will, she purchased the other portion. It was held that the whole townland passed to the plaintiff. Monahan, C. J., who delivered the judgment of the court, considered that the description comprised the whole townland, and, consequently, included all in the townland of which the testatrix was seised at her death.

So in Castle *v.* Fox (*c*), where a testator being entitled to the mansion house of Cleeve Court and lands adjoining, devised "his mansion and estate called Cleeve Court" to certain persons, and the residue of his property to certain other persons; and afterwards, at different times, bought other pieces of land, which he added to Cleeve Court, and treated and spoke of them as part thereof; Sir R. Malins, V.-C., said he was required by sect. 24 to ask the question what it was the testator called the Cleeve Court Estate at the time of his death; and finding upon the evidence that these additions were then regarded and treated by the testator as part of the estate, he held that they passed as such under the specific devise.]

The new rule of construction, however, [would,] according to the general terms in which the enactment is framed, apply to many cases in which its effect [would] be less decidedly salutary, nay, where it [would,] in all probability, defeat the intention; for example, suppose that a testator, having a house in * Grosvenor Square, bequeaths it by the description of his *330 messuage in that square, and afterwards sells the property, and purchases another house in the same square, of which he is possessed at his decease, the bequest will comprise the new acquisition if the enactment which makes the will speak from the death [is literally construed]. So (to put a stronger case), suppose that a testator, having a small farm in the parish of A., devises "all that *his estate* in the parish of A." and that subsequently to the will he disposes of the farm in question, and purchases another in the same parish, but of ten times the value, which he continues to hold until his decease, or such larger farm may have devolved on the testator by descent or otherwise without any spontaneous act on his part, or even without his knowledge, or when incapable of altering his will; in either case the newly acquired estate must, it is conceived, [if the words of the act are taken as they are], be held to pass by the devise (*e*).

to a gift of "my house in G. square,"

— or "my estate in the parish of A."

It may even happen that by a strict application to specific gifts, of the principle which makes the will speak from the death, a gift of this nature might be invalidated for uncertainty. For instance, if a testator, having a house in the Strand, devises it by the description of his house in the Strand, and after-

Effect, where there is more than one subject of gift at the death of testator.

(*c*) L. R., 11 Eq. 542. See Webb *v.* Byng, 1 K. & J. 580, a very similar case, where the after-acquired property was held not to pass through insufficiency of evidence to prove that it was regarded by the testatrix as part of the estate devised. Citing this case, R. P. S. p. 372, Lord St. Leonards says, "consider this case." As to the admissibility of such evidence, see S. C. and other cases post, Ch. XIII.

(*e*) The terms of gift here supposed are more particular than those in Doe d. York *v.* Walker, 12 M. & Wel. 591.

wards acquires another in the same place, and holds both houses at the time of his decease, it is evident that the statutory provision would, in such a case, by bringing both the houses within the terms of the description, render the devise void for uncertainty; unless it could be ascertained by extrinsic evidence which of them was intended (*f*). To avoid such a consequence, probably it would be held that the fact of the testator's ownership of one house only at the date of the will was a sufficient indication of his meaning that house; and yet this is, *pro tanto*, a departure from the principle of the enactment under consideration; for had the devise been in terms of the house in the Strand which should belong to the testator at his decease, there would have been no ground for distinguishing between the house that belonged to him when he made his will, and that which he subsequently acquired: so that, if the extrinsic evidence failed to show which of the two houses was intended (if, indeed, evidence is admissible in such a case (*f*),) the plurality would be fatal to the devise.

*331 * [But the courts have striven to find a reasonable meaning in the act. "Suppose," said Sir J. K. Bruce (*g*), "a man to have a brown horse and bequeath it, and then to sell it and buy another brown horse, and die, does the horse of which he was possessed at the time of his death pass?" Or suppose a man to have a picture, say, of the Holy Family, by some inferior artist, and to bequeath it as "my Holy Family," then to sell it, and afterwards to acquire a far better one on the same subject painted by an eminent artist: Sir W. P. Wood thought it would be a monstrous construction to hold that the latter picture would pass; and he observed that where there was a distinct reference to a distinct and specific thing incapable of increase or diminution, and not to a genus, there was an indication of a contrary intention sufficient to exclude the rule which makes the will speak from the testator's death (*h*). No such case as that of the house, the horse, or the picture has ever been brought into court. If the question should ever arise, it may be expected that the desire to avoid a "monstrous" result will exercise a preponderating influence on its determination (*i*).

Contrary intention indicated by nature of a specific gift.

The third case mentioned above, namely, that of a specific bequest of a definite sum of stock, is somewhat different; for though incapable of increase or diminution, *i.e.* not generic, yet any other equal sum of the same stock is practically identical; and the question is whether the old rule, according to which such a bequest did not extend to the substituted stock, though of precisely equal amount (*k*), has been altered by the act. In

The act not applicable to specific bequest of stock of a definite amount;

(*f*) As to this, *vide post*, Ch. XIII.

[(*g*) Emuss *v.* Smith, 2 De G. & S. 722. But if a breeder of horses should bequeath "his yearlings," and survive into the next year, the yearlings of the latter year and not those of the former (now two-year-olds) would probably be held to pass.

(*h*) Re Gibson, L. R. 2 Eq. 669. (*i*) But see per Malins, V.-C., L. R. 11 Eq. 551, 552.

(*k*) Pattison *v.* Pattison, 1 My. & K. 12. In Re Gibson, presently stated, Wood, V.-C.,

Re Gibson (*l*), where a testator, having 1,000*l*. N. B. railway stock bequeathed "my one thousand railway shares," and afterwards sold his 1,000*l*. stock, and at various times bought stock and shares of the N. B. railway exceeding the amount bequeathed, and was possessed of them at his death; it was contended that although the legacy was specific, and according to the old law * adeemed, yet under sect. 24 *332 of the act the legatee was entitled to have his legacy satisfied out of the newly purchased shares: but Sir W. P. Wood, V.-C., said the testator had distinctly referred to one thing in his will which was no longer in existence at the time of his death: that thing and that only could be considered as the subject of the bequest. The claim therefore failed. This in principle covers a case where the substituted stock is exactly equal to the original subject of bequest.

Again in Sidney *v.* Sidney (*m*), where a testator recited, as the fact was, that his son owed him 1,440*l*. or thereabouts, secured by bills, notes or otherwise (the precise amount was 1,400*l*.), and released him from the payment of interest up to the time of the testator's death; this debt was afterwards paid off, but another of 1,290*l*. was incurred, which was partly secured by notes and partly unsecured, and which remained due at the testator's death. "The question is," said Sir G. Jessel, M. R., "how far the provisions of s. 24 apply to gifts of legacies as distinguished from gifts of residue. *The first question to be considered in all these cases is what does the instrument mean?*" And he held that the will meant to describe a specific sum then existing, and that consequently it could not, under s. 24, be read as speaking at the time of the testator's death, so as to include a new subject, viz., the interest on the new debt. The legacy was therefore adeemed (*n*).]

nor to release of a specific existing debt.

Another question is whether the enactment which makes the will speak from the death has the effect of carrying forward to that period words pointing at present time. For instance, supposing a testator to bequeath "all that messuage in which I *now* reside," and that after making his will he changes his residence to another house belonging to him, which he continues to occupy until his death, does the act make the word "now"

Whether s. 24 makes words of present time point to testator's death.

referred to Lord Hardwicke's doctrine in Avelyn *v.* Ward, 1 Ves. 423, that the substitution of one entire fund (not purchased bit by bit) for another of equal amount was a revival of the bequest. But since 1 Vict. c. 26, a bequest of personalty once adeemed cannot be revived by parol, and the "continuing operation" of a will under s. 24 extends only to uninterrupted gifts.

(*l*) L. R. 2 Eq. 669. A bequest of railway "shares" generally includes railway stock, Morrice *v.* Aylmer, L. R. 7 H. L. 717.

(*m*) L. R. 17 Eq. 65. A release by will of debts is clearly a gift of personal estate within s. 24, Everett *v.* Everett, 7 Ch. D. 428; in this case a release of specified debts "now due and of all other moneys due from" the legatee, was held to include after-incurred debts.

(*n*) See also Maxwell *v.* Maxwell, L. R. 4 H. L. 506, as to expressions showing an intention to refer only to the state of circumstances existing at the date of the will. A bequest, if specific under the old law, is specific also under the new. The Wills Act, s. 24, gives it an enlarged operation; but the nature of the bequest is not altered. See Bothamley *v.* Sherson, L. R. 20 Eq. 313.

apply to the house occupied by the testator at his death? It is conceived that the principle will not be carried such a length, and that this would be considered as a case in which "a contrary intention ap-
*333 pears by the will:" [for the reference is to a specific thing * then in existence, and the words "in which I now reside" are the only distinguishing terms of description.

So where the words describing the subject of gift are far more general, yet if they expressly point to the present time, and are manifestly used with reference to the period when the will is made (*o*), the operation of the act is excluded. Thus, in Cole *v.* Scott (*p*), where by will, dated the 29th of April, 1843, the testator, after devising "the house in which I now reside," and also making another devise of the "residue and remainder of my messuages, &c., whereof I am *now* seised or possessed," also devised and bequeathed "all such manors, &c., as well freehold as copyhold and leasehold, as are *now* vested in me, *or as to the said leasehold premises shall be vested in me at the time of my death* as trustee or mortgagee," the question was whether after-purchased property passed under the residuary devise; and it was held by Sir L. Shadwell, V.-C., and, on appeal, by Lord Cottenham, C., that the after-purchased property did not pass. Both judges, especially the former, relied on the contrasted use of words importing a distinction between the estates then vested in the testator and those he might thereafter acquire, and concluded that the word "now" must be referred to the date of the will. If the will had been undated, the L. C. thought (for reasons not expressed) that "now" must under the act be referred to the time of the death.

Cole *v.* Scott.

But whether the will is dated or not, Cole *v.* Scott is not an authority for giving to the word "now" the effect of excluding after-acquired property in every case in which the testator gives that of which he is "now seised" or "now possessed." Thus in Wagstaff *v.* Wagstaff (*q*), a gift of "all my ready money, shares, freehold property, plate, pictures and any other property that I *may now* possess, except the house at P.," was held by Sir J. Romilly to include all the personal property of the testator at his death. He appears to have thought there was no difference between the words "I possess" and "I now possess." As a matter of grammar, both, it is true, express the present time; but upon the question of indicating a contrary intention within the act, the introduction of the word "now" seems to go much further towards indicating an intention to give only what the testator has at the
*334 time (*r*). Something more than this single * word, however, will generally be wanted for that purpose: some more pointed distinction must be drawn (at least in the case of a general gift) between what belongs to the testator at one time and what belongs to him at

(*o*) See Sugd. R. P. S. p. 372.
(*p*) 16 Sim. 259, 1 M. & Gord. 518. See also Douglas *v.* Douglas, Kay, 400.
(*q*) L. R. 8 Eq. 229.
(*r*) See per Turner, L. J. 8 D. M. & G. 437.

the other. And "now" has never been so construed since the act as to produce intestacy (*t*).

Again, in Re Midland Railway Company (*u*), where a testator gave "all that my messuage situate in Bordgate in Otley, wherein my son D. now resides, with the stables and appurtenances thereto belonging and therewith occupied," and afterwards bought a piece of land adjoining the house, which he attached to it as a garden; it was held by Sir J. Romilly that the garden passed with the house. In his opinion it was as if the testator had said, "I give my farm Whiteacre, now in the occupation of J. S.:" but he added that if the devise had been of "the messuage as it now stands, and the lands now held therewith by D.," it would not have included the after-acquired garden. In the case first put by the M. R., the reference to occupation is not an essential part of the description (*x*): in the second it is; the subject of gift cannot be identified without it, and the word "now" would confine the gift to land so occupied at the date of the will (*y*).

But it is clear that words which merely import but do not emphatically refer to time present, as a general devise or bequest of property, or of property of a particular genus, of which "I am seised" or "am possessed," will generally include all or all of that genus to which the testator is entitled at the time of his death, though acquired after the date of the will (*z*). And the effect of the statute ought not to be frittered away by catching at doubtful expressions for the purpose of taking a case out of its operation (*a*). Thus in Lilford *v.* Keck (*b*), where a testator devised all the freeholds "of which I am seised," and then devised to corresponding uses all the copyhold and leasehold property "of which I am or at the time of my death shall be possessed;" it was held by Sir J. Romilly that after-purchased freeholds passed by the former devise. So in Re Ord (*c*), where a testator, possessed of leaseholds at C., part of which was charged with a mortgage and the rest with an annuity, devised all his leasehold lands at C., charged with the mortgage debts charged thereon, "and also with the annuity now charged thereon," to his son; and afterwards bought other leasehold lands at C.; it was argued that the devise was confined to such leaseholds as were charged with the mortgage and annuity, a construction which of course excluded the after-bought lands; but Sir C. Hall, V.-C., held that the reference to the charges (which was not quite accurate) was insufficient to deprive the words of gift of their proper interpretation under the act.]

Verbs in present tense.

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(*t*) See especially Hepburn *v.* Skirving, 4 Jur. N. S. 651, a strong decision, especially as to the bank shares.

(*u*) 34 Beav. 525. That a devise of a house will generally carry the garden, see post, Ch. XXIV.

(*x*) See Chamberlain *v.* Turner, Cro. Car. 129.

(*y*) Hutchinson *v.* Barrow, 6 H. & N. 583; Williams *v.* Owen, 2 N. R. 585.

(*z*) Doe d. York *v.* Walker, 12 M. & Wel. 591; Lady Langdale *v.* Briggs, 3 Sm. & Gif. 246, 8 D. M. & G. 391.

(*a*) Per Cotton, L. J., Everett *v.* Everett, 7 Ch. D. 428.

(*b*) 30 Beav. 300.

(*c*) 9 Ch. D. 667.

In order to avoid all such questions, a testator should add to his description of property specifically disposed of expressions incapable of being applied or not likely to apply to any other. He should give "the house No. 23 in Grosvenor Square," or "his farm in the parish of A. called B., now in the occupation of C." (all which particulars could hardly coincide in two instances), or "all lands in the county of C. to which he is entitled at the date of his will." The last restriction seems in general the best, as it precludes the possibility of after-acquired property being let in.

Practical suggestion.

[It has hitherto been assumed, and the assumption pervades all the cases, that the words of the act "every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if," &c., are not to be taken in their literal sense as meaning "real and personal estate then actually comprised therein" (*i.e.* devised thereby). It is plain that this sense was not intended, for the context shows that the enactment has reference to property not then actually comprised in the will (*d*). The true meaning appears to be "with reference to the question what estates are comprised in any disposition in the will." If this is so, it disposes of a point raised and left unsettled in Hughes *v.* Jones (*e*), namely, whether the enactment is applicable to exceptions from a devise? To hold that it is, * would (it was argued) be to make the will speak from the death with reference to property excluded from it, whereas the act makes it so speak only with reference to property comprised in it. This argument proceeds upon a mistake. The whole question is, what is comprised *in the terms?* This cannot be answered without taking into consideration and construing all the terms of the description, as well those which exclude as those which include. And if a man devises all his real estate except his copyholds or except his estates in the county of B., or bequeaths all his stock except consols, good sense requires that both parts of the description, being equally general or generic, should be construed to speak as from the same time. If the exception, or exclusive portion, refers to an actually existing state of things, it must, of course, be construed to speak as from the date of the will, just as inclusive terms having a similar bearing must be construed. If the will goes on to make a distinct disposition of the excepted property, with the result

Is s. 24 applicable to property excepted from devise?

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(*d*) See per Turner, L. J. 8 D M. & G. 436 (where the word "is" is misplaced, see 26 L. J. Ch. 49). The words of the act appear to have been hastily adopted from the "propositions" of the 4th R. P. Report, p. 80. They require to be read with the report, which says (p. 24) "We propose that a will shall pass property of any description comprised *in its terms* which a testator may be entitled to at the time of his death, unless a contrary intention shall appear by the will. If this recommendation be adopted the law respecting the time from which a devise of freehold or copyhold estate is to be considered to take effect will be precisely similar to that which is at present in force as to personal estate." And this recommendation is referred to as follows (p. 29): "If *as we have proposed* wills be made to speak with reference to the property comprised in them as at the time of the testator's death," &c.

(*e*) 1 H. & M. 765.

that what is excluded from one devise is included in the other, the question (if question it is) can hardly be said to arise (*f*).

A general power of appointment created after a will, but in the testator's lifetime (*g*), will be executed by the will if the will would have operated to execute the power had it been in existence at the date of the will (*h*); and consequently, under sect. 27 of the act 1 Vict. c. 26, a general residuary devise or bequest will, unless a contrary intention appears by the will (*i*), operate as an execution of all general powers of appointment given to the testator without reference to the date of their creation. But not of general powers of *revocation*. Even where the will is made expressly in exercise of all powers of appointment, a power of revocation will not be thereby executed, if the words of the will can be otherwise satisfied. If there were no power but one of revocation and new appointment it would be different (*k*).]

Powers of appointment created after date of will are exercised by a residuary gift;

—but not powers of revocation.

It will be remembered that the enactment which makes the will speak from the death relates to the subject-matter of disposition only, and that it does not in any manner [affect the * question of testamentary capacity. Thus although the will of a woman under coverture at the time of making it may operate by force of the enactment to dispose of separate property afterwards acquired by her (*l*), or as the execution of a general power afterwards conferred upon her (*m*), it acquires no validity under this section by the mere fact of her having survived her husband and being discoverte at the time of her death (*n*). The statute does not make an instrument valid which through the personal disability of the testator was invalid in its inception, but gives a new rule for the interpretation of instruments which are valid without the aid of the statute.

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Sect. 24 does not supply testamentary capacity;

Neither does the enactment in any manner] interfere with the construction in regard to the objects of gift (*o*); as to whom, there-

(*f*) See Lysaght *v.* Edwards, 2 Ch. D. 521, 522; Re Scarth, 10 Ch. D. 499, better reported 40 L. T. Rep. 184.

(*g*) It need scarcely be observed that if the power is created by will and the donee dies before the donor the power lapses, Jones *v.* Southall, 32 Beav. 31.

(*h*) Sugd. R. P. Stat. 379; and see Carte *v.* Carte, 3 Atk. 174; Stillman *v.* Weedon, 16 Sim. 26; Cofield *v.* Pollard, 3 Jur. N. S. 1203; Patch *v.* Shore, 2 Dr. & Sm. 589; Hodsdon *v.* Dancer, 16 W. R. 1101, W. N. 1868, p. 222.

(*i*) See Pettinger *v.* Ambler, L. R. 1 Eq. 510; and further on this subject, post, Ch. XX. s. 5.

(*k*) Pomfret *v.* Perring, 5 D. M. & G. 775; Palmer *v.* Newell, 20 Beav. 38; Re Merritt, 1 S. W. & Tr. 112, 4 Jur. N. S. 1192.

(*l*) Willock *v.* Noble, L. R. 7 H. L. 599, 8 Ch. 788.

(*m*) Thomas *v.* Jones, 2 J. & H. 475, 1 D. J. & S. 63. "The effect of the section in the case of a married woman is that she must be regarded *as a married woman* executing the instrument immediately before her death, and passing thereby every thing of which at the time of her death she had acquired a power of disposing," per Wood, V.-C., 2 J. & H. 484. A clear opinion was given by Lord Westbury in this case that a *general* power over an equitable estate given to the *survivor* of two persons, to be executed by *deed* or will, was well executed by a will made during the life of both by the one who eventually survived.

(*n*) Willock *v.* Noble, L. R. 7 H. L. 580; Re Wollaston, 32 L. J. Prob. 171; Price *v.* Parker, 16 Sim. 198.

(*o*) Bullock *v.* Bennett, 7 D. M. & G. 283; Violett *v.* Brookman, 26 L. J. Ch. 308.

nor relate to the objects of gift.

fore, the doctrines discussed in the present chapter, respecting the period at which the will speaks, or at which the objects are to be ascertained, remain in full force, even under a will the period of whose execution or republication brings it within the new law.

Effect of a change in the law between will and death.

[If, after the execution of a will, an alteration is made in the law which produces an alteration in the effect of the will, and the testator leaves the will unaltered, he will be presumed to intend that it shall take effect according to the altered law (*p*).][1]

(*p*) Hasluck *v.* Pedley, L. R. 19 Eq. 271 (Apportionment Act, 1870).

[1] So the validity of the execution of a will is to be determined by the law in force at the testator's death. Jones *v.* Robinson, 17 Ohio St. 171; Mullen *v.* McKelvey, 5 Watts, 399; Houston *v.* Houston, 3 McCord, 491; In re Elcock, 4 McCord, 39. But it is held in Pennsylvania that the laws governing *property* when a will is executed are to govern, and not those prevailing (if different) at the testator's death. Taylor *v.* Mitchell, 57 Penn. St. 209; Gable *v.* Daub, 40 Penn. St. 217. See Hargroves *v.* Redd, 43 Ga. 142. The question whether an estate is to be divided according to the law as it existed at the death of the testator, or at the death of the devisee for life, will depend upon the further question, whether the estate of the devisee in remainder is vested or contingent. If his estate vested at the death of the testator, no subsequent change of the law could affect his rights. If it remained contingent until the death of the devisee for life, the law as it then stood must govern, unless a different intention appear in the will. Vantilburgh *v.* Hollinshead, 14 N. J. Eq. 32.

*CHAPTER XI. *338

DOCTRINE OF LAPSE.

THE liability of a testamentary gift to failure, [or as it is generally termed lapse,] by reason of the decease of its object in the testator's lifetime, is a necessary consequence of the ambulatory nature of wills; which, not taking effect until the death of the testator, can communicate no benefit to persons who previously die: in like manner as a deed cannot operate in favor of those who are dead at the time of its execution. [Though the term "lapse" is generally applied to failure by death of the object of gift in the testator's lifetime, yet the same effect may be produced by other means, as where there was a gift of consumable articles to A. for life, or so long as she should remain unmarried (equivalent to an absolute gift), it was held, that the marriage of A. in the testator's lifetime caused a result similar to that of her death (*a*) in his lifetime.] The doctrine applies indiscriminately to gifts with and gifts without words of limitation. Thus, if a devise be made to A. and his heirs, or (unless the will be regulated by the new law) to A. and the heirs of his body, and A. die in the lifetime of the testator, the devise absolutely lapses, and the heir, special or general (as the case may be), of A. takes no interest in the property, he being included merely in the words of limitation, *i.e.* in the terms which are used to denote the quantity or duration of the estate to be taken by the devisee, through whom alone any interest can flow to such heir (*b*).[1]

General principle respecting lapse.

As to real estate;

(*a*) Andrew *v.* Andrew, 1 Coll. 690.]

(*b*) Brett *v.* Rigden, Plow. 345; Fuller *v.* Fuller, Cro. El. 422; Wynn *v.* Wynn, 3 B. P. C. Toml. 95; [Hutton *v.* Simpson, 2 Vern. 722;] see also Goodright *v.* Wright, 1 P. W. 397; Ambrose *v.* Hodgson, 3 B. P. C. Toml. 416.

[1] See Ballard *v.* Ballard, 18 Pick. 41; Birdsall *v.* Hewlett, 1 Paige, 32; Dunlap *v.* Dunlap, 4 Desaus. 314; Gore *v.* Stevens, 1 Dana, 205; Trippe *v.* Frazier, 4 Harr. & J. 446; Prescott *v.* Prescott, 7 Met. 145. An exception to the rule of lapse is created by statute in most of the states. See p. 351, n. "When a devise of real or personal estate is made to any child or other relation of the testator, and the devisee shall die before the testator, leaving issue who survive the testator, such issue shall take the estate so devised, in the same manner as the devisee would have done if he had survived the testator, unless a different disposition shall be made or required by the will." Mass. Gen. Stat. c. 92, § 28. See Ballard *v.* Ballard, 18 Pick. 41; Fisher *v.* Hill, 7 Mass. 86; Sears *v.* Putnam, 102 Mass. 5, 10; Morse *v.* Mason, 11 Allen, 36; Workman *v.* Workman, 2 Allen, 472. In Massachusetts, the issue of a donee who has died during the testator's lifetime, when such issue was born before the making of the will, does not take the gift intended for the parent. Wilder *v.* Thayer, 97 Mass. 439. The doctrine of lapse by the death of a donee during the lifetime of the testator has been changed by statute in New York also in cases where the devise or bequest is to a child or descendant of the testator who dies in the testator's lifetime, leaving a descendant who survives the testator. In such a case, the estate or interest vests in the descendant of the legatee or devisee. Downing *v.* Marshall, 23 N. Y. 366. It is provided in Pennsylvania, by the Act of March 19, 1810, Bright. Purd. 1700–1872, vol. 2, p. 1476,

Bequests of personal property, of course, are subject to the same

that no devise or legacy in favor of a child or other lineal descendant of the testator shall be deemed to lapse by his or her death in the lifetime of the testator, but the intention of the testator to exclude such surviving issue is to prevail if expressed. See Woolmer's Estate, 3 Whart. 477. By statute, in Georgia, legacies do not lapse if any issue of the legatee be living when the testator dies. Code, 1873, Title 6, ch. 2, p. 425. Laws similar to the foregoing, respecting lapse of devises or legacies, exist in South Carolina, Virginia, Maryland, and probably in most of the other states. The Act of Assembly of Pennsylvania, 1810, which prevents the lapse of a legacy bequeathed to a child or other lineal descendant of the testator, is held not to reach the case of a bequest to a niece and her heirs; and in a case of that kind the legatee having died in the lifetime of the testator leaving a husband and children, the legacy was held to have lapsed. Dickinson *v.* Purvis, 8 Serg. & R. 71. A son-in-law is not a child within the meaning of this act. Commonwealth *v.* Nase, 1 Ashm. 242. The act was intended further to give a benefit to the issue, and not to confer any right upon the devisee or legatee to control the devise or legacy. Newbold *v.* Pritchett, 2 Whart. 46. But see Johnson *v.* Johnson, 3 Hare, 157. A legacy lapses where the legatee, not being a lineal descendant of the testator, dies in his lifetime, notwithstanding the testator knew of his death, and intended his children should have the benefit of the legacy. Comfort *v.* Mather, 3 Watts & S. 450. A will was executed in New York in 1825, devising certain real estate to the son of the testator. The testator died in 1840; the son died in 1833. The property was held to belong to the son's children, and not to the heirs-at-law of the testator, in accordance with the statute which took effect in 1831. Bishop *v.* Bishop, 4 Hill, 138. There is a distinction in the English books between a lapsed devise and a lapsed legacy; and while the latter falls into the residuary estate, and passes by the residuary clause, if any there be, and, if not, passes to the next of kin, the former does not pass to the residuary devisee, but, the devise becoming void, the estate descends to the heir-at-law. Hayden *v.* Stoughton, 5 Pick. 528, 537, 538; Price *v.* Maxwell, 28 Penn. St. 23. As to personal property, a residuary clause not only carries all not disposed of, but everything which in the end turns out not to be disposed of. Taylor *v.* Lucas, 4 Hawkes, 215; James *v.* James, 4 Paige, 115; Gore *v.* Stevens, 1 Dana, 206; Van Kleeck *v.* Reformed Dutch Church, 6 Paige, 600. "A bequest of personal property refers to the state of the property at the testator's death; whereas a devise operates at common law only upon land whereof the testator was seised when he made his will, and this was the reason given for the distinction between a lapsed devise and a lapsed legacy. There is further a distinction between a lapsed and a void devise. In the former case, the devisee dies in the intermediate time between the making of the will and the death of the testator; but, in the latter case, the devise is void at the beginning, as if the devisee be dead when the will was made. See Billingsley *v.* Tongue, 9 Md. 575. The heir takes in case of the lapsed devise, but the residuary devisee may take in the latter case, if the terms of the residuary clause he sufficiently clear and comprehensive. See Ferguson *v.* Hedges, 1 Harrington, 524. This distinction appears to be founded on a presumption (though it would seem to be rather overstrained) of a difference in the views and intentions of the testator between the two cases. The subject has been considerably discussed in the courts of this country. In Greene *v.* Dennis, 6 Conn. 292, the devise was held void, because the devisee was incompetent to take; and yet, though the devise was void from the beginning, the heir was preferred to the residuary devisee, on the ground that the testator never intended that the specific devise, which was void, should fall into the *residuum*. The residuary devise was of "the rest and residue of the estate not therein disposed of." See also, to the same effect, Lingan *v.* Carroll, 3 Harr. & M'H. 333; Van Kleeck *v.* Reformed Dutch Church, 6 Paige, 600; James *v.* James, 4 Paige, 115; Van Cortlandt *v.* Kip, 1 Hill, 590; Brewster *v.* McCall, 15 Conn. 297, 298; Van Kleeck *v.* Dutch Church, New York, 20 Wend. 457. In Hayden *v.* Stoughton, 5 Pick. 528, 537, 538, it is held, that a devise, void because the devisee is incapable of taking, will go to the one to whom the testator gives "all his estate not before disposed of." So, if the devisee dies before the making of the will, but not if he dies after, or becomes incapable before the testator's death. Ib. See Brigham *v.* Shattuck, 10 Pick. 306. The alteration of the law in Massachusetts, New York, Virginia, New Hampshire, Pennsylvania, Maine, Vermont, and other states, making the devise operate on all the real estate of the testator at his death, may destroy the application of these distinctions, and give greater consistency and harmony to the testamentary disposition of real and personal estate. 4 Kent, 541, 543. In Prescott *v.* Prescott, 7 Met. 146, Wilde, J., said: "The rule is, that lapsed legacies of personal estate pass to the residuary legatee, if any there be, and, if not, to the next of kin. This rule, by the common law, does not apply to lapsed devises of real estate. The distinction is founded on another principle of the common law, by which a devise of real estate is limited in its operation to lands of which the testator was seised when he made his will. The foundation of this distinction is removed by the Rev. Stats. c. 62, § 3, which provide that 'any estate, right, or interest in lands, acquired by the testator after the making of his will, shall pass thereby, in like manner as if possessed at the time of making the will, if such shall clearly and manifestly appear, by the will, to have been the intention of the testator.' This provision seems to remove the distinction between real and personal estate, so that now all legacies and de-

rule;[1] and it is observable, that, in applying it to such bequests, a legacy to one, and his executors or administrators, is construed as a mere absolute gift (*c*);[2] for the circumstance that, *in regard to personalty, words of limitation are —personalty. *339

(c) [Stone *v.* Evans, 2 Atk. 86;] Elliot *v.* Davenport, 1 P. W. 83, 2 Vern. 521, where the legacy was of a debt, which is liable to lapse equally with gifts in any other form (Toplis *v.* Baker, 2 Cox, 118). It is true that in Sibthorpe *v.* Moxton (or Moxom), 1 Ves. 49, 3 Atk. 580, Lord Hardwicke held that the forgiving of a debt, coupled with a general direction to the executor to deliver up the security (without saying to whom), operated as a release, though the legatee died in the testator's lifetime; his lordship thinking that the latter words imported that the security should be delivered up, whether the debtor were living or not, and which he considered would, beyond all question, be the effect of the words of direction standing alone; though he admitted that, in regard to the administration of assets, it was to be considered as a legacy. In Maitland *v.* Adair, 3 Ves. 231, the words were, "I return A. his bond." A. died in the testator's lifetime, and it was held that the legacy lapsed. This case is overlooked by Mr. Roper (Treat. Leg. 411), who lays more stress on the merely verbal distinction between the giving and forgiving of a debt than seems warranted by the principles of the cases. [In Izon *v.* Butler, 2 Price, 34, the words were, "I remit and forgive, &c., and I direct the bond to be delivered up," and it was held that the legacy lapsed by the death of the debtor in the testator's lifetime. Thomson, C. B., said he had always been at a loss to understand the distinction between giving and forgiving. In South *v.* Williams, 12 Sim. 566, where the testator directed a balance of debts due from A., and property bequeathed to A.'s wife to be struck, and the surplus to be paid to or secured by the legatee, Sir L. Shadwell thought A. was released from the debts, though his wife died in the lifetime of the testator; compare Davis *v.* Elmes, 1 Beav. 131. In Williamson *v.* Naylor, 3 Y. & C. 208, it was decided that shares of a residue given to certain creditors under a composition deed (in which there was no release by the creditors), in proportion to their debts, did not lapse by the deaths of the creditors in the lifetime of the testator; a similar decision was made in Phillips *v.* Phillips, 3 Hare, 281. It is different where the debt has been released, Coppin *v.* Coppin, 2 P. Wms. 295; and the same would probably be held where there was a covenant not to sue, see Golds *v.* Greenfield, 2 Sm. & Gif. 476, but where the testator, who had been bankrupt, and had obtained his certificate, desired that all the creditors of his estate should be paid in full, and directed his executors to pay to the official assignee a sufficient sum for that purpose, it was held that, though the debts were barred by the certificate, the gift was not liable to lapse, the intention being to discharge the moral duty, not only to benefit the creditors individually, Re Sowerby's Trust, 2 K. & J. 630; Turner *v.* Martin, 7 D. M. & G. 429, cor. L. C. on same will.]

vises pass to the residuary legatee." See Blaney *v.* Blaney, 1 Cush. 107. See also to the same effect the remarks of Wager, Senator, in Van Kleeck *v.* Dutch Church, 20 Wend. 499. But see the distinction taken by Cowen, J., in Van Cortlandt *v.* Kip, 1 Hill, 596. Where the residuary estate is bequeathed to several persons in *joint* tenancy, if one or more of them happen to die in the lifetime of the testator, or after his death, but before the severance of the joint tenancy in the residue, their shares will survive to the others. Webster *v.* Webster, 2 P. Wms. 347. But if the residue be given to several as tenants in *common*, the shares of the deceased will not go to the survivors, but will devolve on the testator's next of kin, according to the Statute of Distributions, as so much of the personal estate remaining undisposed of by the will, in case the death happen in the lifetime of the testator; or they will go to the personal representatives of the deceased legatee, in case his death took place after that of the testator. Bagwell *v.* Dry, 1 P. Wms. 700; Page *v.* Page, 2 P. Wms. 488; Frazier *v.* Frazier, 2 Leigh, 642; Craigbead *v.* Given, 10 Serg. & R. 351; Commonwealth *v.* Kiel, 1 Ashm. 242. Where a legacy is given to one for life, with remainder over, and the legatee for life dies before the testator, the remainder does not lapse, but takes effect upon the death of the testator. Billingsley *v.* Harris, 17 Ala. 214; Armstrong *v.* Armstrong, 14 B. Mon. 333; West *v.* Williams, 15 Ark. 682; Mebane *v.* Womack, 2 Jones, Eq. 293. So where the legatee for life refuses the bequest. Adams *v.* Gillespie, 2 Jones, Eq. 244.

[1] Colburn *v.* Hadley, 46 Vt. 71.

[2] In the case of a devise to A., "his heirs and assigns," if A. die in the lifetime of the testator, the devise lapses; the words quoted being words of limitation. Hand *v.* Marcy, 28 N. J. Eq. 59; Sword *v.* Adams, 3 Yeates, 34. If, however, the devise be to A., "*or* his heirs," the case is different, and the heirs take by purchase. Hand *v.* Marcy, supra; Brokaw *v.* Hudson, 27 N. J. Eq. 135; Gittings *v.* McDermott, 2 Mylne & K. 65; Kimball *v.* Story, 108 Mass. 382; Porter's Trust, 4 Kay & J. 188; Wright *v.* Methodist Church, Hoffm. 202. The common-law doctrine of lapse has no application to substituted gifts. The primary gift may lapse, if its object die before the will can take effect, but this does not defeat independent and ulterior limitations to others who are living at the testator's death. Downing *v.* Marshall, 23 N. Y. 366; Norris *v.* Beyea, 3 Kern. 273. There is no lapse by the death of a legatee after the decease of the testator, but before the time of payment arrives, the gift being absolute; and *a fortiori* is this true where the postponement of payment is merely permissive. Traver *v.* Schell, 20 N. Y. 89.

not requisite to carry the absolute interest, has been considered as insufficient to denote an intention to make the executors or administrators substituted and independent objects of gift. And where the devisee or legatee happens to be dead when the will is made, the words of limitation are equally inoperative to let in the representatives of the deceased person (*d*).[1]

Effect of declaration that legacy shall not lapse.

And even a declaration that the devise or bequest shall not lapse, does not *per se* prevent it from failing by the death of the object in the testator's lifetime, since negative words do not amount to a gift; and the only mode of excluding the title of whomsoever the law, in the absence of disposition, constitutes the successor to the property, is to give it to some one else (*e*)[2]. A declaration to this effect, however, following a bequest to a person and his executors or administrators, would be considered as indicating *340 an intention to substitute the executors or * administrators, in the event of the gift to the original legatee failing by lapse (*f*).

Cases of substitution.

[Where the bequest is to A., and, *in case of his death*, "to his executors or administrators," or "to his legal personal representatives," there can, of course, be no doubt that the gift does not fail (*g*); the only question then is, who are the persons to take beneficially, a point which will be treated of hereafter. But where there was a direction to pay legacies within six months, and a gift to the children of the legatee, in case of the legatee's death *not having received* his legacy, it was held, nevertheless, that the legacy lapsed by his death in the testator's lifetime (*h*).

Lapse of gift on contingency.

The doctrine of lapse is properly extended to the cases of gifts on contingency. Thus, if the gift be to A., but on the happening of a certain event to B., if A. dies in the lifetime of the testator, and the event on which B. is to take does not happen, a lapse occurs, although B. survives the testator (*i*).

Again, it is clear, that if A. survive B., and devise an estate to the

(*d*) Maybank *v.* Brooks, 1 B. C. C. 84.

[(*e*) Johnson *v.* Johnson, 4 Beav. 318; Pickering *v.* Stamford, 3 Ves. 493; Underwood *v.* Wing, 4 D. M. & G. 633, 8 H. L. Ca. 183. To enable a person to take under a will it must be proved affirmatively that he survived the testator. Barnett *v.* Tugwell, 31 Beav. 232.]

(*f*) Sibley *v.* Cooke, 3 Atk. 572. [But a declaration that a legacy shall vest in the legatee immediately upon execution of the will, following a gift to one, his executors, administrators and assigns, will not prevent lapse. Browne *v.* Hope, L. R. 14 Eq. 343.

(*g*) Long *v.* Watkinson, 17 Beav. 471; Hinchliffe *v.* Westwood, 2 De G. & S. 216; Hewitson *v.* Todhunter, 22 L. J. Ch. 76. See Ch. XXIX.

(*h*) Smith *v.* Oliver, 11 Beav. 494. But as to this case see Ch. XLIX., s. 1.

(*i*) Humberstone *v.* Stanton, 1 V. & B. 385; Doo *v.* Brabant, 3 B. C. C. 393, 4 T. R. 706; Williams *v.* Jones, 1 Russ. 517.

[1] If an estate be devised charged with legacies, and the legacies fail, the devisee takes the estate entire. Macknet *v.* Macknet, 24 N. J. Eq. 277. See S. C. 27 N. J. 594. So where a testator has in effect charged upon a particular share of the estate a provision made for his widow in lieu of dower, and the widow refuses to accept the provision, the same goes to the benefit of the share so charged, and does not fall into the residue. Ib.

[2] Lapse by death in the lifetime of the testator may be prevented by an unconditional gift over, to take effect in that event. Goddard *v.* May, 109 Mass. 468; Prescott *v.* Prescott, 7 Met. 141; Carpenter *v.* Heard, 14 Pick. 449.

uses declared by B.'s will, a devisee under B.'s will must also survive A., in order to take under A.'s will (*k*). And a power created by will lapses by the death of the donee before the donor (*l*).] Gift by A. to uses of B.'s will. Lapse of power.

Where there is a devise or bequest to a plurality of persons as joint-tenants (*i.e.* who are not made tenants in common (*m*)), no lapse can occur unless *all* the objects die in the testator's lifetime;[1] because as joint-tenants take *per my et tout*, or, as it has been expressed, "each is a taker of the whole, but not wholly and solely" (*n*), any one of them existing when the will takes effect will be entitled to the entire property. Thus, if real estate be devised to A. and B., or personal property be bequeathed to A. and B., and A. die in the testator's lifetime, B., in the event of his surviving the testator, will take the whole (*o*). And the same consequence would ensue if the gift failed from any other cause (*p*); * while it is equally clear that if the devisees or legatees in any of these cases had been made tenants in common, the failure of the gift as to one object would not have entitled the other to the whole by the mere effect of survivorship (*q*).[2] Lapse prevented by survivorship among joint-tenants. *341

Where, however, the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained at the death of the testator, or at a subsequent period, the decease of any of such persons during the testator's life will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common, since members Doctrine in reference to gifts to classes.

(*k*) Culsha *v.* Cheese, 7 Hare, 245.

(*l*) Jones *v.* Southall, 32 Beav. 31.]

(*m*) See Ch. XXXII. (*n*) Cart. 4.

(*o*) Davis *v.* Kemp, Cart. 4, 5, Eq. Ca. Ab. 216, pl. 7; Buffar *v.* Bradford, 2 Atk. 220; Morley *v.* Bird, 3 Ves. 628.

(*p*) Humphrey *v.* Tayleur, Amb. 136; Larkins *v.* Larkins, 3 B. & P. 16; Short d. Gastrell *v.* Smith, 4 East, 419; [all cases of revocation: and Young *v.* Davies, 2 Dr. & Sm. 167, where one joint-tenant was an attesting witness. But in Re Kerr's Trusts, 4 Ch. D. 600, on an *appointment* to A., an object of the power, and B. a stranger, Jessel, M. R., refused to apply "the rule of tenure applicable to real estate," and held that A. took one half only.]

(*q*) Page *v.* Page, 2 P. W. 489; [Sykes *v.* Sykes, L. R. 4 Eq. 200; Re Wood's Will, 29 Beav. 236. But in Sanders *v.* Ashford, 28 Beav. 609, a devise to five persons named, "to be equally divided between them *if more than one*," was held to carry the whole to the survivors by implication from the last words. In Clarke *v.* Clemmans, 36 L. J. Ch. 171, where a testator bequeathed residue to A. and others *nominatim* as tenants in common, but A. was already dead (as the testator showed he knew), Malins, V.-C., held that the others were entitled to the whole fund: *sed qu.*]

[1] Hooper *v.* Hooper, 9 Cush. 122, 130; Holbrook *v.* Harrington, 16 Gray, 102; Dow *v.* Doyle, 103 Mass. 489. But where real and personal property is directed to be equally divided among three individuals, and one of them dies in the lifetime of the testator, the share of such person does not vest in the survivors, but sinks into the residue. Commonwealth *v.* Nase, 1 Ashm. 242; Jackson *v.* Roberts, 14 Gray, 546, 550. See Frazier *v.* Frazier, 2 Leigh, 642; Nelson *v.* Moore, 1 Ired. Eq. 31; Mebane *v.* Womack, 2 Jones, Eq. 293; next p., note 1.

[2] Where a provision is made for the support or maintenance in whole or in part for two persons jointly, until the decease of both, the death of one in the lifetime of the testator does not cause a lapse as to the other. Dow *v.* Doyle, 103 Mass. 489; Prescott *v.* Prescott, 7 Met. 141; Loring *v.* Coolidge, 99 Mass. 191. And if a gift be made to A. and B., and in the event of the death of either, to the survivor, the survivor will take though one die in the lifetime of the testator, unless a different intention appear. Martin *v.* Lachasse, 47 Mo. 591.

of the class antecedently dying are not actual objects of gift.[1] Thus, if property be given simply to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any one child, brother or sister, or any larger number of these objects surviving the testator, without regard to previous deaths (*r*);[2] and the rule is the same where the gift is to the children of a person actually dead at the date of the will, [or to the present-born children of a person, in either of] which cases, it is to be observed, there is this peculiarity, that the class is susceptible of fluctuation only by diminution, and not by increase; the possibility of any addition by future births being [in the former case] precluded by the death of the parent, [and in the latter by the express words (*s*). The rule is also the same if, in a gift to the children of a deceased person, the testator in terms includes any child who may die before him leaving issue, which of course is nugatory (*t*), or if one who would otherwise be a member of the class is an attesting witness (*u*), or if the gift to one is revoked (*x*).]

Gift to executors as a class.

*342 * A gift to executors has sometimes been construed as a gift to a class, and as such carrying the entire subject of gift to the individuals composing the class, *i.e.* sustaining the office, at the death of the testator, though made tenants in common, in exclusion of any who die in the testator's lifetime. Such has been adjudged to be the effect of a bequest "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them (*y*)." [The "recompense" was held to go with the "trouble" to the survivors. Besides, the survivors, of course, took

(*r*) Doe d. Stewart *v.* Sheffield, 13 East, 526; [Shuttleworth *v.* Greaves, 4 My. & Cr. 35; and compare Cort *v.* Winder, 1 Coll. 320.]

(*s*) Viner *v.* Francis, 2 B. C. C. 658, 2 Cox, 190; [Leigh *v.* Leigh, 17 Beav. 605; Dimond *v.* Bostock, L. R. 10 Ch. 358.

(*t*) Re Coleman and Jarrom, 4 Ch. D. 165. But by apt words issue (if any) may of course be substituted to take the share of a deceased parent without destroying the nature of the class-gift. See an instance, Aspinall *v.* Duckworth, 35 Beav. 307.

(*u*) Fell *v.* Biddolph, L. R. 10 C. P. 709.

(*x*) Shaw *v.* M'Mahon, 4 D. & War. 431; Clark *v.* Phillips, 17 Jur. 886. That under a gift "to A. and the children of B.," A. is a member of the class, *vide* ante, p. 269.]

(*y*) Knight *v.* Gould, 2 My. & K. 295; but in Barber *v.* Barber, 3 My. & C. 688, where a testator bequeathed one moiety of the residue of his property, in a certain event which hap-

[1] Hooper *v.* Hooper, 9 Cush. 122, 130; Dow *v.* Doyle, 103 Mass. 489; Holbrook *v.* Harrington, 16 Gray, 102, 104. If the class be composed of relations of the testator, one of whom dies in the lifetime of the testator, leaving issue, the issue take by statute in Massachusetts. Moore *v.* Weaver, 16 Gray, 305. But in the case of a gift to individuals, described by name, the death of one, as has been remarked on the preceding p., note 1, will cause a lapse, unless an intent to the contrary appears. Jackson *v.* Roberts, 14 Gray, 546, 550. See also Stedman *v.* Priest, 103 Mass. 293; Schaffer *v.* Kettell, 14 Allen, 528.

[2] See Jackson *v.* Staats, 11 Johns. 337; Jackson *v.* Merrill, 6 Johns. 185. Where a testator devised lands to his son, and his daughter, and two grandsons (surviving children of a deceased daughter), to be divided between them into three parts, one third to the son, one third to the daughter, and the other third to the two grandsons, and devised other portions to other children in full of their share of his estate, and charged the devisees of the first three parts with the payment of his debts, in equal thirds; and one of the grandsons died in the lifetime of the testator, unmarried, — it was held that the devise to him did not lapse, but survived to his brother. Anderson *v.* Parsons, 4 Greenl. 486.

the whole in trust to pay debts; and the same persons were, by the words of the will, entitled to keep for their own benefit what remained after such payment. The case turned on the special terms of the will.]

If, however, the objects are to be ascertained at some period or event which happens in the testator's lifetime, [it seems formerly to have been considered that] the subsequent decease of any member or members of the class in such lifetime would occasion the lapse of their shares, in the same manner as if the gift had been originally made in favor of the individuals answering the * description. Such certainly was *343 the opinion of Sir R. P. Arden, M. R., in Allen *v.* Callow (*z*); but the point did not arise, and the propriety of the construction seems questionable, for it is difficult to perceive why the throwing into the description of children an additional ingredient, by requiring them to be living at a given period, should vary in other respects the construction applicable to the gift; [accordingly, in Lee *v.* Pain (*a*), where the gift was to M. for life, and after his decease, to his children living at his decease, equally between them, and M. died in the lifetime of the testatrix, leaving three children surviving, one of whom also died in the lifetime of the testatrix, Sir J. Wigram, V.-C., decided that the children living at the death of M. who survived the testatrix took as a class, and that there was no lapse; and his decision has been followed in other cases (*b*). Such a gift] is not the less a gift to a class because a special qualification is superadded; and the fact that the event which regulates the qualification occurs in the testator's

No distinction where class is ascertainable by some event which occurs in testator's lifetime.

pened, to his executors therein named; and in another event (including former), which also happened, he directed that the entire property should "devolve to [four persons, naming them,] to be divided betwixt them in equal proportions, and their heirs for ever;" and added, "which last-mentioned four persons I also appoint as my executors, to see that every thing is duly executed and performed according to my will and desire therein." The testator appointed two other persons as additional executors, and at the foot of his will wrote as follows: "It must be understood to be my will and intention, that if either or more than one of my executors shall refuse to accept the trust and act as executor, then I annul totally my bequest of my property to every such person as shall refuse to take the trusts upon himself." One of the executors having renounced the trusts, his share was claimed by the other three, who contended that the four executors to whom the gift was made were to be considered as a class, and that the three who proved constituted the class; but Lord Cottenham, after a full examination of the authorities, held that the share lapsed to the next of kin, inasmuch as the gift was not to executors described as such, but to individuals *nominatim*, though appointed executors; and he considered it as analogous to a gift to B., C., and D., children of A., as tenants in common, which, of course, would not be a gift to children as a class, [see Bain *v.* Lescher, 11 Sim. 397,] so as to entitle such of the legatees as might be living at the death of the testator. And with respect to the moiety which was given, in the first instance, to the "executors" simply as such, his Lordship considered that this was qualified and explained by the subsequent clause, and indeed, unless so construed, it would carry the half, not to the four, but to the six executors; [and generally a gift to the persons "hereinbefore (or hereinafter) named" as executors is a gift to the individuals named, not to a class. Hoare *v.* Osborne, 33 L. J. Ch. 586. So of a gift to "before-mentioned legatees," the words of reference are merely to save repetition, and the construction must be the same as if the repetition were actually made. Re Gibson, 2 J. & H. 656; Nicholson *v.* Patrickson, 3 Gif. 209.]

(*z*) 3 Ves. 289; see also Ackerman *v.* Burrows, 3 V. & B. 54, where the testator addressed a letter (which was adjudged to be testamentary) to his mother and sisters, in which he desired that, in a certain event, his property might be divided amongst them. Sir W. Grant, M. R., held that the share of a sister who died in the testator's lifetime lapsed; but a case so peculiar, and apparently decided upon its particular circumstances, throws very little light on the general principle. [(*a*) 4 Hare, 250.

(*b*) Leigh *v.* Leigh, 17 Beav. 605; Cruse *v.* Howell, 4 Drew. 215.]

lifetime, and therefore precludes future accessions to the class, has no farther influence upon the construction than the death in the testator's lifetime of a person whose children are simply objects of gift, which we have seen does not prevent its being considered as a gift to a class, and as such comprising the objects living at the death of the testator. Had the courts held that, in order to attract the rule of construction peculiar to classes, it was essential that the class should be susceptible of increase as well as diminution, there would have been something like a principle to proceed upon; but the distinction between a gift to the children of A., who dies in the testator's lifetime, and a gift to the children of A. living at the decease of B., a person who dies in the testator's lifetime, seems to be purely arbitrary.

Gift to next of kin or relations.

It is not clear what would be the effect of a gift to certain other classes of persons, as, to the next of kin or relations as tenants in common of A., a person who dies in the lifetime of the testator, in the event of any of the next of kin or relations dying in the interval between the decease of A. and of the testator; since, in every case where such a gift has occurred (and *344 * in which the entirety has been held to belong to the surviving next of kin at the death of the testator), the bequest seems to have contained no words which could operate to sever the joint tenancy (*c*). [In Ham's Trusts (*d*), though there were words which severed the joint tenancy, yet there were other words which prevented the legatees from taking as a class; Sir R. T. Kindersley, V.-C., however, appears to have been of opinion that without the latter words the gift would have been a gift to a class, and would have taken effect in favor of those only who survived the testator.]

Devises of legal or beneficial ownership only.

Where the devise which lapses comprises the legal or beneficial ownership only, of course its failure creates a vacancy in the disposition merely to that extent. Thus, if a testator devise lands to the use of A. in fee, in trust for B. in fee, and A. die in the testator's lifetime, the legal estate comprised in the lapsed devise to A. devolves to the testator's heir (or, if the will has been made or republished since 1837, and contains a residuary devise, then to the residuary devisee), charged with a trust in favor of B., whose equitable interest under the devise is not affected by the death of his trustee. An example of the converse case is afforded by Doe d. Shelley *v.* Edlin (*e*) where a testator gave (*inter alia*) to A. his real estates to hold to A., his heirs, executors, administrators, and assigns, upon trust to receive the rents and profits thereof, and pay the same to B. for her life, for her separate use, free from the control of her husband; and after the decease of B., upon trust to convey the real estates to such uses and in such manner as B. by deed or will should appoint. B. died

(*c*) Bridge *v.* Abbott, 3 B. C. C. 224; Vaux *v.* Henderson, 1 J. & W. 388, n.
[(*d*) 2 Sim. N. S. 106; see this case stated post, Ch. XXIX.]
(*e*) 4 Ad. & Ell. 582.

in the testator's lifetime. It was held, nevertheless, that the legal inheritance passed to A. under the devise. Lord Denman suggested a doubt whether the doctrine would apply to a case in which the trustee had no duty to perform, as in the case of a devise to the use of A. in fee in trust for B. It seems difficult to discover any solid ground for distinguishing such cases.

Lapse of devise of charged property.

And here it may be noticed that where an estate is devised to one, charged with a sum of money, either annual or in gross, in favor of another, the charge is not affected by the lapse of the devise of the onerated property. Thus, if Blackacre be devised to A. and his heirs, charged with or on condition that he pay * 50*l.* a year, or the sum of 500*l.* to B., and it happens that A. dies in the testator's lifetime, his (the testator's) heir at law (or his residuary devisee, if the will is subject to the new law) will take the estate charged with the annuity or legacy in question (*f*). This principle is strongly exemplified in Oke *v.* Heath (*g*), in which a person having a power of appointment over a sum of money, by will appointed a less sum (part of the fund in question) to A.; and in consideration thereof A. was to pay to his mother an annuity of 100*l.* during her life for her separate use, and to enter into a bond, with a penalty, for the payment thereof; and the testatrix gave the residue of what she had power to dispose of to B. A. died in the testatrix's lifetime, yet the mother was held to be entitled to her annuity out of the fund, the whole of which, by the death of A., had devolved to B., the residuary appointee. *345

Lapse of specific sum charged on real estate — its destination.

In the converse case, namely, where the person for whom the money is to be raised dies in the testator's lifetime, it is more difficult to determine the destination of the lapsed interest, the question being then embarrassed by the conflicting claims of the devisee of the lands charged, and of the heir of the testator: the former contending that the charge has become extinct for his benefit; and the latter, that the lapsed sum is to be regarded as real estate undisposed of by the will.

Rule as to contingent charges;

This, at least, is clear, that where land is charged with a sum of money upon a contingency, and the contingency does not happen, the charge sinks for the benefit of the devisee (*h*). As in the case of a devise of land to A., charged with a legacy to B., provided B. attain the age of twenty-one, as to which Lord Eldon (*i*) has observed, "The devise is absolute as to A., unless B.

(*f*) Wigg *v.* Wigg, 1 Atk. 382; Hills *v.* Worley, 2 Atk. 605.

(*g*) 1 Ves. 135. [See also Re Arrowsmith's Trusts, 6 Jur. 1231, and on app. (where the point did not arise) 2 D. F. & J. 474.]

(*h*) Att.-Gen. *v.* Milner, 3 Atk. 112; Croft *v.* Slee, 4 Ves. 60; [Re Cooper's Trusts, 23 L. J. Ch. 25, 4 D. M. & G. 757;] but such a gift as that in Att.-Gen. *v.* Milner would now be held to be vested.

(*i*) In Tregonwell *v.* Sydenham, 3 Dow, 210.

attain the age of twenty-one: if he does, he is to have the legacy. But his attaining the age of twenty-one is a condition, upon which alone he is to have it; and, if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir at law does not come in, because the whole is absolutely given to the devisee; but a gift which fails must clearly be intended, upon
*346 the failure of the condition, to * be for the benefit of the devisee." It would, of course, be immaterial, in such case, whether the death of the legatee during minority occurred in the testator's lifetime or afterwards.

— where liable to failure by death, though not expressly contingent.

Where a legacy, payable *in futuro*, though not expressly contingent, is bequeathed in such a manner as that it would fail by the death of the legatee before the time of payment (and such is always the rule where the postponement is referable to the circumstances of the legatee, and is not made for the convenience of the estate),[1] the case evidently falls within the principle of Lord Eldon's reasoning; and, consequently, if the legatee die before the vesting age, whether in the lifetime of the testator or not, the charge sinks in the estate.

Charges absolute in event.

It is to be observed, also, that a legacy which, though originally made contingent, becomes absolute by the effect of events in the testator's lifetime (subject, of course, to a liability to failure by lapse), is to be regarded, in applying the doctrine in question, in precisely the same light as if it were originally absolute. Thus, if land be devised, charged with a specific sum to A., on condition of his attaining the age of twenty-one years, and A. do attain that age, and subsequently die in the testator's lifetime, the gift receives the same construction as if it had not originally been made conditional on his attaining the prescribed age.

General doctrine as to the destination of sums payable out of land.

With respect to the general question, as to the destination of sums charged on real estate which lapse by the event of the legatee dying in the testator's lifetime, little direct authority can be adduced; but as there seems not to be any solid distinction between such cases and those in which the gift of the specific sum is void *ab initio*, recourse is naturally had to the cases on this point, which supply much matter for comment. The principle as between the heir and devisee of the land is (*k*), that "if the devise to a particular person, or for a particular purpose, is to be considered as intended by the testator as an exception from the gift to the residuary

(*k*) *Vide* Sir J. Leach's judgment in Cooke *v.* Stationers' Company, 3 My. & K. 264.

[1] A legacy charged upon real estate lapses by the death of the legatee before the time of payment only in those cases in which the payment was postponed by the testator in reference to the situation and circumstances of the legatee, and not where it was postponed for the convenience of the estate, or of the person charged with the payment of the legacy. Harris *v.* Fly, 7 Paige, 421. See Goulbourn *v.* Brooks, 2 Y. & Coll. 539; Donner's Appeal, 2 Watts & S. 372.

devisee, the heir takes the benefit of the failure (*l*). If it is to be considered as intended by the testator to be a charge only on the estate devised, and not an exception * from the gift, the devisee *347 will be entitled to the benefit of the failure."

The following are the decisions in favor of the heir.

Decisions in favor of the heir.

In Arnold *v.* Chapman (*m*) a testator devised a copyhold estate to Chapman, he causing to be paid to his executors the sum of 1,000*l.*; and, after payment of debts and legacies, he devised all the remainder of his estate to the Foundling Hospital. As the bequest of the 1,000*l.* to the hospital was void, a question arose whether it should go the heir, or sink for the benefit of the devisee. Lord Hardwicke held that the heir was entitled by way of resulting trust, observing: "As this charge is well made on the estate, but not well disposed of, by reason of the act, it must be considered as between the heir and the hospital, [*qu.* devisee?] as part of the real estate undisposed of, and must be for his benefit."

Arnold *v.* Chapman.

In the next case, of Gravenor *v.* Hallum (*n*), a testator devised to his executors and their heirs a messuage in Ipswich, subject to the annual payments, making together 10*l.*, thereinafter given and forever charged thereon, and all other his real estate, in trust to be sold, directing the moneys arising from the sale, and his personal estate, to be distributed as therein mentioned. The testator then gave the 10*l.* a-year to charity. Lord Camden held that the heir was entitled. "The rule as to real estate is," he said, "that where the intention of a testator is to devise the residue exclusive of a part given away, the residuary devisee shall not take that part in any event. If he had said, 'I give my estates over and above the rent-charge,' it would have been more plain: it is the same thing as if he had so expressed himself. The rent-charge is severed forever from the devise, which he gives to the residuary legatees."

Gravenor *v.* Hallum.

So in Bland *v.* Wilkins (*o*), before Sir Thomas Sewell, where lands were given to E. N. in fee, upon condition that her executors or administrators should pay 10*l.* to a charity. His Honor held that the 10*l.* should go to the heir, as part of the produce of the land undisposed of.

Bland *v.* Wilkins.

The authority of Arnold *v.* Chapman, and the consequent superiority of the heir's claim, was recognized by Sir J. Leach in Henchman *v.* Att.-Gen. (*p*). Though ultimately the L. C. held

Henchman *v.* Att.-Gen.

[(*l*) As in cases where lands are directed to be sold, and the produce divided, Page *v.* Leapingwell, 18 Ves. 463; Gibbs *v.* Rumsey, 2 V. & B. 294; Jones *v.* Mitchell, 1 S. & St. 290; see also Cruse *v.* Barley, 3 P. W. 20; and Collins *v.* Wakeman, 2 Ves. Jr. 683. As to Cooke *v.* Stationers' Company, 3 My. & K. 262, see judgment of Wood, V.-C., in Re Cooper's Trusts, 23 L. J. Ch. 29, n.]

(*m*) 1 Ves. 108. (*n*) Amb. 643, 1 B. C. C. 61, n. (*o*) In 1782, cited 1 B. C. C. 61.

(*p*) 2 S. & St. 498. A testator devised certain copyhold lands to W. H., his heirs and assigns, upon condition that he within one month after the decease of the testator, paid to his (the testator's) executors a sum of 2,000*l.*, which he desired should be taken as part of his personal estate, and disposed of in the same manner; and, after giving certain legacies, he disposed of the residue of his personal estate, including the 2,000*l.*, in favor of charities.

*348 *the charge to be extinct for the benefit of the devisee of the land, yet the adjudication on the appeal was founded on special circumstances, and did not touch the general doctrine.

[It will be observed that in Arnold *v.* Chapman and Henchman *v.* Att.-Gen., the gift of the money to the executors was good, and might, as Lord Hardwicke observes, be wanted for debts, and, in this view, was well severed from the estate, and not merely a charge upon it (*q*). In Gravenor *v.* Hallum, the annual payments were expressly treated as exceptions, and not charges. In Bland *v.* Wilkins, the grounds of the determination are not known. None of these cases, therefore, are authorities that the benefit of a *charge*, the gift of which is void *ab initio*, falls to the heir.

Observations on Arnold *v.* Chapman and Gravenor *v.* Hallum.

We now come to the cases where the decision was in favor of the devisee of the land, all of which will, it is conceived, be found to be cases of mere charges.]

Thus, in Jackson *v.* Hurlock (*r*), A. devised to B. and her heirs certain manors, charged with the payment of any sum not exceeding 10,000*l.* to such person as he, by any letter or writing to be left with her, should appoint. By a writing so left, he charged on the estate (*int. al.*) several sums to charitable and superstitious uses, amounting to about 6,000*l.*

Decisions in favor of the devisee of the land charged. Jackson *v.* Hurlock.

*349 Lord Northington *held that these void legacies must sink into the estate, for the benefit of the devisee. It had been argued at the bar, he said, upon a mistake, as if the testator had intended, at all events, to take 10,000*l.* out of the estate; whereas he meant the reverse. A sum not exceeding 10,000*l.* had put a charge upon the estate which could not take place.

So, in Barrington *v.* Hereford, decided by Lord Bathurst; which,

The testator died without customary heir or next of kin, and the question was, whether the 2,000*l.* belonged to the devisee, the lord of the manor, or the Crown. Sir J. Leach, V.-C., considered Arnold *v.* Chapman to be a decisive authority against the devisee; and that the lord of the manor could not be entitled to it, as he takes only *propter defectum tenentis*, and here he had a tenant, and had received his fine upon admittance. His Honor observed, that, if there had been next of kin, a question might have been raised, whether the testator did or did not intend that this sum of 2.000*l.* should have all the same qualities as if it had been personal estate at his death. There being no next of kin, the Crown took, by force of its prerogative; if real estate, because there was no customary heir, if personalty, because there was no next of kin. On appeal [3 My. & K. 485,] Lord Brougham considered that, though the Crown might take personalty as *bona vacantia*, it could not take real estate except by escheat; which had no place here, because copyholds must escheat (if at all) to the lord. He thought that it was not material whether the sum was considered to be excepted out of the devise, and therefore devolving to the heir, as in Arnold *v.* Chapman, or as a charge upon it, and therefore failing for the benefit of the devisee of the land, as in Jackson *v.* Hurlock; because, as there was no heir, and as neither the lord (he having a tenant to perform his services), nor the Crown could take by escheat, and as the holding it to be personalty was out of the question, his Lordship considered that the *cestui que trust* had failed, and that the devisee of the land had the benefit of the extinction of the charge by the necessity of the case. His Lordship observed, too, that the money could not be raised by the aid of the court, whn, though it would assist the heir if there had been one, would not have lent itself to the Crown. [As to which see above, p. 68, n. (*q*).

(*q*) But see Tucker *v.* Kayess, 4 K. & J. 339.]

(*r*) Amb. 487, better reported 2 Ed. 263.

according to a very short statement by a reporter of a subsequent period (*s*), seems to have been a bequest of 1,000*l.* to be laid out in land, in trust for B., charged with an annual sum to a charity. It is said that the M. R. gave it (*i.e.* the annual sum) to the residuary legatee, but that the chancellor decided in favor of the specific devisee, as arising out of the estate. Sir R. P. Arden, M. R. in Kennell *v.* Abbott (*t*), said, "that Lord Bathurst first thought the heir entitled, upon the cases of Cruse *v.* Barley (*u*), and Arnold *v.* Chapman; but afterwards his Lordship changed his opinion, *and it is now perfectly settled*, that if an estate is devised, charged with legacies, and the legacies fail, no matter how, the devisee shall have the benefit of it, and take the estate." Barrington *v.* Hereford.

So, in Baker *v.* Hall (*x*), where a testator gave to the minister or clergyman of a certain parish, *for ever*, an annuity or rent-charge of 35*l.*, to be issuing out of a certain messuage, &c., for a charitable purpose, with a power of distress. He then devised the premises (*subject* to the annuity), upon certain trusts; and devised all the residue of his real and personal estate not thereinbefore disposed of, upon other trusts. The question was, whether the annuity, the devise of which was void, went to the residuary devisee, or to the specific devisee of the lands. Sir W. Grant said, that the testator appeared to have *expressly excepted the annuity out of the residue of his estate;* and could never have had it in contemplation that it should go, in any event, to the residuary devisee; and he decided that it sunk for the benefit of the specific devisee. [It will be observed, that the annuity was not an exception out of the estate out of which it was to issue: that estate was devised subject to it; in other words it was a mere charge. According to the law as settled at the present day, there could not be a doubt that the residuary devisee would have no claim, for the authorities (*y*) clearly show that a *declaration of trust in favor of a charity *350 avoids the devise of the legal estate; a rent-charge, therefore, devised as in the above case, never could have existence, and consequently could not form the subject of claim by any person (*z*). Baker *v.* Hall.

In Cooke *v.* Stationers' Company (*a*), Sir J. Leach, M. R., distinguished between a charge and an exception; and being of opinion, that the legacy, in the case before him, was a charge, held that the devisee was entitled. He observed, that the devise being upon condition to pay the legacies made no difference, being no more than a charge of the legacies; consequently Bland *v.* Wilkins (*b*) must be considered as overruled. Cooke *v.* Stationers' Company.

So, in Ridgway *v.* Woodhouse (*c*), where a testator devised real es-

(*s*) 1 B. C. C. 61. (*t*) 4 Ves. 811. (*u*) 3 P. W. 20, stated post, Ch. XIX. s. 5.
(*x*) 12 Ves. 497. [(*y*) Ante, p. 226.
(*z*) The remark in the text also applies to Lord Eldon's observations, 3 Dow, 215, 216. If the trust of the term had been to raise money for charity, the term itself would have been void, and the estate discharged.
(*a*) 3 My. & K. 262. (*b*) Ante, p. 347. (*c*) 7 Beav. 437.

Ridgway v. Woodhouse.

tate in trust for his wife for her life; but in case his wife's sister should reside with her, he directed his trustees to retain out of the rents 100*l.* for every day of such residence, and pay the same to a charity. Lord Langdale, M. R., said: "The direction to pay to the charity is void, and consequently the direction to retain, so far as it was intended to operate for the benefit of the charity, was also void, and had no effect; and that purpose failing, I think the direction to retain must fail altogether."

Re Cooper's Trusts.

The point under consideration was much discussed in Re Cooper's Trusts (*d*), in which there was a specific devise on trust in the first place to raise a sum of money by sale or otherwise; and, after raising as aforesaid, the estate was to be in trust for the testator's son and his issue; it was then directed that the money should go to the testator's daughter for life, and afterwards to her children. Then followed a residuary devise. The daughter survived the testator, but died without ever having had a child. Sir W. P. Wood, V.-C., treated the distinction between an exception and a charge as settled; the question was to which head the case before him belonged. He said he "did not find a case deciding that a gift so circumstanced as that had been held to be an exception" (*e*).

Lapsed charge held to sink for the devisee.

*351 * These principles were applied by Sir R. Kindersley, V.-C., without hesitation to the case of failure by lapse (*f*).

Whether bequest of money to A. and the heirs of his body, remainder to B., lapses by death of A.

Where personal property is bequeathed to A. and the heirs of his body, and in case of failure of issue of A., then to B., (which, as is well settled, is an absolute gift to A., if he survive the testator), it is undetermined whether, if A. die without issue in the lifetime of the testator, the gift to B. will take effect. If we consider that the gift to A., if he survive the testator, is absolute only because the gift to B. is too remote, then it would seem, since questions of remoteness are to be considered with regard to the state of facts at the death of the testator, and not at the date of his will (*g*), that the gift to B. is not open to the

(*d*) 23 L. J. Ch. 25, 4 D. M. & G. 757. See also Carter *v.* Haswell, 3 Jur. N. S. 788, 26 L. J. Ch. 576; Tucker *v.* Kayess, 4 K. & J. 339; Sutcliffe *v.* Cole, 3 Drew. 135; Heptinstall *v.* Gott, 2 J. & H. 449; Re Clulow's Trusts, 1 J. & H. 667, where an accumulation of rents being stopped by statute, the excess was held to sink in the estate.

(*e*) In Tucker *v.* Kayess, sup., the V.-C. said he still adhered to this observation, which he cited as follows: "I do not find a single case in the books *where a sum of money to be paid out of an estate* has ever been held to be an exception." The variation is not immaterial: for in the subsequent case of Heptinstall *v.* Gott (supra) the V.-C., referring to Re Cooper's Trusts, said, "If any child had ever been in existence, I apprehend that the principle of Arnold *v.* Chapman would have applied," — *i. e.* that if the daughter and her child had afterwards died in the testator's lifetime, and the gift had thus failed *by lapse*, the case would have been one of exception, and that the charge would not have sunk for the benefit of the specific devisee. And it appears, in fact, from the V.-C.'s judgment in Re Cooper's Trust, that if a testator makes a disposition of the money, in terms complete, in favor of a person or persons *in esse* during his life, and legally competent to take, the V.-C. would hold the case to be one of exception. *Sed qu.*; and Sutcliffe *v.* Cole (infra), which was a case of lapse, is *contra*.

(*f*) Sutcliffe *v.* Cole, 3 Drew. 135. (*g*) Ante, p. 254.

objection of remoteness, and is therefore good. In Brown *v.* Higgs (*h*), Lord Alvanley seemed to entertain no doubt that the gift to B. would take effect, whether A. died without issue or not; but in Harris *v.* Davis (*i*), Sir J. K. Bruce, V.-C., thought such a gift bad.]

The doctrine of lapse has been modified by the act 1 Vict. c. 26 in three important particulars. First, by s. 25, which provides, "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." [1]

Stat. 1 Vict. c. 26, s. 25. Real estate comprised in lapsed or void devises included in residuary devise.

Under this enactment, the gift of a sum forming an exception out of real estate to a person who dies in the testator's lifetime, or the gift of which is void *ab initio*, [will enure for the benefit of the residuary devisee.] If, however, the will does not contain an operative residuary devise, or the sum [excepted] affects the * property comprised in the residuary devise, [such sum falls to the heir.

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(*h*) 4 Ves. 717; and see Mackinnon *v.* Peach, 2 Kee. 555; Donn *v.* Penny, 1 Mer. 22, 23.
(*i*) 1 Coll. 416.

[1] Legacy devised to child or other descendant of the testator does not lapse: —
Alabama. Code, 1876, Title 4, ch. 2, p. 588.
Arkansas. Digest, 1874, ch. 135, p. 1014.
California. Codes & Stat. 1876, Vol. 1, Title 6, ch. 1, p. 724.
Colorado. Gen. Laws, 1877, ch. 103, p. 931.
Connecticut. Gen. Stat. 1875, Title 18, ch. 11, p. 370.
Dakota. Rev. Code, 1877, ch. 1, p. 347.
Illinois. R. S. 1880, ch. 39, p 422.
Indiana. Stat. 1876, Vol. 2, ch. 3, p. 573.
Kansas. Comp. Laws, 1879, ch. 117, p. 1007.
Maine. R. S. 1871, ch. 74, p. 564.
Massachusetts. Gen. Stat. 1860, ch. 92, p. 479.
Michigan. Comp. Laws, 1871, Vol. 2, ch. 154, p. 1376.
Minnesota. Stat. 1878, ch. 47, p. 570.
Mississippi. Rev. Code, 1871, ch. 54, p. 526.
Missouri. R. S. 1879, Vol. 1, ch. 71, p. 681.
Nebraska. Gen. Stat. 1873, ch. 17, p. 304.
Nevada. Comp. Laws, 1873, Vol. 1, ch. 37, p. 202.
New Hampshire. Gen. Laws, 1878, ch. 193, p. 455.
New Jersey. Revision, 1709–1877, Vol. 2, p. 1247.
New York. R. S. 1875, Vol. 3, ch. 6, p. 65.
Ohio. R. S. 1880, Vol. 2, ch. 1, p. 1436.
Oregon. Gen. Laws, 1843–1872, ch. 64, p. 789.
Pennsylvania. Bright. Purd. Digest, 1700–1872, Vol. 2, p. 1476.
Rhode Island. Gen. Stat. 1872, ch. 171, p. 374.
South Carolina. R. S. 1873, ch. 86, p. 444.
Texas. R. S. 1879, Title 99, p. 713.
Vermont. Gen. Stat. 1862, ch. 49, p. 380.
Wisconsin. R. S. 1878, ch. 103, p. 651.

Legacies to devisee or legatee do not lapse:
Georgia. Code, 1873, Title 6, ch. 2, p. 425.
Iowa. Rev. Code, 1880, Vol. 1, ch. 2, p. 608.
Kentucky. Gen. Stat. 1873, ch. 113, p. 836.
Maryland. Rev. Code, 1878, Art. 49, p. 420.
North Carolina. Battle's Revisal, 1873, ch. 119, p. 847.
Tennessee. Stat. 1871, Vol. 2, ch. 1, p. 1011.
Utah. Comp. Laws, 1876, ch. 2, p. 271.
Virginia. Code, 1873, ch. 118, p. 911.
West Virginia. R. S. 1878, ch. 201, p. 1171.

There is no distinction in Massachusetts in regard to the question whether a lapsed gift falls into the residuum between lapsed devises and lapsed legacies. Either of them will pass under a general residuary clause unless the will shows a clear intention to the contrary. Thayer *v.* Wellington, 9 Allen, 283; Blaney *v.* Blaney, 1 Cush. 107; Prescott *v.* Prescott, 7 Met. 141. This departure from the more general rule is attributed to the statutes which have put devises and legacies upon substantially the same footing. That which is part of the residuum cannot by lapse fall into the residuum. Sohier *v.* Inches, 12 Gray, 385.

Of course the act has no bearing on the question whether the sum be an exception or simply a charge; nor does it] apply to the class of cases first noticed, in which the gift of a sum of money charged upon land on a contingency, is defeated by the failure of the event (whether it be the decease of the object before a certain age, or otherwise), and not by lapse.

The next alteration in regard to lapse relates to devises in tail as to which s. 32 provides, "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 death 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 should appear in the will."

1 Vict. c. 26, s. 32. Devises in tail not to lapse if devisee leaves issue.

The third and remaining alteration concerns gifts to the children or other issue of the testator, as to which s. 33 declares, "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."

Sect. 33. Gift to testator's child or other descendant who leaves issue not to lapse.

It will be observed that the words "such issue," occurring in s. 32, admit of application either to the issue inheritable under the entail, surviving the deceased devisee, or the issue inheritable under the entail generally, whether living at the death of the devisee or not. According to the latter construction, if there be issue living at the death of the devisee or legatee, and also issue living at the death of the testator, the requisition of the statute is satisfied, though the *same* issue should not exist at both periods. Thus, if lands be devised to A. in tail, who dies in the testator's lifetime, leaving an only child, and such child afterwards die in the testator's lifetime, leaving issue who, or any of whom, survive the testator, the devise would, it is conceived, be preserved from lapse. In s. 33, however, there is more difficulty in adopting a similar construction; for in this clause the words "such issue" would seem in strict construction to apply * exclusively to the issue living at the death of the devisee or legatee. But here, also, a liberal construction [has been] adopted (*k*), by considering the word "issue" to be used as *nomen collectivum*, namely,

Remarks upon 1 Vict. c. 26, ss. 32 & 33.

Whether same issue must be living at death of devisee and of testator.

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(*k*) Re Parker, 1 Sw. & Tr. 523, 6 Jur. N. S. 354. But see Sugd. R. P. S. 392.

as including every generation of issue, and not merely as designating the particular individual or individuals living at the death of the legatee; so that the existence of any person belonging to the same *line* of issue at the death of the testator will suffice to prevent the lapse.

Of course the application of both these sections is excluded where the devise in tail or the gift to the testator's child or issue is expressly made contingent on the event of the devisee or legatee surviving the testator; for in such a case to let in the heir in tail under sect. 32 would be something more than substitution: it would be to give the property to the heir in tail in an event upon which the testator has not devised it to the ancestor; and in such a case to hold the child or other descendant of the testator to be entitled under sect. 33, would be in direct opposition to the language of the will. Nor, it is conceived, does the statute touch the case of a gift to one of several persons as joint-tenants; for as the share of any object dying in the testator's lifetime would survive to the other or others, such event occasions no "lapse," to prevent which is the avowed object of both the clauses under consideration. The same reasoning applies to a gift to a fluctuating class of objects who are not ascertainable until the death of the testator, though made tenants in common. Thus, suppose a testator to bequeath all his personal estate to his children simply in equal shares, the entire property will, as before the statute, belong to the children who survive the testator, without regard to the fact of any child having, subsequently to the date of his will, died in the testator's lifetime leaving issue who survive him (*l*). As gifts to the testator's children as a class are of frequent occurrence, their exclusion from this provision of the statute will greatly narrow its practical operation.

Enactment does not apply where gift does not lapse, but property passes over to another.

The reader will perceive that sect. 33 does not substitute the surviving issue for the original devisee or legatee; but makes the gift to the latter take effect, notwithstanding his death in the testator's lifetime, in the same manner as if his death had happened immediately after that of the testator, [and whether it happened * before (*m*) or after (*n*) the date of the will, though not if it happened before the act came into operation (*o*).] The subject of gift, therefore, will, to all intents and purposes, constitute the disposable property of the deceased donee, and as such [will either devolve on his representatives (*p*), or] follow the dispositions of his will so far as that will, according as it may be regulated by the new or the old law, is capable of disposing and

Under sect. 33, issue of child dying in testator's lifetime not substituted. *354

(*l*) Olney *v.* Bates, 3 Drew. 319; Browne *v.* Hammond, Johns. 210.
(*m*) Mower *v.* Orr, 7 Hare, 473; Winter *v.* Winter, 5 Hare, 306; Wisden *v.* Wisden, 2 Sm. & Gif. 396; Barkworth *v.* Young, 4 Drew. 1.
(*n*) Johnson *v.* Johnson, 3 Hare, 157; Skinner *v.* Ogle, 4 No. Cas. 74, 9 Jur. 432.
(*o*) Wild *v.* Reynolds, 5 No. Cas. 1; Winter *v.* Winter, 5 Hare, 314.
(*p*) Winter *v.* Winter, Wisden *v.* Wisden, supra.

does dispose of after-acquired property (*q*). Hence occurs this rather novel result, that it cannot be predicted of any will of a deceased person, whose parent or any more remote ancestor is living, what may be the extent of property which it will eventually comprise, and no final distribution can be made pending this possibility of accession. [The effect of the section is to prolong the original testator's life by a fiction for a particular purpose; that purpose is to give effect to the will in which the gift which would otherwise lapse occurs, and it only points out the mode in which that effect is to be given. Thus the subject of gift devolves with any obligation to which, under that will, it would have been subject in the hands of the deceased donee if he had actually survived; as, an obligation to compensate other legatees under the same will, disappointed by his assertion of rights that defeat their legacies (*r*). But the fiction does not prolong the life generally for other purposes. Thus, an agreement to settle property which should come to the deceased donee (testator's daughter) "during coverture," was held not to include property which had so come to her only by this fiction (*s*). And if the deceased donee was a married woman, whose husband also died before the testator, her will made during coverture would not, it should seem, by virtue of such fictitious prolongation of life, acquire any validity which did not otherwise belong to it (*t*).

Sect. 33 does not apply to appointments under a special power.

It has been decided that sect. 33 does not prevent the lapse of property appointed by will under a power to appoint in *355 favor * of particular objects, where, by the instrument creating the power, the property is disposed of in default of any appointment being made (*u*); but that it does prevent lapse where the power is general, although there may be a disposition in default of appointment (*x*).]

(*q*) Mower *v.* Orr, Johnson *v.* Johnson, supra.
(*r*) Pickersgill *v.* Rodger, 5 Ch. D. 163; see further as to this case, post, Ch. XIV.
(*s*) Pearce *v.* Graham, 32 L. J. Ch. 359. But the subject of bequest has been held liable to probate duty as part of the deceased donee's estate. Perry's Executors *v.* The Queen, L. R. 4 Ex. 27.
(*t*) See the doubt expressed, Re Mason's Will, 34 Beav. 497, 498.
(*u*) Griffiths *v.* Gale, 12 Sim. 327, 354. (*x*) Eccles *v.* Cheyne, 2 K. & J. 676.]

*CHAPTER XII. *356

GIFTS WHEN VOID FOR UNCERTAINTY.

I. *General Doctrine.*
II. *Uncertainty as to Subject of Disposition.*
III. *Uncertainty as to Objects of Gift.*
IV. *Effect of Mistake in Locality or Occupancy of Lands, and of Misnomer generally as to Subjects or Objects.*
V. *What Words are sufficient to create a Trust.*

I. — In the construction of wills the most unbounded indulgence has been shown to the ignorance, unskilfulness, and negligence of testators: no degree of technical informality, or of grammatical or orthographical error (*a*), nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together (*b*);[1] but if, after every endeavor, he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence.[2] Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness.[3] The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless

Indulgence shown to testators in the construction of wills.

Heir or next of kin not to be ousted on conjecture.

(*a*) See 3 Keb. pl. 49, 23; [Henniker *v.* Henniker, 12 Jur. 618. But see Jackson *v.* Craig, 20 L. J. Ch. 204, 15 Jur. 811; Baker *v.* Newton, 2 Beav. 112; Langley *v.* Thomas, 6 D. M. & G. 645. (*b*) See Minshull *v.* Minshull, 1 Atk. 410.]

[1] Den *v.* M'Murtrie, 3 Green (N. J.), 276; Lillard *v.* Reynolds, 3 Ired. 366; Townsend *v.* Downer, 23 Vt. 225; Winder *v.* Smith, 2 Jones, 327. A devise is always most favorably expounded to carry out the intent and give effect to the will of a devisor who, *inops consilii*, preparing his own will, omits or misapplies the legal and proper phrases. Lytle *v.* Beveridge, 58 N. Y. 592. Technical rules of construction must give way to the plainly expressed intention of the testator. Wright's Appeal, 89 Penn. St. 67; Reck's Appeal, 78 Penn. St. 432.

[2] Latent ambiguities may be resolved by the declarations of the testator after the making of the will. Cotton *v.* Smithwick, 66 Me. 360. But such evidence is admissible only when, without resort to parol evidence, the will cannot be interpreted. Ib.

[3] Kelley *v.* Kelley, 25 Penn. St. 460; Wootton *v.* Redd, 12 Gratt. 196.

by express words or necessary implication; which, however, must not be understood to imply that a greater degree of perspicuity or force of language is requisite to defeat the title of the heir to the real estate of a testator, than would suffice to exclude the claim of the next *357 of kin * as the successor to the personalty; for though undoubtedly, on some points, a difference of construction has obtained in regard to these several species of property, that difference is ascribable, rather to the diversity in their respective nature and qualities, than to any disparity of favor towards the claims of the heir and next of kin.[1]

In modern times instances of testamentary gifts being rendered void for uncertainty are of less frequent occurrence than formerly; which is owing probably, in part, to the more matured state of the doctrines regulating the construction of wills, which have now assigned a determinate meaning to many words and phrases once considered vague and insensible, and in part to the more practised skill of the courts in applying these doctrines.[2] Hence the student should be cautioned against yielding implicit confidence to any early cases (*c*), in which a gift has been held to be void for uncertainty, the principle whereof has not been recognized in later times.

To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal.[3]

Uncertainty as to subject of gift.

II. — A simple example of a devise rendered void by uncertainty as to the intended subject-matter of disposition, is afforded by the early case of Bowman *v.* Milbanke (*d*), where the words, "I give all to my mother, all to my mother," were

(*c*) Pride *v.* Atwicke, 1 Keb. 692, 754, 773; Price *v.* Warren, Skinn. 266, 2 Eq. Ca. Ab. 356, pl. 2.

(*d*) 1 Lev. 130, Sid. 191, T. Raym. 97: but in another early case (Taylor *v.* Webb. Styles, 301, 307, 319; S. C. nom. Marret *v.* Sly, 2 Sid. 75), the words, "I make my cousin, Giles Bridges, *my sole heir*, and my executor," were held to constitute the cousin devisee in fee of the testator's lands: it being observed, that the testator not only made him his heir, but his executor also; and if he should not have the lands, the word "heir" was nugatory, for, by being executor only, he should have the goods. [As to which, see Ch. XVIII, s. *in notis*.] The word "heir" was said to imply two things: first, that he should have the lands; secondly, that he should have them in fee-simple. [See also Parker *v.* Nickson, 1 D. J. & S. 177, "I acknowledge A. to be heir."]

[1] If the construction of a gift be doubtful, the law leans to a construction in favor of a distribution as conformable to the general rules of inheritance as possible, consistent with the language of the will. France's Estate, 75 Penn. St. 220; Smith's Appeal, 23 Penn. St. 9. Moreover, where the words of a devise are equivocal, the court will endeavor to put such a construction upon them as will pass the land. Garrison *v.* Garrison, 5 Dutch. 153. In case a clause in a will is obscure or ambiguous, words which manifest an intention to dispose of the whole estate of the testator are to be treated as favoring the construction that he meant to pass a fee. Huber's Appeal, 80 Penn. St. 348; Geyer *v.* Wentzel, 68 Penn. St. 84. So where a will contains no limitation over after a devise in remainder, that fact is to be weighed in support of the same construction. Huber's Appeal, supra; Grove's Estate, 58 Penn. St. 429; Ogden's Appeal, 70 Penn. St. 501.

[2] To avoid a will for uncertainty, it is not enough that the dispositions in it are so obscure and irrational that it is difficult to believe they could have been intended by the testator, but it must be incapable of any clear meaning. Mason *v.* Robinson, 2 Sim. & S. 295; Wootton *v.* Redd, 12 Gratt. 196.

[3] See Rothmahler *v.* Myers, 4 Desaus. 215; Trippe *v.* Frazier, 4 Harr. & J. 446; Flint *v.*

adjudged insufficient to carry the testator's land to his mother, as it was wholly doubtful and uncertain to what the word "all" referred.

Gift of "all" held too indefinite.

In Mohun *v.* Mohun (*e*), the will consisted merely of these words: "I leave and bequeath to all my grandchildren, and share and share alike." By a codicil the testator appointed certain persons to be trustees for his grandchildren and nieces: Sir T. Plumer, M. R., held that this was too uncertain to create a devise. It had been contended that the whole difficulty would be removed by the transposition of the word "all," which, in its present * situation, was without effect, *358 the word "grandchildren" including all who correspond to that description; but his Honor observed, that there was uncertainty both in the subject and object of the bequest, and the court could not transpose words for the purpose of giving a meaning to instruments that had none.

To authorize the transposition of words, it is clearly not enough (as hereafter shown (*f*)) that they are inoperative in their actual position: they must be inconsistent with the context. In the case just stated the word "all," though silent where the testator had placed it, was not repugnant; and it is observable that the transposition of the word "all," even if justifiable, would not, according to Bowman *v.* Milbanke, have supplied a definite subject of disposition.

Remark as to transposition of words.

[But where, after giving several legacies, the will proceeded, "after these legacies and my funeral expenses are paid, I leave to my sister A., without any power or control of her husband; in case of her death to be equally divided amongst her children or grandchildren:" this was held by Sir J. Bacon, V.-C., to be a good gift of the residue to A. (*g*).]

"After legacies, &c. are paid, I leave to A.," residue held to pass.

Where the intended subject-matter of disposition consists of an indefinite part or quantity, the gift necessarily fails for uncertainty. On this principle, a bequest of "*some* of my best linen" (*h*), [or "of a handsome gratuity to each of my executors" (*i*),] has been held void.

Gift of an indefinite part void;

[But a distinction seems to be taken when the will furnishes some ground on which to estimate the amount intended to be bequeathed. Thus, in Jackson *v.* Hamilton (*j*), where the testator directed his trustees to retain a reasonable sum of money *to remunerate them for their trouble* it was referred to

— except where the will furnishes grounds for estimating the amount.

(*e*) 1 S. W. 201. [(*f*) Ch. XVI. s. 2. (*g*) Re Bassett's Estate, L. R. 14 Eq. 54.]
(*h*) Peck *v.* Halsey, 2 P. W. 387. [(*i*) Jubber *v.* Jubber, 9 Sim. 503. (*j*) 3 J. & Lat. 702.

Hughes, 6 Beav. 342. When a direction is made as to the *form* of disposing of some of the testator's property among his heirs, and not as to the disposition itself, the donees and their shares, if no trust be created it is not material that the direction is not carried out by the parties concerned; and the parties, having taken no action as to carrying out the direction, will take as if no such direction had been made. Gill *v.* Grand Tower Mining Co., 92 Ill. 249. And even when the direction contains a mode of disposition in unequal shares, if the direction cannot be followed out by reason of uncertainty as to the shares, the property will descend as intestate estate. Ib.

the master to ascertain what would be a reasonable sum. So, where the bequest is for the maintenance, support, and education of an infant, or for the maintenance and support of an adult person, although no amount be specified, the court will determine the amount to be applied for that purpose (*k*). And a bequest of "3,000*l.* or thereabouts," to be raised by accumulating annual income, has been held good: the words "or thereabouts" being considered as used only to meet the difficulty *359 which would arise * in accumulating up to the exact limit, and to render any little excess, occasioned by the addition of an entire dividend, subject to the same disposition as the specified sum (*l*). So, where a Scotch testator expressed a wish (in effect) to establish in Dundee a hospital for one hundred boys, like, but less than, Heriot's Hospital, but omitted to say how much was to be appropriated for the purpose, it was held in D. P. (*m*), that the testator had sufficiently defined his object to enable the court to determine the amount required for it. And where a testator creates a trust for the repair of an existing tomb (*n*), or even for the building of a new one (*o*), although this, as already noticed (*p*), is a void trust, the court will determine what would have been required for it, if a determination on that point is needed in order to give practical effect to other parts of the will (*q*).

Bequest for maintenance, &c. of an infant or adult good, though no sum specified;

— for founding a school.

A bequest of a sum "not exceeding" 100*l.* (*r*), or of "50*l.* or 100*l.*" (*s*), will be construed in a manner most beneficial to the legatee, and is, therefore, a good gift of the whole 100*l.*; and a bequest will not be void for uncertainty, merely because the amount is differently stated in different parts of the will, if the court can collect that one statement was evidently a mistake, even though the mistake be contained in the very words of gift (*t*).]

Where the amount is differently stated.

An instance of uncertainty in the subject of gift occurred in Jones d. Henry *v.* Hancock, which underwent much discussion (*u*). The testator devised lands to his daughter, Ann Henry, for life, with remainder to her first and other sons in tail male, remainder to his other daughter Frances. The devise to Ann was upon condition that she married a man possessed of a prop-

Uncertainty as to the share the devisee is to take.

(*k*) Broad *v.* Bevan, 1 Russ. 511, n.; Pride *v.* Fooks, 2 Beav. 430; Kilvington *v.* Gray, 10 Sim. 293; Batt *v.* Anns, 11 L. J. Ch. 52; Thorp *v.* Owen, 2 Hare, 610; Pedrotti's Will, 27 Beav. 583; and see 1 Sim. N. S. 103, and other cases noticed along with the above, post.

(*l*) Oddie *v.* Brown, 4 De G. & J. 179, diss. K. Bruce, L. J.

(*m*) Magistrates of Dundee *v.* Morris, 3 Macq. 169; see also Adnam *v.* Cole, 6 Beav. 353.

(*n*) Fisk *v.* Att.-Gen., L. R. 4 Eq. 521; Re Birkett, 9 Ch. D. 576; Fowler *v.* Fowler, 33 Beav. 616, *contra*, must be considered overruled.

(*o*) Mitford *v.* Reynolds, 1 Phil. 185. (*p*) Ante, p. 211, n. (*k*).

(*q*) See Chapman *v.* Brown, and other cases presently stated.

(*r*) Thompson *v.* Thompson, 1 Coll. 395; Cope *v.* Wilmot, 1 Coll. 396, n.; Gough *v.* Bult, 16 Sim. 45.

(*s*) Seale *v.* Seale, 1 P. W. 290; and see Haggar *v.* Neatby, Kay, 379.

(*t*) Philipps *v.* Chamberlaine, 4 Ves. 50.]

(*u*) 4 Dow, 145. See Gibbon *v.* Harmer, 2 Roll. Rep. 425; Hoffman *v.* Hankey, 3 My. & K. 376, post; [Rickards *v.* Rickards, 2 Y. & C., C. C. 419.]

erty at least equal to, if not greater than, the one he left her. The testator then proceeded as follows: "And if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries; and all the remainder of my property shall *immediately pass over *360 and be given up to my second daughter Frances Henry, to whom, in that case, I bequeath it." It was held in D. P., that the devise over was void for uncertainty, as the specific portion or share so given over did not appear in the will itself. On delivering the opinion of the judges, Gibbs, C. J., said, "The will gives over an uncertain part, not specifying the lands if to be held in severalty; or, if this should be considered as an undivided portion in the whole, it cannot be discovered from the will what that portion is. It has hardly been contended, that anything was given over in severalty; but it was contended, with more color, that the person to take the excess, beyond the husband's property, would be tenant in common with Ann, of a moiety or some other given share. It is impossible to put the case upon any other ground than this: a portion is given over, and it cannot be a portion to be held in severalty. The only way then is, that the person to take the excess shall have some undivided portion of the whole; and if the devise defines what that interest is, it will be sufficient to give its objects the benefit of it. But we think that the devise does not define any specific interest which the object of it can take. The only ground upon which this can be contended to be a tenancy in common, which supposes some specific share, is, that it may be left to a jury to decide according to the values. The inconvenience and confusion which would result from this is obvious; different juries would set different values on the respective properties of the husband and wife: and the valuation must be made too at the period of the marriage, and at any distance of time a jury might be called upon to say what was the value of the property. It would not only be difficult, but in some cases impossible, to ascertain the value in this way. Our opinion, however, does not rest on the inconvenience and confusion, but on the principle of law, that such a devise is not sufficient to create a tenancy in common. If it were so, it must be upon the marriage of Ann; and all the consequences of a tenancy in common must then have taken place." "They must have been capable of being separately sued in all real actions, and in actions of ejectment, a modern proceeding which has come in the place of real actions. Now, in every real action, though we do not know from the writ, it must appear in the declaration what is the specific interest in question, how the title is derived, and what the precise interest is; but here there is no such thing. *At the time of Ann's marriage it could not be *361 collected from the will what the specific interest was. If they were in the situation of tenants in common, see how they could answer:

In what the uncertainty consists.

Unless the specific interest or share is distinctly pointed out, devise not sufficient to create a tenancy in common.

a creditor, who has a demand against one of them, institutes his suit, and proceeds to get the lands by *elegit*. He has judgment for a moiety of the share, and the sheriff is directed to deliver a moiety. But the share must appear in order to enable the sheriff to deliver the moiety; and no case has ever occurred where the difficulty has been cast on the sheriff to ascertain the share. And there is no instance of a tenancy in common where the extent of the interest could not be ascertained from the instrument creating it. This difficulty, too, presents itself: tenants in common have each a right to a writ of partition. The writ does not state the share, but in the declaration the precise interest is stated."

Devise in shares to be determined by person omitted to be named.

[But a devise to two persons in such shares as should be determined by (blank), would make them tenants in common in equal shares (*x*). On the same principle an equal division is made where the donee of a power of distribution fails to exercise the power (*y*); or where the gift consists of a general direction that the legatees should "participate" (*z*).]

Gift of part of a larger quantity not uncertain, where devisee is entitled to select.

And (*a*) where the gift comprises a definite portion of a larger quantity, it is not rendered nugatory by the omission of the testator to point out the specific part which is to form such portion, the devisee or legatee being in such case entitled to select; by which means the subject of the gift is reducible to certainty; and "id certum est quod certum reddi potest" is a settled rule in the construction of wills. Thus, if a man devise two acres out of four acres that lie together, it is said that this is a good devise, and the devisee shall elect (*b*).

So, if a testator devise a messuage, and ten acres of land surrounding it, part of a larger number of acres, the choice of such ten acres is in the devisee (*c*).

Gift of any part or of so much as legatee shall select.

[Again, where a testator devised the residue of his property to his wife for life, "reserving to her power to will away any part" of it at her death, with a gift to his daughter of what his *362 wife *should not dispose of; it was argued that it was clear the testator did not intend the power to extend to the whole, and so to disinherit his daughter, and that no limits being defined, the power was void for uncertainty; but it was held that the power extended to the whole estate (*d*). So a trust to permit the testator's wife "to appropriate absolutely to herself such parts" of his plate as she should desire to possess, has been held to give the widow the whole of the plate (*e*). But where a testator bequeathed his house-

[(*x*) Robinson *v.* Wheelwright, 21 Beav. 214.
(*y*) Salusbury *v.* Denton, 3 K. & J. 529.
(*z*) Liddard *v.* Liddard, 28 Beav. 266. See also Greville *v.* Greville, 27 Beav. 594.]
(*a*) Peck *v.* Halsey, 2 P. W. 387.
(*b*) Grace Marshall's case, Dy. 281 a. n., 8 Vin. Abr. 48, pl. 11.
(*c*) See Hobson *v.* Blackburn, 1 My. & K. 574; [Jacques *v.* Chambers, 2 Coll. 441; Duckmanton *v.* Duckmanton, 5 H. & N. 219; Millard *v.* Bailey, L. R. 1 Eq. 378.
(*d*) Cooke *v* Farrand, 7 Taunt. 122. (*e*) Arthur *v.* Mackinnon, W. N. 1879, p. 93.

hold property on trust for sale, "except such articles as his wife should wish to retain for her own use, which he thereby empowered her to appropriate," it was said that this intimated a confidence that the wife would make some selection, and would not take the whole; though to what extent short of that is not very clear (*f*).]

Gift of close A., testator having two of that name, is void.

But, if a testator having two closes called Whiteacre, devises (not one of his closes, but) his *close* called Whiteacre, this does not entitle the devisee to take either of the closes at his pleasure, but the uncertainty as to which is intended, renders the devise void (*g*); [and if he make a general devise of all except the close called Whiteacre, there being two of that name, the exception is uncertain, and the general devise will be read as if it contained no exception (*h*). But where a testator bequeathed all his property in the Austrian and Russian funds, "and also that vested in *a Swedish* mortgage," the testator having several Swedish mortgages, they were all held to pass (*i*). And where a testator having five leasehold messuages in L., comprised in four leases, bequeathed "his four leasehold messuages in L.," it was held that all five messuages passed upon a context somewhat favoring that construction (*k*)].

Gift over of what legatee has not disposed of, held too indefinite.

A bequest of what shall remain or be left at the decease of the prior legatee (*l*), [or of what the legatee is possessed of at *the time of death (*m*), or of what he does not want (*n*), or does not spend (*o*), or of what he can transfer (*p*), or what he can save out of his yearly income (*q*), or of what remains undisposed of, or is not disposed of by deed or will (*r*), or of the "bulk" of certain property (*s*), or a gift over of the whole legacy in case of the death of the prior legatee intestate (*t*), is void for uncertainty.] *363

(*f*) Kennedy *v.* Kennedy, 10 Hare, 438. In Davis *v.* Davis, 1 H. & M. 255, the donee of a power to distribute plate, &c., being also one of the objects, allotted the largest share to himself, and this was upheld. See also Reid *v.* Reid, 30 Beav. 389.]

(*g*) Richardson *v.* Watson, 4 B. & Ad. 798; but evidence is admissible to remove such an ambiguity; see next chapter.

[(*h*) Blundell *v.* Gladstone, 14 Sim. 83, better reported 8 Jur. 301. But the devise was, in fact, of all (except W.), "including trust estates," and W. was given to A.; and the decree was reversed, 3 M. & Gord. 692, on the ground that one of the two properties called W., being vested in the testator as trustee, it was to be presumed that he meant the other to pass by the particular devise (*i*) Richards *v.* Patteson, 15 Sim. 501.

(*k*) Sumpson *v.* Sampson, L. R. 8 Eq. 479.

(*l*) Bland *v.* Bland, 2 Cox, 349;] Wynne *v.* Hawkins, 1 B. C. C. 179; Pushman *v.* Filliter, 3 Ves. 7; Wilson *v.* Major, 11 Ves. 205; [Perry *v.* Merritt, L. R. 18 Eq. 152.

(*m*) Att.-Gen. *v.* Hall, 1 J. & W. 158, n., 2 Cox, 355; Pope *v.* Pope, 10 Sim. 1.

(*n*) Sprange *v.* Barnard, 2 B. C. C. 587; Hudson *v.* Bryant, 1 Coll. 681; it seems that Upwell *v.* Halsey, 1 P. W. 651, cannot now be considered law; see per Lord Loughborough, 2 Ves. Jr. 532, and per Sir E. Sugden, 1 Ll. & G. 298.

(*o*) Henderson *v.* Cross, 29 Beav. 216.

(*p*) Flint *v.* Hughes, 6 Beav. 342.

(*q*) Cowman *v.* Harrison, 17 Jur. 313, 22 L. J. Ch. 993.

(*r*) Bourn *v.* Gibbs, 1 R. & My. 614; Ross *v.* Ross, 1 J. & W. 154; Bull *v.* Kingston, 1 Mer. 314; Grey *v.* Montague, 2 Ed. 205, 3 B. P. C. Toml. 315; Phillips *v.* Eastwood, 1 Ll. & G. 270; Watkins *v.* Williams, 3 M. & Gord. 622; Re Yalden, 1 D M. & G. 53; Bowes *v.* Goslett, 27 L. J. Ch. 249, 4 Jur. N. S. 17; but see Borton *v.* Borton, 16 Sim. 552.

(*s*) Palmer *v.* Simmonds, 2 Drew, 221.

(*t*) Cuthbert *v.* Purrier, Jac. 415; Green *v.* Harvey, 1 Hare, 428; Eade *v.* Eade, 5 Mad. 118; Lighthourne *v.* Gill, 3 B. P. C. Toml. 250; Weale *v.* Ollive, 32 Beav. 421.]

Some of these cases certainly had special circumstances, and the indefiniteness seems not to have been invariably considered to be such as to invalidate the gift (*u*). At all events expressions of this nature are capable of explanation, where the property, or part of it, consists of household furniture, or other articles of a perishable nature, by considering these words as referring to the expected diminution of the property by the use and wear of the first taker. [Neither would there be any uncertainty as to the subject of the gift over in any bequest of specific chattels capable of identification. The point, however, is unimportant; for the gift over would be void on another ground, namely, its repugnancy to the prior gift (*x*).

Whether the same rule holds as to specific chattels.

But where] property (whatever be its nature (*y*)) is expressly limited to the first taker for life, there is not, it is believed, any case in which such expressions have been held to render the ultimate gift void [comprising as they then do the whole *corpus*.] Thus, in Cooper *v.* Williams (*z*) [the testator gave personal property to his wife for life, and what she had left at her death to his next of kin, and it seems to have been thought that the gift over was good.] So in Gibbs *v.* Tait (*a*), where a testator bequeathed a residue to his wife and her assigns, and directed her to apply the interest and proceeds thereof for her own use and benefit, and after her decease or marriage he gave *what should be remaining of such residuary moneys* to other persons, no objection *364 * seems to have been advanced to the validity of the gift on the ground of uncertainty.

Gift of what remains at the decease of A. good where A. takes for life only.

Gibbs *v.* Tait.

[Again in Constable *v.* Bull (*b*), there was a devise and bequest of all the testator's real and personal estate to his wife for her sole and separate use and benefit, "*and at the decease of my wife whatever remains* of my said estate and effects to go" to certain other persons. Sir J. K. Bruce, V.-C., said, the only question seemed to be whether the words "whatever remains of" had the effect of preventing the gift to the widow from being construed as a gift of a life-interest, for that without these words the subsequent bequests would have the effect of so reducing the interest given to the widow: that there were several meanings capable of being rationally attributed to these words which would be inconsistent with the construction giving to the widow the power of disposing of the property, and that he thought the gift over was good. This construction was approved and followed by Sir C. Hall in Bibbens *v.* Potter (*c*).]

Constable *v.* Bull.

(*u*) Duhamel *v.* Ardovin, 2 Ves. 162; Hands *v.* Hands, 1 T. R. 437, n.

[(*x*) See Ch. XXVII.

(*y*) Except "consumable" articles, see Andrew *v.* Andrew, 1 Coll. 690; and Ch. XXVI. *ad. fin.*] (*z*) Pre. Ch. 71, pl. 64. (*a*) 8 Sim. 132.

[(*b*) 3 De G. & S. 411; see also Borton *v.* Borton, 16 Sim. 552; Re Stringer's Estate, 6 Ch. D. 1. But see Flint *v.* Hughes, 6 Beav. 342.

(*c*) 10 Ch. D. 733. In Re Adams, 14 W. R. 18, "all remaining" clearly referred to the previous legacies.]

If the gift of *what shall be left* is preceded by a power of disposition or appropriation reserved to a trustee or prior legatee in favor of particular objects, the expression evidently points at that portion of the property which shall be unappointed or unappropriated under the power. As in Surman *v.* Surman (*d*), where a testator bequeathed his personal estate to his wife for life or widowhood, with a power to her to apply the same to her own benefit and the maintenance of A. and B. during minority; and at her decease or second marriage, he gave the same, *or so much as should then remain*, to certain persons; this was held to be a good bequest of the personal estate unapplied to the prescribed purposes.

Gift of what shall be left preceded by a power of disposition.

Surman *v.* Surman.

[So, in Lancashire *v.* Lancashire (*e*), a testator devised all his real and personal estate to trustees, and directed them to apply the income for the maintenance of A. till she attained the age of twenty-one or married, and then to convey and settle such part as they should think proper on A. for life, with remainder to her children, with remainder, in default of children, to B. in fee; and as to such part or parts of the trust estate as his trustees should not think proper to settle as aforesaid, upon * trust to convey, assign and transfer the same to A. absolutely. A. died before the trustees made any settlement, and Lord Cottenham, affirming the decision of Sir J. K. Bruce, V.-C., held, that the power to make a settlement had determined, and that the heir of A. was entitled to the whole of the real property to the exclusion of B. And the same principle would seem to apply where the power is general (*f*).

Lancashire *v.* Lancashire.

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It will be observed, that in these cases the words seemed or were considered to provide for carrying over everything that was not disposed of under the power, and, consequently nothing having been disposed of, the ultimate limitation carried the whole subject of gift. The next two cases, however, seem to show that if the words are such as to point to a division into parts, and to amount to a gift of the individual parts, then, if one of the parts cannot be ascertained, the legatee of the other part is necessarily disappointed, since his part is undetermined, and the words are not sufficient to carry the whole to him.

Distinction between a gift of the *whole* except an unascertained part and a gift of the remainder after deducting an unascertained part.

Thus, in Jerningham *v.* Herbert (*g*), the testatrix gave to A. such of her jewels as should at her decease be deposited with Messrs. R., and gave the rest of her jewels to B. At her decease there were no jewels deposited with Messrs. R., and Sir J. Leach, M. R.,

Jerningham *v.* Herbert.

(*d*) 5 Mad. 123; [Scott *v.* Josselyn, 26 Beav. 174; Re Sanderson's Trust, 3 K. & J. 497; but see Gude *v.* Worthington, 3 De G. & S. 389, which seems *contra*, but the grounds of the decision do not appear.

(*e*) 2 Phil. 657, 1 De G. & S. 288.

(*f*) See Cooke *v.* Farrand, 7 Taunt. 122, 2 Marsh. 431; Calvert *v.* Johnston, 3 K. & J. 559, 560.

(*g*) 4 Russ. 388.

said that the will contained no present gift of the jewels, but referred to a future act to be done by the testatrix in order to complete her gift, and that act being prevented, the intended gift wholly failed. Again, in Boyce *v.* Boyce (*h*), where the testator devised certain houses in S. to trustees upon trust for his wife for life, and after her decease upon trust to convey to his daughter M. in fee such one of the houses as she should choose, and to convey and assure all the others which M. should not choose to his daughter C.; M. having died in the testator's lifetime, Sir L. Shadwell, V.-C., said it was only a gift of the houses that should remain, *provided* M. should choose one of them, that no choice had been or indeed could have been made by M., and therefore the gift in favor of C. failed.

Gift of the residue of a fund after providing for an illegal object is void, if the amount required for such object is unascertainable.

Where the bequest is of the residue or surplus of a specified fund remaining after providing for an object which is illegal or unattainable, and the exact amount to be laid out on which is not specified, the bequest is necessarily *366 void for uncertainty, * unless the purpose is such and so defined that the court can determine what would have been the proper amount to be expended had the object been legal or attainable, or unless (according to some recent cases) the bequest of surplus carries with it all that is not otherwise effectually disposed of. Thus in Chapman *v.* Brown (*i*), the testatrix, after giving some legacies, gave all the residue of her real and personal estate to her executors to be applied for the purpose of building or purchasing a chapel where her executors should think it was most wanted, and if any overplus should remain from purchasing or building the same, she directed it to be applied to such charitable uses as her executors should think proper. The bequest for the chapel being void, Sir W. Grant, M. R., declared that the gift of the overplus was void also, since the amount could not be ascertained. "He thought it impossible to frame any direction that would enable the master to form any idea as to what would have been proper to expend upon the chapel. If the testatrix had pointed out any particular place, that might have furnished some ground of inquiry as to what size would be sufficient for the congregation to be expected there, but the gift in question was so entirely indefinite, it was quite uncertain what the residue would have been." Again, in Att.-Gen. *v.* Hinxman (*k*), there was a devise of a house to be used as a school for poor persons of the parish of W.; the executors were directed to put the house in repair, and to invest a sum of money in stock in the name of the minister, churchwarden and overseers, who were to apply the dividends for the purposes of the school, and to apply the surplus, if any, after payment of the expenses of the school, among poor parishioners

Chapman *v.* Brown.

Att.-Gen. *v.* Hinxman.

(*h*) 16 Sim. 476.
(*i*) 6 Ves. 404.
(*k*) 2 J. & W. 270; and see Att.-Gen. *v.* Davies, 9 Ves. 535; Att.-Gen. *v.* Goulding, 2 B. C. C. 428.

of W., as the trustees should think fit. The devise of the house for the school being void, and the first trust declared of the stock having consequently failed, Sir T. Plumer decided that the gift of the residue of the surplus dividends, being unascertainable, was void. Again, in Limbrey *v.* Gurr (*l*), where a testator bequeathed 7,000*l.* upon trust to pay the expenses of the testator's funeral and monument, and of building eight almshouses on a particular piece of ground, and to apply the residue to the trusts directed of a legacy of 8,000*l.*, which he bequeathed upon trust out of the income to pay certain weekly sums to the poor persons in the almshouses, to purchase *a quartern loaf for twenty other poor persons, and to keeping the almshouses in repair, and to apply the residue in distribution of bread as therein mentioned; Sir J. Leach held that the residue of each sum was unascertainable, by reason of the gifts to the prior objects failing, and the gift of both residues therefore void.

Limbrey *v.* Gurr.

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But if the testator has so defined his object as to furnish fair and reasonable *data* the court will determine the amount which ought to have been expended on it if it had been legal, and thus at the same time ascertain the amount of the surplus. Thus in Mitford *v.* Reynolds (*m*), the testator, after several bequests, directed the purchase of a particular piece of land, and the construction of a vault for the bodies of himself and his parents and sister, and of a monument, the expense of which purchase and construction was to be met and provided for from the surplus property after payment of debts and legacies. Then came a bequest of the remainder of his property to a valid charitable purpose; and it was held by Lord Lyndhurst that assuming the prior object to be void, yet it was not so uncertain as to the amount that would be required for it as to vitiate the gift to the charity. He thought the difficulties which existed in Chapman *v.* Brown had no existence here. The place was defined, the very spot pointed out, and the extent required for the purchase; there was no difficulty in directing a reference to the master for the purpose of ascertaining what would be a proper sum to carry that intention of the testator into effect. That sum being once ascertained, would be deducted from the residue, the amount of which would then be rendered certain (*n*).

Secus if the amount is ascertainable.

Mitford *v.* Reynolds.

So in Fisk *v.* Att.-Gen. (*o*), where a testatrix bequeathed 1,000*l.* to the rector and churchwardens of a parish and their successors upon trust to apply such part of the dividends as should from time to time be required in keeping in repair her family

Fisk *v.* Att.-Gen.

(*l*) 6 Mad. 151. (*m*) 1 Phil. 185, 706.

(*n*) The L. C. held that the direction as to the monument, &c., was a disposition of an integral part of the residue, and that the "remainder" was what was left of such residue after building the monument. 1 Phil. 199. But owing to the peculiar wording of the L C.'s declaration concerning the charitable gift, Shadwell, V.-C., afterwards thought himself bound to hold that the prior purpose having failed through the refusal of the owner to sell the land, the whole residue was well given to the charity. 16 Sim. 105.

(*o*) L. R. 4 Eq. 521. See also Re Rigley's Trust, 36 L. J. Ch. 147.

grave, and to pay or divide the residue of the said dividends at Christmas in every year for ever, among the aged poor of the parish; *368 Sir W. P. Wood, V.-C., cited Mitford *v.* Reynolds and *the Dundee Case (*o*), and said that, following the latter case, he ought, if the gift of the residue had been exclusive of the amount required for the repair of the grave, to have ascertained the amount required for the void purpose. But he said, "the gift is not to the executors to do certain things and pay the residue to the rector and churchwardens; the gift is out-and-out to the rector and churchwardens, and then there is a gift of a portion for a purpose which fails." That being so, he thought the better construction was that the rector and churchwardens took the whole fund. As to this, however, it is plain that the rector and churchwardens were just as much trustees of one part as of the other; and in Dawson *v.* Small (*p*), where a sum was given on similar trusts, and the distribution was to be made (as was held) by the executors, Sir J. Bacon, V.-C., asked "what difference can it make that a person is named to have the management and conduct of the gift, and that it is given to be disposed of by the executors of the testator? There is no sort of distinction." The cases, therefore, being undistinguishable, he considered himself bound by the *decision* in Fisk *v.* Att.-Gen., and held that the whole fund was well given to the residuary objects discharged from the void purpose.

Does the void gift fall into "the residue"?

It is probable that Sir W. Wood drew the distinction in order to avoid a conflict with Fowler *v.* Fowler (*q*), which was cited before him. In that case the gift was in the form of a direction to executors to invest and apply the income in or towards the maintenance of certain existing graves, and to pay the surplus income to the rector of B. for the time being for his own use, and Sir J. Romilly held that the first trust being void, the second failed for uncertainty. He thought that the particular residue might originally have been held to include what was intended for the void purpose, like a general residue, but that the contrary was quite settled.

However, in Re Williams (*r*) the decision in Fisk *v.* Att.-Gen. was again applied to a case where the distinction on which that decision was based did not exist, the trusts being committed to the executors. Sir R. Malins there said he did not agree that Fisk *v.* Att.-Gen. turned on the distinction in question; he considered that the V.-C. Wood really intended to overrule Chapman *v.* Brown. But if so, why *369 did Sir W. Wood say that, but *for that distinction, he ought to have ascertained the amount required for the void purpose? This would have been an empty form, if the amount when ascertained was still to fall into the "residue." And although he intimated that

(*o*) Ante, p. 359.
(*p*) L. R. 18 Eq. 14. See also Hunter *v.* Bullock, L. R. 14 Eq. 45, before the same judge.
(*q*) 33 Beav. 616.
(*r*) 5 Ch. D. 735.

the Dundee Case had narrowed the authority of Chapman *v.* Brown, he was, of course, alluding only to that part of the decision in the latter case upon which alone the Dundee Case had any bearing, viz. the question whether the court ought or ought not to have determined the amount required for building the chapel. Even on this part of the case Sir G. Jessel thought differently (*s*); for in his opinion there was nothing to guide the court towards determining what would have been a reasonable sum for building the chapel; the whole fund might have been required for it: the Dundee Case, therefore, did not interfere with Chapman *v.* Brown, which still remained an authority for the position that, if the first object is not so defined that you can reasonably ascertain the amount required, the whole must fail, because you might then apply the whole to the first object, and so there would be no ascertainable residue (*s*).

In Re Birkett (*t*) the question again arose on a gift undistinguishable from the gift in Fisk *v.* Att.-Gen., and Sir G. Jessel, M. R., said that the prior purpose being void, he was bound by the decisions of the three V.-CC. to hold that the whole income passed under the gift of surplus. But apart from the authorities, his opinion was clear that the amount required for the repairs of the tomb ought to have been ascertained (as it could be by any competent person), and only the remainder given as surplus. He observed that the case was a singular illustration of the way in which our law gets altered. Re Birkett.

Reference may here be made to the case of Ford *v.* Fowler (*u*), where the testator recommended (construed "directed") F. and his wife to settle a sum which he had bequeathed to the latter, "together with such sum of money of his (F.'s) own as F. shall choose," for the benefit of his wife and children. Lord Langdale, M. R., said that there being a certainty as to that which was in the testator's power, the trust as to that did not fail because the testator expressed a wish as to something over which he had no power.] Trusts of an ascertained fund valid, though intended to embrace another unascertained.

III. Uncertainty in regard to the *objects* of gift arises either *from the testator having described such objects by a term of vague and unascertained signification, or from his having specified a definite class or number of persons, but having shown that all are not to take, and then left it in doubt which of them he intended to select as the object or objects of his bounty. Examples of both kinds will be found in the sequel. It has been often laid down that if a devise be to *one* of the sons of J. S. (he having several sons (*x*)), the devise is void for uncertainty, and can- *370 Uncertainty as to object of gift.

(*s*) See also Cramp *v.* Playfoot, 4 K. & J. 479.
(*t*) 9 Ch. D. 576. (*u*) 3 Beav. 146.]
(*x*) The uncertainty would not be removable by parol evidence; for the terms of the will show that the testator had not determined which of them to make the object of his bounty. [See Wigr. Wills, p. 180; Ashburner *v.* Wilson, 17 Sim. 204; and next Chap.]

not be made good (*y*).[1] And if a man devise to twenty of the poorest of his kindred, this is void for the uncertainty who may be adjudged the poorest (*z*).[2] [So where the devise was "to the testator's brother and sister's family," and the testator had two sisters, the devise was held void (*a*); and a bequest "to and amongst my nephews and nieces John and Nanny" (followed by a blank) or to such of them as should be living at the death of "the tenant of life," was held void for uncertainty, because although by using the plural number, "nephews and nieces," the testator showed he meant to include more than one of each sex, yet by his apparent intention to name those whom he intended for legatees, it was made doubtful whether he meant to include all (*b*).

Blank left for names.

But a gift to a class, with the exception of one person of the class, who is not named, or cannot be ascertained, is not void, but takes effect in favor of the whole class (*c*). And where a testator, after devising property to his daughter A. in fee, and if she die under twenty-five without leaving any children, then over, gave other property on trust to be conveyed equally amongst *such* children of A., the context not showing what limit was intended to be put on the class of children; it was held that all took (*d*). So a gift to the testator's "aforesaid nephews and nieces," none having been previously named, was held to include all (*e*); and a bequest to the children of A., including who the *371 illegitimate * of A., was held, on the same principle, to be a good bequest to the legitimate children of A. (*f*), but to include no illegitimate child (*g*).]

Gift to class except a person not named.

Again, where one having (*h*) three sons, J., E., and W., and lands in three counties, devised the lands in A. to J., the lands in B. to E., and the lands in C. to W.; and added, that if any of his said sons died, then *the one of them to be heir unto the other*. A., the eldest son having died, the land devised to him was claimed by the other two; but the court (Fleming, C. J., doubting)

Devise to three, "the one to be heir to the other."

(*y*) See Strode *v.* Lady Falkland, 2 Ch. Rep. 183, 2 Vern. 624, 625; T. Raym. 82. [So "one of my sisters to be executrix." Re Blackwell, 2 P. D. 72.]
(*z*) Webb's case, 1 Roll. Ab. 609, (D) 1; *et vid.* Scrope's case, 49 Ed. 3, pl. 4, cited 2 Bulst. 180, nom. Morris and Maule.
[(*a*) Doe d. Hayter *v.* Joinville, 3 East, 172; and see Doe d. Smith *v.* Fleming, 2 C. M. & R. 638.
(*b*) Greig *v.* Martin, 5 Jur. N. S. 329. See however the cases Ch. XXX. s. 4.
(*c*) Illingworth *v.* Cooke, 9 Hare, 37. (*d*) Hope *v.* Potter, 3 K. & J. 206.
(*e*) Campbell *v.* Bouskell, 27 Beav. 325. The word "aforesaid" was thus rejected, the M. R. preferring that course to construing the gift as made to nephews and nieces by mistake for grandchildren, who were previously named.
(*f*) Gill *v.* Bagshaw, L. R. 2 Eq 746.
(*g*) Mason *v.* Bateson, 26 Beav. 404.]
(*h*) Wood *v.* Ingersole, 1 Bulst. 61; S. C., but ill reported, Cro. Jac. 260; see also Pollexf. 482; Hill and Baker's case, cited 1 Bulst. 63; and see Saville, 92, 93.

[1] See M'Dermott *v.* United Ins. Co., 3 Serg. & R. 604.
[2] A devise to the persons who at the time constitute a voluntary association is not void for uncertainty, but they will take in their individual and not in their associate character. Bartlet *v.* King, 12 Mass. 537.

decided that nothing passed by the clause in question, as it was not certain what issue should have it. Some stress was laid on the fact that the original devise conferred only an estate for life.

On the other hand, where (*i*) the testator devised to his eldest son Blackacre, to his second son Whiteacre, and to his third son Greenacre, in tail; and further willed that, in case any of his said sons should die without issue, *the survivor to be each other's heir*. The eldest son died without issue; and the question was, whether one or both the surviving brothers should have Blackacre? And the court, on the first hearing of the case, was in great doubt; but it was afterwards holden that the surviving brothers were joint-tenants; and, although the word "survivor" was in the singular number, yet, in sense, upon the whole matter it should be taken and construed as for the plural number: (survivor should be each other's heir) *i.e.* each survivor, *i.e.* all the survivors.

An instance of a bequest held void for uncertainty on account of the vague use of the word "survivors" occurs in a modern case (*k*), where the words were: "I give to my executors the sum of 1,000*l.* upon trust to be invested in the funds of the Bank of England, *during the lives of the survivors or survivor*, for the widows of John Sayce and Thomas Draper, to be divided between them, share and share alike." It was contended for the two legatees that the words "survivors or survivor" applied to the executors, and did not affect the gift to the widows, who, *therefore, were absolutely entitled; but Sir J. Leach, M. R., *372 observed that it was impossible to put any rational construction upon the bequest, which, therefore, was void for uncertainty.

Gift to several alternatively.

Uncertainty is sometimes produced by the mention of several objects alternatively, as in the case of a gift to A. *or* B. (*l*)

To "heirs males of any of my sons or next of kin."

In the early case of Beal *v.* Wyman (*m*), where a question arose on these words, viz., "I give and bequeath one half of my lands to my wife, and, after her death, I give all my lands to the heirs males of any of my sons *or* next of kin;" it was contended that the words "heirs males of any" of his sons were words certain enough to create an estate, for it was all one as if he had said, "to the heirs males of all his sons, if they have heirs males, or to those who have heirs males (*n*);" and the words, "or to the next of kin,"

(*i*) Hambledon *v.* Hambledon, 1 Leon, 262, Saville, 92, 93, Cro. El. 164, Owen, 25; see also Brook, title Devise, pl. 38.

(*k*) Hoffman *v.* Hankey, 3 My. & K. 376. Although the similarity of expression seemed, in some degree, to connect this with the preceding case, yet it rather belongs to the class of cases in which bequests have been held to be void on account of the uncertainty as to the extent of interest the gift was intended to comprise.

(*l*) In the case of a gift to several persons alternatively, there is a fatal uncertainty unless the secondly named person can be considered as intended to be substituted for the first in some event, or unless the word "or" can be changed into "and," which has been often *vexata quæstio*. (See Ch. XVI.)

(*m*) Styles, 240, 2 Danv. 514. pl. 4; [and see Marwood *v.* Darrell, Lee's Ca. t. Hard. 91.]

(*n*) Such, it is probable, would now be held to be the construction of this devise. The

were also certain enough, being joined with the preceding words, and should be meant to the next of kin and their heirs males, if his sons had no heirs males: for in a will, if there be words to express the meaning of a testator, it is sufficient, though the words be not apt. On the other side, it was argued that this devise was void; for it appeared not what heir male should have the land, whether the heir male of his son or the heir male of his next of kin, for the words were disjunctive; and the court seems to have inclined to this opinion, but how the case was ultimately disposed of does not appear.

To "next of kin or heir at law."

So, in Lowndes *v.* Stone (*o*), where a testator, by an unattested will, gave the remainder of his estate to his next of kin *or* heir at law. The personalty was claimed by the next of kin and the heir respectively; the latter contending that the testator used the term "heir at law" as explanatory of the former expression meaning "such next of kin as shall be my heir at law." Lord Loughborough: "You have a fair retort upon each other. On the one side, it is contended that 'next of kin' means 'heir at law;' on the other, that 'heir at law' means 'next of kin.' It must be dis-
*373 tributed according to the statute." [But in Re *Thompson's Trusts (*p*), where, after a life-estate to A., a testator directed his real and personal estate to be sold, and the proceeds paid, "one third to the heirs or next of kin of B. deceased, one third to the heirs or next of kin of C. deceased, one third to the heirs or next of kin of D. deceased;" Sir G. Jessel, M. R., held that the statutory next of kin were entitled, they being the persons indicated by the word "heirs" when used with reference to personalty (*q*).]

"Heirs or next of kin" held to mean statutory kin.

To A. "or his heirs, executors, administrators or assigns."

Again, in Waite *v.* Templer (*r*), where a testator, resident in India, bequeathed a share of his personalty to A., "who resided at L. when I left England, *or* to his heirs, executors, administrators, or assigns forever;" Sir L. Shadwell, V.-C., held that A., having died in the testator's lifetime, the legacy failed, his Honor being of opinion that the additional words were too uncertain to create a substitutional gift.

Reference to uses of *other* estates, there being more than one.

Uncertainty sometimes arises from property being devised to the same uses as the testator's *other* estates, of which there are several, that are devised to different uses (*s*). It may also be occasioned by the testator's apparent misapprehension of the law regulating the devolution of property; as in Thomas

other question, on the words "sons *or* next of kin," is more difficult. Probably they would be construed as meaning "my sons, or such other persons as may happen to be my next of kin."

(*o*) 4 Ves. 649. And see 7 Sim. 363. [Lord Loughborough's expressions are hardly reconcilable with the notion (2 K. & J. 735) that he construed the words as implying heirship according to the nature of the property, and as intimating an intention that the rule of the statute should prevail. (*p*) 9 Ch. D. 607. (*q*) See Ch. XXIX.]

(*r*) 2 Sim. 524; see also Stone *v.* Evans, 2 Atk. 86. [But Waite *v.* Templer was disapproved of by Lord St. Leonards, 3 H. L. Ca. 557.]

(*s*) Leslie *v.* Duke of Devonshire, 2 B. C. C. 187.

v. Thomas (*t*), where a testator, after charging his real and personal estate with the payment of his debts, and giving it to his wife during widowhood, after her decease or marriage willed that all his real and personal estate "be divided *according to the statute of distribution in that case made and provided;*" and it was held that the real estate did not pass to the next of kin under this clause, the court thinking it not clear that the testator intended the real estate to be distributed according to the Statutes of Distribution regarding personalty, but that he must have referred to some statute which he supposed applied to real estate.

"Id certum est quod certum reddi potest," is a rule no less applicable to the *objects* than (as we have seen) it is to the *subjects* of disposition; and, therefore, it is no objection to a gift that it is so framed as to make the objects dependent upon some extrinsic circumstance, though it be an act performed, or even *to be* performed, by the testator himself in his lifetime. As in Stubbs *v.* Sargon (*u*), where a testatrix directed her trustees to dispose of and divide the proceeds of certain property unto and *amongst her partners, who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her said trustees should think fit and deem advisable. It was objected that the gift was void for uncertainty; but it appearing that the testatrix was, at the date of her will, in partnership with certain persons, to some of whom, conjunctively with another person, she on the dissolution of such partnership, disposed of her business, Lord Langdale, M. R., [and on appeal, Lord Cottenham,] held that these latter persons were those among whom the trustees were to divide the property in such shares as they might deem advisable.

No objection that devisee is to be ascertained by future act of testator.

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In many cases devises to several persons successively have been contended to be void on account of the uncertainty respecting the order in which the objects are to take (*x*). Where the devise is to several specified individuals in succession, the obvious rule is, to hold them to be entitled in the order in which their names occur. If it be to a class of persons, constituted such in virtue of birth (*y*), as to children, sons, or brothers (*z*), then priority according to seniority of age may be presumed to be intended. And the circumstance of a condition being imposed on the devisees has been held not to vary the order in which they are successively entitled.

Gift to several successively, not saying in what order.

(*t*) 3 B. & Cr. 825.

(*u*) 2 Kee. 258, 3 My. & Cr. 507.

(*x*) See an instance of a limitation in a deed held to be void on account of uncertainty of this nature, Windsmore *v.* Hobard, Hob. 313.

(*y*) This qualification, though it may sound strangely, seems requisite in order to exclude from the position in the text gifts to some other classes, such as executors; as to which *vide ante*, p. 342.

(*z*) Ongley *v.* Peale, 2 Ld. Raym. 1312, 2 Eq. Ca. Ab. 358, pl. 8; [Young *v.* Sheppard, 10 Beav. 207.

Thus, where (*a*) a testator devised to A. and his brothers successively, but not to be entered on or enjoyed until one month after their marriages, it was held that the devise was not (as contended) void for uncertainty; for as the testator named A. first, *who was the eldest* son, the word "successively" implied that the estate was to go to his next brother after him; and the court agreed that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general; and, therefore, if the second son had married before the eldest, yet he could not have taken.

[On the other hand, in Thomason *v.* Moses (*b*), where the bequest was of the interest of a sum of money to the testator's father for life, then to his brother for life, and then to be continued to the tes-
*375 tator's next nearest heir, and so on, and neither the * father nor the brother was the testator's heir, the gift of the fund after the death of the brother was held void for uncertainty.]

Construction of very obscure will.

In Prestwidge *v.* Groombridge (*c*), the court was called upon to put a construction upon some very blind words, which, had the case occurred a century ago, would probably have been held to be too uncertain to create a gift. The testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews, George and Charles, and the principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business, and added: "In the event of the elder boys George and Charles (both or either of them) being settled before this will comes in force, I provide *that the next boy* (*James or Henry*) *have the benefit and so on.*" George and Charles survived the testatrix, but died under twenty-one. The residue was claimed by James, as being, in the event which had happened, solely entitled. Henry claimed to participate; and the next of kin also put in a claim to the residue as undisposed of. Sir L. Shadwell, V.-C., held James and Henry to be entitled. The intention of the testatrix, he considered, was to make a provision out of the fund for two of her brother's sons; and if the provision failed as to either George or Charles, that James should be supported out of it, and if it failed as to both, Henry also should be supported out of it.

In Powell *v.* Davies (*d*), where M. devised a freehold estate to A. for life, and, after his decease, to be equally divided into four parts, between one child of A., one child of B., one child of C., and one child of D., for them to receive the rents and divide the money between them; and it was his desire that the estate should never be sold out of

(*a*) Ongley *v.* Peale, supra. (*b*) 5 Beav. 77.]
(*c*) 6 Sim. 171.
(*d*) 1 Beav. 532; [and see Ashburner *v.* Wilson, 17 Sim. 204; Wilson *v* Wilson, 1 De G. & S. 152.

the family, provided that if A., C., and D. should never have lawful children, his desire was that their parts should go to the next of kin. At the date of the will, B. had one child born, and the others were unmarried; but after the testator's death, each of them had several children. It was held that the devise was not void for uncertainty, but that the eldest child, whether male or female, of each of the four persons, took a vested estate. Lord Langdale considered that the absence of a devise over of the share of B., who had one child, indicated the testator's intention that the existing child should take that share, and that in each instance the eldest or only child should * be entitled, [since the share vested in him immediately on his *376 birth, and thereupon the gift over failed.

It must be remembered, that, with respect to charities gifts may be good, which, with respect to individuals, would be void. We have seen that charitable bequests are not void for uncertainty in the object (*e*); and where there are two charities of the same name, the legacy will be divided between them, if it cannot be ascertained which was the intended object (*f*). In the case of individuals, the gift would be void for uncertainty. In one case, however, the gift was to the first cousins of the testator, children of his father's brother, of the name of C.: the father had two brothers of the name of C., both of whom had children, and the gift was held to take effect in favor of the children of both brothers (*g*). The decision seems opposed to all the other authorities on this subject.

Charitable legacies not void for uncertainty of object.

However, where a testator bequeathed "to the surgeon and resident apothecary of the Dispensary at B." 19*l.* 19*s.* each, *or any who may hold the like situations at my decease*, and it appeared there was no apothecary, but two surgeons and a dispenser, those persons were each held entitled to a legacy of the specified amount, although in other bequests the testator had used the word surgeons in the plural (*h*).

Where there are in the *same* testamentary paper gifts to each of two objects, one of which does not exist, it will be considered that the objects are not identical, and one gift will fail, though either gift standing alone would have been a good gift to the existing object (*i*).]

IV. It is clearly not essential to the validity of a devise that all the particulars which the testator has included in his description of the subject or object of gift should be accurate.[1] There

All particulars in de-

(*e*) Unless the uncertainty be such as to make the amount of the charitable gift also uncertain; Flint *v.* Warren, 15 Sim. 626.

(*f*) Waller *v.* Childs, Amb. 524; Bennett *v.* Hayter, 2 Beav. 81; Re Clergy Society, 2 K. & J. 615; Re Alchin's Trusts, L. R. 14 Eq. 230. And see Simon *v.* Barber, 5 Russ. 112, where, though the legacy was not held void, the principle of dividing it does not seem to have been acted upon.

(*g*) Hare *v.* Cartridge, 13 Sim. 167. (*h*) Ellis *v.* Bartrum, 25 Beav. 109.

(*i*) Lee *v.* Pain, 4 Hare, 254; see also Douglas *v.* Fellows, Kay, 114. But in Re Maguire, L. R. 9 Eq. 632, the existing object (a charity) got not only its own legacy, but (through *cy-près*) the other also.

[1] Drew *v.* Drew, 8 Fost. 489.

Description of subject-matter of disposition need not be correct.

need only be enough of correspondence to afford the means of identifying both (*k*). Thus, the devise of house *377 or field, * described by name, is not rendered uncertain by its being mentioned to be in the occupation of a person who is not the occupier; for as the property was adequately described in the first instance, this erroneous and unnecessary addition does not vitiate the devise (*l*).[1] And even if it should turn out that part only of the house or field so named was in the occupation of the person designated by the testator as the occupant, the whole nevertheless would pass (*m*).

Mistake in locality of lands.

A reference to occupancy often comes in aid of a defect or error in the locality, and *vice versa*.[2] Thus a devise of "my lands at Bramstead, in the county of *Surrey*, in the occupation of John Ashley," has been held to pass lands in the occupation of John Ashley, at Bramstead, in the county of *Hants* (*n*). Even without the reference to the occupancy, however, in this instance the description would have been sufficient, for the misnomer of the county in which a parish is situate produces no uncertainty, unless the testator should happen to have property answering to the description in a parish of that name in more than one county (*o*).

It has even been held that a devise of houses and lands lying in the *parish* of Billing, and in a street called Brook-street, is a good devise of lands in Billing-*street*, the testator having no lands in the parish of Billing (*p*).[3]

Leasehold will pass as "freehold."

So it is clear that a leasehold estate will pass under the description of freehold, where the reference to its name or local situation, and the fact of the testator having no freehold estate

(*k*) See Purchase *v.* Shallis, 2 H. & Tw. 354, 14 Jur. 403, 19 L. J. Ch. 518; Howard *v.* Conway, 1 Coll. 87; Stephens *v.* Powys, 1 De G. & J. 24.]

(*l*) Blague *v.* Gold, Cro. Car. 447, 473; Thompson *v.* Tonson, And. 188, 2 Leon. 120.

(*m*) Chamberlaine *v.* Turner, Cro. Car. 129.

(*n*) Hastead *v.* Searle, 1 Ld. Raym. 728.

(o) See Owens *v.* Bean, Finch, 395; Brown *v.* Longley, 2 Eq. Ca. Ab. 416, pl. 14.

(*p*) Brownl. 131, 8 Vin. Ab. 277, pl. 7.

[1] It is a settled rule that if there be first an unambiguous and certain description of a thing, and afterwards another description failing in certainty, the latter must be rejected. Jones *v.* Robinson, 78 N. Car. 396. So, too, if a description of person or property be partly false, but sufficient remain to identify the object, the false will be rejected, and the gift sustained. But the case is otherwise if a sufficient description does not remain after rejecting the false; and parol evidence cannot be received to correct the mistake. Fitzpatrick *v.* Fitzpatrick, 36 Iowa, 674. So if a testator devise land in "section thirty-two," having no land there, it is held that evidence cannot be received to show that the testator meant section thirty-three, in which he had land, and that the draftsman of the will made a mistake in the matter. Kurtz *v.* Hibner, 55 Ill. 514. See Fitzpatrick *v.* Fitzpatrick, supra. Mistake in describing the location of lands devised, made by the draftsman of the will, was held, however, proper ground for parol evidence to show the tract intended in Creasy *v.* Alverson, 43 Mo. 13.

[2] See Dodson *v.* Green, 4 Dev. 488.

[3] A devise of a tract of land by name, and described as lying in A. county, passes the whole tract, though part of it lies in another county. Hammond *v.* Ridgely, 5 Harr. & J. 245; Dorsey *v.* Hammond, 1 Harr. & J. 190. A devise of "*all* my homestead farm in D., being the same farm whereon I now live, and the same which was devised to me by my honored father," will pass the whole of the homestead farm, though it appears that a part of it was not devised by the father. Drew *v.* Drew, 8 Fost. 489. See Woods *v.* Woods, 2 Jones, Eq. 420.

answering thereto, leave no doubt of the identity (*q*); and *vice versa*. (*r*).

It has been adjudged, too, that under a devise of buildings in a specified street, houses situate in a lane contiguous to, and opening into, that street pass, for want of a subject more nearly answering to the description (*s*).

In description of objects all particulars need not be correct.

The same principles of construction, of course, apply to objects *of gift. It is sufficient, therefore, *378 that the devisee or legatee is so designated as to be distinguished from every other person, and the inaptitude of some of the particulars introduced into the testator's description is immaterial;[1] and this whether the object of the gift be a corporation

(*q*) Denn d. Wilkins *v.* Kemeys, 9 East, 366.
(*r*) Day *v.* Trig, 1 P. W. 286, post; Doe d. Dunning *v.* Lord Cranstown, 7 M. & Wels. 1.
(*s*) Doe d. Humphreys *v.* Roberts, 5 B. & Ald. 407, post; but observe that these cases were before 1 Vict. c. 26, the effect of which on such questions of construction is remarked upon, post, Ch. XIII.; [see also Baddeley *v.* Gingell, 1 Exch. 319, where houses in an enclosed yard opening into a street, were held to be houses "within the street," so as to be liable to a rate imposed by statute on "houses within the street."]

[1] The general rule is, that where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake will not disappoint the bequest. See 2 Williams, Ex. (6th Am. ed.) 1152; Bradshaw *v.* Bradshaw, 2 Younge & C. 72; Smith *v.* Smith, 4 Paige, 271; S. C. 1 Ed. 180; Att.-Gen. *v.* Sibthorpe, 2 Russ. & M. 107; Trustees *v.* Peaslee, 15 N. H. 317; Woods *v.* Moore, 4 Sandf. 579; Winkley *v.* Kaime, 32 N.H. 268; Douglas *v.* Blackford, 7 Md. 8. The words, "members of my family," have been considered sufficiently certain. Hill *v.* Bowman, 7 Leigh, 650. A legacy having been given to a legatee in the name which she had for many years assumed, the court directed an inquiry who was the person meant, in Neatbway *v.* Ham, Taml. 316; 1 Greenl. Ev. § 301. Devisees may take by their popular names if the testator's intent is clear. Sutton *v.* Cole, 3 Pick. 232. Indeed, an imperfect description of the donee will not render the gift void unless the ambiguity be such that it is impossible, either from the will or other proper evidence, to ascertain who is the object of the testator's bounty. Congregational Soc. *v.* Hatch, 48 N. H. 393; Smith *v.* Smith, 4 Paige, 271. In the case first cited, it was said that a devise was to be held void for uncertainty only when after resort to oral evidence it still remains a matter of mere conjecture what was intended by the testator. See Townsend *v.* Downer, 23 Vt. 225. In the recent case of Straw *v.* East Maine Conference, 67 Me. 493, a bequest to the "Methodist Episcopal Missionary Society of Maine" was given to the "Trustees of the East Maine Conference of the Methodist Episcopal Church," as being the society intended; no society of the name given in the will being in existence. An incorporation of the latter name did exist, and the testator lived within the territorial limits covered by it. And a gift "for the first church of the Christian denomination in Bangor" was given to the First Bangor Christian Church, in Nason *v.* First Bangor Church, 66 Me. 100. So, also, evidence is held admissible to show that a gift to "The Congregational Society in Auburn" was intended for "The First Congregational Society in Auburn," and that a gift to "The Congregational Foreign Missionary Society" was intended for "The American Board of Commissioners for Foreign Missions." Howard *v.* American Peace Soc., 49 Me. 288. A testator bequeathed to the School Commissioners and their successors, of "South Farnham District, Essex county, for the schooling of the poor children of that district, $1,000, to be put out at interest, and the interest only to be applied for the schooling of said poor children." There were School Commissioners of the county of Essex, and the testator was one of them at his death, but they were not a corporate body; there were no other school commissioners of *South Farnham District*, nor was there any such district, that being only the name of an ancient parish; and the bequest was held void. Janey *v.* Latane, 4 Leigh, 327. See Telfair *v.* Howe, 3 Rich. Eq. 235; Carter *v.* Balfour, 19 Ala. 814. On the other hand, a testator gave a legacy to the "Boy's Asylum and Farm School," there being no institution or association of any similar name except a body incorporated by the name of the "Boston Asylum and Farm School for Indigent Boys;" and it was held that this corporation was entitled to the legacy. Minot *v.* Boston Asylum, 7 Met. 416. See General Lying-in Hospital *v.* Knight, 11 Eng. L. & Eq. 191; McBride *v.* Elmer, 2 Halst. Ch. 107; Baldwin *v.* Baldwin, 3 Halst. Ch. 211; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Trustees *v.* Peaslee, 15 N. H. 317; Button *v.* Amer. Tract Soc., 23 Vt. 336; St.

or an individual.[1] Thus, a devise "to the mayor, jurats, and town council of the ancient town of Rye," has been held to be good, though they were incorporated by the name of "the mayor, jurats, and commonalty" (*t*). A bequest "to the fellows and demies of Magdalen College, Oxford," however, has been decided not adequately to designate Magdalen College, whose corporate name or style is, "The president and scholars of St. Mary Magdalen" (*u*). [But where money was bequeathed to the provost and fellows of Queen's College, Oxford, to purchase books to be added to the library, the proper name of the corporation being "the provost and scholars, &c.:" the corporation was held to be entitled principally on the ground that the library belonged to the body corporate, who were, therefore, the proper persons to make additions to it (*x*). And where a bequest to "the Westminster Hospital, Charing Cross," was claimed by the Westminster Hospital in Broad Sanctuary, and also by the Royal Ophthalmic Hospital, and by the Charing Cross Hospital, Agar-street, Strand, the latter was held entitled, as being nearest to the locality mentioned, and as being a general hospital (*y*): the testator, when he intended to give to a hospital of a special character, having so named it (*z*). And where the description is equally applicable to two different objects, either of which would have been sufficiently designated if the other had not existed, evidence is admissible to remove the ambiguity, by showing which of them was known to the testator, and (if a charitable institution) to which of them he subscribed (*a*). If this evidence fails to indicate which the testator meant, the bequest fails, unless, as already noticed, it is charitable and applicable *cy-près* (*b*).

Misnomer of corporations.

As a general rule, "veritas nominis tollit errorem demonstrationis;" so that where there is a person to answer the name, it *379 * will be immaterial that any further description does not precisely apply.] Thus, a bequest to C. M. S. and C. E., legitimate son and daughter of C. S., was held to be a good bequest to persons of those names, though they turned out to be illegitimate, in consequence of an anterior marriage of their father being established (*c*). [And the rule has prevailed, although besides a wrong

General rule as to name.

(*t*) Att.-Gen. *v.* Corporation of Rye, 1 J. B. Moo. 267, 7 Taunt. 546. See also Fitz. Dev. 27, Dalison, 78, s. 8; 10 Rep. 57; Foster *v.* Walter, Cro. Eliz. 106, 2 Leon. 165. But as to gifts to corporations, *vide ante*, p. 65.

(*u*) Att.-Gen. *v.* Sibthorp, 2 R. & My. 107.

[(*x*) Queen's College *v.* Sutton, 12 Sim. 521.

(*y*) See acc. Re Alchin's Trusts, L. R. 14 Eq. 230.

(*z*) Bradshaw *v.* Thomson, 2 Y. & C. C. C. 295; and see Wilson *v.* Squire, 1 Y. & C. C. C. 654; Smith *v.* Ruger, 5 Jur. N. S. 905.

(*a*) Re Kilvert's Trusts, L. R. 7 Ch. 170; Re Fearn's Will, W. N. 1879, p. 8.

(*b*) Re Clergy Society, 2 K. & J. 615.]

(*c*) Standen *v.* Standen, 2 Ves. Jr. 589, 6 B. P. C. Toml. 193; [and see Doe d. Gaines *v.* Louis Hospital Association *v.* Williams, 19 Mo. 609. But it must be remembered that ambiguity on the face of a will cannot be explained by parol evidence. Only latent ambiguities can be so explained. Pickering *v.* Pickering, 50 N. H. 349.

[1] Brewster *v.* M'Call, 15 Conn. 274; Trustees *v.* Peaslee, 15 N. H. 317.

or inaccurate description, one of the Christian names of the legatee was omitted; a gift to "my niece Elizabeth" being held a sufficient description of Elizabeth Jane, a great grand-niece (*d*).

But "nihil facit error nominis cum de corpore constat" (*e*); and there are many cases in which the description is such as to lead to an irresistible inference that the person named was not the person in the testator's mind.] Thus, where (*f*) the devise was to *William Pitcairne, eldest son of Charles Pitcairne*, it was insisted that the eldest son had no title, because his name was not William, but Andrew; nevertheless the court was of opinion that the words were sufficient to point him out with certainty.

Misnomer of individuals.

So (*g*) under a bequest to "*John* and Benedict, sons of John Sweet," a son named *James* (there being no John) was held to be entitled. It was proved, too, that the testator used to call him Jackey; but Lord Hardwicke appears to have thought this evidence unnecessary to establish his title.

James entitled under gift to John.

Again, where (*h*) a testator gave an annuity to his brother *Edward* Parsons for life, and, after his decease, the same to go equally among his (E. P.'s) children, "by his present wife;" and at the date of the will, the testator had no brother except one named *Samuel*, who had a wife and children; but four or five years before, he had a brother named Edward, who as well as his wife, was then dead, which fact was known to the testator, who by the same will, gave legacies to his children. The testator had been in the habit of calling his brother Samuel, Edward and Ned. Lord Loughborough, without argument, held the children of Samuel to be entitled.

Edward, written by mistake for Samuel.

In another case (*i*), a bequest to the "Rev. *Charles* Smith, of Stapleton Tawney, clerk," was held to apply to one who *answered the other parts of the description, but whose name was *Richard;* though it was suggested that the person intended was Charles Smith of Romford, an officer in the army, but who, it appeared, was dead at the date of the will, and that the testator had been informed of the fact. If the other part of the description, as well as the name, had corresponded with those of the deceased Charles Smith, and the testator could have been ignorant of his death, it would have been difficult to sustain the claim of Richard.

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Charles, by mistake for Richard.

So where (*k*) a testator bequeathed to his six grandchildren (*l*) by

Rouse, 5 C. B. 442: Giles *v.* Giles, 1 Kee. 685; Re Blackman, 16 Beav. 377; Ford *v.* Batley, 23 L. J. Ch. 225; Pratt *v.* Mathew, 22 Beav. 334.

(*d*) Stringer *v.* Gardiner, 27 Beav. 35, 4 De G. & J. 468.

(*e*) 11 Rep. 21 a.]

(*f*) Pitcairne *v.* Brase, Finch, 403; see also Gynes *v.* Kemsley, 1 Freem. 293; Rivers' case, 1 Atk. 410.

(*g*) Dowset *v.* Sweet, Amb. 175.

(*h*) Parsons *v.* Parsons, 1 Ves. Jr. 266.

(*i*) Smith *v.* Coney, 6 Ves. 42; see Re Blackman, supra.

(*k*) Garth *v.* Meyrick, 1 B. C. C. 30.

(*l*) As to gift to a specified number of children, *vide post*, Ch. XXX. s. 4.

Other instances of mistake in Christian name.

their Christian names, but the name of Ann, one of them, was repeated, and that of Elizabeth, another, omitted, it was held that Elizabeth should take the share mistakenly given to Ann by the repetition of her name.

Again, where (*m*) a testator gave to his *namesake Thomas* Stockdale, the second son of his brother John Stockdale, the second son, though not named *Thomas*, was held to be entitled, there being no son of that name. The error in the name here was remarkable, as the testator, in describing the legatee as his own namesake, had his attention particularly drawn to the name.

So, under a devise to "Mary Cook, wife of —— Cook" (*n*), a married woman named Elizabeth Cook was held to be entitled, on evidence showing that the testator had no other relative of the name of Cook, and that she was the person intended. In this case the additional description was very slight, it merely showed the devisee to be a married woman.

In cases of this kind, however, it not unfrequently happens that part of the description applies to one person, and part to another. [Here the maxims quoted above give but little help. The essence of the previous cases is that as to one term of the description it is applicable to no one; it is clearly erroneous. But in the cases now referred to each of the terms applies correctly, or with some degree of accuracy, to some one, and the question is, which is wrong? This can only be solved by considering the general context and the surrounding circumstances (*o*), and although it has been said that the demonstration has generally prevailed over the name, yet numerous instances will be found on both sides.

Distinction where there is more than one claimant.

*381 *Thus in Garland *v.* Beverley (*p*) where a testator devised land to his nephew for life, remainder to "William, the eldest son of my said nephew" for life, remainder to the issue of W. in tail; William was, in fact, the second son, but was nevertheless held to be entitled. Again in Gillett *v.* Gane (*q*) where the testator devised to his son for life, remainder to "Robert the fourth son" of the son in fee, with an executory gift over if Robert should die under twenty-one "to ——— the fifth son," and so on to those born after the fifth; Robert Henry, in fact, was the third son, but having attained twenty-one was held to be absolutely entitled.

Cases where the name prevailed.

On the other hand, in Doe *v.* Uthwaite (*r*) where, after previous limi-

(*m*) Stockdale *v.* Bushby, G. Coop 229, 19 Ves. 381.

(*n*) Doe d. Cook *v.* Danvers, 7 East. 299.

[(*o*) See Ch. XIII.

(*p*) 9 Ch. D. 213. So in Pryce *v.* Newbolt, 14 Sim. 354, though the name was not fully given; as to which see also Bernasconi *v.* Atkinson, Gillett *v.* Gane, Charter *v.* Charter, all cited infra.

(*q*) L. R. 10 Eq. 29. Other cases where the name has prevailed over the description are, Bernasconi *v.* Atkinson, 10 Hare, 345; Garner *v.* Garner, 29 Beav. 114; Farrer *v.* St. Catharine's College, L. R. 16 Eq. 19; Re Lyon's Trusts, W. N. 1879, p. 20.

(*r*) 3 Moore, 304, 8 Taunt. 306, 3 B. & Ald. 632. See also Neeld *v.* Neeld, W. N. 1878, p. 219.

tations, the devise was to "Stokeham U., second son of A." for life, remainder to his issue in strict settlement, remainder "to John U., third son of A." and his issue in like manner; in fact, Stokeham was the third son of A. and John was his second, and it was held that the mistake was in the name, and that John and his issue were entitled before Stokeham and his issue. Cases where the description prevailed.

So, where there was a gift to *Clare Hannah*, the wife of A., whose wife was named *Hannah* only, but who had an infant daughter, named *Clare Hannah*, it was held that the testator could not have had an infant in view when he gave a legacy to a wife, and that therefore the wife was entitled to the legacy (*s*). And where both the name and description are almost entirely inapplicable, the general purpose of the testator, collected from the circumstances, will sometimes point out the object: as where there was a gift for life to *Elizabeth*, the natural *daughter* of the testator's servant, *Elizabeth*, *a single woman*, with remainder to her children. The servant Elizabeth was a *married* woman, who had an illegitimate *son John*, who had died leaving children, and a legitimate daughter Margaret, and it was held that the children of John were entitled, and not Margaret, the circumstances being such as to lead to the inference, that the children *of the illegitimate child of *382 the servant Elizabeth, without reference to name or sex, were the objects of the testator's bounty (*t*).

The position in the will of the name of a legatee may sometimes prevent uncertainty. Thus, in Fox *v.* Collins (*u*), where legacies were given to S. C., A. C. of St. Ives, and S. B., and then a legacy to A. C. of Hereford, and others, and the residue was given "to the said S. C., A. C., and S. B., it was held, that under the last gift A. C. of St. Ives was entitled, partly on the ground that the word "said" applied to the three persons taken together, and that in the previous part of the will A. C. of St. Ives was named between S. C. and S. B.] Uncertainty avoided by position of name in will.

If the ambiguity is not removed by the context and by parol evidence [of the surrounding circumstances, the gift necessarily fails for uncertainty; for direct evidence of the testator's intention is inadmissible. Thus in Drake *v.* Drake (*x*), where a testator gave a legacy to "his sister Mary Frances T. D." and the residue of his estate to "his niece Mary Frances T. D." and three other persons. The testator had a sister-in-law, but no niece of that name, though he had nieces, one of whom was named Frances Isabella T. D., another Mary Caroline T. D., and a third Mary Elizabeth T. D.; Name and description evenly balanced.

(*s*) Adams *v.* Jones, 9 Hare, 485; and see Lee *v.* Pain, 4 Hare, 253; Re Wolverton Estates, 7 Ch. D. 197.

(*t*) Ryall *v.* Hannam, 10 Beav. 537; and see Rickit's Trust, 11 Hare, 299.

(*u*) 2 Ed. 107. See also Doe *v.* Westlake, 4 B. & Ald. 57. Other cases in which the description has prevailed over the name are, Re Feltham's Trusts, 1 K. & J. 528; Hodgson *v.* Clarke, 4 D. F. & J. 394; Re Nunn's Trusts, L. R. 19 Eq. 331; Charter *v.* Charter, L. R. 7 H. L. 364 (an important case).

(*x*) 8 H. L. Ca. 172, affirming Romilly, M. R., 25 Beav. 642.

there was no circumstance showing that one niece was intended to take the share of residue rather than another, and nothing to take it from a niece and to give it to the sister-in-law, unless, without any evidence to prove error of demonstration, there was a rigid rule that the name should prevail. It was therefore held in D. P. that the gift of one fourth of the residue failed.

No name except as part of the description.

The same principles are applicable for the construction of wills where the devisee is not mentioned by name, but the description is composed wholly of "demonstration," as, where the gift is to the first or second son, or to the children, of some named person. Thus in Camoys *v.* Blundell (*y*), where the gift was to the "*second* son of Edward Weld, of Lulworth, for life," and there *383 was among other subsequent remainders, a remainder * to the first and other sons of each brother, except *the eldest*, of Edward Weld, and also a remainder to Lady S., *one of the sisters* of Edward Weld; the facts were, that there was no Edward Weld, of Lulworth, but there was a Joseph Weld of that place, who had three sons and an elder brother, and a sister, Lady S., and there was an Edward Joseph Weld, of the same place (son of Joseph Weld), who had *no children or elder brother, and no sister named Lady S.;* and it was decided that the second son of Joseph, as more perfectly answering the description, was the person designated to take the first estate for life under the description of the second son of Edward.

Case of indefinite reference to locality.

Where the objects of gift are described by reference to locality, there must be some definite local limit. Thus, a gift to persons resident in the hospitals of or in the vicinity of C., has been held void for uncertainty as to what should be said to be in the vicinity of C. (*z*).

Where one answers both name and description he will take, notwithstanding improbability.

But where both name and description correctly describe one person, the improbability of a bequest will of course not deprive him of it in favor of another who answers the description and (if the will were to be made afresh) has greater probability on his side, but is of a different name (*a*).]

Effect where trust is created, but the object uncertain.

V. Sometimes a testator distinctly shows an intention to create a trust, but does not go on to denote with sufficient clearness who are to be its objects; the effect of which obviously is, that the devisees or legatees in trust (whom we suppose to be distinctly pointed out) hold the property for the benefit

(*y*) 1 H. L. Ca. 778. See also Delmare *v.* Robello, 3 B. C. C. 447, 1 Ves. Jr. 412; Holmes *v.* Custance, 12 Ves. 279; Daubeny *v.* Coghlan, 12 Sim. 507; Re Ingle's Trust, L. R. 11 Eq. 578; Bristow *v.* Bristow, 5 Beav. 291 (where both fathers bore the same name).

(*z*) Flint *v.* Warren, 15 Sim. 626. As to the extent of London in a gift to "the hospitals of London," see Wallace *v.* Att.-Gen., 33 Beav. 384.

(*a*) Mostyn *v.* Mostyn, 5 H. L. Ca. 155, 23 L. J. Ch. 925. The second of the two Christian names (John Henry) was omitted; but as the testator had done the like in other cases, the statement above given is virtually correct.]

of the person or persons on whom the law, in the absence of disposition, casts it: in other words, the gift takes effect with respect to the legal interest, but fails as to the beneficial ownership.

As in Stubbs *v.* Sargon (*b*), where a testatrix indorsed a promissory note for 2,000*l.* to Mrs. Sargon, which she accompanied with a letter, declaring the note to have been given to Mrs. Sargon for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present to *either branch of her* (the testatrix's) *family* any portion of the principal or interest, as she might consider the most prudent; and, in the event of the *death of Mrs. *384 Sargon, by that bequest the testatrix empowered her to dispose of the said sum and interest by deed or will to those or either branch of her family she might consider most deserving; and that to enable her (Mrs. Sargon) to have the sole use and power of the said sum of 2,000*l.* due by the above note of hand, she had specially indorsed the same in her favor. Lord Langdale, M. R., was of opinion, that the promissory note was not indorsed and delivered to Mrs. Sargon for her own absolute use, but for the purpose of the money secured by it being disposed of by her to such parts or members of the testatrix's family as were intended to be thereby designated. Unfortunately the letter was so expressed that the objects could not be ascertained; and the trust being too indefinite for the court to act upon, the 2,000*l.* must be treated as part of the testatrix's personal estate. On appeal, Lord Cottenham was of the same opinion (*c*).

[In Corporation of Gloucester *v.* Wood (*d*) one of several testamentary papers contained the following words: "In a codicil to my will I gave to the corporation of Gloucester 140,000*l.* In this I wish that my executors would give 60,000*l.* more to them, for the same purpose as I have before named." No codicil or testamentary paper containing any gift to the corporation could be found; and it was decided by Sir J. Wigram that neither legacy could be supported as a gift to the corporation for their own use (though he admitted that a gift to A. "for a purpose" may sometimes be equivalent to a gift to A. absolutely), nor as a general charitable legacy (though it was improbable that a corporation was intended to hold in trust for a private person): the purposes of the gift were therefore uncertain, and the corporation were trustees for the residuary legatees. This decision was affirmed in D. P. (*e*). Corporation of Gloucester *v.* Wood.

So if the gift be expressly "in trust," though to be disposed of in such manner, and for such purposes as the donees think fit,

(*b*) 2 Kee. 255; see also Harland *v.* Trigg, 1 B. C. C. 142; Robinson *v.* Waddelow, 8 Sim. 134, stated Ch. XXIX. See also cases stated ante, pp. 214 *et seq.*

[(*c*) 3 My. & Cr. 507.

(*d*) 3 Hare, 131.

(*e*) 1 H. L. C. 272, and see Aston *v.* Wood, L. R. 6 Eq. 419; Briggs *v.* Penny, 3 De G. & S. 525, 3 M. & Gord. 546, with which cf. Stead *v.* Mellor, 5 Ch. D. 225.

Where gift in trust though discretional.

they are trustees, and the beneficial interest results to the heir or next of kin (*f*): and a gift "to be expended and appropriated in such manner as the donees, or a majority of them, shall in their discretion agree upon," would probably without the words "in trust," produce the same result (*g*).]

*385 *For technical language, of course, is not necessary to create a trust. It is enough that the intention is apparent.[1] [In considering the question, what expressions, though informal, are sufficient to manifest that intention, it will be convenient to deal separately with the cases (1) on precatory trusts, and (2) on words purporting to declare the purpose of the gift.]

1. Precatory trust.

It has been long settled, that words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used;[2] provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter (*h*) and the object or objects of the intended trust.

(*f*) Fowler *v.* Garlike, 1 R. & My. 232. See also Buckle *v.* Bristow, 10 Jur. N. S. 1095.
(*g*) Per Wood, V.-C., Buckle *v.* Bristow, supra; cf. Gibbs *v.* Rumsey, 2 V. & B. 294.]
(*h*) See Re Pinckard's Trust, 4 Jur. N. S. 1041, 27 L. J. Ch. 422; Reeves *v.* Baker, 18 Beav. 373; Macnab *v.* Whitbread, 17 Beav. 299; Smith *v.* Smith, 2 Jur. N. S. 967; Hood *v.* Oglander, 34 Beav. 523.

[1] Trusts under a statute need not be expressed in the language of the statute. It is sufficient if a purpose within the statute is clearly intended by the language used. Donovan *v.* Van De Mark, 78 N. Y. 244, reversing 18 Hun, 200, in which it was held that a trust to manage an estate, and to receive the rents and profits, had been created by the will, distinguishing Verdin *v.* Slocum, 71 N. Y. 345, in which trustees were to permit the beneficiary to take all the rents, &c., they exercising no control or discretion.

[2] See Pennock's Estate, 20 Penn. St. 268; Burt *v.* Herron, 66 Penn. St. 400; Biddle's Appeal, 80 Penn. St. 258; Paisley's Appeal, 70 Penn. St. 153; Kinter *v.* Jenks, 43 Penn. St. 445; Hess *v.* Singler, 114 Mass. 56; Van Amee *v.* Jackson, 35 Vt. 176; Ingram *v.* Fraley, 29 Ga. 553; Bull *v.* Bull, 8 Conn. 47; Gilbert *v.* Chapin, 19 Conn. 342; Harper *v.* Phelps, 21 Conn. 257; Chase *v.* Plummer, 17 Md. 165; Rhett *v.* Mason, 18 Gratt. 541; Steele *v.* Levisay, 11 Gratt. 454; Wace *v.* Mallard, 11 Eng. L. & Eq. 4; 2 Story, Eq. § 1068. The difficulty with which the courts have been perplexed in this matter of precatory trusts is not in regard to the test, but whether the particular expression comes within the test. The test is, Did the testator exercise will in the particular case? Now, it may be observed that direct words of volition are never necessary for the expression of will: it is always sufficient that volition can be read out of the whole context or instrument, however inartificial or inexact the language. The mere fact, therefore, that the testator has made use of the word "wish," "desire," "hope," or any other word not necessarily importing will (*i.e.* command), instead of the word "will" or the like unambiguous term, does not fully indicate an absence of ample direction. Indeed, gifts are most frequently made by the use of the words "wish" or "desire," and unless there be such accompanying language as clearly indicates that the testator intends to give a discretion to the donee as to carrying out the bounty, or as shows that the performance of the wish cannot justly be enforced, the wish amounts to will. Such words then as "I wish" or "I desire," *primâ facie* import command. See, *e.g.* Brasher *v.* Marsh, 15 Ohio St. 103; Burt *v.* Herron, 66 Penn. St. 400. See, however, Brunson *v.* King, 2 Hill, Ch. 483; Lines *v.* Darden, 5 Fla. 51. The real difficulty (although the authorities are not fully agreed upon what has just been stated, of the correctness of which in principle there can be little doubt) arises when words of less decided import are employed; words expressive of confidence or trust (not in a technical sense), or of hope, recommendation, or entreaty. The true question, however, in all cases, to put the test in more specific form, is whether the confidence or hope expressed is meant to govern the conduct of the party addressed or mentioned, or whether it is a mere indication of that which he thinks would be a reasonable or suitable exercise of the discretion of such party; leaving him, however, to the exercise of his own discretion. See Williams *v.* Williams, 1 Sim. N. S. 358; Warner *v.* Bates, 98 Mass. 274.

Thus, in Massey *v.* Sherman (*i*), where a testator devised copyholds to his wife, not doubting that she would dispose of the same to and amongst his children as she should please, this was held to be a trust for the children, as the wife should appoint.

So, in Pierson *v.* Garnet (*k*), where a testator gave his residuary personal estate, in trust for A. for life, subject to certain annuities, and after payment of the annuities, the testator gave the residue to A., his executors, administrators, and assigns, adding, "and it is my dying *request* to the said A., that if he shall die without leaving issue living at his death, the said A. do dispose of what fortune he shall receive under this my will, to and among the descendants of my late annt, A. C., his grandmother, in such manner and proportion as he shall think proper;" it was held by Sir L. Kenyon, M. R., and afterwards by Lord Thurlow, that the effect of the will was to create a trust for the descendants in the described event.[1] Pierson *v.* Garnet.

Again, in Malim *v.* Keighley (*l*), where a testator in certain events and subject to certain trusts, bequeathed the residue of his personal estate to his surviving daughter, and such bequest was followed by these words: "hereby *recommending* to such daughter to dispose of the same after her own death, and the * determination of the several trusts aforesaid, unto and among the children of my daughter A. and my nephew I., desiring that his reputed daughter C. may be considered as one of his children." The surviving daughter died without exercising the power, and Sir R. P. Arden, M. R., and [Lord Loughborough] held, that a trust was created in favor of the children of the daughter and nephew. Malim *v.* Keighley. *386 Precatory trust.

So, in Birch *v.* Wade (*m*), where a testator after giving the residue of his real and personal estate in trust for his wife for life, and then in trust for other persons for life, and after disposing of two thirds absolutely, added: "It is my will and desire, that the other third part of the principal of my estate and effects be left entirely at the disposal of my dear and loving wife among such of her relations as she may think proper." The wife died without making any disposition, and Sir W. Grant, M. R., considered it to be clear that the testator intended his wife's relations to have the benefit of the disposition. Her next of kin at her death, therefore, were held to be entitled (*n*).

(*i*) Amb. 520; [S. C. nom. Macey *v.* Shurmer, 1 Atk. 389.] See also Wynne *v.* Hawkins, 1 B. C. C. 179; [Parsons *v.* Baker, 18 Ves. 476; Malone *v.* O'Connor, 2 Ll. & Go. 465.]

(*k*) 2 B. C. C. 38, 226: [and see Re O'Bierne, 1 J. & Lat. 352.]

(*l*) 2 Ves. Jr. 333, 529; see also Paul *v.* Compton, 8 Ves. 380; [Ford *v.* Fowler, 3 Beav. 146; Knott *v.* Cottee, 2 Phil. 192; Cholmondeley *v.* Cholmondeley, 14 Sim. 590; under the circumstances in Megginson *v.* Moore, 2 Ves. Jr. 630, "recommend" was held not to create a trust.]

(*m*) 3 V. & B. 198.

(*n*) See also Brest *v.* Offley, 1 Ch. Rep. 246; Eales *v.* England, Pre. Ch. 202; Harding *v.* Glyn, 1 Atk. 469; Earl of Bute *v.* Stuart, 2 Ed. 87, 1 B. P. C. Toml. 476; Wright *v.* Atkins, 19 Ves. 299, [Cooper, 111, rev. in D. P. Sugd. Law of Prop. 377;] Cary *v.* Cary, 2 Scho. & L. 189; Forbes *v.* Ball, 3 Mer. 441; Horwood *v.* West, 1 S. & St. 387.

[1] See Podmore *v.* Gunning, 7 Sim. 644; Pope, 10 Sim. 1; Knight *v.* Knight, 3 Beav. Ford *v.* Fowler, 3 Beav. 146, 147; Pope *v.* 148, 172–174; Brunson *v.* Hunter, 2 Hill,

So, in Prevost *v.* Clarke (*o*), a testatrix gave the residue of her property equally between her sons and daughter; and, after directing the share of the daughter to be invested in public securities, &c., added: "Convinced of the high sense of honor, the probity and affection of my son-in-law, E. C., I entreat him, should he not be blessed with children by my daughter, and survive, that he will leave at his decease to my children and grandchildren the share of my property I have bestowed on her." Sir J. Leach, V.-C., was clearly of opinion that these words created a contingent trust (subject to the power of selection) in favor of the children and grandchildren.

Prevost *v.* Clarke.

[Again, in Pilkington *v.* Boughey (*p*), the testator, after reciting that he had purchased an estate for a particular charitable purpose, devised it upon such trusts as certain persons should in her, his, or their discretion, direct or appoint, but he trusted they would exercise such power in doing such charitable acts as they knew he would most approve of. It was held that a gift for charity was clearly pointed out, so that a trust would have attached if the purpose had been legal.

Pilkington *v.* Boughey.

In Foley *v.* Parry (*q*), the testator gave property to his wife * for life, with remainder to his nephew for life, and then stated it to be his particular wish and request, that his wife and *another person* who took nothing under the will, should superintend and take care of the education of the nephew, so as to fit him for any respectable employment; and it was decided by Lord Brougham, affirming the decision of Sir L. Shadwell, that the nephew was entitled to be educated and maintained out of the income of the property given to the widow till he attained the age of twenty-one: the duty was to be performed by means of the fund given.

Foley *v.* Parry.

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Precatory trust.

So,] in Broad *v.* Bevan (*r*), where the testator ordered and directed his son J. (to whom he gave all his real and personal estate) to take care and provide for his (the testator's) daughter A., during her life — Sir T. Plumer, M. R., was of opinion that the daughter was entitled to have a provision made for her out of the residue, in addition to an annuity of 5*l.* which was bequeathed to her.

[Trusts, or powers in the nature of trusts, have also been held to be created by the following expressions: "I desire him to give (*s*);" "I hereby request (*t*);" "empower and authorize her to settle and dispose of the estate to such persons as she

Other cases of doubtful words creating a trust.

(*o*) 2 Mad. 458. [(*p*) 12 Sim. 114. (*q*) 5 Sim. 138, 2 My. & K. 138.]

(*r*) 1 Russ. 511, n. [See also Wilson *v.* Bell, L. R. 4 Ch. 581, where the devise being to the son for life, a direction that his sister should reside with and be maintained by him was held not to operate after his death.

(*s*) Mason *v.* Limbery, cited in Vernon *v.* Vernon, Amb. 4.

(*t*) Nowlan *v.* Nelligan, 1 B. C. C. 489; Shelley *v.* Shelley, L. R. 6 Eq. 540.

Ch. 490; Hart *v.* Hart, 2 Desaus. 57; Van Dyck *v.* Van Beuren, 1 Caines, 84; Farwell *v.* Jacobs, 4 Mass. 634; Bolling *v.* Bolling, 5 Munf. 334; Sydnor *v.* Sydnors, 2 Munf. 263; 2 Story, Eq. §§ 1068, 1070, 1071.

shall think fit by her will, confiding in her not to alienate the estate from my nearest family (*u*);" "advise him to settle (*x*);" "my dear daughters, is, that you do give my granddaughter 1,000*l*., this is my last wish (*y*);" "require and entreat (*z*);" "trusting that he will preserve the same, so that after his decease it may go and be equally divided, &c. (*a*);" "well knowing (*b*);" "under the conviction that she will dispose, &c. (*c*);" "to apply the same (*d*);" and by a direction to trustees to convey to the eldest son at twenty-one, "but so that the settlor's wish and desire may be observed, which is hereby declared, that the other children may be allowed to participate (*e*)."

*But] if the testator's language amounts merely to a general expression of good will towards the objects in question, and does not intimate any definite disposing intention in their favor, as where he adds, "I have no doubt but A. B. (the legatee) will be kind to my children," such words are inoperative to qualify the legatee's interest (*f*). And the same construction has prevailed in some instances in which the indefiniteness was of a less palpable character, as where a testator gave leasehold estates at S. to his brother J. H. forever, "hoping he will continue them in the family (*g*)." *388

Mere expressions of kindness not sufficient.

[Expressions sufficient *per se* to create a trust may be deprived of their effect by a context expressly declaring (*h*), or by implication showing that no trust was intended; as, if a testator, after settling a fund on his daughters and their children, by codicil revokes that bequest on account of the inconvenience of having the money tied up, and leaves the property "to be disposed of by the husbands for the good of their families:" no trust will be created in favor of the wives and children; otherwise the inconvenience complained of would continue (*i*).

Doubtful expressions explained by context.

And where the words of a gift expressly point to an *absolute* enjoyment by the donee himself (*j*), the natural construction of subsequent precatory (*k*) words is that they express the testator's belief or wish without imposing a trust.

Where the gift is for the donee's *absolute* use, prec-

(*u*) Griffiths *v.* Evan, 5 Beav. 241. The devise to the donee of the power was in tail. If it had been in fee, a trust would scarcely have been created without the word "confiding;" see Brook *v.* Brook, 3 Sm. & Gif. 280; Alexander *v.* Alexander, 2 Jur. N. S. 898.

(*x*) Parker *v.* Bolton, 5 L. J. N. S. Ch. 98.

(*y*) Hinxman *v.* Poynder, 5 Sim. 546.

(*z*) Taylor *v.* George, 2 V. & B. 378.

(*a*) Baker *v.* Mosley, 12 Jur. 740.

(*b*) Briggs *v.* Penny, 3 De G. & S. 539, 3 M. & Gord. 546; per Wood, V.-C., Johns. 289. But see per Jessel, M.R., 5 Ch. D. 227.

(*c*) Barnes *v.* Grant, 26 L. J. Ch. 92, 2 Jur. N. S. 1127.

(*d*) Salusbury *v.* Denton, 3 K. & J. 529.

(*e*) Liddard *v.* Liddard, 28 Beav. 266.]

(*f*) Buggens *v.* Yeates, 8 Vin. Ab. 72, pl. 27. [See also Re Bond, 4 Ch. D. 238.]

(*g*) Harland *v.* Trigg, 1 B. C. C. 142. [(*h*) Young *v.* Martin, 2 Y. & C. C. C. 582.

(*i*) Alexander *v.* Alexander, 2 Jur. N. S. 898, not appealed on this point, 6 D. M. & G. 593. See also Shepherd *v.* Nottidge, 2 J. & H. 766; Eaton *v.* Watts, L. R. 4 Eq. 151; M'Cormick *v.* Grogan, L. R. 4 H. L. 82.

(*j*) "Absolute" property means not only unlimited in estate, but unfettered by trust or condition. Per James, V.-C., Irvine *v.* Sullivan, L. R. 8 Eq. 673; and per Wood, V.-C., Godfrey *v.* Godfrey, 2 N. R. 16.

(*k*) *Secus*, if the words are imperative, Bonser *v.* Kinnear, 2 Gif. 195; Evans *v.* Evans, 12 W. R. 508; Curtis *v.* Graham, ib. 998.]

atory words do not create a trust.

Thus,] in Meredith *v.* Heneage (*l*), where the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife, "*unfettered and unlimited*," in full confidence, and with the firmest persuasion that in her future disposition and distribution thereof she would distinguish the heirs of his late father by devising and bequeathing the whole of his said estate together and entire to such of his said father's heirs as she might think best deserved her preference; it was held in D. P. that the wife was absolutely entitled for her own benefit, Lord Eldon considering that the testator intended to * impose a moral but not a legal obligation on his wife; for which he relied much (as did also Lord Redesdale) on the words "unfettered and unlimited." Lord Eldon also adverted to the great difficulty of reconciling the testator's direction that the estate should go "entire" with his direction respecting its "distribution."

Meredith *v.* Heneage.

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So, in Wood *v.* Cox (*m*), a testatrix gave all her estate, real and personal, to A. (and B., their), his heirs, executors, and assigns, "*for his and their own use and benefit* forever, trusting and wholly confiding in his honor that he will act in strict conformity to my wishes." And she appointed A. and B. executors. On the same day the testatrix executed a testamentary paper, by which she gave several annuities and legacies (among others a legacy of 100*l.* to her father, who was her sole next of kin), and which concluded with the following words in the testatrix's handwriting: "Such is the will of Sarah Compton." The words "and B. their," originally written in the will, were obliterated by the direction of the testatrix. Lord Langdale, M. R., held that A. was a trustee for the next of kin, [but his decision was reversed by Lord Cottenham (*n*), who said that to make A. a trustee of the whole property, the words "for his own use and benefit" must be expunged from the will, or, by reason of some irresistible evidence derived from other parts of the testamentary disposition, treated as if they had never been inserted, *a construction which nothing but absolute necessity could justify.*

Wood *v.* Cox.

In Johnston *v.* Rowlands (*o*), the gift was to the testator's wife, to be disposed of "by her will *in such way as she shall think proper*," but he recommended her to dispose of one moiety among her own relations, and the other among such of his own as she should think proper. Sir J. K. Bruce, V.-C., said, "That the word 'recommend' may amount to a command in a particular instrument, and may create a binding trust, is certain. It is equally certain that the word is susceptible of a different interpretation, of an interpretation consistent

Johnston *v.* Rowlands.

(*l*) 1 Sim. 542, 10 Pri. 306.
(*m*) 1 Kee. 317.
[(*n*) 2 My. & Cr. 684. See also Irvine *v.* Sullivan, L. R. 8 Eq. 673, a very similar case.]
(*o*) 2 De G. & S. 356.

with the *legal and equitable power* of the person recommended to depart from the recommendation." He thought that no trust was created.

And in Webb *v.* Wools (*p*), where the gift was "to J., her executors, * administrators and assigns, *to and for her and their own use and benefit*, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children," Sir R. Kindersley, V.-C., said that if he put on the latter part of the sentence a construction which would have the effect of creating a trust for the benefit of the children, he should make the two branches of the sentence contradictory; but he might fairly say that the latter part was not introduced for the purpose of creating any trust, but merely for the purpose of declaring that, giving all his property to J. for her own use and benefit, he reposes full confidence that she will dispose of it for the benefit of herself and children, without imposing any obligation which the court could enforce.[1]

*390 Webb *v.* Wools, the principle recognized.

It remains to notice the case of Ware (or Wace) *v.* Mallard (*q*), where the testator devised and bequeathed all his real and personal property to his wife, her *heirs*, *executors*, *administrators or assigns*, *to and for her sole use and benefit*, in full confidence that she would in every respect appropriate and apply the same unto and for the benefit of all his children. Sir J. Parker, V.-C., decided that the widow took *a life-estate* with a power of appointment among the children. No reasons are reported. If the words "in full confidence," &c., created a trust, it is difficult to see how the widow could take any beneficial interest whatever: and if they did not, it is equally difficult to understand how she could be entitled to less than the whole.

Ware *v.* Mallard, *contra*; questioned.

The authority of the V.-C. has given some currency to this decision (*r*). But the better opinion is, that in such a case no trust is imposed on the widow. Thus, in Re Hutchinson and Tenant (*s*), where a testator gave all his real and personal estates to his "dear wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," it was held by Sir G. Jessel, M. R., that the wife took absolutely.

(*p*) 2 Sim. N. S. 267. See also White *v.* Briggs, 15 Sim. 33; Parnall *v.* Parnall, 9 Ch. D. 97; and the following cases bearing on the subject, Winch *v.* Brutton, 14 Sim. 379; Bardswell *v.* Bardswell, 9 Sim. 319; Williams *v.* Williams, 1 Sim. N. S. 358, post, 394; Huskisson *v.* Bridge, 15 Jur. 738; Fox *v.* Fox, 27 Beav. 301; Green *v.* Marsden, 1 Drew. 646; M'Culloch *v.* M'Culloch,, 11 W. R. 504.

(*q*) 21 L. J. Ch. 355, 16 Jur. 492.

(*r*) Gully *v.* Cregoe, 24 Beav. 185; Shovelton *v.* Shovelton, 32 Beav. 143; Curnick *v.* Tucker, L. R. 17 Eq. 320; Le Marchant *v.* Le Marchant, L. R. 18 Eq. 414. *Qu.* whether in Curnick *v.* Tucker a dictum of Kindersley, V.-C., in Palmer *v.* Simmonds, 2 Drew. 221, was correctly interpreted as a surrender by him of the principle which he enforced in Webb *v.* Wools. Were not his remarks directed exclusively to the words "confidence" and "residuary estate"? There was at least nothing said about a life-estate.

(*s*) 8 Ch. D. 540.

[1] Comp. Cummings *v.* Shaw, 108 Mass. 159; Bamforth *v.* Bamforth, 123 Mass. 280; Gibbins *v.* Shepard, 125 Mass. 541.

He considered the case undistinguishable from Lambe *v.* Eames (*t*), where a testator gave his estate to his widow "to be at her
*391 * disposal in any way she may think best for the benefit of herself and family," — upon which a strong opinion was expressed by the L. JJ. that no trust was created; but assuming that there was, it could not be extended to mean a trust for the widow for life with remainder for the children in such shares as she might think fit to direct.

It should be observed that in some of the cases where Sir J. Parker's construction has prevailed there has been a reference to the donee's death as the time when the recommended disposition was to take effect (*u*); and this may have been taken as marking the point of time when the interest of the other beneficiaries was to commence, as well as negativing the widow's right to dispose of the *corpus* in her lifetime (*x*). But the distinction is discountenanced by Meredith *v.* Heneage, and Johnston *v.* Rowlands, and in expressing his dissent from the construction in question, Sir G. Jessel drew no distinction between the cases where such a reference existed and where it did not.

Limits of the doctrine of precatory trusts.

And with regard to the general question of precatory trusts (*i.e.* where the terms used do not expressly point to an absolute enjoyment by the donee himself)], the courts seem to be sensible that they have gone far enough in investing with the efficacy of a trust loose expressions of this nature, which, it is probable, are rarely intended to have such an operation (*y*). Accordingly we find, of late, a more strict and uniform requisition of definiteness in regard to both the subject-matter and objects of the intended trust, than can be traced in some of the earlier [and a few of the more modern] adjudications.[1]

(*t*) L. R. 6 Ch. 597. See also Mackett *v.* Mackett, L. R. 14 Eq. 49. See these cases referred to again, post.

(*u*) Gully *v.* Cregoe, 24 Beav. 185; Le Marchant *v.* Le Marchant, L. R. 18 Eq. 414; Cholmondeley *v.* Cholmondeley, 14 Sim. 590 (but here the words were only, "to be hers independent of her husband" — as to which see also Stubbs *v.* Sargon, 3 My. & Cr. 513).

(*x*) In Hart *v.* Tribe, 18 Beav. 215, 1 D. J. & S. 418, there was an express "recommendation" not to do so.

(*y*) See this opinion adopted by James, L. J., Lambe *v.* Eames, L. R. 6 Ch. 599.]

[1] Wherever the objects of the supposed recommendatory trust are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion and choice to act, or not to act, is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership, — in all such cases, courts of equity will refuse to create a trust from words of this character. In the nature of things there is a wide distinction between a power and a trust. In the former, the party may or may not act in his discretion. In the latter, the trust will be executed, notwithstanding his omission to act. 2 Story, Eq. Jur. § 1070; Moggridge *v.* Thackwell, 7 Ves. (Summer's ed.) 36 *b* note (*d*) and cases cited; Morice *v.* Bishop of Durham, 9 Ves. (Summer's ed.) 399, note (*a*) and cases cited; 2 Williams (6th Am. ed.), 108; Bull *v.* Bull, 8 Conn. 47. On the other hand, where the objects of the supposed trust are certain and definite, and the property is clearly pointed out, where the relations of the testator and beneficiary are such as to indicate a strong motive for the bounty, and especially where the clause in question is so expressed as to warrant the inference that it was designed to be peremptory, a trust is created. Warner *v.* Bates, 98 Mass. 274, 277; Malim *v.* Keighley, 2 Ves. Jr. 333, 529; Bernard *v.* Minshull, H. R. V. Johns. 287; Williams *v.* Williams, 1 Sim. N. S. 358; Bonser *v.* Kinnear, 2 Giff. 195; Knight *v.* Boughton, 11 Clark & F. 513, 551; Harrison *v.* Harrison, 2 Gratt. 1; Coates' Appeal, 2 Barr, 129; Van Amee *v.* Jackson, 35 Vt. 173; Whipple *v.* Adams, 1 Met. 444; Homer *v.* Shelton, 2 Met. 194,

Thus, in Curtis *v.* Rippon (*z*), where a testator gave all his real and personal estate to his wife, trusting that she would, in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the church of God and the poor. Sir J. Leach, V.-C., held the wife to be absolutely entitled, the testator's intention evidently being to leave the children dependent on her.

Instances of words being too indefinite to create a trust.

So, in Abraham *v.* Alman (*a*), where a will contained the * following passage: "I do likewise will and bequeath to my only son J. the sum of 60*l.* sterling per year forever; also to provide for the two daughters of my child H. E., namely, S. E. and E. E., and the remainder of my property to the two children of my daughter S. A." — Lord Gifford, M. R., held that the words in question did not create a trust on the 60*l.* a year, or the remainder of the property bequeathed to the children of S. A.; the former was a distinct, independent bequest; and it was not clear that the testator intended to make a provision for the daughters of H. E., out of the latter; the court had no means of determining what that provision was to be, [or in what manner or out of what fund to be made.]

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Words too indefinite to create a trust.

Again, in Sale *v.* Moore (*b*), where a testator bequeathed the remainder of what he should die possessed of, after payment of debts and legacies, to his dear wife, adding, "recommending to her, and not doubting, as she has no relations of her own family, but that *she will consider my near relations*, should she survive me, as I should consider them myself in case I should survive her." In a preceding part of the will, the testator had assigned as a reason for his not leaving his brother and sister anything, that they were provided for, and that he could not do so without taking from his wife's property, who was more in need of it. — Sir A. Hart, V.-C., held that the effect of the whole was, that no trust for the relations was created.

So, in Hoy *v.* Master (*c*), where a testator willed the whole of his

(*z*) 5 Mad. 434.
(*b*) 1 Sim. 534; [see also Reeves *v.* Baker, 18 Beav. 373.]
(*a*) 1 Russ. 509.
(*c*) 6 Sim. 568.

206. A strong disposition has been indicated in modern times to limit this doctrine of recommendatory trusts, so far as to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense. See 2 Story, Eq. Jur. § 1069; Sale *v.* Moore, 1 Sim. 534; Shaw *v.* Lawless, 1 Lloyd & G. 558; Ford *v.* Fowler, 3 Beav. 146; Knight *v.* Knight, ib. 148; Hart *v.* Hart, 2 Desaus. 83; Van Dyck *v.* Van Beuren, 1 Caines, 84; Bull *v.* Vardy, 1 Ves. (Summer's ed.) 270, note (*b*). A clause in a will expressing the testator's "will and intention that W. may dispose of the furniture, plate, pictures and all other articles now in my house, absolutely, as he may deem expedient, in accordance with my wishes as otherwise communicated by me to him," gives W. the absolute property, in these articles, even though the will contain a previous residuary bequest to W. for life, with remainder over. Wells *v.* Doane, 3 Gray, 201. So where legacies are given to persons generally, with the additional expression "to be at their disposal," they are considered to be immediate vested interests in the legatees, so as to be transmissible to their personal representatives, although they make no disposition of the property. 1 Roper, Legacies, by White, 429, 430, Ch. 10, § 7. See Hixon *v.* Oliver, 13 Ves. 108; Barford *v.* Street, 16 Ves. 139; Martin *v.* Douch, 1 Chan. Cas. 198; Robinson *v.* Dusgate, 2 Vern. 180; Maskelyne *v.* Maskelyne, Amb. 750; Bull *v.* Kingston, 1 Meriv. 314.

property to his wife for life, and that, after her decease, one third should devolve to his beloved daughter M., and that the other two thirds should be at the sole and entire disposal of his said wife, L. B.; "trusting that, should she not marry again and have other children, her affection for our joint offspring, the said M. B., would induce her to make her said daughter her principal heir." The wife did not marry again, and disposed of her property to a stranger; whereupon it was claimed by the daughter, on the ground that the wife had a life-interest only, with a power of appointment in favor of the children of any future marriage, with an alternative trust for the daughter absolutely. But Sir L. Shadwell held that the wife took the two thirds absolutely.

Again, in Lechmere *v.* Lavie (*d*), where a testatrix made a codicil to her will in the following words: "I hope none of my children will accuse me of partiality, in having left the largest *393 * share of my property to my two eldest daughters, my sole motive for which was to enable them to keep house so long as they remain single; but, in case of their marrying, I have divided it amongst all my children. If they die single, of course *they will leave what they have amongst their brothers and sisters, or their children.*" Sir J. Leach, M. R., considered that these words were not intended to create an obligation upon the two eldest daughters, as they applied not simply to the property given by the testatrix, but to all property which the daughters might happen to possess at their deaths, leaving what she gave by her will at their disposition during their lives, and extending to property which might never have belonged to her, and wanting altogether certainty of amount.

Words too indefinite to create a trust.

It is submitted, however, that the uncertainty in regard to the subject of gift arose, not from the testatrix having combined in the trust with her own property that of her daughters themselves, which she could not dispose of (*e*), but from the absence of any clear indication of intention that the trust was to affect all the property which the daughters derived from the testatrix. The expression "what they have" would seem to imply that the legatees might dispose of as absolute owners, any part they chose, and that the trust should apply only to what remained. This brings the case within the principle of Wynne *v.* Hawkins (*f*), where a testator bequeathed what he should leave behind him to his wife, "not doubting that she would dispose of *what should be left*, at her death, to their two grandchildren." Lord Thurlow said that the words "not doubting" would be strong enough; but that where, in point of intent, it was uncertain what property was to be given, and to whom, the words were not sufficient, because it was doubtful what the confidence was which the testator had reposed; and, where that did not appear, the scale leaned to the presumption that he meant to give the whole to the first taker.

(*d*) 2 My. & K. 197. [(*e*) As to this, see Lefroy *v.* Flood, 4 Ir. Ch. Rep. 1, 12.]
(*f*) 1 Bro. C. C. 179. As to cases of this class, *vide ante*, pp. 362, 363.

So, in Horwood *v.* West (*g*), where a testator recommended his wife to give by her will what *she* should die possessed of under his will in a certain manner — Sir J. Leach, V.-C., assumed, that if these words had been uncontrolled by the context, the trust must have been void for uncertainty; but he thought that it was evident, from a direction in the will to the wife to secure to * herself, on a second marriage, whatever she should possess by virtue of his will, that the testator intended the trust in question to be coextensive with such direction, *i.e.* to extend to all the property the wife derived from the testator.

*394 Words too indefinite to create a trust.

It should be observed, however, in regard to the objection of uncertainty, that the preceding cases, though frequently referred to as if they were the subject of a peculiar rule, merely require, in common with all others, that the intention of the testator should be manifested with sufficient certainty to enable the court to act judicially upon it.

So, in Ex parte Payne (*i*), where a testator, after devising the property in question to his daughter in fee, proceeded to declare that the estate was intended as some reward for her attention to him, and was kept separate from the other interests she would take under his will as a testimony thereof. And he directed his daughter to keep the premises in good repair; and in case she should marry, he strongly recommended her to execute a settlement of the estate, and thereby to vest the same in trustees, to be chosen by her, for the use of herself for life, with remainder to her husband for life, with remainder to the children she might happen to have, *or to such other uses as his daughter should think proper*, to the intent that the said estate, in the event of her marriage, might be effectually protected and secured. The question, on petition, was, whether the daughter (who was unmarried) could make a good title to the devised property in fee. It was contended for her that she could, for that neither the persons to take nor the estates themselves were certain; and that, even if the daughter married, she might limit the estate to such uses as she thought proper: and of this opinion was Lord Abinger, C. B.

[And in Williams *v.* Williams (*k*), where the testator by his will bequeathed property to his wife absolutely for her own use and benefit, and subsequently in a letter to her, wrote as follows: "I hope my will is so worded that everything that is not in strict settlement you will find at your command. It is my wish that * you should enjoy everything in my power to give, using your judgment where to dispose of it amongst your children when you

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(*g*) 1 Sim. & St. 387.

(*i*) 2 Y. & C. 636; see also Knight *v.* Knight, 3 Beav. 148; [S. C. nom. Knight *v.* Boughton, 11 Cl. & Fin. 513, 8 Jur. 923; Lefroy *v.* Flood, 4 Ir. Ch. Rep. 1 (in which great reliance was placed on the fact that the approbation of the devisee was required to the conduct of the persons claiming as *cestuis que trust*; the force of which requisition must, however, depend on circumstances. Bonser *v.* Kinnear, 2 Gif. 195;) Quayle *v.* Davidson, 12 Moo. P. C. C. 238; Maud *v.* Maud, 27 Beav. 615; Scott *v.* Key, 35 Beav. 291 (as to one third); but see Malone *v.* O'Conner, 2 Ll. & Go. 465.

(*k*) 1 Sim. N. S. 358.

can no longer enjoy it yourself, but I should be unhappy if I thought it possible that any one not of your family should be the better for what I feel confident you will so well direct the disposal of." It was held by Lord Cranworth, V.-C., that no trust was created: he thought the words of the codicil could not operate to cut down the absolute interest given to the wife: but he relied chiefly on the uncertainty of the objects to whom the precatory words referred (*l*).]

It will be observed that in all these cases the consequence of holding the expressions to be too vague for the creation of a trust was, that the devisee or legatee retained the property for his or her own benefit; and in this respect these cases stand distinguished from those (*m*) in which there was considered to be sufficient indication of the testator's intention to create a trust, though the objects of it were uncertain: a state of things which, of course, lets in the claim of the heir or next of kin to the beneficial ownership. In such cases there is no uncertainty as to the intention to create a trust, but merely as to the objects; in the other class of cases it is uncertain whether any trust is intended to be created. [But inasmuch as uncertainty in the object furnishes a strong argument that a testator did not intend to create a trust, it is obvious that the two classes of cases are intimately connected with each other.

Meaning of the rule requiring certainty of object and subject for a precatory trust.

For the rule that a certain subject and a certain object are necessary to constitute a trust, where the words used are precatory only, does not mean that the subject or object must be so defined that it can in fact be ascertained by the court. A precatory trust "for the benefit of ——," or of "the person named in such a paper," where no such paper is found, or "for such objects as I have communicated to" the donee, where no such communication has been made (*n*), would completely exclude the donee from all beneficial interest, although it leaves the object wholly unascertained (*m*). But what is meant by the rule is this: in ascertaining whether the precatory words import merely a recommendation, or whether they import a *definite imperative direction to him as to his mode of dealing with the property, the court will be guided by the consideration whether the amount he is requested to give is certain or uncertain, and whether the objects to be selected are certain or uncertain; and if there is a total absence of explicit direction as to the *quantum* to be given, or as to the objects to be selected by the donee of the property, then the court will infer from the circumstance of the testator having used precatory words, expressive only of hope, desire, or request, instead of the formal words usual for

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(*l*) As to the meaning of "family," see L. R. 6 Ch. D. 600, 8 Ch. D. 542, and post, Ch. XXIX.
(*m*) Stubbs *v.* Sargon, Fowler *v.* Garlike, Corporation of Gloucester *v.* Wood, Briggs *v.* Penny, ante, p. 383 *et seq.*
(*n*) Bernard *v.* Minshull, Johns. 276. But where the gift was "subject to such disposition thereof or of any part thereof as the testator *might* by deed or writing thereafter direct," it was held there was no trust, the testator not having made up his mind whether he would make any such disposition or not. Fenton *v.* Hankins, 9 W. R. 300.

the creation of a trust, that those words are used, not for the purpose of creating an imperative trust, but simply as suggestions on the part of the testator, for the guidance of the donee in the distribution of the property; the testator, placing implicit reliance upon his discretion and leaving him the sole judge whether he will adopt those suggestions or not, and whether he will dispose of the property in the manner indicated by the testator, or in any other manner at his absolute discretion. The question is not whether the object is so defined that it can be distinctly ascertained by the court, but whether the object is purposely left to be selected by the donee (*p*); as, for instance, where the testator expresses a desire that the donees shall "distribute the fund as *they think* will be most agreeable to his wishes" (*q*).[1]

2. Gift for a specified purpose.

Secondly, we are to consider whether in cases where words are added expressing a purpose for which the gift is made, such purpose is to be considered obligatory. Where the purpose of the gift is the benefit solely of the donee himself, he can claim the gift without applying it to the purpose, and that, it is conceived, whether the purpose be in terms obligatory or not. Thus, if a sum of money be bequeathed to purchase for any person a ring (*r*), or a life-annuity (*s*), or a house (*t*), or to set him up in business (*u*), or for his maintenance and education (*x*), or to bind him * apprentice (*y*), or *397 towards the printing of a book, the profits on which are to be for his benefit (*z*), the legatee may claim the money without applying it or binding himself to apply it to the specified purpose; and even in spite of an express declaration by the testator, that he shall not be permitted to receive the money (*a*).

Where the purpose is the benefit of donee alone, the gift is absolute.

(*p*) See judgment of Wood, V.-C., Bernard *v.* Minshull, Johns. 287, 290.
(*q*) Stead *v.* Mellor, 5 Ch. D. 225.
(*r*) Apreece *v.* Apreece, 1 V. & B. 364.
(*s*) Dawson *v.* Hearn, 1 R. & My. 606; Ford *v.* Batley, 17 Beav. 303; Re Browne's Will, 27 Beav. 324. It makes no difference whether it be a bequest of a specified sum to purchase an annuity, or a direction to purchase an annuity of a specified amount. Yates *v.* Compton, 2 P. W. 308.
(*t*) Knox *v.* Hotham, 15 Sim. 82. (*u*) Gough *v.* Bult, 16 Sim. 45.
(*x*) Webb *v.* Kelly, 9 Sim. 472; Younghusband *v.* Gisborne, 1 Coll. 400; Presant *v.* Goodwin, 1 Sw. & Tr. 544, 29 L. J. Prob. 115. It follows that if the legatee die before receiving his legacy, his representative is entitled, Yates *v.* Compton, 2 P. W. 308; Barnes *v.* Rowley, 3 Ves. 305; Palmer *v.* Crauford, 3 Sw. 482; Bayne *v.* Crowther, 20 Beav. 400; Attwood *v.* Alford, L. R. 2 Eq. 479.
(*y*) Barlow *v.* Grant, 1 Vern. 255; Nevill *v.* Nevill, 2 ib. 431; but see Woolridge *v.* Stone, 4 L. J. O. S. Ch. 56; see further, Barton *v.* Cook, 5 Ves. 461; Leche *v.* Kilmorey, T. & R. 207; Att.-Gen. *v.* Haberdashers' Company, 1 My. & K. 420; Lewes *v.* Lewes, 16 Sim. 266; Noel *v.* Jones, ib. 309; in Lockhart *v.* Hardy, 9 Beav. 379, a legacy to a devisee to pay off a mortgage debt on the estate devised to him was held good, though the mortgage was foreclosed in the testator's lifetime. And see Earl of Lonsdale *v.* Countess Berchtoldt, 3 K. & J. 185; Re Colson's Trusts, Kay. 133 (enjoyment of repairing fund accelerated by disentailing the estate); and cases cited ante, p. 311, n. (*s*).
(*z*) Re Skinner's Trusts, 1 J. & H. 102, in which it was a question of some difficulty, whether the principal object of the bequest was the benefit of the person named or the publication of the testator's opinions. (*a*) Stokes *v.* Cheek, 28 Beav. 620.

[1] A gift to enable a legatee tn confer a bounty is not a trust, but a beneficial legacy. Ford *v.* Porter, 11 Rich. Eq. 238, 255; Craig *v.* Beatty, 11 S. Car. 375, 377.

Principle of the cases.

These cases rest on the principle that the court will not compel that to be done which the legatee may undo the next moment, as by selling the thing to be purchased or giving up the business: and we shall hereafter see (*b*), that the same principle applies where property is directed to be converted, for the donee may claim it in its original state; but of course, in such case, if there be more than one donee interested in the gift, the deviation from the testator's directions cannot be made without the consent of all, as if the house when purchased was to be conveyed to or settled on two or more persons. So, if the annuity is to be held by trustees for the annuitant with a gift over in case he should alienate or become bankrupt, his right to receive the fund is intercepted (*c*). If the gift is not immediate, but is postponed until the death of a tenant for life, and the annuitant dies before the tenant for life without alienating or becoming bankrupt, it should seem on principle that, as the event on which his interest was to be defeated has not happened, such interest, which originally and apart from the gift over was vested and transmissible (*d*), remains intact, and that his representatives are entitled to the fund; and so it was decided in Day *v.* Day (*e*).

Where interest of legatee is left to discretion of trustees.

Where the amount to be applied for the benefit of the legatee is left to be fixed at the discretion of trustees, the legatee has no right to any more than the trustees in their discretion will allow. *398 * Thus, where real and personal estate was given to trustees upon trust to apply the whole *or any part* of the rents and annual income towards the maintenance of A., and the trustees applied a part only, and then A. died; it was held that his representatives were not entitled to the surplus rents and income (*f*). And in a case where a testator authorized his trustees to apply any sum not exceeding a stated amount in the purchase of church preferment for A., and A. died before any sum had been so applied; it was held that the gift failed; a discretion was vested in the trustees as to the amount of the legacy, and as to the mode and occasion of raising it, and A. could not in his lifetime have claimed payment of it to himself (*g*). But as soon as the trustees exercise their discretion by making a purchase for the object of their power, the thing purchased becomes the absolute property of the latter (*h*); and instead

(*b*) Post, Ch. XIX. s. 2.

(*c*) Hatton *v.* May, 3 Ch. D. 148; per Kindersley, V.-C., Day *v.* Day, 22 L. J. Ch. 881, 17 Jur. 586, also shortly and *semb.* inaccurately reported 1 Drew. 569. But where the annuity was to be purchased *in the name* of the annuitant, it was held that a gift over was ineffectual, and the annuitant entitled absolutely. Hunt-Foulston *v.* Furber, 3 Ch. D. 285.

(*d*) Bayley *v.* Bishop, 9 Ves. 6; and cases n. (*x*), supra.

(*e*) Supra. But the point was decided otherwise by Malins, V.-C., Power *v.* Hayne, L. R. 8 Eq. 262.

(*f*) In Re Sanderson's Trust, 3 K. & J. 497. Compare Beevor *v.* Partridge, 11 Sim. 229. If the whole income is needed for maintenance the result is the same as if there were an absolute trust. Rudland *v.* Crozier, 2 De G. & J. 143.

(*g*) Cowper *v.* Mantell, 22 Beav. 231.

(*h*) Lawrie *v.* Bankes, 4 K. & J. 142. (Commission in the army purchased, and soon after sold by the object.)

of applying a sum specifically the trustees may hand it over to the object (*i*).

Where the motive or purpose of the gift is the benefit of other persons as well as the primary donee, three constructions obtain, according to the language used. The purpose may be so peremptorily expressed as to constitute a perfect trust; or may be such as to leave entirely in the discretion of the primary donee the *quantum* of benefit to be communicated to the other persons, provided that such discretion is honestly exercised; or lastly, the expression of motive or purpose may be merely nugatory and not operate to abridge the previous absolute gift to the primary donee. In the following cases, illustrating these distinctions, the decisions will be found on examination of the reports to turn in many instances on minute distinctions, which it would require too much space to particularize; and some cases will be found almost irreconcilable with others: the preponderance, however, seems to lean in favor of giving the primary donee a discretion which he must honestly exercise, or in default, subject himself to the control of the court, with a tendency, however, rather to narrow than to extend the effect heretofore ascribed to words expressing the purpose or motive of the gift.

Where the purpose not for benefit of donee alone, three constructions.

a. As to the cases in which a complete trust is created. A *gift to A., to dispose of among her children (*k*), or for bringing *399 up her children (*l*), gives A. no interest, but creates a complete trust for the children. And in Taylor *v.* Bacon (*m*), where the testator bequeathed the dividends of stock to R., the wife of his son G., for the benefit of his son G., of herself and of their children, and after the decease of G., the stock to remain in trust for the benefit of R. and her children during her lifetime, if she should remain a widow; it was held that the wife was a trustee of the interest for herself, her husband and children.

a. Cases of complete trust.

In Jubber *v.* Jubber (*n*), the bequest was to the testator's wife for the benefit of herself and her unmarried children, that "they may be comfortably provided for as long as my wife may remain in this life," with a bequest over upon her death. The widow and unmarried daughters were held to be entitled in equal shares to the income during the widow's life, whether as joint-tenants or tenants in common was not decided. In Wetherell *v.* Wilson (*o*), the testatrix, under a general power, bequeathed a sum of stock in trust for her children at twenty-one or marriage, and directed the trustees, in the mean time, to pay the interest of the fund to her husband, in order the better to enable him

(*i*) Messeena *v.* Carr, L. R. 9 Eq. 260; Palmer *v.* Flower, L. R. 13 Eq. 250. In the latter case the power was to purchase promotion in the army, and, in the mean time, purchase was abolished. In Re Ward's Trusts, L. R. 7 Ch. 727, it was held otherwise in case of a deed.

(*k*) Blakeney *v.* Blakeney, 6 Sim. 52. (*l*) Pilcher *v.* Randall, 9 W. R. 251.

(*m*) 8 Sim. 100; see also Chambers *v.* Atkins, 1 S. & St. 382; Fowler *v.* Hunter, 3 Y. & J. 506; Re Camac's Trust, 12 Jur. 470; Barnes *v.* Grant, 26 L. J. Ch. 92; Bibby *v.* Thompson, 32 Beav. 646. (*n*) 9 Sim. 503. (*o*) 1 Kee. 80.

to maintain the children of the marriage, until their shares should become assignable to them. Lord Langdale decided that the husband took nothing beneficially, but was bound to apply the income for the benefit of the children. In Wilson *v.* Maddison (*p*), the testator bequeathed "to A. W., with her little girl and two little boys, for their joint maintenance, — their mother to have the care of bringing them up to the best of her power, till they are able to do for themselves, — 30*l.* a year, to be paid to the said mother, as above, half-yearly, as may best suit;" and it was held that the four persons were constituted joint-tenants, and that while three were minors, the fourth, being an adult, should receive the annuity for their maintenance (*q*).

b. Cases in which there is a discretion liable to be controlled.

b. As to the cases in which the court has considered the primary donee to have a discretion liable to be controlled, if not honestly exercised (*r*). In Hamley *v.* Gilbert (*s*), the residue was given to E. G. H., to be laid out and expended *400 by her at her * discretion, for or towards the education of her son F. G. H., and that she should not at any time thereafter be liable and subject to account to her said son or to any other person whatever for the disposal or application of such residue or any part thereof. It was held that E. G. H. was absolutely entitled to the residue, subject to a trust, to apply a part to the education of her son *during his minority* (*t*), and it was referred to the master to inquire what would be a sufficient sum to be appropriated for that purpose. In Gilbert *v.* Bennett (*u*), the testator bequeathed all his property to his wife and two other persons in trust, to pay the income to his wife for the education and support of his children by her; but none of his property was to be disposed of, but the income arising therefrom to be applied as above, to their maintenance and support, and advancement in life and support of his children; and after her death, he gave the property to be divided among his children. The V.-C. said, the natural construction of the will was, that the testator intended the whole of the income to be paid to his wife for her life, and to impose on her the burden of maintaining and educating the children out of it. In Hadow *v.* Hadow (*x*), Leach *v.* Leach (*y*), Browne *v.* Paull (*z*), and Longmore *v.* Elcum (*a*), words nearly similar received the same con-

(*p*) 2 Y. & C. C. C. 372.
(*q*) See also Re Harris, 7 Exch. 344.
(*r*) The mode and extent of interference exercised by the court depend on the will in each case. See Castle *v.* Castle, 1 De G. & J. 352. (*s*) Jac. 354.
(*t*) As to the confinement of the trust to minority, see Gardiner *v.* Barber, 2 Eq. Rep. 888, overruling Soames *v.* Martin, 10 Sim. 287, *contra*. But where the income of a fund is to be applied for the maintenance or education of the legatee during the life of A. or during any other specified period, the trust does not cease on the legatee attaining majority or dying in A.'s lifetime. Longmore *v.* Elcum, 2 Y. & C. C. C. 363; Bayne *v.* Crowther, 20 Beav. 400; Brocklebank *v.* Johnson, ib. 211, 212. So even where the trust is for maintenance, education, and *bringing up*. Badham *v.* Mee, 1 R. & My. 631. As to cesser of the trust on marriage of a daughter, see Camden *v.* Benson, cit. 8 Beav. 350; Bowden *v.* Laing, 14 Sim. 113; Carr *v.* Living, 28 Beav. 644; Scott *v.* Key, 35 Beav. 291. (*u*) 10 Sim. 371.
(*x*) 9 Sim. 438. (*y*) 13 Sim. 304.
(*z*) 1 Sim. N. S. 92; see also Bowden *v.* Laing, 14 Sim. 113.
(*a*) 2 Y. & C. C. C. 363.

struction. It appears, as the result of these authorities, that where the interest of the children's legacies is given to a parent to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed upon him of maintaining and educating the children (*b*) ; and that a contrary intention is not indicated by a direction, that in case of the parent's death, other trustees should make the application of the fund, in which case, however, such trustees would take nothing beneficially (*c*). Result of the authorities.

[*In Crockett *v.* Crockett (*d*), where the testator directed that all his property should be at the disposal of his wife for herself and children, the only point decided was that the wife and children were not joint-tenants; but Lord Cottenham was of opinion that the wife had a personal interest in the fund, and that as between herself and her children she was either a trustee with a large discretion as to the application of it, or had a power in favor of the children, subject to a life-estate in herself. The former construction would have been the more consistent with the previous authorities. The latter would not only have introduced a limitation of the wife's interest not expressed in the will, but would have left that diminished interest still subject to the charge of maintaining the children. A "recommendation" not to diminish the principal, but to vest it in government or freehold securities, has been held to require this construction (*e*). *401 Crockett *v.* Crockett.

In Raikes *v.* Ward (*f*), the gift was to the testator's wife, "to the intent she may dispose of the same for the benefit of herself and our children in such manner as she may deem most advantageous." The court, in deciding against the claim of the children to an absolute interest, said, it could not deprive the widow of the honest exercise of the discretion which the testator had vested in her, or refuse its assistance to inquire into or sanction any reasonable arrangements which she might desire to make. Expressions somewhat similar to those found in the last two cases have received the same construction in the cases of Conolly *v.* Farrell (*g*), Woods *v.* Woods (*h*), and Costabadie *v.* Costabadie (*i*). Raikes *v.* Ward. Other cases.

In several cases (*k*), the court has held the donee entitled to receive

(*b*) Per Lord Cranworth, 1 Sim. N. S. 103. (*c*) Ib. 105.
(*d*) 2 Phil. 553, reversing the decision, 5 Hare, 326 (which seems to have proceeded on some misapprehension of the decree, 1 Hare, 451). See also Scott *v.* Key, 35 Beav. 291; Armstrong *v.* Armstrong, L. R. 7 Eq. 518.
(*e*) Hart *v.* Tribe, 18 Beav. 215; but see per Turner, L. J. 1 D. J. & S. 418.
(*f*) 1 Hare, 445. (*g*) 8 Beav. 347.
(*h*) 1 My. & Cr. 401.
(*i*) 6 Hare, 410; and see Cowman *v.* Harrison, 10 Hare, 234; Smith *v.* Smith, 2 Jur. N. S. 967; Godfrey *v.* Godfrey, 2 N. R. 16; Dixon *v.* Dixon, W. N. 1876, p. 225.
(*k*) Cooper *v.* Thornton, 3 B. C. C. 96; Robinson *v.* Tickell, 8 Ves. 142; Woods *v.* Woods, 1 My. & Cr. 401; Wood *v.* Richardson, 4 Beav. 174; Pratt *v.* Church, ib. 177; Briggs *v.* Sharp, L. R. 20 Eq. 317.

The donee has been allowed to receive the legacy without his interest being declared.

the legacy or dispose of the property devised or bequeathed and receive the proceeds, without saying whether he was absolutely entitled or bound honestly to exercise a discretionary trust. In such cases it was merely decided that there was no absolute trust.

Distinction where given in first instance *absolutely*.

But here, as in the case of precatory trusts, if the property is given in the first instance for the absolute *402 benefit, or to be at * the disposal, of the donee, especially if such donee be the parent, no trust will be created by subsequent words showing that the maintenance of the children was a motive of the gift. And, although it is not directly denied that the court may control the execution of a trust where the shares of the beneficiaries are left to the discretion of the donee (for the court is in the constant habit of ascertaining the amount required for maintenance of children), yet increased weight is given to that indefiniteness as showing that no trust whatever was intended. Thus, in Lambe *v.* Eames (*l*), where a testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family;" the widow made a will disposing of part of her husband's estate, and giving an interest therein to a natural son of one of his children; and the questions were whether there was a trust, and if there was, whether it had been duly executed. Crockett *v.* Crockett, and other cases cited above, were pressed on the court; but with reference to them Sir W. James, L. J., expressed a strong disapproval of the "officious kindness" of the court in interposing trusts where none were intended, and said, "If the case stood alone, I should say that no sufficient trust was declared by the will; but if there be any such obligation, I think it has been fairly discharged by the way in which she (the widow) has made her will" (*m*).

c. Where primary donee held absolutely entitled.

c. Lastly, as to cases where the primary donee was held to be absolutely entitled.

Brown *v.* Casamajor.

In Brown *v.* Casamajor (*n*), a legacy was given to a father, the better to enable him to provide for his younger children. The father consented to secure the principal for the benefit of his younger children, but the court, on his petition, held him entitled to the past arrears of interest. The report suggests no reason for this decision, but that which appears to be the reasonable one, viz., that the legacy was originally absolute to the father, and remained so except so far as his consent to settle it had deprived him of his interest.

Again, in Hammond *v.* Neame (*o*) there was a gift to a trustee of a

(*l*) L. R. 6 Ch. 597. See also Mackett *v.* Mackett, L. R. 14 Eq. 49. But see Scott *v.* Key, 35 Beav. 291.

(*m*) In Willis *v.* Kymer, 7 Ch. D. 181, a precatory trust for children, *simpliciter*, was held well executed in regard to daughters by limiting their shares to their separate use.

(*n*) 4 Ves. 498.

(*o*) 1 Sw. 35.]

sum of stock, upon trust to pay the income to the testator's niece, "for and towards the maintenance, education and bringing up of all and every her children, until he, she, or they shall attain * twenty-one;" and then the stock was given equally among them. The niece having *no children at the testator's death*, it was held that she was entitled to the interest of the stock.] Hammond v. Neame. *403

So, in Benson *v.* Whittam (*p*), a testator bequeathed certain annuities to be paid out of any money arising from whatever dividends he might die possessed of in the Bank of England, and the residue of the dividends to his brother A. (to enable him to assist such of the children of the testator's deceased brother F. as he might find deserving of encouragement), to be paid to the several persons as they became due. Sir L. Shadwell, V.-C., decided that the words in the parenthesis did not raise any trust in favor of the children of F.; they merely expressed the motive or cause of the gift, and he commented on other passages corroborating this conclusion. Benson v. Whittam.

[In Thorp *v.* Owen (*q*), the testator desired that everything should remain in its present position during the lifetime of his wife, and after her decease gave his real and personal property to other persons, and then added, "I give the above devise to my wife, that she may support herself and her children according to her discretion and for that purpose." Sir J. Wigram, V.-C., decided that the widow took absolutely for her life. He said: "The cases should be considered under two heads: first, those in which the court has read the will as giving an absolute interest to the legatees, and as expressing also the testator's motive for the gift; and, secondly, those cases in which the court has read the will as declaring a trust upon the fund or part of the fund in the hands of the legatee (*r*). A legacy to A., the better to enable him to pay his debts, expresses the motive for the testator's bounty, but certainly creates no trust which the creditors of A. could enforce in this court; and again, a legacy to A., the better to enable him to maintain or educate and provide for his family, must, in the abstract, be subject to a like construction. It is a legacy to the individual, with the motive only pointed out. This is very clearly, and, in my opinion, rightly laid down by the V.-C. in Benson *v.* Whittam; and the cases of Andrews *v.* Partington (*s*), Brown *v.* Casamajor, and Hammond *v.* Neame, illustrate the same principle. At the same time, a legacy to a parent, upon trust to be by him applied, or in trust for the maintenance and education of his children, will certainly give the children a right, in a Court of Equity, * to enforce their natural claims against the parent in respect of the fund on which the trust is declared." And the V.-C. added (*t*): "If you give property to persons to accomplish an object, *increasing their funds*, so that they might Thorp v. Owen. *404

(*p*) 5 Sim. 22.
(*q*) 2 Hare, 607.
(*r*) This second head has in the text been split into two divisions.
(*s*) 2 Cox, 223. Compare Barrs *v.* Fewkes, 2 H. & M. 60.
(*t*) Page 614.

be better able to do it, that is, in point of fact, a gift to them, and there is no trust which others can enforce." This is an important distinction, clear in principle, but often difficult of application.

Bequest to A. to maintain B.

In Biddles *v.* Biddles (*u*), under a gift to A., to bring up and maintain B., A. was held to be absolutely entitled. And in Byne *v.* Blackburn (*x*), where the testator bequeathed a sum of money to trustees, in trust after the death of his daughter M., to pay the dividends to her husband during his life, "nevertheless *to be by him applied* for or towards the maintenance, education or benefit of the children of M.," it was held that no trust was created in favor of the children, and that A. was entitled absolutely for his life; on the ground that if the testator had intended A. to be merely a trustee, he would not have made the bequest in the first instance to other trustees; and that where there is a gift to a parent, coupled with a direction that he shall perform certain parental duties (which are legal obligations as regards a father, but are merely moral obligations in the case of a mother), it is a gift to and a beneficial interest in the person to whom it is made. Yet nothing is more common in trusts for the maintenance of children than to direct the trustees to pay the money over to the children's guardian, to be by him applied for their benefit; and with regard to the second reason, it is difficult to reconcile it with Sir J. Wigram's remarks cited above.]

Remarks upon the cases.

Such, then, is the long train of decisions arising from the neglect of testators clearly to distinguish between expressions which are meant to impose a trust or obligation, and those which are intended merely to inculcate the discharge of a moral duty [or point out the motive of the gift.] At one period the courts seem to have been so astute in detecting an intention to create a trust when wrapped in the disguise of vague and ambiguous expressions, as almost to take from a testator the power of intimating a wish without creating an obligation, unless, indeed, by the use of words distinctly negativing the contrary construction. But though *a sounder principle now prevails, the practitioner will perceive, in the state of the authorities, the strongest incentive to caution in the employment of words which may give rise to a question of this nature. If a trust is intended to be created, this should be done in clear and explicit terms; and if not, any request or exhortation which the testator may choose to introduce, should be accompanied by a declaration, that no trust or legal obligation is intended to be imposed.

*405

Sometimes a testator's recommendation in favor of a third person is not of a nature to create a simple absolute trust for his benefit, but has

(*u*) 16 Sim. 1; see also Berkeley *v.* Swinburne, 6 Sim. 613; Oakes *v.* Strachy, 13 Sim. 414; Leigh *v.* Leigh, 12 Jur. 907; Jones *v.* Greatwood, 16 Beav. 528; Hart *v.* Tribe, 18 Beav. 215 (as to the 100*l.*); Wheeler *v.* Smith, 1 Gif. 300; Howarth *v.* Dewell, 29 Beav. 18.

(*x*) 26 Beav. 41. See also the judgment in Lambe *v.* Eames, L. R. 6 Ch. 597.]

for its object the placing or continuance of such person in some office or capacity connected with the property that is the subject of disposition involving the performance of a certain duty. As where a testator directs that the tenants of the devised property shall be allowed to continue in its occupation, either with or without a condition or restriction as to rent, cultivation, &c.

Direction to permit tenants to continue in occupation;

As in Tibbits *v.* Tibbits (*y*), where a testator made a devise to his son, recommending him to continue his cousins A. and B. "in the occupation of their respective farms in the county of W. as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents," it was held to be a trust for the cousins who had been tenants at will.

It has been much discussed whether a direction or injunction to employ a particular agent or steward, imposes on the devisee an obligation in the nature of a trust in favor of the person so named, subject, of course, to the implied condition to faithfully discharge the duties of the office. [Thus, in Hibbert *v.* Hibbert (*z*), the testator, whose only real estates were in Jamaica, *directed* that his friend H. should be appointed receiver of his real and personal estates, adding that he made this appointment for the sake of benefiting H. in a pecuniary point of view. Sir W. Grant, M. R., held that H. was entitled to be receiver, agent and consignee for the Jamaica estates, upon his personal recognizance, without (as would have been required if he had not been appointed by the testator) giving the usual security.]

—to employ a particular steward, &c.

Hibbert *v.* Hibbert.

So, in Williams *v.* Corbet (*a*), where a testator devised his estates to trustees upon trust to let the same, and apply the *rents in paying off certain incumbrances, and appointed A. to be auditor of the accounts during the execution of the trusts, and *directed* the trustees to pay him the usual annual remuneration. Sir L. Shadwell, V.-C., held that the trustees were not justified in removing A. from the office, there being no imputation on his conduct, for that he had as much right to be the auditor as any one of the devisees had to the estates.

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Williams *v.* Corbet.

[On the other hand] in Lawless *v.* Shaw (*b*), where a testator after devising his estates, charged with certain annuities, to his friend William Shaw (then aged twenty years) for life, with remainders over in strict settlement, and after bequeathing to his friend and agent B. E. Lawless 100*l.* as a token of the testator's esteem for him, and after directing his executors to pay his agent 150*l.* to be distributed among the poor of his estates, declared it to be his particular desire that his executors, whilst acting in the management of all or any of his affairs, as also his friend

Lawless *v.* Shaw.

Direction to employ a particular steward.

(*y*) 19 Ves. 656. [Compare Quayle *v.* Davidson, 12 Moo. P. C. C. 268.

(*z*) 3 Mer. 681. See also Saunders *v.* Rotherham, 3 Gif. 556 (direction to continue testator's trade and employ A. as manager).]

(*a*) 8 Sim. 349.

(*b*) 1 Ll. & Go. 154.

W. Shaw, when he should enter into the receipt of the rents of his estates, should continue Lawless in the receipt and management thereof, and likewise should employ and retain him in the agency and management of lands to be purchased in pursuance of the will, at the usual fees allowed to agents, he having acted for the testator since he became possessed of the estate fully to his satisfaction. The testator also bequeathed to his friend and agent Mr. Lawless 150*l.* to purchase a monumental tablet. Soon after the testator's decease, Shaw, the devisee for life, dismissed Lawless from his office as land-agent, but without impeaching his character or capacity. Lawless filed a bill against Shaw, claiming to be reinstated, which was dismissed by Lord Plunket; whose decree, however, was upon a rehearing reversed by his successor. After reading the clause of the will applicable to Lawless, Sir E. Sugden inquired: "Is that a simple recommendation to continue him in an office removable at pleasure, and which the devisee may put an end to the next hour? or, is it a direction to continue him against the will of the devisee, subject of course to the conditions implied, that he conduct himself honestly and faithfully in the discharge of his duty, and continue competent both in mind and body? Does it mean that the agency shall be of the same character, and that he was to be continued in the same manner as he was employed by the testator himself, that is, removable at pleasure?" His Lordship then proceeded to show
*407 at some length that it was * clearly imperative on the trustees to employ Lawless during Shaw's minority. "Now if it was," he continued, "imperative on the trustees to employ him during the minority, can I draw a distinction and say, that a different right was given by the same words to Shaw from that given to the trustees, particularly in a will where, as I have pointed out, the testator knew how to distinguish the powers which he gave, according to the persons by whom and the period at which they were to be exercised? If imperative on the trustees, it was equally so on Shaw, when he succeeded to the estate. If you look at the language of the clause there can be no doubt as to the intention. It is in substance this: I have found him a faithful agent to myself, and it is my particular desire that you retain him in the management of the estate, and I will leave no doubt as to the fees he is to receive. The word 'continue' is used in the first part of the clause, and in the second the words 'retain and employ.' These are strong words importing a continuance and endurance as long as he conducts himself properly. In the preceding clause there is an absolute gift of 150*l* for charity, and a direction that it should be paid to Lawless to be by him distributed. Can any one doubt that that is imperative? though merely a direction it is nevertheless just as binding as the gift itself of the money to the poor. This is followed by the clause in question, 'and it is also my particular desire,' &c.; these words, in connection with the gift in the preceding clause, import a gift also to Lawless himself: then it is said Shaw is made tenant for life, and can you cut down his life-estate? To this I

answer, I leave him as I find him. The testator employed this gentleman to receive his rents, and desired his devisee to continue him; this is in the nature of a condition imposed on the tenant for life, and therefore the person who takes the estate must perform the condition. It is said that this was intended for Shaw's benefit. It may be so, but not exclusively; I have no means of forming a judgment whether it was or was not. I cannot say whether the testator may not have intended a benefit to the estate itself; he certainly did, so far as he made it imperative upon the trustees to employ Lawless during the minority. A very young man was about to step into possession of an estate; the testator, therefore, might wisely say: 'I will take care to have a faithful agent employed for the benefit of the estate itself; I will at the same time make the office a reward to a tried agent for his past exertions.' Then it is said, Suppose the testator recommended the devisee to * employ a particular baker or tailor; well, suppose the testa- *408 tor did make such a condition in clear express terms, for it would not be implied; *a man may devise an estate under any condition he pleases, provided it is not an illegal one.*"

[The decision of Sir E. Sugden was, however, reversed, and that of Lord Plunket established in D. P. (*c*), on the ground that a gift of an estate to one person is inconsistent with a direction that another should have the management of it. Lord Cottenham said: "If Lawless's title is what it has been argued to be, he has an equitable charge on the legal estate of Shaw; and as he is to have the usual fees of 5*l.* per cent, the result would be that Lawless would not only be an equitable incumbrancer to that amount, but would have a right to manage and direct the estate, and would have full power over the conduct of the property. If so, the testator must have intended that Shaw, to whom he gave the estate for life, should not have the direction of his own estate; for the two powers of direction and management are inconsistent with each other. He must be taken on this view of the case to have intended that the legal devisee for life should not have the management, but that the equitable incumbrancer on the real estate should have the control and management of the property. But the trustees of the will are, during a considerable part of the time, to have not only the management of the estate which the testator devised, but are authorized and directed to lay out part of the personalty, the residue, in the purchase of other lands. If Lawless is the equitable incumbrancer to the amount of one twentieth part of the income of the estate, he has a clear interest in the residue, for he might take one twentieth part of the residue. He might file a bill in chancery, in order to control the application of the residue, and claim to be absolutely interested in what he is entitled to receive, namely, this one twentieth part." The observation as to Lawless being entitled to

Shaw *v.* Lawless, in D. P. reversing decision below.

[(*c*) Shaw *v.* Lawless, 5 Cl. & Fin. 129. See also Finden *v.* Stephens, 2 Phill. 142.

one twentieth share of the residue seems scarcely applicable, for he had in fact, at the utmost, only a percentage on the rents *as a salary*, for performing a duty, and that only so long as he performed it properly and obeyed his employer (*d*). The due yearly performance of that duty was, therefore, a condition precedent to his right to receive his yearly percentage, and such a right to a percentage of the receipts could scarcely be converted into a right to a *like* percentage of the capital.]

(*d*) See 1 Ll. & G. 172.

*CHAPTER XIII. *409

PAROL EVIDENCE, HOW FAR ADMISSIBLE.[1]

As the law requires wills both of real and personal estate (with an inconsiderable exception) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the contents of such will (*a*);[2] and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure

Parol evidence inadmissible to control will.

(*a*) Goss *v.* Lord Nugent, 5 B. & Ad. 64, 65; Wigram on Wills, 5; Lowfield *v.* Stoneham, 2 Stra. 1261.]

[1] It is laid down by high authority that there is no material difference of principle in the rules of interpretation between wills and contracts, except what naturally arises from the different circumstances of the parties. 1 Greenl. Ev. § 287. The object in both cases is the same, namely, to discover the intention. And to do this, the court may, in either case, put itself in the place of the party, and then see how the terms of the instrument affect the property or subject-matter. Doe *v.* Martin, 1 Nev. & M. 524; Brown *v.* Thorndike, 15 Pick. 400. With this view, evidence must be admissible of all the circumstances surrounding the author of the instrument. It is only thus that parol evidence is admissible to explain written instruments; thereby showing the situation of the party in all his relations to persons and things around him. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings; or if the terms are vague and general, or have divers meanings in a will, the words, *e.g.* "child," "children," "grandchildren," "son," "family," or "nearest relation," being loosely employed (see Blackwell *v.* Bull, 1 Keen, 176; Brown *v.* Thorndike, 15 Pick. 400; 1 Phill. Ev. pp. 532–547, Cowen's notes, 939–958); — in all these and the like cases, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect. In regard to wills, much greater latitude, however, was formerly allowed, in the admission of evidence of intention, than is warranted by the later cases. The modern doctrine on this subject conforms more to principle; being nearly or quite identical with that which governs the interpretation of other instruments. See Hiscocks *v.* Hiscocks, 5 M. & W. 363, 367; Webley *v.* Langstaff, 3 Desaus. 509; Breckenbridge *v.* Duncan, 2 A. K. Marsh. 51; Reeves *v.* Reeves, 1 Dev. Eq. 386; Patterson *v.* Leith, 2 Hill, Ch. 16; Comfort *v.* Mather, 2 Watts & S. 450; Lewis *v.* Lewis, ib. 455; Haydon *v.* Ewing, 1 B. Mon. 113; Miller *v.* Travers, 8 Bing. 244; 1 Phill. Ev. 545; 3 Phill. Ev. Cowen & Hill's notes, 1362, *et seq.* and cases cited; Puller *v.* Puller, 3 Rand. 83; Kimball *v.* Morrell, 4 Greenl. 368; Brown *v.* Thorndike, 15 Pick. 400. Hence, if the words of a will are clear, and have a definite meaning, no extrinsic evidence to show a different meaning can now be admitted. Brown *v.* Saltonstall, 3 Met. 426; 1 Greenl. Ev. § 290; 1 Story, Eq. Jur. § 181; Chambers *v.* Minchin, 4 Ves. (Sumner's ed.) 675, note (*a*); Selwood *v.* Mildmay, 3 Ves. (Sumner's ed.) 306, note (*a*); Fonnereau *v.* Poyntz, 1 Bro. C. C. (Perkin's ed.) 480, note (*a*), and cases cited; Spalding *v.* Huntington, 1 Day, 8; Hand *v.* Hoffman, 3 Halst. 71; Canfield *v.* Bostwick, 21 Conn. 550. For example, a devise to the testator's children, he having children of his own and step-children, does not embrace the step-children; and parol evidence is inadmissible to show that the testator intended to include them. Fouke *v.* Kemp, 5 Harr. & J. 135. See post, p. 414, n.

[2] Kinsey *v.* Rhem, 2 Ired. 192; Whitlock *v.* Wardlaw, 7 Rich. 453.

of the testator's intended disposition; for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources. No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the judges, as well of early as of later times, with a cordiality and steadiness which show how entirely it coincided with their own views. Indeed, it was rather to have been expected that judicial experience should have the effect of impressing a strong conviction of the evil of offering temptation to perjury.

Letters and oral declarations of testator rejected.

Thus (among many instances) (*b*), in Strode *v.* Lady Falkland (*c*), letters and oral declarations of the testator being offered to prove the intention to include a reversion in the words, "All other my lands, tenements, and hereditaments, out of settlement," it was unanimously agreed by Lord Cowper, C., J. Trevor, M. R., T. Trevor, C. J., and Tracy, J., that this kind of evidence could not be admitted,[1] for that where a will was doubtful *410 and uncertain, * it must receive its construction from the words of the will itself; and no parol proof or declaration[2] ought to be admitted out of the will to ascertain it.

Evidence of mistake by person who drew the will rejected.

So, in Brown *v.* Selwin (*d*) (which is a leading authority), where the testator having bequeathed the residue of his personal estate to two persons, whom he appointed his executors, and one of whom was indebted to him by bond, it was attempted to be proved by the evidence of the person who drew the will, that he received the testator's written instructions to release the bond debt by the will, but that he refused to do so, under the impression that the appointment of the obligor to be one of the executors extinguished the debt — Lord Talbot held the evidence to be inadmissible; and his decree was affirmed in D. P.[3]

(*b*) Cheney's case, 5 Rep. 68; Vernon's case, 4 Rep. 4; Lawrence *v.* Dodwell, 1 Ld. Raym. 438; Bertie *v.* Falkland, 1 Salk. 232; Gowers *v.* Moor, 2 Vern. 98; Bennett *v.* Davis, 2 P. W. 316; Parsons *v.* Lanoe, 1 Ves. 189; Ulrich *v.* Litchfield, 2 Atk. 374; [Parmiter *v.* Parmiter, 1 J. & H. 135.]

(*c*) 3 Ch. Rep 98.

(*d*) Cas. t. Talb. 240, 3 B. P. C. Toml. 607. [It must always be assumed that the language of the will is that of the testator: if proposed by his professional adviser, it is yet adopted by him; per Wood, V.-C., 10 Hare, 348, 349; and see per Romilly, M. R., 32 Beav. 423. And parol evidence that a will was or was not drawn by a skilled person is not admissible, though any evidence on the point apparent on the face of the will may be considered in construing it, Richards *v.* Davies, 13 C. B. N. S. 69, 861; and if obviously technically drawn, the technical is the primary meaning, per Byles and Willes, JJ., Thellusson *v.* Rendlesham, 7 H. L. Ca. 449, 486. But as in the case of a deed (10 East, 427, 4 B. & Cr. 272), so in the case of a will, evidence is admissible to show that the instrument was in fact executed on a different day from that stated in it. Reffell *v.* Reffell, L. R. 1 P. & D. 139.]

[1] See Mann *v.* Mann, 14 Johns. 1; Ryerss *v.* Wheeler, 22 Wend. 148.

[2] Woodruff *v.* Migeon, 46 Conn. 236; *i.e.* where the language of the will is clear.

[3] See Jackson *v.* Sill, 11 Johns. 201; Tucker *v.* Seaman's Aid Society, 7 Met. 188; Bradley *v.* Bradley, 24 Mo. 311.

Lord Walpole *v.* Earl of Cholmondeley.

Again, in Lord Walpole *v.* Earl of Cholmondeley (*e*), where it appeared that the testator, the Earl of Orford, made a will in 1752, whereby he devised his real estate to certain limitations. In 1756 he made another will, altering those limitations; but in neither of these wills did he bequeath his personalty, appoint executors, or make any provision for the payment of his debts. In 1776 he sent for his attorney, to make a codicil for these purposes; and, on the attorney telling him he should want his will, his Lordship sent him for it to his steward, who gave him the will of 1752. The other will appears not to have been in his custody. The attorney then drew the codicil, which recited generally, that by his last will and testament, *dated 25th November*, 1752, the testator had devised his real estate to certain uses, but had not charged the same with the payment of his debts or legacies, or disposed of his personal estate, or appointed any executors; and he declared that writing to be a codicil *to his* * SAID *last will*, and to be accepted and taken as part thereof, *411 and revoked the same so far only as it was incompatible with the codicil; and he subjected all his estates to the payment of his debts, the legacies thereinafter bequeathed, and his funeral expenses, gave several legacies, and appointed executors. The codicil was duly executed. The parol evidence also went to show, that when the testator made the will of 1756, he told one of the witnesses that he and his great-uncle (to whom the property was thereby limited for life, with remainder to his sons in strict settlement) had made reciprocal limitations in favor of each other's families, in case of failure of issue of either of them. And it appeared further, that when he made the codicil of 1776, he expressed no intention of altering the limitations of the real estate, further than by subjecting it to his debts, legacies and funeral expenses. The question was, whether this evidence could be received to control the operation of that codicil, which had, by republishing the recited will of 1752, revoked that of 1756 (*f*). The court of C. P., and afterwards the court of K. B., on a writ of error, held the evidence to be inadmissible.[1] It had been argued, that the evidence raised a latent ambiguity on the words "last will, dated 1752," by showing that that will was not the last will; and that though the expression "last will" was generally used in a

Express republication of antecedent will not controlled by parol evidence.

(*e*) 7 T. R. 138, 3 Ves. 402; [Re Chapman, 8 Jur. 902, 1 Rob. 1; Payne *v.* Trappes, 1 Rob. 583, 11 Jur. 854; and see Stringer *v.* Gardiner, 27 Beav. 35, 4 De G. & J. 468; Re Nunn's Trusts, L. R. 19 Eq. 332; Farrer *v.* St. Catharine's College, L. R. 16 Eq. 19. Quincey *v.* Quincey, 5 Nn. Cas. 154, 11 Jur. 111, and Re Thomson, L. R. 1 P. & D. 8, are *contra: sed qu.* The *decision* in the former of these two cases may perhaps be supported on the same grounds as Rogers *v.* Goodenough, 2 Sw. & Tr. 342, 31 L. J. Prob. 49; for it appears that the will mistakenly referred to had been destroyed. *Vide ante*, p. 191.

(*f*) Ante, p. 188.

[1] Parol declarations of a testator as to his intention of dying intestate are inadmissible to show a revocation of his will. Lewis *v.* Lewis, 2 Watts & S. 455. See ante, p. 188. Such declarations are inadmissible on the question of revocation, unless they are part of the *res gestæ*. Dan *v.* Brown, 4 Cowen, 483. See Jackson *v.* Betts, 9 Cowen, 208; Jackson *v.* Kniffen, 2 Johns. 31.

technical sense, it was sometimes used in the strict and literal sense, and, therefore, evidence should be admitted to show in what sense it was used by the devisor; but Lord Kenyon observed, that neither of those instruments was a will, properly so called, until the death of the devisor: but were ambulatory until that time, and either of them was capable of being destroyed or set up by the devisor. "Supposing," continued his Lordship, "Lord Orford had said to the attorney, 'I have two wills in the steward's hands, desire him to send me the last will,' and the steward had, by mistake, sent him the first, and that mistake had been shown by parol evidence, there would have been a latent ambiguity; and it seems to me (though the opinion is extra-judicial), that that ambiguity might have been explained by other parol evidence, on the same principle as in the instance of cancelling a will, where parol evidence is admitted to show *quo animo* the act was done; or as in the case of a child's destroying a deed."

Difference between revoking act and revoking codicil.

It will be observed, that in the two cases suggested *412 by Lord * Kenyon, the alleged revoking act is from its nature susceptible of, and indeed requires, this species of explanation. The same observation would have applied to the case then before the court, if the revocation had consisted in the act of the steward sending the wrong will; but as this evidently was not the case, the revocation being wholly produced by the fact of the will being referred to in the codicil, it was clearly impossible, upon the principle adopted in this case, to admit parol evidence of the actual intention to control the revoking effect of the codicil.

Devise inadvertently omitted cannot be supplied.

A fortiori parol evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will.[1] Thus, in Earl of Newburgh *v.* Countess of Newburgh (*h*) where a testator gave instructions to his solicitor to prepare a will, by which his wife was to take an estate for life in lands in the counties of Sussex and Gloucester. The solicitor prepared the draft, and laid it before a conveyancer to settle, by whom, it appeared, that the word "Gloucester" had inadvertently been struck out, and the person who made the fair copy of the settled draft changed the word "counties" into "county;" and the will, therefore, omitted altogether the estate for life in the lands

(*h*) 5 Mad. 364. In Langston *v.* Langston, 8 Bli. 167, 2 Cl. & Fin. 194, a nice question of construction arose, in consequence of the omission of a line by the person copying the will for signature; and Lord Brougham called for and inspected the draft, with a view of informing himself of this fact, in spite of the protestations of the appellant's counsel. Its inadmissibility, however, was admitted by his Lordship, who, in his judgment, emphatically disclaimed all reliance on or influence from the information derived from this source. Perhaps, however, the principle which excludes such evidence was somewhat infringed by the inspection of the draft will, even with the disclaimer; for in such cases who can venture to affirm that his mind has not received a bias, by allowing the inadmissible evidence to have access to it?

1 See Cesar *v.* Chew, 7 Gill & J. 127; Andress *v.* Weller, 2 Green, Ch. 604, 608, 609; Comstock *v.* Hadlyme, 8 Conn. 254; Hyatt *v.* Pugsley, 23 Barb. 285; Abercrombie *v.* Abercrombie, 27 Ala. 489; Harrison *v.* Morton, 2 Swan, 461.

in the county of Gloucester. When the will was executed the abstract of the will (which agreed with the instructions given by the testator), and not the will itself, was read to the testator, so that the mistake remained undiscovered. The widow filed a bill, praying to have the will corrected on this evidence; but Sir J. Leach, V.-C., refused it, because, admitting it to be clearly made out that the mistake existed, the court had no authority to correct the will according to the intention. The will, executed with that omission, was certainly not the will of the devisor; and so it must be found by a jury upon the facts stated as to the Gloucester estate; but the court could not, for that reason, set up the intention of the testator, which by mistake he had been prevented from carrying into execution, as if he had actually executed that intention in the * forms prescribed by the Statute of Frauds. To assume such a jurisdiction would, in effect, be to repeal the Statute of Frauds in all cases where a testator failed to comply with the statute by mistake or accident. His Honor added, that he was willing to direct an issue, whether this was the will of the testator as to the Gloucester estate; and upon this issue the evidence tendered would be admissible (*i*). No such issue was asked. The case was afterwards reheard before the V.-C., when it was suggested, as the result of the conveyancer's evidence, that there was no omission in the will, but that the error was owing to the introduction of a passage which he had at first written, but afterwards struck through with a pen; but which had been copied by mistake in the fair will: and it was contended, therefore, that there ought to be an issue, to try whether those words so introduced by mistake were part of the will. The V.-C. thought that, if such a case had been originally made, they would have been entitled to such an issue (*j*); but that, as it was opposed to the allegations on the record, he could not entertain it. The case was carried to the House of Lords, where the question, whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word "Gloucester" had been inserted in the will, was submitted to the judges, who declared

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(*i*) The report states that a case was cited at the bar on the authority of Richards, C. B., in which Lord Eldon had sent it to the jury upon the same description of facts. [But Lord St. Leonards says (Law of Prop. 207) it could not be maintained that the omission of the word "Gloucester" in the particular devise would render the whole will void as to the Gloucester estate; because although the will did not contain all that the testator intended as to this estate, it contained in the actual devise of it nothing but what he did intend. The case was ultimately decided in D. P. upon the construction of what still appeared on the face of the will. Law of Prop. p. 367.

(*j*) Upon this Lord St. Leonards remarks: "This is a dangerous jurisdiction: for although no doubt the striking out of the two lines would have made the will what the testator directed, yet those lines, though inaccurate, were introduced in order to carry the instructions for the will into legal operation. It might on the same ground be contended that a mistake in a legal limitation made through carelessness or ignorance could be corrected by striking out the words improperly introduced." Law of Prop. p. 197. See also Harter *v.* Harter, L. R., 3 P. & D. 11; Re Davy, 1 Sw. & Tr. 262, 29 L. J. Prob. 161, 5 Jur. N. S. 252. Moreover the effect of striking out the words in Newburgh *v.* Newburgh would be the opposite of that in the decided cases: it would create a devise and not an intestacy. Per Sir J. Wigram, Wills, pl. 183 n. And see Stanley *v.* Stanley, 2 J. & H. 502.]

their unanimous opinion to be, that the evidence was not admissible (*k*).[1]

The distinction suggested in the court below is very important. It seems to amount to this: that though you cannot resort to parol evidence to control the effect of words or *414 expressions which * the testator has used, by showing that he had used them under mistake or misapprehension, nor to supply words which he has not used, yet that you may, upon an issue *devisavit vel non*, prove that clauses or expressions have been inadvertently introduced into the will, contrary to the testator's intention and instructions, or, in other words, that a part of the executed instrument is not his will. In support of this doctrine may be adduced the case of Hippesley *v.* Homer (*l*), where a testator, having by his will dated in 1800, devised his estate to certain limitations, by a codicil made in 1804, after empowering one of the devisees for life to make a jointure and charge portions for children, made certain variations in the limitations in the will, and gave certain additional powers of management to his trustees. The bill alleged,

Clause improperly introduced into will may be rejected on issue *devisavit vel non*.

(*k*) 1 M. & Sc. 352. [See Wade *v.* Nazer, 12 Jur. 188, 6 No. Cas. 46, 1 Rob. 627.]
(*l*) T. & R. 48, n. [See also Powell *v.* Mouchett, 6 Mad. 216; Lord Trimlestown *v.* D'Alton, 1 D. & Cl. 85; Lord Guillamore *v.* O'Grady, 2 Jo. & Lat. 210; Re Duane, 2 Sw. & Tr. 590, 31 L. J. Prob. 173; Re Oswald, L. R., 3 P. & D. 162.

[1] In Comstock *v.* Hadlyme, 8 Conn. 254, the question arose whether an important omission in drafting a will would render it void. The facts were, that the testatrix, intending to give a legacy of one hundred dollars to each of her grandchildren, instructed the scrivener to insert such legacy in her will, and executed the will, supposing that it had been duly inserted, when in fact the scrivener, though he had inserted the names of the legatees, had by mistake omitted the amount. The court held that the mistake did not render the will void. The question how far a will *invalid* as to some of its provisions can be sustained as to others not in conflict with the statute regulating the devise of real estate; and when a will will be avoided *in toto*, on the ground that by declaring void portions of it, the main intent of the testator is defeated, was considered and discussed by Mr. Justice Cowen, in Salmon *v.* Stuyvesant, 16 Wend. 321. The learned judge denied that there was any such doctrine as that a failure in part is fatal to the entire instrument, that the intent of the testator is indivisible, and that the whole must be effectuated, or its identity is lost. "No will of any considerable estate, embracing various kinds of property and seeking to provide for a numerous family by the bestowment of different interests, could ever stand the test of such a principle. Some slight mistake of testamentary power, some uncertainty of expression, some lapse of ademption, or one of the thousand occurrences which baffle human wisdom and forecast, always has arisen and always will arise to prevent the exact fulfilment of all the testator's purposes." See Whitlock *v.* Wardlaw, 7 Rich. 453. In regard indeed to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them, when they are apparent upon the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But, then, the mistake must be apparent on the face of the will, otherwise there can be no relief: for, at least, since the Statute of Frauds, which requires wills to be in writing, parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity. I Story, Eq. Jur. § 169–183; Avery *v.* Chappel, 6 Conn. 270; Mann *v.* Mann, 1 Johns. Ch. 231, 234; Rothmahler *v.* Myers, 4 Desaus. 215; Mellish *v.* Mellish, 4 Ves. (Sumner's ed.) 45, and note (*a*); Phillips *v.* Chamberlaine, ib. 51; Nutt *v.* Nutt, Freem. Ch. (Miss.) 128; Arthur *v.* Arthur, 10 Barb. 9; ante, p. 409, note 1. It follows that an omission by a scrivener in preparing a will of real estate cannot be supplied by parol evidence. Andress *v.* Weller, 2 Green, Ch. 604, 608, 609. Whether such omission can be supplied in a will of personal estate, by parol proof, aided by the written instructions to the scrivener, see ib.; Damer *v.* Janssen, cited 3 Phill. 434; Fawcett *v.* Jones, ib. 434. In Wood *v.* White, 32 Me. 340, in equity, it appeared that a testator bequeathed a legacy to "J. Wood," and the name of "George Wood" was allowed to be substituted, on parol proof that he was the person intended.

that the testator executed the codicil upon the representation and in the belief that it contained nothing but powers to the devisee for life to make a jointure and charge portions for children, and prayed that it might be set aside. The facts charged were admitted by the answer. Issues were directed: First, as to whether the testator did, by a paper writing, purporting to be a codicil to his will, devise in manner following: (Then follow the words of the codicil, by which only the powers of jointuring and charging portions were conferred.) Secondly, whether the testator did, by the said codicil, devise in manner following: (Here was set forth the remaining part of the codicil.) The jury found that the part of the codicil which was the subject of the second issue did not constitute the will of the testator; and that the part of the codicil which was the subject of the first issue did constitute the will of the testator. Whereupon the court (not being able to direct the instrument to be delivered up, as part of it was good) declared that so much of the codicil as did not constitute the will of the testator was void.

[So parol evidence is admissible to show that a document duly executed as a will was never intended to operate as the will of the deceased; as, if two persons, intending to make their wills, each by mistake executes the document prepared for the other (*m*): or to show that a document was not intended to be testamentary, but only as a contrivance to effect some collateral object, *e.g.* to be shown to another person to induce him to comply with the *pretended testator's wish (*n*). In both these cases the *animus testandi* is wanting. So parol evidence is admissible to show that the later of two identical documents was intended to be a duplicate of the earlier one, and not a distinct instrument (*o*).]

Execution of wrong instrument;

—of a pretended will;

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—of a duplicate.

Parol evidence is also admissible for the purpose of counteracting fraud; for to reject it in such case would be to make a rule, whose main object is to prevent injustice, instrumental in producing it. As in Doe d. Small *v.* Allen (*p*), where it appeared that the testator, upon being pressed by some persons to execute a second will, inquired if it were the same as the former; and being told that *it was*, executed the will, which turned out to be different. It was held in K. B. that evidence of these facts ought to have been received. "I agree," said Lord Kenyon, "that the contents of a will are not to be explained by parol evidence; but, notwithstanding the Statute of Frauds, evidence may be given to show that a will was obtained by fraud; and the effect of the evidence offered in this case was to show that one paper was obtruded on the testator for another which he intended to execute."

Rule in cases of fraud.

One will surreptitiously obtruded for another.

(*m*) Re Hunt, L. R. 3 P. & D. 250.
(*n*) Lister *v.* Smith, 3 Sw. & Tr. 282, 33 L. J. Prob. 29.
(*o*) Hubbard *v.* Alexander, 3 Ch. D. 738; see also Doe *v.* Strickland, 8 C. B. 724.]
(*p*) 8 T. R. 147.

[And as a charge of fraud may be supported, so it may be rebutted by evidence of this nature. Thus, in Doe *v.* Hardy (*q*), where the defence to a claim under a codicil to the testator's will was, that the codicil was a forgery; an objection was made to the receipt of evidence offered by the plaintiff of declarations by the testator, that he intended the lessor of the plaintiff should have the property. But Littledale, J., thought the declarations of the testator were admissible to show his intentions, where the defence was either fraud, circumvention, or forgery.]

Promise by heir or devisee to testator enforced.

Another illustration of the principle occurs in the case suggested by Lord Eldon in Stickland *v.* Aldridge (*r*), "of an estate suffered to descend, the owner being informed by the heir, that, if the estate is permitted to descend, he will make a provision for the mother, wife, or any other person, there is no doubt equity would compel the heir to discover whether he did make such promise.[1] So, if a father devises to the youngest son, who promises that, if the estate is devised to him, he will pay 10,000*l.* to the eldest son, equity would compel the former to discover whether that passed in parol; and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of 10,000*l.*" [2]

[(*q*) 1 Moo. & R. 525.] (*r*) 9 Ves. 519. See also Drakeford *v.* Wilkes, 3 Atk. 539.

[1] Gaullaher *v.* Gaullaher, 5 Watts, 200; Owing's Case, 1 Bland, 397.

[2] Where a gift or bequest is procured from a testator through a promise to hold the subject in whole or in part for a third person whom the giver desires to benefit, a trust will arise *ex maleficio* if the promise be not fulfilled. Russell *v.* Jackson, 10 Hare, 206; Tee *v.* Ferris, 2 Kay & J. 357; Jones *v.* Badley, L. R. 3 Ch. 362; McCormick *v.* Grogan, L. R. 4 H. L. 82; Glass *v.* Hulbert, 102 Mass. 24; Gaither *v.* Gaither, 3 Md. Ch. 158; Hooker *v.* Axford, 33 Mich. 453; Bigelow, Fraud, 119. But the grantee or devisee is charged with the trust not by reason merely of the oral promise, but because of the fact that by means of such promise he has induced the transfer of the property to himself. Glass *v.* Hulbert, supra. And this, in the matter of real estate, takes the case out of the operation of the Statute of Frauds. That a devisee taking property upon a parol promise to hold for the benefit of a third person may be compelled at the suit of such person to convey the intended interest, is clear. Hooker *v.* Axford, supra. A more difficult question, however, arises where, with such devisee, there is associated another devisee who claims that he had no knowledge or intimation at the time of the execution of the will, or before the death of the testator, of such intended trust. But parol evidence, though amounting to no more than strong inference of knowledge of the trust, has been held admissible in a case in which the will had been advised and drawn upon the suggestion of the other devisee who fully admitted the trust. Hooker *v.* Axford. The case cited does not go the length of allowing evidence of a trust as to the refusing trustee, where there is *no* evidence of his knowledge of the alleged intention of the testator. It might well be doubted if evidence could be received in such a case. The act of the devisee in claiming to hold the property, notwithstanding the admission of his co-devisee, would not be a fraud. Fraud, in such cases, arises only when the devisee has consented to hold in trust; such consent being presumed to be the reason for omitting the declaration of trust from the will. And an engagement of the kind may be entered into as well by silent assent to the undertaking as by express words of promise. Byrn *v.* Godfrey, 4 Ves. 10; Paine *v.* Hall, 18 Ves. 475. There appears to be no difference between gifts of realty and gifts of personalty obtained by means of such promises. The Statute of Frauds does indeed provide exceptionally for the transfer of title to or interest in land; but fraud (when but for the interference of the courts it would be accomplished) takes a case out of the statute, and nothing short of fraud appears to suffice for the relief of an omitted claimant of personalty. This is the only ground for the interference of equity, Glass *v.* Hulbert, supra; and there is clearly no ground of jurisdiction at law in such cases except fraud. And as it is getting property by deceit, and not the breach of an oral promise, which justifies interference (ib.), it follows that the promise, when not valid in itself, must have been made to the testator and not merely to the claimant. But, in Pennsylvania, the breach of an oral agreement has alone been treated as ground of equitable jurisdiction in analogous cases. Wolford *v.* Herrington, 74 Penn. St. 311, 315; Overton *v.* Tracey, 14 Serg. & R. 326.

And it is clear that, in such a case (and this, indeed, is the * point which is chiefly material here), if the trust were denied *416 by the heir or devisee, it might be proved *aliunde* (*s*).

It seems, too, that parol evidence is admissible for the purpose of rebutting a resulting trust;[1] as in such case it does not contradict the will, its effect being to support the legal title of the devisee against, not a trust expressed (for that would be to control the written will), but against a mere equity arising by implication of law (*t*). Parol evidence admissible to repel a resulting trust.

On the same principle, parol evidence was, under the old law, admissible to support the claim of an executor (now taken away by stat. 1 Will. 4, c. 40) to the undisposed-of residue of a testator's personal estate, against the presumption in favor of the next of kin created by a legacy to the executor (*u*). Such evidence may also be adduced to repel the presumption [as distinguished from an express declaration (*x*)] against double portions; in other words, to show that a legacy by a parent to his child was intended not to be (as the general rule would make it) a satisfaction of a portion previously due to such child by the testator, or that a subsequent advancement to the child was not to be (as it would, according to the general doctrine) a satisfaction [entire or partial, according to its amount (*y*),] of a legacy to such child (*z*). [In all these cases, where parol evidence is admissible to repel the presumption, counter-evidence is also admissible in support of it; the evidence on either side being admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill founded (*a*). But evidence in support of the presumption is not admissible, unless evidence to rebut it has been first admitted; still less is evidence admissible to create a presumption not raised by the law; in the former case it is unnecessary (*b*); and in both cases its effect would be to contradict the apparent meaning of the will (*c*).] It is clear, also, that parol evidence is admissible to prove the fact that the testator intended to place himself *in loco* * *parentis* towards a legatee, who was not his child (*d*); [or to *417

(*s*) See Oldham *v.* Litchfield, 2 Vern. 506; [Podmore *v.* Gunning, 7 Sim. 644; Tee *v.* Ferris, 2 K. & J. 357; Chester *v.* Urwick, 23 Beav. 407; Proby *v.* Landor, 28 Beav. 504; M'Cormick *v.* Grogan, L. R. 4 H. L. 82, Norris *v.* Frazer, L. R. 15 Eq. 318.]
(*t*) Mallabar *v.* Mallabar, Cas. t. Talb. 79.
(*u*) See 1 Rop. Leg. by White, 337. [*Secus* since the Act, Love *v.* Gaze, 8 Beav. 474.
(*x*) Smith *v.* Conder, 9 Ch. D. 170. (*y*) Pym *v.* Lockyer, 5 My. & C. 29.]
(*z*) 1 Rop. Leg. by White, 338. [(*a*) Kirk *v.* Eddowes, 3 Hare, 517.
(*b*) Kirk *v.* Eddowes, 3 Hare, 520; White *v.* Williams, 3 V. & B. 72.
(*c*) Hall *v.* Hill, 1 D. & War. 94; Lee *v.* Pain, 4 Hare, 216; Palmer *v.* Newell, 20 Beav. 39.] (*d*) Powys *v.* Manfield, 3 My. & C. 359.

[1] See Mann *v.* Mann, 14 John. 1; Herrick *v.* Stover, 5 Wend. 680; Williams *v.* Crary, 4 Wend. 443; Botsford *v.* Burr, 2 Johns. Ch. 416; Rider *v.* Kidder, 10 Ves. (Sumner's ed.) 360, and note (*a*); Steere *v* Steere, 5 Johns. Ch. 1; Jackson *v.* Feller, 2 Wend. 465; Boyd *v.* M'Lean, 1 Johns. Ch. 582; Dorsey *v.* Clarke, 4 Har. & J. 551; Hall *v.* Sprigg, 7 Mart. (La.) 243; Powell *v.* Manson Manuf. Co., 3 Mason, 347, 362, 363; Stark *v.* Cannady, 3 Litt. 399; Jackman *v.* Ringland, 4 Watts & S. 149; Buck *v.* Pike, 2 Fairf. 1; 4 Kent, 305, 306; 2 Story, Eq. Jur. § 1202.

prove that gifts have been made to the legatee by the testator in his lifetime, and that they were of a nature to bring them within the equitable presumption (*e*) or within the terms of an express declaration contained in the will (*f*), that advancements should be in satisfaction of legacies. And for this purpose contemporaneous declarations of the testator's intentions are admissible; since the rule which would exclude them, if the intention had been committed to writing, does not apply.]

Construction not to be influenced by parol evidence of actual intention.

Returning, however, to the general rule, it is clear that parol evidence of the actual intention of a testator is inadmissible for the purpose of controlling or influencing the construction of the written will, the language of which must be interpreted according to its proper acceptation, or with as near an approach to that acceptation as the context of the instrument and the state of the circumstances existing at the time of its execution (which, as we shall presently see, forms a proper subject of inquiry), will admit of.[1] No word or phrase in the will can be diverted from its appropriate subject or object by extrinsic evidence, showing that the testator commonly (*g*), much less on that particular occasion (*h*) used the words or phrase in a sense peculiar to himself, or even in any gen-

[(*e*) Rosewell *v.* Bennett, 3 Atk. 77; Kirk *v.* Eddowes, 3 Hare, 509; Twining *v.* Powell, 2 Coll. 262.

(*f*) Whateley *v.* Spooner, 3 K. & J. 542; M'Clure *v.* Evans, 29 Beav. 422.

(*g*) See per Parke, B., Shore *v.* Wilson, 9 Cl. & Fin. 558; Crosley *v.* Clare, 3 Sw. 320, n.; Millard *v.* Bailey, L. R. 1 Eq. 378.

(*h*) Mounsey *v.* Blamire, 4 Russ. 384; Green *v.* Howard, 1 B. C. C. 31; Strode *v.* Russell, 2 Vern. 625; Barrow *v.* Methold, 1 Jur. N. S. 994; Knight *v.* Knight, 2 Gif. 616, is *contra;* but the rule as stated in the text is firmly settled.] Observe that the rule supposes the existence of an appropriate subject or object; otherwise it should seem evidence would be admissible of the testator having commonly described the object (and why not the subject also?) by the terms used in the will. [Lee *v.* Pain, 4 Hare, 251, post; Douglas *v.* Fellows, Kay, 118.]

[1] If the description of a person or thing be wholly inapplicable to the subject intended, or said to be intended by it, evidence is inadmissible to prove whom or what the testator really intended to describe. 1 Greenl. Ev. § 290; De d'Gord *v.* Needs, 2 M. & W. 129; Brown *v.* Saltonstall, 3 Met. 423; Den *v.* Bolick, 1 Ired. 244. As to the inadmissibility of declarations of intent, see also Rothmahler *v.* Myers, 4 Desaus. 215; Kelley *v.* Kelley, 25 Penn. St. 460; Miller *v.* Springer, 70 Penn. St. 269; Iddings *v.* Iddings, 7 Serg. & R. 111; Webb *v.* Webb, 7 Mon. 626, 628; Tudor *v.* Terrel, 2 Dana, 47; Comstock *v.* Hadlyme Soc., 8 Conn. 254, 265, 266; Reeves *v.* Reeves, 1 Dev. Eq. 386; Mordecai *v.* Boylan, 6 Jones, Eq. 365; Cesar *v.* Chew, 7 Gill & J. 127; Duncan *v.* Duncan, 2 Yeates, 302; Sword *v.* Adams, 3 Yeates, 34; Jackson *v.* Sill, 11 Johns. 201; White *v.* Hicks, 33 N. Y. 383; Adams *v.* Winne, 7 Paige, 97; Avery *v.* Chappel, 6 Conn. 270; Geer *v.* Winds, 4 Desaus. 85; Del Mare *v.* Rebello, 3 Bro. C. C. (Perkins's ed.) 446, 451, note (*a*) and cases cited; Tucker *v.* Seaman's Aid Soc., 7 Met. 188, 206; Smith *v.* Wells, ib. 240; Minot *v.* Boston Asylum, ib. 416; Osborne *v.* Varney, ib. 301; Ryers *v.* Wheeler, 22 Wend. 148; Fitzpatrick *v.* Fitzpatrick, 36 Iowa, 674; Mitchell *v.* Walker, 17 B. Mon 61; Johnson *v.* Johnson, 32 Ala. 637; McCray *v.* Lipp, 35 Ind. 116; Harrison *v.* Morton, 2 Swan, 461; Cagney *v.* O'Brien, 83 Ill. 72; Button *v.* Amer. Tract Soc., 23 Vt. 336; Robinson *v.* Bishop, 23 Ark. 378; Willis *v.* Jenkins, 30 Ga. 167; Gilliam *v.* Chancellor, 43 Miss. 437; Gilliam *v.* Brown, ib. 641. But parol evidence is admissible under the statutes of some states to show that the omission of a provision for a child of the testator was intentional. Buckley *v.* Gerard, 123 Mass. 8; Ramsdill *v.* Wentworth, 101 Mass. 125; S. C. 106 Mass. 320; Converse *v.* Wales, 4 Allen, 512; Wilson *v.* Fosket, 6 Met. 400; Mass. Gen. Stat. c. 92, § 25; Lorieux *v.* Keller, 5 Iowa, 196; Lorings *v.* Marsh, 6 Wall. 337. And in the absence of evidence of express declarations by the testator of his intention, it is proper to show the intelligence of the decedent and his relations towards his family. Buckley *v.* Gerard, supra; Converse *v.* Wales, supra; Ramsdill *v.* Wentworth, supra. As to what is an insufficient delaration of intention, see Bancroft *v.* Ives, 3 Gray, 367. But evidence of intentional omission is excluded in certain other states under special statutes,

eral or popular sense, as distinguished from its strict and primary import.[1]

Thus, in Doe d. Brown *v.* Brown (*i*), it was held that a devise * of *copyhold* lands could not be extended to freeholds, by *418 the production of evidence showing that the testator had so described them in a deed executed by him, the will itself furnishing no distinct indication that the testator meant to give what was conveyed by the deed, and there being copyhold lands to satisfy the devise.

"Copyhold" not extended to freeholds by parol evidence.

So, in Doe d. Chichester *v.* Oxenden (*k*) (which is a leading authority), where a testator devised his "estate of Ashton, in the county of Devon;" and evidence was adduced to show that the testator was accustomed to distinguish by the appellation of his "Ashton estate" the whole of his maternal estate, including property in several contiguous parishes; the Court of C. P., notwithstanding this evidence, held that only the premises in the manor of Ashton passed; Sir James Mansfield observing, that this would give the will an effectual operation, and herein the case differed from all others in which such evidence had been received: for in them, without it, the devise would have had no operation; and it was, he said, safer not to go beyond the line. This decision was affirmed in D. P. on the unanimous opinion of the judges (*l*); and the principle of it has been since repeatedly recognized.[2] Thus, in Doe d. Browne *v.* Greening (*m*), the Court of K. B., on its authority, rejected evidence

Extent of "estate of Ashton" not enlarged by extrinsic evidence.

(*i*) 11 East, 441. See Hughes *v.* Turner, 3 My. & K. 666, where Sir C. Pepys, M. R., held that a revoked will could not be looked at for the purpose of influencing the construction of the subsequent unrevoked instrument. [See also M'Leroth *v.* Bacon, 5 Ves. 165; Randall v. Daniel, 24 Beav. 193. But in Re Feltham's Trusts, 1 K. & J. 532, on a bequest to "Thomas Turner, of Regency Square, Brighton," the facts being that there was a James Turner of Regency Square, Surgeon, and a Rev. Thomas Turner, of Daventry, both nephews of testatrix's husband; an old will containing a bequest to "Thomas Turner, of Regency Square, Brighton, Surgeon," was admitted to prove the fact that the testatrix always called the surgeon Thomas. From that fact the court inferred that the actual will (which was not strictly applicable to either claimant) erred in the name and not in the description. "But," said the V.-C., "I cannot rely on the circumstance that she therein (*i.e.* in the old will) gave him a legacy." The distinction appears to have been overlooked in Re Gregory's Settlement, 6 N. R. 282.]

(*k*) 3 Taunt. 147. This case seems to have settled a point left in doubt by Whitbread *v.* May, 2 B. & P. 593. [(*l*) 4 Dow. 65.]

(*m*) 3 M. & Sel. 171. [See also Evans *v.* Angell, 26 Beav. 202. But as to the meaning of "at" see Homer *v.* Homer, 8 Ch. D. 758.]

Chace *v.* Chace, 6 R. I. 407; Bradley *v.* Bradley, 24 Mo. 311. Under the California statute it is held that evidence *dehors* the will that the omission was intentional cannot be received. Estate of Garraud, 35 Cal. 336.

[1] In a case in which it appeared that a testator gave all his "back land" to certain devisees, parol evidence was admitted to show what was intended by the term "back lands," and that the testator usually gave certain lands that name in his family and neighborhood. Ryers *v.* Wheeler, 22 Wend. 148. See Black *v.* Hill, 32 Ohio St. 313.

[2] Tucker *v.* Seaman's Aid Soc., 7 Met. 188, 206; Doe *v.* Hiscocks, 5 Mees. & W. 363; Miller *v.* Travers, 8 Bing. 244; S. C. 1 Moore & S. 342. See also Jackson *v.* Sill, 11 Johns. 201; Mann *v.* Mann, 1 Johns. Ch. 231; S. C. 14 Johns. 1; McCoy *v.* Hugus, 6 Watts, 345; Cesar *v.* Chew, 7 Gill & J. 127; Richards *v.* Dutch, 8 Mass. 506; Farrar *v.* Ayres, 5 Pick. 404; Crocker *v.* Crocker, 11 Pick. 252; Brown *v.* Saltonstall, 3 Met. 423; Minot *v.* Boston Asylum, 7 Met. 416; Winslow *v.* Cummings, 3 Cush. 358; Earle *v.* Wood, 8 Cush. 430, 449; Thayer *v.* Boston, 15 Gray, 347; American Bible Soc. *v.* Pratt, 9 Allen, 109; Gifford *v.* Rockett, 121 Mass. 431.

offered to show that, under a devise of lands "*at* Coscomb," it was intended to include lands *near* Coscomb.

Construction of words not varied by evidence of actual intention.

So, in Doe d. Tyrrel *v.* Lyford (*n*), where the testator devised lands at Sutton Wick, in the parish of Sutton Courtney, *which he purchased of S.*, the same court would not allow it to be proved by extrinsic evidence that he intended to include certain pieces of ground not in the hamlet of Sutton Wick, but parcel of the estate purchased of S., and in the parish of Sutton Courtney.

Again in Doe d. Preedy *v.* Holtom (*o*), where a testator devised to A. his messuage or tenement in Swalcliffe, wherein he (the testator) then resided, with the offices, outhouses, barns, stables, *and other edifices and buildings, yards and gardens to the same adjoining*, and all the several closes or enclosed grounds, pieces and parcels of ground, called and known by the several names of "Cow-house," &c., with the appurtenances, part of the farm and lands then in his own occupation, &c. And he devised to B. all other his hereditaments in Swalcliffe (except what he had before devised to A.). The question was, whether *419 *the devise to A. comprised two cottages adjoining the messuage in which the testator resided, and which he had separated therefrom by a stone wall, and let off to tenants. It was held, that the cottages in question, though not in the testator's own occupation, passed under the devise to A. (it being considered that the devise was not confined to what was in the testator's own occupation), and that evidence of the testator's intention, orally declared at the time of giving instructions for and executing his will, that the cottages should be included in the devise to B., was inadmissible.

Position of relative pronouns not to be varied by parol evidence.

And it may not, perhaps, be quite superfluous to observe, that relative pronouns, which have no independent force or signification, but whose effect depends wholly upon the position which they occupy in the instrument, cannot, by means of parol evidence, be shifted, so as to relate to a different antecedent. Thus, in Castledon *v.* Turner (*p*), where a testator had made dispositions in his will to several, and but two women were mentioned throughout the whole will, viz. his wife and his niece, and, in the latter part of the will, a particular estate was devised to "her" for and during her natural life, — Lord Hardwicke refused to receive parol evidence for the purpose of showing to which of the two women "her" referred; the offering it was an attempt contrary to the principles of the court, because it would tend to put it in the power of witnesses to make wills for testators. And he held, that, though "her" was a relative term, it related to the wife, upon the ground that,

(*n*) 4 M. & Sel. 550. [As to Collison *v.* Girling, 4 My. & C. 63, 9 Cl. & Fin. 88, see Wigr. Wills, 43 & 48, n., 4th ed.]
(*o*) 5 Nev. & M. 391, 4 Ad. & Ell. 76.
[(*p*) 3 Atk. 257.]

throughout the will, in other places, "her" seemed to relate to the wife (*q*).

If, however, the context of the will presents an obstacle to the construing of the terms of description in their strict and most appropriate sense, a foundation is thereby laid for the admission of evidence showing that they are susceptible of some more popular interpretation, which will reconcile them with, and give full scope and effect to, such seemingly repugnant context.

Words may be diverted from their primary acceptation by inconsistency of context.

To this principle, it is conceived, may be referred the important case of Doe d. Beach *v.* Earl of Jersey (*r*), where a testatrix, after reciting a power reserved to her by her settlement, on her marriage with G. V. P., devised, subject to the estate for life of her husband therein, *all that her Briton Ferry estate*, with all the *manors*, advowsons, messuages, buildings, lands, tenements, and *hereditaments thereto belonging, or of which *420 the same consisted. In a subsequent part she added: "Also I give my Penlline Castle estate, which, as well as my Briton Ferry estate, is situate, lying, and being in the county of Glamorgan," &c. [A claim was laid under this devise to certain lands which were neither in the parish of Briton Ferry nor in the county of Glamorgan, but in a parish in the county of Brecon. It appeared by special verdict that the Glamorganshire lands contained 30,000 acres, part whereof consisted of the messuage and lands in the parish of Briton Ferry, comprising the whole of the parish, and that the Brecon lands contained 4,000 acres; that there were six advowsons, of which the advowson of the parish of Briton Ferry was one, and one manor, and one undivided sixth of another manor in Glamorgan, *and that there was no manor of Briton Ferry*. Objections were made to the reception of certain evidence, consisting of old account-books, in which was the following entry: "Briton Ferry Estate in the county of Brecon;" and of proof that the lands in question, together with the other property, had all gone by the name of the Briton Ferry estate. Abbott, C. J., delivered the opinion of the judges, namely, that the words "all that my Briton Ferry estate, with all the manors, &c.," found in the will of this testatrix, in which mention also was made of "her Penlline Castle estate," denoted a property or estate known to the testatrix by the name of her Briton Ferry estate, and not an estate locally situate in a parish or township of Briton Ferry (*s*), and *consequently* that a question

Devise of the *Briton Ferry estate.*

(*q*) Parol evidence is also inadmissible for the purpose of raising a case of election, Clementson *v.* Gandy, 1 Kee. 309, post, Ch. XIV.

(*r*) 1 B. & Ald. 550, and 3 B. & Cr. 870.

[(*s*) The same case had previously been before the Court of K. B. on a somewhat different point; and there Bayley, J., said it was clear that the devise could not be confined to that part of the estate which was within the parish of Briton Ferry, for the testatrix spoke of manors and advowsons, and in that part of the estate there was no manor and only one advowson: the devise, therefore, must extend to the whole of the Briton Ferry estate. 1 B. & Ald. 558.

arising upon any particular tenement was properly a question of parcel or no parcel, and they therefore thought the several matters offered to be proved and given in evidence on the part of the defendant were admissible and ought to have been received. However,] on account of an imperfection in the special verdict, the House of Lords awarded a *venire de novo*.

Words "thereunto belonging."

[So, in Doe d. Gore *v.* Langton (*t*), it was contended that the words "thereunto belonging" must be taken in their primary sense, the consequence of which would be to exclude the lands in question by reason of the words being correctly applicable in every particular to other lands. But the Court of K. B. thought that it was to be collected from the face of the will *421 itself, that *the testator had not used the disputed words in their primary sense (*u*), and held that extrinsic evidence was therefore admissible to show in what sense he had used them. Lord Tenterden, C. J., in delivering the judgment of the court said: "The extrinsic facts in this case leave no room to doubt that the testator intended his newly acquired property to pass by his will as part of his Barrow estate; but, nevertheless, it cannot pass unless that meaning can be collected from the will itself; and there are two clauses in the latter part of the will which appear to manifest that intention and to be sufficient to authorize us to put such a construction on the words *thereunto belonging* as will accord with and give effect to that intention."]

As to translating or deciphering peculiar characters, — and explaining local or technical terms.

And here it may be observed, that if a testator make his will in a foreign language, or introduce therein certain terms or characters which are not understood by the court, recourse may be had to persons conversant with the subject, for the purpose of translating the will, or deciphering the characters (*x*). [And where the testator makes use of words which in their ordinary sense are intelligible, but which are used by a certain class of persons to whom the testator belonged (*y*), or in a certain locality where he dwelt (*z*), in a peculiar sense, parol evidence may be given to show the *fact* of such usage, unless it also appears on the face of the will that the testator used the word in its

(*t*) Stated post, Ch. XXIV. (*u*) 2 B. & Ad. 693.]

(*x*) Masters *v.* Masters, 1 P. W. 421; Norman *v.* Morrell, 4 Ves. 769; [Kell *v.* Charmer, 23 Beav. 195; Clayton *v.* Lord Nugent, 13 M. & W. 206, per Alderson, B.;] Goblet *v.* Beechey, 3 Sim. 24, 2 R. & My. 624, Wig. Wills, App. *Meaning of contraction used by testator.* — In the last case the question was, whether the word "mod." occurring in the codicil to the will of a sculptor, applied to his models. The opinions of sculptors and persons skilled in handwriting differed on this point; and the ultimate conclusion of Lord Brougham was, that the formal bequest in the will could not be revoked by an imperfectly expressed and doubtful word introduced into the codicil. An attempt was made to explain the testator's meaning by the evidence of a person who attested his will; but this, of course, was inadmissible.

[(*y*) Clayton *v.* Greyson, 5 Ad. & Ell. 302; Shore *v.* Wilson, 9 Cl. & Fin. 525.

(*z*) Per Parke, B., Richardson *v.* Watson, as reported 1 Nev. & M. 575; Smith *v.* Wilson, 3 B. & Ad. 728; Anstee *v.* Nelms, 1 H. & N. 225. In the last case, the devise was of "lands in the parish of D." and evidence was admitted to show that a part of the testator's lands which was in another parish was generally reputed to be in the parish of D.

ordinary sense.[1] Generally speaking, for instance, evidence would be admissible to show that the word *close* meant the same thing as farm in the country where the property was situate; but if the testator has in another part of the will used the word *closes* (in the plural), it is manifest that he has used the word *close* in its ordinary sense as denoting an *enclosure;* and then such evidence is not admissible; for that would be to contradict the words of the will (*a*).

[* Again, the testator may have habitually called *422 certain persons by peculiar or nicknames, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, just as if his will were written in cipher or in a foreign language (*b*). Thus, in Lee *v.* Pain (*c*), a testatrix, by a codicil dated in 1836, "had bequeathed to Mrs. and Miss Bowden, of H., widow and daughter of the late Rev. Mr. Bowden, 200*l.* each." The legacies were claimed by Mrs. and Miss Washbourne, the widow and daughter of Mr. D. Washbourne, who had been a dissenting minister at H. The evidence proved that Mrs. Washbourne was the daughter of Mr. Bowden, who died leaving a widow, which latter died in 1820; that the testatrix had been intimately acquainted with Mr. Bowden, and with the claimants, whom she had been in the habit of calling by the name of Bowden, and, on the mistake being pointed out, had acknowledged it. Sir J. Wigram, V.-C., held, that the evidence was admissible, and, there being no other Mrs. and Miss Bowden, decreed the legacies to the claimants (*d*).] Nicknames.

Though it is (as we have seen) the will itself (and not the intention, as elsewhere collected) which constitutes the real and only subject to be *expounded*, yet, in performing this office, a court of construction is not bound to shut its eyes to the state of facts under which the will was made;[2] on the contrary, an State of facts at the date of will proper to be regarded.

(*a*) Richardson *v.* Watson, 4 B. & Ad. 799, 1 Nev. & Man. 575. See Wigr. Wills, pl. 119.

(*b*) Per Lord Abinger, C. B., Doe *v.* Hiscocks, 5 M. & Wels. 368.

(*c*) 4 Hare, 251.

(*d*) See also Wigr. Wills, pl. 65, and n.

[1] Technical words are to be taken in the technical sense, as their primary sense, to be corrected, if at all, by finding the testator's controlling intention in the context. And certain forms of expression employed by testators have been placed upon the same ground as technical words in this respect, and must be taken in their primary sense to have the meaning imputed to them by the adjudicated cases, to be corrected as in the case of technical words. Renwick *v.* Smith, 11 S. C. 294, 306.

[2] Parol evidence is admissible to show the state of testator's property when he made his will. Hyde *v.* Price, 1 Coop. 208; Webley *v.* Langstaff, 3 Desaus. 504; Marshall's Appeal, 2 Barr, 388; Brainerd *v.* Cowdrey, 16 Conn. 1. See Shelton *v.* Shelton, 1 Wash. 53; Dewitt *v.* Yates, 10 Johns. 156; Druce *v.* Denison, 6 Ves. 385 a, and n.; Jarvis *v.* Butrick, 1 Met. 480, 483; Morton *v.* Perry, 1 Met. 446; Edens *v.* Williams, 3 Murph. 27; Tucker *v.* Seaman's Aid Society, 7 Met. 205, 206. So to show the state of his family. Den d. Watkins *v.* Flora, 8 Ired. 374; Woods *v.* Woods, 2 Jones Eq. 420; Rewalt *v.* Ulrich, 23 Penn. St. 388. Parol evidence is also admissible as to facts known to the testator, which may reasonably be supposed to have influenced him in the disposition of his property. Ellis *v.* Essex Merrimack Bridge, 2 Pick. 243; Braman *v.* Stiles, 2 Pick. 460; Glover *v.* Hayden, 4 Cush. 580; Wootton *v.* Redd, 12 Gratt. 196. Indeed, there is no more common remark than that, when interpreting a will, the attending circumstances of the testator, such as the condition of the family, and the amount and character of his property,

investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator.[1] To this end, it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret (*e*);[2] and guided by the light thus thrown on the testamentary scheme, he may find himself justified in departing from a strict construction of the testator's language, without *423 allowing "conjectural interpretation * to usurp the place of judicial exposition" (*f*). Thus, if it appears (and of course it can only appear by extrinsic evidence), that there is no subject or object answering to the description in the will strictly and literally construed, but that there is a subject or object precisely answering to such description interpreted according to the popular and less appropriate sense of the words, the conclusion that the testator employed them in the latter sense is irresistible. Examples of this principle of construction are widely scattered through the present treatise. It may be discerned in the rule (hereafter treated of) which reads a general devise of lands as extending to leaseholds, where the testator had no freeholds on which it could operate: and also in the rule (likewise discussed in the sequel) which reads such a devise as an appointment under a power, where it would otherwise be nugatory for want of property of the testator, strictly so called, on which to operate, though neither of these questions can now arise under a will made or republished since 1837. The principle is further exemplified in those cases in which a devise of lands at a given place has been extended to property not strictly answering to the locality, because there is none which does precisely correspond to it (*g*),[3] or in which an [apparently] specific bequest of stock in the public funds has been held to [authorize payment of the legacy out of

(*e*) Doe d. Templeman *v.* Martin, 4 B. & Ad. 771, per Parke, J.; Smith *v.* Doe d. Lord Jersey, 2 Br. & B. 553, 5 B. & Ald. 387, per Bayley, J.; Doe d. Freeland *v.* Burt, 1 Tr. 701; Guy *v.* Sharp, 1 My. & K. 602, per Lord Brougham; Att.-Gen. *v.* Drummond, 1 Dr. & War. 367, per Sugden, C.; Shore *v* Wilson, 9 Cl. & Fin. 555. per Parke, B.; Doe d. Thomas *v.* Beynon, 12 Ad. & Ell. 431; Blundell *v.* Gladstone, 3 Mac. & G. 692; Phillips *v.* Barker, 1 Sm. & Gif. 583; Wigr. Wills, Prop. V. But in Pilcher *v.* Hole, 7 Sim. 210, the V.-C. said he could not look at the price of stocks for the purpose of putting a construction on a will. How far it may be assumed that a testator, when he makes his will, has the material circumstances in his mind, see Hopwood *v.* Hopwood, 22 Beav. 494, 495; Re Herbert's Trusts, 1 J. & H. 121. If he shows by the will that he has taken a mistaken view of the circumstances, that view must govern the construction, see Hannam *v.* Sims, 2 De G. & J. 151.]

(*f*) *Vide* Wigram on Wills, 2d ed. 75; a work which should be perused by every person who wishes to acquire an intimate acquaintance with this intricate subject.

(*g*) Doe v. Roberts, 5 B. & Ald. 407; [see Baddeley *v.* Gingell, 1 Exch. 319;] but learn the limits of this doctrine from Miller *v.* Travers, 1 M. & Scott, 342, 8 Bing. 244.

may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that point of view discover what was intended. Brown *v.* Thorndike, 15 Pick. 388; Postlethwaite's Appeal, 68 Pa. St. 477; Smith *v.* Bell, 6 Pet. 68; Sicloff *v.* Redman, 26 Ind. 251; Blake *v.* Hawkins, 98 U. S. 315, 324. But where the intention of the testator is clear, neither his situation, nor that of his family or property, will be considered in giving effect to his will. Brearley *v.* Brearley, 1 Stockt. 21.

[1] See, *e.g.* Griscom *v.* Evens, 40 N. J. 402, 407; Goodhue *v.* Clark, 37 N. H. 525, 533; Tilton *v.* Tilton, 32 N. H. 257, 263; Gale *v.* Drake, 51 N. H. 78, 83.

[2] 1 Greenl. Ev. § 287; Doe *v.* Martin, 1 N. & M. 512; Holsten *v.* Jumpson, 4 Esp. 189; Brown *v.* Thorndike, 15 Pick. 388; 1 Phill. Ev. 736.

[3] Allen *v.* Lyons, 2 Wash. C. C. 475.

the general personal estate,] the testator having no such stock when he penned the bequest (*h*). Again, we discover traces of the doctrine in the rule (also hereafter discussed) which construes a gift to the children of a *deceased* person, or the children "*now* born" of a living person, as comprising illegitimate children, there being no legitimate child to supply the gift with a more appropriate object; [or a gift to the testator's nephews, as a gift to his wife's nephews, he having none, and there being, at *the date of his will, no possibility of his ever *424 having any (*i*):] and lastly, in the rule which reads a devise or bequest to apply to a person or thing imperfectly answering the name and description in the will, there being no person or thing more precisely answering to them (*k*). In these instances, and many more which might be adduced, the application of the rules of construction evidently depends on and is governed by the state of extrinsic facts (*l*).

State of facts at date of will, when not to influence construction.

It would be dangerous, however, to place this statement of the doctrine in the hands of the reader, unaccompanied by a caution against the mistaken application of it to gifts comprising a subject or object, or a class of objects, which, by the rules of construction, is to be ascertained at the death of the testator, or at any other period posterior to the date of the will. In such cases, it would be manifestly improper to admit the state of facts existing when the will is made to have any influence upon the construction: for instance, since a residuary bequest comprehends all the personal property of which the testator is possessed at the time of his decease, the absence of any given species of property, or of any property whatever, at the date of the will, to satisfy such bequest, ought not, in the slightest degree, to affect its construction, by extending the bequest to property not strictly belonging to the testator, or over which he has not any power of disposition (*m*). On the same

[(*h*) Selwood *v.* Mildmay, 3 Ves. 306; see, on this much-discussed case, Miller *v.* Travers, *ubi supra* (where Tindal, C. J., refers to the head "falsa demonstratio non nocet"). In Lingdren *v.* Lingdren, 9 Beav. 358, Lord Langdale, M. R., followed it, aad snid of it, "The absence of the fund purported to be given showing that a specific legacy was not intended, other evidence was admitted to show how the mistake arose; and this being clearly shown, it was held that the legatees were entitled to payment out of the general personal estate." See also Wigram, Wills, pp. 102, 103, 164, 167; Auther *v.* Auther, 13 Sim. 422, where the V.-C. took the context for his sole guide. If in another part of the will the testator correctly described the subject, the inference that he meant to include it in the incorrect description would be rebutted. Waters *v.* Wood, 5 De G. & S. 717.

(*i*) Sherratt *v.* Mountford, L. R. 8 Ch. 928.

(*k*) King's College Hospital *v.* Wheildon, 18 Beav. 33.]

(*l*) Observe that, in all the above cases, the parol evidence is not adduced to show that the testator actually intended the devise to have the operation which is given to it, but merely to supply facts from which the court infers such to be the intention; and this inference would not be allowed to be controlled by the production of evidence showing that the construction thus put on the will is at variance with the testator's real intention. [See Stringer *v.* Gardiner, 27 Beav. 35, 4 De G. & J. 468; Sherratt *v.* Mountford, L. R. 8 Ch. 928.

(*m*) Stephenson *v.* Heathcote, 1 Ed. 38; Cave *v.* Cave, 2 Ed. 144; Sibley *v.* Perry, 7 Ves. 532; Lord Inchiquin *v.* French, Amb. 40; Abbott *v.* Middleton, 4 H. L. Ca. 257 (per Lord St. Leonards); Wigr. Wills, p. 81, 3d ed.; Doe *v.* Gillard, 5 B. & Ald. 788, is *contra; sed qu.* But it is otherwise if it appears by the will that the testator is estimating the amount of his property and its sufficiency for the payments he directs; Barksdale *v.* Gilliatt, 1 S. W. 565;

principle, if a testator bequeaths all the stock of a particular denomination, of which he may be possessed at the time of his decease, no argument is supplied for extending the bequest to stock of any other denomination by the circumstance that the testator had at the making of the will no stock answering to the description (*n*). Again, as a *425 devise or bequest to the * children of a living person as a class will comprise all who come *in esse* before the death of the testator, the fact of there being no child properly so called, *i.e.* no legitimate child, at the date of the will, raises no necessary inference that the testator had in his contemplation then existing illegitimate children (*o*). [And in every case it must be remembered, that, whatever the surrounding circumstances, it is still the will that is to be construed. In the words of an eminent judge (*p*), "when the court has possession of all the facts which it is entitled to know, they will only enable the court to put a construction on the instrument consistent with the words; and the judge is not at liberty, because he has acquired a knowledge of those facts, to put a construction on the words which they do not properly bear."]

Effect of 1 Vict. c. 26.

And it is material to observe that the stat. 1 Vict. which (we have seen) makes the will speak as to both real and personal estate from the death of the testator, will tend greatly to narrow the practical range of the rule which authorizes the application of words to a less appropriate subject, on account of the non-existence of one strictly and in all particulars answering to those words. If, therefore, a testator, by a will made or republished since 1837, should devise all his lands in the parish of A., the fact of his *then* not having lands in that parish will supply a much less forcible and conclusive argument than heretofore, for holding the words to apply to lands in a contiguous parish, seeing that a testator not only *may* extend his devise to after-acquired estates, but that a devise is to be construed as speaking at his death, unless the contrary appears; so that the testator may have contemplated, and is to be presumed to have contemplated, the future acquisition of lands in the parish in question, to satisfy the terms of the devise in their strict and proper acceptation (*q*).

Colpoys *v.* Colpoys, Jac. 451, 457; and see Singleton *v.* Tomlinson, 3 App. Ca. 418, 425. And as to real estate, see Stanley *v.* Stanley, 2 J. & H. 503: with which compare Davenport *v.* Coltman, 12 Sim. 605; Tennent *v.* Tennent, 1 J. & Lat. 384.

(*n*) It is otherwise in the case of a specific bequest of stock belonging to the testator at the date of the will. Att.-Gen. *v.* Grote, 3 Mer. 316, 2 R. & My. 699; Sayer *v.* Sayer, 7 Hare, 380, 3 Mac. & G. 607; Boys *v.* Williams, 3 Sim. 563, 2 R. & My. 689; Horwood *v.* Griffith, 4 D. M. & G. 708; Fonnereau *v.* Poyntz, 1 B. C. C. 472, cit. 6 Ves. 401.

(*o*) Post, Ch. XXXI.; and see Doe d. Allen *v.* Allen, 12 Ad. & Ell. 451.

(*p*) Per Sugden, C., Att.-Gen. *v.* Drummond, 1 D. & War. 367. And see per Cotton, L. J., Everett *v.* Everett, 7 Ch. D. 433, 434. The expression "surrounding circumstances" is sometimes strained to include matters wholly outside the scope of the rule, as, instructions given by the testator for preparing his will, Birks *v.* Birks, 4 Sw. & Tr. 23, 34 L. J. Prob. 90 (referred to another ground, ante, 175 n.), or declarations of intentions by the testator, Re Ruding's Settlement, L. R. 14 Eq. 266.

(*q*) See however Lake *v.* Currie, 2 D. M. & G. 536; Nelson *v.* Hopkins, 21 L. J. Ch. 410; ante, pp. 326 *et seq.*; post, Ch. XX. ss. 4, 5.]

Of course, parol evidence is admissible (and that, without intrenching on the doctrine of Doe *v.* Oxenden), in order to * ascertain what is comprehended in the terms of *426 a given description, referring to an extrinsic fact.[1] Thus, if a testator devise the house he lives in (*r*), or his farm called Blackacre (*s*), or the lands which he purchased of A., parol evidence must be adduced to show what house was occupied by the testator, what farm is called Blackacre, or what lands were purchased of A.; such evidence being essential for the purpose of ascertaining the actual subject of disposition. The distinction obviously is, that although evidence *dehors* the will is not admissible, to show that the testator used his terms of description in any peculiar or extraordinary sense, yet it may be adduced to ascertain what the description properly comprehends.[2]

Parol evidence admissible to show what is comprised within a given description.

Of this principle we have a useful example in Sanford *v.* Raikes (*t*), decided by Sir W. Grant, a judge whose exposition of the principles of law was ever marked by a perspicuity and felicity of illustration peculiarly his own. A testator by codicil devised in these words: "I give the house in Seymour Place, which I have given a memorandum of agreement to purchase (and which is to be paid for out of timber, which I have ordered to be cut down), to the Rev. John Sanford." It happened that the testator had shortly before entered into an agreement to purchase the house in question for 7,350*l.*, and had, two days after that contract, given an order in writing to his steward, to cut down timber on a particular estate, to the amount of 10,000*l.* One of the objections made by the heir to this devise was, that the codicil did not refer to any particular timber, and could not be made good by evidence *aliunde;* and reliance was placed upon the cases deciding that a will to incorporate another instrument must so describe it, that the court could be under no mistake. But the M. R. conclusively answered this reasoning. "I had always understood," he observed, "that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascertain the fact; and through that medium, to ascertain the subject of the devise. I do not know what this has to do with cases where there is a reference to some paper, which is to make part of the will. There it may be considered that the will itself must specify the paper that is to be incorporated into it. Here, the question is not upon the devise, but upon the * subject of it. Nothing is offered in explanation of *427 the will, or in addition to it. The evidence is only to ascertain what is included in the description which the testator has given of the

Reference to an extrinsic document.

(*r*) Doe d. Clements *v.* Collins, 2 T. R. 498.
(*s*) Goodtitle *v.* Southern, 1 M. & Sel. 299; see also Buck d. Whalley *v.* Newton, 1 B. & P. 53.
(*t*) 1 Mer. 646.

[1] Nichols *v.* Lewis, 15 Conn. 137.

[2] Burthe *v.* Denis, 31 La. An. 568.

thing devised. Where there is a devise of the estate purchased of A., or of the farm in the occupation of B., nobody can tell what is given, until it is shown by extrinsic evidence, what estate it was that was purchased of A., or what was in the occupation of B. In this case, the direction with regard to payment for the house amounted in effect to a devise of so much of the produce of the timber ordered to be cut down as should be sufficient to pay for the house. What is there in the fact here referred to, namely, an antecedent order for cutting down timber, that makes it less a subject of extrinsic evidence, than such a one as I have alluded to? The moment it is shown that it was a given number of trees growing in such a place, or 10,000*l.* worth in value of the timber on such an estate, that the testator had ordered to be cut down, the subject of the devise is rendered as certain, as if the number, value, or situation of the trees, had been specified in the will."

So, in Ongley *v.* Chambers (*u*), where a testator devised the rectory or parsonage of M., with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises thereunto belonging, with their and every of their rights, members and appurtenances; it was held, that lands, and a messuage (in addition to the parsonage-house), in the same parish, which had been acquired by the owners of the rectory about two centuries ago, and had been uniformly demised and occupied with it since that period, and had been so purchased by and conveyed to the devisors passed: Lord Gifford, C. J., observed, that the expression was "messuages;" whereas, strictly speaking, there was but one messuage belonging to the rectory, namely the parsonage-house. The having recourse to the leases and other extrinsic evidence, to show what lands had been usually enjoyed with the rectory, was objected to on the authority of Doe *v.* Brown and the class of cases before stated; but the distinction between the cases is obvious. Here it was a question of parcel or no parcel, the description referred to the fact, and it was governed by the same principle as the case suggested by Sir W. Grant of a devise of lands in the occupation of A.

Remark on Ongley *v.* Chambers.

[In Ricketts *v.* Turquand (*x*), a testator who had purchased *428 a *house and lands, which, together, were generally called and known as the "Ashford Hall estate," devised as follows: "As it is my wish and desire that all my estate in Shropshire, called Ashford Hall, should be sold, I do, therefore, give and devise the same unto" A. and B., "in trust to sell," &c. Parol evidence was admitted to show what was included by the term "my estate called Ashford Hall." The distinction between this case and Doe *v.* Oxenden was clearly pointed out by Lord

Devise of "my estate called A."

(*u*) 8 J. B. Moo. 665, 1 Bing. 483.

[(*x*) 1 H. L. Ca. 472; see also Doe d. Gore *v.* Langton, 2 B. & Ad. 680; Doe v. Jersey, 1 B. & Ald. 550, 3 B. & Cr. 870; Goodtitle *v.* Southern, 1 M. & Sel. 299; Purchase *v.* Shallis, 2 H. & Tw. 354; Webb *v.* Byng, 1 K. & J 580 (as to which *vide ante*, p. 329 n.); Gauntlett *v.* Carter, 17 Beav. 586; Ross *v.* Veal, 1 Jur. N. S. 751; Harrison *v.* Hyde, 4 H. & N. 805.]

Cottenham, who said: "If a testator describes lands in a particular parish, or in a particular locality, you cannot go into evidence to show he meant by the general appellation to include something out of it. You cannot do that without contradicting the terms used. Here is a term which includes more or less land, according to what was meant by the term used, and all we are in search of is the particular meaning of the expression which is used." The distinction between a devise of "my estate *of* Ashton," and a devise of "my estate *called* Ashford Hall," is, upon the words, not very perceptible. But in Doe *v.* Oxenden the word *of* was held equivalent to *at*, a construction which makes it easier to refer the cases to the opposite principles which governed them, and which are in themselves clear enough.]

Upon the same principle, of course, it is not essential to the validity of a gift, either of real or personal estate, that the person who is the intended object of the testator's bounty should be actually pointed out on the face of the will; it is enough that the testator has provided the means of ascertaining it, according to the maxim, "id certum est quod certum reddi potest." Nor is it material that the description makes the object of gift to depend upon circumstances or acts of persons which are future and contingent, or even upon the future acts of the testator himself, though this is sometimes resisted as contravening the principle of the statutory requisition of attesting witnesses. There seems however to be no valid ground for the objection. Every description must more or less involve inquiry into extrinsic facts; and there is no reason why the ascertainment of the objects may not depend as well upon the acts or conduct, past or future, of the testator, as upon any other contingent circumstance; [provided only the acts are not testamentary.] Hence it was decided in Stubbs *v.* Sargon (*y*), that a devise in favor of the persons * who might be partners of the *429 testatrix, or to whom she might sell her business, was valid; Lord Langdale observing that if the description be such as to distinguish the devisee from every other person, it is sufficient, without entering into the consideration of the question, whether the description was acquired by the devisee after the date of the will or by the testator's own act in the course of his affairs, or in the ordinary management of his property.

Sufficient if testator provide means of ascertaining the object of gift.

[The admission or rejection of parol evidence is commonly said to depend in all cases on the canon, which rejects it in the case of a *patent* ambiguity, or "that which appears to be ambiguous upon the deed or instrument," and admits it in the case of a *latent* ambiguity, or "that which seems certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter, out-

Rule as to patent and latent ambiguities, how far conclusive in deciding on admissibility of evidence.

(*y*) 2 Kee. 255, [3 My. & Cr. 507, ante, p. 94.

side of the deed, that breedeth the ambiguity" (*z*).[1] In the latter case, ambiguity being raised by parol evidence, may, it is said, be fairly removed by the same means. But upon examination the maxim proves not to be an universal guide; for, on the one hand, there are many recognized authorities for the admission of parol evidence to explain ambiguities appearing on the face of the will (*a*), while, on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished from what is the meaning of the words he has used (*b*). It is to the admissibility of this species of evidence that attention is now to be turned. To say that such evidence is admissible, because the ambiguity complained of has been raised by the extrinsic facts, is to lose sight of the essential difference between the nature and effect of the evidence which raises the ambiguity, and that by which it is to be removed; for the former is confined to a development of facts with reference to which the will was written, and to which the language of the will expressly or tacitly refers; and, therefore, it lies within the strict limits of exposition, which it cannot be denied that the latter transgresses (*c*). To render the proposition tenable, it must be supposed to assert only that, if *430 an ambiguity is introduced into an otherwise unambiguous * will by parol evidence of the state of the testator's family, or other circumstances, that ambiguity may be removed by further evidence *of the same nature* (*d*). But if this interpretation of the rule be admitted, all distinction between patent and latent ambiguities is lost, for in *every* case the judge by whom a will is to be expounded is entitled to be placed, by a knowledge of all the material facts of the case, as nearly as possible in the situation of the testator when he wrote it. The conclusion is either that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the canon, in its second branch, asserts the admissibility of evidence to show the testator's intention (as distinguished from the meaning of his written words); and that, consequently, if true, its application must be confined to a special class of cases.

Evidence of intention, when admissible.

It remains to inquire in what cases, if any, such evidence is admissible. Suppose then that evidence has been given of all the material facts and circumstances of the case, and that these have ultimately raised] an ambiguity by disclosing the exist-

(*z*) Bacon's Maxims, Reg. 23.
(*a*) Doe d. Gord *v.* Needs, 2 M. & Wels. 129; Doe d. Smith *v.* Jersey, 2 B. & B. 553; Fonnereau *v.* Poyntz, 1 B. C. C. 472; Colpoys *v.* Colpoys, Jac. 451, Wigr. Wills, 65, 66, 178, whence the views expressed in the text have been adopted.
(*b*) See cases, ante, p. 409, n. (*b*).
(*c*) See Wigr. Wills, 121; per Romilly, M. R., Stringer *v.* Gardiner, 27 Beav. 38.
(*d*) Per Alderson, B., 13 M. & Wels. 204.

[1] This is pronounced, the clearest definition in the books by the court in South Newmarket Sem. *v.* Peaslee, 15 N. H. 317, 327.

ence of more than one object or subject to which the words are equally applicable.[1] The uncertainty as to which of these was in the testator's contemplation would, if the investigation stopped here, necessarily be fatal to the gift. [Under these peculiar circumstances, however, declarations of the testator or other direct evidence of his intention are admissible] to clear up the ambiguity, by pointing out (if they can) the actual subject or object of gift, among the several properties or persons answering to the description.[2] [Of this nature are the examples given by Lord Bacon, in illustration of the maxim, "Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur;"[3] and are styled by him cases of equivocation (*e*).]

"Equivocation."

Thus, where a testator devises his manor of Dale, and it is found that he had at the date of his will two manors, North Dale and South Dale, evidence may be adduced to show which of them was intended (*f*).[4] Again, if a testator, having two closes in the occupation of A., devises all that his close in A.'s occupation, evidence is admissible to prove which of the two closes he meant to devise.[5]

Effect where there are two subjects or objects answering to description.

The same principle, of course, is applicable (and it has been *most frequently applied) to the objects of a devise. Thus, in *431 Lord Cheyney's case (*g*), it was resolved that if a man have two

(*e*) See, as to the meaning of the word *ambiguity*, Wigr. Wills, pl. 210; Cic. Q. Tusc. III. 9.] (*f*) See 1 M. & Sc. 343. (*g*) 5 Rep. 68 b.

[1] Dunham *v.* Averill, 45 Conn. 61, 68; Beardsley *v.* American Miss. Soc., ib. 327; Burnet *v.* Burnet, 30 N. J. Eq. 595; Griscom *v.* Evens, 40 N. J. 402, 407. The testator having used the phrase "my two farms," evidence may be introduced to show the situation of the land, and the manner in which it had been used and treated, in order to ascertain whether a disconnected piece of woodland was in fact a part of one of the "two farms," so as to pass under the devise. Black *v.* Hill, 32 Ohio St. 313. See Ryerss *v.* Wheeler, 22 Wend. 148.

[2] See Wilson *v.* Fosket, 6 Met. 404, 405; Lowe *v.* Carter, 2 Jones, Eq. 377; Mitchell *v.* Mitchell, 6 Md. 224.

[3] Doe *v.* Roe, 1 Wend. 541; Storer *v.* Freeman, 6 Mass. 440, 441; Watson *v.* Boylston, 5 Mass. 417; Stackpole *v.* Arnold, 11 Mass. 29, 30; Webster *v.* Atkinson, 4 N. H. 21; Jackson *v.* Sill, 11 Johns. 201; Peisch *v.* Dickson, 1 Mas. 10, 11; Mann *v.* Mann, 1 Johns. Ch. 231; Vernor *v.* Henry, 3 Watts, 385; Tudor *v.* Terrel, 2 Dana, 49; Edwards *v.* Richards, 1 Wright, 597; Hand *v.* Hoffman, 3 Halst. 78; Baugh *v.* Read, 1 Ves. (Sumner's ed.) 257, n. (*b*), and cases cited; Patterson *v.* Leith, 2 Hill, Ch. 16; Breckenridge *v.* Duncan, 2 A. K. Marsh. 51; Comfort *v.* Mather, 2 Watts & S. 450; Haydon *v.* Ewing, 1 B. Mon. 113; Connolly *v.* Pardon, 1 Paige, 291; Capel *v.* Robarts, 3 Hagg. 156.

[4] Devise of a house and lot in Fourth Street, Philadelphia; the testator had no property in Fourth Street, but had a house and lot in Third Street. Parol testimony was admitted to explain the ambiguity. Allen *v.* Lyons, 2 Wash. C. C. 475. See Riggs *v.* Myers, 20 Mo. 239. So where a testator devised "thirty-six acres, more or less, in lot 37, in 2d division in Barnstead," and there was no such lot as 37 in the 2d division in that town, but there was lot No. 97 in that division, a part of which the testator died possessed of;—it was held that there was a latent ambiguity in the devise which might be explained by parol evidence. Winkley *v.* Kaime, 32 N. H. 268. So where a testator devised all his messuages and lands in the parish of D., parol evidence was admitted to show that, although in point of fact some part of said land was situate in the parish of W., yet that, at the date of his will and death, that part was generally reputed to lie in D. Anstee *v.* Nelms, 1 H. & N. 225.

[5] Where the description in a will of the person or thing intended is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator. 1 Greenl. Ev. § 290. See 1 Phill. Ev. 532, n., 939; Jackson *v.* Goes, 13 Johns. 518; Pritchard *v.* Hicks, 1 Paige, 270; Pinson *v.* Ivey, 1 Yerg. 296; Wusthoff *v.* Dracourt, 3 Watts, 243; Button *v.* American Tract Soc., 23 Vt. 336; Gass *v.* Ross, 3 Sneed, 211.

sons, both baptized by the name of John, and, conceiving that the elder (who had been long absent) is dead, devise his lands, by his will in writing, to his son John, generally, and in truth the elder is living; in this case the younger son may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he, at the time of the will made, named his son John the younger; for, observes Lord Coke, no inconvenience can arise, if an averment in such case be taken (*h*); because he who sees such will, ought at his peril to inquire which John the testator intended; which may easily be known by him who wrote the will, and others who were privy to his intent.

Evidence admitted to show which of two persons answering to the name was intended.

Declarations of testator admitted.

So, in Jones *v.* Newman (*i*), where a testatrix devised to John Cluer of Calcot. There were two persons, father and son, of that name, and evidence was admitted to show which was intended. One of them had subsequently died in the testatrix's lifetime; but, of course, that could not influence the construction.[1] [So, where a testator bequeathed a legacy to "W. R., his farming man," and it appeared he had two farming men of that name, evidence of the testator's declarations in favor of one of them was admitted (*k*).]

Again, in Doe d. Morgan *v.* Morgan (*l*), where a testator devised certain property to his nephew Morgan Morgan, and then in the same will devised other property to his nephew Morgan Morgan, *of the village of Mothvey*. It appeared that the testator had two nephews of this name, one of whom lived at Mothvey, and the other elsewhere; it was contended that as the first devise was to Morgan Morgan *simpliciter*, and the second devise to Morgan Morgan of Mothvey, it was to be presumed that the testator in making this distinction had different persons in his contemplation, and that, this being apparent on the face of the will, parol evidence to the contrary was inadmissible; but the court held that evidence of the testator's oral declarations, made at the time of the will, was admissible.[2]

(*h*) But the effect of the doctrine is to render it necessary to the completeness of a title derived under a devisee, that it should be ascertained that there is not more than one person answering to the description; but this is seldom attended to in practice, unless some discrepancy occurs between the terms of the will and the actual name or addition of the claimant.

(*i*) W. Bl. 60. [(*k*) Reynolds *v.* Whelan, 16 L. J. Ch. 434]

(*l*) 1 Cr. & M. 235.

[1] See Matter of Cahn, 3 Redf. Sur. 31; Connolly *v.* Pardon, 1 Paige, 291; Stokeley *v.* Gordon, 8 Md. 496. In Smith *v.* Smith, 1 Edw. Ch. 189; S. C. 4 Paige, 271, a legacy was left to Mary S., wife of Nathaniel S. Mary S.'s husband was named Abraham, and Sarah S.'s husband was Nathaniel S. Upon extrinsic evidence and circumstances, it was held that Mary S. was entitled. In Vernor *v.* Henry, 3 Watts, 385, the testator had given a legacy to James Vernon Henry, describing the legatee as his nephew, and son of Elizabeth, a deceased sister of the testator. James Vernon Henry claimed the legacy, as also did Robert R. Henry. It appeared in evidence that James was not the nephew but a grandnephew of the testator, and, instead of being the son, he was the grandson of Elizabeth. Robert, on the other hand, was a nephew of the testator, and the only son of Elizabeth who was living at the date of the will. Upon the extrinsic evidence produced, the court held James to be entitled. See Jackson *v.* Stanley, 10 Johns. 133; Jackson *v.* Boneham, 15 Johns. 226; Jackson *v.* Hart, 12 Johns. 77; Hall *v.* Leonard, 1 Pick. 31; Stokeley *v.* Gordon, 8 Md. 496.

[2] Tucker *v.* Seaman's Aid Society, 7 Met. 208, 209.

[* In Doe d. Gord *v.* Needs (*m*), there was a devise to George *432
Gord, the son of *John* Gord; another to George Gord, the son of *George* Gord; and a third to *George Gord, the son of Gord.* The Court of Exchequer held, that evidence of the testator's declarations, that he intended George Gord, the son of *George* Gord, to take the property devised to George Gord, the son of Gord, was admissible: that it was clear the testator had selected a particular object of his bounty; though if there had been a blank before the name of Gord the father, that might have made a difference: that if there had been no mention in the will of any *other* George Gord, the son of a Gord, evidence of the testator's declarations would undoubtedly have been admissible, upon the authorities, which were all characterized by the fact that the words of the will *did* describe the object or subject intended, and the evidence of the testator's declarations had not the effect of varying the instrument in any way whatever; it only enabled the court to reject one of the subjects or objects to which the description applied, and to determine which of the two the devisor understood to be signified by the description which he used in the will: that the mention in other parts of the will of two persons, each answering the description of George the son of Gord, had no more effect for this purpose than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had: and that though the claimant under the devise in question was more perfectly and fully described in another part of the will, still he was correctly, however imperfectly, described by that devise.

In Doe d. Allen *v.* Allen (*n*), a testatrix devised her land to her brother T. A. for his life, and after his decease to John A., grandson of her said brother T. A., his heirs and assigns, charged, nevertheless, with the bequest of 100*l.* to each and every of the brothers and sisters of the said John A. At the time of making the will, there were two grandsons of T. A., each named John; but one of them, the lessor of the plaintiff, had brothers and sisters; the other, the defendant, had none: it was held, that the bequest to the brothers and sisters of the said John A. did * not contain a description of the devisee, *433
so as to exclude extrinsic evidence in favor of the defendant's claim, as it would have applied to after-born brothers and sisters; and that a declaration by the testatrix, of her intention in the defendant's favor, was admissible.]

On the other hand, in Doe d. Westlake *v.* Westlake (*o*), where the devise unto "Matthew Westlake my brother, and to Simon

[(*m*) 2 M. & Wels. 129. See also Phillips *v.* Barker, 1 Sm. & Gif. 583.

(*n*) 12 Ad. & Ell. 451. In Bennett *v.* Marshall, 2 K. & J. 740, the case of two persons, one with several Christian names, the other with one only, that one being identical with the first Christian name of the former, was considered to be the same as the case of two persons bearing the same name. It is not stated however what was the nature of the parol evidence admitted. See also per Malins, V.-C., Webber *v.* Corbett, L. R. 16 Eq. 518.]

(*o*) 4 B. & Ald. 57; [see also Douglas *v.* Fellows, Kay, 114; Webber *v.* Corbett, L. R. 16 Eq. 518; and cf. Fleming *v.* Fleming, 1 H. & C. 242.

Contra, where ground for preferring either is afforded by the will;

Westlake my brother's son;" and it appeared by the evidence, that the testator had three brothers, Thomas, Richard, and Matthew, each of whom had a son named Simon; Thomas and Richard were mentioned in previous parts of the will: the Court of King's Bench held (and that in perfect consistency with the preceding cases (*p*)), that the fact of there being several brothers' sons named Simon did not raise a latent ambiguity, so as to let in evidence of oral declarations made by the testator respecting his intention; it being clear, on the face of the will,[1] that the nephew intended was the son of Matthew. "My brother's son" evidently meant the son of that brother who was then particularly in his mind.

—or by surrounding circumstances.

[And the result would doubtless be the same where the evidence of surrounding circumstances disclosed reasons for the testator preferring one person to another of the same name (*q*): for there is properly no "ambiguity" until all the facts of the case have been given in evidence and found insufficient for a definite decision (*r*).]

To "my brother," &c., the testator having several brothers.

There seems to be no doubt, though it has never been distinctly decided, that the principle of the preceding cases applies to a devise to a person sustaining a given character, as "to my brother, son," &c., without specification of name; so that if the fact should happen to be, that there were more persons than one to whom the description applied, parol evidence would be admissible to show which of them was the intended object of gift; for, as the uncertainty does not appear until the parol evidence discloses the plurality of persons answering to the terms of the will, it seems to be an instance of that [kind of] *ambiguitas latens*, [to remove which evidence of intention is permitted (*s*).] In *434 * several reported cases, indeed, devises of this kind have failed, on account of the uncertainty of the object; but in none of them does parol evidence appear to have been offered to remove the ambiguity.

Thus, in Dowset *v.* Sweet (*t*), a bequest to the son and daughter of W. W. was held to be void as to the son, on account of there being more than one. So, in Doe d. Hayter *v.* Joinville (*u*), one of the grounds on which the devise to the testator's "brother and sister's family" failed was, that there were children of two sisters of the testator, one living and one dead, and it did not appear which of them was intended.

(*p*) See Wigram, Wills, pl. 144.
(*q*) Jefferies *v.* Michell, 20 Beav. 15.
(*r*) Wigram, Wills, Prop. VI. and VII.
(*s*) See acc. per Lord Thurlow, 1 Ves. Jr. 415; and Hampshire *v.* Peirce, 2 Ves. 216 — the gift to "the four children of B." — as to which case, however, see 5 M. & Wel. 371. Note the difference between this case and that of a gift to "*one of* the sons, brothers, &c. of A.," 2 Vern. 625. But a devise "to one of my cousin A.'s daughters that shall marry with a Norton within fifteen years" has been held to mean the daughter who shall *first* marry a Norton, and consequently a good devise. Bate *v.* Amherst, T. Raym. 82. See also Ashburner *v.* Wilson, 17 Sim. 204.]
(*t*) Amb. 175.
(*u*) 3 East, 172.

[1] Wootton *v.* Redd, 12 Gratt. 196.

Sometimes it happens that one part of the description applies to each of several claimants in common, and another part to neither of them; as in the case of Careless *v.* Careless (*v*), where the bequest was to "Robert Careless my nephew, the son of Joseph Careless." It appeared by the evidence that the testator had no brother named Joseph, but he had two brothers, John and Thomas, both mentioned in the will, each of whom had a son named Robert. These nephews were the respective claimants; Thomas's son relying on the fact, that in other parts of his will the testator had described Robert, the son of John, in a different manner, sometimes calling him his nephew Robert simply, without any further designation, and sometimes rightly Robert the son of John. By the parol evidence which was adduced on both sides, it appeared that the testator was intimately acquainted with John's son Robert, but that Thomas's son lived at a distance, and was almost unknown to him, the testator having been introduced to him but once; and it was even doubtful whether the testator knew that his brother Thomas had a son of that name. Sir W. Grant held, that, as the ambiguity was created by facts *dehors* the will, parol evidence was admissible; and the presumption upon the evidence was, that the testator intended that nephew whom he knew best, and with whose name it is certain he was acquainted. "Supposing, however," said the M. R., "that this inaccurate description should be taken therefore to apply to the plaintiff (John's son), the testator has not always applied to him the same description, but has sometimes called him his nephew Robert, generally, and sometimes rightly, * Robert the son of *435 his brother John; and thence it is argued, that as it is plain he knew the plaintiff by his right description, so it cannot be imagined that he inserted a wrong description, intending it should apply to him. But it must be observed, that the claim of the plaintiff to the property given by the general description of the testator's nephew Robert, is not disputed, though it is in words equally ambiguous with this which is disputed. This amounts to an admission on the part of the defendant, to the full extent of what the plaintiff would establish by his evidence. Then it is not pretended that the testator could have meant any body but one of his two brothers, John and Thomas, by the description of Joseph Careless; nor can it be supposed that he was in fact ignorant of the names of his brothers. It was therefore a mere slip of the pen; and then what name did he intend to write? Not Thomas, for then it must have been brought newly to his mind that he had two nephews of the name of Robert, to one of whom he had already given as the son of John; and the necessity of distinguishing between them would in that case have induced him to describe the other accurately (*x*). If he had only one of his nephews in his mind, during the whole time that he

Where part of description applies to each of several persons, and part to neither, evidence admitted.

(*v*) 1 Mer. 384.

(*x*) See also Webber *v.* Corbett, L. R. 16 Eq. 520.

was making his will, it is natural to conceive that such a mistake might have been made by mere inattention; but as actual ignorance is out of the question, such a mistake would not be reconcilable with the supposition that the testator at all thought of his other nephew Robert, so as to bring into his mind the necessity of marking which of the two he intended. During the time that he was making his will, therefore, he forgot (if indeed he ever knew) that he had any nephew called Robert besides the plaintiff."

Again, in Still *v.* Hoste (*y*), a testator bequeathed a legacy to *Sophia* Still, daughter of Peter Still. Still had two daughters only, Selina and Mary Anne; and [the evidence of the attorney who made the will and of another person, proving that Selina was the person meant, was admitted.][1] It is clear that if Selina had been the only daughter, her claim might have been supported on the terms of the will without the aid of extrinsic evidence.

[So, in Price *v.* Page (*z*), where a testator gave a legacy to —— Price, the son of —— Price. The report states that the plaintiff was
*436 the only person who claimed the legacy, but the * executors raised the question whether the father of the plaintiff, to whom the description was equally applicable, was not intended. Evidence was admitted and relied on by Sir R. P. Arden, M. R., that the testator had said that he had or would provide for the plaintiff, and that he had left him something by his will.

Of the three cases last cited, it was said by Lord Abinger, C. B. (*a*), that they did not materially differ from the class immediately preceding. That they differed indeed in this, that the equivocal description was not entirely accurate (*b*); but they agree in its being (although inaccurate) equally applicable to each claimant; and that they all concurred in this, that the inaccurate part of the description was either, as in Price *v.* Page, a mere blank, or, as in the other two cases, applicable to no person at all. That these, therefore, might fairly be classed also as cases of equivocation, and in that case evidence of the intention of the testator seemed to be receivable.

Where part of description applies to one and part to another, evidence of intention is inadmissible.

There is yet another class of cases in which it has been made a question, whether evidence of the nature now under consideration can be legally admitted, namely, where the description in the will, taken altogether, answers to no person or thing, but part of it applies to one, and part to another. Cases are to be met with, supporting the conclusion, that a testator's declarations are admissible to show which of the imperfectly described persons or things he intended to be the object or subject of

(*y*) 6 Mad. 192. [(*z*) 4 Ves. 679.
(*a*) In Doe *v.* Hiscocks, 5 M. & Wels. 370.
(*b*) Legal certainty, not perfect accuracy, is required, see Wigr. Wills, pl. 186.

[1] See Blundell *v.* Gladstone, 1 Phill. Ch. (Eng.) 279.

the gift (*c*). But in] Doe d. Hiscocks *v.* Hiscocks (*d*), where part of the description in the will applied to one person and part to another, the Court of Exchequer rejected evidence of the testator's declarations, at the time of giving instructions for his will, respecting his actual intention. The devise was to the testator's son John H. for life, and on his decease to his (testator's) grandson John H., eldest son of the said John H. for life, and on his decease to the first son of the body of his said grandson John H., in tail male, with other remainders over. At the time of making the will, the testator's son John H. had been twice married; he had by his first wife one son, Simon; by his second wife an eldest son John, and other younger children, sons and daughters. It * was held, that evidence of the instructions given by *437 the testator for his will and of his declarations after its execution was not admissible to show which of these two grandsons was intended by the description in the will. Lord Abinger, in [delivering the judgment of the court, reviewed most of the principal cases on this subject. In the opinion of the court there was but one case, in which evidence was admissible of the testator's declarations, of the instructions given for his will, and other circumstances of the like nature, which were not adduced for explaining the words or meaning of the will, but either to supply some deficiency or remove some obscurity or ambiguity. That case was where the meaning of the testator's words was neither ambiguous nor obscure, and where the devise was, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arose as to which of the two or more persons or things, *each answering the words in the will*, the testator intended to express. Though it was clear he meant one only, both were equally denoted by the words, whence there arose an "equivocation," and evidence of previous intention might be received to solve this latent ambiguity; for the intention showed what he meant to do; and when you knew that, you immediately perceived that he had done it by the words he had used, and which in their ordinary sense might properly bear that construction. It appeared to them that in all other cases parol evidence of what was the testator's intention ought to be excluded. This case is generally considered to have settled the law upon this subject (*e*), and to decide that "the only cases in which evidence to prove intention is admissible, are those in which the description in the will is unambiguous in its application (*i. e.* equally applicable in all its parts) to each of several subjects."

The rule stated.

(*c*) Thomas d. Evans *v.* Thomas, 6 T. R. 678; Bradshaw *v.* Bradshaw, 2 Y. & C. 72; in Doe d. Chevalier *v.* Uthwaite, 8 Taunt. 306, 3 Moo. 304, 3 B. & Ald. 632, sometimes cited in support of the same doctrine, it does not appear that any declarations by the testator were offered in evidence. The case is said to have been ultimately compromised, per Lord Brougham, 1 H. L. Ca. 797.

(*d*) 5 M. & Wels. 363.

(*e*) Wigr. Wills, pl. 215; Blundell *v.* Gladstone, 11 Sim. 467, 470, 1 Phill. 282; Thomson *v.* Hempenstall, 1 Rob. 783, 13 Jur. 814; Bernasconi *v.* Atkinson, 10 Hare, 348; Charter *v.* Charter, L. R. 7 H. L. 364, 377. In Re Blackman, 16 Beav. 377, the rule was transgressed, but the decision seems right without the questionable evidence, ante, p. 379.

In the case of Doe *v.* Allen (*f*), the declarations admitted as evidence have been made by the testatrix ten months after the date of her will, and were objected to on that account. Lord Denman, C. J., concluded the judgment of the court by saying, that "none of the cases which were referred to in the books to show that declarations contemporaneous with the will were alone to be received, established such a distinction. *438 Neither had any * argument been adduced which convinced the court that those subsequent to the will ought to be excluded wherever any evidence of declarations could be received. They might have more or less weight, according to the time and circumstances under which they were made, but their admissibility depended entirely on other considerations." The same remarks would apply to declarations made before the will (*g*).

Declarations need not be contemporaneous with will.

It was stated in a former page that evidence of all the *material* facts of the case was admissible to assist in the exposition of the will. And this statement was necessarily qualified by the insertion of the word *material*, because though the rules specially applicable to the subject now under consideration, may not raise any peculiar obstacle to the admission of evidence tendered in support of a given fact; yet if that fact, supposing it to be proved, ought not to influence the construction of the will, the evidence in support of it is immaterial, and therefore inadmissible. Some examples illustrating this principle have already been given (*h*). It is further exemplified by the well-known rule, that words shall be interpreted in their primary sense, if the context and surrounding circumstances do not exclude such an interpretation, even though the most conclusive evidence of intention to use them in some popular or secondary sense be tendered (*i*): whence it follows that a person, to whom the terms of the description are imperfectly applicable, may not, by parol evidence of facts tending to prove an intention in his favor, support his claim against another person exactly or more nearly answering to all the particulars in the description.][1]

Evidence of *immaterial* circumstances rejected;

Thus, in Delmare *v.* Robello (*j*), where a testator in 1785 bequeathed

(*f*) 12 Ad. & El. 455; Wigr. on Wills, 162.

(*g*) Langham *v.* Sandford, 19 Ves. 649; 2 Tayl. Evid. p. 1009, 7th ed. Lord Kenyon's dictum, Thomas *v.* Thomas, 6 T. R. 677, seems therefore to be overruled.

(*h*) Ante, p. 424.

(*i*) Wigr. Wills, Prop. II. supra, 417. And see Horwood *v.* Griffith, 4 D. M. & G. 708. In Grant *v.* Grant, L. R. 5 C. P. 727, Blackburn, J., cited with approval "Blackburn on Contracts," where it said that in applying the rule a distinction must be observed between contracts and wills, and a greater latitude allowed in construing wills, because in them the testator soliloquized, but that in a contract each party spoke to the other: and accordingly it was held in that case that "nephew" meant "wife's nephew," although it would not have been insensible with reference to extrinsic circumstances if it had been strictly interpreted. *Sed qu.*: a testator speaks to all persons interested under or against his will; and in Wells *v.* Wells, L. R. 18 Eq. 505, Sir G. Jessel, M. R., reaffirmed Sir J. Wigram's proposition and declined to follow Grant *v.* Grant.]

(*j*) 1 Ves. Jr. 412.

1 Tucker *v.* Seaman's Aid Soc., 7 Met. 188, 2 Dall. 70, and the remarks upon it by Shaw, post, 499, note. But see Powell *v.* Biddle, C. J., in 7 Met. 209, 210.

the residue of his estate, in trust to pay the interest for life to all the children of his two sisters, *Reyne* and *Estrella;* in case of the death of any, their issue to have their respective shares, with benefit of survivorship for want of issue. The testator died *in 1789, leaving three sisters: *Reyne*, who was never married, but in 1757 changed her profession of religion from the Jewish to the Roman Catholic persuasion, and became a professed nun, and was baptized by the name of *Maria Hieronyma*, and lived at Genoa; and *Estrella* and *Rebecca*, *who were married*, and lived at Leghorn. Rebecca had several children, who set up a claim on the ground that the testator intended *Rebecca* when he named *Reyne*. Parol evidence [of the *circumstances* as well as of testator's declarations] in support of this claim was rejected by Lord Thurlow, who suggested that Maria Hieronyma might have changed her mind, and have escaped into this country, and have married and had children, notwithstanding her vow. He decided, therefore, that the claim of the children of Rebecca was untenable, *inasmuch as there was a sister answering to the name in the will;* for he considered that the assumption of the conventual name did not prevent the applicability of the former name: it was a part of the profession, and was not meant for the rest of the world; the former name, therefore, continued, and by that such persons were always spoken of. *439

e. g. to exclude an object answering the description.

So, in Andrews *v.* Dobson (*k*), where the bequest was to "James, son of Thomas Andrews, of Eastcheap, printer." There was no person of the name of Thomas Andrews in Eastcheap, but there was James Andrews, a printer, who lived there: he had one son, named Thomas, by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The son by the first wife claimed the legacy, insisting that the testator meant "Thomas, the son of James," instead of "James, the son of Thomas;" [and prayed some inquiry respecting these circumstances:] but Sir L. Kenyon, M. R., said that though there were cases in which legacies were left to persons by nicknames, and evidence had been admitted to show that the testator usually called them thereby, yet he thought this was beyond all precedent, and dismissed the bill.[1]

Evidence not admissible to exclude a person answering to description.

(*k*) 1 Cox, 425.

[1] A testator gave a legacy to "The Seaman's Aid Society, in the city of Boston." Another society, denominated "The Seaman's Friend Society," claimed the legacy, and offered evidence to prove that the testator had no knowledge of the existence of the society named in the will; that he knew the existence of the said other society, was deeply interested in its objects, had contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener who wrote his will to insert the legacy as made to said society; that the scrivener, not knowing the existence of said society, told the testator that the name of the society was "The Seaman's Aid Society;" and that the testator thereupon submitted to have that name inserted. This evidence was held inadmissible, and "The Seaman's Aid Society" was deemed entitled to the legacy. Tucker *v.* Seaman's Aid Soc., 7 Met. 188. See South Newmarket Sem. *v.* Peaslee, 15 N. H. 317; Missionary Society *v.* Reynold, 9 Md. 341; Missionary Society's Appeal, 30 Penn. St. 425; Cresson's Appeal, 30 Penn. St. 437.

In this case there could have been no doubt as to the identity of the *father;* but the difficulty was in admitting the claim of a son of a *different* name, there being a son of *the same* name.

Again, in Holmes *v.* Custance (*l*), where there was a legacy to the children of *Robert* Holmes, "late of Norwich, but now of London." It appeared that, at the date of the will, the testator had no rela-
*440 tive named *Robert*, but that a person of this name, * [who was related to the testator, and] had gone from Norwich to London, at the age of fourteen or sixteen, had died in London, a few years before, leaving a child. It was contended that the legacy did not apply to the child of this person, but to the children of *George* Holmes, who was a relative of the testator, had been formerly of Norwich, and was then resident in London, and had several children, some of whom were in habits of intimacy with the testator; but Sir W. Grant held that the description was not so inapplicable to Robert, as to let in evidence that George was the person intended; that the sense of "late" was not "recently" but "formerly;" and as to his being dead at the time, that the testator might not have known, or might have forgotten it, he being at a distance.

[And in Wilson *v.* Squire (*m*), where a testator bequeathed a legacy to "The London Orphan Society in the City Road," and it appeared that there was no institution precisely answering this description, but there was one in the City Road called the Orphan Working School, which claimed the legacy: evidence was tendered that there was a society called the London Orphan Asylum at Clapton, and that the testator was many years a subscriber to it, and in his lifetime avowed his intention of leaving it a legacy; but Sir J. K. Bruce held, that the Orphan Working School was sufficiently described by the will, and therefore that none of the evidence was admissible.

In Maybank *v.* Brooks (*n*) the rule was applied to a different species of case. A testator bequeathed a legacy to A., "his executors, administrators, and assigns:" A. was dead at the date of the will, which, however, took no notice of the fact: but the personal representative of A. claimed the legacy, insisting that the terms of the bequest made it transmissible, and in support of his claim proposed to read (amongst other) evidence of the testator's knowledge that A. was dead: but Lord Thurlow rejected it, saying, "The only fact to which evidence is afforded is, that the death of A. was within the knowledge of the testator. The end to which it is to be read is, that the legacy was meant to be transmissible: that could not be from a legatee who had been dead several years." . . . "I must accordingly decree the legacy to be lapsed" (*o*).]

(*l*) 12 Ves. 279; see also Doe *v.* Westlake, 4 B. & Ald. 57, ante, p. 433; [Re Ingle's Trust, L. R. 11 Eq. 578.
(*m*) 1 Y. & C. C. C. 654. (*n*) 1 B. C. C. 84.
(*o*) See as to this, ante, p. 338.

And even where no person actually answers to *any* part of the description in the will, it would seem, upon principle, to be *impossible to admit parol evidence *441 ["of intention"] in support of the claim of one to whom the description is in every respect inapplicable:[1] [for the will ought to be made in writing; and if the testator's intention cannot be made to appear by the writing, *explained by the circumstances*, there is no will (*p*).]

Evidence of intention inadmissible to support claim of one to whom no part of description applies.

Thus, Sir John Strange (*q*), in citing a case where the executor constituted in a will was, "my nephew Robert New," which in the engrossing was written "Nune," and parol evidence was admitted, and thereupon New was declared the person meant, observed, that this would hardly have done, if it had not been for the relative words "my nephew," and its appearing that New was the testator's nephew, and that he had no such nephew as Robert Nune.

[And in Miller *v.* Travers (*r*), where a testator devised all his freehold and real estates whatsoever, situate in the *county of Limerick*, and in the city of Limerick, to trustees and their heirs. At the time of making his will, the testator had no real estate in the *county* of Limerick, but he had considerable real estates in the *county of Clare:* and it was held by Lord Brougham, L. C., assisted by Tindal, C. J., and Lord Lyndhurst, C. B., that evidence to prove that the testator *intended* his estates in the county of Clare to pass by the devise, and that the word *Limerick* was inserted by mistake instead of *Clare*, was not admissible.]

Same rule as to subject of gift.

And in no instance has a total blank for the name been filled up by parol evidence (*s*).[2] In such cases, indeed, there is no certain intent on the face of the will to give to *any* person: the testator may not have definitively resolved in whose favor to bequeath the projected legacy (*t*).

Total blanks for names not to be supplied.

(*p*) Per Lord Abinger, Doe *v.* Hiscocks, 5 M. & Wels. 369.]

(*q*) Hampshire *v.* Peirce, 2 Ves. 218.

[(*r*) 8 Bing. 244, 1 M. & Sc. 342.] The judgment of Tindal, C. J., contains a full and able examination of the authorities. [See also Okeden *v.* Clifden, 2 Russ. 309; Re Clergy Society, 2 K. & J. 615; Re Peel, L. R. 2 P. & D. 46; Barber *v.* Wood, 4 Ch. D. 885. Beaumont *v.* Fell, 2 P. W. 141, 2 Eq. Ca. Ab. 366, pl. 8. where a legacy to "Catherine Earnley" was, upon evidence of intention, held well bequeathed to Gertrude Yardley, is overruled (5 H. L. Ca. 168); unless it can be deemed a case of nickname — which is questionable. The same may be said of Masters *v.* Masters, 1 P. W. 425, where on a legacy to "Mrs. Sawyer" inquiry was directed whether Mrs. Swapper was the person intended.

(*s*) Baylis *v.* Att.-Gen., 2 Atk. 239; Ulrich *v.* Litchfield, Ib. 372; Taylor *v.* Richardson, 2 Drew. 16.

(*t*) Per Parke, B., Doe *v.* Needs, 2 M. & Wells. 139.]

[1] If the description of the person or thing be wholly inapplicable to the subject intended, or said to be intended by it, evidence is inadmissible to prove whom or what the testator really intended to describe. His declarations of intention, whether made before or after the making of the will, are alike admissible. Wigram on Wills, pl. 104, 194, 195; 1 Greenl. Ev. § 290. See Rothmahler *v.* Myers, 4 Desaus. 215; Tucker *v.* Seaman's Aid Soc., 7 Met. 188; Hyatt *v.* Pugsley, 23 Barb. 285.

[2] Tucker *v.* Seaman's Aid Soc., 7 Met. 205; Wigram on Extrinsic Ev. Prop. 6, pl. 121, p. 88; Prop. 7, pl. 181, p. 143; 1 Phill. Ev. (Cowen & Hill's ed.) 539, 540, and notes; 1 Greenl. Ev. Pt. 2, c. 15, § 301, and notes; Miller *v.* Travers, 8 Bing. 244; Ram on Wills, c. 3, p. 32, 34, 2 Williams, Ex. (6th Am. ed.)

Partial blanks supplied.

The effect of partial or imperfect descriptions, however, has often come under consideration. In Hunt *v.* Hort (*u*), where the bequest was to Lady , Lord Thurlow considered it as equivalent to a total blank, and, therefore, that the name *442 * could not be supplied by parol evidence. But in Abbot *v.* Massie (*x*), where the bequest was to Mr. and Mrs. G., Lord Loughborough directed an inquiry as to who Mrs. G. was. Of course, if there had been more than one person answering to the imperfect description in the will, and the evidence had failed to point out which of them was the intended object of the testator's bounty, the bequest would, in both the preceding cases, have been void for uncertainty.

Evidence sometimes admissible, though immaterial.

[At the conclusion of his judgment in Blundell *v.* Gladstone, the V.-C. said he decided the case upon the words of the will, coupled with that evidence only which had been given as to the state of the Weld family at the date of the will, *and which he thought was the only part of the evidence which ought to be received* (*y*). But besides that evidence there was parol evidence (*z*) of the testator having, both before and after making his will, and even after correction of his mistake, repeatedly called the possessor of Lulworth by the name of *Edward* Weld. This evidence had been received in the Master's office, and in delivering the opinion of the judges in D. P. (where the suit was carried), Parke, B., said, they thought it was rightly received (*a*). Hence it is to be inferred that evidence (to which, upon the principles discussed in this chapter, there is *per se* no objection) of *facts* connected with the case, and which may by possibility influence the construction of the will, is admissible, although ultimately it is found to be immaterial and has to be excluded from consideration (*b*).]

(*u*) 3 B. C. C. 311; see also 1 M. & Sc. 351.
(*x*) 3 Ves. 148; [and see Re De Rosaz, 2 P. D. 66.
(*y*) 11 Sim. 488. (*z*) Ib. 470.
(*a*) 1 H. L. Ca. 778, nom. Camoys *v.* Blundell.
(*b*) See also Lowe *v.* Lord Huntingtower, 4 Russ. 532, n.; Sayer *v.* Sayer, 7 Hare, 381, Wigr. Wills, pl. 103.]

pp. 1153, 1154. It was remarked, in a general way, by Parker, C. J., in Brown *v.* Gilman, 13 Mass. 158, that, where a contract has been reduced to writing, and the name of the contracting party has been omitted, the omission may be supplied by extrinsic evidence. See also, Penniman *v.* Barremore, 18 Mart. 497; Lynn *v.* Risberg, 2 Dall. 180.

*CHAPTER XIV. *443

ELECTION.

THE doctrine of election[1] may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it.[2] If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition;[3] but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose

Doctrine of election, what.

[1] For a full discussion of this subject, see 2 Story, Eq. Jur. § 1075, *et seq.*; Schuebly *v.* Ragan, 7 Gill & J. 120; Creswell *v.* Lawson, ib. 228; Robertson *v.* Stevens, 1 Ired. Eq. 247; Addison *v.* Bowie, 2 Bland, 606; Daxon *v.* Steele, 2 Jones, 178; Gest *v.* Flock, 1 Green, Ch. 108; Page *v.* Hughes, 2 B. Mon. 442; Butricke *v.* Broadhurst, 1 Ves. (Sumner's ed.) 172, note (*a*); Cogdell *v.* Cogdell, 3 Desaus. 346, 388; Deveaux *v.* Barnwell, 1 Desaus. 497; Collins *v.* Janey, 3 Leigh, 389; Hyde *v.* Baldwin, 17 Pick. 303; Hamblett *v.* Hamblett, 6 N. H. 333; Weeks *v.* Patten, 18 Me. 42; Bugbee *v.* Sargent, 23 Me. 269, 271. Election may be enforced against *femes covert* and infants, between two inconsistent rights, where there is a clear intention of him under whom one of those rights is devised that both shall not be enjoyed, and when it would be against conscience to enjoy both. Robertson *v.* Stevens, 1 Ired. Eq. 247; Tiernan *v.* Roland, 15 Penn St. 429; Sledds *v.* Carey, 11 B. Mon. 181. Wherever a testator may put his devisees to an election to take under or in opposition to his will, the court may, in such case, elect for infants. Addison *v.* Bowie, 2 Bland, 606. See 2 Story, Eq. Jur. § 1097; Frank *v.* Frank, 3 Mylne & C. 171; M'Queen *v* M'Queen, 2 Jones, Eq. 16; Flippin *v.* Banner, ib. 450.

[2] A party entitled to an estate may therefore, by accepting a devise under a will which attempts to dispose of his property, be barred of a clear right. Penn. Life Ins. Co. *v.* Stokes, 61 Penn. St. 136. See also as to the rule stated in the text, Watson *v.* Watson, 128 Mass. 152; Hyde *v.* Baldwin, 17 Pick. 308; Holt *v.* Rice, 54 N. H. 398; Smith *v.* Guild, 34 Me. 443; Weeks *v.* Patten, 18 Me. 42; Buist *v.* Dawes, 3 Rich. Eq. 281; Waters *v.* Howard, 1 Md. Ch. Dec. 112; Fulton *v.* Moore, 25 Penn. St. 468; Hamblett *v.* Hamblett, 6 N. H. 333; Bell *v.* Armstrong, 1 Addams, 365; George *v.* Bussing, 15 B. Mon. 558. And the rule holds good at law as well as in equity. Watson *v.* Watson, 128 Mass. 152; Smith *v.* Smith, 14 Gray, 532; Brown *v.* Brown, 108 Mass. 386; Hapgood *v.* Houghton, 22 Pick. 480, 483; Doe *v.* Cavendish, 3 Doug. 48, 55; S. C. 4 T. R. 741, 743, note; Wilson *v.* Townshend, 2 Ves. Jr. 693, 696; Birmingham *v.* Kirwan, 2 Schoales & L. 444, 450. But where a man gives a child or other person a legacy or portion in lieu and satisfaction of a particular thing, this will not exclude him from another benefit, though it may happen to be contrary to the will; for the court will not construe it in lieu of everything else, when he has named a particular thing. East *v.* Cook, 2 Ves. Sen. 33; Hapgood *v.* Houghton, 22 Pick. 480, 483; Ward *v.* Ward, 15 Pick. 526.

[3] But in order to furnish a case for election under a will, it must be clear that the testator intentionally assumed to dispose of the property of the beneficiary, and did not intend to dispose of any expectant or other interest of his own in the property. Havens *v.* Sackett, 15 N. Y. 365.

of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.

Thus where (*a*) A. seised of two acres, one in fee, and the other in tail, and having two sons, by his will devised the fee-simple acre to his eldest son, who was issue in tail, and the entailed acre to his youngest son, and died. The eldest son entered upon the entailed acre, whereupon the younger son brought his bill against his brother, that he might enjoy the entailed acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed something for him. Lord Cowper said, "The devise of the fee acre to the elder must be understood to be upon the tacit condition, that he shall suffer the younger son to enjoy quietly, or else that the younger son *444 *shall have an equivalent out of the fee acre." And he decreed the same accordingly. [This case is the more remarkable, as showing the length to which the doctrine of election has been carried; because the elder son was actually entitled to both acres by his better title as general or special heir, and took nothing under the will. Yet the mere intention to give him property by the will was held sufficient to put him to his election (*b*).]

Does extend to derivative claims.

But a devisee or legatee is not precluded from claiming derivatively, through another, property which such other person has taken in opposition to the will. Thus, a man may be tenant by the courtesy, in respect of an estate of inheritance taken by his wife in opposition to a will under which he has accepted benefits, without affecting his title to those benefits (*c*). [For, compensation having once been made by the wife (*d*) cannot be exacted a second time. And a devisee or legatee who claims derivatively through another, to whom the will gave nothing, is equally free; for whether the true owner took subject to an obligation which he has discharged, or subject to no obligation whatever, can make no difference: thus one co-heiress electing to take under a will, may retain a share which since the testator's death has descended to her from a deceased co-heiress although bound to give up her own original share (*e*).[1]

(*a*) Anon., Gilb. Cas. Eq. 15; see also Pre. Ch. 351; Belt's Suppl. to Ves. 250; 1 Ves. 234; 1 B. P. C. Toml. 300; 3 B. P. C. Toml. 167; Amb. 388, 1 Ed. 532; 3 B. C. C. 316; 4 B. C. C. 21; S. C. 1 Ves. Jr. 514; 4 B. C. C. 38; 1 Ves. Jr. 534; 2 Ves. Jr. 367; ib. 693; ib. 544; 3 Ves. 191; ib. 384; 5 Ves. 515; 9 Ves. 369; 13 Ves. 224; 1 Dow, 249; 2 V. & B. 187; 2 Mer. 86; 1 Sw. 359; ib. 409; [3 Russ. 278; 4 Y. & C. 18; 2 Drew. 93.] Where several are disappointed the sequestered property is divided among them in proportion to the value of the interests of which they are disappointed. Howells *v.* Jenkins, 1 D. J. & S. 617. If the property which the testator affects to dispose of belongs to several, as tenant for life and remainder-man (Ward *v.* Baugh, 4 Ves. 623), or as tenants in common (Fytche *v.* Fytche, L. R. 7 Eq. 494), each has a separate right of election.

[(*b*) See Schroder *v.* Schroder, Kay, 584–586. But 9 Pri. 573, Richards, C. B., *dub.*]

(*c*) Lady Cavan *v.* Pulteney, 2 Ves. Jr. 544, 3 Ves. 384.

[(*d*) 2 Ves. Jr. 555.

(*e*) Wilson *v.* Wilson, 1 De G. & S. 152. And see Howells *v.* Jenkins, 2 J. & H. 706; Grissell *v.* Swinhoe, L. R. 7 Eq. 291. But see per Lord Moncreiff, L. R. 7 H. L. 79.

[1] See Carder *v.* Fayette Co., 16 Ohio St. 353; Bowen *v.* Bowen, 34 Ohio St. 164; Crostwaight *v.* Hutchinson, 2 Bibb, 408.

It must however be understood that the obligation attaches on whoever at the testator's death is true owner of the property wrongfully disposed of, and to whom also a benefit is given by the will. This is the point of time to be regarded. And it matters not from whom, or by what previous acts or devolutions, such owner's title was derived (*f*). Where the obligation to elect has once attached, the property which is taken under the will as bounty, however and whenever it may devolve, continues liable until compensation is duly made (*g*).]

The doctrine of election clearly applies as well to [contingent as to vested rights (*h*); to the interest of next of kin in the *unascertained residue of an intestate's personal estate (*i*); and to] reversionary and remote as well as to immediate interests (*k*).[1] Lord Hardwicke, indeed, at one time seems to have thought that it did not extend to a remainder expectant on an estate tail (*l*); but the notion stands upon no intelligible principle, and is inconsistent with his own decision in Graves *v.* Forman (*m*), in which he would not allow an heir at law to whom an estate for life in remainder after an estate tail was devised, to take it without giving up a copyhold disposed of to another, but upon which the will could not (in the then state of the law) operate, for want of a previous surrender. The heir it seems (strangely enough) elected to take the estate for life in remainder, and eventually got nothing; the tenant in tail having acquired the fee-simple by suffering a common recovery.

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Does apply to contingent and reversionary interests.

It is immaterial in regard to the doctrine of election, whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds on the erroneous supposition that he is exercising a power of disposition which belongs to him;[2] in either case, whoever claims in opposition to the will, must relinquish what the will gives him (*n*). This seems to result from the impossibility of knowing with certainty that the testator would not have made the disposition, had he been accurately acquainted with the title; and (as a great judge has observed),

Immaterial whether testator is acquainted with his want of title.

(*f*) Cooper *v.* Cooper, L. R. 6 Ch. 15, 7 H. L. 53.

(*g*) Fytche *v.* Fytche, 19 L. T. N. S. 343; Pickersgill *v.* Rodger, 5 Ch. D. 163. Where the person to elect is dead without electing, and his own property and that taken under the will go different ways, the latter is (as between the two) primarily liable, ib. But the disappointed legatees may recover to the extent of the latter against his general estate. Rogers *v.* Jones, 3 Ch. D. 688.

(*h*) Per Lord Loughborough, 2 Ves. Jr. 696, 697.

(*i*) Cooper *v.* Cooper, L. R. 6 Ch. 15, 7 H. L. 53. How the value of such an interest is to be ascertained, see S. C. 7 H. L. 68.]

(*k*) Webb *v.* Earl of Shaftesbury, 7 Ves. 480; Wilson *v.* Lord John Townshend, 2 Ves. Jr. 697.

(*l*) Bor *v.* Bor, 3 B. P. C. Toml. 178, n.

(*m*) Cited 3 Ves. 67; [see Mahon *v.* Morgan, 6 Ir. Jur. 173.]

(*n*) Whistler *v.* Webster, 2 Ves. Jr. 370; Thellusson *v.* Woodford, 13 Ves. Jr. 221; Welby *v.* Welby, 2 V. & B. 199, overruling Cull *v.* Showell, Amb. 727, unless decided on the ground of the great lapse of time, which seems probable.

[1] 2 Story, Eq. Jur. § 1095.

[2] 2 Story, Eq. Jur. § 1093. See Swanston's note to Dillon *v.* Parker, 1 Swanst. 407.

"nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another" (*o*).

Principle of doctrine is compensation, not forfeiture.

A question which has been much discussed is, whether the principle governing cases of election under a will is forfeiture or compensation;[1] or, to speak more explicitly, whether a person claiming against a will is bound to relinquish the benefit thereby given to him *in toto*, or only to the extent of indemnifying the persons disappointed by his election. The strong current of the authorities, particularly those of a recent date, is in favor of the principle of compensation (*p*); interrupted, certainly, by *446 *some *dicta* (*q*), [and by an express decision of Lord Langdale (*r*),] in favor of the doctrine of forfeiture. In Green *v.* Green (*s*), Lord Eldon is generally supposed to have used expressions indicating a similar opinion. But he expressly admits the cases to have decided that the party electing against a *will* was not bound to give up more than was enough to make satisfaction for that which was intended for another; and when he states the contrary doctrine, it is with reference to the case before him, which arose upon a *deed*, "in which," he observed, "as it is a contract, it is very difficult to say that compensation only is to be made" (*t*). The doctrine of compensation

(*o*) See Sir R. P. Arden's judgment in Whistler *v.* Webster, 2 Ves. Jr. 370.

(*p*) Webster *v.* Mitford, 2 Eq. Ca. Ab. 363, stated from Reg. Lib. 1 Sw. 449; Bor *v.* Bor, 3 B. P. C. Toml. 167; Ardesoife *v.* Bennett, 2 Dick. 463; Lewis *v.* King, 2 B. C. C. 600; Freke *v.* Lord Barrington, 3 B. C. C. 284; Blake *v.* Bunbury, 1 Ves. Jr. 523; Whistler *v.* Webster, 2 Ves. Jr. 372; Lady Cavan *v.* Pulteney, 2 Ves. Jr. 560; Ward *v.* Baugh, 4 Ves. 627; Dashwood *v.* Peyton, 18 Ves. 49; Welby *v.* Welby, 2 V. & B. 190; (see these cases stated Gretton *v.* Haward, 1 Sw. 433 n.;) [Tibbitts *v.* Tibbitts, Jac. 317.]

(*q*) Cowper *v.* Scott, 3 P. W. 119; Cookes *v.* Hellier, 1 Ves. 235; Morris *v.* Burroughs, 1 Atk. 404; Villareal *v.* Lord Galway, 1 B. C. C. 292, n.; Wilson *v.* Townshend, 2 Ves. Jr. 697; Wilson *v.* Mount, 3 Ves. 194; Broome *v.* Monck, 10 Ves. 609; Thellusson *v.* Woodford, 13 Ves. 220.

[(*r*) Greenwood *v.* Penny, 12 Beav. 406.]

(*s*) 2 Mer. 86.

(*t*) 19 Ves. 668.

[1] See this point discussed, 2 Story, Eq. Jur. § 1085, and notes; Jennings *v.* Jennings, 21 Ohio St. 81; Sandoe's Appeal, 65 Penn. St. 314. It is said by Mr. Justice Story that the fair result of the modern leading decisions is, that in such a case there is not an absolute forfeiture, but there is a duty of compensation (at least where the case admits of compensation) or its equivalent; and that the surplus, after such compensation, does not devolve upon the heir as a residuum undisposed of by the will, but belongs to the donee; the purpose being satisfied, for which alone courts of equity will control his legal right. Ib. § 1085. The operation of this principle of compensation (apart from statute) is generally thus worked out: In the event of an election to take against the will, equity assumes jurisdiction to sequester the benefit intended for the refusing donee by way of taking the rents, profits, and issues, in order to insure proper compensation to him whom such election disappoints. The surplus, if any, above the value of the property owned by the electing donee, after compensation, does not devolve upon the representative of the testator as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled the legal right. Gretton *v.* Haward, 1 Swanst. 409; Sandoe's Appeal, 65 Penn. St. 314. And the disappointed donee can never get more than the value of the interest intended for him. But if the estate devised to the electing donee is obviously less valuable than that owned by him, equity will decree a conveyance of the estate devised to the first donee, or permit the second donee to recover it in ejectment. Lewis *v.* Lewis, 13 Penn St. 79. It should be added that this doctrine of election is never applied except where, if an election is made contrary to the will, the interest that would pass from the testator by the will can be laid hold of in equity to compensate the disappointed donee. Some free disposable property must be given to the electing donee which can become compensation for what the testator endeavored to take away. Bristow *v.* Warde, 2 Ves. Jr. 336; Box *v.* Barrett, L. R. 3 Eq. 244.

was also subsequently recognized by the same high authority in Kerr *v.* Wauchope (*u*), as well as in the earlier and much-discussed case of Lord Rancliffe *v.* Parkyns (*x*); and [is now generally accepted as the settled doctrine of the court (*y*).]

In order to raise a case of election, there must be a *personal* competency on the part of the author of the attempted disposition, as the doctrine is founded on intention (*z*) which supposes such competency. Thus, under the old law, where personalty was, and real estate was not, disposable by the will of a person under age, the heir of the infant testator was allowed to take his real estate in opposition to the will, without relinquishing a legacy bequeathed to him by the same will (*a*). And though the disability of coverture is, in some respects, distinguishable from and less absolute than that of infancy (a *feme covert* having, it is said, a disposing mind, but not a disposing power, while an infant has neither the one nor the other), yet the principle seems, according to the authorities, to apply to the attempted dispositions of married women. If, therefore, a *feme coverte*, having * a testamentary power, makes an appointment by will in favor of her husband, and by the same will professes to bequeath to another personal estate to which her power does not extend, the husband may take the benefit appointed to him, and also defeat the intended bequest of the other property, by the assertion of his marital right (*b*).

Personal competency to express intention requisite; as to infants and *femes covertes*.

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It formerly happened (and may still occur under a will which is regulated by the old law), that a testator, by a will sufficient in point of execution to pass personal estate, but not adequately attested for the devise of freehold estate, devised such estate away from the heir, to whom, by the same will, he bequeathed a legacy. In such cases the heir is allowed to disappoint the testator's attempted disposition, by claiming the estate in virtue of his title by descent, and, at the same time, take his legacy, on the ground that the want of a due execution precludes all judicial recognition of the fact of the testator having intended to devise freehold estates; and, therefore, the will cannot be read as a disposition of such estates for the purpose even of raising a case of election against the heir (*c*).[1] If,

Heir when put to his election.

(*u*) 1 Bli. 1. (*x*) 6 Dow, 149.

[(*y*) Schroder *v.* Schroder, Kay, 578; Howells *v.* Jenkins, 1 D. J. & S. 617; Cooper *v.* Cooper, L. R. 6 Ch. 15, 7 H. L. 53.] But 1 Roper's Husband and Wife, by Jacob, 556, n. is contrary; [see also Sugd. Pow. p. 575, 8th ed., where the doctrine of forfeiture is also preferred.]

(*z*) *I. e.* a disposing intention, not an intention to put the owner to his election. See per Lord Cairns, Cooper *v.* Cooper, L. R. 7 H. L. 67. (*a*) Hearle *v.* Greenbank, 1 Ves. 298.

(*b*) Rich *v.* Cockell, 9 Ves. 370; [Coutts *v.* Acworth, L. R. 9 Eq. 519, is *contra;* but the point was not taken. In Blaiklock *v.* Grindle, L. R. 7 Eq. 215, the invalid bequest purported to be in exercise of a power given to *f. c.* if she died before her husband. The will was made in his lifetime, but he afterwards died before his wife, so that the point did not arise. As to the capacity of *f. c.* to elect, see Frank *v.* Frank, 3 My. & Cr. 171; Wall *v.* Wall, 15 Sim. 513; Wilson *v.* Townshend, 2 Ves. Jr. 693.]

(*c*) Hearle *v.* Greenbank, 1 Ves. 298, 3 Atk. 697, 716; Carey *v.* Askew, 1 Cox, 241; Shed-

[1] 2 Story, Eq. § 1096, note at the end.

however, the legacy to the heir is bequeathed upon the express condition that he shall confirm the devise, the case is otherwise: the heir then is not permitted to accept the benefit conferred upon him by the will, without performing the condition which the testator has expressly annexed to the enjoyment of his bounty (*d*).

Effect of 1 Vict. c. 26, on doctrine.

Of course this question cannot now arise under wills made or republished since the year 1837, which, if sufficiently executed for the bequest of a personal legacy, will also be effectual to dispose of freehold estate. Nor is this the only instance in which the statute 1 Vict. has tended to narrow the practical range of the doctrine under consideration; for now that the devising power extends to after-acquired real estate, it can no longer be a question (as formerly (*e*)), whether the testator has, by attempting to *448 * dispose of the real estate to which he may be entitled at his decease, raised a case of election against the heir in respect of such property.[1] [Even before the act, the heir was held not to be put to his election in cases of revocation by alteration of estate (*f*).

In what cases a Scotch heir is put to election by English will.

Nearly allied to the cases last noticed, are those where a testator entitled to heritable property in Scotland, affects by will in the English form, ineffectual to pass the Scotch property, to devise it away from the Scotch heir, at the same time giving him property in England. It seems now well settled that in such cases, if the English will purports to give the Scotch property either by name or under the general denomination of property in Scotland (*g*), or of property "in any part of the United Kingdom" (*h*), the Scotch heir is put to his election, while, on the other hand, a devise in general terms of all the testator's property whatsoever and wheresoever

don *v.* Goodrich, 8 Ves. 481; Brodie *v.* Barry, 2 V. & B. 127; Gardiner *v.* Fell, 1 J. & W. 22; [Wilson *v.* Wilson, 1 De G. & S. 152, seems *contra*. But see as to that case Middlebrook *v.* Bromley, 9 Jur. N. S. 614; and per Lord Alvanley Buckridge *v.* Ingram, 2 Ves. Jr. 665, cited by Lord Eldon, 8 Ves. 500].

(*d*) Boughton *v.* Boughton, 2 Ves. 12.

(*e*) See Churchman *v.* Ireland, 4 Sim. 529, [1 R. & My. 250; Tennant *v.* Tennant, 2 Ll. & G. 516; Schroder *v.* Schroder, Kay, 578, 24 L. J. Ch. 510; Hance *v.* Truwhitt, 2 J. & H. 216; ante, p. 322. In Schroder *v.* Schroder the testator (who died before the act 3 & 4 Will. 4, c. 106, s. 3, came into operation), after making his will, which purported to devise his after-acquired real-estates, contracted to buy a certain estate, and then made a codicil directing his trustees to complete the purchase, and hold the estate on the trusts of the will, which were partly in favor of the heir; afterwards the codicil was revoked by a conveyance to uses to bar dower in the testator's favor (*vide ante*, p. 155), and it was held that the heir must elect. But if a testator before 1838, devised estate A., which he had contracted to buy, *to one person*, and estate B., with all other estates which he might subsequently acquire to *another*, and gave benefits to his heir, and afterwards took a conveyance of estate A. to uses to bar dower in his own favor and acquired other estates, it is questioned by the V.-C. whether the heir was bound to elect; for there was no intention to give estate A. to the devisee of B., and the whole doctrine of election proceeded so entirely on the ground of intention, that perhaps the heir might be entitled to retain the estate against both devisees, neither of whom would have a better right against him than the other.

(*f*) Plowden *v.* Hyde, 2 Sim. N. S. 171; Tennant *v.* Tennant, 2 Ll. & Go. 516; Sugd. Pow. 577, 8th ed.

(*g*) Brodie *v.* Barry, 2 V. & B. 127; Reynolds *v.* Torin, 1 Russ. 129; M'Call *v.* M'Call, 1 Dru. 283.

(*h*) Orrell *v.* Orrell, L. R. 6 Ch. 302.

[1] See, however, Gibbon *v.* Gibbon, 40 Ga. 562; Raines *v.* Corbin, 24 Ga. 185.

is held to refer only to such property as he has power to give by the will, and the Scotch heir may claim both by descent and under the will (*i*); the first proposition also seems to apply where the disposition is in the Scotch form, but not sufficient to pass lands in England away from the English heir (*k*), and it is presumed the latter proposition would be held to apply also, as the doctrine of *approbate* and *reprobate* in Scotland, and of election in England, seem to be identical (*l*).

Where an election is raised by a power to appoint to particular objects.

* It is clear that the doctrine of election is appli- *449 cable to cases of appointment under a power, so that if one having a special power by his will gives benefits out of his own property to the objects of the power, and appoints the subject of the power to strangers, the former will be obliged to elect in favor of the latter (*m*). But in cases where the appointment is made to the objects of the power absolutely, and the donee superadds a proviso or condition in favor of strangers to the power; though the proviso is void, no case of election arises. The court reads the will as if all the passages in which such attempts are made were swept out of it, for all purposes, *i.e.* not only so far as they attempt to regulate the *quantum* of interest to be enjoyed by the appointee, but also so far as they might otherwise have been relied upon as raising a case of election (*n*). A residuary appointment that carries an ill-appointed portion of the fund is in this respect undistinguishable from an absolute appointment with ineffectual modifications. Thus where the donee of a special power appointed part of the fund upon trusts that were void for remoteness, and the residue to A. and B., to whom also he bequeathed part of his own estate, it was held first that the ill-appointed part did not pass as in default of appointment, but fell into the residue, and secondly that A. and B. were not bound to elect in favor of the remote objects. Sir W. James, V.-C., collected from the authorities that "The rule as to election is to be applied as between a gift under a will and a claim *dehors* the will and adverse to it, and is

None, where absolute appointment is attempted to be modified in favor of strangers;

(*i*) Johnson *v.* Telford, 1 R. & My. 244; Allen *v.* Anderson, 5 Hare, 163; Maxwell *v.* Maxwell, 16 Beav. 106, 2 D. M. & G. 705.

(*k*) Dundas *v.* Dundas, 2 D. & Cl. 349. The Scotch courts therefore, unlike the English courts, will read against the English heir an instrument imperfectly executed according to the Statute of Frauds, so as to put him to an election; and in like manner the English courts (treating the Scotch heir differently from the English heir, Dewar *v.* Maitland, L. R. 2 Eq. 834) will read against the Scotch heir an instrument insufficient according to the law of Scotland to disinherit him.

(*l*) 2 D. & Cl. 352, 1 Bligh, 21, 16, Beav. 107.

(*m*) Whistler *v.* Webster, 2 Ves. Jr. 370; and see Fearon *v.* Fearon, 3 Ir. Ch. Rep. 19; Reid *v.* Reid, 25 Beav. 469; Tomkyns *v.* Blane, 28 Beav. 422; Cooper *v.* Cooper, L. R. 6 Ch. 15, 7 H. L. 53.

(*n*) Carver *v.* Bowles, 2 R. & My. 301; Church *v.* Kemble, 5 Sim. 525; Blacket *v.* Lamb, 14 Beav. 482; Woolridge *v.* Woolridge, Johns. 63; Churchill *v.* Churchill, L. R. 5 Eq. 44. The doubts expressed in Moriarty *v.* Martin, 3 Ir. Ch. Rep. 26, whether this is law except in cases where the proviso is in terms "so far as lawfully may be" (as in Carver *v.* Bowles) have not prevailed. And see the doctrine recognized Roach *v.* Trood, 3 Ch. D. 444, where however it was excluded by the appointee having executed the appointment (which was by deed) and so accepted the proviso. As to the question whether the appointment is in the first instance absolute, *vide ante*, p. 295.

not to be applied as between one clause in a will and another clause in the same will." Nor was it to be applied in aid of a gift which violated the law against perpetuity (*o*).

nor in aid of a perpetuity.

With the rule as thus stated by the V.-C. agree those cases which have determined that where by the same will several properties are given to the same person, some beneficial and the others burdensome, he is generally at liberty to accept the former * and reject the latter (*p*), although by so doing he throws a burden on the testator's general estate, which, if he accepted both, must be borne by himself; as where the repudiated gift comprises shares in a company which, after the testator's death, fails, and is wound up, the shareholders being called on to contribute (*q*), or where the subject is leasehold property, in respect of which the testator was liable at his death under his covenant to repair (*r*). But the question is one of intention, and, therefore, where a testator bequeathed an annuity to A., and also a leasehold house held at a rack rent beyond its value, Sir J. Leach, M. R., thinking that the plain intention of the testator was that his estate should no longer be subject to the rent of the leasehold house, held that the legatee must take both bequests or neither (*s*).[2]

Two gifts under same will — one may be taken, the other rejected; *450 — unless a contrary intention appears.

Again, where one, having a testamentary power of appointment over a fund which in default of appointment belongs to A., makes his will, and thereby expressly declares that he abstains from making any appointment, on the ground that the fund will devolve (as he supposes) on B., and gives A. certain benefits by his will; A. is not put to his election, since by taking both he disappoints no actual disposition of the testator: all that can be said is that the testator was mistaken (*t*).

There must be an actual disposition of property belonging to the person who is to be put to his election;

A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former property of his, the testator's: but there must be some free disposable property given to the person who is put to his election, which, if he elects to take against the will, may be laid hold of to compensate the disappointed devisees. The doctrine is therefore inapplicable where the will deals only with property subject to special powers

There must also be property of the *testator* to compensate the disappointed devisee.

(*o*) Wollaston *v.* King, L. R. 8 Eq. 165; Wallinger *v.* Wallinger, L. R. 9 Eq. 301; Burton *v.* Newbery, 1 Ch. D. 242; Bizzey *v.* Flight, 3 Ch. D. 274.
(*p*) Andrew *v.* Trinity Hall, 9 Ves. 525. (*q*) Moffett *v.* Bates, 3 Sm. & Gif. 468.
(*r*) Warren *v.* Rudall, 1 J. & H. 1.
(*s*) Talbot *v.* Earl of Radnor, 3 My. & K. 254.
(*t*) Langslow *v.* Langslow, 21 Beav. 552; see also Box *v.* Barrett, L. R. 3 Eq. 244; and post, Ch. XVII.

[1] See Talbot *v.* Radnor, 3 My. & K. 252; Moffett *v.* Bates, 3 Sm. & G. 468. Of course, election may be excluded by an expression of intention by the testator that only one of several gifts to a donee is conditional on his giving up what the testator attempts to devise away from him. Wilkinson *v.* Dent, L. R. 6 Ch. 339, 341.

of appointment. Thus, where a man had an exclusive power of appointing an estate to his children and grandchildren, and an exclusive power of appointing a fund to his children only; and appointed the estate to some of his children, and the fund to his children and to a grandchild. It was held that the children were not bound to elect between giving effect to the appointment of a share in the fund to the grandchild and rejecting the estate appointed to them under the first power (*u*).]

Not applicable to creditors.

The doctrine of election has been held not to apply to creditors;[1] * and, therefore, where a testator ap- *451 propriated to the payment of debts property which was not liable thereto, and by the same will disposed of, in favor of other persons, property which was by law assets for the payment of debts, it was held that the creditors might take the latter in subversion of the testator's devise, without abandoning their claim to the former (*v*). And where a testator devised for payment of debts certain lands (including some which were not his own, but belonged to his son), the son was allowed to participate as a creditor in the provision for debts, out of the other property, without relinquishing his own estate to the creditors (*w*). But now real estates of every description are assets for the payment of debts (*x*).

Whether parol evidence is admissible.

At one period it was doubted whether evidence *dehors* the instrument was admissible for the purpose of showing that a testator considered that to be his own which did not actually belong to him, or was not under his disposing power. In the well-known case of Pulteney *v.* Darlington (*y*), rent-rolls and steward's accounts were admitted to prove that the testator dealt as absolute owner with lands of which he was only tenant in tail, and, consequently, that he must have intended them to pass under a general devise of his real estate, so as to impose election on the heir in tail, to whom, by the same will, a benefit was given, though the testator had a large estate of his own, to which the words were applicable (*z*).

Lord Commissioner Eyre, however, in Blake *v.* Bunbury (*a*), laid it down that "the intent of the testator to dispose of that which was not his, ought to appear on the will." The admissibility of extrinsic evidence, too, was strongly denied by Lord Loughborough, in Stratton *v.*

(*u*) Re Fowler's Trusts, 27 Beav. 362.]

(*v*) Kidney *v.* Coussmaker, 12 Ves. 136; see also Clarke *v.* Guise, 2 Ves. 617.

(*w*) Deg *v.* Deg, 2 P. W. 412. (*x*) Ch. XLVI. s. 1. (*y*) 2 Ves. Jr. 544, and 3 Ves. 384.

(*z*) See also Hinchcliffe *v.* Hinchcliffe, 3 Ves. 516; Rutter *v.* Maclean, 4 Ves. 531; Pole *v.* Lord Somers, 6 Ves. 309; and Druce *v.* Dennison, ib. 385; and see Finch *v.* Finch, 4 B. C. C. 38, 1 Ves. Jr. 534.

(*a*) 1 Ves. Jr. 523.

[1] 2 Story, Eq. § 1092, and note. A will contained the following clause: "I will, firstly, that, loath to offend, by the word *pay*, the generous feelings of my friends, whose kindnesses to me have been many and long continued, — to H. and his wife, I wish their acceptance of twenty-five acres of land," &c. The testatrix was living in the family of H. at the time. It was held that this was a *conditional* devise, that H. by bringing an action against her executor for her board, in which, however, judgment was recovered againt H., elected to relinquish the benefit of the devise; but that he did not thereby forfeit his claim to an independent residuary legacy to his wife, in the same will, the implied condition being limited to the devise of the land. Hapgood *v.* Houghton, 22 Pick. 480.

Best (*b*); and the same judge expressed his disapprobation of Pulteney *v.* Lord Darlington, in Rutter *v.* Maclean (*c*); as did Lord Eldon in Pole *v.* Lord Somers (*d*), and Druce *v.* Dennison (*e*). In the latter case, however, Lord Eldon admitted a statement of property written by the testator, and books of account, as evidence that he considered himself to be owner, and, as such, intended to dispose of certain messuages and leases, the property of his wife, part of which *452 the * testator had made his own by alienation; but Lord Eldon seems to have regarded the papers themselves as testamentary, and to have thought that he must either admit the testator's explanatory statement as extrinsic evidence, or give the parties an opportunity of propounding it as a part of the will in the Ecclesiastical Court. However, in a subsequent case (*f*) he observed that he thought the rules as to election had been settled: "It must appear on the face of the will, that the testator proposes that there should be an election, and as to what subjects." And he referred to Druce *v.* Dennison as standing, to some extent at least, on the special ground which has been noticed. He also adverted to a case of Andrews *v.* Lemon, where a testator bequeathed all his personal property (he having personal property of his own, and also personal property not so strictly his own, but which he had power to dispose of by deed or will) for purposes for which his own was insufficient; Sir L. Kenyon, M. R., directed an inquiry whether by personal property he meant his own strictly, or intended to include both: but when the evidence was taken, he was so much struck with his own decision, that he said: "Though the evidence has been taken, I shall not now admit one word of it, it being necessary, for the general interests of mankind, that persons should in their wills state clearly what they mean."

Parol evidence rejected.

The doctrine thus earnestly advocated by these eminent judges has prevailed in subsequent cases. As in Clementson *v.* Gandy (*g*), where parol evidence was tendered for the purpose of showing that the testatrix had supposed herself to be absolute owner of, and intended to include in the residuary bequest in her will, certain settled property, in which she had only a life-interest, in order to raise a case of election against a legatee under the will, who also took an interest in such property under the settlement; but the evidence was rejected, Lord Langdale, M. R., observing that the intention to dispose must in all cases appear by the will itself; that there was no ambiguity in the expressions the testatrix had employed; and extrinsic evidence for the purpose of contradicting the intention was inadmissible.

With respect to the intention, as manifested by the will itself, it is to

(*b*) 1 Ves. Jr. 285. (*c*) 4 Ves. 537. (*d*) 6 Ves. 322.
(*e*) Ib. 402. (*f*) Doe *v.* Chichester, 4 Dow, 76, 89, 90.
(*g*) 1 Kee. 309; see also Dixon *v.* Sampson, 2 Y. & C. 566. [The exploded doctrine of Pulteney *v.* Darlington was treated *obiter* as law by Jessel, M. R., 5 Ch. D. 171; but the subsequent cases were not cited.]

be observed, that, in order to raise a case of election, it must be clear and decisive,[1] for if the testator's expressions will * admit of being restricted to property belonging to or disposable by him, the inference will be, that he did not mean them to apply to that over which he had no disposing power. Thus, in Dummer *v.* Pitcher (*h*), where the testator having, before making his will, transferred certain 4*l.* per cent and 5*l.* per cent stock (then forming the whole of his funded property) into the joint names of himself and his wife, bequeathed the rents of his leasehold houses, and the interest *of all his funded property or estate*, of whatsoever kind, to trustees, upon trust for his wife for life, and after her decease upon trust to pay divers legacies of 4*l.* per cent stock, the aggregate amount of which fell short by 50*l.* only of the amount of stock of that description so formerly transferred by him: he afterwards made some further purchases of 5*l.* per cent stock, taking the transfers in the joint names of himself and his wife. The testator at his death left no funded property, except the 4*l.* per cents and 5*l.* per cents before mentioned, exclusive of which his assets were greatly inadequate to pay his legacies. It was held first, that all the sums of stock then standing in the joint names of the husband and wife, and whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife; secondly, that the will did not purport to dispose of the stock in terms sufficiently distinct and explicit to put the wife to her election (*i*).

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Expressions must be clear in order to raise a case of election.

In like manner a general devise of the testator's real estate has always been held to show an intention to give what strictly and properly belonged to him, and nothing more, even if the testator had no real estate of his own upon which the devise could operate; for though a general disposition would not, in wills made before the year 1838, pass after-acquired real estate, and, therefore, the presumption rather is that the testator, in framing such a devise, had a particular property in his contemplation; yet the presumption is not of such force as alone to constitute an adequate ground for holding a gift of the testator's property to comprise what belonged to another; a conclusion which seems to be more improbable than the supposition that * the testator introduced into his will a *454

General devise restricted to property of testator.

(*h*) 5 Sim. 35; 2 My. & K. 262; see also Crabb *v.* Crabb, 1 My. & K. 511; [Blommart *v.* Player, 2 S. & St. 597; Parker *v.* Carter, 4 Hare, 411; Smith *v.* Lyne, 2 Y. & C. C. C. 345; Seaman *v.* Woods, 24 Beav. 381.

(*i*) See Att.-Gen. *v.* Fletcher, 5 L. J. N. S. Ch. 75;] and compare Shuttleworth *v.* Greaves, 4 My. & Cr. 38, where certain canal shares standing in the joint names of the testator and his wife were held to be intended to pass under a bequest of "my shares in the N. Canal Navigation," so as to put the wife to her election, the testator having no shares of his own answering to the description.

[1] Clementson *v.* Gandy, 1 Kee. 309; Dummer *v.* Pitcher, 2 My. & K. 262; S. C. 5 Sim. 35; Cavan *v.* Pulteney, 2 Ves. Jr. 544; S. C. 3 Ves. Jr. 384; Pole *v.* Somers, 6 Ves. Jr. 309; Honywood *v.* Forster, 30 Beav. 14; Havens *v.* Sackett, 15 N. Y. 365; Lefevre *v.* Lefevre, 59 N. Y. 434; Church *v.* Bull, 2 Denio, 430; S. C. 5 Hill, 206; Fuller *v.* Yeates, 8 Paige, 325; Jones *v.* Jones, 8 Gill, 197.

general or residuary disposition, without having in view any particular property.

Devise of "ground-rents."

The same principle was held, in Timewell *v.* Perkins (*k*), to apply to a devise of a specified kind of property, as "ground-rents;" in regard to which, however, it is to be observed, that the bequest would have included, and, therefore, might have been designed to include, *leasehold* ground-rents purchased by the testator after the making of the will; so that no inference that he had not his own property in contemplation arises from the circumstance of his not having any such when he made his will; and the same remark applies to devises affecting even real estate in wills made or republished since the year 1837, which (as already shown (*l*)) are operative on after-acquired property of this description.

Devise of lands answering to certain locality.

With respect, however, to wills which are subject to the old law, it is to be observed, that, though a general devise is (as we have seen) construed as comprising property belonging to the testator and that only, even when there is nothing properly and strictly his own on which it can operate; yet a devise of lands answering to a particular locality seems to stand upon a different footing. It is hardly to be supposed that a testator would make such a devise without having a particular property in view. In Read *v.* Crop (*m*), however, where a testator had devised all his freehold and copyhold estates at Roydon, Thorley, Epping, and Witham, in the counties of Essex and Herts (which copyholds he had surrendered to the use of his will), to his wife for life, and after her decease in trust for his children; and it appeared that the testator, at the time of his death, (*quære*, at the making of his will?) was seised in fee of a copyhold estate at Witham, and also of the moiety of an estate at Thorley, to the other moiety of which he and his wife were entitled in her own right; they were also seised in her right of two copyhold estates at Roydon and Epping; but in these places the testator, in his own right, had no property. It was contended, that the testator having taken upon himself to devise his wife's estates, she must be put to her election; but Lord Thurlow said, that the testator had described what he meant to devise by the words, "the estates which he had surrendered." He had not surrendered any of his wife's estates, so that they could not pass by the devise. According to another report (*n*), his Lordship said: "I *455 think * these words are too loose to raise the construction contended for. If he had devised all his estates generally, there would have been no doubt; and I cannot think that his mentioning his estates in the four places by name is sufficient to make me suppose that he meant to devise his wife's estates. As to Thorley, there can be no pretence for it, since he had an estate there to answer the description; and I think, therefore, the wife is not called upon to make an election."

Lord Thurlow's remarks, it is conceived, must be taken in connec-

(*k*) 2 Atk. 102. (*l*) Ante, p. 64. (*m*) 1 B. C. C. 492. (*n*) Cox's MS.; 1 Sw. 402, n.

tion with the special circumstances of the case before the court; for he could hardly mean to affirm, as a general position, that where a testator devises all his lands at A., having no other property there than lands which he holds in right of his wife, he is not to be presumed as intending to dispose of that property. The difference between such a case and that of a general devise of all the testator's real estate is obvious. The reference to locality shows that he has a particular property in view; and if it be answered that every devise, however general in its terms, is specific, we may (without denying this as a general principle) reply, that such clauses are frequently inserted in wills to take in any property which may have escaped the testator's recollection, or may not be within his knowledge; which cannot be affirmed of a devise of lands in a particular parish or town, or even county. Such a question, however, will present itself under a different aspect in regard to wills made since the year 1837, which (we have seen (*o*)) speak, in reference to the property comprised in them, from the death; [though even with regard to them, if they devise lands in a particular locality, it is difficult to say that no inference that the testator had some specific property in view arises from the fact of his having none of his own to satisfy the devise at the date of its execution; for it is a whimsical intention to impute to a testator, when he affects to dispose of all property of a particular character, of which he has now or may hereafter have power to dispose, that he makes that disposition without the least suspicion that he has then any property of that description, and solely with the notion that he may thereafter buy some such property (*p*). Where the devise is specific in the sense of being a gift of a particular estate, as "my R. property," the wife alone and not the devisor being entitled to that property, she must undoubtedly elect (*q*). And * where (*r*) a testator was seised of freeholds in fee-simple and of *456 copyholds in tail, and himself occupied parts of each, and had let other parts of each to tenants at entire rents, and then by will, dated in 1859, devised his "real estate" upon trust as to the "lands occupied by him" for his wife, and confirmed his tenants "in their present occupations at their present rents" for twenty-one years; it was held that the heir in tail of the copyholds (to whom an annuity was bequeathed) must elect.]

Suggested distinction between general devises and devises restricted by locality.

How affected by 1 Vict. c. 26.

But the most numerous as well as the most difficult class of cases with which the courts have had to deal, consists of those in which the testator and the person against whom the election is sought to be raised, have each an undivided share or [some partial or limited] interest in the property; and in which, therefore, the question is not, as in the cases before discussed, simply whether the testator referred to particular tenements,

Question whether testator intends to include interest of co-proprietor.

(*o*) Ante. Chap. X. [(*p*) Per Wood, V.-C., Usticke *v.* Peters, 4 K. & J. 455.
(*q*) Whitley *v.* Whitley, 31 Beav. 173 (will in 1857). (*r*) Honywood *v.* Forster, 30 Beav. 14.

but whether he intended the devise to comprise such property, inclusive of the interest of his co-owner.[1] [Thus, in Padbury *v.* Clark (*s*), the testator being entitled to a moiety of a freehold house, devised "all that my freehold messuage, &c., now on lease to A. and in his occupation," giving the person entitled to the remaining moiety benefits under his will; he was also entitled to a moiety of some other property, which he devised by the description of "all that my moiety," &c. Lord Cottenham observed that he found no ground for a doubt as to the intention to give the entirety; that the words were ample, complete and correct for that purpose, but wholly inapplicable to the supposed gift of a moiety only: and that if this were matter of any doubt, this construction would be strongly corroborated by the other devise, which showed how the testator described a moiety when his intention was to give only a moiety. The L. C. therefore held that the owner of the other moiety must elect. A direction to repair the specifically described property would likewise corroborate this construction (*t*); but it would appear from Lord Cottenham's judgment, and from subsequent authorities (*u*), that a specific devise as of the entire subject will generally suffice, without such assistance, to put the co-owner to his election.

Padbury *v.* Clark.

So, in Swan *v.* Holmes (*x*), where a sum of 10,000*l.* consols stood settled in trust for two sisters for life, and after their *457 * deaths, two thirds of the capital in trust for their brother, and one third in trust for their sisters; and the brother bequeathed the whole of his property to trustees, as to part on certain trusts for his sisters; and he afterwards bequeathed the property, "including the 10,000*l.* trust money," to other persons; it was held that the sisters must elect between the benefits given them by the will, and their interest in the 10,000*l.* consols.

Swan *v.* Holmes.

Question, whether testator, having reversion only, intends to include the immediate interest.

So, where the testator has a reversion only in the lands devised, it frequently becomes a question whether he intended to confine the will to that estate, or to include in it the immediate and absolute interest. *Primâ facie*, the testator must of course be understood to refer only to what he had power to dispose of. But the context of the will must be examined, to see whether an intention to include also what he had no such power to dispose of be indicated; and for this purpose, notwithstanding some strong expressions tending to show the difficulty of applying the doctrine of election to such cases (*y*), the ordinary rules

(*s*) 2 Mac. & G. 298.
(*t*) Howells *v.* Jenkins, 2 J. & H. 706. There was no such direction in Padbury *v.* Clark.
(*u*) Wilkinson *v.* Dent, L. R. 6 Ch. 339; Fitzsimons *v.* Fitzsimons, 28 Beav. 417; Miller *v.* Thurgood, 33 Beav. 496.
(*x*) 19 Beav. 471; see remarks on Reynolds *v.* Torin, post, p. 465.
(*y*) See per Lord Eldon, in Rancliffe *v.* Parkyns, 6 Dow, 149.

[1] In such cases the court will incline to a construction which will make the testator deal only with his own, and thus prevent the necessity of an election. Maddison *v.* Chapman, 1 Johns. & H. 470. See Havens *v.* Sackett, 15 N. Y. 365; 2 Story, Eq. § 1089.

for collecting the testator's intention must be observed, the question being simply, what does the testator mean? If he has subjected the lands in question to limitations which, if the devise be limited to the reversion, cannot, or probably will not, ever take effect, or has conferred powers on the devisees which, on the same hypothesis, they can never exercise, the intention to include the immediate interest will be sufficiently established (*z*). But these indications of intention will not prevail against an express and unreserved confirmation of the settlement creating the estates which precede the testator's reversion. Express declaration overrides conjecture, however probable (*a*).

Similar question where testator is entitled subject to incumbrances.

Again, if a testator, having an estate subject to an incumbrance, simply devises the estate without saying more, he is to be taken to mean the estate in its actual condition;[1] and the incumbrancer to whom other benefits are given by the will, is not, in such a case, put to his election; still less, if the beneficiary be entitled only to participate in the incumbrances with others to whom no benefit is given by the will (*b*). So if, being an incumbrancer only, the testator devise the estate, this may be satisfied without * imputing an intention to dispose of more *458 than his own interest (*c*).

Dowress when put to her election.

A similar question, and one which has been frequently agitated, is] whether the widow of a testator [to whom she was married before 1834] is precluded, by a benefit given to her by his will, from claiming dower out of lands devised by that will.[2]

(*z*) Welby *v.* Welby, 2 V. & B. 187; Wintour *v.* Clifton, 21 Beav. 447, 8 D., M. & G. 641; Usticke *v.* Peters, 4 K. & J. 437.

(*a*) Raucliffe *v.* Parkyns, 6 Dow, 149. But confirmation of a *portion* of the settlement leaves the remaining portion unconfirmed. Blake *v.* Bunbury, 1 Ves. Jr. 514.

(*b*) Stephens *v.* Stephens, 3 Drew. 697, 1 De G. & J. 62.

(*c*) Maddison *v.* Chapman, 1 J. & H. 470.]

[1] Talbot *v.* Radnor, 3 My. & K. 252; Moffett *v.* Bates, 3 Sm. & G. 468.

[2] The intention of the testator to compel the widow to elect must be clear. If it be not made known in express terms, the intention must appear by manifest implication from the will, founded upon the fact that the claim of dower would not be consistent with the language or meaning of the will. 4 Kent, Com. 58; Bull *v.* Church, 5 Hill, 206; S. C. 2 Denio, 430; Savage *v.* Burnham, 17 N. Y. 561, 571; Dodge *v.* Dodge, 31 Barb. 413; Lasher *v.* Lasher, 13 Barb. 106; Palmer *v.* Voorhis, 35 Barb. 479; Lord *v.* Lord, 23 Conn. 327; Fulton *v.* Fulton, 30 Miss. 586; Braxton *v.* Freeman, 6 Rich. 35; Norris *v.* Clark, 2 Stockt. 51; Higginbotham *v.* Cornwell, 8 Gratt. 83; Parker *v.* Sowerby, 4 De G., M. & G. 321. If a testator should bequeath property to his wife, manifestly with the intent that it should be in satisfaction of her dower, it would create a case of election. But such an intention must be clear, and free from ambiguity; and it will not be inferred from the testator's making a general disposition of all his property, although he should give his wife a legacy, for he might intend to give only what was strictly his own, subject to dower. There is no repugnancy in such a bequest. In order to exclude dower, the instrument containing the bequest ought to comprise some provision inconsistent with the claim to it. 3 Wooddes. § 59, p. 493; Arnold *v.* Kempstead, 2 Eden, 237, and cases cited in notes to 2d ed.; Villareal *v.* Galway, Amb. 682; S. C. 1 Bro. C. C. 292, notes; Fuller *v.* Yeates, 8 Paige, 325; French *v.* Davies, 2 Ves. Jr. 572, 577; Lawrence *v.* Lawrence, 2 Vern. 366, and Mr. Raithby's note; Greatorex *v.* Cary, 6 Ves. 615; Birmingham *v.* Kirwan, 2 Scho. & Lef. 452, 453; Pearson *v.* Pearson, 1 Bro. C. C. (Perkins's ed.) 292, and notes; Harrison *v.* Harrison, 1 Kee. 765; Jackson *v.* Churchill, 7 Cowen, 287; Van Orden *v.* Van Orden, 10 Johns. 30; Pickett *v.* Peay, 2 Const. S. C. 746; Kennedy *v.* Mills, 13 Wend. 553; Bull *v.* Church, 5 Hill, 206. See 2 Story, Eq. § 1088; Hill *v.* Hensworth, Lloyd & G. temp. Plunk. 87; Hall *v.* Hill, 1 Dru. & War. 94; S. C. 1 Con. & Law. 120; Baily *v.* Duncan, 4 T. B. Mon. 265, 266; Hall *v.* Hall, 2 M'Cord, Ch. 280; Her-

General devise does not put dowress to her election.

It is clear that a mere devise in general terms of the testator's real estate affords no indication of an intention to dispose of the dower. This was adjudged so long ago as the case of Lawrence *v.* Lawrence (*d*), where a testator gave

(*d*) 2 Vern. 365, 1 Eq. Ca. Ab. 218, pl. 2, 1 Freem. Ch. Ca. 234, 3 B. P. C. Toml. 484, 8 Vin. Abr. Copyh. 361, pl. 22; see also Lemon *v.* Lemon, 8 Vin. Abr. Copyh. 366, pl. 45, 2 Eq. Ca. Ab. 355, pl. 13; Hitchin *v.* Hitchin, Pre. Ch. 133, 2 Vern. 403; Brown *v.* Parry, 2 Dick. 685; Incledon *v.* Northcote, 3 Atk. 430; Strahan *v.* Sutton, 3 Ves. 249; Lord Dorchester *v.* Earl of Effingham, G. Coop. 319; See also Ayres *v.* Willis, 1 Ves. 230; Waller *v.* Fuller, 8 Vin. Abr. Copyh. 244, pl. 19. [So a bequest to the widow on condition that she make no claim on "the residue of my property," was held not to exclude her from dower. Wetherell *v.* Wetherell, 4 Gif. 51.]

bert *v.* Wren, 7 Cranch, 370; Adsit *v.* Adsit, 2 Johns. Ch. 448; Smith *v.* Knishern, 4 Johns. Ch. 9; Dickson *v.* Robinson, Jacob, 503; Shaw *v.* Shaw, 2 Dana, 342; Morgan *v.* Edwards, 1 Dow & Clark, 104; Gordon *v.* Stevens, 2 Hill, Ch. 48; Edwards *v.* Morgan, 13 Price, 782; Duncan *v.* Duncan, 2 Yeates, 302; Jones *v.* Powell, 6 Johns. Ch. 194; Shotwell *v.* Dedam, 3 Ohio, 1; Ellis *v.* Lewis, 3 Hare, 310. That is, at common law, where there is a devise of real estate to a wife, without any declaration in the will that it is to be in lieu of dower, she is not put to her election, but may take both devise and dower. Shaw *v.* Shaw, 2 Dana, 342. See, also, Larrabee *v.* Van Alstine, 1 Johns. 307; Kennedy *v.* Medrow, 1 Dall. 414; Ambler *v.* Norton, 4 Hen. & M. 23. She is not bound to make her election until all the circumstances are known, and the condition and value of the funds are clearly ascertained. 2 Story, Eq. Jur. § 1098; Kidney *v.* Coussmaker, 12 Ves. (Sumner's ed.) 136, note (*a*); Hall *v.* Hall, 2 M'Cord, Ch. 280. An election made under a mistake will not bind her. Snelgrove *v.* Snelgrove, 4 Desaus. 274; 4 Kent, 57. Still she may lose her right by delay. Blunt *v.* Gee, 5 Call, 481. So, a widow claiming dower, and having it partitioned off to her by legal process, and holding and enjoying the same for several years, has made her election, and cannot afterwards set it aside and claim her third in fee-simple, under the statute, when the estate is nearly settled. Quarles *v.* Garnett, 4 Desaus. 146. See Pigott *v.* Bagley, M'Clel. & Y. 56; Upshaw *v.* Upshaw, 2 Hen. & M. 3; O'Driscoll *v.* Koger, 2 Desaus. 299; 2 Story, Eq. Jur. § 1088, and notes; Allen *v.* Pray, 3 Fairf. 138; Perkins *v.* Little, 1 Greenl. 148; Kennedy *v.* Medrow, 1 Dall. 415; Stark *v.* Hunton, Saxt. 216. In some cases, the intent to exclude the right to dower has been shown by matters extraneous to the will. Baily *v.* Duncan, 4 T. B. Mon. 265, 266. By the General Statutes of Massachusetts, when any provision is made for a widow by will, she must elect whether she will have that or her dower; but she shall not have both, unless it plainly appears, by the will, that the testator so intended. Gen. Stat. c. 92, § 24. This makes an alteration of the rule at common law. Reed *v.* Dickerman, 12 Pick. 149; Allen *v.* Pray, 3 Fairf. 138. Still, a provision for the widow in her husband's will does not affect her claim to one third of the residue of his personal property. Kempton, Appellant, 23 Pick. 163; Nickerson *v.* Bowly, 8 Met. 424; Briggs *v.* Hosford, 22 Pick. 288. And the provision of the General Statutes of 1860 has since been changed, 1861, c. 164. By the Statutes of 1871, c. 200, "a widow for whom *no* provision is made in the will of her husband may file her waiver of the provisions of the will in like manner and with the same effect as if provision had been made for her in the will." For circumstances amounting to an election by the widow, see Quarles *v.* Garnett, 4 Desaus. 146; Blunt *v.* Gee, 5 Call, 481; Steele *v.* Fisher, Edw. 435; Shaw *v.* Shaw, 2 Dana, 342; Clay *v.* Hart, 7 Dana, 6; Watkins *v.* Watkins, 7 Yerg. 283; Pearson *v.* Pearson, 1 Bro. C. C. (Perkins's ed.) 292, and notes and cases cited; Wake *v.* Wake, 1 Ves. (Sumner's ed.) 335, and notes; Wilson *v.* Hamilton, 9 Serg. & R. 424. The statutes of many of the states make provision for the period of time within which the widow shall make her election. The statute of Virginia, 1727, gave the widow nine months, now extended to one year. See Kinnard *v.* Williams, 8 Leigh, 400; Code, 1873, Title 31, ch. 106, p. 854. The R. S. of Ohio, 1880, Vol. 2, Title 2, ch. 1, p. 1433, give the widow one year. The Gen. Stat. of Vermont, 1862, Title 16, ch. 55, p. 412, allow the widow the period of eight months for her election after probate. The statutes of Massachusetts give six months after probate of the will; and, like those of New York, they assume that the substituted provision in lieu of dower is taken, unless waived within the time prescribed. See Laws of 1861, c. 164; 1 Rev. Stat. New York, 741, §§ 11, 12, 13, 14; Pratt *v.* Felton, 4 Cush. 174; Adams *v.* Adams, 5 Met. 277. But it was further provided by the statute of Massachusetts (Rev. Stat. c. 68, § 13), that "if the widow is deprived of the provision made for her, by will or otherwise, in lieu of dower, she may be endowed anew, in like manner as if such provision had not been made." (See Gen. Stat. c. 90, § 13.) The widow has been held to come within this provision, if all the property of the testator is taken or required for the payment of his debts. Thompson *v.* McGaw, 1 Met. 66. The Revised Statutes of Illinois, 1880, ch. 41, p. 426, declare that any provision by will bars dower, unless it be otherwise expressed in the will, and unless the widow, within one year, renounces the provision. See 4 Kent, 58, 59, note (*c*).

certain legacies to his widow, and also part of his real estate during widowhood, and devised the residue of his estate to other persons; and it was held in D. P. that she was not precluded by the acceptance of the legacies from claiming dower in the whole.

And the addition of the word "all" would not enlarge the operation or vary the construction of the devise, which is still but a gift of "all" the testator's own estate. Thus, in Thompson *v.* Nelson (*e*), where a testator devised "all and singular" his real estates whatever, and all his goods, chattels, and personal estate, to trustees, upon trust in the first place to pay his wife the sum of 480*l.*, and then to apply the residue amongst his three children — Sir L. Kenyon, M. R., held that she was entitled to both, on the principle that to put the widow to her election, "it should appear that, if she took both dower and the provision under the will, some other part of the testator's disposition would be defeated."

According to these authorities, as well as upon principle, it seems to be immaterial whether the lands devised to the widow be or be not part of that out of which her dower arises; nor, it should seem, would her dower be excluded even in respect of the lands so devised. Where the contrary has been decided, it has always been upon the ground of the testator having introduced into the devise some special provision which is irreconcilable with the widow's claim of dower; as by prescribing a * mode of enjoyment that requires the devisee to have *459 the entirety of the property.

What provisions are inconsistent with claim of dower.

Thus, in Birmingham *v.* Kirwan (*f*), where a testator devised his house and demesne to trustees, upon trust to permit his wife to enjoy the same for life, she paying 13*s.* yearly for every acre, to keep the house in repair, and not to let, except to the person who should be in possession of the remainder; and the residue of his lands, subject to debts and legacies, to A. for life, remainder to B. in fee. The question was as to the wife's right of dower: first, in the part devised to her; secondly, in the residue. Lord Redesdale: "The result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the land to be set out by metes and bounds. It is clear the assertion of a right of dower as to the house and demesne would be inconsistent with the devise of the house and demesne. The house and demesne are devised with the rest of the estate to trustees. That devise taken simply might be subject to the widow's right of dower, but it is coupled with a direction that she shall have the enjoyment of the house and demesne, paying a rent of 13*s.* an acre, which must be paid out of the whole (*g*).

(*e*) 1 Cox, 447; see also Dowson *v.* Bell, 1 Kee. 761; Harrison *v.* Harrison, ib. 765.
(*f*) 2 Sch. & Lef. 444.
(*g*) Why out of the whole? If a devise of my house and demesne does not include the dower, how can an obligation to pay a certain rent for every acre (which clearly means every acre of what is before devised), extend it? See infra.

Then follow directions that she shall keep the house and demesne in repair, that she shall not alien, except to the person in remainder; directions which apply to the whole of the house and demesne, and could not be considered obligations on a person claiming title by dower. It was clearly, therefore, the intention of the testator, that the wife should enjoy the whole of the house and demesne under a right created by the will; and not part of it under a right which she previously had, and part under the will." On the other question, however, his Lordship held, that the devise of the beneficial interest in the house and demesne was not a bar to the widow's right of dower in the rest of the estate. The will might be perfectly executed as to all other purposes, without injury to the claim of dower. With respect to the rest of the estate, it might be mortgaged or sold subject to that claim.

It should be observed, that a restriction on letting, which was one of the circumstances adverted to by Lord Redesdale, in the preceding case, had been held by Sir R. P. Arden, M. R., in Strahan *v.* Sutton (*h*), not to render the devise inconsistent with *the dowress's claim, though it was contended that she might have her dower set out by metes and bounds; in answer to which the M. R. said: "It has been determined, that the widow need not take it by metes and bounds; she may take a rent-charge; she may take one third of the rents and profits. To think she would occupy one chamber in this house, in order to let it to those persons" (*i.e.* the persons to whom it was prohibited to be let), "is really most extravagant." The devise in Strahan *v.* Sutton containing this prohibitory direction was to another person, and not to the dowress as in Birmingham *v.* Kirwan. The principle of the two cases, however, is not easily distinguishable. Subsequent judges, certainly, seem to have followed Lord Redesdale, in allowing weight to circumstances of a less decisive and unequivocal character than Sir R. P. Arden thought necessary (*i*) to create an inconsistency which would exclude the dowress's claim. As in Miall *v.* Brain (*k*), Sir J. Leach, V.-C., held, that the claim of dower was inconsistent with a trust to permit another to use, occupy, and enjoy the estate for her life; his Honor thinking that the testator contemplated the personal use, occupation, and enjoyment.

As to direction to let;

*460

— to use, occupy, and enjoy;

So, in Butcher *v.* Kemp (*l*), the same learned judge considered that a direction to trustees (to whom a farm was devised during the minority of the tenant for life, who was the testator's daughter) "to carry on the business thereof, or to let the same upon lease for her benefit," was inconsistent with the claim of dower. "The testator's plain intention," said the V.-C. "is that his

— to carry on business and let.

(*h*) 3 Ves. Jr. 249.
(*i*) See his judgment in French *v.* Davies, 2 Ves. Jr. 576, and in Strahan *v.* Sutton, 3 Ves. 250.
(*k*) 4 Mad. 119.
(*l*) 5 Mad. 61; [see also Roadley *v.* Dixon, 3 Russ. 192.

trustees should, for the benefit of his daughter, have authority to continue his business in the entire farm which he himself occupied, consisting of about 136 acres; and this intention must be disappointed, if the widow could have assigned to her a third part of this land." How far this argument and decision are obnoxious to the reasoning applied to some of the cases stated in the sequel, the learned reader will form his own opinion.

[Again, in Hall *v.* Hill (*m*), there was a general devise of the testator's estates to a trustee, upon trust to pay his wife an annuity, and to permit her to enjoy part of the property for her life, and the residue was otherwise disposed of. By a codicil a power to lease was given to the trustee. Sir E. Sugden, C., decided that the widow must elect between her dower and the * benefits under the will. He observed, that *461 "he was not aware how a power of leasing in the case before him could be exercised over all the estate, if the widow's right to dower were allowed. He could understand how the rents might be enjoyed or the estate sold subject to the claim for dower; but how could the estate be demised subject to the right of the lady to have a third part set out by metes and bounds?" In O'Hara *v.* Chaine (*n*), before the same judge, there was a devise to trustees, upon trust to sell and a power to lease *from year to year* so much as remained unsold, and also a direction to the trustees to complete the sale of lands contracted to be sold by the testator in his lifetime. As to the estates contracted to be sold, the court said there was no doubt the widow must elect as in the absence of any stipulation the contract imported that they were to be conveyed discharged of dower; as to the residue the power of leasing was sufficient to show she must also elect. These decisions as to the effect of a power of leasing have been followed by Sir J. K. Bruce, V.-C., in Grayson *v.* Deakin (*o*), and by Sir R. T. Kindersley, V.-C., and the Court of Appeal, in Parker *v.* Sowerby (*p*) (in which latter case the circumstance that the power was limited to the minority of the devisees was considered to make no difference); and, yielding to the current of authority, by Sir J. Stuart, V.-C., in Linley *v.* Taylor (*q*).

A power to lease puts the widow to her election.

However fine the distinction, yet it is clearly settled, in accordance with the opinion of Lord Redesdale (*r*), that a general devise of all the testator's estates upon trust for sale will not put the widow to her election; because the sale may be made subject to her right of dower (*s*).[1] But in a case where there was

Power of sale does not put the widow to her election.

(*m*) 1 D. & War. 94, 1 Con. & L. 120. (*n*) 1 J. & Lat. 662.
(*o*) 3 De G. & S. 298; and see Reynard *v.* Spence, 4 Beav. 103; Lowes *v.* Lowes, 5 Hare, 501; Pepper *v.* Dixon, 17 Sim. 200. See also Thompson *v.* Burra, L. R. 16 Eq. 592.
(*p*) 1 Drew. 488, 4 D. M. & G. 321, overruling Warbutton *v.* Warbutton, 2 Sm. & Gif. 163.
(*q*) 1 Gif. 67. (*r*) Ante, p. 459.
(*s*) Ellis *v.* Lewis, 3 Hare, 313; Gibson *v.* Gibson, 1 Drew. 42; Bending *v.* Bending, 3 K. & J. 257.

[1] See Colgate *v.* Colgate, 8 C. E. Green, 379.

a devise of a particular house, with the furniture and appurtenances, upon trust for sale, Sir L. Shadwell, V.-C., thought the widow must elect (*t*). "How," he asked, "could there be a sale of the house if the lady had said, 'No, I will have a third of it'? Directing the property to be sold *with the appurtenances attached to it*, is necessarily inconsistent with the claim of dower." The difference between the two cases is not clear.

Election as to the whole property implied from powers relating to part.

Where lands are included in one devise to trustees, *462 and powers * or directions are given to them as to part sufficient to exclude the widow's dower as to that part, she will, it seems, be put to her election as to the other part also. The powers or directions expressed as to part show how the trustees were intended to take the whole (*u*).]

Another point much discussed has been, as to the effect of the property being devised to the dowress and others in equal shares. In Chalmers *v.* Storil (*x*), the devise was in these words: "I give to my dear wife A. and my two children (naming them) all my estates whatsoever, to be equally divided amongst them, whether real or personal." One of the questions was, whether the wife, taking a share under this devise, was bound to relinquish her dower. Sir W. Grant considered the claim of dower to be directly inconsistent with the disposition of the will. He said: "The testator directing all his real and personal estate 'to be equally divided,' &c., the same equality is intended to take place in the division of the real as of the personal estate, which cannot be, if the widow first takes out of it her dower, and then a third of the two remaining thirds. Farther, by describing his English estates, he excludes the ambiguity which Lord Thurlow, in Foster *v.* Cooke (*y*), imputes to the words 'my estate,' as necessarily extending to the wife's dower."

As to devise to dowress and another in equal shares.

Lord Thurlow's observation in Foster *v.* Cooke, to which probably Sir W. Grant referred, was made in answer to an argument founded on the testator's direction to trustees to possess themselves of "all his estates and substance," and was as follows: "Because he gives all his property to trustees, am I to gather from his having given all he has, that he has given that which he has not?" That he would not have considered the word "English" (which, it is observable, does not appear in the case as reported), to constitute a ground for varying the construction, is evident from his decision in Read *v.* Crop (*z*), where he held that a devise of estates in a certain locality did not demonstrate an intention to include the testator's wife's interest in lands in which he and she had undivided shares; or, indeed,

Remarks on Chalmers *v.* Storil.

(*t*) Parker *v.* Downing, 4 L. J. N. S. Ch. 198.
(*u*) Miall *v.* Brain, 4 Mad. 119; Roadley *v.* Dixon, 3 Russ. 204; O'Hara *v.* Chaine, 1 J. & Lat. 665.]
(*x*) 2 V. & B. 222. [But is the report correct? See 3 K. & J. 261, 262.]
(*y*) 3 B. C. C. 347.
(*z*) Ante, p. 454.

even lands belonging exclusively to the wife, though the testator had no lands of his own answering to the locality. It is evident, however, that the M. R. did not wholly rely on this ground, as * he *463 lays much stress upon the words importing equality of division. That these words ought not to influence the construction, will be apparent upon a moment's consideration. The presumption being (as we have seen), that a testator means to dispose of his own interest exclusively of that of any co-owner, it follows that every devise is first to be read as applying to that interest, and, unless some repugnance or inaptitude occurs in such an application of the testator's language, there is no ground for extending the devise to that portion of interest which is not disposable by him. Now, to try Chalmers *v.* Storil by this test. A testator gives all his estates, or all his *English* estates (no matter, for the present purpose, which), to A. (who has dower or any other interest in the lands), B., and C., "equally to be divided among them." These words are obviously satisfied by applying them to the interest, whatever it may be, belonging to the testator; for nothing is to be divided but what is before given; and as it is clear that, if the devise had stopped at the names of the devisees, it would not have included the dower, the subsequent words evidently ought not to be made a ground for extending them. The argument for such a construction is evidently fallacious: it makes the words "all my estates" extend to the dower, by reason of the after-added expression, "equally to be divided;" assuming, in opposition to the established construction of devises couched in these general terms, that the dower is one of the subjects "to be divided." It is remarkable that a judge, whose logical acuteness and powers of reasoning have deservedly excited admiration, should not have instantly detected the fallacy of the argument (*a*).

But, however unsatisfactory may be the principle upon which Chalmers *v.* Storil stands, it seems to have been adopted in several subsequent cases. Thus, in Dickson *v.* Robinson (*b*), where the testator having given his real and personal estate to his widow, upon trust, for the equal benefit of herself, his two daughters, and the child or children with which she was then pregnant — Sir T. Plumer, M. R., on the authority of Chalmers *v.* Storil, held, that the widow, if she took under the will, must relinquish her dower.

Chalmers *v.* Storil followed.

Dickson *v.* Robinson.

So, in Roberts *v.* Smith (*c*), where a testator devised to his wife * M., a freehold messuage in fee-simple, *464 his ready money, and household furniture. He then devised to A. and B. and the said M. certain freehold and leasehold messuages, and all other his estates and property, upon trust to apply

Roberts *v.* Smith.

[(*a*) See, however, per Wickens, V.-C., Thompson *v.* Burra, L. R. 16 Eq. 602; and see Taylor *v.* Taylor, 1 Y. & C. C. C. 727, where the power to lease was not relied on by the V.-C.]

(*b*) Jac. 503. (*c*) 1 S. & St. 513. [And see Goodfellow *v.* Goodfellow, 18 Beav. 356.]

one half part of the money arising therefrom to M., so long as she should remain unmarried, for the support of herself and the children of her former husband, until they should attain twenty-one; and then, upon trust to pay the same, and also the other half part of the moneys to arise as aforesaid from the time of the testator's death, for the maintenance of his (the testator's) children until twenty-one; and, on attaining that age, such child to take an equal share of his said freehold property. The widow claimed dower. Sir J. Leach, V.-C., said: "The principle referred to in Chalmers *v.* Storil decides this case. The plain intention of the testator was, that the wife should have half the income of his property for the maintenance of herself and her children by her former husband, and that the other half of the income should be applied to the maintenance and education of the testator's own children. That intended equality would be disappointed if the wife were in the first place to take her dower."

Remarks upon Roberts *v.* Smith.

Undoubtedly, if an intention to give an immediate interest in the entire *corpus* of the land can be perceived in these cases, the intended equality would be destroyed by letting in the dower. But how does this intention appear? There is no other evidence of it than a simple devise of the land, which all the authorities, from Lawrence *v.* Lawrence down to Dorchester *v.* Effingham, tell us demonstrates no intention to give a larger interest than the testator has; otherwise, indeed, the question could never arise, as the widow must, in every case, be excluded from dower in land devised by the will, or relinquish all claims under it. The probability is, that in these cases the testator never thinks of the dower; but that, as Lord Alvanley has observed, is not sufficient for her exclusion: "it must appear that he did know it, and meant to bar her, or that what she demands is repugnant to the disposition" (*d*). This principle, indeed, is not denied in Chalmers *v.* Storil and Roberts *v.* Smith, but the great difference consists in the application of it.

Ellis *v.* Lewis.

[Sir J. Wigram commented on these cases in Ellis *v.* Lewis (*e*), where the devise was upon trust to sell and

Devise on trust to sell.

*465 pay debts and * legacies, and invest the residue of the proceeds, and pay a moiety of the income to the testator's wife during her widowhood, and the other moiety to his sister for life, with bequests over after their decease. The V.-C., in deciding that the widow was not obliged to elect, founded his judgment on the ground that, according to the cases, a trust for sale was not inconsistent with dower, and that the direction to divide the proceeds of sale could not decide what the subject of the sale was, so as to show that it included the interest of the widow: and he distinguished the cases before noticed, and apparently opposed to this construction, on the ground that in them

(*d*) See French *v.* Davies, 2 Ves. Jr. 577.

[(*e*) 3 Hare, 314; see also Gibson *v.* Gibson, 1 Drew. 58; Bending *v.* Bending, 3 K. & J. 257.]

there was a direction to divide the *subject of gift itself;* in the case before him, it was the proceeds of the sale only that were to be divided, and he referred to the close of the judgment in Chalmers *v.* Storil, as showing that, in Sir W. Grant's opinion, the testator there intended his property to be divided as it stood *in specie*, an intention certainly inconsistent with the right of dower.]

In Reynolds *v.* Torin (*f*), where a testator bequeathed to his wife during her life four sevenths of the income of his general residuary estate, in which he intended to include a Scotch heritable bond, as appeared by the schedule of his property annexed to his will (in which he had specified the amount of this bond), but the infant heir having elected, under the order of the court, to claim against the will, took that bond by his legal title, subject to the widow's right of terce — Lord Gifford, M. R., held, that the widow must elect, and that, although disappointed of the four sevenths of the interest of the bond debt which the testator meant her to enjoy, she must, if she claimed what he had effectually bequeathed to her, bring in her terce to increase the general residuary estate. Reynolds *v.* Torin.

As the testator had stated this bond at its full amount in the schedule of his property, perhaps this case may be sustained independently of the reasoning on which Chalmers *v.* Storil and the other cases of that class (which, it is observable, were not cited in it), are founded; though certainly the ground of distinction would have been much stronger if the widow's terce had extended to a portion of the capital; for, subject to her claim in respect of part of the income, the capital was still the property of the testator. Remarks upon Reynolds *v.* Torin.

Another question which has been much litigated between the *dowress and devisees, is, whether she is put to her election by a rent-charge, or an annuity charged on the property out of which the dower arises. Lord Hardwicke, in Pitts *v.* Snowden (*g*), decided that she was not [and although this has not been uniformly followed (*h*) it] seems to have been treated as clear [in all the later cases (*i*)]. *466 Dowress not barred by mere annuity out of property.

And it seems to be the sound doctrine. It ought, in the words of Lord Alvanley, in French *v.* Davies (*j*), "to be clear, plain, and incontrovertible, that the testator could not possibly give what he has given, consistently with her claim of dower." A mere annuity [though a circumstance deserving weight (*k*)] certainly furnishes no such incon-

(*f*) 1 Russ. 129.

(*g*) 1 B. C. C. 292, n.

(*h*) Arnold *v.* Kempstead, Amb. 466, 2 Ed. 236; Villa Real *v.* Lord Galway, Amb. 682, more fully reported 1 B. C. C. 292, n.; Jones *v.* Collier, Amb. 730; Wake *v.* Wake, 3 B. C. C. 255, 1 Ves. Jr. 135.

(*i*) Pearson *v.* Pearson, 1 B. C. C. 291; Foster *v.* Cooke, 3 B. C. C. 347; Miall *v.* Brain, 4 Mad. 119; Dowson *v.* Bell, 1 Kee. 761; [Holdich *v.* Holdich, 2 Y. & C. C. C. 18; Lowes *v.* Lowes, 5 Hare, 501; Hall *v.* Hill, 1 D. & War. 103.]

(*j*) 2 Ves. Jr. 572.

[(*k*) Per Wickens, V.-C., Thompson *v.* Burra, L. R. 16 Eq. 602.]

trovertible evidence; on the contrary, the more reasonable supposition is, that the testator gives that which he has power to dispose of, and that only; and the answer to the argument commonly urged, that the remedy by distress requires that the entirety of the lands should be subject to the annuity, and not the two thirds only, is that the dowress takes not an undivided third, but the entirety of a divided share, which is set out by metes and bounds. In French *v.* Davies (as well as in Greatorex *v.* Carey (*l*), where a similar decision was made by Lord Alvanley), the annuity was charged on a mixed fund, consisting of both real and personal property, and the same occurred in Miall *v.* Brain. In Pearson *v.* Pearson (*m*), Lord Loughborough seems to have thought that the annuity was a bar of dower if the annual value of the lands was not adequate to satisfy both; but this appears to introduce a fluctuating and unsatisfactory rule, and the notion derives no countenance from any of the recent cases (*n*).

To whom the bar of dower enures.

And here it may be observed, that where a widow is barred of her dower in lands devised by the will, by a benefit given to her in satisfaction of such claim, the exclusion is considered as made, not in favor of the devisee personally, but of the estate; and, consequently, it enures to the benefit of the heir, in case of the devolution of the land upon him by the failure of the devise (*o*).

Widow, when excluded from share of personalty.

*467 *But it has been decided that a gift to the widow in satisfaction of all her claims on the testator's estate, does not preclude her from claiming her share of the personalty under the Statutes of Distribution, in the event of the failure of a bequest of that property.[1] And, therefore, where a testator gave certain property to his wife in satisfaction of all dower or thirds which she could claim out of his real and personal estate, or either of them, and bequeathed his personal estate to charitable purposes (which bequest was void as to real securities), it was held that the clause in question did not prevent the widow from claiming her share in the real securities, with the next of kin, since neither the heir at law, nor by parity of reasoning, the next of kin, can be barred by anything but a disposition of the heritable subject, or personal estate, to some persons capable of taking (*p*). [So an annuity given to the widow "in lieu and satisfaction of all dower and thirds or *other claims and demands* which she could or might have had or been entitled to" out of

(*l*) 6 Ves. 615. (*m*) 1 B. C. C. 291.

[(*n*) Except Warbutton *v.* Warbutton, 2 Sm. & Gif. 163, which, however, is overruled, ante, p. 461.]

(*o*) See Pickering *v.* Lord Stamford, 3 Ves. 337.

(*p*) Pickering *v.* Lord Stamford, 2 Ves. Jr. 272, 581, 3 Ves. 332, 492; see also Sampson *v.* Hutton, 11 Vin. Abr. Copyh. 185, 2 Eq. Ca. Ab. 439, but more correctly stated 3 Ves. 335; [but a declaration to this effect in a *settlement* will of course effectually bar the widow. Gurly *v.* Gurly, 8 Cl. & Fin. 743; Druce *v.* Denison, 6 Ves. 395; the former case appears to overrule Slatter *v.* Slatter, 1 Y. & C. 28.

[1] See Kempton, Appellant, 23 Pick. 163; Hosford, 22 Pick. 288; Crane *v.* Crane, 17 Nickerson *v.* Bowly, 8 Met. 424; Briggs *v.* Pick. 422; and ante, p. 458, n.

the testator's estate, will not bar her right as *customary heir* to her husband in respect of copyholds not disposed of by his will (*q*).]

The difference between such a case and that of dower seems to be this: Where a testator gives a benefit in lieu of dower, he purchases an interest in the estate for the benefit of any and every person claiming that estate under him, whether as heir or devisee; and the exclusion of the dower arises, not from the disposition of the property (which, it has been shown, will not *per se* exclude the dower), but from the provision for the widow being given expressly in satisfaction of it, and, consequently, is not affected by the failure of the disposition. Whereas, in the case under discussion, though the gift is expressed to be in satisfaction of the widow's claim on the testator's estate, yet, in fact, the efficient part of the exclusion consists in the disposition, which gives the property to some other person: that disposition therefore failing, the widow's claim under the Statutes of Distribution is revived; and such claim is not inconsistent with any disposition in the will. It would seem to follow, from this view of the subject, that where the exclusion of the dower by means of election arises merely from the terms and mode in which the estate * subject to the dower is devised, there is strong *468 ground for holding that the failure of the devise lets in the claim of dower. The question, of course, is always a question of intention to be collected from the whole will.

Effect of failure of disposition of dower-lands, where a benefit is given in lieu of dower.

[And with regard to the widow's exclusion from her share of the personalty, it is said to be different if, on the face of the will, there is an original intestacy as to a part of the personal estate: on the ground that the exclusion cannot then be represented as auxiliary to any disposition of that portion of the personalty: it must have an independent effect; and the only effect it can possibly have is to exclude the widow from participation in the undisposed part of the personalty. This was so decided by Sir J. Stuart, V.-C., in the case of Lett *v.* Randall (*r*). He distinguished the case from one where it might be attempted to exclude the heir from taking undevised realty, without effectually disposing of it to some other person. The equivalent to that in regard to personalty would be an attempt to exclude all the next of kin, which would be as nugatory as an exclusion of all mankind. In the case before the court, the exclusion of the widow would enure to the benefit of the remaining next of kin.]

Distinction in case of personalty where widow is in terms excluded, but part of the personalty is left undisposed of.

A provision made for a wife "for her jointure, and in lieu of dower and thirds, at common law [out of any real or personal estate," though, strictly speaking, the widow has no thirds at common law out of her husband's personal estate, has been

What bars widow of share in personal estate.

(*q*) Norcott *v.* Gordon, 14 Sim. 258.
(*r*) 3 Sm. & Gif. 83, not appealed on this point, 2 D. F. & J. 388. But see Sykes *v.* Sykes, L. R. 4 Eq. 200.

held to extend to her distributive share out of such estate (*s*). Where the provision was made "for a jointure and in lieu of dower and thirds at common law" (without express mention of personal estate), and was charged on the land only, it was held to be clear that the widow was excluded only from further claim against the land (*t*). But where the provision was made in similar terms, and charged both on real and personal estate, it was held that you must look to the fund out of which the provision was made, and that the widow was therefore excluded from her share of the personal as well as the real estate (*u*). The words "in lieu of dower or thirds at common law *or otherwise*," have been held to extend to the wife's right of freebench in copyholds (*v*).]

Effect of 3 & 4 Will. 4, c. 105, upon points discussed in this chapter.

The question whether a dowress is put to her election by the contents of her husband's will, will less frequently arise in regard *to widows whose marriage was since the 1st of January, 1834; as such persons may, under the act of 3 & 4 Will. 4, c. 105, be excluded from dower by various acts of the husband, including a disposition of the property by deed or will [(for which a general devise has been held sufficient (*x*))], or a mere declaration therein, or a rent-charge, or other interest devised to her out of any lands subject to dower; but a mere gift of personal estate, or of an interest in lands not liable to dower, will not defeat the widow's claim. [This act does not affect copyholds (*y*); but it must be remembered that the Wills Act, 1 Vict. c. 26, has been held (*z*) to render a devise of copyholds as effectual as a surrender to bar the widow of freebench.

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As to copyholds.

Gift in lieu of a specified thing does not exclude from another gift.

The ordinary doctrine of election may, doubtless, be excluded either wholly or partially, if the testator so desires. "The rule in Noys *v.* Mordaunt," said Lord Hardwicke (*a*), "of not claiming by one part of a will in contradiction to another, is a true rule, but has its exceptions. . . . Several cases have been, and several more may be, in which a man shall give a child or other person a legacy or portion in lieu or satisfaction of particular things expressed, which shall not exclude him from *another benefit*, though it may happen to be contrary to the will; for the court will not construe it as meant in lieu of everything else when he has said a particular thing; which East has done in his will, declaring what the provision for the plaintiff should be in satisfaction of, not of this sum of money. Let the defendant, therefore, transfer it to plaintiff."

The case put by Lord Hardwicke (ending with the words "said a particular thing") occurred in Brown *v.* Parry (*b*), where a testator

(*s*) Gurly *v.* Gurly, 2 D. & Wal. 463, 8 Cl. & Fin. 743.
(*t*) Colleton *v.* Garth, 6 Sim. 19.
(*u*) Thompson *v.* Watts, 2 J. & H. 291.
(*v*) Nottley *v.* Palmer, 2 Drew. 93.
(*x*) Lacey *v.* Hill, L. R. 19 Eq. 346.
(*y*) Powdrell *v.* Jones, 2 Sm. & Gif. 407; Smith *v.* Adams, 5 D. M. & G. 712.
(*z*) Lacey *v.* Hill, L. R. 19 Eq. 346, ante p. 60.
(*a*) East *v.* Cook, 2 Ves. 33. See also Bor *v.* Bor, 3 B. P. C. Toml. 167.
(*b*) Romilly's No. Cas. 85, also reported, but imperfectly, 2 Dick. 685.

gave his wife an annuity "to be accepted by her in lieu of her dower," and also bequeathed other benefits to her (without adding in lieu of her dower); the widow elected not to take the annuity, but to keep her dower; and it was held by Lord Thurlow that she was nevertheless entitled to take the rest of the testator's bounty, and that the case was too clear for argument. In truth, this is not properly a case of election at all; which arises only when something is taken *against* the will. There is here a legacy upon an express condition *which is submitted to;* and another legacy without express condition. Why should a * condition be annexed by implication to the latter bequest, when *470 by taking it the legatee disappoints no part of the will?

But the case is different where a gift is made in lieu of a particular thing expressed, and there is then a question, — not whether the legatee, while rejecting the proposed exchange, can take another gift *under the will* unconditionally, but — whether, while accepting the exchange, he can insist on his right to another property *against* the will. Thus, in Wilkinson *v.* Dent (*c*), where a testatrix gave to her brother T. 10,000*l.* in satisfaction of any sums in which she then was or might at her death be indebted to him, and to her brother W. 3,000*l.* in lieu and satisfaction of any rent-charge out of a certain part of her real estate, and specifically disposed of the entirety of another estate, in which both brothers had interests; it was held that the brothers taking their legacies must bring these latter interests into account as well as the debts and the rent-charge. Sir W. M. James, L. J., said: "There are two legacies which the will declares are to be taken in satisfaction of certain demands against the estate. It is the common case where the father of a family leaves a legacy to a member of his family, and says you must take that and not raise *any question* against my estate. It is argued that in such a case there is a special direction which prevents election as to other parts of the will, and reference was made to East *v.* Cook. It is not very easy to understand that case, but it was probably of this kind: My eldest son is owner of a bit of property; it would be very convenient that this bit of property should go along with a property which I am devising to my second son; so I make a devise of this bit of property to the second son; and, *among other gifts* to my eldest son, I give him a piece of property which I state in my will to be in lieu of his bit of property, which I purport to take away from him (*d*). In such a case the eldest son is merely put to his choice between those two bits of property. It is a case where the ordinary doctrine of election is excluded by an apparent expression of intention by the testator,

(*c*) L. R. 6 Ch. 339. See also Fytche *v.* Fytche, 19 L. T. N. S. 343; the report of which, L. R. 7 Eq. 494, omits to state the gift upon which the whole case turned, viz. the gift of the wife's navigation shares, after her death, away from her.

(*d*) The L. J. did not say how much of this he supposed to be expressed in the will, and how much to be supplied by conjecture. The case put resembles that put by Lord Hardwicke, but both of them differ from the case which actually arose in East *v.* Cook, since what the plaintiff there claimed and took he took *against* the will, viz. Goff's 1,000*l.*

that only one of the gifts to the eldest son is conditional on his giv-
*471 ing up what the testator purports to take away from him. * Such a case in no way governs the present. . . . The question is whether there is testamentary bounty to a person whose estate and right are by another part of the will interfered with. It is clear there is, though before the amount of the bounty can be ascertained, the amount of the claim which the legatee had against the testatrix must be ascertained."

From what acts an election is presumed.

In order to presume an election from the acts of any person, that person must be shown to have had a full knowledge of all the requisite circumstances as to the amount of the different properties, his own rights in respect of them, &c. (*e*) ; and a person having elected under a misconception is entitled to make a fresh election (*f*) : and the fact of a person not having been called upon to elect and entering into the receipt of the rents and profits of both properties, as it affords no proof of preference, cannot be held an election to take one and reject the other (*g*).] [1]

(*e*) Wake *v.* Wake, 1 Ves. Jr. 335, and the other cases mentioned 1 Sw. 381, n.; Reynard *v.* Spence, 4 Beav. 103; Edwards *v.* Morgan, 13 Price, 782, M'Clel. 541, 1 Bli. N. S. 401. Brice *v.* Brice, 2 Moll. 21; Wintour *v.* Clifton, 21 Beav. 468; Sopwith *v.* Maughan, 30 Beav. 235; Wilson *v.* Thornbury, L. R. 10 Ch. 239.

(*f*) Kidney *v.* Coussmaker, 12 Ves. 136.

(*g*) Padbury *v.* Clark, 2 Mac. & G. 306; Brice *v.* Brice, 2 Moll. 21; but see Worthington *v.* Wiginton, 20 Beav. 67; and generally, as to what acts constitute election, see note to Dillon *v.* Parker, 1 Sw. 382; Giddings *v.* Giddings, 3 Russ. 241; Brisco *v.* Brisco, 1 J. & Lat. 334; Mahon *v.* Morgan, 6 Ir. Jur. 173; Ruttledge *v.* Ruttledge, 1 Dow. & Cl. 331. As to how far the gain or loss to the person called on to elect is to weigh in presuming election, see Harris *v.* Watkins, 2 K. & J. 473.]

[1] Whether enforced on the law or equity side, election depends upon principles of equity and justice. It will not be binding when made in ignorance of material facts. Watson *v.* Watson, 128 Mass. 152, 155. So too an alleged election may be repudiated when made (though with knowledge of the facts) in misapprehension of the party's legal rights and in ignorance of his obligation to elect. Watson *v.* Watson, supra; Reed *v.* Dickerman, 12 Pick. 146, 151; Delay *v.* Vinal, 1 Met. 57, 65; Pusie *v.* Desbouvrie, 3 P. Wms. 315; Wake *v.* Wake, 1 Ves. Jr. 335; S. C. 3 Brown, C. C. 255; Padbury *v.* Clark, 2 Mac. & G. 298; S. C. 2 Hall & T. 341; Spread *v.* Morgan, 11 H. L. Cas. 588, 602, 611, 615. And when a will has been proved in common form (by the executor, *ex parte*) a legatee may afterwards, upon tendering the sum received under the will, or upon bringing it into court, contest the validity of the will and compel probate of it in solemn form. Watson *v.* Watson, 128 Mass. 152; Bell *v.* Armstrong, 1 Add. Eccl. 365, 374; Hamblett *v.* Hamblett, 6 N. H. 333; Holt *v.* Rice, 54 N. H. 398.

* CHAPTER XV. *472

EFFECT OF REPUGNANCY OR CONTRADICTION IN WILLS, AND AS TO REJECTING WORDS.

Rule in case of contradiction or repugnancy.

DOUBT is sometimes cast upon the intention of a testator by the repugnancy or contradiction between the several parts of his will, though each part, taken separately, is sufficiently definite and intelligible.[1] In such cases the context (which is so often successfully resorted to for the purpose of throwing light on a doubtful passage) becomes itself the source of obscurity; and, unless some principle of construction can be found authorizing the adoption of one, and the rejection of the other of the contrariant parts, both are necessarily void, each having the effect of neutralizing and frustrating the other. With a view to prevent this most undesirable result, it has become an established rule in the construction of wills, that where two clauses or gifts are irreconcilable, so that they cannot possibly stand

[1] The court is bound to give effect to every word of the will, without change or rejection, provided an effect can be given to it not inconsistent with the general intent of the whole will taken together. Gray *v.* Minnethorpe, 3 Ves. Jr. 103; Constantine *v.* Constantine, 6 Ves. 100; Doe *v.* Rawding, 2 B. & Ald. 441; Homer *v.* Shelton, 2 Met. 202; Jones *v.* Doe, 1 Scammon, 276; Leavens *v.* Butler, 8 Port. 380; Kane *v.* Astor, 5 Sandf. 467; Lasher *v.* Lasher, 13 Barb. 106. But where it is impossible to form any consistent whole, the separate parts being absolutely irreconcilable, the last will prevail, as indicating the testator's latest intention. Constantine *v.* Constantine, 6 Ves. 100; Doe *v.* Biggs, 2 Taunt. 109; Sherrat *v.* Bentley, 2 My. & K. 149; Homer *v.* Shelton, 2 Met. 202; Pickering *v.* Langdon, 22 Me. 430; Smith *v.* Bell, 6 Peters, 84; Bradstreet *v.* Clarke, 12 Wend. 602; Baird *v.* Baird, 7 Ired. Eq. 265; Evans *v.* Hudson, 6 Ind. 293; Miller *v.* Flournoy, 26 Ala. 724; Covenhoven *v.* Shaler, 2 Paige, 122; Adie *v.* Cornwell, 3 T. B. Mon. 276; Lewis's Estate, 3 Whart. 162. As where one clause of a will gives certain property to one person, and a subsequent clause gives the same property to another person, the devisee under the last devise takes the property. Hollins *v.* Coonan, 9 Gill, 62; Pratt *v.* Rice, 7 Cush. 209. So a devise of an undivided part of a testator's real estate must yield to a subsequent clause in the will, authorizing the executors, at their discretion, to sell and convey a part or the whole of the real estate of the testator. Pratt *v.* Rice, supra. But this rule is only applied where the two provisions are totally inconsistent with each other, and where the real intention of the testator cannot be ascertained. Covenhoven *v.* Shuler, 2 Paige, 122; Pickering *v.* Langdon, 22 Me. 430; Homer *v.* Shelton, 2 Met. 202; Walker *v.* Walker, 17 Ala. 396. See Howard *v.* Howard, 4 Bush, 494; Stickle's Appeal, 29 Penn. St. 234; Newbold *v.* Boone, 52 Penn. St. 167; Sheets's Estate, ib. 257; Shreiner's Appeal, 53 Penn. St. 106; McBride *v.* Smyth, 54 Penn. St. 245; Braman *v.* Stiles, 2 Pick. 460, 463; Bartlett *v.* King, 12 Mass. 542; Pratt *v.* Rice, 7 Cush. 209; Iglehart *v.* Kirwan, 10 Md. 559; Auburn Sem. *v.* Kellogg, 16 N. Y. 83; Sweet *v.* Chase, 2 N. Y. 73; Kane *v.* Astor, 9 N. Y. 113; Oxley *v.* Lane, 35 N. Y. 340; Lovett *v.* Gillender, ib. 617; Thrasher *v.* Ingram, 32 Ala. 645; Redding *v.* Allen, 3 Jones, Eq. 358; Kerr *v.* Chislin, L. R. 8 Eq. 462; Evans *v.* Hudson, 6 Ind. 293; Gilman *v.* Gilman, 52 Me. 165. Subsequent clauses in a will are not incompatible with or repugnant to prior clauses when they may take effect as qualifications of the latter without defeating the intention of the testator in mak-

together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention: "Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est" (*a*). Hence it is obvious that a will can seldom be rendered absolutely void by mere repugnancy: for instance, if a testator in one part of his will gives to a person an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a life-interest only, the prior gift is restricted accordingly.

Posterior of two inconsistent clauses preferred;

As in Crone *v.* Odell (*b*), where a testator devised the residue of his real and personal property to his children A., B., and C., and all their younger children, their heirs, executors, *473 administrators * and assigns, for ever; so far it was a clear joint devise; but he went on to declare, that, nevertheless, his intentions were, that A. should receive the entire interest or yearly produce of such part of his real or personal fortune as he (testator) intended for his (A.'s) younger children during his life. The testator then made a similar direction as to B. and C.; and he provided, that, in case any of his said three children should die, the share of such should go to the younger children of such children; if no younger children, to the survivors; and he gave the parents a power of distribution among their younger children. Lord Clare held the parents and children to be entitled jointly; but this was reversed by Lord Manners, who determined that the parents took life-interests only, with a power of distribution among their younger children; which decree was affirmed in D. P.

So, in Sherrat *v.* Bentley (*c*), where a testator, after bequeathing

(*a*) Co. Litt. 112, b; Ulrich *v.* Litchfield, 2 Atk. 372; Sims *v.* Doughty, 5 Ves. 243; Constantine *v.* Constantine, 6 Ves. 100; Doe d. Leicester *v.* Biggs, 2 Taunt. 109; see also Chandless *v.* Price, 3 Ves. 99; Wykham *v.* Wykham, 18 Ves. [421; Marks *v.* Solomon, 18 L. J. Ch. 234, 19 L. J. Ch. 555.]

(*b*) 1 Ba. & Be. 449, 3 Dow, 61; see also Roe d. James *v.* Avis, 4 T. R. 605.

(*c*) 2 My. & K. 149. Se also Re Brooks' Will, 2 Dr. & Sm. 362; Gravenor *v.* Watkins, L. R. 6 C. P. 500, post Ch. XXXIII. s. 5.

ing the prior gift. Taggart *v.* Murray, 53 N. Y. 233; Sweet *v.* Chase, 2 Comst. 73; Norris *v.* Beyea, 13 N. Y. 280; Tyson *v.* Blake, 22 N. Y. 559; Stickle's Appeal, 29 Penn. St. 234. While it is in general true that, of two contradictory clauses in a will, the first must give way, still the two clauses must refer to the same subject-matter, and the last must be clearly inconsistent with the first. If the main provision plainly covers the whole subject, and is defined in terms that exclude all doubt, the subsidiary provision must in ordinary cases be confined to its partial and restricted operation. Sheetz's Appeal, 82 Penn. St. 213, Woodward, J. See also Barksdale *v.* White, 28 Gratt. 224; Rayfield *v.* Gaines, 17 Gratt. 1; Kenzie *v.* Roleson, 28 Ark. 102; and cases cited supra. It must not, therefore, be understood that, because the testator uses in one part of his will words having a clear meaning in law, and in another part words inconsistent with the former, the first words are to be cancelled or overthrown. Jesson *v.* Wright, 2 Bligh, 56, per Lord Redesdale. It is well established that the general intent, although first expressed, will overrule the particular. Jesson *v.* Wright, 2 Bligh, 56; Doe *v.* Harvey, 4 Barn. & C. 620; Hawley *v.* Northampton, 8 Mass. 3; Cook *v.* Holmes, 11 Mass. 528; Chase *v.* Cockerman, 11 Gill & J. 185; Morton *v.* Barrett, 22 Me. 257; Pickering *v.* Langdon, 22 Me. 413; Miller *v.* Flournoy, 26 Ala. 724. If there are words which have no intelligible meaning, or are absurd, or repugnant to the clear intent of the rest of the will, they may of course, as will appear later, be rejected. Bartlett *v.* King, 12 Mass. 537.

several legacies, devised unto his wife a certain messuage and all other his real estates, and his household goods and all other his personal estate, *to hold to his said wife, her heirs, executors, administrators and assigns, for ever.* The testator then directed that none of the legatees should be entitled until twelve months *after his wife's decease;* and, in case his wife should happen to die in his lifetime, and the before-mentioned devises and bequest to her should thereby lapse, the testator gave the estate and effects, as well real as personal, comprised therein, to S., his heirs, executors, administrators and assigns, to the use of such persons as his wife should, in her lifetime, by writing under her hand appoint. The testator then gave some pecuniary legacies, and proceeded to devise and bequeath to W. A. and his (the testator's) brother-in-law's children the residue of his real and personal estates, to be equally divided amongst them, share and share alike, *at the decease of his said wife.* The heir at law contended, that the will was void for uncertainty, on account of the repugnance between the gift to the wife, her heirs, executors, administrators and assigns, and the subsequent gift of the residue to others, to be divided at her decease. The person claiming under the wife contended that the pecuniary legacies and the gift of the residue were only to take effect in the event of her decease in the testator's lifetime; but Sir J. Leach, M. R., was of opinion that the court was not warranted in putting such a construction upon the * will, for that the testator's general intention, as collected from *474 the concluding passages in his will, was to give the wife the full enjoyment during her life only, and to give it over to the persons named afterwards; and that the words "heirs, executors, administrators and assigns," were to be rejected; and his Honor referred, as one of the grounds of his decision, to the rule, that the latter part of a will shall prevail against inconsistent expressions in the prior part of it. On appeal, Lord Brougham affirmed the decree, observing that either the testator had changed his intention and was minded to give his wife a life-estate instead of the fee, or he was ignorant of the force of the words he had originally used, and those words must be rejected as having been used by mistake. The former alternative was the one to which the rule, sanctioned by the authorities (which he stated in detail), led. The latter was the inference drawn, not unfairly, from the whole instrument taken together.

But in these cases it is a settled and invariable rule not to disturb the prior devise farther than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition.[1] —but prior devise not unnecessarily disturbed.

As in Doe d. Amlot *v.* Davies (*d*), where a testator devised all his

(*d*) 4 M. & Wels. 599. [See also Crossman *v.* Bevan, 27 Beav. 502; Spence *v.* Handford, 4 Jur. N. S. 987, 27 L. J. Ch. 767.]

[1] See Henning *v.* Varner, 34 Md. 102.

messuage and garden in the occupation of D., and also all that his messuage and garden wherein he then resided, both situate in P., to trustees and their heirs, upon trust to pay the rents to his wife during widowhood, and after the determination of that estate, to the use of his children by his said wife, equally to be divided between them and the lawful issue of their or his bodies or body, and, in default of such issue, to his nephew D. The testator immediately afterwards gave to his daughter F. a pecuniary legacy when she attained the age of twenty-one years, and the house where she then lived, after the decease of her mother or the day of intermarriage; and the testator gave to his daughter R. a legacy in like manner, and the house then in the occupation of D., after the decease of her mother or the day of her intermarriage. The two houses last referred to were those comprised in the previous devise. It was admitted that, under the first devise, the daughters would have been tenants in common in tail of the two houses, but, as the second devise clearly indicated an intention to give one of the houses to each daughter, the whole was in some degree rec-
*475 onciled by holding each to take an estate * for life in severalty in her own house, under the latter devise (which contained no word of inheritance), leaving the prior devise still to operate on the inheritance in remainder, of which it made the two daughters tenants in common in tail expectant on the estate for life of each in the respective houses.

Devise annulled by subsequent inconsistent devise in same will;

The doctrine in question has been sometimes unsparingly applied, even where the effect of the posterior devise is not merely (as in the two last cases) to restrict and qualify the interest conferred by the prior devise, but wholly to defeat and frustrate such prior devise. Thus, in Ulrich *v.* Litchfield (*e*), where a testatrix bequeathed her real *and personal estate* to A. and B. equally for life, and, upon the death of A., she gave the whole estate to B. in tail, with remainder over, with a few pecuniary legacies, and charged her real estate with the payment of the legacies, if the personalty should be insufficient. The testatrix then gave *all the residue of her personal estate* to her uncle C.'s three daughters. Lord Hardwicke held the daughters to be entitled to the residue of the personal estate, considering that the testatrix must be presumed to have altered the intention expressed in the prior part of her will.[1]

—the whole to be reconciled, if possible.

But the rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render every part of it effective (*f*).[2] In the attainment of this object

(*e*) 2 Atk. 372.

[(*f*) Langham *v.* Sandford, 19 Ves. 647; Shipperdson *v.* Tower, 1 Y. & C. C. C. 459; Briggs *v.* Penny, 3 De G. & S. 539; Jackson *v.* Forbes, Taml. 88; Brocklebank *v.* Johnson, 20 Beav. 205.]

1 See Pratt *v.* Rice, 7 Cush. 209; Hollins *v.* Coonan, 9 Gill, 62.

2 Van Vechten *v.* Keator, 63 N. Y. 52; Van Nostrand *v.* Moore, 52 N. Y. 12; Tisdale

the local order of the limitations is disregarded, if it be possible by the transposition of them to deduce a consistent disposition from the entire will. Thus, if a man, in the first instance, devise lands to A. in fee, and in a subsequent clause give the same lands to B. for life, both parts of the will shall stand; and, in the construction of law, the devise to B. shall be first (*g*), the will being read as if the lands had been devised to B. for life, with remainder to A. in fee.[1]

So where (*h*) a testator, after devising the whole of his estate to A., devises Blackacre to B., the latter devise will be read as an exception out of the first, as if he had said, "I give * Blackacre to B., and, subject thereto, all my estate, or the residue of my estate, to A." *476

By parity of reason, where (*k*) a testator gives to B. a specific fund or property at the death of A., and in a subsequent clause disposes of the whole of his property to A., the combined effect of the several clauses, as to such fund or property, is to vest it in A. for life, and, after his decease, in B.[2] Devise qualified by subsequent disposition.

Again (*l*), where a testator gave his real and personal estate to A., his heirs, executors, and administrators, and in a subsequent part of his will gave all his property to A. and B., upon trust for sale, and to pay the interest of the proceeds to A. for life, and at her decease, upon trust to pay certain legacies, leaving the residue undisposed of, A. was held to be entitled, under the first devise, to the beneficial interest in reversion, not exhausted by the trust for the payment of legacies created by the second (*m*).

Sometimes it happens that the testator has, in several parts of his will, given the same lands to different persons *in fee*. At first sight this seems to be a case of incurable repugnancy, and, as such, calling for the application of the rule, which sacrifices the prior of two irreconcilable clauses, as the only mode of escaping from the conclusion that both are void. Even here, however, a reconciling construction has been devised, the rule being in such cases, according to the better opinion, that the devisees take concurrently (*n*). The contrary, indeed, is laid down by Effect of separate contradictory devises, each in fee. Both take concurrently.

(*g*) Per Anderson, Anon., Cro. El. 9; see also Ridout *v.* Dowding, 1 Atk. 419; [Plenty *v.* West, 6 C. B. 201; Usticke *v.* Peters, 4 K. & J. 437.]

(*h*) Cuthbert *v.* Lempriere, 3 M. & Sel. 158; [see also Anon., Dalison, 63; Adams *v.* Clerke, 9 Mod. 154; Allum *v.* Fryer, 3 Q. B. 442; Doe d. Snape *v.* Nevill, 11 Q. B. 466.]

(*k*) Blamire *v.* Geldart, 16 Ves. 314,

(*l*) Brine *v.* Ferrier, 7 Sim. 549.

(*m*) The inconsistent gifts were in fact contained in several papers supposed to be written at different times; but as they had been proved as one will, they were, of course, to be so construed.

(*n*) 3 Leon. 11, pl. 27; 8 Vin. Abr. Copyh. 152, pl. 3; Arg. in Coke *v.* Bullock, Cro. Jac. 49, and in Fane *v.* Fane, 1 Vern. 30.

v. Mitchell, 13 Rich. 263; Rountree *v.* Talbot, 89 Ill. 246; Siceloff *v.* Redman, 26 Ind. 251; Mütter's Estate, 38 Penn. St. 314; Fahrney *v.* Holsinger, 65 Penn. St. 388; Vancil *v.* Evans, 4 Coldw. 340; Homer *v.* Shelton, 2 Met. 202; Iglehart *v.* Kirwan, 10 Md. 559; Pickering *v.* Langdon, 22 Me. 430; Smith *v.* Bell, 6 Peters, 68, 84; Bradstreet *v.* Clarke, 12 Wend. 602; Baird *v.* Baird, 7 Ired. Eq. 265; Miller *v.* Flournoy, 26 Ala. 724; Griffin *v.* Pringle, 56 Ala. 486; Davis *v.* Bennet, 30 Beav. 226.

[1] See Crissman *v.* Crissman, 5 Ired. 498.

[2] See Hatfield *v.* Sneden, 42 Barb. 615; Pruden *v.* Pruden, 14 Ohio St. 251; Parker *v.* Parker, 13 Ohio St. 95.

Lord Coke (*o*), and other early writers (*p*), who say that the last devise shall take effect; and a similar opinion seems to have been entertained by Lord Hardwicke, though he admitted that, latterly, a different construction had prevailed (*q*). The point underwent much discussion in Sherrat *v.* Bentley (*r*), already stated; and Lord Brougham, after reviewing the authorities, and fully recognizing the general doctrine, which upholds the latter part of a will by the sacrifice of the former to which it was repugnant, considered that, consistently with this *477 rule, it might be held, that, where there are two devises in * fee of the same property, the devisees take concurrently. "If, in one part of a will," he said, "an estate is given to A., and afterwards the same testator gives the same estate to B., adding words of exclusion, as 'not to A.' the repugnance would be complete, and the rule would apply. But if the same thing be given, first to A., and then to B., unless it be some indivisible chattel, as in the case which Lord Hardwicke puts in Ulrich *v.* Litchfield, the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule, as laid down by Lord Coke and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety; though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation."

Whether as joint-tenants or tenants in common.

[It is laid down by Lord Hardwicke in Ulrich *v.* Litchfield (*s*), that the two devisees, if they take concurrently, are joint-tenants; this is supported by several old authorities (*t*), and appears to have been assumed by Lord Brougham, who speaks of their joint estate (*u*). When he speaks (as above) of each taking a "moiety," it is only as opposed to either taking the whole to the exclusion of the other. In Ridout *v.* Pain (*x*), Lord Hardwicke says, that "latterly such a devise has been construed either a joint tenancy or tenancy in common, according to the limitation;" and this it is said must be presumed to mean, "that if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a joint tenancy, the devisees shall be joint-tenants, but otherwise shall be tenants in common" (*y*).[1] Now, as both devisees are supposed to have vested estates in fee, this interpretation points to their being

(*o*) Co. Lit. 112. (*p*) Plow. 541.
(*q*) See Ulrich *v.* Litchfield, 2 Atk. 374.
(*r*) 2 My. & K. 165, ante, p. 473.
[(*s*) 2 Atk. 372.
(*t*) 14 Vin. Ab. 485, pl. 2; Anon., Cro. El. 9; Wallop *v.* Darby, Yelv. 210; Co. Lit. 21 a, n. (4.)
(*u*) 2 My. & K. 166.
(*x*) 3 Atk. 493.
(*y*) Co. Lit. 112 b, n. (1), by Harg.]

[1] See McGuire *v.* Evans, 5 Ired. Eq. 269; Jones's Appeal, 3 Grant, 169.

joint-tenants. Independently of authority this seems the] preferable construction, as less violence is thereby done to the testator's language than by making them tenants in common, as the creation of a tenancy in common requires positive intention.

It is observable that both Lord Hardwicke and Lord Brougham considered that the doctrine in question did not apply to a single indivisible chattel; but such an exclusion is attended with * difficulty, for though, certainly, it may seem *478 rather absurd that a testator should give a horse or a watch to several persons concurrently, yet it is impossible to say that there may not be such an intention; and where is the line to be drawn? Is it to depend upon the greater or less convenience attending a joint or concurrent enjoyment of the subject of gift?

Whether doctrine applies to an indivisible chattel.

Sometimes where an estate in fee is followed by apparently inconsistent limitations, the whole has been reconciled by reading the latter disposition as applying exclusively to the event of the prior devisee in fee dying in the testator's lifetime, the intention being, it is considered, to provide a substituted devise in the case of lapse (*z*); [or by understanding the latter devise to be dependent on a certain contingency mentioned in the will, though such contingency may not clearly appear to be attached to it (*a*).]

Apparent inconsistency reconciled by reference to lapse.

The anxiety of the courts to adopt such a construction as will reconcile and give effect to all parts of a will is further exemplified by Holdfast d. Hitchcock *v.* Pardoe (*b*), where a testator devised to A. a farm in the occupation of C., and to B. lands in L. marsh; and it appeared that part of the farm in the occupation of C. consisted of lands in L. marsh; but there was another estate, not in his occupation, consisting entirely of marsh lands in L.; and it was held, that the subsequent devise was not, as contended, a revocation of the preceding devise, but that A. took the farm, and B. the marsh lands not included in that farm.

Instances of devises reconciled.

[So, where (*c*) a testator devised to A. "her heirs, executors and administrators," a house in T. Street (describing it), and in distinct clauses gave her several other houses, "the whole of which *premises* were in the borough of Plymouth, during her natural life," but should A. have children, "the before-mentioned houses" to descend to them; but if she should die without issue (which happened), then the "said premises" to become the joint property of the children of X. The house included in the first devise being, as well as all the rest, in the borough of Plymouth, it was contended that it went with them to the children of X. But it was held, that although the words were not

(*z*) Clayton *v.* Lowe, 5 B. & Ald. 536; but see remarks on this case, post, Ch. XLIX.
[(*a*) Ley *v.* Ley, 2 M. & Gr. 780.]
(*b*) 2 W. Bl. 975; see also Woolcomb *v.* Woolcomb, 3 P. W. 111.
[(*c*) Doe d. Bailey *v.* Sloggett, 5 Exch. 107.]

perfectly accurate, yet they could not intend that the testator meant by the subsequent words to cut down the estate in fee first given.]

*479 *But, perhaps, the strongest authority of this kind is Bettison *v.* Richards (*d*), where a testator, after devising an estate *pur autre vie*, devised *all other his estates*, real and personal, *wheresoever situate*, unto E. L., her heirs, executors, &c., forever, charged with debts and certain legacies; and in case his son should die without issue of his body lawfully begotten, then he devised all his manors, messuages, tenements and real estate *not thereinbefore disposed of*, situate in the several counties of H., G., N., L., and D., and the town of N. (though, it will be observed, he had previously disposed of *all* his real and personal estate), and also all his personal property in the public funds or elsewhere, unto the said E. L. during her life, and after her decease unto R. S. in fee. It appeared that the testator had the reversion in fee expectant on the determination of an estate tail male in his son, in large estates in the several counties specified, except D. and the town of N., where he had lands in fee-simple in possession. It was contended that the latter devise was confined to the lands in the specified counties, *of which the testator had the reversion only;* and that the other lands *even in the counties particularized in the second devise*, passed under the first devise; and of this opinion appears to have been the Court of C. P., which certified that E. L. took an estate in fee in the lands *in D.* and the *town of N.*, subject to the debts, &c.

[These cases also exemplify a rule which is certainly not of less frequent application than that enunciated at the beginning of this chapter, viz., that where there is a clear gift in a will it cannot afterwards be cut down except by something which with reasonable certainty indicates the intention of the testator to cut it down. It need not (as sometimes stated) be equally clear with the gift. "You are not to institute a comparison between the two clauses as to lucidity" (*e*). But the clearly expressed gift naturally requires something unequivocal to show that it does not mean what it says.

Clear gift not cut down by doubtful expressions.

It is clear that words and passages in a will, which are irreconcilable with the general context, may be rejected, whatever may be the local position which they happen to occupy;[1] for the *480 *rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any

Rule as to the rejection of words.

(*d*) 7 Taunt. 105.

[(*e*) Per Lord Campbell, Randfield *v.* Randfield, 8 H. L. Ca. 225, where the rule was held inapplicable. For further instances of the application of the rule see Clavering *v.* Ellison, 3 Drew. 451, 26 L. J. Ch. 335; Re Larkin, 2 Jur. N. S. 229; Davis *v.* Bennet, 30 Beav. 226; Walmsley *v.* Foxhall, 1 D. J. & S. 605; Kerr *v.* Clinton, L. R. 8 Eq. 462; Crozier *v.* Crozier, L. R. 15 Eq. 282.

1 A gift to certain children by name will control another description of the same beneficiaries as "children of A.," unless this construction is prevented by other language of the will. Hoppock *v.* Tucker, 59 N. Y. 202; Ashling *v.* Knowles, 3 Drew. 593.

degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein (*f*).[1]

Thus, in Boon *v.* Cornforth (*g*), where a testator bequeathed the interest of 6,000*l.* stock to his daughter for life, and after her decease, upon trust to dispose of the principal and interest to and between her husband and his (testator's) daughter's child and children, viz. her husband should have and enjoy one half of the interest thereof for and during his natural life, *if there should be no child or children* (the words in italics were interlined (*h*)), and the child or children the other half; on his death his half should go to the child or children, but till the child or children attained twenty-one the husband should have the whole interest, and on the death of their father, they should have the remaining 3,000*l.*; but if no such child or children at the time of her death, or they should die before twenty-one, then to go on further trust as he should thereafter mention, — Lord Hardwicke rejected the interlined words, as inconsistent and repugnant with the whole disposition; holding that there was no alternative but to reject either these or the entire provision.

Passage at variance with context rejected.

So, in Coryton *v.* Helyar (*i*), where a testator devised lands to the use of his son *for ninety-nine years*, and, after the determination of that estate, to the use of trustees during the life of the son, to preserve contingent remainders; and, after the decease of the son, to the use of his first and other sons in tail male, — Lord Hardwicke held, that the term was, with reference to the true construction of the several parts of the will, to be construed, not as an absolute term, but as determinable with the decease of the son.

In several instances inconsistent words engrafted on a prior clear and express devise have been rejected.

Thus where (*j*) the devise was to A. and her heirs, *for their * lives*, Lord Ellenborough rejected the latter words; which, he said, were merely the expression of *481

Ambiguous words inconsistent with prior devise rejected.

(*f*) See per K. Bruce, L. J. 3 De G. & J. 266, 267.]

(*g*) 2 Ves. 277; [Jones *v.* Price, 11 Sim. 557; Aspinall *v.* Andus, 7 M. & Gr. 912; Hanbury *v.* Tyrell, 21 Beav. 322 (case on a deed); Campbell *v.* Bouskell, 27 Beav. 325, ("aforesaid nephews," "aforesaid" rejected); Smith *v.* Crabtree, 6 Ch. D. 591 ("living at the death or second marriage of my wife" rejected).]

(*h*) Lunn *v.* Osborne, 7 Sim. 56, affords another instance of the rejection of words which had been interlined by a testator, and were at variance with the general context.

(*i*) 2 Cox, 340. [See, for other examples of powers or interests reduced within a limited period by force of the context, Watlington *v.* Waldron, 4 D. M. & G. 259; Chapman *v.* Gilbert, ib. 366.]

(*j*) Doe d. Elton *v.* Stenlake, 12 East, 515. [See also Towns *v.* Wentworth, 11 Moo. P. C. C. 545; Hugo *v.* Williams, L. R. 14 Eq. 224.

[1] See Bartlett *v.* King, 12 Mass. 537; Brailsford *v.* Haywood, 2 Desaus. 32; Holmes *v.* Cradock, 3 Ves. Jr. (Sumner's ed.) 321, Mr. Hovenden's note (4); Davis *v.* Boggs, 20 Ohio St. 550.

a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heirs might take, they could in fact only enjoy the benefit of it for their own lives. [And where (*k*) a testator gave to his wife, her heirs and assigns for ever, his house and other property, with the intention that she might enjoy the same *during her life*, and by her will dispose of the same as she thought proper; it was contended that the wife took only a life-interest with a testamentary power of appointment; but the court held, that the latter part of the clause did not cut down the clear gift of a fee-simple contained in the former part, and that the testator merely meant to mention all the incidents of a fee which occurred to him at the time.] [1]

So, where (*l*) a testatrix bequeathed an annuity, to be equally divided between M. B., C. S., and C. A., "to them and their heirs, or the survivor of them, *in the order they are now mentioned*," Sir W. Grant rejected the latter words as repugnant. "The proposition," said he, "equally to divide a fund between two persons in a given order is mere nonsense, directly repugnant. There can be no division if there is an order in which they are to take. Suppose it stood simply a bequest to be equally divided between A. and B., in the order they are mentioned, the court could only say the first words are plain, importing equal division, a benefit, and a personal benefit to both; and they do not know what meaning to put upon the other words: they are insensible, as coupled with such preceding words. The only question therefore is, whether words having a plain meaning are to be rejected for the sake of words of which you do not see the sense or meaning. It is very probable the testatrix might have had in her mind some vague, indefinite notion of preference, but that is not expressed in any manner, so that the court can act upon it; not even by saying the words importing equal division are to be coupled with the original annuitants and not with the survivors. Those words must be equally applied to all the persons who are to take, or they must be equally rejected. It is to be equally divided among the three; not a different division among *482 the * survivors. In order to give effect to the latter words, I should be under the necessity of rejecting the words expressing an equal division, retaining the others with reference to one event, and of doing the reverse in reference to another event. In the event of all

(*k*) Doe d. Herbert *v.* Thomas, 3 Ad. & Ell. 123, 4 Nev. & M. 696. See also Brocklebank *v.* Johnson, 20 Beav. 205; Pasmore *v.* Huggins, 21 Beav. 103.]

(*l*) Smith *v.* Pybus, 9 Ves. 566; see also Jesson *v.* Wright, 2 Bligh, 1, and other cases of the same class discussed, Ch. XXXVII. s. 2; and Reece *v.* Steel, 2 Sim. 233; Townley *v.* Bolton, 1 My. & K. 148; [Harvey *v.* Harvey, 5 Beav. 134.

[1] In Randfield *v.* Randfield, 8 H. L. Cas. 225, it is declared that in applying the rule that a clear gift in a will is not to be cut down by any subsequent provision unless the latter is equally clear, the intention of the testator, and not the comparative clearness of the two parts of the will, is to be regarded. See further Siegwald *v.* Siegwald, 37 Ill. 430; McNaughton *v.* McNaughton, 34 N. Y. 201; Wynne *v.* Walthall, 37 Ala. 37; Rountree *v.* Talbot, 89 Ill. 246.

living, I should have kept the former and rejected the latter words; but in the event of two surviving, I am to reject the former and preserve the latter. There is no ground for such a capricious rejection of words to suit the event. The testatrix has not pointed out the specific event in her contemplation, or showed a different intention as to the accruing parts and the whole; and this order to take place is so obscurely expressed, that it is utterly impossible for me to give any effect to it."

[The embarrassment often caused by cases of this description is exemplified by Morrall *v.* Sutton (*m*), where a testator limited life-interests in his leasehold property charged with certain annuities, with remainder to S. C., "her executors, administrators and assigns, subject to the said annuities charged thereon during her natural life." The general rules above mentioned were acknowledged on all hands; but there was a difference of opinion upon the question, whether or not sufficient evidence of the testator's intention could be collected from the context to authorize the rejection of the words "during her natural life," so as to give S. C. the absolute interest; for, in the absence of such evidence, those words being placed last must, according to the general rule, overrule the preceding words "executors," &c., thereby limiting S. C.'s interest to a life-estate. Coleridge, J., in a valuable judgment, supported the affirmative against the opinions of Parke, B. (who, with Coleridge, J., assisted the L. C. upon the appeal), and of Lord Langdale, M. R., from whom the appeal was brought. The case was ultimately compromised.]

But words are not to be expunged upon mere conjecture, nor unless actually irreconcilable with the context of the will, though the retention of them may produce rather an absurd consequence. Words not to be expunged unless inconsistent.

Thus, where (*n*) a testator, after bequeathing certain property to Thomas Brailsford, son of his nephew Samuel Brailsford, devised his real estates "to the use of *the said* Thomas Brailsford and his assigns, for and during the term of his natural life, and after his decease, to the use of *the said Thomas Brailsford, son of my nephew Samuel Brailsford*, his heirs and assigns forever." The only Thomas Brailsford mentioned in the will was the son * of Samuel, but the testator had *483 another nephew of that name (who was uncle of the legatee), to whom, therefore, it was contended that the devise to "*the said* Thomas Brailsford," applied, though he was not before named, according to the case in Hawkins (*o*), that father and son having the same name, the son, not the father, is distinguished by an addition (*p*). The words "The said," it was observed, might be considered surplusage; and that the

(*m*) 4 Beav. 478, 1 Phill. 533.]
(*n*) Chambers *v.* Brailsford, 18 Ves. 368; [and see Mellish *v.* Mellish, 4 Ves. 48.]
(*o*) 2 Hawk. P. C. 271, s. 106.
(*p*) See also Goodright d. Hall *v.* Hall, 1 Wils. 148.

devise was either void for uncertainty, or, there must be an inquiry. But Sir W. Grant said, that it was impossible to contend that there was, *primâ facie*, any ambiguity in the description; by the words, "the said Thomas Brailsford," the Thomas Brailsford who had been before mentioned was sufficiently described. "The argument on the other side," he said, "rests chiefly on the inconsistency of giving to the same person, in the same sentence, an estate for life and also an estate in fee; there is certainly a particularity in that; *but the devise as it stands is not so insensible or contradictory as to drive the court to the necessity of expunging or adding words to give it a meaning;*" and this decree was affirmed by Lord Eldon (*q*).

Devise not controlled by reason assigned.

And though *repugnant* expressions will yield to an intention and purpose expressed or apparent upon the general context, yet it does not appear that a bequest actually made, or a power given, can be controlled merely by the reason assigned. The assigned reason may aid the construction of doubtful words, but cannot warrant the rejection of words that are clear (*r*). Thus, where (*s*) a testator expressed his conviction of the honor and justice of his trustees, and made that conviction the ground of his reposing in them the trust of distributing his property among his relations, authorizing them to fix both the objects and the proportions, but afterwards gave the power in express terms, to them, *and the heirs, executors and administrators of the survivor of them* — Sir W. Grant, M. R., observed: "Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet I am not authorized to strike these words out of the will, upon the supposition, though not
*484 * improbable, that they were introduced in this part by inadvertence or mistake."

Devise in general terms will not control another distinct devise.

[Again, it is a general rule, that a devise in general terms shall not, even though otherwise inoperative, be held to control another devise made in distinct terms. Thus, in Borrell *v.* Haigh (*t*), where a testatrix devised all her messuages, cottages, closes, lands and hereditaments at H. to A., and afterwards gave all her copyhold estates and hereditaments at N. and T., and *elsewhere;* and it appeared that the only place besides N. and T., in which the testatrix had copyholds, was H.: Lord Langdale, M. R., held, nevertheless, that the prior devise, which *per se* clearly carried the copyholds at H., was not defeated by the vague expression which followed.

(*q*) 19 Ves. 652, 2 Mer. 25; see also Roe *v.* Foster, 9 East, 405; [Ridgeway *v.* Munkittrick, 1 D. & War. 90, 91; Ridout *v.* Pain, 3 Atk. 493; Langley *v.* Thomas, 6 D. M. & G. 645.]

(*r*) Per Sir W. Grant, 16 Ves. 46; [and see 4 Ves. 808; Thompson *v.* Whitelock, 5 Jur. N. S. 991.]

(*s*) Cole *v.* Wade, 16 Ves. 27.

[(*t*) 2 Jur. 229. See also Sidebotham *v.* Watson, 11 Hare, 170 (4th question).

So in Greenwood *v.* Sutcliffe (*u*), where a testator devised his estate called S., in trust for his daughter Anna for life, and at her death the trustees were to stand seised thereof, "and also of all accruing share and interest to which she might become entitled by survivorship under the trusts of his will or otherwise," to the use of her children as tenants in common in fee. And the testator devised another estate, called R., to trustees to hold in trust for his daughter Maria, for life; and after her death (in the events which happened), to stand seised thereof to the use of the testator's son William and his said daughter Anna, or such of them as should be then living, their heirs and assigns in equal shares. Maria died before the testator; and upon the death of Anna, who survived her father and sister, her children claimed the R. estate under the words contained in the former part of the will, "all accruing share," &c., on the ground that the effect of them was, in the events which had happened, to limit the R. estate, after the death of Anna, to her children. But it was held, that the direct and express limitation of the R. estate to William and Anna, and their heirs and assigns, as tenants in common, was not controlled by the words in question, although no other operation could be attributed to them.]

It is to be observed, too, that a devise of lands, in clear and technical terms, will not be controlled by expressions in a subsequent part of the will, inaccurately referring to the devise, in terms which, had they been used in the devise itself, would have conferred a different estate, if the discordancy appear to have sprung merely from a negligent want of adherence to the language of the preceding devise.

Clear devise not controlled by subsequent inaccurate words of reference.

*Thus, where (*x*) a testatrix devised lands to her eldest daughter A. S., *and the heirs of her body* forever, with remainder over, charged with a sum of money to be raised out of the yearly profits; and the testatrix declared it to be her will that her executors (thereinafter named) should stand seised of the lands until they should have raised the said sum, or until the same should be discharged by A. S. *and her heirs;* and after the raising or payment thereof by the said A. S. *or her heirs*, then that *A. S. and her heirs* should enjoy the said lands forever (*y*). It was held that the word "heirs" (of A. S.), thrice repeated referred to the special designation of heirs to whom the estate was devised in the beginning of the will, and were not intended to introduce a new and more general denomination of heirs, and to revoke the express estate tail given in the beginning of the will. *485

So, where (*z*) the devise was to A. and the heirs *male* of his body,

(*u*) 14 C. B. 226.

(*x*) Doe d. Hanson *v.* Fyldes, Cowp. 833.

(*y*) The words "for ever" were not strictly repugnant, as an estate tail is capable of perpetuity of duration.

(*z*) Tuck *v.* Frencham, Moore, 13, pl. 50, 1And. 8; [see also Ellicombe *v.* Gompertz, 3 My. & Cr. 127; Hillersdon *v.* Lowe, 2 Hare, 355; Mortimer *v.* Hartley, 3 De G. & S. 332.]

and, in case he should die *without issue*, then over, the words "without issue" were held to mean without issue *male*.

Both the preceding cases exhibit deficiency, rather than repugnancy of expression, and will serve, therefore, not inaptly to conduct to the commencing subject of the next chapter.

*CHAPTER XVI. *486

AS TO SUPPLYING, TRANSPOSING AND CHANGING WORDS.

I. *As to supplying Words.* — It is established that [where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted (*a*), those words] may be supplied, in order to effectuate the intention, as collected from the context.[1] Of this we have a very simple example in an early case, where a devise to A. and the heirs of his body, and, if he should die, then over, was read "and if he should die *without issue* (*b*)."[2]

Words may be supplied, when.

"Without issue" supplied.

So, where (*c*) a man having three sons, John, Thomas, and William, devised lands to John, his eldest son, and the heirs of his body, after the death of Alice, the devisor's wife; and declared that if John *died*, living Alice, William should be his heir. And the testator devised other lands to Thomas, and the heirs of his body, and, if he died without issue, then that John should be his heir; and he devised other lands to William and the heirs of his body, and, if all his sons should die without heirs of their bodies, then that his lands should be to the children of his brother. John died in the lifetime of Alice, leaving a son; and the court held, that, upon the whole context of the will, the construction should be "if John died *without issue*, living Alice;" and that this was the intent appeared, it was said, by other parts of the will, the other sons having other lands to them and the heirs of their bodies; and that if they all died without issue, it should be to his brother's

[(*a*) See Hope *v.* Potter, 3 K. & J. 206; per K. Bruce, L. J. 3 De G. & J. 266, 267.]
(*b*) Anon. 1 And. 33; see also Atkins *v.* Atkins, Cro. El. 248.
(*c*) Spalding *v.* Spalding, Cro. Car. 185.

[1] Words may be supplied when it is clear, beyond a reasonable doubt, what the omitted words are. Aulick *v.* Wallace, 12 Bush, 531; Covenhoven *v.* Shuler, 2 Paige, 122; Deakins *v.* Hollis, 7 Gill & J. 311; Cresswell *v.* Lawson, Ib. 227; Pickering *v.* Langdon, 22 Me. 429; Geiger *v.* Brown, 4 McCord, 418; Lynch *v.* Hill, 6 Munf. 114. And it is no objection to supplying the words that persons may differ in regard to which of two or more words of similar signification will more appropriately supply the omission. Aulick *v.* Wallace, supra. But words can never be supplied to create an intent. Hill *v.* Downes, 125 Mass. 509, 512. See Varner's Appeal, 87 Penn. St. 422. Nor against a manifest intention to omit them. Caldwell *v.* Willis, 57 Miss. 555.

[2] Liston *v.* Jenkins, 2 W. Va. 62. See McKeehan *v.* Wilson, 53 Penn. St. 74; Butterfield *v.* Hamant, 105 Mass. 338, that the court will not do this by way of supplying an intention. Hill *v.* Downes, supra.

children, not meaning to disinherit any of his children. And it was declared not to be a contingent remainder or limitation to abridge the former express limitation.

"Without issue" read "without leaving issue."

And in several instances where a testator, in a will made before the year 1838, has used the phrase "without *leaving* issue" * and "without issue" indifferently, in bequests of *personalty*, in regard to which alone (as hereafter shown) the difference of expression is material, the word "leaving" has been supplied, in order to produce uniformity, which, it was considered, must have been intended.[1]

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Word "leaving" supplied in expression "without issue."

Thus, in Sheppard *v.* Lessingham (*d*), where A., having two children, F. and M., bequeathed certain stock, in trust as to one moiety, for F. for life, remainder to such child or children of F. as should be living at his decease; and if he should not leave any child, or in case such children should die without issue, then to M. for life, remainder to such child or children of M. as she should have at the time of her death; and in case M. should leave no issue living at her death, or if such child or children as she should so leave should die *without leaving any issue*, then to J. S.; and, as to the other moiety, the testatrix appointed the interest to be paid to M. for life, remainder to such child or children as she should leave at her decease; and in case M. should leave no such child or children, or all such child or children as she should leave should die *without issue*, then to F. for life, remainder to his children living at his decease; and in case F. should leave no child or children, or they should die without issue, then to J. S. the same as the other moiety — Lord Hardwicke was of opinion that the same construction was to be put on the words "without issue" in the bequest over of the second moiety to F., as on the words "without *leaving* issue," in the other moiety (*e*); the only difference intended in the disposition of the two moieties evidently being to prefer F. as to one moiety, and M. as to the other. The consequence was, that these words, being used in relation to personal estate, referred to issue at the death (*f*).

Again, in Kirkpatrick *v.* Kilpatrick (*g*), where a sum of money was

(*d*) Amb. 122. See also Radford *v.* Radford, 1 Kee. 486, where freeholds and leaseholds were combined in the same devise. [Cf. Pye *v.* Linwood, 6 Jur. 618, stated post, Ch. XLI. s. 1, n.]

(*e*) But the word "leaving" occurred in the *ulterior* bequest of the other moiety.

(*f*) Even with this construction, the gift over, in the event of the children not leaving issue, was too remote, as M. might have had children born *after the death of the testator*.

(*g*) 13 Ves. 476; [see also Wheable *v.* Withers, 16 Sim. 505. But see Else *v.* Else, L. R. 13 Eq. 196. In Radley *v.* Lees, 3 M. & Gr. 327, the codicil showed that the testator's intention would be defeated by supplying the words there proposed to be inserted in the will.

[1] Newton *v.* Griffith, 1 Harr. & G. 111; Brown *v.* Brown, 1 Dana, 39. See Lynch *v.* Hill, 6 Munf. 114. The words of a contingent limitation being "in case C. without issues of body lawfully begotten, then," &c., the word "die" and the word "her" may be supplied, as evidently intended by the testator, but not the word "leaving," which he might not have known to be necessary in law to give the limitation effect, and therefore might not have intended to use. Ib.

bequeathed to J. and S. to be equally divided; but in the event of the death of either of them, *before he attained the age of twenty-one years, and without issue*, his share to go to the survivor; but in the event of both dying *without issue*, then over; * Lord Erskine, on the authority of the last case, supplied the words "under twenty-one," in the ulterior bequest. *488

Words "under twenty-one" supplied.

[The case of Lang *v.* Pugh (*h*) was of the same kind. A testator gave a sum of money, in trust for his son T. for life, and after his death for his lawful issue if then of age or married, equally if more than one, if only one the whole to go to such only child; or in case such child or children of his son should be under age at the death of the son, then "to be divided or paid to him, her, or them, in manner aforesaid, on their attaining their respective age or ages of twenty-one years, if sons, or if daughters, on their marriage respectively." Sir K. Bruce, V.-C., read the will as if it had been written, "or in the case of daughters *marrying earlier*, upon marriage;" he thought it improbable that the testator could "have meant a daughter of T. surviving her father, and having attained majority in her father's lifetime, to take the fund or a portion of it absolutely, though never married, but that he meant altogether to exclude any daughter, a minor at her father's death, if not then married, unless she should at some period of her life marry."

"On marriage" read "at twenty-one or marriage."

Again, in the leading case of Abbott *v.* Middleton (*i*) a testator gave an annuity of 2,000*l.* to his wife for life, and directed funds to be set apart for securing it, "and on her decease the sums provided and set apart for such payment to become the property of my son A. so far as he the said A. my son shall receive the interest on such sum during his life, and on his demise the principal sum to become the property of any child or children he may leave, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters" B., C. and D. The son A. having died before his mother, but leaving a child, the question was, whether the words "without leaving any child" could be supplied after the word "dying" in the final gift over, so as to leave the child of A. in possession of the property, and it was held by Sir J. Romilly, M. R., that those words must be supplied. Referring to Spalding *v.* Spalding (*k*), he said the principal ground of the decision there seemed to him to be the expression of the testator's intention that the heirs of the body of the first son should take, and it was * to be observed that they could take only by descent through the father, whereas in the present case they took vested interests *489

"Dying" read "dying without leaving a child."

(*h*) 1 Y. & C. C. C. 718; see also King *v.* Cullen, 2 De G. & S. 252; Woodburne *v.* Woodburne, 3 De G. & S. 643.
(*i*) 21 Beav. 143, 7 H. L. Ca. 68. And see Brotherton *v.* Bury, 18 Beav. 65.
(*k*) Ante, p. 486.

direct from the testator. The judgment of the M. R. was affirmed in D. P., principally on the same ground (*l*). A clear gift was not to be divested by an unmistakable provision to that effect (*m*).

Elliptical expression supplied; but an event not contemplated will not be provided for.

In the foregoing cases the testator had used expressions that were, or were considered to be, plainly elliptical. Some contingency or state of circumstances that was present to his mind was imperfectly described. But the court cannot provide for an event which appears to have been absent from the testator's mind, however strange the omission may be. Thus in Eastwood *v.* Lockwood (*n*), where a testator disposed of all his property on trusts for the maintenance of his children until Hannah, the youngest, attained twenty-one; and as soon as she attained that age he disposed of his personal estate among certain of his children; and as to a specified part of his real estate, he devised it to his son A. in tail male, subject to a certain charge; and as to other specified parts, he devised one to each of his other sons in tail male, with a gift over "in case any of his said sons should die during the minority of Hannah, or in the event of any of them dying without such lawful issue as aforesaid, and either before or after, their or his share should be divisible according to the provisions of the will" (*i.e.* before Hannah attained twenty-one); A. died before that time leaving issue, and it was argued on the authority of Spalding *v.* Spalding (*o*), that his estate was not cut down. Sir W. P. Wood, V.-C., agreed that the words "in case of any son dying during the minority of Hannah" standing alone would have brought the case within that authority: but the words that followed made it different. The testator had put two classes of events together. He had said: "I point to a dying in the one case *simpliciter* during a given epoch. I point to a dying without issue in the other case generally, either before or after Hannah attains twenty-one." It was true that in one sense the second alternative might be included in the *490 first, yet still it was emphatic; and though it seemed * strange to suppose that he meant it in this sense, yet, if he did, he could hardly have expressed himself more clearly. Notwithstanding the existence of issue, therefore, the estate of A. was divested and went over.]

The principle of supplying omitted words has been applied in numerous other cases, from which the following have been selected, as affording apt examples of its application.

Thus, where (*p*) a testator having two sisters, A. H. and M. J., and

(*l*) By Lords Chelmsford and St. Leonards; Lords Cranworth and Wensleydale diss. Whether the words were supplied or not the will remained incomplete. If they were not supplied, the testator's bounty to his grandchildren would depend on their father's surviving his mother, which appeared unreasonable. If they were supplied and the son survived his mother, and died leaving no child, the fund would not go to the children of the daughters, but would fall into the residue.

(*m*) See Hope *v.* Potter, 3 K. & J. 206.

(*n*) L. R. 3 Eq. 487. (*o*) Ante, p. 486.]

(*p*) Doe d. Leach *v.* Micklem, 6 East, 486; see also Webb *v.* Hearing, Cro. Jac. 415; Anon. 2 Vent. 363; Pearsall *v.* Simpson, 15 Ves. 29; Lord Eldon's judgment in Doe d. Planner *v.* Scudamore, 2 B. & P. 296.

also two cousins, F. and G., devised his estate at A. to his sister A. H. for life, remainder to his sister M. J. for life, remainder to another person for life, remainder to F. in tail, remainder to G. in tail, with remainders over; and then devised another estate at B. "to his sister M. J. for life, OR *if she should survive his wife and sister A. H., so that she should come into possession of the estate at A.*," then to L. J. *for life*, towards the support of his cousins F. and G., remainder to the said G. in fee. M. J. survived the testator's widow, but not his sister A. H., and it was therefore contended that the remainder to L. J. and G. failed; but the court decided, that, as the word *or* so placed was unintelligible, being referable to no other alternative; and as it was apparent from the whole context that the testator had in contemplation another alternative, namely, the death of his sister M. J., and that he meant to make a provision after the death of his sisters for his cousin G. as well as his cousin F., which was not satisfied by only giving G. a remainder in tail after a remainder in tail to his brother F.; in order to render the sentence complete and sensible, and to give effect to the apparent intent of the testator, the necessary words might be supplied to make the devise read as a gift to his sister M. J. for life, AND AFTER HER DEATH, *or if she should survive his wife* (*q*) *and sister A. H.*, so that she should come into possession of the estate at A., then over to L. J., who consequently took a vested remainder, and was entitled in the events that had happened.

Words supplied to provide for an alternative event, obvious, though not expressed.

But no case, probably, has gone further in supplying words in compliance with the intention appearing by the context, than Doe d. Wickham *v.* Turner (*r*), where the testator's deficiency of * expression left the devise without an object. The *491 will was in these words: "I give unto H. W. a messuage or tenement now in the possession of W. *Item*, I give further unto my nephew H. W. half part of my garden, and 100*l.* stock in the 4 *per cent.* Bank annuities. *I give, further, my yard, stables, cowhouse, and all other outhouses in the said yard*, my sister M. W. to have the interest and profits during her life." The question was, whether the nephew was entitled to the yard under this devise. The court (Best, J., diss.) decided in the affirmative; for as the testator had used the word "further" in the preceding part of his will, when he made an additional gift to the same devisee, and as the clause would otherwise have been senseless and inoperative, the words "to him" might be supplied, and then it was a devise to M. W. for life, remainder to her son H. W. *in fee* (*s*).

Object supplied by reference to preceding devise.

(*q*) It does not distinctly appear why the death of the wife is introduced; but probably she had a life-estate in the property at A.; [or, perhaps, it was because the wife had a life-annuity of 50*l.* out of estate A.; and that therefore M. J. was not intended to lose estate B. till after the cesser of that charge upon her interest in estate A.]

(*r*) 2 D. & Ry. 398.

(*s*) There must be a mistake in this, as the will was destitute of any ground for raising a

So, in Langston *v.* Pole (*t*), where a testator, passing over the first son of A. (his son and devisee for life), proceeded to limit the estate to the *second* and other sons of A. in tail successively [according to seniority], and then to the first and other daughters of A. in like manner: on a case from Chancery the court of C. B. supplied the vacancy in the series of limitations, by holding the first son to take an estate tail immediately expectant on his father's decease. [It appears that the court of B. R. had come to an opposite conclusion upon the same will. Neither court gave reasons. The decision of the court of C. B. was affirmed in D. P. Lord Brougham relied on the trusts of a term, which were, in case there should be only one son and one daughter, to raise a portion for the daughter; an absurd provision, if the daughter herself took the estate, as she would, under the circumstances, unless the son did. However, he was of opinion that the phrase "other sons" included the first son, and therefore the decision of the court below was right, without supplying any words (*u*).

*492 * It is clear, however, that words, and even clauses, may be supplied in a set or series of limitations or trusts, from which they have been omitted without apparent design, where those limitations or trusts as they stand are inconsistent with the context, and the context shows what must be added to re-

Words supplied to make limitations consistent with context.

fee in the devisees, and it was not necessary for the court to determine *the quantity* of the devisee's interest.

(*t*) 2 M. & Pay. 490, [5 Bing. 228, Taml. 119, and in D. P. nom. Langston *v.* Langston, 8 Bli. 167, 2 Cl. & Fin. 194, Sugd. Law of Prop. 370. See also Newburg *v.* Newburg, Sugd. Law of Prop. 367; Parker *v.* Tootal, 11 H. L. Ca. 143.

(*u*) See also Clements *v.* Paske, 3 Dougl. 384, cit. 1 M. & Sel. 130, 2 Cl. & Fin. 230, n. The devise was to trustees during the life of J. C., upon trust for J. C. for life, and after his decease to the eldest son of J. C., and for default of such issue, then likewise to the second, third, and every other son of J. C. successively, according to seniority, and the several and respective heirs male of the body and bodies of such (omitting the first son) second, third, or other son or sons, the *eldest of such sons* and the heirs male of his body being always preferred to and take before any of the younger sons and the heirs male of his body, and, in case of such issue male failing by J. C., then over. It was held in B. R. that the eldest son of J. C. took an estate tail, and not an estate for life. Lord Mansfield seems to have chiefly relied on the word "likewise," as indicating an intention that the first son should have the same estate as the younger sons, and not on the word "other" as (according to Lord Brougham's judgment in Langston *v.* Langston) he might have done. In Owen *v.* Smyth, 2 H. Bl. 594, Eyre, C. J., doubted whether words such as those which afterwards occurred in Langston *v.* Langston could, in a deed, be considered to give an estate tail to the eldest son. In Barnacle *v.* Nightingale, 14 Sim. 456, there was a devise to A. for life, and, after his decease, *to his first son, and, for default of such issue*, to the second, third, &c., and all and every other son and sons of A., and the heirs of his or their bodies lawfully issuing, the elder always to be preferred and to take before the younger of such sons and the heirs of his body: Shadwell, V.-C., decided that the limitation to the heirs of the body of the first son had been omitted, and could not be supplied, and that such son took only an estate for life. The Court of B. R. decided the direct contrary on the same will, Doe d. Harris *v.* Taylor, 10 Q. B. 718; and with the latter decision agrees Galley *v.* Barrington, 2 Bing. 387, in which, upon a settlement expressed in very similar words, the Court of C. B. held that the limitation "to the heirs of the body" included the heirs of the body of the first as well as of the second and younger sons; and Owen *v.* Smyth, 2 H. Bl. 594, where the limitations in a deed were to the use of N. for life, remainder to the use of the first son of N., and for default of such issue to the use of the second, third, and all and every other son and sons of N., successively, and of the several heirs male of the body and bodies of *all and every such son and sons*, so that the elder of such sons and the heirs male of his and their bodies should always take before the younger of the same sons and the heirs male of his and their body and bodies; and it was held that the words in italics included the first son as well as the others and gave him an estate tail. It must be observed that the authority of Doe *v.* Taylor is impaired by the reasons given for the decision, viz. that the words "*for default of such issue*" did not, as in the universal rule, mean for default of

move the inconsistency (*x*). Thus, in Greenwood *v.* Greenwood (*x*), where a testator bequeathed his real and personal estate to trustees on trust to sell and invest the sale moneys, and "pay the moneys and the investment for the time being representing the same to my wife during her life upon trust for all my children or any child who, being sons, shall attain twenty-one, or being daughters, shall attain that age or marry, in equal shares;" with power for the trustees "after the death of my wife, or previously thereto if she shall so direct, to raise any part not exceeding one half of the then expectant presumptive or vested share of any child under the trusts hereinbefore declared," for the advancement of the child; and "after the death of my wife" to apply the whole or a part "of the income of the share to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared" for maintenance of the child: and, in *default of chil- *493
dren, "then from and after the death of my said wife and such default of children," over. The question was whether the wife had a beneficial interest for her life in the fund, and it was held by the L. . that she had. Sir W. James observed that if the will had ended with the gift to the children in equal shares, it would have been difficult to alter the natural meaning of the words, which imported a gift to the wife during her life in trust for the children, giving the latter an estate *pur autre vie* only. But when they read the powers of advancement and maintenance, which were powers dealing after the death of the wife with what the testator treated as already given to the children, it was evident that the natural meaning of the previous words could not be the true one, these powers being utterly inconsistent with the view that the previous trust for children was one determining with the wife's life; they were driven, therefore, to separate the words in the gift to the children from the gift to the wife for life, the words "after her death" being implied after the gift of her life-estate.

So in Re Daniel's Trusts (*y*) a postnuptial settlement, reciting an intention to make further provision for children, vested a fund in trustees for the wife for life, and after her death "for all and every the child and children of the marriage who, being a son or sons, have or hath already attained or shall hereafter attain the age of twenty-one years, and their respective executors and administrators; and if there shall be but one such child the whole shall be in trust for such only child and *his or her* executors or administrators," with a direction "during the minority of each of the said children" to apply the income of "the presumptive share of every such child for *his or her* maintenance until such *his or her* share should become vested, or until *he or she* should die," and a power to apply "all or any part of the expectant share of each of the said

such issue as took under the previous limitation, that is, "for default of such first son," but meant "for default of issue of such first son," and that the first son, therefore, took an estate tail by implication. See post, Ch. XL. s. 3, and Re Arnold's Estate, 33 Beav. 163.

(*x*) 5 Ch. D. 954. (*y*) 1 Ch. D. 375.

sons" for his preferment or advancement. There were several sons and daughters, all of whom had attained twenty-one. It was held by Sir G. Jessel, M. R., that sons only were entitled. But on appeal it was held that daughters also were by implication entitled to participate. The L.JJ. thought the recital and the use of the words "his or her" and "he or she" gave abundant evidence of an intention to provide for children both male and female. Sir W. James said: "These
*494 words are part of a common form, and we *must deal with the case as if the words had run 'for all and every the child and children who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters ———; and if there shall be but one such child, then the whole shall be in trust for such one or only child.' The only question then would be what is to be supplied; and as maintenance is given during minority, I should have no difficulty in supplying 'attain twenty-one.'" It is presumed that the L. J. did not mean that this was the only qualification intended as to daughters, for no one ever saw a "common form" of trust for "children who being sons attain twenty-one, or being daughters attain twenty-one." As all the daughters had attained twenty-one, and were thus entitled at all events, it was unnecessary to say what other qualification was intended. But this drops the common form theory.

Again, in Sweeting *v.* Prideaux (*z*), where a testator bequeathed 16,000*l.* in trust to pay the income of one moiety to his daughter A. for life for her separate use, and after her death to divide that moiety among her children, or failing children among her statutory next of kin; and to pay the income of the other moiety to his daughter B. for life "in the same manner in every respect, and subject to the same control, as he had before directed as to A., it being his intention that his said daughters' fortunes should not be subject to the control of their husbands." He then gave 6,000*l.* in trust for his son C. for life, and after his death for his children, and failing children to form part of his estate; and he empowered the trustees to apply the income of the 16,000*l.* and 6,000*l.* for the maintenance of his said daughters' or son's children as they might think proper. B. died leaving children, and it was held by Sir C. Hall, V.-C., that they were by implication entitled to the moiety given to B. for life. He said: "The daughters were treated collectively, it being his intention that their 'fortunes' should be alike, and the income was not only given to them but there was a provision for maintenance of his 'said daughters' and son's children.' There was a separate provision for the heads of the three families."

So where (*a*) a testator gave his real and personal estate (which he directed to be sold and converted) in trust as to one seventh for
*495 one son, and as to another for the other son. And he *directed his trustees to hold the remaining five sevenths in trust to pay the

(*z*) 2 Ch. D. 413. And see note on limitations by *reference*, Ch. XXII. s. 6.
(*a*) Re Redfern, 6 Ch. D. 133.

income to his daughters A., B., C., D. and E. in equal shares during their lives; and after the death of A., in trust as to one fifth for the children of A.; and after the death of B., in trust as to another fifth for the children of B.; and after the death of C., in trust as to another fifth *for the children of D.*; and after the death of E., in trust as to another fifth for the children of E., with power for the trustees "until *the share* of the issue of any of his said daughters should become payable" to invest the same, and apply the income for the maintenance of such issue; it was held by Sir J. Bacon, V.-C., that a trust must be implied after the death of C. for the children of C. He observed that the testator was making an equal division of his estate among his seven children, but that unless this trust was implied he would die intestate as to one seventh: could he impute such an intention to the testator on reading the whole will, and looking especially to the provision for maintenance of the issue — "*that is to say* (added the V.-C.) *the issue of the five daughters?*"]

Words of limitation used in one devise, not to be applied to a distinct devise.

But it is not to be inferred from any of the preceding cases, that words may be inserted upon mere conjecture, in order to equalize estates created by several distinct and independent devises, in favor of persons with respect to whom the testator has expressed no uniformity of purpose, though it may reasonably be *conjectured* that he had the same intention as to all.

Thus, where (*b*) a testator having three sons, T., F., and H., devised lands to T. and the heirs male of his body, remainder to F. and his heirs. *Item*, he devised his house in H. to F. and the male heirs of his body, remainder to H. and the heirs male of his body; *Item*, he gave to H. and his heirs freely another house; *Item, he gave to his said son H.* houses and land *without any words of limitation.* Also he willed that H. should enjoy certain other premises to him and his heirs for ever, and for want of heirs of his body, to F. for ever: it was held that H. had only an estate for life in those premises in reference to which no words of limitation were added.

Words of limitation not extended by inference to other devises.

So, where (*c*) a testator gave unto his wife, her heirs and assigns for ever, all his lands in the parish of B., and then in the occupation of S. *And* he gave and devised *to his loving wife* * *aforesaid* all his lands, tenements and houses *496 lying in C. (to wit), the house he then lived in, &c. (describing them); it was held that the wife took only an estate for life in the lands in C.

So, where (*d*), as touching his "worldly and personal estate," a tes-

(*b*) Spirt *v.* Bence, Cro. Car. 368; [see Hay *v.* Earl of Coventry, 3 T. R. 83.]

(*c*) Right d. Mitchell *v* Sidebotham, Dougl. 759. See also Paice *v.* Archbp. of Canterbury, 14 Ves. 366; [Doe d. Crutchfield *v.* Pearce, 1 Pri. 353.]

(*d*) Doe d. Child *v.* Wright, 8 T. R. 64; see also 1 B. & P. N. R. 335; where the same construction was adopted by three of the judges, with the reluctant concurrence of Sir James Mansfield.

tator gave the same in the following manner: He gave to his grandson James Wright, *all his lands, freehold, copyhold, and leasehold, in Essex; also*, he gave to his grandson James Wright, all his *estate*, freehold and copyhold, in Ellington, in Huntingdonshire; and also he gave to his grandson John Wright, all his *estate*, &c., called the Coal-yard, in the parish of St. Giles, London; and he gave to his grandson James Camper (who was his heir at law), the house he lived in, and also his houses and land called Castle Yard, in Holborn, London: it was held that James Wright took only an estate for life in the lands in Essex, in respect of which the testator had not used the word "estate," which in two of the other devises was held to carry a fee.[1]

A striking instance of the application of the principle in question appears in Right d. Compton *v.* Compton (*e*), where a testator devised to his son Thomas Compton (his heir-at-law) all his lands for life, and he gave to his grandson Thomas Compton, after the death of his father, all the north side of his Down Farm, being about 250 acres; he gave to his granddaughter Frances, all the south part, being about 240 acres; he gave unto his grandsons George and Edmund, and his granddaughter Elizabeth, the upper part of the Lain Farm, being about 200 acres, equally between them as long as they should remain single; but if either of them should marry, "*then to have paid by the other two* 10*l. a year for his or their life.*" He gave to Edward and John, and his granddaughters Mary and Ann, all that lower part of the Lain Farm, being about 240 acres, equally between them as long as they should live single; but if either of them married, *then* 10*l. a year for his or their life* (but not said to be paid *by the others*). The testator also gave unto his son's wife 5*l.* a year out of each of the said farms, if she should survive him. It was contended that the words "to have paid *by the other two*," used in the clause respecting the upper part of the Lain Farm (and which had the effect of enlarging the estate of the devisees of that farm to a fee (*f*)), might be supplied in the *497 * devise of the lower farm, in which they were omitted; as there could be no plausible reason assigned for supposing that the testator meant to make a different disposition of one part of the same farm to certain of his grandchildren, from that which he had made of another part of the same farm to other of his grandchildren. But the court decided that the devisees of the lower Lain Farm took an estate for life only. Lord Ellenborough said, "that the exposition of every will must be founded on the whole instrument and made *ex antecedentibus et consequentibus*, is one of the most prominent canons of testamentary construction; yet, where between the parts there is no connection by grammatical construction, or by some

Words not supplied in order to render

(*e*) 9 East, 267. [See also Morris *v.* Lloyd, 3 H. & C. 141.]
(*f*) *Vide post*, Ch. XXXIII. s. 2.

1 See Godfrey *v.* Humphrey, 18 Pick. 589; Turbett *v.* Turbett, 3 Yeates, 187; Bradstreet *v.* Clarke, 12 Wend. 602.

reference, express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied the phrase or expressed himself imperfectly, the court cannot go into one part of the will to determine the meaning of another *perfect in itself and without ambiguity*, and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction." And he subsequently said, that "from a testator having given persons in a certain degree of relationship to him a *fee-simple* in (part of) a certain farm, no conclusion, which can be relied upon, can be drawn, that his intention was to give to other persons, standing in the same rank of proximity, the same interest in another part of the same farm, where the words of the two devises are different: the more natural conclusion is, that, as his expressions are varied, they were altered because his intention in both cases was not the same."

Under uniform several devises of different parts of one farm, to persons in same relationship.

Again, in Doe d. Ellam *v.* Westley (*h*), where a testatrix gave several pecuniary legacies, prefacing each request with the word *Item*. "*Item*" she devised a messuage to J. E., and after his decease to his son. She then proceeded as follows: "*Item*, I give and bequeath unto M. W. all that my messuage or dwelling-house wherein I now dwell, with the garden and all the appurtenances thereunto belonging; *and I also* give unto the said M. W. all my household goods and chattels, and implements of household within doors and without, *all for her own disposing*, *free* * *will and pleasure*, immediately after my decease;" it was held, that the words in italics were confined to the last section of the clause, and consequently that the devisee took only an estate for life in the messuage. [And in De Windt *v.* De Windt (*i*), where a testator devised his estates in N. to his nephew A. for life, and after his death to his sons in tail lawfully begotten; and in the event of his or their death without sons lawfully begotten, the testator left the said estates to his cousin B., and after his death to his sons lawfully begotten, *beginning with the elder*. It was held that these four words applied to the latter limitation only, and not to the limitation to the sons of A., who consequently took as tenants in common.

Words enlarging or modifying estate of devisee not extended to other devises in the will;

*498

Again, in Walker *v.* Tipping (*k*), where, amongst several legacies of

(*h*) 4 B. & C. R. 667; [see also Anon., Moo. 52; Gower *v.* Towers, 26 Beav. 81. But it is said a devise thus, "I give Blackacre to C. and his heirs, *and also* Whiteacre" (not repeating the devisee's name and the verb of gift), gives C. the fee in Whiteacre; per Levinz, J., 1 Mod. 130. (*i*) L. R. 1 H. L. 87.

(*k*) 9 Hare, 800. But it is difficult to overcome the impression that the bequests in question were elliptical. See Willis *v.* Curtois, 1 Beav. 189, where a testator gave to A. his "carriages, horses, &c., and chattels in and about his house at M.; *and also* his household goods and furniture, pictures, plate, &c., and likewise his watches and personal ornaments;" Lord Langdale, M. R., held that A. was entitled to all the testator's household goods, &c., and not those

—nor words diminishing it.

300*l.* each to the testator's grand-nephews, some of which were directed to be paid at particular ages, and others to be sunk in annuities for the lives of the respective legatees, there occurred two bequests as follows: "J. W., 300*l.* annuity for life." "Martha —, 300*l.*, an annuity for life." Sir G. Turner, V.-C., held, that he could not read these bequests as if they were gifts of sums of 300*l.* *to be sunk* in annuities for the lives of the legatees, but must understand them in their plain and obvious sense as giving annuities of 300*l.*

The same principle is applicable to the *objects* of a devise. Thus, in Clarke *v.* Clemmens (*l*), where a testator bequeathed legacies to "my brother A.," "my sister B.," "the widow of my late brother C.," and "the eight children of D.," and gave the residue of his estate to X. for life, and after her death "in trust for *the said* A., B., and C., and the eight children of the said D.," it was held by Sir R. Malins, V.-C., that the testator never intended to give a share of the residue to C., for he had already referred to him as dead at the date of the will; it was clear, therefore, that he had made some mistake, and it was highly probable that he intended to have given the share to C.'s widow, but as this intention was not certain, the court could not make the addition needed to effectuate it (*m*).

Name of legatee not supplied by conjecture.

*499 * Still less can the words of a devise contained in a will be extended to modify the effect of an independent devise contained in a codicil (*n*).]

But where a testator divides his will into sections, numerically arranged, and in some instances places the words of limitation at the end of each section, it seems, they will be considered as applicable to the several devises contained in that section, and not be confined to those in immediate juxtaposition. As, in Fenny d. Collings *v.* Ewestace (*o*), where a testator devised, "first," to his wife, all his household goods, &c., to her and her heirs forever; *also*, he gave to his wife three cow commons, to her and her heirs forever. "2*dly*." To his two nephews, J. and T. C., all that piece of land called P.; *also*, he gave to his nephews, J. and T. C., all that piece of land called L., to be equally divided between them as tenants in common, *and to their several heirs and assigns forever*. "3*dly*," as follows: "I give unto my nephew J. D. all that my house and premises at P., in the occupation of R.; I *also* give unto my nephew J. D.

Effect, where clauses of will are numerically arranged.

only which were at his house at M. As to the force of the word "item," or "also," see Hopewell *v.* Acland, 1 Salk. 239: of the word "likewise," Paylor *v.* Pegg, 24 Beav. 105.

(*l*) 36 L. J. Ch. 171.

(*m*) Note, however, that the words "the said" confined the choice to those previously mentioned, that C. was confessedly out of the question, that all the others were correctly re-named except C.'s widow and X. (on whose death the disposition was to take effect), and that between these two there could scarcely exist a judicial doubt.

(*n*) Biss *v.* Smith, 2 H. & N. 105; Grimson *v.* Downing, 4 Drew. 132.]

(*o*) 4 M. & Sel. 58; [see also Child *v.* Elsworth, 2 D. M. & G. 679; Gordon *v.* Gordon, L. R. 5 H. L. 282 (where several clauses began, each with the words "as to").]

all that my land in the parishes of P. and A., in the occupation of J. T., *to him my said nephew J. D., his heirs and assigns forever.*" The question was, whether the words of limitation in the last devise applied to the lands in the occupation of R., or were confined to those immediately preceding, *i.e.* in the occupation of J. T.; and it was held that they applied to both. Lord Ellenborough said: "If it had not been for the numerical arrangement, there might have been some difficulty, but that removes it. It seems clear, from the context, that both in the second and third clause the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within those words all that he had disposed of in the preceding parts of the sentence."

II. *As to the Transposition of Words and Clauses.* — It is quite clear that, where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context by being (*p*) transposed, the courts are warranted in making that transposition.[1]

Words may be transposed, when.

*Thus, where (*q*) A. devised all that his messuage, dwelling-house, or tenement, with all lands, hereditaments, and appurtenances thereto belonging, situate in Blythbury, in the parish of *M. R., then in the occupation of T. W.*, except one meadow, called Floodgate Meadow; and it appeared that T. W. was in possession of the messuage, and a small part only of the lands in Blythbury, *and not of Floodgate Meadow;* it was held, that the words "now in the occupation of T. W." might be transposed and applied to the dwelling-house according to the fact, which would render the whole consistent; whereas, without this transposition, the exception of Floodgate Meadow was senseless and nugatory, as it had never been in the occupation of T. W. The effect consequently was, that the devise extended to all the lands in Blythbury, except Floodgate Meadow, whether in the occupation of T. W. or not. *500

Instances of transposition.

So, where (*r*) the devise was in the following words: "I devise all my hereditaments in Standon unto my sister Elizabeth Thorley and to her daughters Ann Shaw and Frances Thorley, their heirs and assigns, equally to be divided between and amongst them, share and share alike, as tenants in common, and not as joint-tenants, *for and during the life of my said sister Elizabeth Thorley;* and from and immediately after her decease, then I devise the said third part of the aforesaid hereditaments *so devised to my said sister*

Words transposed in compliance with context.

(*p*) See Green *v.* Hayman, 2 Ch. Cas. 10; Sparke *v.* Purnell, Hob. 75; Cole *v.* Rawlinson, 1 Salk. 236; East *v.* Cook, 2 Ves. 32; Duke of Marlborough *v.* Lord Godolphin, ib. 74; [Gibson *v.* Lord Montfort, 1 Ves. 490; Mohun *v.* Mohun, 1 Sw. 201.]

(*q*) Marshall *v.* Hopkins, 15 East, 309.

(*r*) Doe d. Wolfe *v.* Allcock, 1 B. & Ald. 137.

[1] Chrystie *v.* Phyfe, 19 N. Y. 344; Linstead *v.* Green, 2 Md. 82; Walker *v.* Walker, 17 Ala. 396; Covenhoven *v.* Shuler, 2 Paige, 122.

for life as aforesaid, unto her said two daughters Ann Shaw and Frances Thorley, their heirs and assigns forever, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants." It was contended, that under this devise the daughters of the testator's sister took estates *pur autre vie* for the life of their mother concurrently with her as tenants in common; and *as to one third* with remainder in fee to the daughters, leaving the reversion in fee in the other two-thirds undisposed of; but it was held, that the daughters took estates in fee in *the entirety* expectant on the decease of their mother. Lord Ellenborough said: "The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend; but although the language of this will is confused, and the words are scattered in such a way as, if *taken in the order in which they stand, they do not convey any meaning;* yet, in favor of *501 common sense, we may take the liberty of transposing them, * according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention. The labor of the argument has been, to make the testator dispose of only one third of his estate, and thereby to compel an intestacy as to the remainder; whereas, his meaning evidently was to dispose of the whole."

Observations upon Doe *v.* Allcock.

That this construction accorded with the intention of the testator, is highly probable; and if, as suggested, the words taken in the order in which they stood did not convey *any* meaning, the established rules of construction clearly authorized the transposition. But the difficulty was in saying that the words *were* unmeaning in their actual order; for it is submitted, that the will, read in that order, contained a clear and express devise to the three devisees for the life of the mother, remainder as to one third to the two daughters in fee; and had the testator deliberately intended to confine his dispositions to those estates, he could hardly have expressed himself in more technical or formal language. The construction indeed was apparently absurd, but let it be remembered that the absurdity of a disposition, if unequivocally expressed, is no objection to its receiving a literal interpretation (*s*). However, the case was *professedly* decided upon the principle before laid down, and may, therefore, properly be treated as an authority in favor of that principle (*t*).

Transposition of the subject of devise.

Another case of transposition sometimes occurs, where a testator has devised lands at A. to B., and lands at C. to D., and it appears by the fact of the limitations of each devise being exactly applicable to the testator's estate in the lands comprised in the other, and other circumstances, that he has, in each in-

(*s*) Mason *v.* Robinson, 2 S. & St. 295.

[(*t*) But Holroyd, J., while concurring in the decision, rested his judgment on the ground that the words "equally to be divided" down to "Elizabeth Thorley," might be read as in a parenthesis, and so made to refer only to the mode of enjoyment during the life of E. Thorley, without affecting the quantity of estate to be taken by the devisees.]

stance, placed the devised estate in the position intended to have been occupied by the other.

As where (*u*) J. H., — having an estate in the county of Monmouth, of which he was seised in fee to his own use, and another estate in the county of Radnor, of which he was also seised in fee subject to the trusts of his marriage settlement (by which he had covenanted to convey the lands to the use of himself, remainder to his wife for life, remainder to his first and other sons in tail), both which estates had formerly belonged to an uncle, * and came to him, the *502 one by descent, the other by purchase from another co-heir of his uncle, — by his will, reciting that he was seised in fee of a messuage and lands at L., in the county of *Radnor*, and of a moiety of a messuage in the parish of O. R., in the county of *Radnor*, and that he was also seised of the reversion in fee, expectant on the death of his wife, and of his son without issue, of lands in the counties of *Monmouth* and *Northumberland* (whereas the settled lands were in Radnorshire, and those in Monmouthshire and Northumberland were absolutely his own), devised his said estate in the said county of *Radnor* to his wife for life, remainder to his only son for life, remainder to his (the son's) sons and daughters in tail, in strict settlement, remainder to his own daughter, &c., and devised the reversion of his said estates in the said county of Monmouth, *after the deaths of his wife and only son without issue*, to his daughter, &c. The will moreover referred to the lands devised as part of the estate of his late uncle. It was held that, comparing the devising clause with the recital and the facts, sufficient appeared to ascertain, beyond a possibility of doubt, that the devisor had made a mistake in the local description, and that his intent was to pass the present interest of his estate in fee in possession, which was in the county of Monmouth, and the reversion of his settled estate in the county of Radnor, although he had misdescribed their respective local situations.

[It seems, therefore, that, although the words as they stand are not absolutely senseless or contradictory, transposition will be made if it be required to effectuate an intention clearly expressed or indicated by the context. Eden *v.* Wilson (*x*) is an instructive example of this doctrine. A testator devised his estates to his daughter for life, remainder to her first son R. for life, remainder to his first and other sons successively in tail, remainder to her second son J. for life, with like remainder to his sons in tail, with remainders to the daughter's third, fourth and other sons in tail; and with a proviso shifting the estate from any son who might become entitled to the D. estates under the will of the late D. (by which those estates were entailed on the second and younger sons); "provided always that if my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning

Transposition of words to fit the general intent.

(*u*) Moseley *v.* Massey, 8 East, 149; [conf. Doe d. Chevalier *v.* Uthwaite, 8 Taunt. 306, 3 B. & Ald. 632.] [(*x*) 1 Ex. 772, 14 Q. B. 256, 4 H. L. Ca. 257.

of this my will, to my real estates hereby limited, then and in either of those cases, I devise the said real estates to all the daughters of
*503 * the body of my said daughter living at her death as tenants in common and their heirs respectively, with cross remainders amongst them in case of any one or more of them happening to die under twenty-one and without issue, and if there should be but one such daughter living at my said daughter's decease and no issue of any other daughter then in being, then to such only surviving daughter and her heirs, but if any such daughter shall die in her said mother's lifetime leaving issue" such issue to take their parents' share, "and in case my said daughter shall have no issue of her body living at her death" then over. At the death of the testator's daughter her two sons R. and J. were living, besides several daughters; but both sons afterwards died without issue, and it was contended that the second of the two cases "in either of" which the limitation to the daughters was to take effect had thus happened: but it was held in D. P. upon the whole proviso that the estates limited by it were not designed as a mere continuation of the previous limitations (to which they did not fit on), but were intended to take effect, if at all, at the daughter's death in favor of persons then living, and that to effect this the words "living at her death" in the introductory passage must be read in connection with the verb "have," not with the words "issue male of her body," and so made to run through both branches of the proviso. In other words, the expression "living at her death" was transposed and read as if it came immediately after the verb "have." It was not, however, a limitation cutting down the previous devise, but a remainder contingent on the determination of that devise in a particular manner.]

Transposition of name.

The same principle, too, is applicable to the *objects* of a devise; for it has been held, that, where (*y*) a testatrix, having two nieces, Mary who had never been married, and Ann who had been married and was dead leaving two children, bequeathed one moiety in a certain portion of her property to *the children* of her niece *Mary*, and the other moiety to her niece *Ann;* it being evident that the bequest to the children of Mary was intended for the children of Ann, and that to Ann for Mary, the court corrected the mistake.

As to changing words.

III. *As to changing Words.* — To alter the language of a testator is evidently a strong measure, and one which, in general, is to be justified only by a clear explanatory context.[1] It often

(*y*) Bradwin *v.* Harpur, Amb. 374.

[1] The court, in Keith *v.* Perry, 1 Desaus. 353, construed "her" into "their," to give effect to the intent of the testator. So in Horwitz *v.* Norris, 60 Penn. St. 261. The word "heirs" may be read "children." Bowers *v.* Porter, 4 Pick. 198; Ellis *v.* Essex Merrimack Bridge, 2 Pick. 243; Brailsford *v.* Heyward, 2 Desaus. 18. Or "issue," Gifford *v.* Choate, 100 Mass. 343, 345. See Dove *v.* Torr, 128 Mass. 38; Minot *v.* Tappan, 122 Mass. 535. "Heir" may be construed to mean "heir apparent." Morton *v.* Barrett, 22 Me. 257, 264. "Children" may be construed "issue." See Clifford *v.* Koe, L. R. 5 App. Cas. 447; Castner's Appeal, 88 Penn. St. 478. Merrymans *v.* Merryman, 5 Munf. 440. So it may be construed to include "grandchildren." Osgood *v.* Lovering, 33 Me. 464.

*happens, however, that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this is not enough: it must be apparent, not only that he has used the wrong word or phrase, but also what is the right one (*z*); and, if this be clear, the alteration of language is warranted by the established principles of construction.[1] Doe *v.* Gallini (*a*) affords an apposite example of such a correction of phrase. The testator, after devising estates for life to his children, and, in case of the death of any of them, to their respective children living at their decease, for life, proceeded thus: "And from and after the decease of all the children of *each* of my said sons and daughters *without issue*, I give and devise the estate or 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 my said sons and daughters respectively, so long as there shall be any stock or offspring remaining." It was contended that the word "all" was to be changed into "any," and the words "without issue" to be read "leaving issue," in order to render the language of the will sensible and consistent with the context; and the court did not hesitate in adopting this construction, though the point was not the main subject of discussion in the case. *504

Words "without issue" read *leaving* issue.

[So, in Hart *v.* Tulk (*b*), where a testator's general intention appeared by the will to be to make an equal distribution of his property (which he described in seven different schedules), amongst his seven children; and he subjected the properties comprised in the seven schedules to mortgage debts in such a manner, that, if in a particular clause the words "fourth schedule" were read literally, not only would the entire plan of the will, as indicated above, be frustrated, but the payment of the debts in the manner provided by the will would

"Fourth" read "fifth."

(*z*) Taylor *v.* Richardson, 2 Drew. 16.]

(*a*) 5 B. & Ad. 621, 3 Ad. & Ell. 340, 2 Nev. & M. 619, 4 Nev. & M. 893. [And see Jarman *v.* Vye, L. R. 2 Eq. 784 ("all" admitted to mean "any").

(*b*) 2 D. M. & G. 300; and see Philipps *v.* Chamberlaine, 4 Ves. 50; Dent *v.* Pepys, 6 Mad. 350; Bengough *v.* Eldridge, 1 Sim. 173; Pasmore *v.* Huggins, 21 Beav. 103 (where "future" might, it seems, have been read "former"); Re Bayliss's Trust, 17 Sim. 178 (where "are" was interpreted in a future sense); Taylor *v.* Creagh, 8 Ir. Ch. Rep. 281 (400*l.* read 500*l.*); compare Thompson *v.* Whitelock, 5 Jur. N. S. 991.]

"If he should die," construed "when he should die." Smart *v.* Clark, 3 Russ. 365. "May leave" construed "may have." Du Bois *v.* Ray, 35 N. Y. 162. For other recent examples, see Taylor *v.* Johnson, 63 N. C. 383; State *v.* Joyce, 48 Ind. 310; Dow *v.* Dow, 36 Me. 211; Bates *v.* Dewson, 128 Mass. 334; Missionary Soc. *v.* Chapman, ib. 265; Bowditch *v.* Andrew, 8 Allen, 339, 342.

[1] The italicized clause in the following bequest was rejected in Estate of Wood, 36 Cal. 75: "I wish $5.000 to go to C. *in the event of my dying intestate.*" But no words in a will are to be rejected if any intelligible meaning can be given them. Seibert *v.* Wise, 70 Penn. St. 147. Hortwitz *v.* Norris, 60 Penn. St. 261. They are not to be rejected on conjecture. Caldwell *v.* Willis, 57 Miss. 555. A repugnancy which will justify the rejection of a word or clause from a will must arise upon the face of the will. Davis *v.* Boggs, 20 Ohio St. 550. But such repugnancy need not arise between the word or clause in question and some other word or clause, but may consist in a conflict with the general tenor and scope of the will. Ib. But it is only in case of irreconcilable repugnancy that words or clauses can be rejected. Baxter *v.* Bowyer, 19 Ohio St. 490.

become impossible; Sir J. K. Bruce and Lord Cranworth, L.JJ., held that they were warranted in reading the word "fourth" as meaning "fifth," *which the context showed was the change required to render the will consistent.] [1]

*505

The changing of words, however, has most frequently occurred in regard to expressions which, in common parlance, are often used inaccurately; as the word "severally" for "respectively," of which we have an instance in Woodstock *v.* Shillito (*c*), where a testator gave the interest of a fund to his wife for life, and after her death to such of his four daughters as should be then living, in equal shares, during their respective lives; and from and after the *several* deceases of his four daughters, he gave one fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child. The surviving daughters claimed to be entitled to the entire fund, under the express gift to the daughters living at the decease of the testator's widow; but Sir L. Shadwell, V.-C., held, that the words "from and after the several deceases of my said daughters," were to be construed "from and after the decease of my daughters *respectively*." "It was clear," he said, "the testator meant to give to the children the share of their mother on her death."

"Several" used in sense of *respective*.

But by far the most numerous class of cases, exhibiting the *change* of a testator's words, are those in which the disjunctive "or" has been changed into the copulative *and*, and *vice versâ*.[2] It is obvious that these words are often used orally without a due regard to their respective import; and it would not be difficult to adduce instances of the inaccuracy, even in written compositions of some note; it is not surprising, therefore, that this inaccuracy should have found its way into wills. Accordingly we find that the courts have often been called upon to rectify blunders of this nature:

"Or," changed into *and*.

(*c*) 6 Sim. 416.

[1] It is a rule of construction that where a gift to children speaks of them as a specified number, which is less than the number in existence at the date of the will, the specified number will be rejected on the presumption of a mistake, and all the children so in existence will be entitled unless it can be inferred who were the particular children intended. Kalbfleisch *v.* Kalbfleisch, 67 N. Y. 354; Garvey *v.* Hibbert, 19 Ves. 124; Spencer *v.* Ward, L. R. 9 Eq. 507. The rule that all in existence will take does not prevail if the particular ones be pointed out by some additional description; Wrightson *v.* Calvert, 1 Johns. & Hem. 250; or if some of a class have already been provided for, and the specified number corresponds with the number of those not provided for, and there is a division into the same number of shares. Kalbfleisch *v.* Kalbfleisch, supra; Shepard *v.* Wright, 5 Jones, Eq. 22.

[2] Where it is clear, from the intention of the testator, that the word "or" is used instead of "and," and *e converso*, the court will change the word. O'Brien *v.* Heeney, 2 Edw. 242; Miles *v.* Dyer, 5 Sim. 435; Ray *v.* Enslin, 2 Mass. 554; Carpenter *v.* Heard, 14 Pick. 449; Parker *v.* Parker, 5 Met. 134, 137; Hunt *v.* Hunt, 11 Met. 88; Sayward *v.* Sayward, 7 Greenl. 210; Thackeray *v.* Hampson, 2 Sim. & S. 214; Monkhouse *v.* Monkhouse, 3 Sim. 126; Englefried *v.* Woelpart, 1 Yeates, 41; Turner *v.* Whitted, 2 Hawkes, 613; Parrish *v.* Vaughan, 12 Bush. 97; Jackson *v.* Blanshan, 6 Johns. 54; Beall *v.* Deale, 7 Gill & J. 216; Den *v.* Mugway, 3 Green, 330; Ward *v.* Waller, 2 Speer's, 786; Den *v.* English, 14 Penn. St. 280; Munro *v.* Holmes, 1 Brev. 319; Bostick *v.* Lawton, 1 Speer, 258; Kelso *v.* Dickey, 7 Watts & S. 279; Butterfield *v.* Haskins, 33 Me. 393; Janney *v.* Sprigg, 7 Gill, 197; Tennell *v.* Ford, 30 Ga. 707; Holcomb *v.* Lake, 1 Dutch. 605; s. c. 4 Zabr. 686. But this substitution will not be made, unless it be necessary to carry out the clear intention of the testator. Holcomb *v.* Lake, supra; Robertson *v.* Johnston, 24 Ga. 102.

so often, indeed, as to have swelled the cases on the subject into a mass requiring much attention and discriminative arrangement, in order to deduce from them any intelligible and consistent principles; and, in performing this task, the liberty must be taken of sometimes referring the cases to principles not distinctly recognized by the judges who decided them.

In the case of devise over, in event of death under twenty-one, *or* without issue.

It has been long settled that a devise of real estate to A. and his heirs, or, which would be the same in effect, to A. indefinitely, and in case of his death under twenty-one, *or* without issue, over, the word "or" is construed "and," and, consequently, the estate does not go over to the ulterior devisee, unless both the specified events happen.

*506 * One of the earliest authorities for this construction is Soulle *v.* Gerrard (*d*); where a testator, having four sons, devised lands to Richard, one of his sons, and his heirs, forever; and if Richard died within the age of one-and-twenty years, *or* without issue, then, that the land should remain to his other three sons. Richard died under age, leaving issue a daughter. It was held that, in the event which had happened, the devise over to the three sons had failed; for, that by the words and intent, it was not to commence unless *both* parts were performed, and that it was "all one as if the disjunctive *or* had been a copulative."

Principle of the rule;

The ground for changing the testator's expression in these cases is, that as, by making the event of the devisee leaving issue a condition of his retaining the estate, he evidently intends that a benefit shall accrue to such issue through their parent, it is highly improbable that he should mean this benefit to depend upon the contingency of the devisee attaining majority; while, on the other hand, it is very probable that the testator should intend, in the event of the devisee dying under age leaving issue, to give him an estate which would devolve upon the issue; but that, if he attained twenty-one (the age at which he would acquire a disposing competency), he should take the estate absolutely, *i.e.* whether he afterwards died leaving issue or not. The change of *or* into *and*, therefore, substitutes a reasonable for a most unreasonable scheme of disposition.[1]

— applicable to bequests of personalty.

And though it has generally happened that the subject to which this rule of construction has been applied is real estate, yet the rule is equally applicable (as the reason of it evidently is) to bequests of personalty; and, therefore, in the case

(*d*) Cro. El. 525; S. C. nom. Sowell *v.* Garrett, Moore, 422, pl. 590; Price *v.* Hunt, Pollex, 645; Barker *v.* Suretees, 2 Str. 1175; Walsh *v.* Peterson, 3 Atk. 193; Doe d. Burnsall *v.* Davy, 6 T. R. 34; Fairfield *v.* Morgan, 2 B. & P. N. R. 38; Eastman *v.* Baker, 1 Taunt. 174; Right *v.* Day, 16 East, 67; see also Doe d. Herbert *v.* Selby, 4 D. & Ry. 608, 2 B. & Cr. 926; [Morrall *v.* Sutton, 1 Phill. 551.]

1 Sayward *v.* Sayward, 7 Greenl. 210; Jackson *v.* Blanshan, 6 Johns. 54; Jackson *v.* Reeves, 1 Wend. 388; Holmes *v.* Holmes, 5 Binn. 252; Carpenter *v.* Heard, 14 Pick. 449.

of a legacy to A., and in case of his death under age *or* without issue, to B., it is not to be doubted that A. would retain the legacy, unless he died under age *and* without leaving issue at his decease.

And, of course, it would be immaterial that the original bequest was expressly made contingent on the legatee attaining majority. As in Mytton *v.* Boodle (*e*), where a testator bequeathed 5,000*l.* to A. if he attained twenty-one; but if he should not attain that age, *or* die without leaving issue, then over. It was held, that A., on attaining twenty-one, was absolutely entitled.

*507 * In this case (*f*) the expression which raised the question in the will was repeated in the codicil — a circumstance which was considered (and it is conceived rightly) not to indicate that it was used advisedly.

Gift over in case of death during minority unmarried or without issue.

And the same construction obtains where another event is associated with the dying under age and without issue, as in the case of a devise in fee or bequest to A., with a gift over, in case of his dying during minority *unmarried*, *or* without issue (*g*); and that, too, though the copulative "and" is found in company with the disjunctive "or" in the same will, indeed in this very sentence. As in Miles *v.* Dyer (*h*), where the bequest was to A. for life, and after her decease to her children on their attaining twenty-one; in case they should die in the lifetime of A., *or* under twenty-one, *and* without leaving issue, then over, it was held that the interests of the children were not divested unless the three events happened.

It is obvious that the ground for changing *or* into *and* exists *à fortiori* where children or issue are the express objects of the prior gift; as where (*i*) there is a devise to a person when he attains twenty-one, for life, remainder to his children (the devise, in the case referred to, was to the sons successively and the daughters concurrently), in tail, with a devise over if he die *under twenty-one* OR *without children.*

Suggested extension of the rule.

It would seem that the principle in question applies to every case where the gift over is to arise in the event of the preceding devisee or legatee dying under prescribed circumstances, *or* leaving an object who would, or at least who *might*, take a benefit derivatively through the devisee or legatee, if his interest remained undivested, and to whom, therefore, it is probable the testator intended indirectly a benefit, not dependent upon the circumstance of the devisee or legatee dying under the prescribed circumstances or not. In this point of view it would seem to be immaterial whether the dying is confined to minority, or is associated with any other contin-

(*e*) 6 Sim. 457.
(*f*) And in Framlingham *v.* Brand, infra.]
(*g*) Framlingham *v.* Brand, 3 Atk. 390; [see Doe *v.* Cooke, 7 East, 269, post.]
(*h*) 5 Sim. 435, 8 Sim. 330.
(*i*) Hasker *v.* Sutton, 9 J. B. Moo. 2, 1 Bing. 501. [But the only question there was whether the remainder was vested or not. The defendants could not succeed unless it was, and it could be so only by adopting Lord Hardwicke's "construction" in Brownsword *v.* Edwards (post, 509): reading *or* as *and* was insufficient: and the court certified against them. And see now Cooke *v.* Mirehouse, 34 Beav. 27, post. 512.]

gency, as in the case of a gift to A., and if he shall die *in the lifetime of B.* OR *without* * *issue* (*k*), [or die *without issue* OR *intestate* (*l*),] then over; or whether the event is leaving issue or leaving any other object who would derive an interest or benefit through the legatee, if his or her interest was held to be absolute, as a husband or wife. *508

Thus, where (*m*) a testator bequeathed the residue of his personal estate to his daughter, her executors, &c., with a proviso, that in case his daughter happened to die under twenty-one, *or without leaving any husband* living at her death, then he gave several legacies, all which he directed to be paid within twelve calendar months after his decease, *in case of the death of his daughter under age as aforesaid;* and in such case he gave the residue to other persons — Sir W. Grant, M. R., held, that "or" was to be read "and," and that the expression "under age *as aforesaid*" meant not leaving a husband. Gift over on death under twenty-one, *or* without leaving a husband.

The cases under consideration, perhaps, may seem to form an exception to the rule that words, unambiguous in themselves, are not to be rejected or changed on account of their unreasonableness; but as this construction has obtained so long, is confined to a particular expression, and that expression one which is often used indiscriminately with the substituted word, there does not seem to be much danger in this seeming latitude of interpretation; but it should, if possible, be made to rest upon some solid principle, fixing definite limits to its application. The cases, it is conceived, in effect though not professedly, warrant us in stating that principle to be (as before suggested), that where the dying under twenty-one is associated with the event of the devisee leaving an object who would, if the devisee retained the estate, take an interest derivatively through him, the copulative construction prevails; though it is by no means equally clear that the rule is *confined* to such cases.

Lord Hardwicke, in Brownsword *v.* Edwards (*n*), expressed an opinion, that the construction in question was not applicable to estates tail, [on the ground that there was no occasion for it; since an estate tail was capable of a remainder, and the words might, by an "easy construction," be read as such; *so as to secure the estate to the issue, if any, and yet give effect to the remainder in case the issue failed at any time.* At the present day the * court follows Lord Hardwicke in declining to change "or" into "and" (or the contrary) where the prior estate is in tail, but rejects the "construction" upon which alone his opinion was based. The course of decision deserves attention. In some of the cases, it Whether rule applies to estates tail. *509

(*k*) Wright *v.* Kemp, 3 T. R. 470, [a case on a transaction *inter vivos;* Denn *v.* Kemeys, 9 East, 366; Doe d. Knight *v.* Chaffey, 16 M. & Wels. 656.

(*l*) Green *v.* Harvey, 1 Hare, 428; Beachcroft *v.* Broome, 4 T. R. 441; and see Incorporated Society *v.* Richards, 1 D. & War. 283; Greated *v.* Greated, 26 Beav. 621.]

(*m*) Weddell *v.* Mundy, 6 Ves. 341. (*n*) 2 Ves. 249.

will be seen, the gift over was if the tenant in tail should die under twenty-one *or* without issue, in others the conjunction "and" was used.]

Brownsword *v.* Edwards. In Brownsword *v.* Edwards (*o*), the devise was to trustees and their heirs to receive the rents until A. should attain twenty-one; and if he should live to attain twenty-one or have issue, then to A. and the heirs of his body; but if A. should die before twenty-one *and* without issue, then in trust for B. [in like manner, with gifts over in the like words to other branches of testator's family; and for want of such issue to his own right heirs]. A. and B. were the testator's illegitimate son and daughter [but for the purposes of the argument were taken to be legitimate]. A. attained twenty-one and died without issue [and it was argued that the gift to B. had failed, only one of the two events upon which it was limited having happened. But Lord Hardwicke held B. to be entitled. He said: "There is no necessity in this case to transpose or supply material words; but there is a plain natural construction upon these words, viz. if A. shall happen to die before twenty-one, and also shall happen to die without issue; which construction plainly makes the dying without issue *to go through the whole* and fully answers the intent, which was in that manner. Had the first devise been to A. and his heirs, this construction, I believe, could not be made; for where there is such a contingent limitation I do not know that the court has changed heirs into heirs of the body to make it so throughout. But much stronger constructions than this have been made in devises: as, in a devise to one and his heirs, and if he should die before twenty-one *or* without issue, the court has said it was not the intent to disinherit the issue, and therefore *or* shall be construed *and;* but if the first limitation had been in tail there would be no occasion to resort to that, but the court would make the construction I do now" (showing that, whether the word of the will was *and* or *or*, he thought some "construction" equally necessary), "viz. if he dies without issue before twenty-one then over by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder: an estate tail is capable of a re-
*510 mainder, and it is * natural to expect a remainder after it. It is contrary to his intent to let in this remainder to the right heirs to defeat all the intermediate limitations to his family."

Woodward *v.* Glasbrook. A stricter adherence to the letter was preserved in the earlier case of] Woodward *v.* Glasbrook (*oa*), where a testator devised a house to his sons, James and Thomas, and the heirs of their bodies, in equal moieties, and devised other houses to his other children in like manner; and provided that, if any of his said children should die under twenty-one *or* unmarried (*p*), the part or share of him or her so dying should go

Devise over if devisee in tail should die under twenty-one *or* unmarried.

(*o*) 2 Ves. 249. (*oa*) 2 Vern. 388.
(*p*) Not "without issue." But "unmarried" equally involves the extinction of the estate tail.

to the survivors; and it was held by Holt, C. J., that the shares of two of the children dying unmarried, though they attained twenty-one, went to the devisees over.

In Doe d. Usher *v.* Jessep (*q*), where A. devised to trustees and their heirs, in trust for his natural son J. and the heirs of his body, and if J. should die before he attained his age of twenty-one years, *and* without issue, then over. J. attained his majority, but died without issue. It was contended, on [a mistaken view] of Brownsword *v.* Edwards, that "and" was to be read *or*, which would, in the event that had happened, give effect to the devise over; but Lord Ellenborough, though he admitted the cases to be very similar (the only distinction being that the limitation over in the cited case was in favor of a daughter, who, without such a construction as was there put upon the word "and," would have been without a provision) [which is a distinction without a difference (*r*)], decided that the word was to be taken in its literal sense.[1]

Doe *v.* Jessep.

"And" not changed into "or" in limitation over after an estate tail.

[Again, in Mortimer *v.* Hartley (*s*), where the testator devised lands to John and Ann successively in tail (*t*), and "if it should please God to take away both Ann and John under age, *or* without leaving lawful issue," then over to X. Ann died under age and without issue, and John died without issue, but not under age. On a case from Chancery the Court of Exchequer refused to read "or" as "and," and held that the devise over took effect. Parke, B., in delivering the judgment of the court, said: "If we abide by the words of the will, it is possible we may * disappoint what we may conjecture to have been one intention of the testator, because it is a reasonable intention to entertain, that is, to give a benefit to the issue if their parents should die under age, but we are sure of carrying into effect a manifest and declared intention of the testator to give the remainder over to X. on the determination of the estate tail: on the other hand, if we change 'or' into 'and' for the purpose of effecting the conjectured intention to give a benefit to the issue on the death of their parents respectively under age, we defeat the clear and manifest intention to give the remainder to X. on failure of the issue of John and Ann, and cause an intestacy as to that remainder, a circumstance which ought to be avoided." If the first devise had been in fee-simple he admitted the authorities would have required the change; "but as none of the authorities apply to an estate tail, and we have Lord Hardwicke's high authority for distinguishing such a case, we think we ought to do so,

Mortimer *v.* Hartley.

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(*q*) 12 East, 288; see also Soulle *v.* Gerrard, Cro. El. 525 (stated, ante, p. 506), where it was considered (though, according to subsequent authorities, erroneously), that the first devisee had an estate tail.

[(*r*) 6 H. L. Ca. 84, 85, 96. (*s*) 6 Exch. 47, 3 De G. & S. 316.

(*t*) The court of C. B. held upon the same will that the prior devise gave a fee, and then they read "or" as "and," 6 C. B. 819.

[1] See Chrystie *v.* Phyfe, 19 N. Y. 344; Doe *v.* Watson, 8 How. 263.

and abide by the ordinary sense of the words. *If any change should be made*, the one which would be most likely to effectuate the intent of the testator would be to read the words as if they had been 'if it should please God to take away both John and Ann under age *or at any time* without issue.' By so reading them the issue would take if their parents died under age, and X. succeed on the determination of the estate tail. But *if this cannot be done* we think we should make no change at all."

But this was exactly the change which the court had "Lord Hardwicke's high authority" to make. Whether it was made or not, the result, as it happened, was the same; for in either case the gift over took effect without disappointing any issue. But if there had been any issue they would have been disappointed, and it seems strange to invoke Lord Hardwicke's authority for a conclusion which it was the declared object of his construction to avoid. When the case came back to Chancery, Sir K. Bruce, V.-C., virtually adopted that construction, saying: "On the authority of Brownsword *v.* Edwards and Murray *v.* Jones (*u*) and other cases I am of opinion that the testator has but inaccurately expressed that he disposed of everything after the failure of the limitations in the prior clauses, *in whatever manner they might fail.*"

Grey *v.* Pearson.

It is evident, however, that this construction strikes out the words "under twenty-one;" and in Grey *v.* Pearson (*v*), where the will was undistinguishable from the will in Doe *v.* Jessep, *512 * the devisee in tail attained twenty-one, but afterwards died without issue; and it was held in D. P., following Doe *v.* Jessep, that the words must be taken literally, and that the gift over failed. It was admitted that where lands were devised to one *and his heirs* with a gift over if he died under twenty-one *or* without issue, "or" was to be read "and;" it was too late to question the authorities which had so decided: but, it was said, those decisions did not govern a case where the first devise was in tail, with a gift over if the devisee died under age *and* without issue. The House refused, therefore, to apply those authorities to the case before it; and on the ground that Lord Hardwicke's "construction" had not been uniformly adopted it rejected that also, deeming it to be somewhat forced and very unusual (*x*).

Modern authority, therefore, while it still distinguishes the case of an estate tail, deals with it on wholly different principles from those upon which the distinction was originally based. For (as we have seen) Lord Hardwicke never meant to read the words so as in any event to disappoint the issue; whereas Mortimer *v.* Hartley and Grey *v.* Pearson will require both "or" and "and" to be strictly construed although the issue may be thereby disappointed. The readiness with which Lords

(*u*) 2 V. & B. 313, stated post, Ch. L.
(*v*) 6 H. L. Ca. 61, by Lords Cranworth and Wensleydale, diss. Lord St. Leonards.
(*x*) Lord St. Leonards, on the other hand, thought it "easy and natural." As to Doe *v.* Jessep he said it was hastily decided, and that the judges of K. B. showed by their remarks that they misunderstood the real nature of the case, 6 H. L. Ca. 97.

Cranworth and Wensleydale accepted the distinction of an estate tail, while rejecting the grounds for it, was plainly due to their disapprobation of the so-called speculative system of construction adopted in the old authorities; and since Grey *v.* Pearson "or" has been strictly construed even in the case (already mentioned as furnishing an *à fortiori* argument for changing "or" into "and") where children or issue were express objects of the prior gift: as, where (*y*) the devise was to A. for life if he should attain thirty-one, with remainder to his eldest son in fee, with a gift over if A. should die under thirty-one *or* not have a son. A. attained thirty-one but died without having a son, and it was held that the gift over took effect, for that "or" could not be construed "and." Sir J. Romilly, M. R., said he never knew of a case where the change had been made for the purpose of defeating the will and creating an intestacy. It will, however, be perceived that if A. had had a son and afterwards died under thirty-one the son would have been disappointed: for the construction could not properly depend on the * event. The literal construction, however, has not yet *513 been tested by any case where such disappointment would have ensued.

Of changing "and" into "or" in cases where the previous estate is not in tail more will be said hereafter.] To return for the present to the cases in which "or" has been construed *and*. The argument for this construction is, of course, very strong where the effect of an adherence to the words of the will would be to deprive the legatee of what was previously given to him in *either* of two alternate events, unless both events should happen, as in the case of a bequest to A. on his attaining thirty-one *or* marrying; and in case he should die under thirty-one *or* unmarried, then over: in such a case "or" is necessarily construed *and*, in order to make the limitation over consistent with the terms of the prior gift (*z*). [So where property is given to a person in either of two events, and afterwards given over in terms unless not only those two events but an additional event also happens, Sir L. Shadwell, V.-C., thought that, if it were necessary, the court would read the word *or* as *and* (*a*).

Gift in either of two events, with gift over on non-happening of one *or* the other.

These decisions depended on the inconsistency which, upon a literal construction, would have existed between the prior gifts and the executory gifts over. Where there is no prior gift this ground fails: so that a bequest to A. after the death of testator's mother *or* the second marriage, death, or forfeiture of his wife,

Where there is no prior gift.

(*y*) Cooke *v.* Mirehouse, 34 Beav. 27. As to Hasker *v.* Sutton, 9 J. B. Moo. 2, 1 Bing. 501, *vide supra*, p. 507, n.]

(*z*) Grant *v.* Dyer, 2 Dow, 87; [Thompson *v.* Teulon, 22 L. J. Ch. 243; Collett *v.* Collett, 35 Beav. 312, stated Ch. XXVII. s. 1.

(*a*) Grimshawe *v.* Pickup, 9 Sim. 591; and Miles *v.* Dyer, ante, p 507; Law *v.* Thorp, 25 L. J. Ch. 75, 1 Jur. N. S. 1082; Johnson *v.* Simcock, 6 H. & N. 6, 7 Jur. N. S. 344; Bentley *v.* Meech, 25 Beav. 197; Hawkins *v.* Hawkins, 7 Sim. 173.

although the testator had made life-provisions for both his mother and wife, upon whose death, therefore, a certain amount of the estate would be set free, was held to take effect immediately on the death of the mother without waiting for the second marriage, death, or forfeiture of the wife: in other words, the court refused to read "or" as "and" (*b*). And a similar observation must be made with reference to the opposite change of "and" into "or" (*c*).

"Or" read *and* on general context.

Sometimes the general context or plan of the will calls for the conjunctive construction in cases not easily reducible to any specific head. Thus, in Long *v.* Dennis (*d*), where there was a devise to A. for life, upon condition that if he should marry with any woman not having a competent fortune, *or* without the * consent of trustees, the estate should not vest; the Court *514 of K. B., considering that the testator meant to require the sanction of the trustees only in case A. married a woman without a competent fortune, and also that conditions in restraint of marriage were odious, held that the estate vested upon performance of either part of the condition; that is to say, they read the word "or" as *and*. And in another case, where a testator bequeathed (*e*) the produce of real estate, after the cesser of certain life-estates, to J. A. for life, and after his death to his eldest son for life, "and to remain entailed on the eldest son descended from J. A. and his posterity from one generation to another forever: but in case of death *or* want of issue from the said J. A.," then over: Sir L. Shadwell, V.-C., read the will as if it had been "in case of death *and* failure of issue," so as to agree with the general intent collected from the context, that all the descendants of J. A. were to take in succession.]

Gift to several objects alternatively.

Where there is a gift to two objects or classes of objects alternatively, the ambiguous use of the disjunctive "or" occasions much perplexity. Sometimes, as we have seen, the gift has been held to be void for uncertainty (*f*); but more frequently, in such cases, the word has been changed into *and*. As in Richardson *v.* Spraag (*g*), where a testatrix bequeathed money in trust for such of her daughters or daughters' children as should be living at her son's death — it was held, that the children, as well of the living as of the deceased daughters, came in for their shares, the word "or" being read *and*.

Gift to A. *or* his children, read *and*.

So, in Eccard *v.* Brooke (*h*), where the bequest was to L. for his life, and after his decease to the nephews and nieces who should be then living, as well on the side of the testatrix's late husband as of her own, to wit: A. *or* her children, and B. *or* his children, and C. *or* his children, and D. *or* his children, and E. *or* her

(*b*) Hawksworth *v.* Hawksworth, 27 Beav. 1.
(*c*) See Malden *v.* Maine, 2 Jur. N. S. 206.
(*d*) 4 Burr. 2052; see also Nicholls *v.* Tolley, 2 Vern. 388.
(*e*) Monkhouse *v.* Monkhouse, 3 Sim. 119; see also Hawkes *v.* Baldwin, 9 Sim. 355.]
(*f*) Ante, p. 372. (*g*) 1 P. W. 434. (*h*) 2 Cox, 213.

children, share and share alike. Of these five persons four died in the lifetime of L., three without issue and one leaving two children. The other was living and had no child. Sir L. Kenyon, M. R., was of opinion that the word "or" must be considered as if it had been *and*, for that otherwise he must either adopt the argument that it meant to substitute the children of each nephew and niece who should happen to die, in the room of their father or mother, for which he saw no sufficient ground, or he must say that the clause was so uncertain
* that he could give it to none. He held that the two children *515
of the deceased niece and the surviving niece took in equal thirds; but that, if the latter had had any children living, they would have taken equally with her.

Gift to A. *or* his issue.

Again, in Horridge *v.* Ferguson (*i*), where the testatrix directed the residue of her property to be divided among such of the children of five persons (naming them) as should be born in lawful wedlock and living at her decease, *or* the issue of such of them as should be married — Sir T. Plumer, M. R., considered, that, in order to make sense of the passage, "or" might be construed *and*. All the children and grandchildren, therefore, took equally.

"Or" read "and" to prevent uncertainty.

[And in Maude *v.* Maude (*k*), where a testator bequeathed a sum of money to his four sons A., B., C. and D., in trust for another son E. during his life, and after the death of E. without children upon trust to divide the money equally amongst the testator's said sons A., B., C. and D., *or* to such other of his sons as should afterwards be, in succession, trustees for E. under the proviso thereinafter contained, Sir J. Romilly, M. R., held that "or" must be read "and:" otherwise, if two of the four had died and two others had under the proviso become trustees in their place, and then E. had died without issue, would the two original *or* the two new trustees take the fund? If they did not all take one class must be excluded.]

To A. *or* his heirs.

"Or," too, has often been changed into *and* where interposed between the name of the devisee and words of limitation introduced into the devise, as in the case of a devise of real estate to A. *or* his heirs, or to A. *or* the heirs of his body (*l*), [or to A. *or* his issue, where the word "issue" has been taken to be a word of limitation (*m*).] Whether the same construction would be applied to bequests of personalty to A. *or* his executors or administrators is not quite clear, for in such a case, as the words of limitation are not necessary to confer the absolute interest (a difference, however, which no longer exists), there may seem to be more reason for contending that

(*i*) Jac. 583. [(*k*) 22 Beav. 290.]
(*l*) Read *v.* Snell, 2 Atk. 642; Wright *v.* Wright, 1 Ves. 409; [Harris *v.* Davis, 1 Coll. 416: Greenway *v.* Greenway, 2 D. F. & J. 128; Adshead *v.* Willetts, 29 Beav. 358.
(*m*) Parkin *v.* Knight, 15 Sim. 83; but of course not where substitution, and not succession, is clearly intended, see Speakman *v.* Speakman, 8 Hare, 180.]

they are inserted *diverso intuitu*. The strong tendency of the modern cases certainly is to consider the word "or" as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime: in * other words, as inserted in prospect of, and with a view to guard against, the failure of the gift by lapse.

"Or" read as introducing a substituted gift.

*516

Thus, in Davenport *v.* Hambury (*n*), where the bequest was to A. *or* her issue, it seems to have been taken for granted that the word *or* was intended to substitute the issue in case of the death of A. in the testator's lifetime; the question discussed being, not *whether* issue were entitled, but *how, i.e.* whether *per stirpes* or *per capita*. So, in Montagu *v.* Nucella (*o*), where legacies were bequeathed to the testator's nephews and nieces, "*or* to their respective child or children," Lord Gifford, M. R., held the effect to be to vest the legacies absolutely in the children surviving the testator, and that the children were let in only as substitutes for their parent or parents dying in the testator's lifetime. And in Gittings *v.* Mac Dermott (*p*), where a testator bequeathed certain stock to the children of his sister, the late Elizabeth Wall, OR *to their heirs*, Sir J. Leach, M. R., considered it to be clear that the word "or" implied a substitution, and that the next of kin (who in regard to personalty were considered to be designated by the word heirs) of such of the legatees as died in the testator's lifetime were entitled to their legacies; and Lord Brougham, on appeal, affirmed the decree.

To A. *or* her issue.

To legatees, *or* to their respective child or children.

To the children of A., *or* to their heirs.

These cases [which have been repeatedly followed (*q*)] are inconsistent with, and therefore have overruled Newman *v.* Nightingale (*r*), where a sum of 500*l.* was bequeathed to the sole use of A. *or of her children* forever; and Lord Thurlow held, that the true construction of the words was, to give A. an interest for life, and the children to take it amongst them at her death.

Where, however, the words in question are applied to a bequest which may not take effect in possession on the testator's decease, another point presents itself, namely, whether the word "or" (admitting it to be introductory of a substituted gift) is meant to provide against the contingency of the first-named legatee dying in the testator's lifetime, or that of his dying in the interval between the death of the testator and the vesting in possession.

Whether words refer to contingency in lifetime of testator, or afterwards.

(*n*) 3 Ves. 257; see also Crooke *v.* De Vandes, 9 Ves. 199; [and see the same force attributed to the word *and* in Burrell *v.* Baskerfield, 11 Beav. 534; Tucker *v.* Billing, 2 Jur. N. S. 483. *Sed qu.* as to the last case.]

(*o*) 1 Russ. 165. (*p*) 2 My. & K. 69.

[(*q*) Whitcher *v.* Penley, 9 Beav. 477; Penley *v.* Penley, 12 Beav. 547; Chipchase *v.* Simpson, 16 Sim. 485; Salisbury *v.* Petty, 3 Hare, 86; Doody *v.* Higgins, 9 Hare, App. 32; Jacobs *v.* Jacobs, 16 Beav. 557; Amson *v.* Harris, 19 Beav. 210; Sparks *v.* Restal, 24 Beav. 218; Re Craven, 23 Beav. 333; Timins *v.* Stackhouse, 27 Beav. 434; Re Porter's Trust, 4 K. & J. 188; Blundell *v.* Chapman, 33 Beav. 648; Margitson *v.* Hall, 10 Jur. N. S. 89; Finlason *v.* Tatlock, L. R. 9 Eq. 258; Holland *v.* Wood, L. R. 11 Eq. 91.]

(*r*) 1 Cox, 341.

*Such a question occurred in Girdlestone *v.* Doe (*s*), where a testator bequeathed 40*l.* per annum to A. for life, and after her decease to B. *or his heirs;* and it was held that B., who survived the testator, did not take the absolute interest, but that the latter words created a substitutional gift for his next of kin in the event of B. dying in the lifetime of A. (*t*). *517

[But if the gift be to the specified persons "or their heirs *or assigns*," it is clear that the words are words of limitation only; for the power of assigning implies an absolute and indefeasible interest (*u*).

Gift to "assigns" implies an absolute interest.

Here we may distinguish those cases where, under a power to appoint in favor of A. *or* B. (A. and B. being either classes or individuals), a gift in default of appointment is implied between A. *and* B. (*x*). This is an apparent but not a real change of "or" into "and"; the true reason that A. and B. both take being that both are objects of the power, and no selection having been made by the person empowered to select, the court divides the subject of gift equally between the objects of the power (*y*). Again, a gift to A. for life, and after his death to a class of persons "*or* the issue of such of them as shall then be dead (*z*), or to A. for life, and after his death to such of a class as shall be then living or *their* next of kin" (or "heirs"), will generally be construed to mean, such of the class as shall be living at the death of the tenant for life, *and* the issue or next of kin (or heirs) of such as shall then be dead (*a*)].

Power to appoint to A. *or* B. Implied gift to A. and B. in default.

The word "and," too, is sometimes construed *or*. This change (being the converse of that which is exemplified by the preceding cases [but, like it, generally made to favor the vesting of a legacy, and not to devest it (*b*)], may be called for by the general frame and context of the will, [as in Jackson *v.* Jackson (*c*) where a testator *bequeathed a leasehold house to *518

As to turning "and" into *or*.

(*s*) 2 Sim. 225; see also Corbyn *v.* French, 4 Ves. 418; [Tidwell *v.* Ariel, 3 Mad. 403;] Hervey *v.* M'Laughlin, 1 Price, 264; [Price *v.* Lockley, 6 Beav. 180; Salisbury *v.* Petty, 3 Hare, 86.]

(*t*) The further discussion of the point suggested by this case, however, will more properly find a place in Ch. XLIX.

[(*u*) Re Walton's Estate, 8 D. M. & G. 173; Re Hopkins' Trust, 2 H. & M. 411.

(*x*) Brown *v.* Higgs, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; Longmore *v.* Broom, 7 Ves. 124; Burrough *v.* Philcox, 5 My. & Cr. 73; White's Trust, Johns. 656; Penny *v.* Turner, 15 Sim. 368, 2 Phil. 493, overruling Jones *v.* Torin, 6 Sim. 255.

(*y*) 7 Ves. 128; 2 Phil. 495. The power is exclusive, ib. and Re Veale's Trusts, 4 Ch. D. 61, 5 Ch. D. 622.

(*z*) Shand *v.* Kidd, 19 Beav. 310.

(*a*) King *v.* Cleaveland, 26 Beav. 26, 4 De G. & J. 477; Re Philp's Will, L. R. 7 Eq. 151; Burton *v.* Hillyar, L. R. 14 Eq. 160; Wingfield *v.* Wingfield, 9 Ch. D. 658. But in Lachlan *v.* Reynolds, 9 Hare, 796, "their" was strictly construed as referring to the "children then living," so that "heirs" must if anything necessarily be deemed a word of limitation, and *or* be read *and*, which was confirmed by another gift to the children living at another period *and* their heirs.

(*b*) See per Wood, V.-C., Day *v.* Day, Kay, 708; Maddison *v.* Chapman, 3 De G. & J. 536.

(*c*) 1 Ves. 217. This is an analogous case to Grant *v.* Dyer, 2 Dow, 87, ante, p. 513. The L. C. added, that if R. had survived the wife, but had no issue then living, he would have taken only a life interest, and that by the express words of the gift; so that it seems the Court, in effect, struck out of the clause introducing the bequest over the words "if he should be living at the time of my wife's death."

his wife for her life: "and after her death, if my son R. shall be living, then to him" for his life, "but if he should be living at the time of the death of my wife, *and* shall then or hereafter have any issue male of his body, then all the right therein to go to R.; but if R. should die in the life of my wife without leaving issue male," then over: Lord Hardwicke thought it clear on the face of the will that the testator did not intend the property to go over unless R. died in the lifetime of the wife without issue male; and to effect this end he construed "and" as "or"; so that, although R. died in the lifetime of the wife, yet, as he left issue male, he took the estate absolutely.

So, in Hetherington *v.* Oakman (*d*), where the ultimate bequest after the failure of certain prior interests under the will was to the testator's nephews and nieces *and* such of them as should be then living, it was impossible, upon any reasonable construction, to read the word "and" otherwise than as "or." So if a testator give a power to be exercised by A. *and* his heirs *and* assigns, the words as they stand requiring the heirs to join with the ancestor, would prevent a sale being ever made at all; for "nemo est hæres viventis:" "*and*" must therefore be read disjunctively (*e*).

And where a testator made a bequest after a specified period "to such of his grandchildren *and* their issue as should then stand to him in equal degree of consanguinity, and their heirs as tenants in common," the word "and" was read "or," it being impossible that grandchildren and their issue could be in equal degree of consanguinity to the testator (*f*).

The change may also be called for] by the circumstance that a literal adherence to the testator's language occasions that one member of his apparently copulative sentence is included in, and, therefore, reduced to silence by, another. On this ground, probably, the construction has prevailed in several cases where an ulterior gift was to take effect on the death of the first devisee unmarried *and* without issue.

Unmarried *and* without issue.

Thus, in Wilson *v.* Bayly (*g*), where a testator devised certain leasehold lands to trustees, in trust for his son John until his marriage, and then to make provision for his wife; and if *519 John should * have any issue, then to assign the premises to him, to enable him to make provision for his children; and if John should happen to have no issue lawfully begotten, in trust for testator's son Mark in like manner; it being his intention that, if his son should die before he was married, or, if he were married, and should have no issue lawfully begotten, then the lands should be enjoyed by Mark; and in case both his sons, Mark and John, should "happen to die unmarried, *and* neither of them should have any issue lawfully begotten," then over. Mark died unmarried. John married,

(*d*) 2 Y. & C. C. C. 299; see also Haws *v.* Haws, 1 Ves. 13, 1 Wills. 165; Stubbs *v.* Sargon, 2 Kee. 255; Stapleton *v.* Stapleton, 2 Sim. N. S. 216; Davidson *v.* Rook, 22 Beav. 206.
(*e*) Jones *v.* Price, 11 Sim. 557; see acc. Sugd. Pow. 844, pl. 24, 8th ed.
(*f*) Maynard *v.* Wright, 26 Beav. 285.] (*g*) 3 B. P. C. Toml. 195.

but had no issue. The devise over was held to have taken effect, the clause being construed in the disjunctive.

So, in Hepworth *v.* Taylor (*h*), a bequest over, in case the legatees died unmarried *and* without issue, was held to take effect on the death of one married but without leaving issue.

Again, in Maberley *v.* Strode (*i*), where the bequest was in trust for the testator's son A. for life, and after his decease for his children; but in case he should die unmarried *and* without issue, or having issue they should all die, if sons, before they attained twenty-one, or, if daughters, before they attained twenty-one or were married, then over. A. married, but died without issue; and Sir R. P. Arden, M. R., held that the gift over took effect.

So, in Bell *v.* Phyn (*k*), where a residue was bequeathed equally between the testator's three children, and in case of the death of any of his children (without being married *and* having children), the share of the child so dying to be divided between the surviving children — Sir W. Grant, M. R., on the authority of the last case, held, that the word "and" was to be construed *or*, for as, legally speaking, there could be no children without a marriage, it was almost necessary, in order to give effect to all the words, to construe the copulative as disjunctive. [However, the daughter whose share was in question having married and also had a child, it was unnecessary to decide the point.

"Without being married and having children."

And in Mackenzie *v.* King (*l*), where real and personal property was given in trust for A. for life, and after her death for her children; but in the event of her not intermarrying *nor* having children, then the same property to be subject to her disposal by will or otherwise; Sir K. Bruce, V.-C., held that "nor" (the component parts of which are "and not") must be read "or not," and that the fund was at A.'s disposal, in the event either of her remaining single, or marrying and not having a child.]

* But, though, by construing the contingency of dying unmarried and without issue copulatively, the latter member of the sentence is rendered inoperative (since the fact of being unmarried includes the not having or leaving issue, which always means *lawful* issue), yet, on the other hand, the disjunctive construction reduces to silence the word "unmarried;" for if the condition upon which the first taker retains the estate is his marrying and having issue, or, in other words, if the estate is to go over on the non-happening of *either* of these events, then, as the having issue includes the event of marriage, the result of the two events, placed disjunctively, is precisely the same as if the contingency of having issue stood alone. In these cases, it will be observed, the disjunctive construction can never operate to let in the devisee over to the exclusion of the children or issue of the first taker, *520

(*h*) 1 Cox, 112. (*i*) 3 Ves. 450. (*k*) 7 Ves. 459.
[(*l*) 12 Jur. 787, 17 L. J. Ch. 448.

as in the class of cases before noticed; which accounts for the seeming anomaly of torturing the words in both instances to produce a contrary effect. [But since Grey *v.* Pearson (*m*) the cases last noticed have lost much of their weight as authorities for applying to any given case the rule which would change "and" into "or" in order to prevent one member of a compound sentence being rendered inoperative. Though it be a canon of construction that effect is if possible to be given to every word used, it is one which must bend to circumstances (*n*); and where the result of changing *and* into *or* would be only to render one member of the sentence inoperative instead of the other, the change certainly ought not to be made (*o*). It does not appear to have been made in any case since Grey *v.* Pearson; which indeed was treated by Sir J. Romilly (*p*) as having overruled Bell *v.* Phyn and Maberley *v.* Strode, as well as Brownsword *v.* Edwards.

*521 * The decision in Grey *v.* Pearson is sometimes referred to as if the rule that words are *primâ facie* to be taken in their ordinary and grammatical sense was new, and as if a more strict and literal construction was now generally required than had previously obtained. But the rule is an old one (*q*). The application of it in that particular case was strict, and within its particular scope the decision is of course conclusive: but that no new principle of general application has been introduced by it is shown by the subsequent decision of D. P. in Abbott *v.* Middleton (*r*), and by other cases noticed above (*s*).]

Grey *v.* Pearson and Abbott *v.* Middleton.

The word *unmarried* means either never having been married, or, not having a husband or wife at the time. The former is its ordinary signification;[1] and it was considered as so used in the cases stated above (*t*), where, however, the effect of

Whether "unmarried" means not *having*

(*m*) 6 H. L. Ca. 61.

(*n*) Per Lord Cranworth in Clarke *v.* Colls, 9 H. L. Ca. 612; and in Earle *v.* Barker, 11 H. L. Ca. 280, Lords Cranworth and Chelmsford (agreeing with Romilly, M. R., 33 Beav. 353) preferred construing an ambiguous clause, forming one member of a copulative sentence, in a way that rendered it inoperative, to changing "and" into "or." Lord Westbury would have preferred the latter course; but both led to the same decision.

(*o*) Re Kirkbride's Trusts, L. R. 2 Eq. 400.

(*p*) In Seccombe *v.* Edwards, 28 Beav. 440: and see L. R. 1 Eq. 680.] Maherley *v.* Strode, and Bell *v.* Phyn, were much canvassed in Dillon *v.* Harris, 4 Bligh, N. S. 329; where Lord Brougham seemed very reluctant to consider them as general authorities for turning into *or* the word "and," occurring in a limitation over, in case of the prior legatee dying unmarried and without leaving lawful issue; he thought Sir W. Grant, in deciding Bell *v.* Phyn upon the authority of Maberley *v.* Strode, did not sufficiently advert to the special circumstances of the latter case. Dillon *v.* Harris, however, did not raise the point, as the prior bequest was to take effect upon the legatee marrying with consent, and the bequest over was in case he should so die unmarried and without leaving lawful issue; which Lord Brougham thought referred to such a marriage as had been previously referred to, namely, marriage with consent; and as the legatee had married without consent and had left no issue (so that, even according to the disjunctive construction, the bequest over failed), the question did not arise. [(*q*) See Ch. LI.

(*r*) 7 H. L. Ca. 68, ante, p. 488; where Lords Cranworth and Wensleydale were again opposed to Lord St. Leonards, but were not on this occasion in a majority.

(*s*) Pp. 493, 494.

(*t*) P. 519. So construed also in Radford *v.* Willis, L. R. 7 Ch. 7; where the devise was to an unmarried daughter for life, with remainder in fee to "her husband," and a gift over

[1] See In Re Thistlethwayte's Trust, 31 Eng. Law & Eq. 547.

such construction was to render the word inoperative. But the sound rule in such cases would seem to be, to construe the expression as used in the latter, being its less accustomed sense (*u*), which has a twofold advantage, that it removes the necessity of changing the particle "and" to "or," and gives effect to all the testator's words.

been married, or not being married at the time.

Thus in Doe d. Everett *v.* Cooke (*x*), where the bequest was to B. and his assigns (after the death or marriage of A.) for his life, and after his decease then to the child or children of B. by any future wife, his, her, or their executors, administrators and assigns; but the testator declared his will to be upon this further condition, that in case B. should die an infant unmarried *and* without issue, then over to C. and his children. B. attained his majority, and died, leaving a widow, but without having had issue; and it was held, that in these events the gift over failed. Lord Ellenborough said: "The most rational construction we can give this will is, to construc it as Lord Hardwicke did the devise in Framlingham *v.* Brand (*y*), as one contingency, namely, B.'s dying an infant, attended with two qualifications, viz. his dying * *without* *522 *leaving a wife surviving him*, or dying without children. Had he left a wife, and had died an infant, and no children, the testator might have intended that, in such event, the widow should be benefited by taking her share under the Statute of Distribution with the next of kin, or that B. should be able to make a testamentary disposition in her favor; meaning, also, that if he left children, they should have the estate in preference to the wife; and that if he left neither wife nor children at his death during his minority, C. and his children should have the estate; but that if he arrived at the age of twenty-one, he should have a power to dispose of it, though he left neither wife nor children."

"Unmarried" construed to mean not having husband or wife *at the time.*

So, in Doe d. Baldwin *v.* Rawding (*z*), where a testator devised his lands to his daughter and any other children he might leave, and to her or their heirs and assigns forever; but in case his daughter and such other children as aforesaid should die *under the age of twenty-one years unmarried and without lawful issue*, then to his wife in fee. The daughter died under age and without issue, but leaving a husband surviving; and it was held, on the authority of the last case, that the devise over failed.

[As B. in the former case left a wife and the daughter in the latter case left a husband surviving, neither of them were "unmarried" in *any* sense, and it was therefore unnecessary to

"Unmarried" ought

if she died "unmarried"; for the remainder which (it was held) vested in the husband on marriage (see above, p. 324), was not to be defeated by the accident of his dying first.]

(*u*) The word "unmarried" is used in this sense in the stat. 3 W. & M. c. 11, s. 7, which provides, that, "if any *unmarried* person, not having a child or children, shall be lawfully hired," &c.; as no one, *not having been* married can have children in the legal sense.

(*x*) 7 East, 269. (*y*) 3 Atk. 390.

(*z*) 2 B. & Ald. 441. [See also Re Sanders' Trusts, L. R. 1 Eq. 675.

to be construed according to the context.

decide upon the actual meaning of the word. The former case shows the opinion of Lord Ellenborough; but in the latter, Bayley and Holroyd, JJ., seem to have thought that either of the two meanings might be ascribed to it according to the context, and Lord Cottenham was of the same opinion (*a*).

Where personal property is limited, in case of the death of a married woman in her husband's lifetime, to such persons as would have been entitled thereto in case she had died intestate and unmarried, the word "unmarried" is always held to mean, "not having a husband at the time of her death" (*b*). To ascribe to the word its other meaning would plainly exclude the children of the marriage; and slight circumstances, such as an express provision made for the children in another part of *523 the * will, either out of the same (*c*), or a different (*d*) fund will not control the rule. And this construction has been even extended to cases where the phrase used was "die without having been married" (*e*).

Limitation to next of kin of *feme coverte* as if she had died "unmarried."

And the mere circumstance that the woman is unmarried at the date of the will does not supply a reason for putting a different construction on the word, since when it occurs with such a context it is clear that her marriage at some future time is contemplated (*f*). On the other hand, where a legacy is given to a person who at the date of the will has never been married, and the gift is made conditional on the legatee being "unmarried," it may well be that the testator intends the legacy to be conditional on the continuance of the legatee in the same status. And if the purpose of the legacy be to provide the testator's unmarried daughter with an outfit, and he speaks of her (though in a different part of the will) as "still unmarried," the intention is put beyond a doubt (*g*).

Gift to person not married at date of will on condition of her being unmarried.

The term "unmarried" is a *designatio personæ;* and, if once a person is entitled to participate in a fund by filling the character of an unmarried person, he will not lose that right if he subsequently marries (*h*).

(*a*) Maugham *v.* Vincent, 9 L. J. N. S. Ch. 329, 4 Jur. 452.

(*b*) Maugham *v.* Vincent, supra; see also Hoare *v.* Barnes, 3 B. C. C. 317, ed. by Eden, n. (*a*); Hardwick *v.* Thurston, 4 Russ. 380; Pratt *v.* Mathew, 22 Beav. 328, 8 D. M. & G. 522; Re Gratton's Trusts, 3 Jur. N. S. 684, 26 L. J. Ch. 648; Re Saunders' Trust, 3 K. & J. 152. In the last case the words occurred in a settlement on a first marriage and were made to include the event of the wife surviving the husband. She survived him, married again, and died before her second husband. The children of the second marriage were held entitled.

(*c*) Coventry *v.* Earl of Lauderdale, 10 Jur. 793; Pratt *v.* Mathew, supra; Clarke *v.* Colls, 9 H. L. Ca. 601, affirming Mitchell *v.* Colls, 9 Johns. 674. Where the provision for children is *in all events* absolute, the question *cannot* arise; for they take under the express gift to them.

(*d*) Re Norman's Trust, 3 D. M. & G. 965.

(*e*) Wilson *v.* Atkinson, 4 D. J. & S. 455; Re Ball's Trust, 11 Ch. D. 270.

(*f*) Day *v.* Barnard, 1 Dr. & Sm. 351. It is to be observed that all the cases on this point, except this and Re Gratton's Trusts, have arisen on marriage settlements.

(*g*) Re Thistlethwayte's Trust, 24 L. J. Ch. 713; and see Heywood *v.* Heywood, 29 Beav. 9.

(*h*) Jubber *v.* Jubber, 9 Sim. 503; see Niblock *v.* Garratt, ante, p. 324; Hall *v.* Robertson, 4 D. M. & G. 781.

"And" not construed "or" where a previous gift would be thereby divested.

It has already been observed that in the majority of cases where "and" has been construed disjunctively, it has been in order to favor the vesting of a legacy, and not in order to defeat a previously vested gift; and generally it will not be so construed where the latter consequence would follow; as, where the bequest is to A. for life, remainder to his eldest son (or to his children), with a gift over if A. should die under twenty-one and without issue (or under twenty-one and without children (*i*)). Again, in Day *v.* Day (*k*), where a testator bequeathed the interest of his residuary personal estate to his wife for life, and after her * death to his brother for life, and after the death of *524 the survivor, the capital to A., subject to the payment of 1,000*l.* each to B., C. and D., which the testator gave to them to be paid to each of them at the end of twelve months next *after the decease of the survivor* of his wife and brother; provided, that if either of the said B., C. and D. should die "in the lifetime of my said wife *and* my said brother," his legacy should lapse. Sir W. P. Wood, V.-C., refused to read "and" as "or," and thereby cause a lapse of B.'s legacy, who had survived the wife but died before the brother (*l*). And this is independent of Grey *v.* Pearson.]

(*i*) Malcolm *v.* Malcolm, 21 Beav. 225; Key *v.* Key, 1 Jur. N. S. 372. See also Coates *v.* Hart, 32 Beav. 349, 3 D. J. & S. 504, 516.

(*k*) Kay, 703. See also Re Kirkbride's Trusts, L. R. 2 Eq. 401; Reed *v.* Braithwaite, L. R. 11 Eq. 514; W— *v.* B—, 11 Beav. 621.

(*l*) It was held that "die in the lifetime of my said wife and my said brother" meant "die in their *joint* lifetime:" and Brudnell's case, 5 Co. 9, was cited.]

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* CHAPTER XVII.

ESTATES ARISING BY IMPLICATION (a).

I. *Effect of Recitals.*
II. *Implication from Devises and Bequests on Death of a person simply.*
III. *—on Death combined with some Contingency, and under other varieties of Context.*
IV. *As to implying Trust from Devise of Legal Estate.*
V. *Implication from Powers of Selection and Distribution.*
VI. *Implication of Estates Tail.*
VII. *Implication of Gifts to Children.*

Recitals, whether they create an actual gift.

I. SOMETIMES a testator shows by the recitals in his will, that he erroneously supposes a title to subsist in a third person to property which, in fact, belongs to himself. Such recitals do not in general amount to a devise; for, as the testator evidently conceives that the person referred to possesses a title independently of any act of his own, he does not intend to make an actual disposition in favor of such person; and though it may be probable, or even apparent, that the testator is influenced in the disposition of his property by this mistake, yet there is no necessary implication that, in the event of the failure of the supposed title, he would give to the person that benefit to which it is assumed he is entitled.

Thus, where (b) a testator bequeathed unto A., his wife, 600*l.*, to be paid to W., saying it was for payment of lands lately purchased of W., *and was already estated as part of a jointure to A. his wife during her life*, being of the value of 67*l. per annum;* that of Wiskow, York, and Malton, the lands there amounting to the yearly value of 63*l.*, in all 130*l.*, which, *being also estated upon A. his wife, was in full of her jointure.* It appeared that these lands had not been settled on the wife. And it was held by Pollexfen, C. J., Rokeby, and Ventris (Powell, J., *dissentiente*), that these expressions did not amount to a devise to the wife, for it appeared "that the testator did not intend to devise her anything by the will, for he mentions that she was estated in it
*526 * before." Powell, J., relied upon a case (c) in which "I have made a lease to J. S., at 10*s.* rent," was held to be a good

[(a) Nothing contrary to law can be implied, per Turner, L. J., 26 L. J. Bank. 83.]
(b) Wright *v.* Wyvell, 2 Vent. 56.
(c) Moore, 31.

devise; but the other judges considered the case to be of little authority.

So, where (*d*) J. S., tenant for life, with remainder to his wife for life, remainder to his own right heirs, expressed himself in his will as follows: "*Item*, my land at W. my wife Mary is to enjoy for her life, and after her death it of right goes to my daughter E. forever, provided she has heirs." The court held that the first clause was not a devise to the wife, for the lands were settled upon her for life; and what was said as to the daughter was only a declaration of the devisor what the condition of the estate was, and how she was to enjoy it; and he could not say of right who was to enjoy them, if she claimed under the will.

Again, where (*e*) B., by his will, reciting that he was entitled for life, under the will of A., to the advowson of the rectory of D., with remainders over, "subject to a direction in the said will, that my brother J. D. shall be presented to said rectory when it shall next become vacant, which it is my wish may be complied with; now, I hereby declare it to be my desire and earnest wish, that in case upon the vacancy of the said living the said J. D. shall not be then living, or in case the said rectory shall again become vacant after the said J. D. shall have been presented to and accepted said presentation, then" A. P. was to be presented. The fact was, that, under the will of A., J. D. was only entitled to the presentation on a certain contingency which had not happened. The question then arose, whether the expressions in the will of B. raised a gift in him by implication, so as to put the persons actually entitled under the will of A., who took benefits under the will of B., to their election. Lord Eldon decided in the negative, observing that he found no authority for holding mere recital, without more, to amount to gift, or demonstration of intention to give.

[And in Adams *v.* Adams (*f*), a devise and bequest to trustees * of real and personal estate, *527 subject to the dower and thirds at common law of the testator's wife in and out of his real estates (the testator's interest therein being an equity of redemption and not liable to dower), upon trust to receive the income, and pay the same or the overplus thereof after deducting the dower or thirds of his said wife for the maintenance of his children, was held not to give the wife by implication a rent-charge equal to what dower out of the whole estate would have amounted to.] Adams *v.* Adams.

(*d*) Wright *alias* Right *v.* Hammond, 1 Stra. 427, 1 Com. Rep. 231, 8 Vin. Abr. 110, Devise, L. 2, pl. 32, 2 Eq. Ab. 338, pl. 11.

(*e*) Dashwood *v.* Peyton, 18 Ves. 27; and see Doe d. Vessey *v.* Wilkinson, 2 T. R. 209, stated Ch. XXV. s. 3; [Lane *v.* Wilkins, 10 East, 241, ante, p. 201. See also Smith *v.* Maitland, 1 Ves. Jr. 362; Langslow *v.* Langslow, 21 Beav. 552; Circuitt *v.* Perry, 23 Beav. 616; Box *v.* Barrett, L. R. 3 Eq. 244.] But see also Poulson *v.* Wellington, 2 P. W. 533; Wilson *v.* Piggott, 2 Ves. Jr. 351; both which, however, arose on dispositions by deed.

[(*f*) 1 Hare, 537; see also Doolan *v.* Smith, 3 J. & Lat. 547; Ralph *v.* Watson, 9 L. J. Ch. 328; and cf. West *v.* Culliford, 3 Hare, 265, where the words were more properly words of original charge than of recital.

Reference by testator to a disposition made in that his will.

It seems, however, that if a testator unequivocally refer to a disposition as made in that his will, which, in fact, he has not made, the intention to make such a disposition, at all events, will be considered as sufficiently indicated. [In such cases, "the court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift," differing, in this respect, from the cases in which "the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, and in which the recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication" (*g*).]

Thus, where (*h*) a testator bequeathed one moiety of certain leasehold estates to E.; and if she should die before twenty-one, to G.; and if he should die before a certain event, to another person; and after her death to A.; and provided that in case A. should die without issue, and E. or G. should be then living, or either of them, the *said* moiety of his leasehold messuages, *before given to the said A., should go to E. and G.* Sir T. Sewell, M. R., thought it quite clear that the second devise related to the other moiety not before devised, as the manner in which it was given was inconsistent with the disposition of the first moiety, which A. was not to take until after the death of E. and G. He further held, that the court would imply a gift of the second moiety to A. and her issue ([the issue taking, since there was no gift over except on the death of A. without issue]), with contingent limitations over. There could, he said, be no doubt of the intention, and the words of gift being omitted by mistake, the court would supply them.

*528 * ["Implication," said Lord Westbury in Parker *v.* Tootal (*i*), "may either arise from an elliptical form of expression, which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction." The case in which this was said affords an example of the former kind of implication, a devise "to the first son of T. severally and successively in tail male" being read as a devise "to the first and every other son;" otherwise the phrase "severally and successively" would have been without meaning.

Assumption by testator that his will contains a devise.

(*g*) Per Wigram, V.-C., Adams *v.* Adams, 1 Hare, 540; and per Lord Brougham, Yates *v.* Thomson, 3 Cl. & Fin. 572. The difference appears to have been overlooked in Hall *v.* Lietch, L. R. 9 Eq. 376. A direction to pay debts, including one described as owing by the testator but overstating its amount, will generally belong to the latter category mentioned in the text, and not entitle the creditor to the larger amount. Wilson *v.* Morley, 5 Ch. D. 776.]

(*h*) Bibin *v.* Walker, Amb. 661. [As to Frederick *v.* Hall, 1 Ves. Jr. 396, *qu.*

(*i*) 11 H. L. Ca. 143, 161.

Implication of the latter kind described by Lord Westbury is seen when from a direction that certain persons shall deal with the rents of an estate in a particular manner, a devise of the estate to those persons has been implied (*k*); or when from a direction to invest real and personal estate is implied a trust to sell the real estate (*l*).

But a gift which is confined by unambiguous terms to a specific part of a testator's property, as a bequest of "all his capital in ready money and bank billets," will not be extended so as to include the entire personalty by a mere introductory clause declaring the testator's intention to dispose of all his property. It would be different if the testator himself referred to the bequest as including all his property (*m*).

Again, in Jordan *v.* Fortescue (*n*), under a gift by codicil of "500*l.*, in addition to 1,500*l.* before bequeathed" to the same person, there having, in fact, been only two legacies of 500*l.* each bequeathed to him by will and first codicil, it was held that there was a gift by implication of 2,000*l.* But it must be remembered, that though words such as those used in the last case may by implication effect an increase in the amount of the first gift, yet the rule that a clear gift is not to be cut down by subsequent words of doubtful import prevents them from having * any operation where their *529 effect would be by implication to diminish the first gift (*o*). Jordan *v.* Fortescue.

And where a testator expresses an intention to make up a person's existing fortune, derived either under his own will or from other sources, to a certain sum, and for that purpose gives a legacy which proves to be insufficient, the legatee shall, nevertheless, have the sum specified and intended for him. Thus, in Ouseley *v.* Anstruther (*p*), where a testator, reciting that under a settlement his wife would have an income of 1,560*l.*, directed his trustees to add an annuity of 440*l.*, so as to raise his wife's jointure to 2,000*l.*; the income under the settlement being less than was supposed, the wife was, nevertheless, held entitled to have it made up to 2,000*l.* In the converse case of the income being more than the testator supposed, the wife would have been entitled only to the 2,000*l.* (*q*). Intention to give what will make up a certain sum.

And in Ives *v.* Dodgson (*r*), a testatrix, upon a contingency which (as she showed by her will) she expected not to be (and which was not) ascertained until after her own death, bequeathed a life-annuity of

(*k*) See Ex parte Wynch, 5 D. M. G. 221, and cases there cited. See also Newburgh *v.* Newburgh, Sug Law of Prop. 367: a devise of the estates in the omitted county (see above, p. 412) was implied from the name and arms clause, the leasing power, and other parts of the context. And see Langston *v.* Langston, 2 Cl. & Fin. 194, and other cases, ante, p. 491 *et seq.*

(*l*) Affleck *v.* James, 17 Sim. 121.

(*m*) Wylie *v.* Wylie, 1 D. F. & J. 410. See also cases cited Ch. XXXIII. s. 4, showing the inefficacy of the word "estate," occurring in the introductory clause of a will to pass the fee-simple.

(*n*) 10 Beav. 259; see also Hayes d. Foorde *v.* Foorde, 2 W. Bl. 698; Edmunds *v.* Waugh, 4 Drew. 275; Farrer *v.* St. Catharine's College, L. R. 16 Eq. 24.

(*o*) Mann *v.* Fuller, Kay, 624; Gordon *v.* Hoffman, 7 Sim. 29, ante, p. 181.

(*p*) 10 Beav. 459. Compare Thompson *v.* Whitelock, 5 Jur. N. S. 991.

(*q*) Milner *v.* Milner, 1 Ves. 106; Trevor *v.* Trevor, 5 Russ. 24.

(*r*) L. R. 9 Eq. 401.]

40*l.* to A.; she then bequeathed to A. 30*l.* free of duty, and afterwards by codicil said: "I increase the *immediate* annuity of 30*l.* left by my will to A. to an annuity of 50*l.* duty free." It was held by Sir W. James, V.-C., that the plain meaning of the words of the codicil was that A. was to have an annuity of 50*l.* in addition to the contingent annuity of 40*l.*

In these cases, it will be noticed, there were words of gift as well as of recital.]

And even where the testator has evidently mistaken the law respecting the devolution of his property, yet, if he has by his will shown very clearly an intention that it shall devolve according to such mistaken notion, the intention will prevail. An early case (*s*) presents a very nice question of this nature.

Reference to a person as heir held to create a devise by implication to that person.

A testator having issue by C. three daughters, S., A. and E., devised to C. for life all his freehold wherever, until S. his heir came to twenty-one, paying to the heir 10*s.* during the term, and to the rest, after fifteen years old, 20*s.* apiece, and the heir to pay to A. and E. 100*l.* apiece, 40*l.* at the decease of the wife, &c.; and if S. his heir died without heir before twenty-one, so that the lands descended and fell to A., then A. to pay to E., &c. *530 * It was argued that S. took nothing under the will by implication, there being no express devise to her. But, on the other side, it was contended that S. was sole heir; for it was all one to devise to her as to make a stranger heir of his land; and here the daughter S. was not sole heir unless made so by the intent of the will, which six times called the eldest daughter his heir; otherwise A., the younger daughter, would have equal share in the land and also the legacies. Hale, C. J. — "The testator was mistaken in his intent that the eldest daughter was his heir, but intended his lands should go according to that mistake: also she that is called heir is to pay the portions to the younger daughters, and no provision is made for her. Therefore, albeit there is no express devise to S., yet, she being named his heir, this is sufficient to exclude the rest, and to make her sole heir" (*t*).

But the disposition of a will will not be disturbed by an erroneous recital of its contents in a codicil, unless a design to revoke or modify the disposition in the will can be fairly collected from the whole instrument.

Erroneous reference in codicil to the disposition of the will.

Thus, where (*u*) a testator, after bequeathing certain legacies to his wife, devised to her for her life certain leasehold premises at Northwood, and he gave his leasehold estate at Wrentnall, and his estate at Northwood, after his wife's death, and the residue of his estate, to other persons. In a codicil, exe-

(*s*) Tilley *v.* Collyer, 3 Keb. 589.
(*t*) See Taylor *v.* Webb, Sty. 331, ante, p. 357, n.; [Parker *v.* Nickson, 1 P. J. & S. 177. Compare Jackson *v.* Craig, 15 Jur. 811.]
(*u*) Skerratt *v.* Oakley, 7 T. R. 492.

cuted on the same day, he directed that the bequest to his wife in his will should be in full of all her claims on his estate, except the estate for life of his "wife and her assigns, in the premises at Wrentnall, any thing in the foregoing will to the contrary notwithstanding." It was contended, that the widow was entitled to the Wrentnall estate, under her husband's codicil, it being manifest by the concluding clause that he intended to give her something to which she had no right by the will; but the court decided against the widow's claim. Lord Kenyon said, that the intention must be collected from the will and codicil taken together,[1] and it was impossible not to see that the word "Wrentnall" was written in the codicil instead of the word "Northwood."

[So in Vaughan *v.* Foakes (*x*), where a testatrix bequeathed *the residue of her estate to A., and by a codicil, reciting that *531 gift, and that A. might die before her, she in that case appointed B. and C. her residuary legatees; and afterwards the testatrix made a second codicil to "her former one," as follows: "As the death of Mrs. W. (the mother of B. and C.) has taken place, and as her two children will ultimately become my residuary legatees, the 15*l.* she was to have I give to D." It was held by Lord Langdale, M. R., that the first codicil was not disturbed by the second. "There is a misrecital," he said, "of what she had previously given: she recites that as an absolute which is only a contingent gift; if the word *may* had been used, instead of *will*, the recital would have been in exact conformity with the prior gift."

Misrecital of disposition in the same instrument.

But this principle of construction is not confined to the case of a will and codicil; it has also been applied to a misrecital occurring in the same instrument as the disposition sought to be disturbed. Thus, in Smith *v.* Fitzgerald (*y*), where a testator bequeathed several legacies to be paid out of the debt owing to him from the Nabob of A., and if any of the legatees died before him he gave their legacies to S., and "after all the legacies are paid (except those mentioned from the Nabob's debt, as they may require time) all such balance as shall remain overplus (exclusive of the Nabob's, *willed to S.*) to be equally divided among the trustees," it was held by Sir W. Grant, M. R., that the residue of the debt not exhausted by the legacies was not given to S. by implication. He said: "The language refers to something as already done, something that he had given or supposed he had given to (S.). If in the preceding part there was nothing that could in any way answer the description of what he here says he had willed to (S.), there would then be room for the application of the doctrine, that a declaration by a testator that he had given something is

[(*x*) 1 Kee. 58; see also Bamfield *v.* Popham, 1 P. W. 54, 2d point; Re Smith, 2 J. & H. 594; Re Arnold's Estate, 33 Beav. 163; Richardson *v.* Power, 19 C. B., N. S. 780 (on same will); Mackenzie *v.* Bradbury, 35 Beav. 617.

(*y*) 3 V. & B. 2; see also Phillips *v.* Chamberlaine, 4 Ves. 51.

[1] Westcott *v.* Cady, 5 Johns. Ch. 343.

sufficient evidence of an intention to give it, and amounts to a gift; but the question here is, whether he did not mean to describe, however inaccurately, that which he had before actually given. Without denying that the recital of a gift as antecedently made may amount to a gift, the court ought to see very clearly that there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest."

Ambiguity in will controlled by recital in codicil.

Where, however, the terms of the prior disposition *532 are *themselves ambiguous, their construction may properly be guided by a recital couched in more precise language in a codicil. Thus, in Darley *v.* Martin (*a*), where a testator bequeathed leaseholds to A. for life, and after her death to her issue, and "in default of such issue," to B.; and, by a codicil, recited that he had bequeathed the leaseholds to B. after the death of A. and "in default of her *leaving* lawful issue;" it was held, that the gift over in the will being capable of importing a bequest over if no issue were living at the death, it ought to be inferred that the testator employed it in that sense, because in the codicil he referred to it as if it were a gift over in default of A.'s *leaving* issue.]

II. It is a well-known maxim, that an heir at law can only be disinherited by express devise or necessary implication,[1] and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed (*b*).[2]

Necessary implication, what.

1. As to real estate.

In the application of this principle one chief topic of controversy has been, how far a devise to any person, in the event

(*a*) 13 C. B. 683; see also per Lord Brougham, 10 Cl. & Fin. 17; Grover *v.* Raper, 5 W. R. 134.

(*b*) 1 V. & B. 466; "necessary implication is that which leaves no room to doubt," per Lord Mansfield, in Jones *v.* Morgan, Fearne, C. R. App. No. III.; and see 3 Ves. 113.]

[1] See Hayden *v.* Stoughton, 5 Pick. 528, 536; Ker *v.* Wauchope, 1 Bligh, 25, 26; Schauber *v.* Jackson, 2 Wend. 13; Van Kleeck *v.* Ref. Dutch Church, 6 Paige, 600; Jackson *v.* Schauber, 7 Cow. 187; Bender *v.* Dietrick, 7 Watts & S. 284. The intention to disinherit the heir is always necessary to raise an estate by implication. Roosevelt *v.* Fulton, 7 Cowen, 71; Jackson *v.* Schauber, 7 Cow. 187.

[2] Howard *v.* American Peace Soc., 49 Me. 288; Thomas *v.* Thomas, 6 T. R. 671; Roosevelt *v.* Fulton, 7 Cowen, 71; Jackson *v.* Schauber, 7 Wend. 187; S. C. 2 Wend. 13; Van Kleeck *v.* Reformed Dutch Church, 6 Paige, 600; Bender *v.* Dietrick, 7 Watts & S. 784; Putnam, J., in Hayden *v.* Stoughton, 5 Pick. 528, 536; Chinn *v.* Respass, 1 T. B. Mon. 25; Wilde, J., in Grant *v.* Hapgnod, 13 Pick. 159, 164. When there is an express devise there is no room, generally speaking, for resorting to implication. It is only when words of devise are wanting, that this necessity arises. "Before an implication is raised," observes Sir W. Grant in Patton *v.* Randall, 1 Jac. & W. 196, "there must be an absence of express devise, and in opposition to a devise it can never be raised." "But if," says Walworth, Ch., in Rathbone *v.* Dyckman, 3 Paige, 27, "the particular devise or request cannot be reasonably accounted for except upon the supposition that the testator intended to make the corresponding disposition of other parts of his property, or of previous estates therein, the court will carry into effect the intention of the testator by implying such corresponding disposition." Thus, it is well settled, that when there are trusts to be executed, which require for their effectual execution an estate in fee, such an estate will be implied. Oates *v.* Cooke, 3 Burr. 1686; Deering *v.* Adams, 37 Me. 264. 273, 274. So, too, implication may be resorted to even in cases of an express devise if the nature of the estate devised be not stated. Thus, in the case of a gift of an estate to A., another to B., A. takes by implication a life-estate. Sisson *v.* Seabury, 1 Sumn. 235; Hill *v.* Thomas, 11 S. Car. 346, 359. But it is said that this rule is not to be applied to gifts of personalty. White *v.* Green, 1 Ired. Eq. 45.

of the non-existence or on the decease of another, indicates an intention to make the last-named person a prior object of the testator's bounty. In such cases it is probable that the person, whose non-existence is made the contingency on which the devise over is to fall into possession, is placed in this position for the purpose of taking the property in the first instance; and this probability is, of course, greatly strengthened, if the devisee is the person on whom the law, in the absence of disposition, would cast the property. Hence it has become a settled distinction, that a devise *to the testator's heir* after the death of A., will confer on A. an estate for life by implication; but that, under a devise to B., *a stranger*, after the death of A., no estate will arise to A. by implication (*c*). This is an exact illustration of the difference between necessary implication and conjecture.[1] In the former case, the inference that the testator intends to give an estate for life to A. is irresistible, as he cannot, without the grossest absurdity, be supposed to mean to devise real estate to his heir at the death of A., and yet that the * heir should have it in the *533 meantime, which would be to render the devise nugatory. On the contrary, where the devisee is not the heir, however plausible may be the conjecture, that by fixing the death of A. as the period when the devise to B. was to take effect in possession, the testator intended A. to be the prior tenant for life, yet it is *possible* to suppose that, intending the land to go to the heir during the life of A., he left it for that period undisposed of. In some cases, indeed, we find it laid down without any qualification, that a devise to B. upon the death of A., raises an implied estate in A.; but such *dicta*, even if accurately reported (which is often doubtful), cannot weigh against the current of authorities, grounded on acknowledged principles of law (*d*).

Devise to the heir after the death of A. gives A. an estate by implication.

Of course, it is not essential to the doctrine that the will should describe the devisee as the heir apparent or heir presumptive of the testator. Thus, a devise "to my eldest son B. after the death of A.," would raise an implied estate for life

Devisee need not be described as heir.

(*c*) Year Book, 13 Hen. 7, fol. 17; Bro. Ab. Dev. pl. 52; 8 Vin. 214, pl. 5; 2 Freem. 270; T. Jon. 98; Vaugh. 263; 1 Eq. Ab. 197, pl. 6; 1 Vern. 22; 2 Vern. 572; 5 Ves. 804; 18 Ves. 40; 1 Mer. 414; 1 S. & St. 544; 5 B. & Ald. 722; 9 B. & Cr. 218; but see *contra*, 1 P. W. 472; 2 Eq. Ab. 343, pl. 5, 363, pl. 14, which seems inconsistent with, and is overborne by, the mass of authorities. The point, indeed, was not definitively disposed of.

(*d*) Ex parte Rogers, 2 Mad. 455; see also Den d. Franklin *v.* Trout, 15 East, 398, where, however, the person in whose favor it was said the implied gift would have been raised, was himself heir, and the point, therefore, could not have arisen.

[1] Devises by implication are sustainable only upon the principle of carrying into effect the intention of the testator; and unless it appears upon an examination of the whole will, that such must have been his intention, there is no devise by implication. Rathbone *v.* Dyckman, 3 Paige, 9; Browne *v.* De Laet, 4 Bro. C. C. 534, 535, and Mr. Eden's note (*a*); Lytton *v.* Lytton, 1b. (Perkins's ed.) 460, 461, notes; Grout *v.* Hapgood, 13 Pick. 159, 164; Ferson *v.* Dodge, 23 Pick. 293, 294; Deering *v.* Adams, 37 Me. 264. An implication may be rebutted by a contrary implication equally strong, Rathbone *v.* Dyckman, 3 Paige, 9. But courts are not permitted to give an effect to the will of a testator contrary to the plain and obvious import of the terms used by him, upon a mere conjecture as to his intention. Manigault *v.* Deas, Bail. Eq. 298.

in A., the fact being that B. is the heir apparent, though not designated as such. The authorities do not distinctly inform us, however, whether, in order to raise the implication, the devise must be to the person who, according to the state of events at the making of the will, would be the testator's heir, or the person who eventually becomes such. The former seems to be the preferable doctrine; for to treat it as applying to the eventual heir, would be to construe the will according to subsequent events, in opposition to a fundamental principle of construction. If, therefore, a testator having two sons, A. and B., devise real estate to B. (the younger son) after the decease of his (the testator's) wife, this would not, it is conceived, give to the wife an estate for life by implication, though it should happen that, by the decease of A., the elder son, without issue in the testator's lifetime, the younger son (*i. e.* the devisee) had become his heir. On the other hand, if a testator, whose issue was an only daughter, devised real estate to such daughter after the death of his wife, and it happened that he had a son afterwards born, who survived him, the sound conclusion would seem to be, that the wife *would* take an implied estate for life, though the ulterior devisee was not in event the testator's heir; the result, in short, being that the implication occurs wherever the express devise is to the person who is the testator's heir apparent or presumptive at the *date of the will, and not otherwise (*e*). Perhaps, when the distinction between a devise to the heir and to a stranger was originally established, the difficulty attending the application of the doctrine to an heir or heiress presumptive, who is liable to be superseded by the birth of a son of the testator, was not sufficiently considered.

Whether devisee must be heir *at the death.*

*534

It has been said that the implication arises in the case of a devise as well to one of several coheirs, as to a sole heir; and, thereto one of several coheirs. fore, that where a man devises to one of his two daughters (his coheiresses), after the death of his wife, she (the wife) takes an estate for life by implication (*f*). This, it must be admitted, is a considerable extension of the doctrine, and carries it beyond the principle on which it is founded, since there seems to be not the same absurdity in supposing a testator to give to *one* of his coheiresses after the death of another person, intending it to descend to *all* in the meantime, as where the devisee is the same and the *only* individual upon whom the intermediate interest would have descended. The point, too, rests rather on *dictum* than decision, for the case in which Lord Cowper advanced this position was decided upon another point, and it is not to be found in the contemporary reports of the same case; but it was referred to *arguendo* as a settled rule of law in another case (*g*).

In cases, too, which are the converse of the last, viz., where there is

[(*e*) See acc. per Cur. Ralph *v.* Carrick, infra.]
(*f*) Hutton *v.* Simpson, 2 Vern. 723; S. C. nom. Simpson *v.* Hornby, Gilb. Eq. Rep. 115.
(*g*) Willis *v.* Lucas, 1 P. W. 472.

a devise to the heir and other persons after the decease of A.,[1] the implication would seem, looking at the reason and principle of the doctrine, not to arise (as there is no incongruity in the supposition that the testator intended the heir to take a share at the period in question, and the entirety in the meantime). [Accordingly in Ralph *v.* Carrick (*h*), where a testator gave all his real and personal property, in trust to be converted and out of the proceeds to pay debts and legacies, and in the event (which happened) of his death without lawful issue, *and after the death of his wife* and payment of debts and legacies, the whole residue of his property real and personal to be divided in specified proportions among the children of his late aunts (naming them), the descendants of any child then dead taking the share of its deceased parent; and he directed the surplus proceeds of his real estate to be invested to provide for the jointure payable to his wife under their marriage settlement. It was held that, although * the testator's coheirs and next of kin (*i*) were included among the children of his aunts, the wife did not take a life-estate by implication. Sir C. Hall, V.-C., relied on the circumstance of the gift being to an unascertained class, and also on the clause expressly providing for payment of the wife's jointure out of the very fund in which she claimed a life-estate, as repelling the implication. But the L. JJ. proceeded entirely on the general principle that a devise to the heir and another after the death of A. will not raise a life-estate by implication in A.: for as heir he takes the whole, while as devisee he takes a share only. The same principle must, it should seem, govern the case of a devise after the death of A. to one of several coheirs.

Devise to heir and others after the death of A.

Ralph *v.* Carrick.

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Sir H. Cotton pointed out the fallacy of a proposition urged at the bar in this case, and which sometimes of late has been heard even from the bench — that, subject to the established rules, the duty of the court was to construe the will as a person of ordinary intelligence would do, and that no such person would doubt that in this case the testator intended the widow to have a life-estate. "Of course," said the L. J., "we are bound by the rules which have been established by the courts to enable us to say what the words used do mean. Subject to that we are bound to construe the will as trained legal minds. And that differs from the mind of an ordinary person in this way, that even persons of ordinary intelligence not so trained are accustomed to jump at the conclusion as to what a person means by the words he uses by fancying he must have done what they under similar circumstances think they would have done. That is conjecture only: and conjecture on an imperfect knowledge of the circumstances:

Theory of construction by "ordinary intelligence."

[(*h*) 5 Ch. D. 984, 40 L. T. N. S. 505.
(*i*) But on this question the widow must be reckoned among the next of kin.]

[1] See Dashwood *v.* Peyton, 18 Ves. (Sumner's ed. 27, 49,) Mr. Hovenden's note (4); 4 Kent, 541, and note.

because although, if the facts before them and in evidence were all the facts, they may think that they would have taken a particular course, yet it does not follow that all the facts known to the testator are in their minds or in evidence before them, or that the testator's mind was in any way constituted as regards the attention he paid to the rights and claims of the different parties dependent on him, as their minds are constituted, or that he would have acted in the same way as they. Therefore as lawyers we must construe the will like any other document," with one difference only, namely, that technical words are unnecessary in a will.

In the previous] case of Blackwell *v.* Bull (*k*), where a testator *536 *devised in the following words: "In the first place, my will and wish is, that my business of a cheesemonger be carried on by my wife and my son jointly, for the mutual benefit of my family; and I likewise will and devise in trust all my property, for the following purpose, that is to say, that, *at my wife's decease*, the whole of my property, of whatever nature or description, as well freehold as personal, shall be equally divided amongst my children, J., R., W., M., and C., their executors or assigns." One of these children was the heir-at-law. Lord Langdale, M. R., [without adverting to this fact, said, "As to the property not engaged in the trade], though the case as regards the real estate is not without difficulty, yet on the whole will, and what appears to me the evident intention, I think the widow is entitled to a life-interest in both the real and personal estate." [It seems, therefore, that the M. R. did not intend to decide the general question; upon which, at all events since Ralph *v.* Carrick, it cannot be deemed an authority. Referring to this and other cases Sir C. Hall, V.-C., said that in several of them the interest of "the widow was *more or less* connected with the carrying on of a business and supporting a family, which seemed to have been *a sort of* indication as to how the property was to be enjoyed during her life" (*l*).]

Distinction where there is an express anterior devise of part to the person on whose death devise is to take effect.

Where, however, there is an anterior express devise for life of part of the lands to the person on whose decease the devise in question is to take effect, the implication has been sometimes avoided, by having recourse to what may, for convenience of distinction, be called the distributive construction, by which the words *after the death* are applied exclusively to the lands devised expressly for life; and the words of devise, without these expressions of postponement, are applied to the rest of the property, which, therefore, passes immediately to the devisees: a construction which, doubtless, was adopted in the first

(*k*) 1 Kee. 176.

[(*l*) 5 Ch. D. 995. The V.-C. gave a very similar explanation of Cockshott *v.* Cockshott, 2 Coll. 432, where the widow was held to take a life-estate by implication in estates upon which in a certain event a life-annuity in her favor was expressly charged by the will: and this, by virtue of a clause postponing "possession" by express devises until the wife's death. But as to a similar clause added by codicil, see Barnet *v.* Barnet, 29 Beav. 239.]

instance on account of the improbability that a testator should intend a person, to whom he had expressly given part, to take the rest by implication. But the rule seems not to have been restricted (as this reasoning would imply) to cases in which the devise over is to the heir, but has obtained where such devise was to a stranger, and in which, as the estate would, if the devise were postponed, * devolve to the heir in the meantime, and not belong to the devisee for life by implication, there would seem to be no reason for denying to the words of postponement their full effect, in regard to all the subjects of devise. *537

Thus, in Cook *v.* Gerrard (*m*), where the testator Sir R. Kempe, being seised of demesne lands in fee, and also of the reversion of other lands expectant on the death of A., directed that his wife should have the demesne lands for one year after his death; and then, after stating that he was desirous to continue the capital messuage in the name and blood of the Kempes, he devised the demesnes and the *reversion* to B., *habendum* immediately from the expiration of one year next after his decease, and the decease of A., for the life of B., he doing no waste. The testator further directed that B. should, after the death of A., pay three annuities of 20*l.* each by half-yearly payments. The testator died, and the year expired. It was contended that, in order to effect the intention of the testator, the words must be taken distributively: First, because if the lands descended to the testator's daughter and heir, she might change her name by marriage, and then his intention that the demesne lands should remain in the name of the Kempes would be defeated. Secondly, if A. died within the year after the testator, the annuities given by the will could not be paid, unless B. took the land immediately after the death of A., notwithstanding the year was not expired (*n*). And, thirdly, if the demesne lands should descend to the heir in the meantime, until the death of A., then he might commit what waste he pleased, and there would be no means to prevent it, which would be directly against the true meaning of the testator. The court of K. B. held, that the words of the will should be taken distributively, and that B. had good title to the demesne lands after the expiration of the year, and before the death of A. Cook *v.* Gerrard.

So, in Simpson *v.* Hornsby (*o*), where a testator devised to his wife for life all his lands in J., *and after the death of his wife*, he devised all his lands in J., *and certain other lands, and all other his real estate whatsoever*, to his daughter B. and the heirs of her body with remainder to his daughter J. for life, with remainder to his first and other sons in tail. Lord Cowper was of opinion that Simpson *v.* Hornsby.

(*m*) 1 Saund. 183, [cited 9 B. & Cr. 225.]

(*n*) This argument supposes, that if both were postponed for the life of A., then both would be postponed for the year.

(*o*) 1 Pre. Ch. 439, 452, 2 Vern. 723; stated from R. L. 9 B. & Cr. 228; see also Boon *v.* Cornforth, 2 Ves. 276, where, however, the construction was aided by the context.

*538 the wife took nothing by implication, and that she was * entitled to a life-estate in only those lands which were expressly devised to her; and that the rest of the real estate was intended to pass by the will immediately to B.

Doe v. Brazier.

Again, in Doe d. Annandale *v.* Brazier (*p*), where the testator gave to B. the rents of a messuage situate in A., for his life, *and after the decease of the said B.*, he gave the same rents, *together with* the rents of all his other houses and lands in A. aforesaid, unto certain persons for their lives and the life of the survivor, with remainder over. The question was, whether these devisees were entitled to the *other* lands at A. immediately on the testator's decease, or not till after the death of B.; and it was decided, that the words "from and after the decease of the said B." were to be confined to the lands devised to B. for his life, and did not postpone the interest of the devisees in question in the rest until that period (*q*).

Aspinall v. Petvin.

A different construction, however, prevailed in Aspinall *v.* Petvin (*r*), where a testator devised his real estate to trustees, in trust to pay one moiety of the rents to his wife E. for life, and the other moiety to his son W. (who was his heir at law), *and after the death of his said wife*, upon trust to convey the said hereditaments unto W. in fee; but if he died without issue in the lifetime of the wife, then, upon trust, *after the death of the wife*, to convey the same to testator's nephew J. in fee. W. died without issue in the lifetime of the wife; and the question was, whether J. was entitled immediately to the moiety of the rents not expressly devised to the wife, and, if not, whether she did not take it by implication (*s*). Sir J. Leach, V.-C., after very clearly laying down the general rule as before stated, considered this to be the common case of a devise to a stranger after the death of A.; and that, accordingly, no estate was raised in E. by implication, but the moiety in question for her life descended to the testator's heir at law.

Remarks on Aspinall v. Petvin.

*539 * It is remarkable that the point suggested by the class of cases under consideration was not presented to the view of the court in this case, namely, that the words referring to the death of the wife applied exclusively to the moiety before devised to her, and did not prevent J. from taking the other moiety

(*p*) 5 B. & Ald. 64.

[(*q*) See also Dyer *v.* Dyer, 1 Mer. 414; Drew *v.* Killick, 1 De G. & S. 266, (where the words of the will seemed to point to the distributive construction); Simmons *v.* Rudall, 1 Sim. N. S. 115 (devise in fee with executory gift over to strangers of that "together with" the residue).]

(*r*) 1 S. & St. 544. It was ingeniously argued that, as J. was heir, as well to the testator *as to W.*, in the event on which the estate was given to him, namely, the death of W. without issue, it came within the principle of the case of an estate given to the heir after the death of the widow; but the answer to this is, that in those events, the vacant interest did not *necessarily* devolve upon J., as W. in his lifetime might have devised or otherwise aliened it; and, consequently, the argument founded on the absurdity of his taking both did not apply; [but see Doe d. Driver *v.* Bowling, 5 B. & Ald. 722.]

(*s*) No arguments appear to have been advanced in favor of the hypothesis, that if the widow did not take, it descended to the heir.

immediately; but, perhaps the frame of the will scarcely admitted of such a construction. The words "after the death of my wife" had been just before used in reference to both moieties in the devise to the son, and the terms of the *executory trust* seemed to import that no conveyance was to be made to J. until the death of the wife. This decision, therefore, appears not to clash with the preceding cases, which might seem to have established the distributive construction as the ordinary rule; but we are taught not so to consider them by a decision, in which all the cases in favor of this construction were treated as standing on special grounds, and as constituting an exception to the general rule.

Distributive construction not the general rule.

The case here alluded to is King *v.* Inhabitants of Ringstead (*t*), where a testator devised to the widow of his late son T. M. part of a messuage, to hold to her and her assigns for the term of her natural life, if she should so long continue a widow; *and from and after her decease or day of marriage*, he gave the same and *other real property therein mentioned*, unto the four children of his late son T. M. deceased, their heirs and assigns forever. It was contended on the authority of the preceding cases, that the words were to be construed distributively, and, consequently, that the children took an immediate estate in possession in the property not devised to the wife; but the court, after taking an elaborate view of those cases, and showing that in each of them the intention of the testator, as collected from the context of the will, required such a construction, considered that they did not apply to the will under discussion, where the words must be construed in their ordinary grammatical sense. It was held, therefore, that, until the death or marriage of the son's widow, the estate not devised to her descended to the testator's heir at law.

It will be perceived that, as in this case the widow took no implied estate (the express devise on her decease or marriage, not being to the heir of the testator), the construction adopted by the court did not involve the difficulty of giving by implication to a person, in the lands not expressly devised to her, an estate corresponding to that which she derived in the lands so devised, in opposition to the maxim, "expressio unius est exclusio * alterius." Had it been attended with this result, the conclusion of the court might have been different. Possibly the distributive construction will, in future, be (as it ought originally to have been) restricted to such cases; but, considering how extremely slight is the difference of language in the will which was the subject of adjudication in King *v.* Ringstead, and in some of the preceding cases, particularly Simpson *v.* Hornsby, it must be confessed that King *v.* Ringstead does not place the doctrine on such a footing as to exclude future controversy.

Remarks upon King *v.* Ringstead.

*540

[The suggestion that the distributive construction will be restricted to cases where the postponed devise is to the heir at law finds

(*t*) 9 B. & Cr. 218.

King v. Ringstead followed.

support in Attwater *v.* Attwater (*u*), where a testator gave to his cousins A. and B. his freehold house and premises, for their use during the life of each; and at the decease of both gave the same to C., a son of his niece, to be retained in the family forever, together with his copyhold and leasehold property at N. C. was not the testator's heir at law or next of kin, and Sir J. Romilly, M. R., said that although there was considerable conflict between the authorities, he considered that the case was governed by the rule laid down and settled by King *v.* Ringstead; that C., therefore, took nothing in the copyholds and leaseholds until after the decease of both A. and B., and that the customary heir (who was also sole next of kin) took the intermediate interest.]

Effect of residuary devise in excluding the implication arising from devise to heir.

The position that a devise to the heir after the death of A. creates in A. an implied estate for life, supposes that the will does not contain a residuary devise; for a clause of this nature would, by disposing of such intermediate estate, and thereby intercepting the descent to the heir, clearly exclude all ground for the implication. Thus, if a testator devises Whiteacre to his heir apparent or heir presumptive after the death of his wife, and in the same will devises the residue of his real estate to A. (a stranger), since the estate for life, not included in the devise to the heir, would, if no implied gift were raised, pass to A. as real estate not otherwise disposed of, which might possibly be intended, the residuary devisee, and not the wife, would, it is conceived, take the estate during her life (*x*).

Application of doctrine to residuary devises.

Another remark is, that where the will contains a residuary disposition of real estate, a devise of particular lands to the *541 residuary devisee, to take effect in possession on the decease of another person, supplies exactly the same argument for implying an estate for life in that person, as a similar devise, in the cases already discussed, to the heir; for to suppose that the testator intends lands, which he has specifically devised to the residuary devisee at the death of A., to go to him in the meantime under the residuary clause, involves precisely the same absurdity as to suppose that an heir is intended to take immediately what is expressly given to him at a future period; and, therefore, in the case supposed, A. would, undoubtedly, have an estate for life by implication.

Whether a gift to all after-born children implied in a gift to posthumous children.

[It was decided in one case, that a devise by a testator, "in case his wife should be *enceinte* with one or more children at the time of his death, to such child or children," implied a gift to any children born after the date of the will though before the testator's death, on the ground that it was impossible to suppose the father would provide for a posthumous child,

[(*u*) 18 Beav. 330. See also Davenport *v.* Coltman, 9 M. & W. 481, 12 Sim. 588, where, however, the distributive construction was not suggested, and the income during the wife's life was not claimed by the daughters. But see Lill *v.* Lill, 23 Beav. 446.

(*x*) Per Kindersley, V.-C., Stevens *v.* Hale. 2 Dr. & Sm. 28, acc.

leaving children *in esse* unprovided for (*y*). But in Doe d. Blakiston *v.* Haslewood (*z*), the Court of C. P. unanimously overruled that decision, thinking that in such a case the testator never contemplated the birth of children in his lifetime, and never *intended* to provide for them by his will: the will was made in contemplation of a particular combination of circumstances, which not having happened, the will failed. However, in a subsequent case (*a*), Blackburne (L. C. Ir.), though not called upon to decide the point, expressed a preference for the elder authority.]

As to devises in the first instance to survivors.

As a devise to a stranger after the death of A. creates no estate in A. by implication in the meantime, it might seem to follow that a devise to the survivor of several persons would not raise an estate by implication in the whole during their joint lives; but, in the actual state of the authorities, it would be hazardous to advance any such proposition, seeing that, in one instance at least, a different construction prevailed, though certainly not without some aid from the context. A testator (*b*) devised lands at T. to trustees, in trust to receive the rents and profits during the lives of his four daughters and the survivor of them; and "*afterwards* to pay such rents and profits to and *among such *survivor*, and the child or *542 children of such my daughters who shall first happen to die; and from and immediately after the decease of my said four daughters, my will is, that they do sell the premises, and pay the moneys arising therefrom, in four equal parts," to the children of his daughters. By a subsequent clause, he bequeathed his chattels among his children, except his daughter H., who was only to receive in full satisfaction of what was before bequeathed to her three shillings a week during her life, or "until her distributory share was exhausted," out of his estate at T. and personal effects, for her separate use. The court was clearly of opinion that the testator never intended to leave all his daughters without any provision until three of them were dead; and with reference to the subsequent clause, which showed that his daughter H. was in his opinion entitled for life, they held all the daughters to take.

As to implication of devise to survivors.

Cases the converse of the preceding have sometimes occurred, namely, where the income is expressly disposed of during the joint lives only of several co-devisees or co-legatees, with a gift over on the decease of the survivor, thus leaving unprovided for the destination of the intermediate interest accruing in the interval between the determination of the joint lives and the death of the survi-

(*y*) White *v.* Barber, 5 Burr. 2703.
(*z*) 10 C. B. 544.
(*a*) Re Lindsay, 5 Irish Jurist, 97; see also Alleyne *v.* Alleyne, 2 Jo. & Lat. 558; Goodfellow *v.* Goodfellow, 18 Beav. 356.]
(*b*) Saunders *v.* Lowe, 2 W. Bl. 1014. For other cases in which the implication arising from the whole will was held to be equivalent to, and to supply the place of a direct gift, see Brown *v.* De Laet, 4 B. C. C. 527; Crowder *v.* Clowes, 2 Ves. Jr. 449; Wainewright *v.* Wainewright, 3 Ves. 558.

vor. In several such cases (*c*), the interest in question has been held to belong to the survivors, either under an implied gift to them, or in virtue of the right of survivorship incident to a joint tenancy; and the latter seems to have been the chosen ground of determination, though this result was only attainable by the rejection of words which, unless controlled by the context, would have had the effect of making the co-devisees or co-legatees tenants in common.

In Townley *v.* Bolton (*d*), the bequest was in these words: "I give to my sister M. T. and her husband G. S. T. 50*l.* per annum Long Annuities *for their joint lives*, and *after their decease*, to go to my own nephew, C. P." Sir J. Leach, M. R., held, that the gift over being after the decease of the husband and wife, it was plain that the testator intended that the survivor should be entitled.

Here, too, it is doubtful whether the survivor became entitled *543 *by the effect of the implication of a gift in remainder for life, expectant on the determination of the joint lives, or as surviving joint-tenant for life, the words "for their joint lives" (which otherwise would have determined the interest of both on the death of either (*e*)) being rejected. The latter appears to have been the ground taken in the arguments at the bar.

Annuity to several for lives of them and survivor.

In Jones *v.* Randall (*f*), a testator bequeathed an annuity, upon trust for A. for life, and after her death to pay and divide the same amongst the children of A. who should happen to survive her, in equal shares if more than one child, and if but one child, then to such only child; such annuity to be paid during the lives of such children, *and the life of the survivor of them*. It was contended that the survivors were entitled by implication; but Sir T. Plumer, M. R., held that the argument, that because the annuity was for the life of the survivors, therefore the survivors were to take, amounted only to conjecture; [that the words in question only described how long the annuity was to last; they determined the subject-matter of the bequest, regulating the duration, but not the persons to participate in it: and] the children took as tenants in common an annuity for their lives and for the life of the survivor.

[So in Bryan *v.* Twig (*g*), a bequest of an annuity to the children of J. B. equally share and share alike, for and during the term of their joint natural lives or the life of the survivor of them, was held by Sir J. Rolt, L. J., to make the children tenants in common to an annuity which was to endure until the death of the survivor; so that on the

(*c*) Tuckerman *v.* Jefferies, 3 Bac. Abr. 681, Gwillim's ed. 81; Armstrong *v.* Eldridge, 3 B. C. C. 215; Pearce *v.* Edmeades, 3 Y. & C. 246; all stated post, Ch. XXXII.; [Cranswiek *v.* Pearson, 31 Beav. 624. But see Re Drakeley's Estate, 19 Beav. 395; Stevens *v.* Pyle, 28 Beav. 388; and other cases cited, Ch. XXXII.]

(*d*) 1 My. & K. 148; [see also McDermott *v.* Wallace, 5 Beav. 142; Moffatt *v.* Burnie, 23 L. J. Ch. 591; Day *v.* Day, Kay, 703.

(*e*) Grant *v.* Wimbolt, 23 L. J. Ch. 282; but see Smith *v.* Oakes, 14 Sim. 122.]

(*f*) 1 J. & W. 100.

[(*g*) L. R. 3 Ch. 183. See also L. R. 3 Eq. 433 (similar bequest in the same will); Eales *v.* Earl of Cardigan, 9 Sim. 384.

death of one his share went to his representatives. With reference to Armstrong *v.* Eldridge and similar cases (*h*), he said that where the duration of the annuity was not clearly defined a gift over on the death of the survivor was material, but was immaterial where the duration of the annuity had already been distinctly marked out as extending till the death of the survivor: and that it was important to observe that in none of those cases were the representatives of the deceased annuitants parties to the suit.

Where, too, there is a gift to A., B. and C. for their lives, and after the decease of A., B. and C., to their children, a gift of the whole to the survivors or survivor for his or their lives must not be too readily inferred, the court, in favor of the children, being *gen- *544 erally inclined to lay hold of slight indications of an intention to give the share of each, on his death, to his children (*i*).]

The general principles before stated, as governing the doctrine of implication in regard to real estate, it is conceived, are applicable to bequests of personal estate,[1] including terms for years; for though the terms in which the doctrine is [frequently stated as regards real estates], namely, that the heir is not to be disinherited by any implication other than a necessary one, applies exclusively to real estate [yet it is equally true that the next of kin is not to be displaced by conjecture (*k*)]. 2. Doctrine of implication in regard to personal estate.

In an early case (*l*), it was held by three justices, that if a man gave a term to his son after the death of the wife of the testator, this shall not raise any estate in the wife, because it does not appear that his intent was so, inasmuch as the son ought not to have it by the law by the death of the testator without any devise, but the executor.[2]

But in Doe d. Bendale *v.* Summerset (*m*), where A. possessed of a term of ninety-nine years, determinable on the lives of his daughter B. and J. S., bequeathed the premises to his daughter M. after the death of his daughter B., during the life of J. S.; Willes and Blackstone, JJ., held that B. took an estate for life by implication. A strong probable implication was, they said, sufficient: it need not be a necessary implication. Willes, J., it is said, spoke slightly of the case in Moore; and Blackstone, J., still more slightly of the case in Croke, which, he observed, was not determined, but was only upon a collateral point.

If Doe *v.* Summerset is to be considered as identified with a proposi-

(*h*) *Vide ante*, n. (*c*).

(*i*) Hawkins *v.* Hammerton, 16 Sim. 410; Doe d. Patrick *v.* Royle, 13 Q. B. 100; but see Pearce *v.* Edmeades, 3 Y. & C. 246; and other cases noticed post, Ch. XXX. s. 5.

(*k*) 3 Ves. 493; ante, p. 356.]

(*l*) Horton *v.* Horton, Cro. Jac. 74; S. C. nom. Burton *v.* Horton, 8 Vin. Abr. 214, Dev. (Pa.) pl. 3; see also Rayman *v.* Gold, Moore, 635 (where, however, the point did not arise, as the wife, at whose death the property was devised, was appointed executrix, and became entitled *quâcunque viâ*).

(*m*) 5 Burr. 2608.

[1] In White *v.* Green, 1 Ired. Eq. 45, it is said that this rule, that a gift by will to A. after the death of B. is a gift to B. for life by implication, is to be confined to estates of inheritance. and is not to be applied to personal estates. See ante, p. 532, note 2.

[2] See Doughty *v.* Stillwell, 1 Bradf. 300; White *v.* Green, 1 Ired. Eq. 45.

Observations upon Doe v. Summerset.

tion that the bequest of a term of years to B. after the death of A. gives a life-interest to A. by implication, it is as difficult to reconcile it with Horton *v.* Horton as with sound principle [and must be considered as overruled by Ralph *v.* Car-
*545 rick (*n*), which shows that] the analogy between a devise of * real estate to the heir [and a gift of personal estate to the next of kin] after the death of A. [is complete; and that unless] the legatee of the future interest is the sole person entitled in the character of next of kin, residuary legatee, or executor [at the date of the will], to the intermediate interest, not specifically disposed of, [A. will not take a life-interest by implication.

Tendency to imply life-interest in personal bequests, checked by Ralph v. Carrick.

Cases decided in the interval between Doe *v.* Summerset and Ralph *v.* Carrick, during which there was] an inclination to construe generally a bequest of personalty at the death of A. to give to A. a prior life-interest by implication, [must be carefully examined before they are accepted as authorities upon the question, what kind of context will furnish sufficient special grounds for raising the implication in cases where the legatee of the future interest is not the sole person entitled as above mentioned. The implication was raised] in one instance where there was an express gift to the same legatee determinable during her life. Thus, in Bird *v.* Hunsdon (*o*), where a testator directed, after payment of debts and legacies, the residue of his money to be put into government security, and the interest to be paid to bring up and educate M., adding, "the said M. to have the interest so long as she continues single and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children, all share alike." M. married and had a child; nevertheless, she was held to be entitled to the income during the remainder of her life. Sir T. Plumer, M. R., observed, that the testator contemplated three periods: "First, he gives the interest for maintenance, that is, during minority; and, again, for maintenance after minority, while she lives single and has no child. To the third period, the interval between her marriage and her death, there are no words expressly applicable; but the interest being first given to a favored object, and the capital not given over till the death of that person, the court is driven to the necessity of saying, either that there is intestacy during the remainder of her life, or that

[(*n*) 5 Ch. D. 984, 40 L. T. N. S. 505. This decision overrules Humphreys *v.* Humphreys, L. R. 4 Eq. 475, and renders it unnecessary to refer in detail to cases where special grounds were relied on to repel the implication, *e.g.* Stevens *v.* Hale, 2 Dr. & Sm. 22 (A. otherwise provided for); Isaacson *v.* Van Goor, 42 L. J. Ch. 193 (express life-estate to A. in certain events); Cranley *v.* Dixon, 23 Beav. 512 (partial intestacy — often deemed strong ground for raising the implication — obviated by residuary bequest); Henderson *v.* Constable, 5 Beav. 297 (gift under a power — interest during life of A. held to go as in default of appointment).]

(*o*) 2 Sw. 342; see also Blackwell *v.* Bull, 1 Kee. 176, ante, p. 535; [Cock *v.* Cock, 21 W. R. 807, is but shortly reported; Davies *v.* Hopkins, 2 Beav. 276, may perhaps be referred to another ground, post. Ch. XXII. s. 6, n. Re Betty Smith's Trusts, L. R. 1 Eq. 79, and perhaps Re Blake's Trust, L. R. 3 Eq. 799, are not properly cases of implication, but of express gifts upon apparent (not real) contingencies.]

she is to take during her whole life. The latter seems the more reasonable alternative."

[This case bears some resemblance to those cited in the next section, where a gift to A. during minority has been enlarged to *an absolute fee in A. on his attaining twenty-one, by virtue of a gift over in case of his death under that age.] *546

III. Hitherto the doctrine of implication has been viewed chiefly in its application to the simple case of devise or bequest on the decease of some person or persons; but it is obvious that the principle may come under consideration in a somewhat more complex form, as where the event, upon which the express devise is to take effect, is the death of a person, combined with some other contingency. For instance, in the case of a devise to B. in the event of A. dying under age; in which case, as there is no devise to A. in the alternative event of his attaining his majority, the question arises, whether he can take the fee (*p*) by implication in such event. If B. were the testator's heir apparent or presumptive, there would be no difficulty in arriving at the affirmative conclusion; the case then being evidently analogous to that of a devise to the heir, to take effect in possession on A.'s decease, which, we have seen, raises an estate for life in A. By parity of reason, it would seem that a devise to a stranger, in the event of A. dying under age, supplies no more valid ground for holding A. to take an estate in fee by implication, than is afforded for the implication of an estate for life to a person on whose decease the lands are devised to a stranger: for a testator *may* intend the fee to descend to the heir on the alternative contingency of A. attaining his majority. And, perhaps, the authorities rightly considered, do not militate against this hypothesis; for, though an estate in fee was held, in one instance, to arise by implication, under such a devise, to a person who was not the testator's heir, yet the construction was founded on reasoning partly derived from the context.

Implication from express gift on death combined with some contingency.

Thus, in Goodright d. Hoskins *v.* Hoskins (*q*), a testator bequeathed unto his son Richard certain leasehold premises called S. to hold the same unto his said son Richard until his (R.'s) son Thomas should attain the age of twenty-one years, and no longer; but in case his said son Thomas should die in his minority,[1] then the testator gave the said leasehold premises under John and Richard, sons of the said Richard, or either of them, attaining the age of twenty-one years as aforesaid; and he desired that his premises at S. might be quitted and delivered up as

Gift implied from limitation over if the object died under twenty-one.

(*p*) Why, it may be asked, a fee? On this point vide Purefoy *v.* Rogers, 2 Saund. 388, and other cases discussed Ch. XXXIII. s. 3.

(*q*) 9 East, 306.

[1] See 4 Kent, 541; Cassell *v.* Cooke, 8 Serg. & R. 290.

aforesaid by his said son Richard; and the testator, in a certain
*547 event, revoked, * but otherwise confirmed, the said bequest of S. and the other legacies given to his son Richard's family. Thomas attained twenty-one, and was held to be entitled: Lord Ellenborough relying much upon the direction that the premises should be *quitted and delivered up as aforesaid* by the testator's son Richard, that is, when Richard's son Thomas came of age, to Thomas; "for to whom else" (said his Lordship) "could Richard deliver up the possession in that event?"

But might not these words (which merely imported *by* whom the premises were to be delivered up) have been satisfied by their delivery up to *any* person entitled under or *dehors* the will? Unless Thomas were to become entitled at twenty-one, the limitation over, in case he died under that age, was certainly very absurd, and the case may be considered as somewhat analogous in principle to those in which a devise has been enlarged to a fee by such a devise over (*r*).

Remark upon Goodright *v.* Hoskins.

This case was much relied on in Davis *v.* Davis (*s*), in support of the argument for raising an implied gift to the testator's daughter, from the following words: "It is my wish that my brother S. be my executor, to arrange, dispose of, and settle all my affairs; and I appoint him guardian to my daughter." Sir J. Leach, M. R., decided in favor of the implication. He said, that it was plain it was not the intention of the testator that his brother should take a beneficial interest, but that he should only arrange and settle his affairs; and, from his appointment as guardian to the daughter, it was to be implied that the arrangement and settlement was to be for her benefit; but Lord Brougham reversed this decree, conceiving that there was nothing in the language or provisions of the will from which a bequest to the daughter could be safely and reasonably implied. He observed, that Newland *v.* Shephard (*t*) and Goodright *v.* Hoskins (the former of which had been often questioned (*u*), and the latter had been rested by Lord Ellenborough on special grounds) fell far short of this.

Davis *v.* Davis.

*548 * [The analogy suggested above is closer where there is in the first place an estate devised to be enlarged. Thus in Croppton *v.* Davies (*x*), where a testator devised three houses to trustees upon trust, as to the first, for his daughter A., her

Absolute gift at twenty-one implied from limita-

(*r*) Vide Ch. XXXIII. s. 3. (*s*) 1 R. & My. 645.

(*t*) 2 P. W. 194. In this case (which is often cited) a testator gave the residue of his real and personal estate to trustees, upon trust, to apply the income for the maintenance of his grandchildren during minority, but went no further. Lord Macclesfield — "The intention is most plain, that the grandchildren should have the surplus, both of the real and personal estate, after their age of twenty-one." [In Atkinson *v.* Paice, 1 B. C. C. 91, a bequest in trust for R. L. until he should come of age, was held to be an absolute gift to R. L.; and in Peat *v.* Powell, Amb. 387, 1 Ed. 479, a devise and bequest in nearly the same words received the same construction. See further Ch. XXXIII. s. 3, *ad fin.*; Tunaley *v.* Roch, 3 Drew. 720.

(*u*) 3 Atk. 316. "I say nothing as to whether it was rightly decided," per Wood, V.-C., 2 J. & H. 128. (*x*) L. R. 4 C. P. 159.

heirs and assigns; as to the second, for his daughter B., her heirs and assigns; and as to the third, to apply the rents for the advancement and benefit of his granddaughter C. until she attained twenty-one, but, in case she should die under that age, then he devised the same to A. and B. and their heirs as tenants in common: all the residue of his real and personal estate he devised to X., Y. and Z. C. attained twenty-one, and the Court of C. P., without saying that the devise alone would have raised a fee by implication, thought, that, looking to it and to the other provisions together, the intention was clear to give C. the whole interest in the third house, to go over to A. and B. only in an event which had not happened. If this were not so, the strange consequence would follow that if C. died under twenty-one the house would go over to A. and B., whereas if she attained twenty-one it would go over to the residuary legatees, who were other persons. Such an intent the court thought could not be presumed from the structure and language of the will.

tion until twenty-one and gift over under that age.

In Tomkins *v.* Tomkins (*y*) there was nothing but a bare devise "to his brother in trust for his eldest son B. till he should attain twenty-one, and, if he should die before twenty-one, then a devise over;" yet it was held that on attaining twenty-one B. took the whole by implication. So, in Gardiner *v.* Stevens (*z*), where leaseholds were bequeathed "in trust for A. and B. till B. is twenty-five years old, and in case they, A. and B., should die before B. attains twenty-five," then over, it was held by Wood, V.-C., that, on B. attaining twenty-five, A. and B. became absolutely entitled in equal moieties. And in Wilks *v.* Williams (*a*) the same judge treated it as clear that upon a devise or bequest of real or personal estate, upon trust for the child or children of any person until they attain twenty-one, followed by a gift over to a third person in case the children do not live to attain twenty-one, the children, if they live to attain twenty-one, take absolutely. The case itself went somewhat further. The testatrix desired her trustees to invest the residue, and gave the interest to A. and B. equally, and at their decease the dividends were "to be *continued to their children till they *549 come to the age of twenty-one." There was no gift over, but the testatrix added, "I constitute and appoint C. and D. trustees for the said A. and B. and their children." The children were held to take absolutely on attaining twenty-one; for the trust during minority was complete without the last clause, which therefore must be looked upon as indicating that, after the children attained twenty-one, the trust for their benefit was still to continue.

But, of course, the children will not take an absolute interest by implication if in the same event there is an express gift to them of a less interest (*b*). And it has been held that the event upon which the gift over is to take effect must exactly cor-

When this implication fails.

(*y*) As cited by Lord Mansfield, 1 Burr. 234.
(*a*) 2 J. & H. 125.
(*z*) 30 L. J. Ch. 199.
(*b*) Savage *v.* Tyers, L. R. 7 Ch. 356.

respond with that upon which the limited trust is to cease. If the gift over depends on a further collateral event, as on death under twenty-one and unmarried, the implication does not arise (*c*). And where (*d*) the trust during minority was for the minor *and his mother*, with a gift over to her if he died under twenty-one, Sir R. Kindersley, V.-C., held that there was not enough to show that the minor, if he attained twenty-one, was to be benefited exclusively of his mother.]

No implication that *equitable* is to be co-extensive with *legal* disposition.

IV. Where a testator gives several distinct subjects of disposition to trustees, and then proceeds to dispose of the equitable or beneficial interest in terms applicable to one of those subjects only, there is no necessary implication that he intended the legal and equitable disposition to be co-extensive, though it may be highly probable that he did so, and more especially when the omitted subject is convenient (though not essential) to the enjoyment of the other.

As in Stubbs *v.* Sargon (*e*), where a testatrix devised to trustees and their heirs her copyhold dwelling-house (wherein she principally resided), garden and ground, *together with the furniture and effects therein*, and the coach-house and stable thereto belonging, and also the ten cottages, and two new cottages built by her, with their appurtenances, at L., upon trust, that the trustees and the survivors, &c., and the *heirs* or assigns of the survivor, should pay the rents of the said *hereditaments* to her niece S. S., the wife of G. S., or permit and suffer her to use and occupy the said *hereditaments* during her life, to the intent that *550 the same * hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to G. S. for his life; and after his decease, upon trust, that the trustees and the survivors and survivor of them, and the *heirs* or assigns of such survivor, should be possessed of and interested in the said hereditaments, in trust for such of the testatrix's nephews and nieces, or grand-nephews and grand-nieces, as S. S. should appoint; and in default of appointment, upon trust that the said trustees and the survivors and survivor of them, or the heirs or assigns of such survivor, should sell and dispose of the said hereditaments and premises (*f*); and the testatrix directed that the produce of such sale should constitute part of her residuary personal estate. The will contained a general residuary clause (*g*). Lord Langdale, M. R., held, that the furniture and effects did not pass to S. S., but belonged to the residuary legatees, the testatrix having, in the statement of the trusts, employed words only applicable to the real estate; and Lord Cottenham, on appeal, was of the

(*c*) Savage *v.* Tyers, L. R. 7 Ch. 356. (*d*) Fitzhenry *v.* Bonner, 2 Drew. 36.]

(*e*) 2 Kee. 255, 3 My. & Cr. 507; compare this case with Ackers *v.* Phipps, 9 Bli. 431, 3 Cl. & Fin. 665.

(*f*) The addition of the word "premises," in this instance, afforded ground for extending the ultimate trust, unless restricted by the preceding trusts to the furniture; but as the proceeds under this trust were to form part of the residuary personal estate, the point was immaterial. (*g*) This fact is to be assumed, but is not stated in the report.

same opinion, observing, that it was probable the testatrix intended that the furniture and effects should accompany the copyholds, but she had omitted to declare such to be her intention.

So, in Jackson *v.* Noble (*h*), where a testator gave certain freehold, *copyhold*, and leasehold estates (particularly describing them) and 1,000*l.* stock, to trustees, their heirs, executors, administrators and assigns, to hold the last-mentioned *freehold and leasehold* estates, and stock, unto the trustees, their heirs, executors, administrators and assigns, in trust for his daughter A. for life, for her separate use; and after her decease, upon trust, to convey and assign the several last-mentioned freehold and leasehold estates and 1,000*l.* stock unto the heirs, executors, administrators and assigns of A. And the testator empowered his daughter to grant leases of the freehold and leasehold estates so given to her. Lord Langdale held, that as the testator had omitted all mention of the copyhold estates after the devise to the trustees, he could not consider them as comprised in the trust.[1]

Omission to dispose of equitable interest not cured by implication.

V. Implied gifts may be and often are created by powers of selection or distribution in favor of a defined class of objects; * for, where property is given [or appointed under a general power (*i*)] to a person for life, and after his or her decease to such children, relations, or other defined objects as he or she shall appoint, or among them in such shares as the donee shall appoint, and there is no express gift over to these objects in default of appointment, such a gift will be implied; the presumption being that the testator could not have intended the objects of the power to be disappointed of his bounty, by the neglect of the donee to exercise such power in their favor (*k*).[2] *551

Gifts implied from powers of selection and distribution.

A leading authority for this construction is the case of Brown *v.* Higgs (*l*), where the bequest was "to such children of my nephew S.,

(*h*) 2 Kee. 590.

[(*i*) White *v.* Wilson, 1 Drew. 298.

(*k*) The early cases of Crossling *v.* Crossling, 2 Cox, 396; and Duke of Marlborough *v.* Godolphin, 2 Ves. 61, which are opposed to this construction, would probably be decided differently at the present day; see Sugd. Pow. 8th ed. 592.]

(*l*) 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; see also Harding *v.* Glyn, 1 Atk. 469; Cruwys *v.* Colman, 9 Ves. 319; Forbes *v.* Ball, 3 Mer. 437; [Witts *v.* Boddington, 3 B. C. C. 95;] Walsh *v.* Wallinger, 2 R. & My. 78; [Grieveson *v.* Kirsopp, 2 Kee. 653; Jones *v.* Torin, 6 Sim. 255 (as to which see ante, p. 517, n. (*x*)); Martin *v.* Swannell, 2 Beav. 249; Fenwick *v.*

[1] A gift by implication must be founded upon some expression in the will from which an intention can be inferred. Silence alone is not a safe ground to proceed upon by way of inferring an intended gift. Nickerson *v.* Bowly, 8 Met. 424. See Davers *v.* Dewes, 3 P. Wms. 40; Dicks *v.* Lambert, 4 Ves. 725, 732. When, for example, a bequest of personal property is made to the testator's wife, the part undisposed of will go to her and the next of kin, according to the Statute of Distributions. Briggs *v.* Hosford, 22 Pick. 288; Ex parte Kempton, 23 Pick. 163; Nickerson *v.* Bowly, supra. See also to the same effect Waugh *v.* Riley, 68 Ind. 482; Dale *v.* Bartley, 58 Ind. 101; Lindsay *v.* Lindsay, 47 Ind. 283; Rusing *v.* Rusing, 25 Ind. 63; Armstrong *v.* Berreman, 13 Ind. 422.

[2] See In re Phene's Trusts, L. R. 5 Eq. 346. A power of disposition is implied by the language "what shall remain at the time of her [the donee's] decease." Gifford *v.* Choate, 100 Mass. 343.

as my nephew I. shall think most deserving, and that will make the best use of it, or to the children of my nephew W., if any such there are, or shall be." I. died in the lifetime of the testator. Sir R. P. Arden, M. R., and subsequently Lord Eldon, after great consideration, held the children to be entitled under the implied trust: [and this decision was affirmed in D. P.]

Implied gift in one, not precluded by express gift in another, event.

And the implication, it seems, is not repelled by the circumstance that the testator has expressly given the property to the persons who are objects of the power, in the event of the donee dying before him (*m*); which event, it is to be observed, would have prevented the power from arising; so that the express gift and the implied one are alternative and not inconsistent.

Implication precluded by express gift in same event.

An express gift over in default of appointment, in favor of either the objects of the power or any other person, of course precludes all implication (*n*). [But a gift over in default of objects of the power strengthens the implication in their favor (*o*).]

And there is, it seems, no necessary inference that the testator *552 * intends that a qualification, applied by him exclusively to the objects of the power, should be extended to the objects of the gift expressly limited in default of appointment to a class of objects identical in other respects with that of the power. Thus, where (*p*) the devise was to A. for life, with remainder to such child and children of A. and *him surviving*, who should be educated as a member of the Church of England, in such parts and proportions, &c., as A. should appoint, and, in default of such appointment, to the first son of A. who should be educated as aforesaid and the heirs of the body of such son, with divers remainders over: it was contended that as the power of appointment was restricted to "surviving" children, the gift over was to be construed with a like limitation; but Sir J. Leach, M. R., held, that such a construction would be contrary to the force of the expressions used, and was not warranted by necessary or rational inference.

Objects of power and implied gift must be identical.

A gift arising *by implication* from a power of selection or distribution, however, applies to the persons who are objects of the power, and to them only; and consequently, if the appointment is to be testamentary, the gift takes effect in favor of the objects living at the decease of the donee, to the exclusion

Greenwell, 10 Beav. 412; Fordyce *v.* Bridges, 10 Beav. 90, 2 Phil. 497; Burrough *v.* Philcox, 5 My. & Cr. 73; Falkner *v.* Lord Wynford, 15 L. J. Ch. 8, 9 Jur. 1006; Penny *v.* Turner, 15 Sim. 368, 2 Phil. 493; Alloway *v.* Alloway, 4 D. & War. 380; Salusbury *v.* Denton, 3 K. & J. 535; Joel *v.* Mills, ib. 474; Reid *v.* Reid, 25 Beav. 469; Izod *v.* Izod, 32 Beav. 242; Re Caplin's will, 2 Dr. & Sm. 527. As to the sufficiency of precatory words to create a power from which a gift may thus be implied, see Bernard *v.* Minshull, Johns. 292. No gift can be implied where the donee has a discretion whether he will appoint anything or not. Re Eddowes, 1 Dr. & Sm. 395. Compare Brook *v.* Brook, 3 Sm. & Gif. 280.

(*m*) Kennedy *v.* Kingston, 2 J. & W. 431.

[(*n*) Pattison *v.* Pattison, 19 Beav. 638; Roddy *v.* Fitzgerald, 6 H. L. Ca. 823; Goldring *v.* Inwood, 3 Gif. 139. Compare Re Jefferys' Trusts, L. R. 14 Eq. 136.

(*o*) Butler *v.* Gray, L. R. 5 Ch. 30.] (*p*) Smith *v.* Death, 5 Mad. 371.

of any who may have died in his lifetime, and who of course could not have been made objects of an appointment by will (*q*). [Consequently, if all the objects die in the donee's lifetime, no gift at all can be implied. So, although the power be to appoint by deed or will, yet if upon the true construction of the instrument creating it the objects of it are required to be living at a deferred period, the implied gift in default will also be to those persons only (*r*). Where the power is to appoint in favor of some one person to * be selected out of *553 a class, if any gift could be implied in default of appointment, it ought to be to one person only of the class; but as no gift can be implied to one more than another, it seems that none of the class can take by implication (*s*).]

And it should seem, that a gift arising by implication from a power of selection or distribution in favor of *relations*, will apply exclusively to the relations living at the death of the donee, even though [they be not the donee's own relations, and though] the power is not in terms confined to an appointment by will (*t*).

If the subject of the implied gift resulting from such a power be real estate of inheritance, the implication [confers] an estate in fee, even though the will be dated before 1838, if the power authorizes the limitation of estates in fee (*u*).

Life-interest not implied in donee from power of distribution.

Although a power of selection or distribution is usually preceded by the reservation of a life-interest to the donee, yet such a gift, where omitted, will not be implied. Thus, it was decided, that where a testatrix, after bequeathing her property to her mother, requested her to leave 500*l.* to each of her (the testatrix's) sister A.'s children (and some legacies to other persons), and the remainder to her sister B., "to dispose of among her children as she may think proper," B. herself took no interest (*x*).

(*q*) Walsh *v.* Wallinger, 2 R. & My. 78; see also Kennedy *v.* Kingston, 2 J. & W. 431; [Freeland *v.* Pearson, L. R. 3 Eq. 658. In Falkner *v.* Wynford, 15 L. J. Ch. 8, 9 Jur. 1006, the power was to appoint by *deed* or will, and, consequently, the gift by implication was not restricted to the objects living at the decease of the donee. An express gift in default of appointment applies to the same class of persons as a simple gift unconnected with any power, Pattison *v.* Pattison, 19 Beav. 638; Richards *v.* Davies, 13 C. B. N. S. 69, 861. And it is said that a gift to a class in such shares as A. shall by will appoint is to be distinguished from a mere power for A. to give among the class, and is for this purpose equivalent to an express gift in default, Lambert *v.* Thwaites, L. R. 2 Eq. 151; but in Woodcock *v.* Renneck, 1 Phill. 72, 4 Beav. 190, it was held by Lords Lyndhurst and Langdale that the question who were entitled under such a gift depended upon the construction of the whole clause, including the words importing power.

(*r*) Halfhead *v.* Shepherd, 28 L. J. Q. B. 248, 5 Jur. N. S. 1162; Re White's Trust, Johns. 656; Re Phene's Trusts, L. R. 5 Eq. 346; Winn *v.* Fenwick, 11 Beav. 438; Stolworthy *v.* Sancroft, 33 L. J. Ch. 708, 10 Jur. N. S. 762. But it has been doubted whether the point of construction in the last two cases was rightly decided. L. R. 2 Eq. 159, 160, 4 Ch. D. 68. (*s*) Sugd. Pow. 8th ed. 593.]

(*t*) Att.-Gen. *v.* Doyley, 4 Vin. Abr. Ch. Us. C. pl. 16, p. 485; Harding *v.* Glyn, 1 Atk. 469, cited 5 Ves. 501. The case of Pope *v.* Whitcombe, *as reported* 3 Mer. 689, is *contra*, in regard to a power of distribution; but, as corrected from R. L., Sugd. Pow. 8th ed. pp. 663, 953, is an authority on the same side. [And see Finch *v.* Hollingsworth, 21 Beav. 112.

(*u*) Bradley *v.* Cartwright, L. R. 2 C. P. 511. And see Casterton *v.* Sutherland, 9 Ves. 445; Crozier *v.* Crozier, 3 D. & War. 383.]

(*x*) Blakeney *v.* Blakeney, 6 Sim. 52; [but see Huddleston *v.* Gouldsbury, 10 Beav. 547; Ramsden *v.* Hassard, 3 B. C. C. 236.]

VI. It remains to consider the implication of estates tail. According to the doctrine which has been the subject of discussion in the second section, it is not to be doubted, that if lands were devised to the testator's heir apparent or heir presumptive in fee in case A. should die without issue (which, if the will were made before 1838, would import a *general* failure of issue (*y*)), this would make A. tenant in tail, with reversion in fee to the testator's heir, — the event described being precisely that which would involve the extinction of an estate tail; and it being impossible to suppose that the testator could intend to make a *554 * devise to take effect at a future period, to the very person who would in the absence of disposition take the property by act of law, without intending that it should in the mean time devolve to some other person. The reports, however, do not present exactly such a case.

Implication of estates tail, before 1 Vict. c. 26.

It has been long settled, however, that a devise, in a will which is regulated by the old law, to a person and his heirs, or to a person indefinitely, with a limitation over in case he die without issue, confers an estate tail, on the ground, in the former case, that the testator has explained himself to have used the word "heirs" in the qualified and restricted sense of heirs of the body (*z*), and in the latter case on the ground that he has, by postponing the ulterior devise until the failure of the issue of the prior devisee, afforded an irresistible inference that he intended that the estate to be taken by the prior devisee under the indefinite devise should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, as an executory devise to take effect on a general failure of issue, would, of course, be void for remoteness.[1] According to some early cases, however, an express estate for life cannot be so enlarged into an estate tail by implication, on the ground that implication can only be admitted in the absence of, and never in contradiction to, an express limitation. But in Bamfield *v.* Popham (*a*) (which is the authority usually adduced for this doctrine), the conclusion at which the court arrived may be sustained upon other grounds; if not, it has been overruled by numerous decisions (*b*), in which an estate tail has been raised

Whether an express estate for life can be enlarged to an estate tail by implication.

(*y*) The implication doctrine discussed in the text assumes that the words referring to "death without issue" import an indefinite failure of issue. What force of context is requisite to explain them to be used in any other than this their ordinary sense (which is a subject of much intricacy, from the accumulation of authorities), will be considered Ch. XLI.

[(*z*) For other cases where "heirs" has been so explained, see Ch. XL. s. 3.]

(*a*) 1 P. W. 54, Salk. 236, 2 Vern. 427, 449; see 1 Ves. 26.

[(*b*) Per Parker. L. C., Blackborn *v.* Edgeley, 1 P. W. 605;] Langley *v.* Baldwin, 1 P. W. 759; Stanley *v.* Lennard, 1 Ed. 87; Att.-Gen. *v.* Sutton, 1 P. W. 754, 3 B. P. C. 75; Doe d. Bean *v.* Halley, 8 T. R. 5; [Parr *v.* Swindels, 4 Russ. 283; Key *v.* Key, 4 D. M. & G. 73; Stanhouse *v.* Gaskell, 17 Jur. 157; Andrew *v.* Andrew, 1 Ch. D. 411.]

[1] 4 Kent, 276 *et seq.* and notes; Fisk *v.* Keene, 35 Maine, 349; Hansell *v.* Hubbell, 24 Penn. St. 244; Parker *v.* Parker, 5 Met. 134; Nightingale *v.* Burrill, 15 Pick. 104; Thomason *v.* Andersons, 4 Leigh, 118; Hoxton *v.* Archer, 3 Gill & J. 199.

in the first taker, by implication from words devising the property over in case he die without issue, although the prior devise was expressly for life; the intention of the testator being manifest, that the estate should not go over to the next devisee until the whole line of issue was extinct. And it is observable that this construction prevailed in a case, where the words in question were accompanied by expressions which might, if the court had been particularly anxious to escape from the rule, have afforded a plausible ground of dereliction. The case here referred to is Machell *v.* Weeding (*c*), where the testator gave real and personal * estate to his wife for *555 life, and after her decease to his son J. *for his life;* but if his son *should die without issue, not leaving any children*, then his estates to be sold, and the money divided among his other children. It was contended that the words "not leaving any children" were explanatory of the preceding words "die without issue," and, consequently, that they did not make J. tenant in tail; but Sir L. Shadwell, V.-C., considered that the words in question were included in the previous words; a dying without leaving a child being one mode of dying without issue; and he observed, that it was perfectly manifest that the testator did not intend the estate to go over so long as any issue of the first taker were in existence. "And I consider it," he said, "to be a settled point, that, whether an estate be given in fee, *or for life*, or generally, without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail."

Express estate for life enlarged to an estate tail.

It is to be observed, that where the devise over is to take effect on the event of the prior devisee dying without issue *living at the death*, it has no effect in enlarging a prior estate for life to an estate tail (*d*); as the event described is not that by which an estate tail is necessarily extinguished, for such an estate determines on the failure of issue at *any* time. The only question, in such a case, would be, whether the words would raise an estate by implication in the issue living at the death. Lord Hardwicke suggested a point of this nature in Lethieullier *v.* Tracy (*e*), but the case did not require its determination. It is clear that, where the estate previously devised is in fee, no such implication arises; but this is not quite conclusive, inasmuch as the motive to imply an estate tail in such cases is much less cogent, since the alternative construction gives the prior devisee an estate in fee-simple in the event of his leaving issue; whereby he is enabled to make a provision for such issue, if he leaves any: so that the scheme of disposition which is thus imputed to the testator is reasonable, and wholly free from the inconvenience and objection which attach to a similar construction where the devise is for

Estate tail not implied from words referring to issue *at the death.*

(*c*) 8 Sim. 4.
(*d*) See Lethieullier *v.* Tracy, 3 Atk. 774, 793. [See also 8 H. L. Ca. 593; L. R. 3 H. L. 132, 134, and (*contra*) ib. 138.]
(*e*) 3 Atk. 796.

life only, in which the effect of rejecting the implication is, that, in the event of the first taker leaving issue, the property is undisposed of, as it cannot go to either himself, his issue, or the ulterior devisee.

*556 * And it is to be observed, that where the person, on whose general failure of issue a devise is expressly made expectant, is the heir at law of the testator, he becomes, by the application of the rule under consideration, tenant in tail by implication, in precisely the same manner as if there had been a prior devise to him and his heirs in the will (*f*).

Rule where person whose issue is referred to is heir at law of testator.

[But it is not sufficient that the words used by the testator show that he contemplated the determination of the devisee's estate upon a general failure of issue, unless an actual devise over, either express or implied, to take effect in that event, be found in the will. Thus, in Doe d. Cape *v.* Walker (*g*), where the testator in his will said, "If my son W. (who was the testator's heir at law) should die, and having no heirs lawfully begotten, and my freehold messuage should fall by descent unto my granddaughter M.," and then directed his granddaughter to pay certain legacies "within twelve months after she came into possession of the estate," the court held that there was no gift to the granddaughter, and therefore that W.'s estate was not cut down to an estate tail; and Newton *v.* Barnardine (*h*), where the words, "if R. die before he hath any issue of his body, so that the lands do descend to G.," were held to be a good gift by implication to G., and to raise an estate tail in R., was distinguished on the ground that, in the circumstances contemplated by the testator, G. was not heir of R., and "descend" was not used in its ordinary sense; and they laid stress on the words "so that," as denoting the consequence of an estate tail in R.]

If, however, the person, in default of whose issue the estate is given over (or the person to whom it is so given), be not the heir at law of the testator, and if the former take no prior estate under the will susceptible of enlargement or modification from these words, an estate will not accrue to him by implication; and, consequently, the devise, to take effect on the contingency in question, is void for remoteness, as an executory devise limited to arise after an indefinite failure of issue (*i*).

Where he is neither heir nor prior devisee, no implication.

In Gardner *v.* Sheldon (*k*) (which is a leading authority on this point), A., having a son and two daughters, devised in the following words: "If it shall happen my son B. *and my two* *557 * *daughters* die without issue of their bodies lawfully begotten, then all my lands shall remain to my nephew D. and his heirs." It was held, 1st, that no express estate was given to the children; and, 2dly, that they took no estate by implication, because, then, it must be

[(*f*) Goodright *v.* Goodridge, Willes, 369, 7 Mod. 453; Daintry *v.* Daintry, 6 T. R. 307.
(*g*) 2 M. & Gr. 113. And see Scrape *v.* Rhodes, Com. Rep. 542.
(*h*) Moore, 127, Owen, 29.] (*i*) Ante, p. 254.
(*k*) Vaugh. 259, 1 Eq. Ca. Ab. 197, pl. 6, 1 Freem. 11.

either a joint estate for life, with several inheritances in tail, or several estates tail in succession, one after another. The latter it could not be, because it was uncertain which should take first; nor the former, because the heir at law could not be disinherited without a necessary implication, which in this case there was not, for it was only a designation and appointment when the land should come to the nephew, as if he had devised thus: "I leave my land to descend, or give it, to my son and his heirs, till he and my two daughters die without issue, or so long as any heirs of the body of him and my two daughters shall be living," and then to his nephew (*l*).

This doctrine, however, has sometimes been considered as shaken by two modern decisions. The first is Tenny d. Agar *v.* Agar (*m*), where a testator devised certain lands to his only son A. and his heirs, upon condition that he paid to the testator's daughter B. 12*l.* a year until twenty-one, and after that age to pay her 300*l.* for her portion; and, in default of payment, that she should enter and hold the lands to her and her heirs forever; and in case his (the testator's) said son *and daughter* happen to die "*without having* (*n*) *any children issue* lawfully begotten or to be begotten," then he devised the lands to C. in fee. The son entered, and performed the condition. He afterwards suffered a recovery, declaring the uses to himself in fee. The son and daughter both died without issue, the former having devised the property. Against his devisees the heir at law of C. the remainder-man brought an action of ejectment, contending that the son and daughter took respectively an estate in fee, subject to an executory devise on their dying "without leaving any child or issue" at their decease (which, of course, would not have been affected by the recovery), and not estates tail. But the court held that nothing could be clearer than that the testator intended that C., the devisee in remainder, should not take until the extinction of the lines of issue of both his son and daughter; and that to effectuate this intention the true construction was, that * A. should take an estate tail only, with remainder in tail by implication to B., with remainder in fee to C. *558

Tenny *v.* Agar.

The other seemingly opposing case is Romilly *v.* James (*o*), where a testator devised to A., his brother, all his real estate, subject to the devises thereinafter expressed. He then devised to his brother's son, B., all his estate called M., to hold to him and his heirs forever; and the testator afterwards provided, that *in case his brother and his son should happen to die, having no issue of either of their bodies*, then he devised all his real estate to his nephew J. and his heirs.

Romilly *v.* James.

(*l*) They also held, that this would be a good executory devise to the nephew; but it is clear that such a devise would be void for remoteness.

(*m*) 12 East, 252.

(*n*) From other parts of the case it seems the word was "leaving;" but, the subject being real estate, the variation is immaterial.

(*o*) 6 Taunt. 263, 1 Marsh. 592.

B. died without having had issue, and A. died without leaving issue. It was contended here, as in Tenny *v.* Agar, that B. took a fee, subject to an executory devise in the event of himself and his father both dying without leaving issue at their respective decease. But the court held that B. was tenant in tail. "The will" (said Gibbs, C. J.) "gives the fee to A. in all which is not afterwards disposed of; the subsequent clause removes that estate in the premises before given to A., and gives a similar clear estate in fee in the premises to B., divesting the estate of the father (*p*); but if A. and B. die without having issue, then the estate is given over. This plainly cuts down his (*i.e.* B.'s) estate to an estate tail, and doing so, it leaves something behind which A. may take as part of the real estate of the testator; but the same clause cuts down also the preceding estate in fee given to A. to an estate tail. B., therefore, takes an estate tail, with remainder in tail to his father, remainder in fee to J."

Remarks upon Tenny *v.* Agar;

It is observable that, in Tenny *v.* Agar, the only material question was, whether the words, "leaving any child or issue," imported an indefinite failure of issue (*q*); for the affirmative of that proposition being established, it was unnecessary to inquire whether the estate of the first taker was cut down to an estate tail, with remainder in tail by implication to the other person on failure of whose issue it was given over; or whether the first taker had a fee, subject to an executory devise to arise on these events; for, in the former case, the recovery suffered by the first devisee in tail had acquired the fee-simple; and in the latter, the devise over was void for remoteness: so that the title derived from the first devisee *quâcunque viâ* was good. The opinion of the court, therefore, upon the question, whether an estate tail arose by implication, may be considered as extra-
*559 judicial. It is *observable, too, that the words referring to the failure of issue may have been intended to cut down the fee-simple, which the daughter was to take on the non-performance of the condition by the son, to an estate tail. Lord Ellenborough, in his judgment, assumed that there was a preceding devise in fee to the daughter as well as to the son.

—upon Romilly *v.* James.

In Romilly *v.* James, the C. J. appears to have considered the general devise to A. as a gift of the remainder in fee of the property in question, expectant on an estate tail in B., and that it was in effect a devise to B. and his heirs, and in default of issue by him, to A. It is evident, therefore (whatever may be thought of the soundness of this interpretation), that this case also is no authority for the proposition, that a devise in default of issue of a person, not heir at law and not taking a prior estate by the will, raises in that person an estate tail by implication. A distinct recognition of the contrary doctrine

(*p*) These expressions are taken *verbatim* from the report.
(*q*) On this point see Ch. XLI.

occurs in the later case of Doe *v.* Lucraft (*r*), which has this peculiarity, that the devise over was in case of the failure of the testator's own issue (*s*); and it was treated as clear, that the words did not raise an estate tail by implication.

[But there is a difference between a gift over in default of issue of A., to whom no prior estate is given, and a gift over in default of issue of A. *and B.* following a devise of a prior estate to A. (but none to B.). In the latter case there is good ground for arguing that the same words which raise an estate tail in A. shall raise a like estate for B. in remainder after the estate tail implied in A.; assuming, of course, that the will has not, as was the case in Gardner *v.* Sheldon, left it in doubt whether they were intended to take successively in that order. A strong opinion in favor of such an implication was expressed in Parker *v.* Tootal (*t*).]

Gift to A. with gift on death without issue of A. and another.

The rule which implies an estate tail from words importing a failure of issue, was carried to a great length in one case, where the implication was considered not to be repelled by an *express* contingent devise in tail to the same person (*u*). The testator * bequeathed to A., his only son, an annuity, *560 increasing it at various ages until thirty, and to be paid to him until he married; *and in case he happened to marry before thirty*, then the testator devised to A. and the heirs of his body all his real (and personal) estate, subject to the payment of certain sums of money; *and if his said son should happen to die without leaving lawful issue of his body*, then he devised same to his (testator's) brother in fee: and it was held that the latter words raised an estate tail in the son by implication, which was not affected by the non-happening of the event upon which the express estate tail was made to depend, namely, his marrying before the age of thirty.

Estate tail implied, notwithstanding express contingent devise in tail.

The contrary hypothesis, namely, that if the devisee attained thirty without marrying, he was to take nothing, imputed to the testator a very absurd intention; but it was difficult to say that the words importing a failure of issue did not refer to the heirs of the body mentioned in the preceding devise.

No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked, as the stat. 1 Vict. c. 26, s. 29, provides that such words shall be

Effect of stat. 1 Vict. c. 26, upon the implication of estates tail.

(*r*) 1 M. & Sc. 573, 8 Bing. 386. [*Qu.* however whether the doctrine is touched by that case; for the failure of issue was held not to be general (which it is essential it should be for the implication of an estate tail), but confined to the testator's death. Moreover, in whom was the estate tail to be implied?] (*s*) As to these cases *vide post.*

[(*t*) 11 H. L. Ca. 143, by Lords Westbury, Cranworth, and Chelmsford. see pp. 159, 169, 173. Scrape *v.* Rhodes, Com. Rep. 542, is sometimes cited *contra*; but there (it was held) was no gift over of the devised land (in default of issue of the persons named), but only a charge of certain legacies, and the failure of issue was held not to be general.]

(*u*) Daintry *v.* Daintry, 6 T. R. 307.

held to mean a failure of issue in the lifetime or at the death of the person referred to, 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; and it is also provided, that the act shall not apply to cases where the words 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 (*x*).

Distinction where prior devise is in fee or indefinite,

Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee-simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt, was the effect contemplated and designed by the legislature.

*561 *A different and less desirable result, however, will occur where the prior devise being expressly for life, will not be enlarged by the statute to a fee-simple; while, on the other hand, the words importing a failure of issue will nevertheless be restricted. Thus if, by a will since 1837, real estate be devised to A. for life, and in case he should die without issue, to B., A. will take an estate for life only, with a contingent remainder to B., to take effect in the event of A.'s dying without leaving issue at his decease. Whether in such case the issue, if any, living at the decease of A. would take the fee by implication, remains to be decided: such a construction would certainly be convenient, as avoiding the palpable absurdity of making the estate of the ulterior devisee depend on the contingency of there not being issue, and yet, in the alternative event, giving the property neither to A. himself, nor to such issue, but leaving it to devolve to the heir at law or residuary devisee (as the case may be) of the testator. There is, however, no authority for implying an estate in the issue living at the death (*y*), and the contrary conclusion [is supported by Monypenny *v.* Dering (*z*), where it was argued that a devise over in default of issue of A., a tenant for life, to some only of whose issue an estate was expressly given, showed that the intention must have been that not some only but all the issue should take; but Sir J. Wigram, V.-C., said, that, admitting such to be the intention, it furnished no sufficient ground for supplying estates *by purchase* to the omitted issue.

and where expressly for life.

As to implying an estate in the issue.

[(*x*) See this section of the statute further observed upon, post, Ch. XL. s. 4, and Ch. XLI. s. 4.]

(*y*) *Vide ante*, p. 555.

[(*z*) 7 Hare, 588.]

He had asked for but did not get any authority for such a proposition.]

If, in a will which is subject to the new law, property real or personal is given in the event of the death without issue of a person to whom no preceding interest is given, the effect is simply to create a contingent gift to take effect on this event, leaving the property in the alternative event undisposed of; for, in such cases there is, of course, the same difficulty in raising an implied gift to the issue living at the death, as where the gift in question is preceded by a life-interest in the person whose failure of issue is made the contingency on which such gift is to take effect. Effect where there is no prior gift.

If however the devisee on the contingency of the failure of issue of another were the heir apparent or the heir presumptive of the testator, an argument would arise for implying a fee-simple in the parent or ancestor of the issue, in order to avoid the supposition (so stultifying to a testator) that he intends to * give to a person at a future time, *562 that which will intermediately devolve to him by act of law, without providing for its destination in the mean time.

The chief advantages attending the newly enacted mode of construing words importing a failure of issue are, 1st, that it brings all executory limitations depending on such a contingency within the limit prescribed by the rule against perpetuities (supposing, of course, that the person referred to is existing at or before the death of the testator, or necessarily comes *in esse* within twenty-one years afterwards), which limitations otherwise were, we have seen, void for remoteness; and this was the inevitable result whenever there was not sufficient ground for implying an estate tail in the first taker; in other words, when the person whose issue was referred to took no estate under the will, and neither he nor the express devisee was the heir at law of the testator; and, 2dly, that by excluding the implication of an estate tail in the person whose issue is so referred to where he takes an estate under the will, or where he or the express devisee happens to be the heir at law of the testator, the new construction has the effect of exempting the interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being, that instead of the ulterior devisee having (as formerly) a remainder in fee expectant on an estate tail in such prior devisee (which of course the latter might have barred by a disentailing assurance), he takes by executory devise engrafted on a preceding fee-simple, to arise on the event of the first devisee dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event. Advantages and disadvantages of the new enactment.

Against these advantages must be set the inconvenience which is consequent on the rejection of the implication of an estate tail in the first taker, where he takes an estate, expressly restricted to life, and therefore not capable of being enlarged by the recent act to a fee-simple;

in which case, the existence of issue at his death produces, as already shown, a vacancy in the disposition.

Implication of gifts to children.

VII. As no implied estate to the issue arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorized ground for implying a gift to *children* from a similar limitation over in default of these objects.

*563 * Accordingly, in several cases (*a*) it has been considered that a bequest to a person, and if he shall die without having children, or without leaving children (which means without having had a child born, or without leaving a child living at his decease (*b*)), then over, does not raise an implied gift in the children; but the parent takes an absolute interest, defeasible on his dying without having had, or without leaving, a child, as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children, he shall have the means of providing for them.

As to implying gifts in children from devise over in default of them.

Where the prior gift to the parent is expressly for life.

And even where the language of the will necessarily confines the interest of the parent to his life, [the children will not generally be held to take by implication: it is extremely probable that the testator intended a benefit to them; but *si voluit non dixit* (*c*). But it seems that in such a case] the court will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker

(*a*) Weakly d. Knight *v.* Rugg, 7 T. R. 322; Doe d. Barnfield *v.* Wetton, 2 B. & P. 324; [Addison *v.* Busk, 14 Beav. 459, 2 D. M. & G. 810; Dowling *v.* Dowling, L. R. 1 Ch. 612.] In Weakly d. Knight *v.* Rugg, leasehold property was bequeathed to A., and in case she died without having children, then over; and it was held, that A., on the birth of a child, was absolutely entitled, the only question discussed being, whether the words meant "without having a child born," or "without leaving a child living at the death." In Doe *v.* Wetton, the devise was to A., her heirs and assigns forever; but if she should die leaving no child, lawful issue of her body, living at the time of her death, then over. Here the only contested point was, whether the first taker had an estate tail, or an estate in fee defeasible on her dying without issue living at her decease; and the court decided in favor of the latter construction. Lord Eldon, C. J., observed, "if she had any children living at the time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grandchildren. *Nothing, however, is given to them by this will: they are merely named in the description of the contingency on which the estate is to go over.*" [See also Abram *v.* Ward, 6 Hare, 165.

(*b*) See Ch. XXX. s. 6.

(*c*) Ranelagh *v.* Ranelagh, 12 Beav. 200; Greene *v.* Ward, 1 Russ. 262; Sparks *v.* Restal, 24 Beav. 218; Webster *v.* Parr, 26 Beav. 237; Neighbour *v.* Thurlow, 28 Beav. 33. Wetherell *v.* Wetherell, 4 Gif. 51, as ultimately disposed of, 1 D. J. & S. 138, is not *contra*. See also Cooper *v.* Pitcher, 4 Hare, 485; Addison *v.* Busk, 14 Beav. 459; Lee *v.* Busk, 2 D. M. & G. 810, where the prior gifts were indefinite, but the gift over being in case the prior legatee died before the testator leaving no child, the result involved was the same as if the prior gift had been for life, *i.e.* the existence of issue who would intercept the gift over without any direct or indirect benefit to themselves.]

have no child, but that the property is not to go to the child, if there be one, or its parent.

Thus, where (*d*) a testator having by his will bequeathed 1,000*l.* to his niece A., by a codicil, reciting that she had * married indiscreetly, and that he intended to withdraw the legacy out of her power to dispose of it, and out of the power of her husband so to do, did therefore direct his executors to secure his said niece the interest of the said 1,000*l.* independently of her husband, by placing out that sum in trust for his niece, she to enjoy the interest or dividends during her life, *and at her decease, without child or children*, the principal and interest to be divided among such of her sisters as should be then living. Sir T. Plumer, V.-C., was of opinion that by the combined effect of the will and codicil, he was justified in saying that the children took the legacy by necessary implication. *564

Here the implication was evidently aided by the testator's prefatory expressions in the codicil, which showed that he did not intend to deprive his niece of the legacy bequeathed by the will, but merely to qualify it in a manner suited to her altered condition; [and, as the V.-C. remarked, the children were also the personal representatives of the niece. Remark on Ex parte Rogers.

Again, in Kinsella *v.* Caffrey (*e*), where a testator gave 50*l.* a-year each to L. and T. for their lives, and on the death of either leaving issue (construed children) his annuity to go to such issue; but if L. or T. should die leaving no issue at his death, his annuity was to go to the survivor for his life, and if both should die leaving no issue, or leaving such *and such issue should die under twenty-one*, both annuities were to sink into the residue. T. died unmarried, and afterwards L. died, leaving children. It was held by C. Smith, M. R. Ir., that L.'s children were entitled by implication to T.'s annuity. "Why," he asked, "was the event of their attaining twenty-one introduced if they were intended to take nothing prior to their attaining twenty-one?" Ex parte Rogers followed in Ireland;

He relied much on Ex parte Rogers, which, however, has been gravely doubted (*f*), and the authority of which must be applied with extreme caution. In cases of implication, said Turner, L. J., the court has gone far enough, and it is doubtful whether it would go as far as it formerly did in that direction (*g*). but questioned in England.

In a case where there was a gift to "the children of A. who shall be living at my death, or who shall have died in my lifetime leaving issue, share and share alike," it was argued that there was a gift by implication to the issue of a child who died before the testator; but this, of course, was held by Sir G. Jessel, M. R., to be inadmissible (*h*).]

(*d*) Ex parte Rogers, 2 Mad. 449. Some of the positions advanced in the judgment in this case must be received with an implied qualification. [(*e*) 11 Ir. Ch. Rep. 154.

(*f*) By Lord Cranworth in Lee *v.* Busk, 2 D. M. & G. 812; by Lord Romilly, Neighbour *v.* Thurlow, 28 Beav. 33.

(*g*) Dowling *v.* Dowling, L. R. 1 Ch. 615. (*h*) Re Coleman and Jarrom, 4 Ch. D. 165.]

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*CHAPTER XVIII.

RESULTING TRUST TO THE HEIR.

I. *Resulting Trust to the Heir in Real Estate not beneficially disposed of.*
II. *Effect where particular Estates are void in their Creation.*

I. If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed-of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property. It is clear, therefore, that where real estate is devised in fee, upon trust for a person incapable of taking, or who is not sufficiently defined, or who dies in the testator's lifetime, or who disclaims the estate, the beneficial interest in the estate so devised results to the heir at law (*a*).

Effect when will leaves property partially undisposed of.

Trust results to the heir, when.

On the same principle, where lands are devised upon trust for particular purposes, as for payment of debts, or with a direction to pay the rents to A. for life, and no further trust is declared, all the unexhausted beneficial interest results to the heir, as real estate undisposed of (*b*).[1]

(*a*) Hartop's case, 1 Leon. 253, Cro. El. 243; and other cases infra. [As to trusts for undefined objects, see also ante, pp. 384 *et seq.*] In the case of the legal estate so circumstanced, the lands descend to the heir charged with the trust.

(*b*) Culpepper *v.* Aston, 2 Ch. Ca. 115, 223; Roper *v.* Ratcliffe, 9 Mod. 171, 2 Eq. Ca. Ab. 508. In both the above propositions, however, it is assumed that the subject of disposition is the testator's general or residuary real estate, or that the will does not contain a residuary devise, the effect of which to pass the undisposed-of interest in particular lands is considered in Ch. XX.

[1] If real estate be devised upon trust to sell for a particular purpose, and that purpose either wholly fails, or does not exhaust the proceeds, the part that remains unapplied, whether the estate has been actually sold or not, will result to the testator's heir, and not to his next of kin. Starkey *v.* Brooks, 1 P. Wms. 390; Randall *v.* Bookey, Prec. Ch. 162; Stonehouse *v.* Evelyn, 3 P. Wms. 252; Robinson *v.* Taylor, 2 Bro. C. C. 589; Cruse *v.* Barley, 3 P. Wms. 20; Watson *v.* Hayes, 5 My. & Cr. 125; Davenport *v.* Coltman, 12 Sim. 610; Burnett *v.* Foster, 7 Beav. 540; Marriott *v.* Turner, 20 Beav. 557; Ex parte Pring, 4 Y. & Coll. 507; Eyre *v.* Marsden, 2 Keen, 564; Wright *v.* Wright, 16 Ves. 188; Hooper *v.* Goodwin, 18 Ves. 156; Spink *v.* Lewis, 3 Bro. C. C. 355; Chitty *v.* Parker, 4 Bro. C. C. 411; Lewin, Trusts (5th Eng. ed.), 124, and other cases in note (*a*). See also Hawley *v.* James, 7 Paige, 213; S. C. 5 Paige, 318; Wood *v.* Cone, 7 Paige, 471; Wright *v.* Methodist Ep. Church, 1 Hoff. 203; Bogert *v.* Hertell, 4 Hill, 492; Craig *v.* Beatty, 11 S. C. 375, 380; Estate of Tilghman, 5 Whart. 44; Snowhill *v.* Snowhill, 1 Green, Ch. 30; Hewitt *v.* Wright, 1 Brown, C. C. (Perkins) 86, 90; Robinson *v.* Taylor, 2 Brown, C. C. (Perkins) 589, 595; Wheldale *v.* Partridge, 5 Ves. (Sumner) 397; Chambers *v.* Brailsford, 18 Ves. (Sumner) 368. And the whole or surplus will result in this manner, though the proceeds of the realty be blended with the personal estate in the formation of one common fund. Ackroyd *v.* Smithson, 1 Bro. C. C. 503; Jessopp *v.* Watson, 1 My.

This doctrine is so well settled that if the character of trustee be plainly and unequivocally affixed to the devisee, no question can at this day be raised respecting its application;[1] but the difficulty in these cases generally is, to determine whether it is intended that the interest in the land, *ultra* the

Question whether devisees take beneficially, or not.

& K. 665; Salt *v.* Chattaway, 3 Beav. 576. And even an express declaration that the proceeds of the sale shall be considered as part of the testator's *personal estate* will not prevent the operation of the rule. Collins *v.* Wakeman, 2 Ves. Jr. 683; Lewin Trusts (5th Eng. ed.), 121. In a late case, where the testator even said, "Nothing shall result to the heir at law," it was held that nevertheless a bequest to the next of kin was not implied, but that the heir at law must take in spite of the intention to the contrary. Lewin Trusts (5th Eng. ed.), 122; Fitch *v.* Weber, 6 Hare, 145.

[1] A trust results by operation of law where the intention not to benefit the devisee or legatee is expressed upon the instrument itself; as if the devise or bequest be to a person "upon trust," and no trust declared. Lord Eldon in Dawson *v.* Clarke, 18 Ves. 254; Southouse *v.* Bate, 2 Ves. & B. 396; Morice *v.* Durham, 10 Ves. 537; Woollett *v.* Harris, 5 Madd. 452; Pratt *v.* Sladden, 14 Ves. 198; Dunnage *v.* White, 1 Jac. & W. 583; Goodere *v.* Lloyd, 3 Sim. 538; Penfold *v.* Bouch, 4 Hare, 271: Gloucester *v.* Wood, 3 Hare, 131; S. C. 1 H. L. Cas. 272; Longley *v.* Longley, L. R. 13 Eq. 137; Att.-Gen. *v.* Windsor, 24 Beav. 679; S. C. 8 H. L. Cas. 369; Lewin, Trusts (5th Eng. ed.) 119. Or where the bequest is to a person named as executor "to enable him to carry into effect the trusts of the will," and no trust is declared. Barrs *v.* Fewkes, 2 Hem. & M. 60. Or where the devise or bequest is upon certain trusts that are too vague to be executed. Fowler *v.* Garlike, 1 R. & My. 232; Morice *v.* Durham, 9 Ves. 399; S. C. 10 Ves. 522; Stubbs *v.* Sargon, 2 Keen, 255; S. C. 3 Mylne & C. 507; Leslie *v.* Devonshire, 2 Bro. C. C. 187; Vezey *v.* Jamson, 1 Sim. & S. 69; Williams *v.* Kershaw, 5 Cl. & Fin. 111; Lewin, Trusts (5th Eng. ed.), 119; Ellis *v.* Selby, 7 Sim. 352; S. C. 1 Mylne & C. 286; James *v.* Allen, 3 Meriv. 17; Sturtevant *v.* Jaques, 14 Allen, 526. Or where the gift is upon trusts to be thereafter declared, and no declaration is ever made. Emblyn *v.* Freeman, Pr. Ch. 541; London *v.* Garway, 2 Vern. 571; Collins *v.* Wakeman, 2 Ves. Jr. 683; Fitch *v.* Weber, 6 Hare, 145; Lewin, Trusts (5th Eng. ed.), 119; Brookman *v.* Hales, 2 Ves. & B. 45; Sidney *v.* Shelley, 19 Ves. 352; Taylor *v.* Haggarth, 14 Sim. 8; Flint *v.* Warren, 16 Sim. 124; Sturtevant *v.* Jaques, 14 Allen, 526. Or upon trusts that are void for unlawfulness. Carrick *v.* Errington, 2 P. Wms. 361; Arnold *v.* Chapman, 1 Ves. Sen. 108; Tregonwell *v.* Sydenham, 3 Dow. 194; Jones *v.* Mitchell, 1 Sim. & S. 290; Gibbs *v.* Rumsey, 2 Ves. & B. 294; Page *v.* Leapingwell, 18 Ves. 463; Pilkington *v.* Boughey, 12 Sim. 114; Lewin, Trusts (5th Eng. ed.), 120; Russell *v.* Jackson, 10 Hare, 204; Cook *v.* Stationers' Co., 3 My. & K. 262; Stevens *v.* Ely, 1 Dev. Eq. 493; Dashiel *v.* Att.-Gen., 6 Harr. & J. 1; Leonard *v.* People, 5 Ired. Eq. 137. Or upon trusts that fail by lapse, &c. Ackroyd *v.* Smithson, 1 Bro. C. C. 503; Spink *v.* Lewis, 3 Bro. C. C. 355; Williams *v.* Coade, 10 Ves. 500; Digby *v.* Legard, cited Cruse *v.* Barley, 3 P. Wms. 22, note by Cox; Hutcheson *v.* Hammond, 3 Bro. C. C. 128; Davenport *v.* Coltman, 12 Sim. 610; Muckleston *v.* Brown, 6 Ves. 63; Hawley *v.* James, 5 Paige, 318. For in these and the like cases, the trustee can have no pretence for claiming the beneficial ownership, when, by the express language of the instrument, the whole property has been impressed with a trust. Lewin, Trusts (5th Eng. ed.), 120. When property has been devised to a trustee for a specific purpose only, and the trust has failed by reason of the extinction of the *cestui que trust*, as a corporation, the trustee holds the property, after such failure, not for his own benefit, but for the devisor's heirs at law, as a resulting trust, and is answerable to them for it. Metcalf, J., in Easterbrooks *v.* Tillinghast, 5 Gray, 17, 21. Although the introduction of the words "upon trust" may be strong evidence of the intention not to confer on the devisee a beneficial interest (see Hill *v.* London, 1 Atk. 620; Woollett *v.* Harris, 5 Madd. 452; Sturtevant *v.* Jaques, 14 Allen, 526), yet that construction may be negatived by the context, or by the general scope of the instrument. Dawson *v.* Clarke, 15 Ves. 409; S. C. 18 Ves. 247, 257; Coningham *v.* Mellish, Pr. Ch. 31; Cook *v.* Hutchinson, 1 Keen, 42; Hughes *v.* Evans, 13 Sim. 496; Dillaye *v.* Greenough, 45 N. Y. 438. And in like manner the devisee may be designated as "trustee;" but the expression may be explained away; as, for instance, if the term be used with reference to one only of two funds, the devisee may still establish his title to the beneficial interest in the other. Batteley *v.* Windle, 2 Bro. C. C. 31; Pratt *v.* Sladden, 14 Ves. 193; Brigham *v.* Stewart, 13 Minn. 106; Lewin, Trusts (5th Eng. ed.), 120; Pratt *v.* Beaupre, 13 Minn. 187; Dillaye *v.* Greenough, 45 N. Y. 438. On the other hand, there may be a total absence of the word "trust," or "trustee," throughout the whole will, and yet the court may collect an intention that the devisee or legatee should be a trustee, as where there is a direction that the devisee or legatee shall be allowed all his costs and expenses, which would be without meaning if he took beneficially. Lewin, Trusts (5th Eng. ed.), 120; Saltmarsh *v.* Barrett, 29 Beav. 474; S. C. 3 De G., F. & J. 279.

purpose to which it is devoted, shall belong to the devisees in a fiduciary character, or for their own benefit.[1]

Lord Eldon's statement of the principle.

The distinction between the two classes of cases was, in King *v.* Denison (*c*), thus stated by Lord Eldon: "If I give to A. and his heirs all my real estate, charged with my *566 debts, that is a * devise for a particular purpose, but not for that purpose only; if the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. And the effect of these two modes admits just this difference: the former is a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, *subject* to a particular purpose; the latter is a devise *for* a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal estate is given for the purpose of satisfying trusts expressed, and those trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir.[2] But where the whole legal interest is given for a particular purpose, with an intention to give to the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him."

In illustration of this subject, it is proposed to state a few of the leading cases, showing, first, where a trust has been held to result; and, secondly, where not.

In Wych *v.* Packington (*d*), a testator, after appointing his wife S.

(*c*) 1 V. & B. 272.
(*d*) 3 B. P. C. Toml. 44. [See also Barrs *v.* Fewkes, 2 H. & M. 60.]

[1] This intention is to be gathered from the general purpose and scope of the instrument under which the question arises. Lord Hardwicke in Hill *v.* Bishop of London, 1 Atk. 620; Sir W. Grant in Walton *v.* Walton, 14 Ves. 322; Lord Cowper in Starkey *v.* Brooks, 1 P. Wms. 391; Lord Eldon in King *v.* Denison, 1 Ves. & B. 279; Ellis *v.* Selby, 1 Mylne & C. 298; Lewin, Trusts (5th Eng. ed.), 118. The heir will not be excluded from a resulting trust upon bare conjecture. Halliday *v.* Hudson, 3 Ves. 211; Kellett *v.* Kellett, 3 Dow, 248; Amphlett *v.* Parke, 2 R. & My. 227; Phillips *v.* Phillips, 1 Mylne & K. 661; Salter *v.* Cavanagh, 1 Dru. & Wal. 668; Hennersbolz's Estate, 16 Penn. St. 435. And there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that no benefit was intended to the heir; for the trust results to the real representative, not on the ground of intention, but because the ancestor has declared no intention. See Lewin, Trusts (5th Eng. ed.), 118, 119; Hopkins *v.* Hopkins, Cas. t. Talb. 44; Tregonwell *v.* Sydenham, 2 Dow, 194; Lloyd *v.* Spillett, 2 Atk. 151; Habergham *v.* Vincent, 2 Ves, Jr. 225. Thus, a legacy to the heir will not prevent a trust fund resulting. Randall *v.* Bookey, 2 Vern. 425; S. C. Pr. Ch. 162; Hopkins *v.* Hopkins, Cas. t. Talb. 44; Starkey *v.* Brooks, 1 P. Wms. 390; overruling North *v.* Crompton, 1 Ch. Cas. 196; Salter *v.* Cavanagh, 1 Du. & Wal. 668. But joined to other circumstances in favor of the devisee, it will not be without its effect. Rogers *v.* Rogers, 3 P. Wms. 193; S. C. Sel. Ch. Cas. 81; Dorksey *v.* Dorksey, 2 Eq. Cas. Ab. 506; Mallahar *v.* Mallahar, Cas. t. Talb. 78.

[2] If, upon a devise (Sherrard *v.* Harborough, Amb. 165; Hobart *v.* Suffolk, 2 Vern. 644; Nash *v.* Smith, 17 Ves. 29; Davidson *v.* Toby, 2 Bro. C. C. 203; Kericke *v.* Bransbey, 2 Eq. Cas. Ab. 508; Levet *v.* Needham, 2 Hern. 138; Halliday *v.* Hudson, 3 Ves. 210; Kellett *v.* Kellett, 3 Dow, 248) or bequest. (Robinson *v.* Taylor, 2 Bro. C. C. 589; Mapp *v.* Ellcock, 2 Phill. 793; S. C. 3 H. L. Cas. 492; Read *v.* Stedman, 26 Beav. 495; Lewin, Trusts (5th Eng. ed.), 117), a trust is declared of part of an estate, and nothing is said as to the residue, there clearly the creation of the partial trust is regarded as the sole object in view, and the equitable interest undisposed of by the settlor will result to him or his representative. Lewin, Trusts (5th Eng. ed.) 117, 118; Aston *v.* Wood, L. R. 6 Eq. 419; Jones *v.* Bradley, L. R. 3 Eq. 635.

sole executrix of his will, devised to his said dear wife, his executrix, a rent-charge of 200*l.* per annum, out of certain lands, upon trust that she, her executors, &c., should be supplied with moneys out of the rents and profits for the discharging his debts, legacies, and payments; to which end, he gave and bequeathed to her a lease for thirteen years of the said rent-charge, to commence six months after his decease. And the testator devised to his wife certain lands for life, in augmentation of her jointure; and the residue of his lands to his daughter (who was heir at law) in tail. The personal estate being found sufficient to satisfy the debts and legacies, it was not necessary to resort to this fund. The House of Lords, affirming a decree of the Court of Exchequer, held that the rent-charge resulted to the heir. Cases of resulting trusts.

So, in a case which arose on the will of Serjeant Maynard (*e*), who devised his lands to three persons, to the use of them and their heirs, upon the trusts after mentioned; and then directed the trustees, upon the death of the countess, his wife, to convey the estate to certain persons for life; but without disposing of the remainder in fee. It was contended that the devise, being * to them and *567 their heirs, upon the trusts after mentioned, imported that they should be trustees only for those purposes; and when those estates were spent, the land was to remain to them to their own use. But the L. C. held, that the remainder in fee resulted to the heir, adverting to the circumstance that the devise was to three persons, and one of them no relation to the testator.

[And in Watson *v.* Hayes (*f*), the testator devised all his real estates to trustees "in trust to and for the purposes hereinafter mentioned;" he then desired his estates to be sold, and out of the produce an annuity for life and a sum of money to be paid to his natural daughter, and also an annuity of 400*l.* to his wife for her life, and the residue of the income to be applied for the maintenance of his children till they attained twenty-one, "when it is my will that they shall respectively receive the principal, or one fifth part of such sum as may remain, after first reserving a sufficient capital, the interest arising from which shall be sufficient to pay the above annuity of 400*l.* to my said wife and my legacy to my natural child." The testator left five legitimate children. It was held that there was no gift of the moneys to be set apart to produce the annuity of 400*l.*, but that those moneys resulted to the heir at law as part of the real estate undisposed of.]

It is clear that where lands are devised upon trust for sale, the resulting trust in favor of the heir is not repelled by a mere bequest to him of a sum of money payable out of the proceeds.

Thus (*g*), where a testator devised lands to his executors and their

(*e*) Hobart *v.* Countess of Suffolk, 2 Vern. 644, 1 Eq. Ab. 272, pl. 7; [see also Collis *v.* Robins, 1 De G. & S. 131; Wills *v.* Wills, 1 D. & War. 439; Bird *v.* Harris, L. R. 9 Eq. 204.
(*f*) 5 My. & Cr. 125.]
(*g*) Starkey *v.* Brooks, 1 P. W. 390; see Randall *v.* Bookey, 2 Vern. 425.

Legacy to the heir does not exclude him.

heirs, in trust, to be sold by them, and the survivor of them, for the best price, and with the money to pay his debts, legacies, and funeral, and among the legacies were two to his coheirs: it was contended, on the authority of North *v.* Crompton (*h*), that, there being legacies to the heirs, and none to the executors, the latter must take for their own benefit; but Lord Cowper, C., held, that the trust resulted to the coheirs, adverting to the direction to the executors to sell for the best price, which need not have been inserted if they were intended to be owners (*i*); and also the devising the estate to the survivor, which, he observed, was a further argument of its being rather a trust than an ownership.

Resulting trust in lands devised to be sold.

*568 * Indeed, where the property is devised in trust to be sold, the point is so clear against the trustees, that a claim by them is seldom advanced; but the contest in such cases generally lies between the heir at law and the residuary legatee, or next of kin, whose respective claims are discussed in the next chapter.

So, where (*k*) a testator devised his manors, advowsons, &c., to trustees in trust, to pay his son 1,000*l.* a year for his life, and the rest of the profits to be laid out in land, to be settled to certain uses; Lord Hardwicke held, that the right of presentation arising from the advowsons during the son's life was a fruit undisposed of, and devolved to the heir; no other profits being given than such as might be accumulated; though, he said, if the testator had devised all the surplus rents and profits, it would have carried the right of presentation (*l*).

As to chattel interest devolving upon the heir.

And here it might be observed, that where the portion of real estate left undisposed of is a chattel interest, it devolves upon the heir as personalty, and is transmissible to his personal representative (*m*).

Cases in which devisees held to take beneficially.

We now proceed to the cases in which a trust has been held not to result, there being an apparent intention to give the devisee as well the beneficial interest as the legal estate.

(*h*) 1 Ch. Ca. 196; see also Halliday *v.* Hudson, 3 Ves. 210.

(*i*) Why not, as there was a trust for creditors, which might have absorbed all?

(*k*) Sherrard *v.* Lord Harborough, Amb. 165; see also Kellett *v.* Kellett, 3 Dow, 248.

(*l*) With this *dictum* agrees Earl of Albemarle *v.* Rogers, 2 Ves. Jr. 477, 7 B. P. C. Toml. 522, where a testator devised all his manors, messuages, lands and hereditaments to A. for eleven years from his death; and from the end, expiration, or sooner determination of the said term, and in the mean time subject thereto, to B. and his issue in strict settlement. The term was declared to be bequeathed to A., upon trust, to receive the rents, issues and profits of the premises, and thereout to pay certain charges therein mentioned, *paying the overplus of such moneys to the testator's daughter E.* During the eleven years an avoidance occurred in an advowson forming part of the property, and the next presentation was claimed by B., as the devisee of the estates subject to the term, the trusts of which, it was said, did not comprise an interest of this description; and also by E., either as the *cestui que trust* of the residuary rents, issues, and profits, during the term, or as heir at law; and it was held to belong to her in the former character, the entire beneficial interest during the term, not absorbed by the charges, being given to her. [See also Johnstone *v.* Baber, 6 D. M. & G. 439: But see Martin *v.* Martin, 12 Sim. 579.]

(*m*) Levet *v.* Needham, 2 Vern. 138; see also Wych *v.* Packington, 3 B. P. C. Toml. 44, stated ante, p. 566; [Hewitt *v.* Wright, 1 B. C. C. 90; Sewell *v.* Denny, 10 Beav. 315; Burley *v.* Evelyn, 16 Sim. 290; Whitehead *v.* Bennett, 18 Jur. 140.]

In Hill *v.* Bishop of London (*n*) a testator devised his perpetual advowson of B., in the county of H., to his honored mother-in-law G. S., willing and desiring her to sell and dispose thereof to certain colleges. Upon the refusal of one, the offer was to be made to another, in a prescribed order. Item, he gave to his said mother-in-law his freehold lands in the parish of O., and to her heirs and assigns forever. It was held, that the * beneficial interest in the advowson included in the first devise *569 did not result to the heir. "The general rule," said Lord Hardwicke, "that, where lands are devised for a particular purpose, what remains after that purpose is satisfied results, admits of several exceptions. If J. S. devise lands to H., to sell them to B. for the particular advantage of B., that advantage is the only purpose to be served, according to the intent of the testator, and to be satisfied by the mere act of selling, let the money go where it will; yet there is no precedent for a resulting trust in such a case. Nor is there any warrant, from the words or intent of the testator, to say that this devise severs the beneficial interest: it is only an injunction on the devisee to enjoy the thing devised in a particular manner. If A. devises lands to J. S., to sell for the best price to B., or to lease for three years at such a fine, there is no resulting trust." There were in this case, he observed, two objects of the testator's benevolence, G. S. and the colleges.

Effect of direction to sell to certain persons.

He also adverted to the circumstance that the word *trust* was not made use of; but this, though not immaterial, is by no means conclusive; for a trust may be created without that word, if such an intention can be collected from the whole will (*o*).

Word "trust" not necessary in creating one.

Lord Hardwicke's statement of the general rule may seem to clash with Lord Eldon's, before cited. He appears to have confounded the distinction, so clearly marked by Lord Eldon, between a devise *for* (*p*), and a devise *subject to*, a particular purpose; but, as the case before Lord Hardwicke seems to belong to the latter class, it is in accordance with that distinction. The frame of the devise and the context (for it was immediately followed by a devise, clearly beneficial to the same person) certainly favored the construction adopted. The case suggested by his Lordship, of a devise to A. to sell for the best price to B., perhaps, is more open to doubt. He admitted, however, that, under a

Distinction between a devisee *for*, and *subject to*, a particular purpose.

(*n*) 1 Atk. 618.

(*o*) Halliday *v.* Hudson, 3 Ves. 210; and see King *v.* Denison, 1 Ves. & B. 273; [Saltmarsh *v.* Barrett, 29 Beav. 474. 3 D. F. & J. 279 (on the word "charged"); Barrs *v.* Fewkes, 2 H. & M. 60 ("to enable"); Bird *v.* Harris, L. R. 9 Eq. 204 ("in consideration"). And a trust will not be created by the word "trust," if an intention not to do so appears by the whole will, Hughes *v.* Evans and Williams *v.* Roberts, both stated post, pp. 571, 572; Clarke *v.* Hilton, L. R. 2 Eq. 810.]

(*p*) See Abrams *v.* Winshup, 3 Russ. 350, where the word "for" was read as "charged with."

devise of lands to be sold for payment of debts, there was a clear resulting trust.

Effect of expressions importing benefit to the devisee.

The resulting trust for the heir in lands devised for a particular purpose is excluded, where the devise contains expressions importing an intention to confer on the devisee a benefit.

*570 *Thus (*q*), where a testator, having given 5*l.* to his brother, (who was his heir,) made and constituted his dearly beloved wife his sole executrix and *heiress of all his lands* and real and personal estate, to sell and dispose thereof at pleasure, and to pay his debts and legacies, Lord King held, she was not, after payment of debts, a trustee for the heir. He said that the devise that the wife should be sole heiress of the real estate, did, in every respect, place her in the stead of the heir, and not as a trustee for him; that it was plainer by reason of the language of tenderness, his "dearly beloved wife," which must have intended something beneficial to her, and not what would be a trouble only; and what made it still stronger was, that the heir had a legacy.

Of expressions of kindness.

That neither of these two circumstances alone is sufficient, is quite clear. The former occurred in Wych *v.* Packington (*r*), where the expression was "my dear wife," and yet the trust was held to result; and the latter, in Randall *v.* Bookey (*s*), where a legacy to the heir was decided not to rebut the inference of a resulting trust.

Of describing devisee by relationship.

Where the devisee is merely described by the relationship, as "my cousin," "my brother," unaccompanied by any particular expression of kindness, the argument is still less strong, the designation being merely part of his description; though certainly, in Coningham *v.* Mellish (*t*), the fact of the devisee being described as "my cousin," and that of his being as nearly related to the testator as the heir, seem to have formed the grounds of the determination. In the cases of that period, however, the doctrine of resulting trusts was not so invariably and steadily maintained as it is now; and many positions to be found in them are inconsistent with the rules at present established. Such a description of the devisee is certainly a circumstance to be attended to, and was so referred to by Lord Eldon, in reference to Coningham *v.* Mellish (*u*); but that it would now be allowed the weight which was given it in that case, is not probable.[1]

[Where the gift to the devisee was in the first instance expressly

(*q*) Rogers *v.* Rogers, 3 P. W. 193, Cas. t. Talb. p. 530.
(*r*) Stated supra, p. 566.
(*s*) 2 Vern. 425, 1 Eq. Ab. 272, pl. 4; [and see Hughes *v.* Evans, 13 Sim. 504.]
(*t*) Pre. Ch. 31, 1 Eq. Ab. 273, pl. 8, 2 Vern. 247.
(*u*) See King *v.* Denison, 1 V. & B. 274. [See also per Wood, V.-C., Barrs *v.* Fewkes, 2 H. & M. 67.

[1] But if from the whole will the intention is apparent that the donee shall not take the beneficial interest, all such circumstances are unavailing. King *v.* Mitchell, 8 Pet. 349; King *v.* Denison, 1 Ves. & B. 275.

upon trust, and the trust afterwards declared did not absorb the whole property, yet, on the whole, the testator having described the devisee as his most dutiful and respectful nephew, * and having expressly declared that the heir should take nothing except a provision made for him by the will, it was held that the devisee took beneficially subject to the trusts declared (*x*).][1]

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No trust though word "trust" used.

In Rogers *v.* Rogers, the purpose expressed, namely, the payment of debts and legacies, was not beneficial to the devisee; and, therefore, unless she had taken the surplus, she would have derived no benefit from the devise. It has been truly said that "where the purpose expressed is something in favor of the party to whom the bequest is made, the presumption is rather stronger that the benefit specified is the only benefit which he is intended to derive from the bequest" (*y*).

As to the expressed purpose of the devise being beneficial or not to the devisee.

In Dawson *v.* Clarke (*z*), a testator gave to his friends A. and B. all his real and personal estate, to hold to them, their heirs, executors, administrators, and assigns, upon trust in the first place to pay and charged and chargeable with all his just debts and funeral expenses and the legacies thereinafter bequeathed. The testator, after bequeathing several legacies, appointed A. and B. executors. Lord Eldon, — "The question is, whether, upon the whole will, this is to be taken as a devise and bequest to these executors with reference to their office, upon a trust to pay; or as giving them the absolute property subject only to a charge; and I think the latter was the intention."[2]

Of this case Lord Langdale, M. R. (*a*), has observed that Lord Eldon gave effect to the words "charged and chargeable" (which he had placed in opposition to the words "upon trust"), on some ground which does not appear in the report. It

Lord Langdale's remark on Dawson *v.* Clarke.

(*x*) Hughes *v.* Evans, 13 Sim. 496.]

(*y*) Per Sir W. Grant, in Walton *v.* Walton, 14 Ves. 322.

(*z*) 15 Ves. 409, 18 Ves. 247. This case was decided at the Rolls, in reference exclusively to the personal estate. [See also Clarke *v.* Hilton, L. R. 2 Eq. 810. Executors by their mere appointment were formerly entitled at law to the residue of personalty not expressly disposed of: and equity followed the law unless the next of kin could show from the will an intention that the executors should be trustees. This burden of proof was shifted by 1 Will. 4, c 40; Juler *v.* Juler, 29 Beav. 34; Travers *v.* Travers, L. R. 14 Eq. 275; and the question now seldom arises; but it arose in Harrison *v.* Harrison, 2 H. & M. 237, and was there decided in favor of the executor. Whether executors claiming, not merely *virtute officii*, but by express gift, were entitled for their own benefit, was before the act treated as a separate question depending on the general principles discussed in the text. Mapp *v.* Elcock, 2 Phil. 793, 3 H. L. Ca. 492; Re Henshaw, 34 L. J. Ch. 98; and (notwithstanding Love *v.* Gaze, 8 Beav. 472) it has been decided that this question is not affected by the act. Williams *v.* Arkle, L. R. 7 H. L. 606. See also Saltmarsh *v.* Barrett, 29 Beav. 474, 3 D. F. & J. 279. Of course the act is inapplicable to a gift to one of several executors. Clarke *v.* Hilton, L. R. 2 Eq. 810. By sect. 2 the act is not to apply as between the executor and the crown, where there is no next of kin. Cradock *v.* Owen, 2 Sm. & Gif. 241; Powell *v.* Merrett, 1 Sm. & Gif. 381; Read *v.* Stedman, 26 Beav. 495; Dacre *v.* Patrickson, 1 Dr. & Sm. 182.]

(*a*) 1 Kee. 324.

[1] See Gibbs *v.* Rumsey, 2 Ves. & B. 294; Cawood *v.* Thompson, 1 Smale & G. 409; Lomax *v.* Ripley, 3 Smale & G. 48; Ralston *v.* Telfair, 2 Dev. Eq. 255.

[2] See King *v.* Denison, 1 Ves. & B. 260; Southouse *v.* Bate, 2 Ves. & B. 396; Mullen *v.* Bowman, 1 Coll. Ch. 197; Wood *v.* Cox, 1 Keen, 317; S. C. 2 Mylne & C. 684; Downer *v.* Church, 44 N. Y. 647; Irvine *v.* Sullivan, L. R. 8 Eq. 673; Clarke *v.* Hilton, L. R. 2 Eq. 810.

might be that he considered the last words in the will as explanatory of the first.

A devise subject to certain annuities.

The general doctrine was much discussed in King *572 *v.* Denison (*b*), * where a testatrix devised her real estate to her cousin Mary A., wife of R. A., and to her cousin Arabella J., and their heirs and assigns for ever; *subject, nevertheless, to, and chargeable with*, the payment of the annuities thereinafter mentioned; and she bequeathed her personal estate to three other persons, subject to, and chargeable with, her debts and legacies; and gave such three persons equal legacies. Lord Eldon held, that the devisees of the real estate were not trustees, after paying the annuities, for the heir at law; he thought the intention was (according to the distinction stated by him, already quoted), that they should not take merely *for the purpose of paying* those annuities, but beneficially, *subject to* them. The Court of K. B. had made a similar decision upon the same will (*c*).

Circumstance of devisees being a married woman and an infant.

It happened in this case that one of the devisees was a married woman, and the other an infant of fifteen: persons, therefore, ill adapted to be trustees. But, though Lord Eldon admitted these were circumstances to be attended to (*d*), yet, he observed, that, if they were trustees upon the whole context, he could not say that they were not so on that ground; and upon the singularity that the testatrix had given to these cousins in preference to nearer relations, a sister and aunt, he said the answer was, she had made the disposition.

—and not testator's nearest relatives.

Of their being trustees of the personal estate.

Another circumstance in the case was, that the testatrix had used the same expression, "subject and chargeable," in the bequest of the personal estate to her executors, of which it was contended they were trustees, in consequence of having equal legacies given them; but Lord Eldon observed, that, admitting this construction as to the personalty, which he thought doubtful upon the cases, it did not follow that the same words, in different parts of the will, applied to a different subject, were to receive the same construction. It was only the same as if she had said that the executors should not take the personalty beneficially, but had made no such declaration as to the real estate (*e*).

[Lastly, in Williams *v.* Roberts (*f*), where a testator gave all his real and personal estate to his wife, her executors and administrators, upon trust to pay to his daughter an annuity during the life of his wife, and upon further trust that she, the said executrix, *at the time of her decease, should cause her executors, administrators, or assigns*, to pay

(*b*) 1 V. & B. 261.
(*c*) Smith d. Denison *v.* King, 16 East, 283; see also Wood *v.* Cox, 2 My. & Cr. 684, ante, p. 389; [Briggs *v.* Penny, 3 Mac. & G. 546.]
(*d*) See Blinkhorn *v.* Feast, 2 Ves. 27.
(*e*) But see Countess of Bristol *v.* Hungerford, 2 Vern. 645.
[(*f*) 4 Jur. N. S. 18, 27 L. J. Ch. 177.]

or cause to be paid to certain *persons, *should they survive* *573
his wife, certain legacies, which did not exhaust the beneficial interest; it was held, notwithstanding the express words of trust, that the undisposed-of interest belonged to the testator's wife and executrix, "the will being inconsistent with the notion that she was not to have a beneficial interest in the property."]

It should be noticed that an exception to the doctrine of resulting trusts exists in regard to gifts to charity;[1] the rule being, that, where lands, or the rents of lands, are given to charitable purposes, which at the time exhaust, or are represented to exhaust, the whole rents, and those rents increase in amount, the excess arising from such augmentation shall be appropriated to charity, and not go, by way of resulting trust, to the heir at law (*g*). It has been observed by Lord Hardwicke (*h*) and Lord Eldon (*i*), that, at the time this doctrine was established, the right of the heir at law under a resulting trust was not sufficiently understood, or it never could have been adopted. Both these great judges, however, acknowledged it to be a principle not now to be shaken. But, if a man give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say that the *cestui que trust*, even in the case of a charity, is entitled to the surplus. There would either be a resulting trust, or it would belong to the person who takes the estate (*j*). As to resulting trust in lands given to charity.

[It may be here observed that where property, vested in a trustee for the testator, is devised to other trustees for purposes which do not appear, or which are void, or fail, so that the heir, if there be one, would be let in, then in case of there being no heir, the trustees under the will can claim a conveyance from and enjoy the property beneficially as against the prior trustees (*k*)].

(*g*) Thetford School case, 8 Co. 130; Duke's Ch. Uses, 71; Sutton Colefield case, 10 Rep. 31; Duke, 68; Att.-Gen. *v.* Johnson, Amb. 190; Att.-Gen. *v.* Sparks, Amb. 201; Att.-Gen. *v.* Haberdashers' Company, 4 B. C. C. 103; S. C. nom. Att.-Gen. *v.* Tonna, 2 Ves. Jr. 1; see also Bishop of Hereford *v.* Adams, 7 Ves. 324; [Re Jortin, ib. 340; Att.-Gen. *v.* Wansay, 15 Ves. 231; Att.-Gen. *v.* Drapers' Company, 4 Beav. 67; Att.-Gen. *v.* Wax Chandlers' Company, L. R. 6 H. L. 1.] (*h*) Amb. 190. (*i*) 2 J. & W. 307.

(*j*) Lord Eldon in Att.-Gen. *v.* Mayor of Bristol, 2 J. & W. 307; [and Att.-Gen. *v.* Skinners' Company, 2 Russ. 443. See also Mayor of Beverley *v.* Att.-Gen., 6 H. L. Ca. 310.] But as charitable dispositions of lands by will are prohibited by the statute of 9 Gen. 2, c. 36 (ante, p. 219), unless in favor of certain objects, this question rarely occurs, except under wills which are prior to the statute. [(*k*) Onslow *v.* Wallis, 1 Mac. & G. 506.]

[1] Charities are so highly favored by the English law, that they have always received a more equitable construction than gifts to individuals. 2 Story, Eq. § 1165. The Court of Chancery has been astute to find out grounds to sustain them. Ib. § 1172, 1179. If lands are given to a corporation for any charitable uses which the donor contemplates to last forever, the heir never can have the land back again. Ib. § 1177. And when the increased revenues of a charity extend beyond the original objects, they are not a resulting trust for the heirs at law, but are to be applied to similar charitable purposes, and to the augmentation of the benefits of the charity. Ib. § 1178. See also Jackson *v.* Phillips, 14 Allen, 539, 589; Moore *v.* Moore, 4 Dana, 354, 366; Att.-Gen. *v.* Wilson, 3 Mylne & K. 362; Att.-Gen. *v.* Ironmongers' Co., 2 Mylne & K. 576; S. C. 2 Beav. 313; Att.-Gen. *v.* Draper's Co., 2 Beav. 508; Att.-Gen. *v.* Coopers' Co, 3 Beav. 29; Att.-Gen. *v.* Tonna, 4 Bro. C. C. (Perkins's ed.) 103, *et seq.* and notes. But the distinction heretofore pointed out between the *cy-près* doctrine of equity and that of the sign-manual should be remembered in determining upon the disposition of the charitable gift.

II. Another question which has been agitated between the heir and devisee is, whether if, in a series of consecutive limitations, *a particular estate be void in its creation from being limited to a person incapable by law or refusing to take, the remainders immediately expectant on such estate are accelerated, or the interest in question descends to the testator's heir at law as real estate undisposed of.[1]

Destination of particular estates void in their creation.

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The early authorities are clearly in favor of the acceleration. Thus, it is laid down in Perkins (*l*), that, "if a man, seised of land devisable in fee, devised it to a monk for life, the remainder to a stranger in fee, and the devisor dies, the monk being alive, in this case the remainder shall take effect presently." [But Sir J. Leach, M. R., put this case on the ground that the monk was actually dead in the eye of the law (*m*). So if land be devised to an attesting witness with remainder over, the remainder takes effect at once (*n*).]

Ulterior estate held to be accelerated.

So it was held by Gawdy, J., in Fuller *v.* Fuller (*o*) (though the case did not raise the point), that if the devisee of an estate tail refuse, the devisee in remainder shall take immediately. And the same point, in regard to a devisee for life, was maintained *arguendo* in Cranmer's case (*p*).[1]

The principle of these cases undoubtedly applies to the case of a devise of a life-estate being revoked by the testator: [and this has been so decided (*q*).]

As to acceleration by revocation of previous estate.

The doctrine evidently proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, or his decease without issue, if tenant in tail, yet that, in point of fact, it is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way. Such a principle is familiar in its application to the case of an estate for life being determined by forfeiture; and it seems not to be (as commonly supposed) contradicted by Carrick *v.* Errington (*r*), where a man settled [the equitable fee-simple of] lands to the use of T. E. (a papist) for life;

(*l*) 567. See also ss. 567, 569; and Shepp. Touchst. 435, 451.
[(*m*) 2 My. & K. 779. (*n*) Jull *v.* Jacobs, 3 Ch. D. 703.]
(*o*) Cro. El. 423. [So where devisee in tail died, though he left issue, Hutton *v.* Simpson, 2 Vern. 723; but see now 1 Vict. c. 26. s. 32.] (*p*) Dy. 310 a.
[(*q*) Lainson *v.* Lainson, 18 Beav. 1, 5 D. M. & G. 754.]
(*r*) 2 P. W. 361, 5 B. P. C. Toml. 391. [It is not stated in P. W. that the settlement was an equitable one, and consequently the case reads as if it were a direct authority that removal of the prior estate brought the estate in remainder of the trustees to preserve into possession; but see Lord Hardwicke's statement of the case in Hopkins *v.* Hopkins, 1 Atk. 597, and the statement of the case in Brown, and in 6 Bac. Abr. Gwil. 128. An express provision that in a certain event the estate for life shall cease *as if the devisee were actually* dead, clearly points to acceleration. Craven *v.* Brady, L. R. 4 Eq. 209, 4 Ch. 296.]

[1] If the devisee of property for life declines to accept it, it vests in possession in those to whom it was limited in remainder: and the heirs of the devisor have no right to the possession of the property during the life of the first devisee. Yeaton *v.* Roberts, 8 Foster, 459; Adams *v.* Gillespie, 2 Jones, Eq. 244; Macknet *v.* Macknet, 9 C. E. Green, 277.

remainder to trustees during * T. E.'s life, to preserve con- *575
tingent remainders; remainder to his first and other sons in tail male; remainder to W. E. The limitations in favor of the papist were, in the then state of the law (*s*), void; and it was held, that the remainders were not accelerated, *on the special ground, that such a construction would have defeated the limitations to the first and other sons of T. E.* [This special ground seems to resolve itself into the common rule, that a contingent remainder in an equitable estate does not fail by the determination of the previous estate, and it then necessarily followed, that the intermediate equitable interest during the life of T. E., being undisposed of, resulted, according to another common rule, to the grantor. It was also argued that W. E. ought to be let in until there was issue of T. E., and then that such issue would be entitled: but Lord King said the court would not "take upon itself so to direct and displace estates." "There is no case," said Sir J. Romilly, M. R., in Sidney *v.* Wilmer (*t*), "in which the estate of a remainder-man has been accelerated for the purpose of giving him a right to rent accrued before his estate took effect" (*u*).

Estate if not accelerated may be too remote.

In some cases, those for instance of a void limitation in tail, the result of deciding against acceleration would be to make the subsequent limitations void, as being, in that view, executory devises to take effect on an event too remote, namely, the indefinite failure of issue of the intended devisee in tail. Any effect which might be attributed to this consideration must of course be extended to all cases alike, as a test of the general principle, and not applied as a circumstance which ought to influence the determination of the particular case where the remainder would otherwise be void (*x*).

Whether same rules apply to personalty.

Whether the same principles are applicable to *quasi*-remainders of personalty appears to be undecided. Sir J. Romilly said not as a general rule; though in the case before him he held that there were special circumstances strong enough to create an exception (*y*). In Lainson *v.* Lainson (*z*), where a remainder in * freeholds was held to be accelerated by the revoca- *576
tion of the life-estate, the remainder in leaseholds bequeathed on corresponding trusts was held by the same judge to be also accelerated.

(*s*) But now see stat. 18 Geo. 3, c. 60.

[(*t*) 25 Beav. 266. See further as to this case and as to the destination of interim rents, post, Ch. XX. s. 1.

(*u*) See also Wade-Gery *v.* Handley, 1 Ch. D. 653, 3 Ch. D. 374; Chambers *v.* Brailsford, 18 Ves. 375 *ad fin.*; Andrew *v.* Andrew, 1 Ch. D. 414. But shifting clauses usually provide expressly or by implication for the destination of the rents in the mean time. Turton *v.* Lambarde, 1 D. F. & J. 516; D'Eyncourt *v.* Gregory, 34 Beav. 36.

(*x*) See ante, p. 293. And see Re Colson's Trusts, Kay, 135, where the enjoyment of an accumulation fund was accelerated, the devisees in tail of the estate for whose benefit it was created having barred the entail.

(*y*) Eavestaff *v.* Austin, 19 Beav. 591.

(*z*) 23 L. J. Ch. 170. Compare David *v.* Rees, 1 R. & My. 687, where stock was bequeathed in trust for A. for life, remainder to B. for life: by codicil an annuity to A. was substituted for his life-estate, and B.'s interest was held not accelerated.

And a similar decision was made by Sir R. Malins, V.-C., in Jull *v.* Jacobs (*a*). It is difficult to state any but a technical distinction on this head between real and personal estate. But if a void prior gift is made defeasible, and the subsequent gift is limited to take effect, in a particular event, and the very opposite or alternative of that event actually happens, the subsequent gift fails altogether, though the prior gift, being void, is out of the way (*b*).]

The doctrine of acceleration underwent much discussion in Tregonwell *v.* Sydenham (*c*), where a testator devised certain estates at S., subject to some terms of years, to the use of his son A. for life; remainder to trustees, during his life to preserve contingent remainders; remainder to the first and other sons of A. in tail male; remainder to the eldest daughter of A. in tail general; with the like remainder to his second and other daughters, and divers remainders over. The testator then devised estates at D., subject to certain terms of years, to A. for life; remainder to his first and other sons in tail male; remainder to the second and other sons of the testator in tail male; and, in default of his male issue, as to that part of those estates called C., remainder to the use of the testator's brother B. for life; remainder to his first and other sons in tail male, and, after several other remainders, remainder to the plaintiff J. for life; remainder to his first and other sons in tail male; remainder to the testator's right heirs. And as to all other his estates in D., to retain the same for sixty years, and receive the rents and grant leases until the trustees should have received 17,500*l.*, which they should apply to the uses following: viz. when they should have received 2,500*l.*, to lay out the same, with the interest, in some real estate in certain parishes, and settle the estate so purchased on such person for life as, by virtue of his said will, should then be in possession of his estate at S., or in case, by suffering a common recovery, that estate should be in other hands, then on such person as would, in case no recovery had been suffered, have been in possession of the same; and so, from time to time, as soon as the further sum of 2,500*l.* should be raised, until the whole *577 * 17,500*l.* should be so raised, should lay out the same in lands as thereinbefore directed, to be settled on the several persons as should be, or should have been, in case no such common recovery had been suffered at each of the said times, in possession of his S. estate, with such remainder on each of the said settlements as might continue the said estates in the blood and name of the St. Barbes; and, after the said 17,500*l.* should be so raised, then to raise the further sum of 2,500*l.*, to be laid out in some real estates in some or one of the parishes of D., E., &c. and to settle the said estate so purchased on such person for

Tregonwell *v.* Sydenham.

Devise to take effect *after* raising of a sum of money for certain purposes not accelerated by failure of the purposes.

(*a*) 3 Ch. D. 703.
(*b*) Lomas *v.* Wright, 2 My. & K. 769.]
(*c*) 3 Dow, 194.

life as, by virtue of that his will, should then be in possession of the estate of D.; or, in case of suffering a common recovery or otherwise, his said estate should be in other hands, then on such person as would, in case no recovery had been suffered, have been in possession of the same by virtue of his will, with such remainder as might continue the same in the name and blood of the Sydenhams. *And after the said two sums, amounting to* 20,000*l. and expenses, should be raised for the said uses, or determination of the said term of sixty years*, then to the use of the testator's brother B. for life, with remainder to his eldest and other sons in tail male; and, after such other remainder as he had limited with respect to the first part of his D. estate, remainder to J. the elder plaintiff, for life; remainder to his first and other sons in tail male, with the ultimate remainder in fee to the testator's right heirs. The testator died, leaving A., his only son, and two daughters. A. died in 1799, leaving his grandson T., the only son of one of his daughters, his heir at law. A., B. and several of the intermediate devisees (*d*), having died without issue male, the plaintiff J. the elder, became entitled to an estate for life in possession in the property at C., and plaintiff J., the younger (his eldest son), to an estate in remainder therein. T. was tenant in tail of the S. estate; and, as to the second part of the D. estate, the trusts of the term had not been executed. On a bill filed by J. and J. the younger to have the trusts of the term declared void as tending to a perpetuity, and that the residue should be assigned for their benefit, the Court of Exchequer declared the trusts to be void, and the term to attend the inheritance. But the House of Lords, on appeal, reversed the decree; declaring, first, that the trusts of the term were *not* void in their creation, but became so in event, the trusts for raising the money being valid; but that * of settling the lands to uses being *578 void as too remote, in consequence of its happening that the person then in possession, and to whom, therefore, an estate for life was to be limited with remainder to his issue, was one who was not in existence at the testator's death (*e*). Secondly (and this is the point material to the present discussion), that the trusts of the term resulted for the benefit of the heir at law of the testator (*f*).

Term for raising certain moneys for void purposes held to belong to the heir.

The argument of Lord Redesdale and Lord Eldon, upon which this part of their decision turned, was, that the land, not being given over until "from and after" the raising of the money, the intermediate interest was evidently not included in the devise, and, therefore, went to the heir. The interest given to the devisee was exclusive of, and with a deduction of, that sum. "The testator, then," observed Lord Eldon, "has said that the devisees shall not take it. The policy of the law

(*d*) It is stated in the report that they died in the testator's lifetime, but this appears to be a mistake.

(*e*) On this point *vide ante*, p. 276.

[(*f*) Lord St. Leonards in Law of Prop. p. 362, says, "I prefer the decision of the Exchequer."]

will not permit the uses for which the testator intended it to take effect; and in such a case, in the absence of any expression of intention on the part of a testator with respect to a purpose which the law will allow, the doctrine of law is, that *he* shall take the interest who takes independently of all intention, and on whom the law casts it. On these grounds, I agree that the money must be raised and applied for the benefit of the heir, and not of the devisees" (*g*).

Remark on Tregonwell v. Sydenham.

It is evident that the two points decided in D. P. had no necessary connection; or, in other words, that the deciding the heir to be entitled was not a consequence of holding the trusts of the term to be void in event only, and not in their creation; for Lord Eldon expressly laid it down, that, if the trusts had been to raise 20,000*l.* for charities (in which case they would have been clearly void *ab initio*), and after the sum had been raised, then to the devisees, as the intention would not have been in their favor, the heir would have been let in (*h*).

Term for years, trust being satisfied, or not arising, attends inheritance for the benefit of devisee.

It is clear, however, that where a term of years is created for particular purposes, and the land *subject thereto* is devised over, the term, after the purposes of its creation are satisfied, or immediately, if those purposes do not arise, attends the inheritance for the benefit of the devisee. And such was the decision in * Davidson *v.* Foley (*i*), although the nature of the trust and the expressions of the testator afforded an argument in favor of a contrary construction. The testator devised lands to trustees, their executors, &c., for ninety-nine years, upon the trusts after mentioned, and, after the expiration or other determination thereof, and subject thereto, to A., testator's son, for life, remainder to his first and other sons in tail male. Another term was created, in the same manner, of property similarly given to B., another son, and his sons in tail male. The trusts of the respective terms were for the trustees, in their discretion, to pay testator's two sons an annual allowance, not exceeding a given sum, but so as that *they should have no estate or interest in the rents of the property for their lives*, other than the trustees, in their discretion, should think proper; and then to pay off a certain mortgage; and then to pay certain debts of his sons, but so that the testator's sons' creditors should have no lien upon the land; and, *after the decease of his sons*, and the payment of the mortgage-money and debts before mentioned, and the costs, the terms were to attend the inheritance. Lord Thurlow was of opinion, that, as the purposes for which the terms were created were exhausted, the terms attended the inheritance for the benefit of the tenants for life. It

(*g*) And with this doctrine the cases on the statute restraining accumulation of income (ante, p. 311) seem to agree.

[(*h*) But in the case put not only the gift of the 20,000*l.*, but also the term would have been void *ab initio* (ante. p. 226), and the reversioner, and not the heir, would then have become entitled in possession. See Williams *v.* Goodtitle, 5 M. & Ry. 757, post, p. 580.]

(*i*) 2 B. C. C. 203. See Lord Eldon's judgment in Sidney *v.* Shelley, 19 Ves. 364.

had been ingeniously argued, he said, that these were trusts extending beyond the lives of the sons, and that, if those trusts were sufficient, the sons were to have no interest for their lives. But the nature of a resulting trust was, that it was such as had escaped the attention of the testator, and that here the intention of raising a trust beyond the payment of debts was totally unexpressed. No trust could be raised upon the terms used.

Lord Thurlow's reasoning evidently assumes that the devises, subject to term, comprised all the interest not actually absorbed by the trusts of such term; and this may serve to reconcile some expressions in his judgment, which might otherwise seem to warrant a conclusion more favorable to the heir than to the devisees.

Case in which term was created, but no trusts were declared.

The same principle was applied where a term for years was devised, upon trusts to be thereinafter declared (but which were not declared), with devises over on the "expiration or sooner determination" of the term, the words "subject thereto," though not actually occurring in the will, being by force of the intention appearing upon the general context, supplied. As, in Sidney *v.* * Shelley (*k*), where A. devised lands to trustees *580 and their heirs, to the use of them, their executors, &c., for ninety-nine years, "upon the trusts hereinafter expressed and declared concerning the same, and from and after the expiration or other sooner determination of the said term of ninety-nine years," he gave the said lands to several persons for life and in tail; and the will contained no declaration of the trusts of the term: it was strongly contended that the trusts resulted to the heir, chiefly on the authority of a dictum of Lord Hardwicke (*l*), in a case wherein a term of ninety-nine years having been created by settlement, without any declaration of trust, he is made to say, upon the question whether there was a resulting trust for the settlor, "It has been determined so in the case of voluntary settlements and wills;" distinguishing a settlement for valuable consideration. But Lord Eldon, in the principal case, decided that the testator, having created a term for ninety-nine years, upon trusts to be afterwards declared, and, at the expiration or sooner determination of that term, having devised those estates in such a manner as that the actual enjoyment of them was clearly intended; the termors having nothing for their own use, and he not having declared any trust, the result was exactly the same as if some trust had been declared, which it became unnecessary to satisfy, or which was satisfied after his death. He considered that the will was to be read as if the words "subject to the trusts thereof" were in it.

Lord Eldon observed, that, if the limitation had been simply to the trustees, without reference to any trusts, however monstrous the

(*k*) 19 Ves. 352.
(*l*) In Brown *v.* Jones, 1 Atk. 191. A note of this dictum, found among Lord Northington's papers, coincided.

As to terms not upon trust.

supposition with reference to the intention, the subsequent devisees must have taken subject to the term.

Reversion accelerated where term is void.

[If the limitation of the term itself is void, as where trusts are declared in favor of a charity, the devisee of the freehold is, of course, immediately entitled in possession (*m*).

The doctrine of acceleration does not extend to estates limited under powers of appointment; where, if the particular estate fails, the remainder continues such, and the estate, during the life of the intended taker, goes as in default of appointment (*n*).]

As to appointments under powers.

*581 * Sometimes an estate is made to determine at the majority of a minor; and it happens that he dies under age: whence arises the question, whether the devisee is entitled to hold the estate until the minor would, if living, have attained the prescribed age; or whether the devise over (for it has generally, though not necessarily, happened that there is such a devise) is accelerated.

Whether, under devise to A. during minority of B., A.'s estate determines on B.'s decease during minority.

In Carter *v.* Church (*o*), A. devised lands to his daughter in fee, and declared that his executors should receive the profits until she attained twenty-one, towards payment of his debts and legacies. The daughter died when five years old. The Lord Keeper was of opinion that the charging the profits until the daughter attained twenty-one, amounted to a term until she would, if living, have attained that age.

So, in Coates *v.* Needham (*p*), where A. devised lands to C. and D. and their heirs, upon trust, to receive the rents until his son W. should attain the age of twenty-one years; and pay one third to the testator's wife in lieu of dower; and out of the other two thirds to raise portions for his daughters; and devised all to W., when twenty-one, in tail; and, in default of such issue, then over. W. died under the age of twenty-one, without issue; the widow afterwards died before W. would, if living, have attained that age; and it was held, [according to the first report of the case (*q*), which is probably the correct one (*r*), that the wife's administrator was entitled during the term for which the minority would have lasted; but, in a subsequent case on the same will it was held] that the wife's third for such period was an interest undis-

[(*m*) Williams *v.* Goodtitle, 5 M. & Ry. 757.

(*n*) Per Sugden, C., Crozier *v.* Crozier, 3 D. & War. 365, 366; Sugd. Pow. 508, 8th ed. And distinguish the cases there cited, and Reid *v.* Reid, 25 Beav. 469, in which the remainder as well as the particular estate fails. In Craven *v.* Brady, L. R. 4 Eq. 209, 4 Ch. 296, the remainder was *expressly* accelerated. In that case, 4 Eq. 214, Romilly, M. R., cites as applicable to the general question of accelerating an appointed remainder some observations of Sir E. Sugden in Crozier *v.* Crozier, which appear to refer only to the question whether under an appointment the failure of the particular estate involved also the failure of the remainder; and stops just short of the passage cited above in the text.]

(*o*) 1 Ch. Ca. 113.

(*p*) 2 Vern. 65; [Levet *v.* Needham, ib. 138, which states the decision in Coates *v.* Needham wrongly.

(*q*) 2 Vern. 65.

(*r*) The decree is given in Mr. Raithby's edition from Reg. Lib., but he states that he could not find any decree in Levet *v.* Needham,] the most singular feature in which case is, the holding the interest of the wife to have ceased at her death. If, as the court assumed, a term was absolutely carved out of the inheritance, clearly words of limitation were not necessary to vest it in the wife with the transmissible quality of personal estate.

posed of, and went to the testator's heir, on the ground that nothing was given to the devisees until W. attained (or, rather, would have attained) his majority, and died without issue.

On the other hand, in Manfield *v.* Dugard (*s*), where A. devised lands to his wife until B., his eldest son, should attain twenty-one; and, when he should attain that age, to him in fee. * B. died at the *582 age of thirteen; whereupon his heir at law claimed the rents from his death. The L. C. held, that the heir was entitled, for that the wife's estate determined at the death of the son, whose estate in fee, which was vested at the testator's death, took effect in possession on that event.

One of the reasons assigned for this adjudication was, that the land was not devised to the wife for the payment of debts; [and this agrees with Boraston's case (*t*), where a testator devised lands to his executors until such time as his grandson, Hugh, should accomplish his full age of twenty-one years, and the mean profits to be employed by his executors towards the performance of his will. Hugh died at the age of nine years; and it was argued by Coke, that the term of the executors did not thereby cease, because it was to be intended that the testator had computed that the profits to be taken of his lands by his executors, during the minority of his grandson, would suffice to pay his debts and perform his will, and that he did not intend that it should determine by the death of his grandson, for then his debts would remain unsatisfied and his will unperformed, which was granted by the whole court (*u*).

This argument was adopted by Sir J. Jekyll, M. R., in Lomax *v.* Holmedon (*x*), in which he distinguished the cases where such an interest was created for a particular purpose, as for a fund for payment of debts (which he said was Boraston's case), from the cases where no such intention appeared: in these latter he said the interest would absolutely determine by the death of the party under the age specified in the will. It is plain that here] the existence of the minority supplies the sole occasion and motive for the creation of the estate in question (*y*). [The principle of these authorities is clearly unaffected by the circumstance of the specified purpose being insufficient to exhaust the whole proceeds of the term. The construction is that the testator has made his own computation, so that the estate must endure until the * regular expiration of the term, and if any *583

(*s*) 1 Eq. Ca. Ab. 195, pl. 4. [(*t*) 3 Co. 19 a. (*u*) 3 Co. 21 a.

(*x*) 3 P. W. 176. See also Sweet *v.* Beal, Lane, 56, where the term was held to endure beyond the death of the minor under age, for the termor's own benefit, which was therefore the "particular purpose" in that case.

(*y*) See Castle *v.* Eate, 7 Beav. 296. If the person to whom the intermediate interest is given should die during the minority, the same reasons (*i. e.* "the existence of the minority") will give the interest to his representatives during the remainder of the term: See Laxton *v.* Eedle, 19 Beav. 321. Where it is a class during whose minority the income of property is given, the estate will continue while there is a chance of any persons becoming members of the class, though none may for the time being be actually in existence, *e.g.* during the life of a parent whose children's minority is contemplated, semb. Conduitt *v.* Soane, 4 Jur. N. S. 502.]

part of the beneficial interest is undisposed of, it must result to the heir at law.]

Postponement during minority, not extended to devisees over.

Sometimes it happens that real estate is devised to a minor contingently on his attaining twenty-one, with a devise over in the event of his dying under that age; in which case, though, under the original devise, if construed to be contingent, the property would during the minority have devolved to the heir at law of the testator as real estate undisposed of; yet, on the minor dying under age, the devise over, not being subject to the postponement affecting the original devise, takes effect in possession immediately (*z*).

(*z*) Chambers *v.* Brailsford, 18 Ves. 368.

*CHAPTER XIX. *584

DOCTRINE OF CONSTRUCTIVE CONVERSION.

I. *Money considered as Land, and vice versâ. Distinction between absolute and qualified Converting Trusts.*

II. *Election to take Property in its actual State.*

III. *Effect where Legatee's Enjoyment is apparently postponed until Conversion, and, generally, as to relative Rights of Legatee for Life and ulterior Legatee under residuary Clauses.*

IV. *Destination of undisposed-of Interests in Property directed to be converted. Doctrine of Conversion as between Claimants under Will and real and personal Representatives of Testator.*

V. *Effect of Failure by Lapse, or otherwise, of pecuniary Gifts out of Proceeds of Land.*

I. On the principle that equity considers that as done which ought to have been done, it is well established that "money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted;[1] and this in whatever manner the direction is given: whether by will, by way of contract,[2] marriage articles, settlement, or otherwise; and whether the money be actually deposited, or only covenanted to be paid; whether the land is actually conveyed,

Money to be laid out in land considered as land, and *vice versâ*

[1] Bramhall *v.* Ferris, 4 Kernan, 41; Bogert *v.* Hertell, 4 Hill, 492; Stagg *v.* Jackson, 1 Comst. 206; Brothers *v.* Cartwright, 2 Jones, Eq. 113. In general, Courts of Equity do not interfere to change the quality of property as the testator or intestate has left it, unless there is some clear act or intention, by which he has unequivocally fixed upon it throughout a definite character, either as money or land. It is said that there is no equity between the heir and the next of kin as to the right of property in such cases. To establish a conversion, the will must direct it absolutely, or out and out, for all purposes (not merely those of the devises), irrespective of contingencies and independent of all discretion. Wright *v.* Methodist Ep. Church, Hoff. 202; Clay *v.* Hart, 7 Dana, 11; 2 Story Eq. Jur. § 1214; Evans *v.* Kingsberry, 2 Rand. 120; 2 Kent, 230, note; Brearley *v.* Brearley, 1 Stockt. 21. See further on conversion, North *v.* Valk, Dud. Eq. 212; Peter *v.* Beverly, 10 Peters, 532; Wood *v.* Cone, 7 Paige, 472; Gott *v.* Cook, ib. 522; S. C. 24 Wend. 660; Van Vechten *v.* Van Veghten, 8 Paige, 104; Proctor *v.* Ferebee, Ired. Eq. 143; Amphlett *v.* Parke, 2 Russ. & M. 221; Snowhill *v.* Snowhill, 1 Green, Ch. 30; Craig *v.* Leslie, 3 Wheat. 563, 577; Stephenson *v.* Jandle, 3 Hayw. 109; Leadenham *v.* Nicholson, 1 Har. & G. 267; Marsh *v.* Wheeler, 2 Edw. 156; Newby *v.* Skinner, 1 Dev. & B. Eq. 488; Ram on Assets, c. 14, § 1, pp. 204–209; Bunce *v.* Vandergrift, 8 Paige, 37; Rutherford *v.* Green, 2 Ired. Eq. 122; Reading *v.* Blackwell, Bald. C. C. 166. A conversion may have actually taken place in the lifetime of the testator, as where he gives land which he has already sold or agreed to sell. In this case, the devisee will be entitled to the purchase-money. Wright *v.* Minshall, 72 Ill. 584.

[2] A contract to sell devised estate, not performed by the testator, is deemed to work a conversion of the land, so as to make nothing but the bare legal title pass to the devisee, while the real interest passes as money to the executor. Cooper *v.* Cooper, 21 Ind. 124.

or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land" (*a*).[1] It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character. This doctrine is founded in justice and good sense: since it would be obviously unreasonable that the condition of the property, as between the representatives of the parties beneficially interested, should depend on the acts of persons through whom, instrumentally, the conversion is to be effected, and in whom no such discretion *585 is expressed * to be reposed. The principle is, besides, too well supported by numerous authorities (*b*), to be called in question at this day.[2]

Cases illustrative of the doctrine.

Thus, money directed to be laid out in land, and settled on A. in fee, is, though not actually laid out, descendible as real estate to the heir, is subject to tenancy by the curtesy (*c*); is not liable (otherwise than real estate is liable) to simple contract debts (*d*); and passes under a devise of lands, tenements,

(*a*) *Vide* Sir Thomas Sewell's judgment in Fletcher *v.* Ashburner, 1 B. C. C. 499, whose statement of the doctrine in these terms was commended for its accuracy by Lord Alvanley, in Wheldale *v.* Partridge, 5 Ves. 396. [As to conversion by contract, *vide ante*, pp. 52, 162. None on voidable contract, as, on purchase by trustee for sale, Ingle *v.* Richards, 28 Beav. 361.]

(*b*) 2 Keb. 841; 2 Vern. 55; Pre. Ch. 543. cited 2 Vern. 58; 1 Vern. 345; 2 Vern. 20; 1 Eq. Ab. 273, pl. 5; 1 Eq. Ab. 274, pl. 6; 2 Vern. 101; ib. 295; ib. 506; 1 P. W. 172; Pre. Ch. 400; 1 Eq. Ab. 175, pl. 5; 3 P. W. 212: Ca. t. Talb. 80; 1 P. W. 204; ib. 483; 1 B. P. C. Toml. 207; 3 B. P. C. Toml. 1; ib. 148; 2 Atk. 452; 3 Atk. 111; 3 ib. 254; 1 B. C. C. 224; 7 B. P. C. Toml. 530; 1 B. C. C. 497; ib. 505; 2 Kee. 653.

(*c*) Sweetapple *v.* Bindon, 2 Vern. 536; Cunningham *v.* Moody, 1 Ves. 174; Dodson *v.* Hay, 3 B. C. C. 404. (*d*) Lawrence *v.* Beverly, 2 Keb. 841; now see Ch. XLVI. s. 1.

[1] When land held in trust under a will is taken for public use, by right of eminent domain, the money paid for it stands in its place, subject to the same trust and to the same ultimate disposition. Holland *v.* Cruft, 3 Gray, 162, 180; Gibson *v.* Cooke, 1 Met. 75. In Holland *v.* Adams, 3 Gray, 188, it was laid down as the result of the authorities that in case of a conversion of real into personal estate to stand in the place of the real without changing the beneficial destination, the character thus impressed upon the money will attach to it until it reaches one who, if it had remained real estate, would take it beneficially, that is, to his own use absolutely, or with a power to dispose of it absolutely, or make it his own to all purposes; and it will then be his absolutely.

[2] Holland *v.* Cruft, 3 Gray, 162, 180. The doctrine of conversion by a direction to sell real estate must be taken with the qualification that the change does not take place until the period arrives or the event occurs when the conversion ought to be made. Hence, where the direction is to sell real estate after the death of the testator's widow, and not before, the conversion is postponed until the happening of that event; but when the event does happen conversion occurs whether a sale is made or not. Savage *v.* Burnham, 17 N. Y. 561, 569. If a direction to sell land, however, is absolute, it is no exception to the rule that land directed to be sold and turned into money is to be treated as money from the death of the testator, for all the purposes of the will, that the time of sale is remote, and that the conversion in fact cannot be made until the time arrives. McClure's Appeal, 72 Penn. St. 414, and many cases cited. If a testator make an alternative gift of property to his son, so that on his election it becomes the duty of the executor to invest the sum set apart in land, the conversion becomes complete in law as well as equity on the purchase of the land, and the gift is to be treated as a devise of land. Ross *v.* Drake, 37 Penn. St. 373. A conversion is not prevented from taking place by reason of the fact that the legal estate has not been given in trust to the person in whom the power of sale is vested, or by reason of the fact that there was no devise of the lands and that they passed by descent to the heirs of the testator. Fisher *v.* Banta, 66 N. Y. 468; Post *v.* Hover, 33 N. Y. 593; Bogart *v.* Hertell, 4 Hill, 492.

and hereditaments (*e*), in a will sufficiently attested to pass real estate; [and will not pass under a general bequest purporting to include personal estate only (*f*).]

On the same principle, where, under the old law, a person entitled to the fee-simple, in possession or reversion, of lands to be purchased, devised them by a will executed before the actual conveyance, the lands subsequently purchased were bound in equity by the devise (*g*).

So, in the converse case of real estate, whether freehold or copyhold, being directed to be sold, and the proceeds bequeathed to A., who, after surviving the testator, happens to die before the sale, the property devolves to his personal, not his real, representative, with all the incidental qualities of personal estate (*h*).

It is true that, on one occasion (*i*), Lord Loughborough doubted whether, in such cases, there was any equity between the real and personal representatives; suggesting that they were rather to take according to the state in which the property was found. But this solitary dictum has been completely overruled by subsequent judges, who, following the earlier cases, have confirmed the rule before stated (*k*).

General doctrine denied by Lord Loughborough.

His dictum overruled.

The doctrine, of course, applies where the ultimate destination * of the property is to be reached by several gradations. Thus, land directed to be sold, and the proceeds to be invested in land, will, though neither conversion has been actually effected, be regarded as real estate (*l*).

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Double conversion.

[In order to work a constructive conversion, an actual sale or purchase either immediately or in future, and either absolutely or contingently at a specified time, must be directed expressly or impliedly. A direction that real estate shall not be sold but shall be considered as personal, or *vice versâ*, is insufficient (*m*), since the law does not allow property to be retained in one shape, and yet to devolve as if it were in another. But where a sale is not expressly excluded, such a direction would generally amount to a trust for sale (*n*).[1]

No conversion unless a sale intended.

(*e*) Lingen *v.* Sowray, 1 P. W. 172; Shorer *v.* Shorer, 10 Mod. 39; Harvey *v.* Aston, 1 Atk. 364; Guidot *v.* Guidot, 3 Atk. 254; Rashleigh *v.* Master, 1 Ves. Jr. 201, 3 B. C. C. 99; Hickman *v.* Bacon, 4 B. C. C. 333; Green *v.* Stephens, 12 Ves. 419, 17 Ves. 64.

[(*f*) Gillies *v.* Longlands, 4 De G. & S. 372; and see Richards *v.* Att.-Gen. of Jamaica, 13 Jur. 197; Re Pedder's Settlement, 5 D. M. & G. 890; Re Skeggs, 2 D. J. & S. 533.]

(*g*) See Lord Cowper's judgment in Lingen *v.* Sowray, as reported 1 Eq. Ca. Ab. 175, pl. 5. Such a question can hardly arise under a will made or republished since 1837.

[(*h*) Elliott *v.* Fisher, 12 Sim. 505.] (*i*) Walker *v.* Denne, 2 Ves. Jr. 170.

(*k*) Wheldale *v.* Partridge, 5 Ves. 388, 8 Ves. 227; Thornton *v.* Hawley, 10 Ves. 129; Biddulph *v.* Biddulph, 12 Ves. 161; Green *v.* Stephens, ib. 419, 17 Ves. 64; Kirkman *v.* Miles, 13 Ves. 338; Triquet *v.* Thornton, ib. 345; Van *v.* Barnett, 19 Ves. 102; Ashby *v.* Palmer, 1 Mer. 296, and stated post; Stead *v.* Newdigate, 2 Mer. 521.

(*l*) Sperling *v.* Toll, 1 Ves. 70; Pearson *v.* Lane, 17 Ves. 101. [In such a case, where part of the land has been sold and the money not yet re-invested, the money will not pass under a devise of all the testator's interest in the land, if there is any part unsold to answer the description. Re Pedder's Settlement, 5 D. M. & G. 890.

(*m*) Att.-Gen. *v.* Mangles, 5 M. & Wels. 120.

(*n*) Tait *v.* Lathbury, L. R. 1 Eq. 174; Johnson *v.* Arnold, 1 Ves. 169.

[1] "I request my executor to sell" will work a conversion. Green *v.* Johnson, 4 Bush, 164. A sale may also be required by implication, without any express direction. Wurt *v.* Page, 19 N. J. Eq. 365.

Effect of words giving an option as to investments.

Where a trust is in form optional to invest money, either in the purchase of fee-simple lands or leaseholds, or on securities bearing interest, there will be no constructive conversion of the money into land, unless the trusts or limitations declared of the fund are such as are applicable only to fee-simple property, and can be properly carried into effect only by the purchase of such property (*o*); where the trusts are applicable solely to personalty, or may be adapted either to personalty or fee-simple lands, the money will be deemed unconverted.

And first as to the cases where money has been held to be converted.

Cases where money has been held converted.

Earlom *v.* Saunders.

In Earlom *v.* Saunders (*p*), lands were devised to trustees to the use of the testator's wife for life, with remainder to his first and other sons in tail male, with remainder to his daughters in tail, with remainder to two persons as tenants in common in fee; and money was bequeathed to trustees to be laid out in the purchase of lands *or any other security or securities* as they should think proper and convenient; and the testator directed that the lands and securities should be made to and settled on the trustees, their heirs and assigns in trust and to the use of his wife for life, and after her decease to such uses and under such provisions, conditions and limitations as his lands before devised were limited; Lord Hardwicke, on the ground that if the money was laid out on se-
*587 curities which were personal, all the limitations * might not take place, considered the money to be constructively converted.

Cowley *v.* Hartstonge.

In Cowley *v.* Hartstonge (*q*), the point was much considered. The trust was to lay out moneys "either in the purchase of lands of inheritance, or at interest, as my trustees shall think most fit and proper, and then upon this further trust, to pay the rents of the said lands of inheritance, or the interest of the money, &c., to H. for his life," and then followed a series of limitations of estates for life and in tail to the sons and daughters of H., and to other persons in strict settlement. It was held in D. P. that taking the whole will together, the testator contemplated *an investment in land at some time or other*, and there was therefore a constructive conversion. There was an ultimate limitation to the testator's right heirs, *executors and administrators;* but Lord Redesdale said the meaning of that was merely that if all the previous limitations failed before the death of H. there was no further cause for investing in land, and the personal estate might be left to go to the testator's next of kin, and the real estate to the heir.

Hereford *v.* Ravenhill.

In Hereford *v.* Ravenhill (*r*), fee-simple estates were devised in strict settlement, and money was bequeathed upon trust with consent to be invested in the purchase of freehold, *leasehold*, or

(*o*) See De Beauvoir *v.* De Beauvoir, 3 H. L. Ca. 524.
(*p*) Amb. 241; see also Johnson *v.* Arnold, 1 Ves. 169; Meure *v.* Meure, 2 Atk. 265.
(*q*) 1 Dow, 361. (*r*) 5 Beav. 51.

copyhold messuages, lands, or hereditaments, which were to be conveyed, settled or assured to the like uses, &c., as the hereditaments thereinbefore devised stood limited. There was, also, a power to invest at interest till a purchase could be made. Lord Langdale, M. R., decided that this was a trust for conversion, and observed that the case before him differed from Walker *v.* Denne (presently noticed), in that the leaseholds to be purchased in that case were to be for very long terms of years. This difference is not very apparent; but the limitations in the several cases were such as easily to lead to different conclusions.

In Cookson *v.* Reay (*s*), the testator directed a sum of money to be invested in land or other securities for his son John, the interest of such money or produce of such lands to be paid to him for his life, and if he married with consent, and made a proper settlement on his wife, that the remainder should go to such child or children as he might have lawfully begotten, and on failure of these to the testator's son Isaac and his heirs forever. Lord Langdale, without deciding the point, said that, upon the authorities of Earlom *v.* Saunders and Cowley *v.* Hartstonge, he was inclined to consider the money as directed to be laid out * in the purchase of land, and *588 that the direction to invest on some other securities had reference only to the time which might elapse before a purchase of land could be procured. On appeal to D. P. (*t*), Lord Brougham inclined to the same opinion by reason of the words "remainder" and "heirs" in the limitations to the children and Isaac. It would seem that "heirs" alone would not have supported this conclusion (*u*). However, assuming that the will had converted the money, the decision was that the beneficiaries had reconverted it. Cookson *v.* Reay.

In Simpson *v.* Ashworth (*x*), the testator gave to his daughter C. 4,000*l.* out of his personal estate, and directed his executors to pay her the interest of 2,000*l.* till she attained the age of twenty-one years. He also directed his executors or the survivor of them, as soon as convenient after his decease, to purchase an estate, not to exceed 2,000*l.*, for her use and her lawful heirs, the daughter to come into possession, with the accumulations, at her age of twenty-one years. If the land was not bought before she attained that age, she was to receive the 4,000*l.*, and to give security for 2,000*l.*, to be returned, if she died without lawful heirs, to the testator's son and daughters that should have heirs, share and share alike, and provided the land be purchased, to be returned in the same manner. Lord Langdale held that the 2,000*l.* was intended to be converted at all events, and that the daughter took an estate tail. Applied to personal estate the gift over on the death of the daughter without heirs (*i.e.* heirs of her body) would have been void for remoteness; which of itself, Simpson *v.* Ashworth.

(*s*) 5 Beav. 22. (*t*) Cookson *v.* Cookson, 12 Cl. & Fin. 121.
(*u*) Attwell *v.* Attwell, L. R. 13 Eq. 23; Walker *v.* Denne, 2 Ves. Jr. 170.
(*x*) 6 Beav. 412.

according to Earlom *v.* Saunders, was strong reason for deciding in favor of the conversion.

Cases where money has been held not converted.

Next, with respect to the cases in which it was held that there was no conversion.

Curling *v.* May.

In Curling *v.* May (*y*), the trust was to lay out money in the purchase of lands, or put the same out on good securities, upon trust for the separate use of H., her heirs, executors and administrators. The money never having been laid out, Lord Talbot decreed the administrator of H. to be entitled.

Van *v.* Barnett.

In Van *v.* Barnett (*z*), lands were devised to trustees to be sold, and the produce, with the consent of certain persons, was directed to be laid out in the purchase of *lands or in government securities*, and the latter trust was held not to operate as a reconver-
*589 sion, the trusts declared of the fund in its ultimate state * not being such as to show that a re-investment in land at some time or other was intended (*a*).]

Walker *v.* Denne.

In Walker *v.* Denne (*b*), where money was directed to be laid out in (freehold) lands, *or* long terms of years, in trust for A. for life, and afterwards for her children and their heirs, but if there should be no child or heirs of her body living at her death, then for the testator's right heirs, Lord Loughborough held that it was not converted into realty so as to escheat to the crown on failure of heirs, there being an option in the trustees to have it laid out in either species of property. Indeed he doubted whether, even if there had been no such option, the crown could have claimed. But his doubt appears to have referred as well to the general doctrine, as to its effect in regard to escheat. There would seem to be considerable difficulty in supporting the claim of the crown to have the money laid out in such a case, escheat being a consequence of tenure, and, therefore (it should seem) inapplicable to equitable interests of every description (*c*).

Doctrine of conversion in regard to escheat.

[Sometimes there is no express trust for conversion, but the accompanying directions are such as lead to an implication that conversion was intended; as, where real and personal estate was devised to trustees in trust to "invest" the same in the funds (*d*); and, again, where leaseholds were given upon the same trusts and subject to the same powers as those declared of the moneys to arise by sale of property previously given in trust for sale (*e*). But the same inference is not necessarily to be drawn from a trust to divide into several shares, even though the trustees have an express *power* of

Implied trust for conversion.

(*y*) Cited 3 Atk. 255. (*z*) 19 Ves. 102.
(*a*) See also Biggs *v.* Andrews, 5 Sim. 424; Rich *v.* Whitfield, L. R. 2 Eq. 583, where however the point was rather assumed than decided.]
(*b*) 2 Ves. Jr. 170; see also Van *v.* Barnett, 19 Ves. 102.
[(*c*) See 3 My. & K. 494; ante, p. 68, n. (*q*). (*d*) Affleck *v* James, 17 Sim. 121.
(*e*) Murton *v.* Markby, 18 Beav. 196. The question arose upon a claim by tenant for life to enjoy leaseholds in specie. See also Tait *v.* Lathbury, L. R. 1 Eq. 174, ante, p. 586.

sale (*f*) : or though they are directed to "invest" *some* of the shares; as in Cornick *v.* Pearce (*g*), where a testator devised all his real and personal estate to trustees upon trust to receive and apply the rents, issues and proceeds for the benefit of his two daughters until the youngest should attain the age of twenty-one, and then to divide the whole of his estate and effects into two equal moieties, one moiety to be divided between his two daughters equally, and the other moiety to be placed out by the trustees on government or real securities, the dividends and interest to be paid to the * daughters during their lives, and upon the death of the daughters, "upon trust to divide the moneys and effects amongst the children equally." If either of the daughters should die leaving a husband surviving, the testator directed that the husband should enjoy her share for his life, and upon his decease that such share should come back to the surviving daughter, her executors, administrators and assigns. It was held by Sir J. Wigram, V.-C., that there was no direction which required a conversion, except as to the moiety to be settled; as to that moiety alone was anything to be done which made a sale necessary; and the words applied only to a moiety after a division had been made. But in Mower *v.* Orr (*h*), where a testator, after stating that his property consisted of copyholds, leasehold houses, merchandise in Australia, cash at his banker's and in the public funds, and that as it was so scattered about and not realized he could not state what he should die worth, divided it into twenty shares, sixteen of which he disposed of by giving a certain number to each of his three sons absolutely, and, as to the remaining four, he gave two to his daughter absolutely and two to be invested in the funds for the use of her children; and he appointed two of his sons executors, requesting them to get his property together and divide it according to his intention. It was held by the same judge that the testator must be understood as directing a conversion of his copyhold estate into personalty. The V.-C. said that the division of the entire property into a number of shares and the directions as to the investment and disposition of *some* of such shares precluded the supposition that he intended the copyholds to remain unsold. In Cornick *v.* Pearce it appeared to him the purposes of the will would, in the circumstances of that case, be effected without a conversion of the whole estate: there was a direction that the estate should be enjoyed in specie until the division, and the literal construction of the will did not require a sale of the whole estate either for the purpose of the division or the settlement of a moiety.

Cornick *v.* Pearce. *590

This distinction is not very tangible. The V.-C. did not expressly advert to the testator's request "to get his property together," though in other cases much reliance has justly been placed on similar directions, coupled with an express power of sale, as indicating a desire to

(*f*) Greenway *v.* Greenway, 29 L. J. Ch. 601, 605, 2 D. F. & J. 128; Lucas *v.* Brandreth, 28 Beav. 273. (*g*) 7 Hare, 477. (*h*) 7 Hare, 475.

form the whole property into one common fund by the means pointed out, viz. by sale (*i*).]

*591 *A provision that, until land be purchased, the money shall be placed out on security at interest, does not prevent its receiving the impression of real estate *instanter* (*k*), this being a mere temporary arrangement; [unless it appears, as of course it may, from other parts of the instrument, that the arrangement is not, in fact, intended to be merely temporary; for instance, if by a final disposition of the *capital* fund, in certain events, as money, it is shown that the conversion is to take place only in the alternative events (*l*).

Direction for temporary investment does not prevent conversion.

A trust to sell within a specified period converts the property though no sale be made within the period; the specification of time being directory only (*m*). In Tily *v.* Smith (*n*), the testator directed that his wife should hold one of his houses for her use to bring up his children E. and M., and at their arriving to the age of twenty-one years, then all his estates real and personal to be sold and converted into money, and the proceeds to be divided between his wife and as many children as she had at his decease. The wife and M. survived the testator, but E. died in his lifetime under twenty-one, and M. afterwards died under twenty-one, so that, strictly construed, the time for conversion never arrived. However, the V.-C. thought that the words "at their arriving," &c., meant only "subject thereto," or "when there shall be no child alive under twenty-one," and that in the event, which happened, of the wife or one or both of the daughters surviving the testator, he intended that there should positively and absolutely at some time, and not conditionally or contingently, be a sale of the real estate. That time, he thought, arrived at or before the widow's death.

Trust to sell at a stated time.

Tily *v.* Smith.

Again, it is not generally material that the sale or purchase is to be made only when the trustees think fit. Thus, in Doughty *v.* Bull (*o*), the trust was to sell as soon as the trustees should see necessary for the benefit of the testator's children, and to apply the money for their benefit; and it was held that only the time of the sale, and not the question whether there should be any sale, was left to the discretion of the trustees.

Effect of sale or purchase being only to be made on consent.

Doughty *v.* Bull.

If the purchase is to be made with consent or ap-

*592 probation (*p*) *or on or after request or direction, the question whether or not a conversion is intended, must be answered from a consideration of the whole instru-

Effect where sale or purchase to be made upon request.

(*i*) Burrell *v.* Baskerfield, 11 Beav. 525; Re Cookes' Contract, 4 Ch. D. 454.]
(*k*) See Edwards *v.* Countess of Warwick, 2 P. W. 171.
[(*l*) Wheldale *v.* Partridge, 5 Ves. 388, 8 Ves. 227.
(*m*) Pearce *v.* Gardner, 10 Hare, 287; and see Cuff *v.* Hall, 1 Jur. N. S. 972.
(*n*) 1 Coll. 434. (*o*) 2 P. W. 320. See also Robinson *v.* Robinson, 19 Beav. 494.
(*p*) The person whose approbation is required will not be allowed to delay the sale for his own advantage and to another's prejudice, Lord *v.* Wightwick, 4 D. M. & G. 803, 6 H. L. Ca. 217.

ment, and especially of the trusts to which the property is subjected, and the persons by whom the request is to be made.

Thus in Lechmere *v.* Earl of Carlisle (*pa*), L. covenanted within one year to lay out a sum of money in the purchase of lands, with the consent of trustees, and to settle them; and it was held that the money thus agreed to be laid out should be taken as land. To the objection that the trustees must previously give their consent, Sir J. Jekyll, M. R., replied, that in his opinion they were not to do the first act; L. ought to have proposed his purchase and settlement, upon which the trustees were to signify their agreement or disagreement.] Lechmere *v.* Carlisle.

Again, in Thornton *v.* Hawley (*q*), Sir W. Grant was of opinion, that the circumstance that a sum of stock was to be sold after request, and the produce laid out in the purchase of land at the request and with the consent of [husband and wife, or the survivor, or the executors or administrators of the survivor], did not prevent the fund being immediately impressed with the quality of real estate [because to such property alone were the limitations applicable, and also because it was hardly possible to suppose an intention to give an option to any person who should be an executor or administrator whether it should be money or land, though it might be intended to give that option to the husband and wife. From these considerations he inferred] that this requisition did not exclude the authority of the trustees to convert the property at their own discretion, without request; but only rendered it imperative on them to act on the request, if made. *If* the M. R. was right in this construction of the deed, the conclusion at which he arrived respecting the nature of the property was inevitable. Thornton *v.* Hawley.

[On the other hand, in Re Taylor's Settlement (*r*), houses held in fee-simple had been vested by marriage settlement in trustees in trust, upon request of the husband and wife, or the survivor, to sell and invest the produce of the sale, and to pay the income of the money, or of the houses till a sale, to W. for life, and after his decease, to his wife for life, and after the decease of the *survivor, to convey the houses unless sold, or to assign the money, to the issue of W. and his wife. The houses had been sold, not under the trust, but under compulsory powers in an act of parliament, which also provided that the purchase-money should be re-invested in land, to be settled to the same uses; so that the money retained the character which the houses possessed under the settlement (*s*). Upon the question what that character was, Sir G. Turner, V.-C., held that the set- Re Taylor's Settlement. *593

(*pa*) 3 P. W. 211. And see Wrightson *v.* Macaulay, 4 Hare, 497.]

(*q*) 10 Ves. 129; see also Triquet *v.* Thornton, 13 Ves. 345; [Johnson *v.* Arnold, 1 Ves. 169.] But see Lord Eldon's judgment, in Van *v.* Barnett, 19 Ves. 102; where, however, the direction was alternative to invest in personal security or land.

[(*r*) 9 Hare, 596; and see Davies *v.* Goodhew, 6 Sim. 585; Huskisson *v.* Lefevre, 26 Beav. 157.

(*s*) As to this, *vide ante*, pp, 162, 163.]

tlement had not worked a conversion of the houses. He remarked that, in Thornton *v.* Hawley, the sale was, after the death of the husband and wife, to be made at the request of the executors or administrators of the survivor; but, in the case before him, the sale was to be made only on the request of the husband and wife or the survivor; so that no sale could be made after their deaths; and that words of request in cases of such nature must be construed as inserted for the purpose either of enforcing obligation or of giving discretion, as the context of the instrument might require. In this case, the general intent that the houses should be sold at some time or other was evidently wanting, the last proviso in the settlement directing that the property, if sold, was to be personal, if not sold, real.]

Effect of property directed to be sold being devised in a certain contingency as land.

It seems that the converting effect of a trust for sale, in regard to a legatee to whom the proceeds are bequeathed, is not prevented by the fact, that in an alternative event, the testator has devised the property in terms adapted to its original state; as he may have contemplated the possibility of the contingency happening before a sale could be effected; besides which, it seems to have been considered, that the property might be real estate as to one legatee, and personalty as to another, to whom it was given in an alternative event.

Lands devised to be sold, and proceeds given to A.;

Thus, in Ashby *v.* Palmer (*t*), where a testatrix devised and bequeathed her real and personal estates to trustees, upon trust, as soon as convenient after her decease, to sell, and with the money thereby raised, and the rents until the sale, to pay her and her late husband's debts, and with the surplus to educate and * bring up her daughter; and when she should attain twenty-one, or marry, "to pay the moneys which should be in the hands of the trustees, by virtue of the will, undisposed of for the uses aforesaid," to the daughter. And the testatrix went on to direct, that if the daughter died under twenty-one or unmarried, the moneys in the hands of the trustees, *and such part of the real estate* (*if any*) *as should remain unsold at the time of her decease*, and not be applied for the payment of her debts or for the education of her daughter, should go to the testatrix's sister, her heirs, executors and assigns. The daughter attained twenty-one but was a lunatic, and therefore incompetent to elect to take the estate as land or money. The question was, whether it went, at her death, to her heirs at law or next of kin? For the heir, it was contended that the estate was not to be sold at all events, but only to

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—with a limitation over of the moneys, *or the estate, if unsold*, to B.

(*t*) MS.; also reported 1 Mer. 296, but with the omission of the very bequest on which the question arose, and to the particular language of which the M. R. adverted; [see also Tily *v.* Smith, 1 Coll. 434, supra; Ward *v.* Arch, 15 Sim. 389; and see Lord Redesdale's remarks in Cowley *v.* Hartstonge, 1 Dow, 381, cited supra. But the mere fact that conversion is less necessary for distribution in one alternative than in another will not prevent a trust for sale from being imperative in both, Wall *v.* Colshead, 2 De G. & J. 683. And see Wilson *v.* Coles, 6 Jur. N. S. 1003.]

answer a particular purpose; that the testatrix did not mean it to go as money; *that she contemplated the possibility of its not being sold.* For the next of kin, it was argued that the estate was to be sold out and out; that the testatrix had no objection that her sister should take it as land, if by accident it should remain unsold; and she might have contemplated the premature death of the daughter before a sale could be effected; in which event, and in that only, she directs that the trustees shall not proceed in the accomplishment of her purpose. And it was contended that the words "pay to" supported this construction; and it was said that, at all events, the daughter was to take it as money.

Held to be personal estate as to A.

Sir W. Grant, M. R.: "I think that the construction of this will admits of no reasonable doubt: it is the settled rule of this court, that land once impressed with the character of money retains that impression till some act is done, by a person competent to do that act, to restore it to its primary character. The testatrix has directed the estate to be sold; but the question is, not whether the estate shall be actually sold or not, but whether it is to be treated as personal estate? There is no gift to the daughter in any other shape than that of money. I see nothing inconsistent in the subsequent clause, by which, in the event of the death of the daughter under twenty-one, such part of the estate as should remain unsold is given to the sister (*u*). She might choose to give it to the daughter as money, and to the sister as land. There is no inconsistency in saying it shall be converted *quoad* the first taker, not *quoad* the second. The cases * which *595 have arisen between the heir and next of kin of a testator have no application to the present" (*x*).

And though a mere *power* of sale or purchase, of course, does not change the nature of the property; yet, the circumstance of the clause respecting the sale or purchase being framed in the language of a power will not prevent its producing a constructive conversion, if the context of the will shows that it is meant to be imperative, or in the nature of a trust.[1] Thus, in Grieveson *v.* Kirsopp (*y*), where a testator gave to his widow,

Mere power does not produce conversion unless by force of the context.

(*u*) As to this, see also Crabtree *v.* Bramble, 3 Atk. 680.

(*x*) What is the effect of a direction to purchase land in a particular parish, in which it turns out that land cannot be obtained, is not settled. Lord Thurlow thought it could not be laid out elsewhere; Lord Loughborough, that it might. Lord Eldon has alluded to these conflicting opinions without stating his own; see Broome *v.* Monck, 10 Ves. 610; also Hayes' Introd. 5th ed. p. 95.

(*y*) 2 Keen, 653; [see also Burrell *v.* Baskerfield, 11 Beav. 525; Nickison *v.* Cockill, 3 D. J. & S. 622; Re Cookes' Contract, 4 Ch. D. 454.]

[1] Drayton's Appeal, 61 Penn. St. 172. It has, *obiter*, been laid down that it is sufficient to work a conversion of real estate that the testator *authorizes* his executors to sell, if it be apparent from the general provisions of the will that he intended such estate to be sold, even though there be no imperative direction in terms to sell. Dodge *v.* Pond, 23 N. Y. 69; Dodge *v.* Williams, 46 Wis. 70. Conversion, however, does not follow even in case of an inevitable necessity to sell in order to administer some portion of the will, unless there is a positive or at least a clearly implied direction to sell. Neely *v.* Grantham, 58 Penn. St. 433. A contingent direction to sell works no conversion. Ib. If a testator authorize an executor, in his discretion, to sell land, and then *direct* him to convert all the rest of his estate into money, the latter provision does not include the real estate. Graydon *v.* Graydon, 23 N. J. Eq. 229.

for the benefit and advantage of his children, power of selling his Woodfoot estate; and by a codicil expressed himself (in effect) thus: "My mind and will is and I do empower my wife to sell all my estates whatsoever; and the money arising from such sale, together with my personal estate, she, my said wife, *shall* and may divide and proportion among my said children, as she shall think fit and proper, or as she shall direct by will." The estate was neither sold nor appointed by the widow. It was held that a trust for the children was created by the will, and that they were entitled equally. It was held also, that the direction to sell operated as a conversion of the real estate, and that the shares of those children who were dead devolved on their representatives as personalty.

Nature of property made to depend on trustee's option to sell or not.

But although, in general, the presumption is that a testator does not intend the nature of the property to depend upon the option of the person through whom the conversion is to be effected; yet, if upon the whole will it appears to have been the intention of the testator to give to such person an absolute discretion to sell or not, the property in the mean time will, as between the real and personal representatives of the persons beneficially entitled, devolve according to its actual state. Thus, in Polley *v.* Seymour (*z*), a testatrix devised the residue of her real and personal estate to W., his heirs, executors and administrators, according to the different qualities thereof, upon trust to retain and keep the same in the state it should be in at the time of her decease, as long as he should think proper, or to sell and dispose of the whole, or such part *596 thereof as and when he or they should * from time to time think expedient, and then, upon trust to invest the proceeds. The testatrix then directed that W., his heirs, executors or administrators, should stand possessed of all such the general residue of her real and personal estate, and after such sale, of the securities whereon the same should have been invested, in trust, out of the rents and profits, interest, dividends and proceeds, to pay several life-annuities; and, after payment thereof, the testatrix directed W., his heirs, executors and administrators, to stand possessed of all the said residue of her said real and personal estate, and of the stocks, funds and securities whereon the same or any part thereof should have been invested, and the rents and profits, interest, dividends and produce thereof, in trust for five persons (including W. himself), in equal shares, and for their respective heirs, executors, administrators and assigns, according to the different qualities thereof. It was held, that upon the terms of this will, it was not the intention of the testatrix that the property should be converted out and out; but that W. had a discretion to sell the whole or any part of it, when and as he might think expedient; and that, until he exercised

(*z*) 2 Y. & C. 708; [see also Re Taylor's Settlement, 9 Hare, 596, supra; Harding *v.* Trotter, 21 L. T. 279, V.-C. S.; Greenway *v.* Greenway, 2 D. F. & J. 128; Lucas *v.* Brandreth, 28 Beav. 273; Re Ibbetson, L. R. 7 Eq. 229.

that discretion, the property must be considered to remain in the state it was in at the time of the death of the testatrix.

[So in Yates *v.* Yates (*b*), where a testator devised lands to trustees in trust for his wife during her life, with remainders over; and for carrying into effect the purposes of his will, he "authorized his trustees at such time or times as they should think proper, in case they should think it necessary so to do, but as to which they should have absolute discretion" to sell the lands or any part thereof: the land in question was nearly unproductive in its actual state, but was valuable for building purposes; it had not yet been sold by the trustees; and the widow, the tenant for life, claimed interest at 4*l.* per cent upon the value of the land from the death of the testator: but Sir J. Romilly, M. R., held that she was not entitled to this, the trustees having a discretionary *power* to sell when they thought fit. If there had been an absolute trust for conversion, though the time for exercising it had been left to the discretion of the trustees, the case would have been different.]

Legacy duty on proceeds of real estate often raises question whether conversion is absolute.

The question whether real estate is absolutely converted by a direction or authority has often come under consideration on the claim of the crown to legacy duty under the General Stamp Act (55 Geo. 3, c. 184, sched. part 3), which subjects to the duty * "moneys to arise from the sale, *597 mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged or otherwise disposed of." On this subject, the following points have been decided: —

Rule on this subject.

1st, Where real estate is directed to be sold out and out, the duty attaches, though by reason of the legatee electing to take it as real estate the property is not actually sold (*c*).

2dly, Where the trustees have an option to continue the property in its actual state or to sell [for the purpose of distributing the proceeds according to the will, and in the exercise of this discretion they sell, the legacy duty attaches (*d*); but not if they do not sell (*e*). If the power of sale is given only for the purpose of re-investment in land (*f*) or for the variation of securities (*g*) or (it seems), for the purpose of raising debts and legacies or other prior charges (*h*), the duty is not payable, whether the property is sold or not, and although, after a sale, the beneficial owners have elected to take the property as money (*i*).

3dly, Where a sale is directed by the court in order to raise a charge, duty will attach on the amount necessary to satisfy the charge, if the will contains a power of sale which the donees of the power are com-

(*b*) 28 Beav. 637.]
(*c*) Att.-Gen. *v.* Holford, 1 Pri. 426; Adv.-Gen. v. Ramsay's Trustees, 2 C. M. & R. 224, n.; [Williamson *v.* Adv.-Gen., 10 Cl. & Fin. 1.
(*d*) Att.-Gen. *v.* Simcox, 1 Ex. 749.]
(*e*) Att.-Gen. *v.* Mangles, 5 M. & W. 120; [Att.-Gen. *v.* Simcox, 1 Ex. 749.
(*f*) Mules *v.* Jennings, 8 Ex. 830.
(*g*) Re Evans, 2 C. M. & R. 206; Adv.-Gen. *v.* Smith, 1 Macq. Sc. Ap. 760.
(*h*) Per Lord Cranworth, Adv.-Gen. *v.* Smith, supra.
(*i*) Mules *v.* Jennings, supra.

pelled by the court to exercise, but not (*k*) if the court acts upon its general jurisdiction in such cases.]

Mere power of sale does not let in legacy duty.

And it is to be observed, that where trustees are authorized to sell or not, as they think proper, and in virtue of this option they leave the property unconverted, the legacy duty is not attracted by a mere declaration in the will that the property shall be deemed to be personal estate, as it is not in the power of a testator to alter or regulate the nature of the subject of disposition by any such declaration (*l*).

Person absolutely entitled, may elect to take property in its actual state.

*598 * II. But although a new character may have been in plain and unequivocal terms impressed upon property by means of a trust for conversion; yet such constructive quality is liable to be determined by the act of the person or persons beneficially entitled, who may, at any time before its conversion *de facto*, elect to take the property in its actual state.[1] And then comes the inquiry, Who are personally competent to make, and what amounts to, such an election? It is clear that an in-

(*k*) Hobson *v.* Neale, 8 Ex. 368, 17 Beav. 178; Harding *v.* Harding, 2 Gif. 597.]

(*l*) Att.-Gen. *v.* Mangles, 5 M. & Wel. 120. [*Legacy duty on proceeds of conversion.* — Reference may here be made to some of the authorities on legacy duty. An annuity charged on land is liable to duty, and so is a rent-charge limited under a power in a will, whether the power is to be exercised by deed or will, and whether it be general or in favor of particular objects (Att.-Gen. *v.* Pickard, 3 M. & Wel. 552, 6 M. & Wel. 348; Sweeting *v.* Sweeting, 1 Drew. 336); and it is immaterial that the appointee is put to an election, as in case of a wife, between the rent-charge and her dower (Att.-Gen. *v.* Henniker, 7 Exch. 331; Sweeting *v.* Sweeting, supra). On the other hand, where the power is given by deed to charge or appoint out of land "a specific sum," whether generally or in favor of particular objects, duty does not attach (Att.-Gen. *v.* Hertford, 14 M. & Wel. 284); but the duty does attach on a sum of money not charged on land, appointed under a general power given by deed (Re Cholmondeley, 1 Cr. & Mees. 149); and money given by will, under a general power to appoint contained in a previous will, pays double duty, that is to say, under the first will as if it had been an absolute legacy to the donee of the power, and under the second will as if it had been an ordinary legacy out of the estate of such donee; but before 23 & 24 Vict. c. 15, s. 4 (ante, p. 3, n.), probate duty was payable only under the first will (Platt *v.* Routh, 6 M. & Wel. 756, 3 Beav. 257, 10 Cl. & Fin. 257). The last case also decides that a power to appoint to any one except specified individuals, must, at all events so far as regards the legacy duty acts, be considered as a general power of appointment. Nothing but what is generally a charge in favor of one person on the estate of another is within the act (Shirley *v.* Ferrers, 1 Phill. 167). But a charge originally in favor of a third person, but which by *subsequent circumstances only* has become a charge in favor of the owner of the estate, is within the act (Att.-Gen. *v.* Metcalfe, 6 Exch. 26; and see Swabey *v.* Swabey, 15 Sim. 502; Re Taylor, 8 Exch. 384). As to money bequeathed to be laid out in land, see Re De Lancey, L. R. 5 Ex. 102, 7 Ex. 140. The importance of these cases, and of those referred to in the text, is much diminished by the act 16 & 17 Vict. c. 51, imposing succession duty on real estate. The amount payable, however, and the mode of payment, are sometimes different, according as it is legacy or succession duty which attaches; and the latter is a charge on the property, while the former is not.

Probate duty on proceeds of land. — Probate duty is payable on whatever the executor recovers *virtute officii*; it is therefore payable on the purchase-money of land contracted to be sold, though the purchase is not completed until after the death of the vendor (Att.-Gen. *v.* Brunning, 8 H. L. Ca. 243); and on a share of the proceeds of real estate which at the time of the testator's or intestate's death has either by express trust (Att.-Gen. *v.* Lomas, L. R. 9 Ex. 29) or by construction of equity — as in the case of a share of partnership realty (per James, V.-C., Forbes *v.* Stevens, L. R. 10 Eq. 178) — been impressed with the character of personalty, though not actually sold. It is otherwise where the conversion is effected by, or is dependent on, the will of the deceased person, and where consequently the conversion takes effect only from and after his death (Matson *v.* Swift, 8 Beav. 369, Custance *v.* Bradshaw, 4 Hare, 315, explained 8 H. L. Ca. 260).]

[1] Smith *v.* Starr, 3 Whart. 62. See Leiper *v.* Irvine, 26 Penn. St. 54.

fant (*m*), or lunatic (*n*), is incompetent, and also a *feme covert* (*o*), unless under a power or trust authorizing her to deal with the property as a *feme sole* (*p*). It was said by Lord Macclesfield in Edwards *v.* Countess of Warwick (*q*), that the election might be made by parol. Lord Hardwicke, in Bradish *v.* Gee (*r*), said that he could not admit this proposition; but the affirmative appears to have been decided at the Rolls (*s*), in Chaloner *v.* Butcher.

Who competent to make election.

Parol election whether good.

The expressions or acts declaratory of such an intention, however, [though it is said they may be slight (*t*)] must be *unequivocal (*u*). Thus, where (*v*) a person was, *599 under a settlement, tenant in tail of lands, with a reversion in fee to himself, and was entitled under the same settlement to lands to be purchased with a certain sum of money and settled to the same uses; it was held, that his levying a fine of the land limited by the settlement, to bar the issue, did not demonstrate an intention to take as money the fund not laid out (*x*).

What amounts to an election.

And where a person entitled to the fee-simple in lands to be purchased with trust-money, called in [part of] the money, and placed it out upon a fresh security, in the name of a trustee for himself, his executors and administrators, it was held that he had by these acts elected to take [that part] as money (*y*), [but that the rest of the money, whether subsisting upon the securities upon which it was originally placed or any other securities where no new trusts had been declared, ought to be considered as real estate.]

Changing the securities.

But, where (*z*) the legatee of the proceeds of an estate directed to be sold, entered upon the whole estate, and made a lease of part of it, reserving rent to her heirs and assigns, she was held to have elected to take it as land. [And letting to a new tenant from year to year has been held to bring the case within the same principle, on the ground that if the tenant were lawfully evicted by a purchaser under the trust for sale, the lessor would be liable to an action by the tenant (*a*).

Demising the property.

Taking, and for nine years retaining, possession of the estate directed

(*m*) Carr *v.* Ellison, 2 B. C. C. 56; Van *v.* Barnett, 19 Ves. 102. [Except under the direction of the court, Robinson *v.* Robinson, 19 Beav. 494.]
(*n*) Ashby *v.* Palmer, 1 Mer. 296.
(*o*) Oldham *v.* Hughes, 2 Atk. 452; [Sisson *v.* Giles, 3 D. J. & S. 314.
(*p*) Re Davidson, 11 Ch. D. 341.]
(*q*) 2 P. W. 173. (*r*) Amb. 229.
(*s*) 8 March, 1736, cited 3 Atk. 685.
[(*t*) Per Lord Eldon, 8 Ves. 236.]
(*u*) Stead *v.* Newdigate, 2 Mer. 531; [Re Pedder's Settlement, 5 D. M. & G. 890.]
(*v*) Edwards *v.* Countess of Warwick, 2 P. W. 171, 2 Eq. Ca. Ab. 42, pl. 3, 1 B. P. C. Toml. 207; [and see Biddulph *v* Biddulph, 12 Ves. 161; Dixon *v.* Gayfere, 17 Beav. 433; Griesbach *v.* Fremantle, 17 Beav. 314; Meredith *v.* Vick, 23 Beav. 559.]
(*x*) As to barring entails in lands *to be* purchased, see stat. 3 & 4 Will. 4, c. 74, ss. 70, 71; and 1 Hayes's Introd. 5th ed. p. 204.
(*y*) Lingen *v.* Sowray, 1 P. W. 172, Pre. Ch. 400, 1 Eq. Ca. Ab. 175, pl. 5.
(*z*) Crabtree *v.* Bramble, 3 Atk. 680; [and see Mutlow *v.* Bigg, 1 Ch. D. 385.
(*a*) Re Gordon, 6 Ch. D. 531. But see Meek *v.* Devenish, ib. 573.

Taking possession of it — length of possession.

to be sold, have been held sufficient of themselves to prove an intention to re-convert (*b*). But possession for two or three years by tenants in common (without more) has been held insufficient (*c*). The circumstance that, where several are entitled in common, a sale is required for convenient division of the property, would seem to diminish the probability of their intending to put an end to the trust. But where two tenants in common had been in possession for seven years, and it was clearly shown that one *600 of them, who was also the principal acting * trustee, desired to retain the estate for building purposes, slight evidence of the concurrence of the other satisfied the court that the latter also had elected to keep the estate unsold (*d*).

Taking possession of deeds.

Again, in Davies *v.* Ashford (*e*), where a person made inquiry as to his interest in lands held upon trust for sale, and on finding that he was absolutely entitled to the money to arise from the sale, took the title deeds into his own possession (from whom or by what means he had obtained them being held immaterial), it was held that there was sufficient evidence of his election that the land should not be converted.

Devising the land directed to be sold, as land.

A specific devise to the ordinary uses of a strict settlement of real estate, of the land directed to be sold, is clear evidence of an intention to retain it unsold (*f*).] And where (*g*) a person entitled to the absolute reversion in a fund of this description, [who described himself in a memorandum at the foot of an account of the property as being entitled to the *fund* as residuary *legatee* of the last owner, which he was,] made his will, in which, after devising certain real estate, he bequeathed the residue of his personal estate in possession *or reversion*, Sir W. Grant decided, that as the testator [had so described himself, and] had no other reversionary interest to which this expression could be applied, it amounted to a demonstration of intention to bequeath this fund as personal estate. There seems, however, to be some difficulty in drawing any such inference from the inaptitude of the terms of the bequest to any other *existing* property of the testator at the date of the will, seeing that a residuary disposition of this nature comprises after-acquired personalty (*h*).

Bequeathing as personalty a fund directed to be invested in land.

(*b*) Re Gordon, supra.
(*c*) Kirkman *v.* Miles, 13 Ves. 338; Brown *v.* Brown, 33 Beav. 399.
(*d*) Re Davidson, 11 Ch. D. 341. (*e*) 15 Sim. 42.
(*f*) Meek *v.* Devenish, 6 Ch. D. 566.]
(*g*) Triquet *v.* Thornton, 13 Ves. 345; [compare Re Skeggs, 2 D. J. & S. 533.]
(*h*) It seems, that where a person covenants to purchase land, and eventually himself becomes solely entitled to it, so that the obligation to lay out, and the right to call for, the money centre in the same person; the covenant is, without any act on his part, considered as discharged. As in Chichester *v.* Bickerstaff, 2 Vern. 295, where A. on his marriage covenanted to lay out a sum of money in the purchase of land, to be settled to the use of himself for life; remainder to his intended wife for life; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to his own right heirs. A. did not lay out the money, and survived his wife, who died without issue; and it was decided, that the money, though once bound by the articles, became free again by the death

[* Again, in Cookson *v.* Reay (*i*), where a sum of money subject to a trust for investment in land, which ultimately became liable to be settled upon one for life, with remainder to another in fee, was, by those two persons in a deed appointing new trustees, spoken of as moneys which they were then entitled to receive, and trusts for investment in *securities* were declared, it was held that there was sufficient evidence that they had elected that the money should not be converted, and this, although the trusts of the moneys and securities were declared by reference to a prior settlement, the trusts of which were also declared by reference to a former will, under which will it was assumed for the purpose of the decision that the money was constructively converted; this reference was held not sufficient to outweigh the direct words contained in the deed of appointment, as to the parties being entitled to the receipt of the money. *601

In Harcourt *v.* Seymour (*k*) there were several circumstances, from which, taken together, election was presumed; the principal one seems to have been, that the sum of money in question, which was subject to a trust for investment in land (to which, when purchased, the testator would have been entitled in fee, subject only to a provision for his wife in bar of dower), was included in a statement of the testator's personal property found among his papers after his death.] Harcourt *v.* Seymour.

And here it may be observed, that in order to amount to an election to take property in its actual, as distinguished from its eventual, or destined, state, the act must be such as to absolutely determine and extinguish the converting trust; and hence it would seem to follow, that where two or more persons are interested in the property, it is not in the power of any one co-proprietor to change its character, in regard even to his own share; for, as the act of the whole would be requisite to put an end to the trust, nothing less will suffice to impress upon the property a transmissible quality, foreign to that which it had received from the testator. All persons interested must concur in act of election.

Thus, if lands be devised to trustees upon trust for sale, and to pay the proceeds to A., B. and C., in equal shares, and after the death of the testator, and before the sale is effected, A. grants a lease of his one third, or does any Owner of undivided share of land cannot elect.

of the wife without issue, and the consequent failure of the objects of the several limitations; and was therefore, at the death of the settlor, his personal estate. This decision, indeed, was questioned by Lord Talbot, in Lechmere *v.* Lechmere, Cas. t. Talb. 90; and by Sir J. Jekyll, in Lechmere *v.* Earl of Carlisle, 3 P. W. 221; but Lord Thurlow, in the great case of Pulteney *v.* Darlington, 1 B. C. C. 238, 7 B. P. C. Toml. 530,* expressed a strong opinion that it was right; which case went, Lord Eldon has said, to this: "that if the property was at home, in the possession of the person under whom they claimed as heir and executor, the heir could not take it;" and his lordship observed, the question, then, was not upon the equity between the heir and the executor, but whether the property was at home.

[(*i*) 5 Beav. 22, nom. Cookson *v.* Cookson, 12 Cl. & Fin. 125. (*k*) 2 Sim. N. S. 12.

* The able and elaborate arguments of Sir John Scott (afterwards Lord Eldon), and Mr. Fearne, the counsel for the appellants, display the deepest research into the subject, but they did not succeed in overturning the decree.

other act unequivocally dealing with it as real estate, and then *602 * dies; his share will, nevertheless, it is conceived, devolve to his personal representatives, as it would still be the duty of the trustees to proceed to a sale, on account of the other shares, the converting trust having been created for the benefit of all (*l*).

Election by contingent owner pending the contingency.

[But if the whole of the proceeds are given to A. on a contingency, and on failure of that contingency to others, the primary donee may, pending the contingency, declare his intention to keep the land unsold, so as upon the happening of the contingency to re-convert the land, if no sale has been (as, of course it may nevertheless have been) previously made (*m*).

Election by one tenant in common of money to be laid out in land.

And of course, if *money* be directed to be laid out in land for the benefit of A., B. and C. as tenants in common in fee, any one or more of them may take their shares of the money without the consent of the rest. "For," said Lord Cowper, "it is in vain to lay out this money in land for B. and C., when the next moment they may turn it into money, and equity, like nature, will do nothing in vain" (*n*).]

Dispositions by partial owner before actual conversion.

And although it is not in the power of the owner of an undivided share, or any other partial interest in land which is directed to be converted, by his single act to change its character, and thereby impart to it a different transmissible quality, it does not follow that every disposition by such partial owner adapted to the property in its actual state, is nugatory. On the contrary, it is clear, that if a person entitled to a reversionary interest in money to be laid out in land, shows an intention to dispose thereof by will, or otherwise, as personal estate, it will pass by such disposition (*o*); though, on the death of the donee intestate, it would devolve on *his* real representative. So, if the legatee of the proceeds of real estate directed to be sold devise the land in its character of real estate, the devisee will be entitled to the fund in question, though it would, when acquired, be personal estate in the hands of such devisee (*p*).

Delegation of power by beneficiary.

[Where property subject to a trust for conversion was settled by the owner on her marriage, and a power to reconvert (or *603 retain * the property in its actual state) was reserved to the trustees, to be exercised with the consent of the tenants for life or the survivor, it was held by Sir W. P. Wood, V.-C., that the power ceased as soon as the property had vested

(*l*) See 1 B. C. C. 500; Elliott *v.* Fisher, 12 Sim. 505; Holloway *v.* Radcliffe, 23 Beav. 163; 11 Ch. D. 348. But this rule would not apply where the trust for sale of land was for the purpose of paying debts, legacies, &c.; the devisee (or legatee of the surplus proceeds) subject to the charges, might himself clear them off and retain the land unsold, Grieshach *v.* Fremantle, 17 Beav. 314. So if the legatees, though not paid, acquiesced in the retention, Mutlow *v.* Bigg, 1 Ch. D. 385. And after lapse of time and where no prejudice accrues to them their acquiescence will be easily inferred, ib.

(*m*) Meek *v.* Devenish, 6 Ch. D. 566, explaining Sisson *v.* Giles, 3 D. J. & S. 614.

(*n*) Seeley *v.* Jago, 1 P. W. 389. And a small sum (A.'s share) might be as advantageously laid out in land for A. as a large sum (the entire fund) for A., B. and C.]

(*o*) Triquet *v.* Thornton, 13 Ves. 345. (*p*) See Hewitt *v.* Wright, 1 B. C. C. 86.

absolutely in the children, although one of the tenants for life was still living (*q*).]

And here it may be observed, that where (*r*) real estate was devised upon trust for sale, and the proceeds were to be divided among several persons, one of whom was a married woman, who (the estate being unsold) joined with her husband in levying a fine of her share therein; it was held, that the wife was by this means barred of her equity to a settlement out of the fund. And the same effect, it is conceived, would now be produced by the husband and wife conveying the property by a deed acknowledged by her, according to the statute of 3 & 4 Will. 4, cap. 74, ss. 77, 79.

Husband and wife may convey land directed to be sold as real estate.

III. Sometimes, the exercise of trustees' option to convert regulates not merely the devolution of property as between the real and personal representatives respectively of the beneficial objects, but also determines its destination under the will itself; *i.e.* until conversion, it belongs to one, and when actually converted, to another. Large and inconvenient as such a discretion is, yet, if the intention to confer it be clearly manifested, the construction must prevail, in spite of any suspicion that the testator misapprehended the effect of the term he has employed.

Trustees' option to sell may affect destination of property.

As in Brown *v.* Bigg (*s*), where a testator ordered and empowered his wife (in case she chose so to do) with the advice of W. G., to sell all his G. estates (stating that she would probably not choose to live there), with the crop, stock, and effects, with all convenient speed; and the money arising from such sale, to be placed out on security, the yearly interest of which, as well as the interest due to the testator on notes, bonds, mortgages or otherwise (except what was in the public funds), he gave to his wife for life, determinable as to one moiety on marriage again. * And after giving several legacies, the tes- *604 tator after his wife's death left the whole of his personal estate, principal and interest, of every kind, both on public and private security, before undisposed of, to several persons. The wife sold part of the G. estate, and died; and Sir W. Grant, M. R., held, that the proceeds of such part belonged to the residuary legatees, and that the unsold part of the estate remained the property of the testator's heir.

So, if the fund arising from the sale be disposed of in such terms

[(*q*) Doncaster *v.* Doncaster, 3 K. & J. 26. And see Rich *v.* Whitfield, L. R. 2 Eq. 583.]

(*r*) May *v.* Roper, 4 Sim. 360. This doctrine is often found very convenient in practice, where a married woman has a reversionary interest in a fund of this description; which, in its character of personalty, she is incompetent to deal with, so as to bar her contingent right by survivorship, but which may be effected by means of a deed (duly acknowledged as to the wife) assigning the property. [Briggs *v.* Chamberlain, 11 Hare, 69, overruling Hobby *v.* Allen, 15 Jur. 835, 20 L. J. Ch. 199, 4 De G. & S. 289; and see Tuer *v.* Turner, 20 Beav. 560; Franks *v.* Bollans, L. R. 3 Ch. 717. The Act 20 & 21 Vict. c. 57, enabling married women thenceforth to dispose of their reversionary interests in personalty, does not extend to interests under marriage settlements.]

(*s*) 7 Ves. 279; [and see Harding *v.* Trotter, 21 L. T. 279, V.-C. S.]

Vesting of fund postponed until actual sale.

as unequivocally and explicitly to make the vesting depend on the period of actual sale, the vesting will be postponed accordingly.

Thus, where (*t*) a testator devised certain real estates to his wife for life, and directed that A. should, as soon after her decease, on her refusing to release her dower, as conveniently might be, sell the estate; and as to the moneys arising from the sale, together with the rents till sold, he gave the same to be equally divided between his five nephews (naming them), at such time as the sale should be completed, *in case they should be then living;* but, in case any of them should die in his lifetime, or before the sale of his said estate should be completed, leaving issue, his part should be paid to his children; but in case any of them should die in his lifetime, or before the sale should be completed, without leaving issue, to the survivors. Sir W. Grant held, that the share of a nephew surviving the testator, but dying before the sale, did not vest; observing, that to adopt the contrary construction would deny to the testator the power, by any express form of words, or clear manifestation of intention, to make the vesting depend on the actual sale.

In all such cases, however, the courts, ever anxious to avoid imputing to a testator a mode of disposition at variance with what is usual and convenient, will diligently seek in the context of the will for means of escape; and in one class of cases, of very frequent occurrence, the literal force of the language of the will has, even without any such aid from the context, been moulded into conformity with probable intention. The cases here alluded to are those in which a will, creating a trust for conversion, is so framed as that the enjoyment of the *cestui que trust* is apparently made to wait until actual conversion. The inconvenience of such a postponement is obvious; it seems hardly supposable that the * testator could mean that the actual enjoyment by the object of his bounty should be liable to be deferred for an indefinite period, by difficulties attending the execution of the trust, or the want of activity in the trustees in effecting a conversion. To prevent such consequence, a liberal construction has obtained in these cases, and the legatee, until the execution of the trust, takes an interest in the unconverted property, corresponding to that which he would have been entitled to in the proceeds, if the conversion had taken place. Thus, where (*u*) lands were conveyed upon trust to be sold, and out of the money arising from the sale other lands were to be purchased, to be settled to certain uses, and a person who would have been tenant in tail under those uses with reversion in fee to himself, levied a fine of the estate conveyed to be sold; Sir W. Grant held, that though no

Doctrine as to enjoyment of property which is subject to a trust for conversion.

*605

(*t*) Elwin *v.* Elwin, 8 Ves. 547. See also Faulkener *v.* Hollingsworth, cit. 8 Ves. 558.
(*u*) Pearson *v.* Lane, 17 Ves. 101.

estate was in terms limited to him in that property, yet he was tenant in tail in equity; and, by the fine, acquired an equitable fee. [So, where by will trustees were directed to sell an advowson when full, and invest the proceeds for the benefit of A. during her life, and afterwards for other persons, a sale of the advowson not having been effected while the advowson was full, it was held that the right to nominate a clerk was in A. (*x*).]

Relative rights of tenant for life and remainder-man.

But though the general principle is well settled, yet many questions have arisen in the course of its application, especially respecting the precise point of time at which the enjoyment of the legatee for life commences; the effect of an express direction to accumulate the income until conversion; and, above all, as to whether the legatee for life of the proceeds is, until the conversion of the property, to take the actual income, or the assumed income; in other words, whether he is entitled to the income accruing from the property in its actual condition, or the income which, if duly converted and invested, it would have yielded.

Points of this nature have most commonly occurred under general residuary clauses containing trusts for sale and conversion, in which the principle has to be applied to the various species of property of which a residue is composed.

Rules deduced from cases.

The following positions will be found to embody the chief doctrines to be deduced from the authorities: —

As to income during first year of property duly invested;

1. In the ordinary case of residuary personal estate being directed to be sold or otherwise converted into money, and the *produce (either with or without a prior express trust for payment of debts and legacies) laid out in government or real securities for the benefit of a person for life, at whose decease the capital is given over, without any express appropriation of the income accruing before conversion, the income arising from such part of the residue as, at the testator's decease, was actually invested in government or real securities, [or other] securities of the nature contemplated by the investment trust, belongs to the residuary legatee for life from the period of the testator's decease (*y*).[1] *606

2. In the case already described, namely, that of a residuary bequest

[(*x*) Briggs *v.* Sharp, L. R. 20 Eq. 317. And see Hawkins *v.* Chappel, 1 Atk. 621; Johnstone *v.* Baber, 6 D. M. & G. 439; O'Shea *v.* Howley, 1 J. & Lat. 391.]

(*y*) Hewitt *v.* Morris, T. & R. 241; Angerstein *v.* Martin, ib. 232; Dimes *v.* Scott, 4 Russ. 209; La Terriere *v.* Bulmer, 2 Sim. 18; Douglas *v.* Congreve, 1 Kee. 410; [Taylor *v.* Clark, 1 Hare, 161; Macpherson *v.* Macpherson, 16 Jur. 847, 1 Macq. H. L. 243; Hume *v.* Richardson, 4 D. F. & J. 29; Brown *v.* Gellatly, L. R. 2 Ch. 751. But income arising within the first year from so much of the testator's estate (say consols), as is required for payment of debts and legacies, is not income arising from residue; it falls into and increases the capital of the residue, Holgate *v.* Jennings, 24 Beav. 623. In other words, there is no residue till those payments have been made, and tenant for life must keep down the interest of debts as well during the first as during subsequent years, Allhusen *v.* Whittell, L. R. 4 Eq. 295; Marshall *v.* Crowther, 2 Ch. D. 199 (real estate), and cases there cited. Greisley *v.* Earl of Chesterfield, 13 Beav. 288, therefore does not furnish a general rule. The income of a fund set apart to answer a contingent claim, arising until the contingency happens or becomes impossible, is income, not capital, Allhusen *v.* Whittell, supra, and cases there cited. But see Tucker *v.* Boswell, 5 Beav. 607.]

[1] See post, p. 612, note.

— of property not duly invested.

containing a trust for sale and conversion, without any express appropriation of the annual income until conversion, the destination of such income arising within the first year from the unconverted property (comprising all which does not consist of such investments as the proceeds are directed to be converted into) was long doubtful. In La Terriere *v.* Bulmer (*z*), Sir A. Hart, V.-C., decided, that the first year's income formed part of the capital. In Dimes *v.* Scott (*a*), Lord Lyndhurst held the legatee for life to be entitled during the year, in lieu of the actual income, to dividends on so much Three per Cent stock as the proceeds of the property, if converted, would have purchased at the end of the year. In Douglas *v.* Congreve (*b*), Lord Langdale, M. R. (after noticing these conflicting opinions), gave the legatee for life the actual income arising from unconverted funds, from the testator's death until the end of the year, or until conversion, which should first happen (*c*); a rule which certainly seems to be more just than the first, and more convenient than the second, of the others which have been referred to, [and was

*607 * apparently adhered to by the same judge in Mehrtens *v.* Andrews (*d*). However, the rule laid down in Dimes *v.* Scott has since been repeatedly followed, and must be considered as now settled (*e*).] The ground, however, for the construction which gives the income to the legatee for life of the proceeds from the testator's death, is strengthened, where he has bequeathed out of the fund pecuniary legacies, which are expressly made to carry interest from that period (*f*); and it should seem that such is the invariable rule, where the subject of disposition is a specific property, and the execution of the trust for conversion is not involved in the administration of the general personal estate; in which case (there being no analogy to the case of general pecuniary legacies which are payable at the end of a year) the legatee of the dividends or interest would be entitled to the rents from the period of the testator's death (*g*). [Where the words of the will are sufficiently clear upon the point, the tenant for life will of course be entitled to the income of the property in specie until conversion, however long that may be deferred (*h*). The question what words are sufficient for this purpose, will be discussed presently.

3. The rule that a conversion is to be deemed as having been made

(*z*) 2 Sim. 18. (*a*) 4 Russ. 195. (*b*) 1 Kee. 427.

(*c*) See Angerstein *v.* Martin, T. & R. 232, [acc. But Lord St. Leonards has said (16 Jur. 847, 1 Macq. H. L. Ca. 243), that when Lord Eldon there decreed the dividends on Russia stock to the tenant for life his attention could not have been called to the point. See also per K. Bruce, V.-C., 1 Y. & C. C. C. 318. (*d*) 3 Beav. 72.

(*e*) Taylor *v.* Clark, 1 Hare, 161; Morgan *v.* Morgan, 14 Beav. 77; Brown *v.* Gellatly, L. R. 2 Ch. 751; Allhusen *v.* Whittell, L. R. 4 Eq. 295.]

(*f*) Fitzgerald *v.* Jervoise, 5 Mad. 25. The marginal abstract of this case is very inaccurate. (*g*) See Hutcheon *v.* Mannington, 1 Ves. Jr. 366; Sitwell *v.* Bernard, 6 Ves. 541.

[(*h*) Sparling *v.* Parker, 9 Beav. 524; Mackie *v.* Mackie, 5 Hare, 70; Wrey *v.* Smith, 14 Sim. 202; Johnstone *v.* Moore, 27 L. J. Ch. 453; Scholefield *v.* Redfern, 2 Dr. & Sm. 173; Stroud *v.* Gwyer, 28 Beav. 130; Straker *v.* Wilson, L. R. 6 Ch. 503. In the last two cases executors had power to determine how much of trade profits should go as income and how much as capital.]

within a year from the testator's death, is applied in favor of, as well as against, the tenant for life. Thus,] where trustees are directed to convert the property (whether it be land into money, or money into land), *and until conversion the income is directed to be accumulated* and added to the capital; and it happens that the conversion is deferred beyond the period of a year from the testator's decease, the process of accumulation ceases, and the title of the legatee for life to the income commences, at the end of such year; this being considered to afford a reasonable time for the conversion of the property (*i*); and it is * immaterial, in such case, that the clause directing the accumulation of the immediate income goes on to provide for its investment (*k*). And it is to be observed, that where the purchase of land is to be made with a pecuniary legacy, which is to come out of the testator's general estate (and payment of which, therefore, may, under the general rule, be made at any time within a year), the twelve months, at which the income becomes receivable by the tenant for life, is computed from the time of the receipt of the legacy (*l*).

Effect of direction to accumulate until conversion.

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4. With respect to such portion of the property as is, in point of fact, converted before the end of the year following the testator's decease, the legatee for life takes the actual income of the fund constituted of the proceeds from the time of its actual investment; and that too, of course, without regard to the fact of there being an express direction to accumulate the profits until conversion or not (*m*).

As to income of property converted within the year.

5. If the property [*can be*, but] is not, actually converted at the end of a year from the testator's decease, it must be computed what would have been the result, if the conversion had taken place at such year's end, and the proceeds had been then invested in Three per Cent stock; the dividends of which stock will form the income to which the legatee for life will be entitled either from the testator's decease, or from the end of the year, according to the fact, whether there is not, or is, an intermediate trust for accumulation (*n*). And this rule applies as well where the unconverted fund or property is of a permanent nature, as where it is limited in its duration, as leaseholds, &c. (*o*).[1] [It

As to income of property which can be but is not converted within the year.

(*i*) Sitwell *v.* Bernard, 6 Ves. 520; and cases there cited; Kilvington *v.* Gray, 2 S. & St. 396; Noel *v.* Henley, 7 Pri. 241; [Stair *v.* McGill, 1 Bli. N. S. 662;] Vickers *v.* Scott, 3 My. & K. 500; [Tucker *v.* Boswell, 5 Beav. 607; see also Vigor *v.* Harwood, 12 Sim. 172, where an *implied* direction to accumulate was altogether disregarded, so that the tenant for life got the income from the testator's death.]

(*k*) Entwistle *v.* Markland, 6 Ves. 528.

(*l*) Parry *v.* Warrington, 6 Mad. 154.

(*m*) La Terriere *v.* Bulmer, 2 Sim. 18; see also Dimes *v.* Scott, 4 Russ. 209; Gibson *v.* Bott, 7 Ves. 89.

(*n*) But the stock might happen to be lower at the actual investment at the year's end; and then, it should seem, a portion of the income would be undisposed of during the life.

(*o*) See Dimes *v.* Scott, 4 Russ. 209; Mills *v.* Mills, 7 Sim. 501; [Mehrtens *v.* Andrews, (Sumner's ed.) 839. n. (*a*); Stapleton *v.* Palmer, 4 Bro. C. C. (Perkins's ed.) 493, n. (*a*).

[1] See 2 Story, Eq. § 790, and note at the end. Sitwell *v.* Bernard, 6 Ves. (Sumner's ed.), 520, n. (*a*); Powell *v.* Evans, 5 Ves.

*609 * also applies *in favor* of the tenant for life to moneys recovered after a long interval, and to reversionary interests from which he might derive no benefit, precisely as it is applied against him to property of a wasting nature, from which he would derive more than his proper share of income (*p*); and the value of such interests is to be calculated, not at what they would sell for at the testator's death, but on their falling into possession it is to be ascertained what would have been the value at the end of a year from the testator's death of a sum of money which, as the event has turned out, was to become payable at the end of so many years, calculated at 4*l.* per cent simple interest. On the value so ascertained, the tenant for life will be entitled to his proper number of years' interest, at 4*l.* per cent, and the residue of the amount actually received, after deducting the amount of such *610 interest, will form the capital of the fund; but the tenant for * life

3 Beav. 72; Hume *v.* Richardson, 4 D. F. & J. 29; Brown *v.* Gellatly, L. R. 2 Ch. 751.] In Dimes *v.* Scott, a testator bequeathed the residue of his personal estate to trustees, upon trust, to convert the same into money, and thereout to pay debts, and invest the surplus in *government or real security*, for the benefit of A. for life; at whose decease the capital was given to other persons absolutely. When the testator died, part of his property was invested in an East India security yielding 10*l.* per cent, on which the executors permitted it to remain for several years, and during this period paid over the whole interest to the legatee for life; Lord Lyndhurst decided that they could only be allowed, as a proper application of income, a sum equal to the dividend on so much Three per Cent Consols as the proceeds of the security, if turned into money at the end of a year from the testator's decease, would have purchased; such dividends to be computed from the decease of the testator; and though it appeared that the fund had actually yielded more than it would have produced if sold at the end of a year, yet the trustees were held not to be entitled to the benefit of this gain, by way of set-off against the claim of the ulterior legatees for excess of income paid to the legatee for life; but were bound to account for both such excess, and also the entire sum actually received on the conversion of the security. [In Robinson *v.* Robinson, 1 D. M. & G. 247, where trustees had an option to invest in government or real securities, and had neglected to convert improper investments and a loss had ensued, they were charged, not with so much government stock, (for they were not bound to choose that mode of investment), but with the money value of the fund at the year's end, and 4*l.* per cent interest on such value; and it was held to follow that the income of the tenant for life who had acquiesced in the default must also be 4*l.* per cent on the same value. But where the only question is what are the relative rights of tenant for life and remainder-man in an improper investment forming part of the testator's estate, the rule in Dimes *v.* Scott and Taylor *v.* Clark applies, and whether the will does or does not give an option to invest in government or other securities, the tenant for life is entitled only to dividends on so much consols. Brown *v.* Gellatly, L. R. 2 Ch. 751. Anderson *v.* Read, 22 W. R. 527 (cor. Hall, V.-C.), where the trust for investment is stated to have been "comprehensive," appears to be to the same effect.

G. O. 1*st Feb.* 1861. — The General Order of 1st February, 1861, does not appear to affect rule in the case of improper securities left unconverted. But securities authorized by it, or by the statutes on which it is founded, are proper investments for a testator's estate, although not expressly authorized by the will; and the tenant for life will be entitled as income to the annual proceeds of such investments, when actually found, or made, part of the testator's estate. Hume *v.* Richardson, 4 D. F. & J. 29.

(*p*) Pickering *v.* Pickering, 4 My. & Cr. 303; Turner *v.* Newport, 2 Phil. 14, 14 Sim. 32; Hinves *v.* Hinves, 3 Hare, 611; Lord Eldon's observation in Howe *v.* Lord Dartmouth, 7 Ves. 148; Wilkinson *v.* Duncan, 23 Beav. 469 (where the interest of the tenant for life was held to be the difference between the value at the year's end and the amount actually recovered, which is in fact equivalent to giving the tenant for life 4*l.* per cent on the value at the year's end); Johnson *v.* Routh, 27 L. J. Ch. 305, and Countess of Harrington *v.* Atherton, 2 D. J. & S. 352 (where the tenants for life of the reversion were already tenants for life in possession of the fund); Cox *v.* Cox, L. R. 8 Eq. 343; Wright *v.* Lambert, 6 Ch. D. 649. The principle seems not to have been applied, where the income of a fund set apart for a particular purpose, becomes during a period undisposed of, and falls into the residue. In such cases the tenant for life of the residue is held entitled only to the income arising from the investments as they are made of the undisposed-of income, and not to the dividends on a sum representing the capitalized value of the undisposed-of income. See Tucker *v.* Boswell, 5 Beav. 607; Crawley *v.* Crawley, 7 Sim. 427; and the cases ante, p. 312, as to the persons entitled to the interest of income directed to be accumulated beyond the period allowed by the Thellusson Act.

will not be entitled to any payment till the fund actually becomes productive (*q*), and in case of his death before that time his personal representative will of course become entitled. In a case where there were both wasting and reversionary interests, the court, for the benefit of all parties, adjusted the payments to the tenant for life out of the wasting interests, so as to compensate for his loss of income under the reversionary interests (*r*).

As to income of property which cannot be converted.

6. Where property ought to be, but from its nature *cannot be*, immediately converted, at least without great loss to the estate, the authorities are not quite uniform. Thus, in Gibson *v.* Bott (*s*), where leaseholds directed to be converted could not be sold for want of a good title, Lord Eldon gave the tenant for life 4*l.* per cent from the testator's death on a sum to be ascertained as the value *at the testator's death* (*t*). Lord Langdale, in Mehrtens *v.* Andrews (*u*), after the leases had expired, directed a value to be put upon them *having reference to the enjoyment had thereunder*, and that the income of the tenant for life should be taken as the dividends of the sum of consols which could have been purchased for that value; and in Meyer *v.* Simonsen (*x*), where conversion could not, from the nature of the property, be immediately made, Sir J. Parker, V.-C., decided, that interest at 4*l.* per cents hould be allowed. He said there were three distinct classes of cases: "First, where the subject-matter of the bequest is either invested in the funds, or in some security of which the court approves, there conversion is not necessary, and the tenant for life takes the interest of the fund as it is, and the *corpus* belongs to those in remainder. The second class is where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remainder-man, such a case is one of partial conversion, and the proceeds of the part converted must be laid out on the permanent securities approved of by the court, of which the tenant for life will take the interest, and the remainder-man the *corpus*. The third class is where the property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate, as in Gibson *v.* Bott, and Caldecott *v.* Caldecott (*y*). There the rule is not to convert the property, but to set a value upon it, and give to the tenant for life 4*l.* per cent on such value, and the residue of the income must then be *invested, *611 and the income of the investment paid to the tenant for life, but the *corpus* must be secured for the remainder-man (*z*).]

It remains to be considered, how far the preceding rules apply to

(*q*) Taylor *v.* Clark, 1 Hare, 170.
(*r*) Glengall *v.* Barnard, 5 Beav. 245.
(*s*) 7 Ves. 89.
(*t*) 1 Y. & C. C. C. 320, n. (*a*).
(*u*) 3 Beav. 72.
(*x*) 5 De G. & S. 723; see Caulfield *v.* Maguire, 2 J. & Lat. 162.
(*y*) 1 Y. & C. C. C. 312.
(*z*) And see Fearns *v.* Young, 9 Ves. 549; Walker *v.* Shore, 19 Ves. 387, 1 Y. &. C. C. C. 321, n., Arnold *v.* Ennis, 2 Ir. Ch. Rep. 601; Re Llewellyn's Trust, 29 Beav. 171; Brown *v.* Gellatly, L. R. 2 Ch. 751 (as to the ships). But see Crawley *v.* Crawley, 7 Sim. 427, *contra*.

How far preceding doctrines apply to residuary bequests without a trust for conversion.

cases, in which the residuary clause contains no express trust for conversion: as where a testator simply bequeaths all the residue of his personal estate in trust for A. for life, and after his decease, for B. absolutely. In such cases [the general rule of the court is, that all property of whatever kind, whether perishable or permanent, except what is invested on permanent government (*a*), or real securities, must be converted and invested in 3*l.* per cent Consols (*b*). It follows] that as to property, which at the testator's death is invested upon permanent government or even real securities, the legatee for life is entitled to the actual income, *i.e.* the dividends or interest, from the period of the testator's decease (*c*).[1] But as to property which has a temporary duration only, as leaseholds, or annuities for lives or years, the actual income of which, it is obvious, partakes to some extent of the nature of capital, the same rule could not justly be applied, as it would evidently have the effect of conferring an undue advantage on the person entitled for life, at the expense of the ulterior taker. The fair course, [and at the present day the settled rule,] in such cases seems to be, to carry to account, as capital, the income accruing from the time of the testator's decease; and, in lieu of such income, to pay to the legatee for life from that period, a sum equal to the dividends which the produce of the sale would have yielded, if invested in Three per Cent stock; such investment, however, not being supposed to be made until the period of the actual sale (if within the year), though it regulates the income retrospectively from the testator's death. But if the sale does not take place within a year after the testator's decease, the amount must, it should seem, be regulated by the presumed proceeds, *i.e.* the value at
*612 the end of such * year, together, in either case, with dividends on the interim income of the terminable unconverted property (*d*).[2]

(*a*) Including those authorized by G. O. 1st Feb. 1861.

(*b*) Howe *v.* Lord Dartmouth, 7 Ves. 137; Thornton *v.* Ellis, 15 Beav. 193. This rule applies in favor of one having a life-annuity charged on a wasting fund or on residue. Fryer *v.* Buttar, 8 Sim. 442; Wightwick *v.* Lord, 6 H. L. Ca. 217. It also applies to reversionary interests in favor of the tenant for life, Hinves *v.* Hinves, 3 Hare, 611: and also where trustees have an express option to convert or retain existing securities, and they decline to exercise it. Prendergast *v.* Prendergast, 3 H L. Ca. 195; see also Baud *v.* Fardell, 7 D. M. & G. 633, 634.]

(*c*) Mills *v.* Mills, 7 Sim. 501; and see Howe *v.* Earl of Dartmouth, 7 Ves. 137.

(*d*) Fearns *v.* Young, 9 Ves. 549; Howe *v.* Earl of Dartmouth, 7 Ves. 137; Mills *v.* Mills, 7 Sim. 501; [Morgan *v.* Morgan, 14 Beav. 72; Fryer *v.* Buttar, 8 Sim. 442; Benn *v.* Dixon, 10 Sim. 636; Chambers *v.* Chambers, 15 Sim. 183; Smith *v.* Pugh, 6 Jur. 701; Lichfield *v.* Baker, 2 Beav. 481, 13 Beav. 447. But see Sutherland *v.* Cooke, 1 Coll. 503, and] Crawley *v.* Crawley, 7 Sim. 427, where 4*l.* per cent was allowed, and a remark on the last case, Hayes & Jarm. Con. Wills, 3d ed. p. 227. [The rule that the tenant for life is only entitled to so much for income as the property would have produced if sold and invested in consols, does not apply where the testator dies, and his property and the persons entitled under his will reside out of the jurisdiction of the Court of Chancery, but it attaches as soon as the persons entitled arrive in this country. Holland *v.* Hughes, 16 Ves. 111.]

1 Lovering *v.* Minot, 9 Cush. 151.

2 The decisions generally declare that the person taking a residue for life is ordinarily entitled to the proceeds from the death of the testator, and not merely after the expiration of a year, when the executor is not prohibited from paying the principal within that time. See Hewett *v.* Morris, 1 Turn. & R. 241; Williamson *v.* Williamson, 6 Paige, 298; Lovering *v.* Minot, 9 Cush. 151. But as to the rule in New York, see Wheeler *v.* Ruthven, 74 N. Y. 428; Campbell *v.* Cowdrey, 31 How. Pr. 172, reversing 1 Tuck. 122, and 19 Abb. Pr. 210. These cases hold that interest begins one year

What would be the destination of income arising from a fund, which, though not wasting or fluctuating, is precariously secured, is more doubtful. It would clearly be the duty of any executor or trustee to call in the money as soon as possible (*e*); but in the mean time, if the fund should happen to yield a larger amount of income than a proper investment (as in the case of a loan on personal security at 10*l.* per cent), the trustee or executor could not, it is conceived, with safety pay the legatee for life the actual income, though no loss of principal were eventually sustained; having regard to the severe lesson taught to trustees by the case of Dimes *v.* Scott (*f*), in which, however, it is to be remembered, there was an express trust for conversion.

As to income of a fund precarious, but not wasting.

Every well-drawn will, of course, precludes all such questions by explicit declaration; and this remark will serve to conduct to the next point for inquiry, namely, —

What amounts to an indication of intention that the legatee for life shall, in exclusion of the general doctrine, enjoy in specie the property which is the subject of disposition? This, of course, like all others, is a question of construction, to be elicited from the whole will; and on which a right conclusion can be formed only by an attentive examination of the cases; some of which will be found to turn upon rather nice distinctions.

It is clear, that where a testator gives the income of a specific fund to a person for life, in terms exclusively applicable to describe the income in the then state of the property, the ulterior legatee cannot call for its conversion, even though it be of a wasting nature. As in Vincent *v.* Newcombe (*g*), where a testatrix who was possessed of long annuities, and no other stock, bequeathed certain annual sums to be paid out of her "funded property," and then gave to A. the whole of the remainder of her *dividends* * during *613 her natural life; and at A.'s decease, the testatrix

What expressions prescribe an enjoyment in specie.

In the case of a specific bequest;

(*e*) Thornton *v.* Ellis, 15 Beav. 193. But see Johnson *v.* Johnson, 2 Coll. 441.

(*f*) See [Caldecott *v.* Caldecott, 1 Y. & C. C. C. 737: hnt] *contra* Douglas *v.* Congreve, 1 Keen, 410; [and Mehrtens *v.* Andrews, 3 Beav. 72: where the fund was both wasting and precarious.] (*g*) 1 You. 599; [and see Cockran *v.* Cockran, 14 Sim. 248.]

after the testator's death, though the statute of that state prohibits payment of legacies until a year after the grant of letters to the executor. In the recent case of State *v.* Adams, before the Supreme Court of Missouri (to appear in 70 Mo.), it was held that where suit, which was dismissed, had been instituted to contest the validity of a will probated, interest could not be demanded of the executrix until the dismissal of that suit. This proceeds upon the ground that the executor is not deemed to be in default so long as he cannot carry out the provisions of the will. See Valentine *v.* Ruste, 93 Ill. 585. Again, a party's contest of the will is a refusal of the gift; and it has lately been held in Pennsylvania that interest cannot be claimed while such refusal continued and until demand for the gift. Vandergrift's Appeal, 80 Penn. St. 116. That is, interest begins from the time of acceptance. Hamilton *v.* Porter, 63 Penn. St. 332. See further as to interest, Weld *v.* Putnam, 70 Me. 209; Ayer *v.* Ayer, 128 Mass. 575; Brown *v.* Knapp, 79 N. Y. 136; 2 Kent, 354, and n.; Evans *v.* Eglehart, 6 Gill & J. 171; De Peyster *v.* Clendining, 8 Paige, 295. As to the security that may be required by remainderman of tenant for life, see Howe *v.* Dartmouth, 7 Ves. (Sumner's ed.) 151; Homer *v.* Shelton, 2 Met. 194.

gave sums of stock to various persons, using in such bequests terms applicable not to long annuities, but rather to capital, as 1,000*l.* stock, &c. The ulterior legatees claimed to have the long annuities converted into Three per Cents, on the ground, that, as the long annuities were a decreasing fund, the ulterior legatees might, by the progress of such decrease, be disappointed of their legacies: but Lord Lyndhurst decided, that A. was entitled to the residue of the long annuities during her life, under the words "the whole of the remainder of my dividends." *A fortiori* are trustees not justified in converting into a permanent stock long annuities [passing by a specific bequest of "all stocks and funds standing in" the testator's name] in trust for a person for life, and then to other persons absolutely (*i*)?

—of a non-specific bequest.

[But according to the doctrine of the present day, the question does not depend on the legacy being specific or not (*k*).] The same principle applies, even to a residuary clause, if an intention that the property shall be enjoyed in specie can be collected from the terms in which either the life-interest, or the ulterior subject of disposition, or both these interests, is or are bequeathed. [For the general rule stated above as to the conversion of perishable into permanent securities, did not originally ascribe to testators the intention to effect such conversions except in so far as a testator may be supposed to intend that which the law will do: but the court, finding the intention of the testator to be that the objects of his bounty shall take successive interests in one and the same thing, converts the property as the only means of giving effect to that intention. But if the will express an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply (*l*). It has been said that the effect of the later cases is to allow small indications of intention to prevent its application (*m*): but it must be done by a fair construction of the will, the burden being always on those who would exclude the rule (*n*).

Expressions which prescribe enjoyment in specie.

*614 * A direction to renew or keep in repair (*o*) or to demise (*p*) or discharge incumbrances on (*q*) leaseholds (*r*), points to enjoyment in specie; and where after a bequest of a residue for life there is an express trust for conversion at a specified period, it will be inferred that no conversion

(*i*) Lord *v.* Godfrey, 4 Mad. 455; [see also Milne *v.* Parker, 12 Jur. 171; D'Aglie *v.* Fryer, 12 Sim. 1; Bethune *v.* Kennedy, 1 M. & Cr. 117; Hubbard *v.* Young, 10 Beav. 203 (gift of "my property," "my property is in the India House"); Boys *v.* Boys, 28 Beav. 436 ("property yielding income at my decease"). And see Mills *v.* Brown, 21 Beav. 1.

(*k*) Per Lord Langdale, 10 Beav. 205; and see 4 My. & Cr. 299, 1 Drew. 181, overruling dictum of Shadwell, V.-C., in Mills *v.* Mills, 7 Sim. 508, 509.

(*l*) Per Wigram, V.-C., in Hinves *v.* Hinves, 3 Hare, 611.

(*m*) 14 Beav. 82; and see 3 Hare, 612, 613.

(*n*) Macdonald *v.* Irvine, 8 Ch. D. 101.

(*o*) Crowe *v.* Crisford, 17 Beav. 507.

(*p*) Hind *v.* Selby, 22 Beav. 373; Thursby *v.* Thursby, L. R. 19 Eq. 395.

(*q*) Re Sewell's Estate, L. R. 11 Eq. 80.

(*r*) If specifically devised leaseholds are sold compulsorily, and the purchase-money is invested in consols, the tenant for life is entitled to have his income made up out of the

is to take place previously to that period, and the tenant for life, therefore, takes the income in specie (*s*); so where there there is a power to sell generally (*t*), and *à fortiori* where there is a direction not to sell without consent (*u*), or for a definite term of seven years (*x*), or a direction is given either to sell or not (*y*). And an express trust to convert all "except government stock" entitles the tenant for life to specific enjoyment of long annuities (*z*). And this was so held, even though in the same will the trustees were directed to invest the proceeds of conversion in "government stock," a direction which admittedly did not authorize them to invest in long annuities: the reason why it did not do so being not that long annuities did not come within the words of the direction as well as within the words of the exception, but because the court would not permit the trustees to select perishable securities (*a*). From this latter position it is no long step to hold that a *power* to retain "government stock" following a trust to sell all (without exception) does not authorize trustees to retain long annuities (*b*). * Still less could long annuities be properly *615 retained (even though there were no express trust for sale), if the power were in general terms for the trustees to leave the testator's moneys invested as they should find them (*c*), or a power to retain "undoubted real or personal securities" (*d*).

Effect of trust to convert all except specified part;

—of *power* to retain specified part;

Again, a power to sail the testator's ships for the benefit of his estate till they can be satisfactorily sold (*e*), or a direction to sell a horse if a stated sum should be offered, if not, to let him, and if a sale should be made, to invest the money (*f*), — a

— of directions for interim management;

corpus, Jeffreys *v.* Conner, 28 Beav. 328: and see Re Pfleger, L. R. 6 Eq. 426, and cases cited. But where leaseholds renewable by usage but not by law (as church lands) are thus specifically bequeathed, with a positive trust to renew and to pay the fine out of the rents, the testator thus shows an intention to treat the property as permanent: so that if it be compulsorily sold, the tenant for life has no such right. Re Wood's Estate, L. R. 10 Eq. 572. So if renewal is refused by the lessor, the unexpired leasehold ought to be converted into a permanent fund. This, together with the renewal fund, if any, formed out of rents, will be *corpus*, to the income only of which the tenant for life will be entitled, Hollier *v.* Burne, L. R. 16 Eq. 163 (where, p. 167, Lord Selborne's statement of "the general law of the court" is not true if applied to specific gifts, though unless so applied is irrelevant); Maddy *v.* Hale, 3 Ch. D. 327; distinguishing Tardiff *v.* Robinson, 27 Beav. 629, n.; Morres *v.* Hodges, ib. 627; Hayward *v.* Pile, L. R. 5 Ch. 214; in which there was no absolute trust to renew, and the tenants for life were held entitled to the rents in specie.

(*s*) Alcock *v.* Sloper, 2 My. & K. 699; Hunt *v.* Scott, 1 De G. & S. 219; Daniel *v.* Warren, 2 Y. & C. C. C. 290; Harvey *v.* Harvey, 5 Beav. 134; Rowe *v.* Rowe, 29 Beav. 276. In Mills *v.* Mills, 7 Sim. 508, the direction to convert had reference to a conversion into *actual money* for the purpose of making loans, and did not therefore exclude by implication a previous conversion into *other investments*.

(*t*) Burton *v.* Mount, 2 De G. & S. 383; Bowden *v.* Bowden, 17 Sim. 65; Skirving *v.* Williams, 24 Beav. 275; Re Llewellyn's Trust, 29 Beav. 171. But see Jebb *v.* Tugwell, 20 Beav. 84. (*u*) Hinves *v.* Hinves, 3 Hare, 609; Ellis *v.* Eden, 23 Beav. 543.

(*x*) Green *v.* Britten, 1 D. J. & S. 649. (*y*) Simpson *v.* Lester, 4 Jur. N. S. 1269.

(*z*) Howard *v.* Kay, 27 L. J. Ch. 448; Wilday *v.* Sandys, L. R. 7 Eq. 455. See also Grant *v.* Mussett, 8 W. R. 330.

(*a*) Per Lord Romilly, L. R. 7 Eq. 457. (*b*) Tickner *v.* Old, L. R. 18 Eq. 422.

(*c*) Porter *v.* Baddeley, 5 Ch. D. 542. And see Re Llewellyn's Trust, 29 Beav. 171 (express trust to convert).

(*d*) Preston *v.* Melville, 15 Sim. 35 (express trust to convert).

(*e*) Brown *v.* Gellatly, L. R. 2 Ch. 751. Cf. Thursby *v.* Thursby, L. R. 19 Eq. 395.

(*f*) Arnold *v.* Ennis, 2 Ir. Ch. Rep. 601. See Gibson *v.* Bott, ante, p. 610.

sale upon the first good opportunity being in each case evidently contemplated — shows no intention to alter equities between successive takers, but only to regulate the discretion of the trustees in conducting the sale, and will not give the tenant for life the actual profits made before sale. So a direction to convert certain specific parts of the personal estate does not imply that the residuary estate is not to be converted (*g*); neither does a direction to sell the residuary personal estate for payment of debts and legacies imply that it is to be sold for no other purpose; since a sale for the purpose of making those payments is no more than the law itself would order in the common course of administration without an express direction (*h*). A power to vary securities, though an insufficient ground for conversion in the case of a specific gift (*i*), yet affords a strong argument in favor of a sale when it has reference to a residuary bequest (*j*).

—of trust to convert specific part, &c.

Where various items of property are dealt with together, the fact that some of them are clearly to be enjoyed in specie (and more especially if these be of a kind which, according to the general rule, ought to be converted), affords an argument in favor of the remaining items having been also intended to be so enjoyed (*k*); an argument, however, which requires other corroborative circumstances to render it conclusive (*l*).

Where of several items in one gift some are clearly subject to sale.

*616 * An intention that the tenant for life shall enjoy the property in specie is sometimes collected from the circumstance that the terms of the gift over point to the very property as it existed at the testator's death. Thus, in] Collins *v.* Collins (*m*), where the words of the bequest were "I give to my wife, all and every part of my property, in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death the property so left to be divided in the following manner." Part of the testator's property consisted of a leasehold messuage, held for a term of twenty-eight years; and Sir J. Leach, M. R., considered that the ulterior legatees were not entitled to have the lease sold, but that it was the intention of the testator, that his widow should enjoy the leasehold property for her life.

Where the gift in remainder points to the very property. Collins *v.* Collins.

Again, in Pickering *v.* Pickering (*n*), where a testator gave to his

(*g*) Cafe *v.* Bent, 5 Hare, 34; Morgan *v.* Morgan, 14 Beav. 85, 86; Hood *v.* Clapham, 19 Beav. 90. *Secus* where all is directed to be sold except specific parts, see cases cited ante, p. 614.

(*h*) Caldecott *v.* Caldecott, 1 Y. & C. C. C. 312; Sutherland *v.* Cooke, 1 Coll. 498; Johnson *v.* Johnson, 2 Coll. 441.

(*i*) Lord *v.* Godfrey, 4 Mad. 455. (*j*) Morgan *v.* Morgan, 14 Beav. 85.

(*k*) Bethune *v.* Kennedy, 1 My. & Cr. 114; Burton *v.* Mount, 2 De G. & S. 383; Simpson *v.* Earls, 11 Jur. 921, V.-C. Wigram; House *v.* Way, 12 Jur. 958, 18 L. J. Ch. 22, V.-C. Wigram; Howe *v.* Howe, 14 Jur. 359 (K. Bruce, V.-C.); Cotton *v.* Cotton, ib. 950; Booth *v.* Coulton, 7 Jur. N. S. 207 (freehold distillery with *utensils*, &c., let together at one rent); Holgate *v.* Jennings, 24 Beav. 623, where it was said that though investments were to be enjoyed in specie, debts, as turnpike bonds, must be got in.

(*l*) Howe *v.* Earl of Dartmouth, 7 Ves. 138; Blann *v.* Bell, 5 De G. & S. 658, 2 D. M. & G. 775.] (*m*) 2 My & K. 703. (*n*) 2 Beav. 31.

wife, subject to the payment of his debts and legacies, and such annuities and assurances as he was liable to pay, all the interest, rents, dividends, annual produce and profits, use and enjoyment, of his real and personal estate, for life; and at her decease, the testator gave all the rest and residue of his estate, real and personal, to his son-in-law; but, in case of his dying before the testator's wife, then he directed the residue to be divided in manner therein mentioned. Part of the testator's property consisted of a leasehold house and a life-annuity; and the charges thereon also comprised annual payments. Lord Langdale, M. R., decided, that in this case the testator had indicated an intention that the property should be specifically enjoyed by his wife during her life; and Lord Cottenham, on appeal (*o*), was of the same opinion; grounding his judgment especially on Collins *v.* Collins, to which he thought the direction to divide the property on a certain event precisely assimilated the case before him. He remarked that in Collins *v.* Collins there were expressions only applicable to the actual condition of the property. Pickering *v.* Pickering.

[In Harris *v.* Poyner (*p*), the testator devised and bequeathed all the residue of his real and personal estate, "and all his estate, term and interest therein," to trustees in trust for his wife for life, and after her death, he devised "*the same, and all his estate, term and interest therein*" to his son; Sir R. Kindersley, V.-C., thought *that the testator intended the son to take the identical property, and, therefore, that there was to be no conversion during the life of the widow. Harris *v.* Poyner. *617

In Pickup *v.* Atkinson (*q*), the ground on which the conversion was opposed was, that there was a gift to the tenant for life of the *rents*, profits, dividends and interest of all the residue, &c., and that if leaseholds comprised in the residue were to be converted, the word "rents" would, in effect, be struck out of the will. In support of this Goodenough *v.* Tremamondo (*r*) was cited, where Lord Langdale, M. R., relying on the use of that word in the gift for life, and gift over, held that there was to be no conversion; but Sir J. Wigram, V.-C., in deciding that there must be a conversion in the case before him, said, that according to that argument, the use of the words "dividends" (*s*), "interest," would prevent the conversion of any property yielding income denominated by those words. How- Effect of gift of *rents* to tenant for life.

[(*o*) 4 My. & Cr. 289.

(*p*) 1 Drew. 174; but see Lichfield *v.* Baker, 2 Beav. 481, 13 Beav. 447; Thornton *v.* Ellis, 15 Beav. 193; Bowden *v.* Bowden, 17 Sim. 65.

(*q*) 4 Hare, 624.

(*r*) 2 Beav. 512; and see Marsball *v.* Bremner, 2 Sm. & Gif. 237; Crowe *v.* Crisford, 17 Beav. 507; Skirving *v.* Williams. 24 Beav. 275. And apparently its effect is not impaired by the circumstance of the leaseholds being included in the same gift with freeholds: *i. e.* the word is not applied exclusively to the latter, Hood *v.* Clapham, 19 Beav. 90; Wearing *v.* Wearing, 23 Beav. 99; Vachell *v.* Roberts, 32 Beav. 140; but see Craig *v.* Wheeler, 29 L. J. Ch. 374.

(*s*) Some stress was laid upon this word by Sir J. Leach, in Alcock *v.* Sloper; and see Blann *v.* Bell, 5 De G. & S. 658; Bowden *v.* Bowden, 17 Sim. 65.

ever, in Cafe *v.* Bent (*t*), where a testator directed a percentage on the receipt of the "rents" of the residue, after satisfying "all ground rents and other outgoings," to be paid to his son, and none of the property included in the residue except leaseholds produced "rents," the same judge held that the leaseholds were to be enjoyed in specie. This conclusion was probably fortified by a different percentage being given on the "dividends" arising from the residue.]

Effect where there is an enumeration of specific items combined with general residue.

Sometimes, a testator combines with the general words of a residuary clause, an enumeration of certain species of property, thus raising the question, whether the enumeration is to be considered as taking the specified property out of the rule applicable to a general residue. [There is great authority for saying that such enumeration of particulars, unless it is enough to make the bequest of those particulars properly "specific," is insufficient of itself to exclude the rule (*u*).]

*618 Bethune *v.* Kennedy.

*In Bethune *v.* Kennedy (*x*), [the bequest was held to be specific.] There a testatrix, after bequeathing 100*l.* long annuities to A. and B., added, "the residue of my property, all I do or may possess in the funds, copy or leasehold estates, to my dear sisters M. and H., during their lives; at the decease of both of them to be equally divided, share and share alike, between my cousins" (naming them). Part of the residue consisted of 150*l.* long annuities; and the question was, whether the legatees for life were entitled to receive the annuities, or whether they ought to be turned into a permanent fund. Sir C. C. Pepys, M. R., decided in favor of the former construction, on the ground, that it was not a mere residuary clause, but a specific bequest of the sum belonging to the testatrix in the long annuities; and was to be enjoyed by the legatee for life, in the state in which the testatrix left it. As to the copyhold or leasehold estates, he said, it was not disputed that the gift was specific; and if so, why should it not also be specific with respect to the funds? The intention, it was reasonable and natural to presume, must have been the same with respect to both descriptions of property; and there could be no doubt, he observed, that a bequest of all that a testator may possess in the funds, would be a specific bequest of all funded property; the rule being, that the legacy is not the less specific for being general. The M. R. considered, that the case was distinguishable from Alcock *v.* Sloper, where the argument in favor of the non-conversion was founded on the terms in which the income was given, and not (as here) on the mode of bequeathing the capital.

[The decision in the last case was followed by Lord Lyndhurst, C., in

(*t*) 5 Hare, 24; see Neville *v.* Fortescue, 16 Sim. 333.

(*u*) Stirling *v.* Lydiard, 3 Atk. 199; Mills *v.* Mills, 7 Sim. 508; House *v.* Way, 18 L. J. Ch. 22, 12 Jur. 959; Cotton *v.* Cotton, 14 Jur. 950; James *v.* Gammon, 15 L. J. Ch. 217; Simpson *v.* Earles, 11 Jur. 921; Pickup *v.* Atkinson, 4 Hare, 628; and see Sutherland *v.* Cooke, 1 Coll. 504; Morgan *v.* Morgan, 14 Beav. 72; Craig *v.* Wheeler, 29 L. J. Ch. 374; Re Tootal's Estate, 2 Ch. D. 628.]

(*x*) 1 My. & Cr. 114.

Vaughan *v.* Buck (*y*), on a will of doubtful construction, which the L. C. said might for the purpose now in question be read thus: "I give the whole of my property, viz., my house, 21 North Street, 1,000*l.* New 4*l.* per cents, 1,500*l.* in the 3*l.* per cent Consols, 645*l.* in the 3*l.* per cent Reduced, and 20*l.* per annum long annuities with the residue and interest, if there should be any, to my wife for life, and after to be divided equally between my surviving children:" it was held that the widow was entitled to enjoy the house, which was leasehold, and the long annuities, in specie. "With respect to the house," Lord Lyndhurst said, "the bequest is clearly specific, and as to the long annuities they constitute one of the items in the *testator's property existing at the date of the will, and which *619 by this description he bequeathed to his wife. . . . Bethune *v.* Kennedy is similar in principle, and corresponds nearly in its circumstances with the present." Vaughan *v.* Buck.

In Oakes *v.* Strachey (*z*), there were two gifts to the testator's wife during widowhood, first, of the interest of all the money the testator had or might possess in the funds or on other securities; and, secondly, of the interest of all his other property, for the maintenance of herself, and the maintenance and education of the testator's children by her: the V.-C. thought the testator had drawn a distinction between the two sorts of property, and that the former was to be enjoyed in specie, and the latter not. Oakes *v.* Strachey.

If wasting property (as leaseholds) bequeathed in specie be converted into a permanent fund, with the consent of the tenant for life, and he survives the period when the leaseholds would have expired, the capital of the permanent fund will become the absolute property of the tenant for life (*a*). But a lease, in which the tenant for life is *cestui que vie*, would practically not become his absolute property immediately, at least not so as to enable him to assign or surrender it; for the chance of renewal for the benefit of the remainder-man would be thereby lost, and it seems that on this account a sale or surrender by him would be set aside (*b*). It may be here added, that a tenant for life in specie of a share in a partnership has been held not entitled to the increase of the capital made during his life (*c*).] Effect of conversion of wasting property with consent of tenant for life.

IV. It is clear, that, where a testator directs real estate to be converted into money, for certain purposes, and the trusts of the will directing the application of the money, either as originally created, or as subsisting at the death of the testator, do not exhaust the whole beneficial interest, such unexhausted inter- Destination of undisposed-of interests in property directed to be converted.

[(*y*) 1 Phill. 75; see also Hubbard *v.* Young, 10 Beav. 203; Mills *v.* Brown, 21 Beav. 1.
(*z*) 13 Sim. 414.
(*a*) Phillips *v.* Serjent, 7 Hare, 33; Re Beaufoy's Estate, 1 Sm. & Gif. 20.
(*b*) Harvey *v.* Harvey, 5 Beav. 134, where, however, under the peculiar circumstances, the sale was not held bad. (*c*) Mousley *v.* Carr, 4 Beav. 49.]

est, whether the estate be eventually sold or not (*d*), belongs to the heir as real estate undisposed of (*e*). The heir is ex-
*620 cluded, not by the * direction to convert, but by the disposition of the converted property, and so far only as that disposition extends. Thus, in Wilson *v.* Major (*f*), where lands were given by a testator to his wife upon trust to sell and invest the money upon security at interest; and he gave and bequeathed the interest and dividends of the same to the use of his said wife, without making any ulterior disposition of the fund, Sir W. Grant, M. R., held, that, there being no declaration of the trust of the money beyond the life of the wife, it resulted to the testator's heir.

Principle same, whether land or money is the object of conversion.

And the same principle, it is now settled, applies in the converse case of money being directed to be laid out in land, which is then devised for a limited estate only; the fund *ultra* that interest, though eventually turned into land, goes as personal estate undisposed of to the residuary legatee or next of kin of the testator, on the ground that the will operates to convert the fund so far only as it disposes of it.[1]

Thus, in Cogan *v.* Stephens (*g*), where the testator directed his executors immediately to lay out the sum of 30,000*l.* in the purchase of an estate, the income of which he settled on one for life, with remainder to others in tail, subject to which the estate (which was to be purchased and always run in the testator's name) was given to a charity. The money was not laid out, and the gift to the charity being void under the Statute of Mortmain, and the prior limitations having determined, it was held by Sir C. Pepys, M. R., that the next of kin, and not the heir at law of the testator, was entitled to the fund.

So, in Hereford *v.* Ravenhill (*h*), where a testator gave his ready money and the money which should be owing to him, to trustees, upon trust, as soon after his decease as a convenient purchase could be found, to invest it in the purchase of freehold, copyhold, or leasehold hereditaments to be settled to certain uses. These limitations having failed (some of them in the lifetime of the testator, and the rest subsequently), Lord Langdale, M. R., in a suit for ascertaining who was entitled to the fund, which had not been laid out, held, that the heir was not a necessary party; observing, that it had been decided in Cogan *v.* Stephens that where a testator directed his personal estate to be converted into

(*d*) See Hill *v.* Cock, 1 V. & B. 173.

(*e*) 2 Vern. 571; ib. 645; 3 P. W. 20; 2 Dick. 500; 1 B. C. C. 503; 2 B. C. C. 589; 3 B. C. C. 355; 4 B. C. C. 411; 2 Ves. Jr. 271; ib. 683; 3 Ves. 210; 4 Ves. 542; ib. 803; 10 Ves. 500; 11 Ves. 87; ib. 205; 12 Ves. 413; 16 Ves. 188; 18 Ves. 156; 1 V. & B. 173; ib. 410; 2 V. & B. 294; 2 Kee. 564; [1 R. & My. 752; 5 My. & Cr. 125; 4 Y. & C. 507.] The case of Ogle *v.* Cook, cited 1 B. C. C. 512, had been considered as a solitary exception to this class of cases; but it was afterwards discovered that the very point which was alleged to have made it so was left undecided. See R. L. cited 2 Ves. Jr. 686.

(*f*) 11 Ves. 205; see also Robinson *v.* Taylor, 2 B. C. C. 389.

(*g*) 1 Beav. 483, n. [5 L. J. N. S. Ch. 17.] (*h*) 1 Beav. 481.

[1] See Fletcher *v.* Ashburner, 1 Bro. C. C. (Perkins's ed.) 497, 503, n. (*a*); 2 Story, Eq. Jur. § 790, and notes.

real estate for several purposes, some of which failed, his heir was not, after satisfying the purposes which would take effect, entitled to the * personalty, as being impressed with the character of real *621
estate; [and he subsequently decreed the residuary legatee to be entitled (*i*).]

And the same rule obtains, where the testator's disposition of the converted property, though originally complete, has partially failed in event by the decease of any one of the objects in the testator's lifetime; in which case the interest comprised in the lapsed gift devolves to the person who would have been entitled to the entire property, if the testator had died wholly intestate in regard thereto.

Lapsed shares of proceeds of real estate devolve to heir.

The title of the heir, under such circumstances, to a lapsed share of real estate directed to be sold, was established in Ackroyd *v.* Smithson (*k*), well known as containing the celebrated argument of Lord Eldon (then Mr. Scott), which Lord Thurlow admitted to have changed his opinion. The testator devised all his real and personal estate in trust to be sold and converted into money, to pay debts, legacies, and funeral expenses; and the overplus to be paid to certain persons (to whom he had bequeathed pecuniary legacies), in proportion to their respective legacies. Some of these legatees died in the testator's lifetime; and, on a question whether their lapsed shares belonged to the heir at law or next of kin of the testator, Lord Thurlow at first inclined to the opinion that the next of kin were entitled, but, upon further argument, he decided in favor of the heir. He said, that he used to think, when it was necessary for any of the purposes of the testator's disposition, to convert land into money, that the undisposed-of money would be personalty; but the cases fully proved the contrary. It would be too much, he observed, to say, that if all the legatees had died, the heir could, as he certainly might, prevent a sale; and yet that, because a sale was necessary, the heir should not take the undisposed part of the produce.

So, if the produce of real estate directed to be sold be disposed of in a certain event which does not happen, or for a purpose which is illegal, the beneficial interest comprised in the contingent or illegal gift which thus fails devolves to the heir.

Effect of failure of devise by contingency or illegality.

And it is, of course, immaterial that the testator has combined his personal estate in the same gift with the proceeds of the real estate; the effect in such case being that, by the failure * of the intended disposition, the real estate de- *622
scends to the heir, and the personalty devolves to the

Failure of disposition of real and personal estate respectively.

[(*i*) Hereford *v.* Ravenhill, 5 Beav. 51.] Fletcher *v.* Chapman, 3 B. P. C. Toml. 1 [where, however, no claim appears to have been made by the next of kin], and a dictum of Lord Redesdale, 3 Dow, 207 (see also 4 B. C. C. 527) are thus virtually overruled.

(*k*) 1 B. C. C. 503. [But where the court or a trustee sells more than necessary of the estate of a *living owner*, there is no equity to reconvert for his heir. L. R. 18 Eq. 197; ante, 162.]

next of kin of the testator. Thus, in Jessopp *v.* Watson (*l*), where a testator directed a mixed fund, composed of the produce of his real and personal estate, to be applied to certain specified purposes, and the residue to be divided equally among his children or child at twenty-one, if sons, and twenty-one or marriage, if daughters; and if no such child, to such person or persons as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter his heir, who died under twenty-one, intestate and unmarried. Sir J. Leach, M. R., held, that so much of the residuary fund as was constituted of real estate, descended to the daughter as heir at law; and that so much as was constituted of personalty devolved to and was divisible among the persons entitled under the Statute of Distribution to the personal estate of the testator.

So, in Eyre *v.* Marsden (*m*), where a testator gave his real and personal estate to trustees upon trust, at any time after his decease to sell and convert the property, and during the lives of his children to accumulate the annual income; and, after the decease of his surviving child, he gave the produce of the real and personal estate (directing such part as had not been previously converted, to be then converted) to his grandchildren. One of the children having survived the testator more than twenty-one years, the trust for accumulation became void for the excess under the Thellusson Act (*n*), and the income, being held to be thenceforth undisposed of during the life of the surviving child, was claimed by the next of kin of the testator, as well of the proceeds of the real as the personal estate, on the ground that there was an absolute conversion. But Lord Langdale, M. R., decided that it belonged to the heir, observing that the sale was directed for the purposes of the will, and for the benefit of the legatees, not for the benefit of the next of kin, whose claim was therefore confined to the income of the personal estate.

The position that the heir is not excluded by any conversion, however absolute, may seem, indeed, to be indirectly encountered by those cases in which a distinction has been carefully drawn between absolute and qualified conversion (*o*). The learned Editor of Peere Wil-
*623 liams's Reports, in a note which has often * been referred to with commendation (*p*), states the question in those cases to be, "whether the testator meant to give to the produce of the real estate the quality of personalty *to all intents*, or only so far as respected the *particular purposes* of his will."[1] There seems to be no ground to except to this statement of the doctrine, provided that, by an indication of intention to give to real

Conversion for purposes of will — what.

(*l*) 1 My. & K. 665; [see also Roberts *v.* Walker, 1 R. & My. 752; Edwards *v.* Tuck, 23 Beav. 268; Bedford *v.* Bedford, 35 Beav. 584.]
(*m*) 2 Kee. 574.
(*n*) Ante, p. 302.
(*o*) Wright *v.* Wright, 16 Ves. 188.
(*p*) Cruse *v.* Barley, 3 P. W. 20, Mr. Cox's n.

[1] See Wheldale *v.* Partridge, 5 Ves. (Sumner's ed.) 397, n. (*a*); Brown *v.* Bigg, 7 Ves. (Sumner's ed.) 279 *b*, n. (*b*); 2 Story, Eq. § 793.

estate the quality of personalty "to all intents," we are allowed to understand something very special and unequivocal, amounting, in effect, not merely to a disposition of the fund as personalty to the legatees named in the will, but to an alternative gift to the persons entitled by law to the personal estate, in the event of the failure of the intended disposition. Unless such an interpretation be given to the terms of this proposition, it must, however respectable the authority from which it proceeded, be pronounced to be not strictly accurate; at all events, it is not an explicit statement of the rule, and requires, it is conceived, in order to be a safe guide in its application, the following explanatory addition: "But that every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin." The respective claims of his own representatives, it may be confidently affirmed, are, in such cases, not in the contemplation of the testator, who always calculates on his legatees surviving him. [Accordingly, it is now settled, that neither a direction that the proceeds of the sale of land shall be deemed personal estate (*q*), nor such a direction joined with an express declaration that the heir at law shall not take in case of lapse (*r*), will exclude the claims of the heir at law.]

As to conversion subjecting fund to simple contract debts.

Upon the principle that real estate directed to be sold is converted only for the purposes of the will, it was held by Sir W. Grant (*s*), that such a devise in trust to pay certain legacies did not throw open the fund to simple contract creditors, though he *said that a substantive and independent intention to turn real estate into personalty, at all events, would have that effect.[1] Such a conversion, however, as that referred to by his Honor, must be of a special kind. It must have no specified object, for a specification of the object, we see, will confine it; or it must contain some expression showing that it is not so confined. In short, it must be manifest that the property is to be considered as personalty *quoad* this purpose, or, in other words, that the fund is intended to be subjected to the claims of simple contract creditors. In Kidney *v.* Coussmaker (*t*), it had been held, that where a testator had devised real estate in trust to be sold, and directed the

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[(*q*) Taylor *v.* Taylor, 3 D. M. & G. 190, overruling Phillips *v.* Phillips, 1 My. & K. 649; and see Robinson *v.* London Hospital, 10 Hare, 19; Gordon *v.* Atkinson, 1 De G. & S. 478; Flint *v.* Warren, 16 Sim. 124; Shallcross *v.* Wright, 12 Beav. 505; Hopkinson *v.* Ellis, 10 Beav. 169; Williams *v.* Williams, 5 L. J. N. S. Ch. 84; Collins *v.* Wakeman, 2 Ves. Jr. 683 (as to the 1,000*l.*). But Jessel, M. R., though he admitted it was so settled, yet thought such a direction might well have been held to mean that the next of kin should take. 1 Ch. D. 610. (*r*) Fitch *v.* Weber, 6 Hare, 145; Sykes *v.* Sykes, L. R. 4 Eq. 200.]

(*s*) Gibbs *v.* Ougier, 12 Ves. 413.

(*t*) 1 Ves. Jr. 436.

[1] See on this point Kidney *v.* Coussmaker, 1 Ves. Jr. (Sumner's ed.) 436, n. (*a*).

produce [to be applied in payment of the incumbrances on the estate, and the remainder] to be considered as part of [the residue of his] personal estate, and then bequeathed the [residue of his] personalty after payment of his debts, the fund was subjected to the debts. Sir W. Grant, in the last case, expressed his doubt of the soundness of the decision, [but more recently it has been approved (*u*).

Trustees entitled where no heir.

Again, where a testator, having devised lands to trustees upon trust for sale, did not dispose of the surplus proceeds, and died without heir or next of kin, it was held that the crown had no title to the surplus proceeds (as it would have had if they had been personalty), but that the trustees were entitled to retain them for their own benefit (*x*).]

As to proceeds of real estate, passing under a residuary bequest.

In farther confirmation of the principle in question, it is now settled that the undisposed-of residue of money to arise from the sale of real estate will not pass under a general bequest of personalty in the same will, unless the testator expressly declare that it shall be considered as part of his personal estate, [or unless such an intention can be collected from the force and meaning of the expressions used by the testator through the whole will (*y*).

Berry *v.* Usher.

Thus, in Berry *v.* Usher (*z*), the appointment of two persons as joint residuary executrix and executor was held not to give them the proceeds of real estate directed to be sold. And in] Maugham *v.* Mason (*a*), where A. devised freehold chambers to trustees and their heirs, upon trust to sell, and apply the money arising by such sale towards payment of the legacies by his will * bequeathed; and the rents, until sold, to be applied to the same uses; and after giving certain legacies, the testator then, as to all the residue of his personal estate, after payment of his debts, &c., bequeathed the same to trustees, upon trust to convert the said residue into money, and lay the same out as therein mentioned. Sir W. Grant held that the produce of the sale of the real estate, after payment of the legacies, resulted to the heir, and did not pass under the residuary bequest.

Real fund will not pass under a bequest of personalty.

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This construction, it will be observed, was somewhat aided by the circumstance of the trust being to convert the residue into money, which could not strictly apply to the money produced by the real estate; but the M. R., though he adverted to this circumstance, decided the case upon the general principle, that where there was a direction to sell land for a particular purpose, the surplus did not form "part of the personal estate, so as to pass by the residuary bequest."

[So, in Dixon *v.* Dawson (*b*), the testatrix devised and bequeathed

[(*u*) Bright *v.* Larcher, 3 De G. & J. 156; Field *v.* Peckett, 29 Beav. 568.
(*x*) Taylor *v.* Haygarth, 14 Sim. 8. See also Cradock *v.* Owen, 2 Sm. & Gif. 244, 245.
(*y*) See per Sir J. Leach, in Phillips *v.* Phillips, 1 My. & K. 661.
(*z*) 11 Ves. 87.] (*a*) 1 V. & B. 410. [(*b*) 2 S. & St. 327.

her real and personal estate upon trust to sell and convert, and out of the proceeds of the real estate to pay her debts and testamentary expenses, and also certain legacies and annuities, and in case the proceeds should be insufficient then to pay the same out of the personal estate, and she also bequeathed legacies to charities to be paid out of her personal estate, and then proceeded thus: "Should any part of my personal estate and effects still remain undisposed of, after satisfying all my just debts and personal and other incidental expenses, and providing for the said charities herein mentioned, and paying the several legacies or sums of money herein bequeathed or directed to be paid thereout, then upon trust that my said trustees shall pay and transfer the residue and remainder of my *said estate and effects not hereby otherwise disposed of* unto, &c." It was decided by Sir J. Leach, V.-C., that the last gift did not include the residue of the proceeds of the real estate, and that the heir at law was entitled. Dixon *v.* Dawson.

And in Collis *v.* Robins (*c*), where the testator devised real estate upon trust for sale, and out of the proceeds and the rents in the mean time to pay the testator's debts and the trustees' costs and certain legacies, and the will then proceeded, "and as to all and singular my ready moneys and securities for money to *me belonging, and all other my personal estate and effects whatsoever and wheresoever the same may be at the time of my decease, I give and bequeath, &c." Sir J. K. Bruce, V.-C., held that the surplus of the proceeds of the real estate belonged to the heir at law.] Collis *v.* Robins. *626

But it is clear that if there be a declaration that the money arising from the sale shall be considered as part of the testator's personal estate, it will pass under a general bequest of personalty in the same will. [For although there is no clear authority in the affirmative (*d*), yet the argument adopted with reference to such a declaration in cases of intestacy as to part of the produce of land directed to be sold, viz., that the testator has adapted his language to a case of testacy but not to a case of intestacy (*e*), while it excludes the next of kin admits the claim of the residuary legatee.] Effect of declaration that proceeds shall be personalty.

And it seems, that where the testator has blended the proceeds of the real and personal estates in regard to one legatee taking a temporary interest, it is to be inferred that he does not intend them to be subsequently severed; and accordingly, in such a case, very slight circumstances will suffice to extend a bequest applicable in terms to the personalty only, to the produce of the real estate, in order to avoid such severance. Inference that real and personal estate once blended are not to be afterwards severed.

(*c*) 1 De G. & S. 131. See also Brown *v.* Bigg, 7 Ves. 279, stated ante, p. 603.]

[(*d*) The point was included in the decision of Collins *v.* Wakeman, 2 Ves. Jr. 683, but was not argued for the heir. It seems to have been assumed, Robinson *v.* London Hospital, 10 Hare, 27.

(*e*) See per Turner, V.-C., Robinson *v.* London Hospital, 10 Hare, 19, and other cases cited above.]

Thus, where (*f*) a testator gave his real estate and the residue of his personalty to trustees, to sell and convert the same, and invest the proceeds, and then gave the interest, dividends and produce of the whole of his real estate, and of the residue of his personalty, to his wife for life, and after her decease he gave one moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his brother M., his executors, administrators and assigns, and he gave the other moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his sister-in-law B. for life; and, after her decease, he gave the *whole* of the principal of such moieties, or the *whole residue of his estate* whatsoever and wheresoever, and the securities on which the same should be invested, to his said brother M., his heirs, executors, administra-
*627 tors and assigns; and the question being, * whether the sister-in-law was entitled to a moiety of the income arising from the proceeds of the real estate, Sir J. Leach, M. R., decided in the affirmative; he said, that the testator had made one mixed fund of the residue of the personalty and the proceeds of the sale of the real estate; that the whole was to be invested in government stocks, or on real securities, and the interest was to be paid to the widow during her life; that there was no intention that upon her death a division should take place of the personalty from the produce of the realty; and, in fact, such a division could not be made; that, therefore, the testator, in the moiety given to B. during her life, meant to include the real estate; and that this conclusion was strengthened by the clause immediately following, in which the testator used the phrase, "the whole of the principal of such moieties," as synonymous with, and equivalent to, "the whole residue of my estate, whatsoever and wheresoever" (*g*), and which was, consequently, a declaration that the moieties of which he spoke were moieties of the whole residue of his estate.

[The blending of the proceeds of the two estates for any purpose not exhausting the whole is always taken as rendering probable an intention that they shall be kept together throughout, and as inviting such a construction of subsequent words of gift as will carry that intention into effect. Thus, in Court *v.* Buckland (*h*), where a testator devised and bequeathed his real and the residue of his personal estate in trust to sell, and to dispose of the net moneys to arise from such real and residuary personal estate (after payment of debts and legacies) *according to the trusts thereinafter declared concerning the same.* He then declared that until sale the real and personal estate should be subject to the trusts thereinafter declared concerning the said net moneys, and that the rents and annual produce thereof should be deemed income *for the purposes of the same trusts*, and that the real estate should be transmis-

(*f*) Byam *v.* Munton, 1 R. & My. 503. [(*g*) See Wall *v.* Colshead, 2 De. G. & J. 683.
(*h*) 1 Ch. D. 605. See also Spencer *v.* Wilson, L. R. 16 Eq. 501.

sible as personal estate. The testator then directed a sum to be set apart *out of the said net moneys* to answer a life-annuity, subject to which it was to form part of his *residuary personal estate:* and, subject to the annuity and to legacies and debts, the testator directed his trustees to stand possessed of *his residuary personal estate* in trust as to one moiety for his son, and, as to the other, for his daughter and her children. Sir G. Jessel, M. R., held that the net * proceeds of the *628 real estate were included in the trusts of the "residuary personal estate." He adverted, among other points, to the blending of the two estates, for the payment of debts and legacies and of an annuity, as warranting the inference alluded to above. He also noticed that the direction to treat the rents until sale as income "for the purposes of the same trusts" (*i.e.* the trusts of the net moneys) was unmeaning unless it referred to beneficial trusts of the income, and was intended to exclude the rule of the court, which gives the beneficiaries not the actual income but the dividends of so much consols. But, he observed, there were no trusts at all to which this direction, or to which the words "trusts hereinafter declared concerning the same" could apply, unless they applied to the trusts of "the residuary personal estate;" which trusts, moreover, were declared "subject to the annuity and to the debts and legacies," which the testator had before said were to come out of the "net moneys."

Effect, after blending, of appointing a "residuary legatee."

Again, in Singleton *v.* Tomlinson (*i*), a testator directed his executors to pay his funeral expenses and debts "out of the proceeds of his property." He then recited that he was possessed of "landed and chattel property," and directed his executors to sell his "landed estates" for the best price. He gave certain legacies; he specifically devised a certain estate; and specifically bequeathed his plate and furniture; and concluded, "I constitute A. my *residuary legatee.*" It was held in D. P., that A. was entitled to the surplus proceeds of the real estate, as well as of the personal estate, after payment of the funeral expenses, debts and legacies. Lord Cairns said it was a complete scheme of disposition of the whole of the testator's property of every kind, his intention being that his "property" (which clearly included real as well as personal property) should be turned into money, that his debts and his legacies should be paid, that the furniture and plate should be delivered to the person to whom it was bequeathed, and that he who was described as the "residuary legatee" should be entitled to the whole of the surplus. The term "residuary legatee" standing alone, or (above all) in a will which appeared to make a division between real property and personal property, meant *primâ facie* the person taking what the law calls the resi-

(*i*) 3 App. Ca. 404. See also Wildes *v.* Davies, 1 Sm. & Gif. 482, and other cases post, Ch. XXII. s. 6. In Griffiths *v.* Pruen, 11 Sim. 202, the gift was of "any sum appearing after fulfilling" the will, an expression as properly applicable to the proceeds of real estate as to personalty. And see Bromley *v.* Wright, 7 Hare, 334.]

*629 due of the personal property; but it was a term * which must be fashioned and moulded by the context, and where you had a context in which the testator was found looking at his landed property, not as land, but as something which was all to be sold and turned into money, then the term became as applicable to the proceeds of landed property as it would have been in the first instance to personal property.

In the last case, the heir at law relied on] Kellett *v.* Kellett (*k*), where a testator bequeathed legacies to several children; he bequeathed his interest in certain lands to A., and then proceeded as follows: "The remainder of my properties I devise to my executors to make good the above sums and the following sums, that is to say:" and then, after enumerating other legacies, he concluded thus: "And I also ordain, appoint and devise the said W. G. and H. executors to this my last will and testament; *also my residuary legatees, share and share alike.*" It was contended by the executors that the real estates were by the will, and for the purposes of it, turned into personal estate, to the residue of which they were entitled; or that if there was no such conversion, yet, by the manifest intention of the testator, they were legally and beneficially entitled to such parts of the estates as should remain after payment of the debts, legacies, &c., except the estates specifically devised to A. But [Lord Manners held that the intention was not made plain enough to disinherit the heir]. The executors appealed to D. P., relying principally on the argument, that by constituting them residuary legatees the testator intended them to take the residue of all that was included under the word "properties" in the preceding devise: but the House refused to disturb the decree. Lord Eldon said: "I should very much misrepresent the state of my mind with respect to this question, if I did not say that it is a state of infinite doubt, whether, according to the rules of law, and as collecting the intention of the testator from the whole of the will, the residue was intended by the testator to include the real estate. It is a whimsical way of putting it; but I feel a strong bias towards the opinion that he did mean to include it. I cannot say that the decision in this case is wrong, and I cannot say that it is right; but as I cannot say that it is wrong, it appears to me that the decree ought to be affirmed." Lord Redesdale expressed himself nearly to the same effect.

Kellett *v.* Kellett.

Although the trust clearly authorized a sale to pay legacies, there *630 was no express direction to sell; [a fact upon which Lord * Manners laid great stress. But although the land was thus less clearly treated as "something that was all to be turned into money," it is reasonably plain that neither Lord Eldon nor Lord Redesdale, if the case had come originally before him, would have held that any part of the testator's "properties" was undisposed of. At the present day,

(*k*) 1 Ba. & Be. 533, 3 Dow, 248.

the question must be treated as one purely of construction, unaffected by any special indulgence to the heir. No case, indeed, has gone further against the heir than the early one of] Mallabar *v.* Mallabar (*l*), where a testator devised and bequeathed all his lands in certain counties to his sister C., her heirs and assigns, upon trust that the same should be sold, and out of the moneys arising therefrom his just debts paid; and out of the remainder of the money he bequeathed certain legacies including one to the heir at law; and then, after his debts and legacies paid as aforesaid, and subject to the same, the testator gave the residue of his personal estate to his said sister, whom he appointed sole executrix. The produce of the real estate, after paying debts, was claimed by the heir. Lord Talbot admitted parol evidence against him; but afterwards decreed, upon the will itself, that there was no resulting trust, and that the executrix should have the whole residue including the produce of the real estate.

The giving of the residue "after debts and legacies paid as aforesaid," certainly afforded an argument that it was intended to include the fund in question which had been expressly subjected to those charges. The case has always been considered as governed by its particular circumstances (*m*).

Heir takes as personalty — where.

It is observable, that where a *partial* undisposed-of interest in real estate directed to be sold results to the heir at law of the testator, it becomes personalty in his hands. Thus, in Wright *v.* Wright (*n*), where A. devised his real estate in trust to be sold to pay his debts, &c., and the residue in trust for his daughter, but if she died in the lifetime of his wife, to his wife for life, and, at her decease, to go as he (the testator) should by a codicil direct. He left no codicil. The daughter died in the widow's lifetime. The reversionary interest in the fund expectant on the widow's decease, which descended to the daughter as the heir at law of
* the testator, was, at her death, claimed by her administratrix *631
as personalty, and by her heir at law as real estate. Sir W. Grant held, on the authority of Hewitt *v.* Wright (*o*), (in which the same principle was applied to a disposition by deed), that it was personal estate in the daughter, and accordingly belonged to her administratrix. According to the doctrine already stated (*p*), it is clear that no act on the part of the heir electing to take such partial interest as real estate would avail to change its character.

But if the purposes of the will *wholly* fail, as if all the legatees of the

(*l*) Ca. t. Talb. 78.
(*m*) 1 V. & B. 416.
(*n*) 16 Ves. 188; see also Smith *v.* Claxton, 4 Mad. 484; Jessop *v.* Watson, 1 My. & K. 665; [Dixon *v.* Dawson, 2 S. & St. 327: Carr *v.* Collins, 7 Jur. 165; Tily *v.* Smith, 1 Coll. 434; Hatfield *v.* Pryme, 2 Coll. 204; White *v.* Smith, 15 Jur. 1096; Bagster *v.* Fackerell, 26 Beav. 469; Wilson *v.* Coles, 28 Beav. 215.]
(*o*) 1 B. C. C. 86. [See also Clarke *v.* Franklin, 4 K. & J. 257.]
(*p*) Ante, p. 601.

Where the objects of the conversion wholly fail.

moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made, the property will devolve upon the heir as real estate (*q*), [and in such a case it is immaterial that a sale has by mistake taken place on the supposition that the trusts have not wholly failed (*r*): but the question whether the will causes a conversion or not is to be determined by the circumstances as they exist at the testator's death, and therefore where it is uncertain at that period whether a conversion will be required for the purposes of the will, the heir will take the property as personalty, although those purposes may have failed before a sale takes place (*s*).

Next of kin takes as realty — where.

In the converse case, *i.e.* where personal estate is directed to be laid out in land, which is to be held on trusts which (either originally or by lapse) leave *part* of the interest undisposed of, this partial interest results to the testator's next of kin or residuary legatee as real estate, in case of whose death it passes to *his* heir at law, or devisee (*t*).

On the same principle, when land is devised charged with a sum of money, which is given on trusts which do not exhaust the entire property in the money, and the undisposed-of interest sinks for the benefit of the devisee (*u*), the devisee takes it as he finds it, viz. as personalty. This, of course, assumes him to be absolutely entitled to the land (*x*).]

Specific sums payable out of the

*632 *V. It remains to examine the claim of the heir to undisposed-of sums of money constituting part of the produce of real estate devised to be sold.[1]

(*q*) [Chitty *v.* Parker, 2 Ves. Jr. 271. And] see Sir J. Leach's judgment in Smith *v.* Claxton, 4 Madd. 493.

[(*r*) Davenport *v.* Coltman, 12 Sim. 610. Cf. Bowra *v.* Rhodes, 31 L. J. Ch. 676.

(*s*) Carr *v.* Collins, 7 Jur. 165, per Shadwell, V.-C.

(*t*) Curteis *v.* Wormald, 10 Ch. D. 172; overruling Reynolds *v.* Godlee, Johns. 536, 582, where Wood, V.-C., held that it resulted to the executor, and through him to the next of kin, as personal estate. The V.-C. put the case of the liberated fund being wanted to make good abated legacies under the will, "in which case the land purchased must certainly be dealt with as the estate of the testator which the executors must apply as personal estate in payment of the legacies." But the case is scarcely relevant. Nothing of course results to the next of kin until all the purposes of the will which ought to be satisfied have been satisfied.

(*u*) See as to this, ante, p. 348.

(*x*) Re Newberry's Trusts, 5 Ch. D. 746.]

[1] It is established doctrine that when a will directs the conversion of realty for certain purposes only, and these are limited, for example, for the payment of particular legacies, and follows the direction by a bequest of the residue of the personal estate, the conversion takes place only so far as the proceeds of the sale are needed to pay the legacies prior to the residuary one; and the gift of the personalty will not carry the produce of the sale of the lands in the absence of a contrary intent plainly manifested. Richards *v.* Miller, 62 Ill. 417. The surplus retains the quality of realty, and is transmitted either by a devise of the realty, if there be one, or descends under the intestate laws. Given *v.* Hilton, 95 U. S. 591, Strong, J. There are certain things which are considered indicative of an intent to cause a complete conversion. It has been held that a general direction to sell and apply the proceeds indiscriminately to the payments of debts and legacies operates as a conversion out and out. Ib.; King *v.* Woodhull, 3 Edw. 79; Durour *v.* Motteux, 1 Ves. 320. Blending the proceeds of realty and personalty in one fund for the payment of debts and legacies is generally regarded evidence of an intention to give to the proceeds of a sale ordered the character of personalty throughout; though this is not a conclusive

produce of real estate belong to the heir — when.

It is clear, that a sum expressly excepted out of the produce of the sale, but not attempted to be disposed of, belongs to the heir (*y*).

Sums excepted but not disposed of.

Nor is it to be doubted, that where a legacy is payable out of a fund of this description upon a contingency which does not happen, the residuary devisee of the fund has the benefit of such failure, on the principle that, in the event which has happened, there is no actual disposition in favor of the legatee (*z*).

Sums given on a contingency;

— given to objects incapable of taking.

Where, however, a sum of money, part of the proceeds of real estate, is in terms given to an object incapable by law of taking, the authorities respecting its destination are conflicting, though here, also, there seems to be a preponderance in favor of the heir. The cases of Cruse *v.* Barley (*a*), Collins *v.* Wakeman (*b*), and Gibbs *v.* Rumsey (*c*), are all in favor of the heir; but it will be more convenient to bring these authorities distinctly before the reader in the discussion of a subordinate question connected with the doctrine. This chain of authority, however, in favor of the heir, is interrupted by Page *v.* Leapingwell (*d*), where a testator devised certain real estate to trustees upon trust to sell, and out of the moneys arising therefrom to pay certain legacies, including two sums of 200*l.* to the poor of two parishes; and after payment of the legacies, to apply the overplus for the benefit of certain persons. There was also a general disposition of the residue of his real and personal estate, not thereinbefore disposed of. Sir W. Grant, M. R., observed that the disposition as to the 200*l.* was void as a devise to charity, and therefore lapsed.

Remarks upon Page *v.* Leapingwell.

According to the decree, however, his Honor appears to have decided, that the 200*l.* went, not to the heir (as might have been inferred from the observations in his judgment), but to the general residuary devisee; a conclusion which it seems difficult to reconcile with the principle discussed in the next chapter, and repeatedly laid down by Lord Eldon and other judges, that a resid-

(*y*) Collins *v.* Wakeman, 2 Ves. Jr. 683, stated post, 638; [Watsnn *v.* Hayes, 5 My. & Cr. 125;] and as to trusts for conversion in deeds, see Emblyn *v.* Freeman, Pr. Ch. 541; [Griffith *v.* Rickets, 7 Hare, 311; Matson *v.* Swift, 8 Beav. 368.] (*z*) Ante, p. 345.
(*a*) 3 P. W. 20. (*b*) 2 Ves. Jr. 683. (*c*) 2 V. & B. 294. (*d*) 18 Ves. 463.

indication. Given *v.* Hilton, supra. When land must be sold and converted into money for a particular purpose, and more is sold than is necessary for the object, the excess received from the sale is treated as land. Cook *v.* Cook, 20 N. J. Eq. 375; Oberle *v.* Lerch, 18 N. J. Eq. 346; ib 575. In case of a direction by a testator for the conversion of his lands into money for a specified purpose, the heir is entitled to the possession of them until the time for the conversion arrives, unless they are otherwise disposed of. Current *v.* Current, 11 N. J. Eq. 186. See also Bradshaw *v.* Ellis, 2 Dev. & B. Eq. 20. Whether in such case the heir will be entitled to the use of the rents and profits of the land in his own right, or must hold them as trustee, will depend upon the terms of the disposition of the estate to be converted. If the heir be not expressly or by clear implication a trustee, it would seem that he would be entitled to the income. If the testator order real estate to be converted into money for some special purpose other than the payment of debts, as to pay a legacy, the executor cannot claim the fund as personalty to be used in paying debts. Winants *v.* Terhune, 15 N. J. Eq. 185.

uary devise is, under the old law, in effect, a specific devise of the lands not included in the particular devises contained in the will. *633 It is enough, however, for our present purpose to * show that in Page *v.* Leapingwell, the void legacies bequeathed out of the real fund did not go to the residuary devisee of that fund. In this respect it agrees with, and is confirmed by, Jones *v.* Mitchell (*e*), where A. devised his real estate, after certain limitations, to trustees in trust to be sold, and out of the moneys to be produced by the sale, to pay certain legacies, and then a legacy of 800*l.* to charities, and to pay the residue to B.; Sir J. Leach, V.-C., held that the void legacy of 800*l.* belonged to the heir, on the principle *that the residuary devisee of real estate, or of the price of real estate, could take nothing but what was at the time intended for him.*

Destination of lapsed sums specifically given out of the produce of real estate.

The principle of the two preceding classes of cases seems to apply, with exactly the same force, to the case of lapse; and, undoubtedly, at one period, the established rule as to these cases also was, that the heir was entitled on failure of the devise; unless, according to the doctrine of some cases (*f*), the produce of the sale was blended with the personal estate in one general residuary disposition.

Principle governing the cases.

The ground upon which this rule was established (and the principle is equally applicable to every class of cases before noticed), is this: that where a testator devises real estate to be sold, and out of the produce gives a specific sum, say 1,000*l.*, to A., and the residue to B., the residue is to be considered as a gift of the specific sum which the purchase-money, after deducting 1,000*l.*, shall happen to amount to; the gift being the same in effect as if the testator had said, I give to B. the purchase-money minus 1,000*l.* which I give to A. It is a mere distribution of the purchase-money among them, the one taking a certain and the other an uncertain share; and B. has no more right, *in any event*, to take the share of A., than A. has to take the share of B.

Claim of the heir supported by Hutcheson *v.* Hammond.

Thus, in Hutcheson *v.* Hammond (*g*), A. devised certain lands to trustees to sell, and invest the money produced by the sale in the funds, in trust for H. for his life, and after his decease to pay certain sums of money, including 1,000*l.*, to G. P.; then in trust to pay all the residue of the said principal money and interest to B. and C.; and she gave the residue of her personal estate to H. G. P. died in the lifetime of the testatrix; and Buller, J., sitting for Lord Thurlow, held, after much argument, *634 * that the lapsed sum did not fall into the particular or the general residue, but went to the heir. He said, here there was no

(*e*) 1 S. & St. 290.
(*f*) See Lord Thurlow's judgment in Hutcheson *v.* Hammond, 3 B. C. C. 148; Kennell *v.* Abbott, 4 Ves. 802; but as to which see post.
(*g*) 3 B. C. C. 128.

apparent intention against the heir: therefore the general rule must take place, that the money is considered as land, and, if it lapsed, belonged to the heir at law. This decision was affirmed, on a rehearing, by Lord Thurlow (*h*), who observed, that the testatrix having said nothing as to the 1,000*l*., the heir was not defeated. *The merely directing an appropriation of a part would not defeat his claim to what was not disposed of.*

This case was considered to have fixed, beyond controversy, the rule of law upon this subject, having been acquiesced in for upwards of thirty years, and received reiterated confirmation in the several analogous decisions of Collins *v.* Wakeman, Gibbs *v.* Rumsey, and Jones *v.* Mitchell. The reader, therefore, will be not a little surprised to find a different doctrine unhesitatingly propounded in a subsequent case (*i*), which was as follows: Lord W. devised certain real estates to trustees, upon trust for sale, and out of the produce to pay certain sums of money, including a sum of 5,000*l*. to his wife, her executors and administrators, in part satisfaction of 10,000*l*. secured to her by their marriage settlement out of certain trust funds in case of her surviving him and failure of issue of his body by her (*k*); and after these purposes he directed the trustees to invest the residue of the said moneys upon certain trusts. The testator's wife died in his lifetime. One question was, whether the 5,000*l*. devolved upon the heir or next of kin, or belonged to the persons entitled to the residue. Richards, C. B., after taking a distinction between legacies and debts (*l*), the former of which, he thought, were raisable out of the real estate only, and the latter out of the realty in aid of the personal estate; and, treating the gift of 5,000*l*. *as belonging to the former class*, held, that by the lapse the residuary devisees of the fund were entitled.

Claim of the heir negatived in Noel *v.* Lord Henley.

There is a singular discrepancy in the several parts of the C. B.'s judgment. In one place, he treats the devised sum as a debt, and as such, chargeable on the real estate in aid of the personalty; observing, that "you might as well say that all the * *other* debts which are thrown on the real estate, in case the personalty will not pay them, are so many trusts for the heir at law: such a doctrine was never heard of." And yet he afterwards says, that "with respect to the 5,000*l*. to Lady W., *that is excluded out of the personal estate, and I should think would, if she had lived, have been raisable out of the real estate only.*"

Observations upon the judgment in the Exchequer.

*635

The decree as to the 5,000*l*. was affirmed in D. P. (*m*). Lord

(*h*) 3 B. C. C. 148.
(*i*) Noel *v.* Lord Henley, 7 Pri. 241, Dan. 211, 322.
(*k*) If the devise could have been considered as subject to this contingency, there would be no difficulty in reconciling the decision with Hutcheson *v.* Hammond, on the principle before stated in regard to contingent charges, ante, p. 345. It seems to be impossible, however, consistently with sound construction, or the principle upon which it was decided, so to treat it. [See however Lord Eldon's remarks on the appeal, cited next page.]
(*l*) As to which, see post, Ch. XLV.
(*m*) Noel *v.* Lord Henley, 1 Dan. 322, [12 Pri. 213.

Noel *v.* Lord Henley affirmed in D. P.

Lord Redesdale's reasoning.

Redesdale said: "If any property is given by a will in the nature of a legacy to a person in being at the time the will is made, but who dies before the testator, that legacy of course becomes lapsed and no longer payable. That is a contingency to which every person who makes a disposition by will must be deemed to know that such a disposition is subject; and, although it is contended, on the part of the heirs at law, that this 5,000*l.* arising out of the sale of the estate should be applied to their benefit as so much real estate undisposed of by the will, I conceive that that is not the true construction of the will; because, having given that 5,000*l.* as a legacy, which in its nature must be subject to that species of contingency, that contingency is one which he must be supposed to have looked to for the benefit of those persons to whom he gave the residue of the money to arise from the sale of the estate: and, therefore, it seems to me that the decree is perfectly right in the manner in which it has disposed of that question, by holding that that 5,000*l.* is not to be raised out of the money which may be raised by sale of the real estate, inasmuch as that contingency has happened to which the testator is supposed to have looked at the time he made the will." Lord Eldon [concurred in the decree, but apparently on a different ground; for he said (using the word "contingency" in a different sense, as it seems, from Lord Redesdale) that the 5,000*l.* was only to be payable upon a contingency; and that not having happened, no direction was given, the will having failed with reference to that part of it.]

Remarks upon Noel *v.* Lord Henley.

The reasoning which regards the death of the devisees in the testator's lifetime as an event within the testator's contemplation, on which Lord Redesdale grounded his opinion, is directly opposed to the principle recognized in a great variety of cases (*n*), that a testator is in general supposed to calculate upon his dispositions taking effect, and *not* to provide for the happening of *636 events * in his lifetime which will defeat them, as the death of legatees, &c. The whole doctrine of lapse stands upon this principle.

It is most extraordinary that none of the judges who decided Noel *v.* Lord Henley cite or allude to Hutcheson *v.* Hammond (*o*), whose authority they were subverting; and we are left to conjecture whether their decision was made in ignorance or with the intention of overturning that case. Fortunately, however, the perplexing uncertainty in which the doctrine was thus placed, is in some degree dissipated by the subsequent case of Amphlett *v.* Parke (*p*), presently stated, which, as eventually decided, appears to have restored the authority of Hutcheson *v.* Hammond. Lord Brougham's judgment, on the appeal, contains a

(*n*) See accordingly Robinson *v.* London Hospital, 10 Hare, 28.

(*o*) But it was cited *arg.* in D. P. 12 Pri. 258, and is referred to, Sug. Law of Prop. p. 363, as being overruled by Noel *v.* Noel.]

(*p*) 4 Russ. 75, 2 R. & My. 221.

detailed examination of many of the cases, among which, however, neither Hutcheson *v.* Hammond, nor Noel *v.* Lord Henley is to be found, nor do they appear to have been cited at the bar. Indeed, the question chiefly discussed in this case was, whether the declaration that the produce of the sale should be deemed personal estate, and the blending of such produce with the general residuary personal estate, did not so absolutely convert it into personal estate as to exclude the heir; and the adjudication in the negative affords the strongest possible confirmation of the doctrine of Hutcheson *v.* Hammond, in opposition to Noel *v.* Lord Henley, in both which these circumstances were wanting.

The unavoidable mention of Amphlett *v.* Parke has rather anticipated the subject next to be considered, namely, whether the circumstance of the produce of the real estate being blended with the general personal estate constitutes a ground for excluding the heir, by applying to the mixed fund the rule applicable to the latter species of property; such rule being (as is well known) that the residuary legatee takes, even under the old law, whatever is not effectually disposed of to other persons. It seems difficult to discover any solid reason why the blending of the two funds should produce this consequence. The testator, intending the proceeds of the two species of property to go in the same manner, comprising them in the same disposition for mere convenience, and to avoid a needless repetition of language; and the effect ought, one should think, to be the same as if, in one part of his will, he had given the proceeds of the real estate * to A., and in another part, the proceeds of the residuary personal estate to A. How far the authorities lend their support to such a conclusion will be seen by the following statement of them. *637

Whether blending of proceeds of real and personal estate excludes the heir.

A leading case on this subject is Cruse *v.* Barley (*q*), where a testator devised all his freehold and copyhold lands to P. and his heirs, in trust to sell the same, and, in the first place, to pay off all incumbrances upon the premises, and all his just debts. He devised all his personal estate to the same trustee, in trust to sell, and to apply the money arising by the sale, *and also the money to be produced by sale of the real estate*, amongst his five children: viz. to his eldest son C. 200*l.* at his age of twenty-one: the residue amongst his four younger children at their respective ages of twenty-one or marriage. C. died under twenty-one; upon which a question arose as to the 200*l.*, which, it was admitted, never vested in C. Sir J. Jekyll, M. R., having ordered the precedents to be looked into, declared that the 200*l.* should be construed as land, and descend to the heir: for that it was the same as if so much land as was of the value of 200*l.* was not directed to be sold but suffered to descend.

Cruse *v.* Barley.

The legacy in this case was contingent, and failed by the non-hap-

(*q*) 3 P. W. 20.

Remark on Cruse v. Barley.

pening of the event on which it depended; a circumstance which was not adverted to, but which would clearly now be held to take it out of the principle in question (*r*). It is enough, however, for the present purpose, that the heir was not excluded by the blending of the residue of the fund with the personal estate.

Durour v. Motteux.

The next case is Durour *v.* Motteux (*s*), where a testator devised all his estate, consisting in a freehold and leasehold, moneys, securities (specifying many other species of personal property), and all he had or might have, of what kind soever, to trustees to sell; and, after payment of all his debts, funeral expenses, and legacies, to place out all the residue of his personal estate at interest, upon securities upon the trusts therein mentioned. One of the questions was, whether a legacy of 1,200*l.*, which was void (because to be laid out in land for charitable purposes), belonged to the heir or the residuary legatee. Lord Hardwicke decided in favor of the legatee; laying some stress upon the fact of the real estate being turned into personal, and observing that the intent to in-

Residuary legatee held to be entitled to void legacy.

*638 clude the whole in the residue plainly appeared from * the testator's description of *all* his personal estate; so that the whole of the real was to be considered as personal property (*t*).

In this case (which has been regarded as a leading authority), we find, for the first time, the circumstance of the blending of the produce of the real and personal estates was made the ground of the decision; and this principle was still more distinctly recognized in the subsequent case of Hutcheson *v.* Hammond (*u*), where Lord Thurlow, while deciding in favor of the heir's title to a lapsed legacy, payable out of the proceeds of real estate, added "though, if a testator has blended his real with his personal fund, and has made a residuary legatee, it will carry all that is not disposed of."[1]

Dictum of Lord Thurlow, in Hutcheson v. Hammond.

No allusion to any such doctrine, however, occurs in Collins *v.* Wakeman (*x*) (the next case of this class), where a testator devised certain lands to W., his heirs and assigns, in trust to sell; and the money arising from such sale he directed to be considered as part of his personal estate, and to be disposed of by his said trustee and executor, his heirs, executors, and administrators, in manner following. He then gave several

Collins v. Wakeman.

Heir held to take legacy excepted out of proceeds of land, but not disposed of.

(*r*) See ante, pp. 345, 632, and Doe d. Wells *v.* Scott, 3 M. & Sel. 300; the principle of which is, of course, applicable to devises out of the produce of real estate devised to be sold.

(*s*) 1 Ves. 320; more fully and accurately stated, 1 S. & St. 292, n.

(*t*) Of this case, Sir W. Grant has observed: "From the little Lord Hardwicke is reported to have said, it is difficult to ascertain from what expressions he inferred that, by the description of all his personal estate, the testator meant to include everything in the residue. The decision is generally accounted for by the particular manner in which the sale was directed, and the circumstance of the testator having blended the real and personal estates in one gift to trustees, to sell the *whole* with his personal estate," &c., 1 V. & B. 417; see also 2 R. & My. 232; but see ib. 245. (*u*) 3 B. C. C. 148, stated ante, p. 633. (*x*) 2 Ves. Jr. 683.

[1] See Brown *v.* Higgs, 4 Ves. (Sumner's ed.) 708, note (*b*).

pecuniary legacies out of his said trust moneys and personal estate, and gave to his executor W. the sum of 1,000*l.*, to be disposed of according to any instructions he might leave in writing. The testator then gave all the residue of his goods and chattels, personal estate and effects whatsoever and wheresoever, subject to debts, legacies, and funeral expenses, costs of his will and of W., whom he also appointed executor, to M., her executors, administrators, and assigns. The testator left no instruction as to the 1,000*l.*, which was now claimed by the residuary legatee, the next of kin, and the heir at law. Lord Loughborough decided in favor of the heir; observing, that, "where the court has no direction from the testator, to whom the money arising from any part of his real estate shall go, it rests with his heir at law" (*y*).

Remark on Collins *v.* Wakeman.

In this case, it will be observed, the express declaration, that * the produce of the sale should be considered personal estate, did not, in Lord Loughborough's opinion, authorize the court to apply to the produce of the real estate the rule applicable to personalty in reference to the effect of the failure of a specific gift. *639

Kennell *v.* Abbott. Residue of real fund being blended with the personalty, void legacy held to fall into residue.

This case was soon followed by Kennell *v.* Abbott (*z*), where a testatrix devised a certain copyhold estate to A. and her heirs, in trust to sell, and out of the moneys arising therefrom to pay certain legacies; she then made some specific bequests; and, as to the residue of the purchase-money arising from the sale of the said estate, household goods, and all the residue of her moneys, securities for money, personal estates and effects whatsoever, she gave to B., her executors and administrators, subject to her debts and funeral expenses; and she appointed B. executrix. One of the legacies payable out of the produce of the land was void on account of fraud in the legatee; which raised a question whether it belonged to the residuary legatee or the heir. Sir R. P. Arden, M. R., held, that it devolved to the residuary legatee. He distinguished Hutcheson *v.* Hammond, on the ground of there being two residues — a special residue of the money arising from the sale, and the general residue; but that here the testatrix had given particular parts of her estate, stock, leasehold estate, household goods, furniture, and many other articles, and this copyhold estate, which she ordered at all events to be sold, and out of the purchase-money she directed these legacies to be paid; and she made a residuary disposition, "as to which," continued his Honor, "the question is, whether it is not, to all intents, a general residuary clause, carrying everything not disposed of. I am of opinion it is, under Mallabar *v.* Mallabar, and Durour *v.* Motteux. It is making the real estate, to all intents and purposes, personal; and then, taking a retro-

(*y*) In Amphlett *v.* Parke, 2 R. & My. 221, Lord Brougham treated Collins *v.* Wakeman as a case in which the next of kin and the heir at law were the only litigating parties; but, according to the printed report, the residuary legatee also claimed. (*z*) 4 Ves. 802.

spective view of what she had done, and meaning to give everything not disposed of, she adds this residuary clause. Therefore, I think this estate is turned entirely into money."

Remark on Kennell *v.* Abbott.

This case seems to have occasioned much of the uncertainty in which this doctrine has been long involved by contradictory decisions. It was certainly founded on a very partial view of the then state of the authorities, as neither Cruse *v.* Barley, nor Collins *v.* Wakeman was noticed by the M. R., though the latter case was the latest upon the subject; having been decided only a short period before, by his contemporary on the Equity Bench.

*640 * We now come to Gibbs *v.* Rumsey (*a*), where a testatrix devised her freehold, copyhold and personal estates to trustees, upon trust to sell, and out of the money to arise by the sale, together with her ready money and other effects, she bequeathed certain charitable legacies, and 100*l.* to her trustees for their care and trouble. And she afterwards bequeathed the residue of the *moneys arising from the sale*, and all the residue of her *personal estate*, to her trustees and executors to dispose of as they should think proper. It was held, that these trustees took the residue for their own benefit under this bequest; and, with respect to the charitable legacies, Sir W. Grant treated it as a point quite clear, that they went to the heir at law, and not to the residuary legatee or next of kin. The principal question in the case was, whether the devisees were trustees of the surplus or not (*b*); and it is observable that the point, as to the destination of the void legacies, does not appear to have been discussed; nor was Kennell *v.* Abbott cited, or a single argument advanced in favor of the residuary legatees.

Gibbs *v.* Rumsey. Heir held to take void legacies.

Observation upon Gibbs *v.* Rumsey.

The subject, however, was much more fully investigated in the subsequent case of Amphlett *v.* Parke (*c*), where A. devised freehold and copyhold lands to M. and P., upon trust for sale, and directed that the moneys to arise from such sale should be considered as *part of her personal estate;* and then went on to direct, that, out of the moneys to arise from the sale, and all *other* her personal estate, certain legacies should be paid, and all the residue of her personal estate, and the moneys arising from her real estate, the testatrix gave upon certain trusts. Sir J. Leach, V.-C., held, that some of the legacies which had lapsed fell into the residue. He observed, that the two first passages of the will purported an intention that the moneys arising from the sale should be considered as personal estate at the testatrix's death; but the latter passages pointed the other way; and it was only from deference to Durour *v.* Motteux, and Mallabar *v.* Mallabar, that he came to the conclusion in this case, that the testatrix had in her view the improbable intention,

Amphlett *v.* Parke.

Heir held to take void legacies.

(*a*) 2 V. & B. 294. (*b*) Ante, p. 384.
(*c*) 1 Sim. 275, 4 Russ. 75, 2 R. & My. 221.

that the moneys arising from the sale of her real estate should, for purposes not foreseen by her, have the same qualities as if, at her death, they had been part of her personal estate. On a rehearing, he continued of his former opinion; but his judgment was reversed by * Lord Brougham, who decided in favor of the heir, after an *641 elaborate examination of many of the authorities.

The only case which his Lordship seemed to consider to press strongly against the heir was Kennell *v.* Abbott, which he deemed to be inconsistent with the current of authority, especially Cruse *v.* Barley, Digby *v.* Legard (*d*), and Gibbs *v.* Rumsey, and to have been founded on a misconception of Durour *v.* Motteux, in the report of which in Vesey the will was not accurately stated, and the decision appeared from a MS., in his possession, of Lord Hardwicke's judgment, to have chiefly turned on another question. Lord Brougham regarded Mallabar *v.* Mallabar as standing on special grounds, especially that of a legacy being given to the heir at law, but which circumstance has not invariably, we have seen (*e*), been considered to be of so much weight. In that case, however, the question, as already shown (*f*), was not, as to the destination of a lapsed or void legacy given out of the proceeds of real estate; *but whether such proceeds passed under a general residuary disposition.*

Lord Brougham's judgment in Amphlett *v.* Parke.

It will be observed, that in several of the preceding cases, including Gibbs *v.* Rumsey, and Amphlett *v.* Parke, the *entire* proceeds of the real estate (not merely, as in Kennell *v.* Abbott, the surplus, after payment of the legacies in question) were blended with the personalty, the legacies being charged on such mixed fund; so that the fact of the void or lapsed legacy being made payable out of the personal, as well as the real, estate, was not considered to afford a ground for applying to such legacies, *in toto*, the rule applicable to personal estate.

Remark on preceding cases.

In the interval between the original decree in Amphlett *v.* Parke and its reversal, occurred the case of Green *v.* Jackson (*g*), where a testator bequeathed all his personal estate to trustees, upon trust to pay some legacies, and also devised all the residue of his real estate (after some particular devises) to the same trustees, their heirs and assigns, upon trust to sell. The testator then directed, that the moneys which should be received by his trustees by such sale, and by virtue of the bequest of the * personalty, and *642 all other his moneys which should come to their hands, after his

Green *v.* Jackson.

(*d*) *Digby* v. *Legard.* — 3 P. W. 22, Cox's note, 2 Dick. 500. A. devised her real and personal estate to trustees, in trust to sell, to discharge debts and legacies, and to pay the *residue* to five persons in equal shares. One of them died before the testatrix, and Lord Bathurst held, that the share of the deceased *residuary* legatee in the real estate resulted to the testatrix's heir. The case, therefore, does not appear immediately to belong to the class of authorities discussed in the text, but ranks with Ackroyd *v.* Smithson, stated ante, p. 621.

(*e*) Ante, p. 567.

(*f*) Ante, p. 630.

(*g*) 5 Russ. 35, 2 R. & My. 238.

Void legacies held to fall into residue.

debts and legacies, and two sums directed to be sunk by way of annuity, and all costs attending the execution of the will should be paid and provided for, should be placed in a banking-house until the whole (except certain sums) should be got in. He then directed his trustees to pay considerable sums for charitable purposes, and concluded with a direction to them to pay and apply all the residue of the moneys in their hands, after full satisfaction and discharge of the aforesaid several payments and bequests, to certain persons. It was admitted that the charitable legacies failed in the proportion which the produce of the real estate bore to the produce of the personalty (*h*). The heir at law claimed the benefit of such failure; but Sir J. Leach, M. R., on the authority of Durour *v.* Motteux, and also, he said, upon principle, held that the failure of the charitable legacies enured for the benefit of the residuary legatees; and that no distinction could be made between that part of the residue which had arisen from the real estate, and that part which had arisen from the personal estate: he observed that the facts in Gibbs *v.* Rumsey were not distinctly stated, and the argument there turned on another point. He did not advert to the other opposing authorities.

Remark on Green *v.* Jackson.

Green *v.* Jackson was referred to by Lord Brougham in Amphlett *v.* Parke, as warranted by the particular terms of the will; but as his remarks went to impugn the authority of Durour *v.* Motteux, on which it was chiefly founded, they probably induced the appeal which was brought against the decision of the M. R., and which was argued before Lord Lyndhurst, who, however, affirmed the decree, and that, too, chiefly on the authority of Durour *v.* Motteux. The circumstance that, in Green *v.* Jackson, the legacy was void *ab initio*, and in Amphlett *v.* Parke failed in event by lapse, seems to furnish no solid distinction between these cases; for the principle applicable to each species of case is, it is conceived, the same.

Salt *v.* Chattaway.

[The last case on this subject appears to be Salt *v.* Chattaway (*i*), in which a testator devised and bequeathed to trustees all his real and personal estate, "subject to the payment thereout of his just debts, funeral and testamentary expenses," upon trust to sell and receive the purchase-money, and all money that might be owing to him at his decease, "and thereout and out of the *643 * ready money he might die possessed of to pay, among other legacies, a legacy of 100*l.* to A. *when he should attain the age of twenty-one*," and to divide the residue into three parts, which he then proceeded to dispose of. A. died under twenty-one, in the testator's lifetime: the contingency upon which the legacy was given thus never happened. According to the principle before stated (*k*), this would seem to have been the natural ground for holding that the legacy fell

(*h*) On this subject, *vide ante*, p. 535. [(*i*) 3 Beav. 576.
(*k*) Ante, pp. 345 and 632.]

into the residue. Lord Langdale, however, passed over this ground: he said: "It is not easy to reconcile all the cases which are to be found in the books on these subjects; and the question, whether the lapsed pecuniary legacy passes by the gift of residue or ought to be considered as undisposed of, appears to me to be attended with more doubt than the other: but considering, however, that the conversion of the real estate must be deemed to have been made for all the purposes of the will, and that besides the intention to give a legacy of 100*l.* to A., there was also an intention to dispose of the residue after payment of the legacies; that the testator had determined the qualities of the property which his legatees were to take; and that the gift of the residue is made in terms to give the residuary legatees of personal estate the benefit of lapsed legacies, it appears to me that the proper course is to follow the decisions of Durour *v.* Motteux and Green *v.* Jackson, and, in conformity with those cases, I am of opinion that the lapsed legacy of 100*l.* must be held to have fallen into the residue and to have passed by the gift of the residue."]

General remarks on the cases.

Here, then, closes the long line of cases respecting the destination of pecuniary legacies, originally void or failing by lapse, so far as they are payable out of the proceeds of real estate, where *such proceeds are blended with the general personal estate.* The state of the authorities is certainly not such as to justify the hope of all litigation being at an end on this perplexing subject. An adjudication founded on a full examination of *all* the cases is still wanting.

Rule in regard to wills since 1837.

The question, of course, will present itself under a different aspect in reference to wills made or republished since the year 1837, and containing a residuary devise, as such devise is made by the act 1 Vict. c. 26, s. 25, to extend to all *interests* in real estate comprised in any devise which fails by lapse or from being contrary to law, or otherwise incapable of taking effect; but * the *644 remarks occurring on this point have already found a place in connection with the subject of the failure of pecuniary charges on real estate, not directed to be converted (*l*); to which it [should be added that when the sum is a charge, as distinguished from an exception, the failure still (as before the act) enures for the benefit of the specific devisee, not of the residuary devisee (*m*).]

(*l*) Ante, p. 351.

[(*m*) Tucker *v.* Kayess, 4 K. & J. 339 (will dated 1853); Sutcliffe *v.* Cole, 3 Drew. 135 (will dated 1843, 24 L. J. Ch. 486). And see the judgment in Carter *v.* Haswell, 26 L. J. Ch. 576, where it was immaterial whether charge or exception; the general (being the only) devisee could alone benefit by the failure. The case is more properly one of void particular devise falling into residue.]

*645

*CHAPTER XX.

OPERATION OF A GENERAL DEVISE OF REAL ESTATE.

I. *In regard to void, lapsed and partial specific Devises.*
II. ———— *Reversions.*
III. ———— *Copyholds.*
IV. ———— *Leaseholds.*
V. ———— *Powers of Appointment.*

Operation of a general bequest.

I. A RESIDUARY bequest, it is well known, operates upon all the personal estate of which a testator is possessed at the time of his death, and, consequently, includes all specific legacies which are void, or fail by the death of the legatee in the testator's lifetime (*a*),[1] and such would undoubtedly be its operation, though all the specific legacies were in this situation, so that a bequest, in terms embracing the "residue," should become, in event, a gift of the whole.

Before 1 Vict. c. 26, every general devise specific in its nature.

But as under the old law (which still applies to all wills made before 1838, whatever be the period of the testator's decease), a testator could only devise the real estate to which he was actually entitled at the time of making his will, it follows that every residuary devise in such a will, however general in its terms, is in its nature specific (*b*);[2] being in fact a specific disposition of the lands not before given, or, to speak more accurately, not before *expressed to be given* by the will.[3] Thus, if a testator being seised of Blackacre and Whiteacre, and having no other real estate, devise Blackacre to A. in fee, and all the rest of the lands

(*a*) Brown *v.* Higgs, 4 Ves. 708; Shanley *v.* Baker, ib. 732; Jackson *v.* Kelly, 2 Ves. 285.
(*b*) See Lord Eldon's judgment in Howe *v.* Earl of Dartmouth, 7 Ves. 147; Broome *v.* Monck, 10 ib. 605; Hill *v.* Cock, 1 V. & B. 175; Spong *v.* Spong, 1 Y. & J. 370.

[1] Tindall *v.* Tindall, 23 N. J. Eq. 244. See Brown *v.* Higgs, 4 Ves. (Sumner's ed.) 708; Van Kleeck *v.* Dutch Church, 6 Paige, 600. As to the "residue," see Willard's Estate, 68 Penn. St. 327; Phelps *v.* Robbins, 40 Conn. 250; Burnet *v.* Burnet, 30 N. J. Eq. 595; Vitteto *v.* Atkins, 1 Heisk. 553. In numerous instances, a bequest of "what shall remain" or "be left" at the decease of a prior legatee, has been held void for uncertainty. The expression is, however, susceptible of explanation, as where the property, or part of it, consists of household furniture, farming utensils, or farm stock, by considering the words as referring to the expected diminution of the property from its perishable nature, or by the use and wear of the first taker. Sarle *v.* Court of Probate, 7 R. I. 270; Gibbs *v.* Tait, 8 Sim. 132; Surman *v.* Surman, 5 Madd. 123.

[2] 4 Kent, 510, and note; Perry *v.* Phelips, 1 Ves. Jr. 255, note (*a*); 2 Williams, Ex. (2d Am. ed.) 847. In regard to the distinction between a lapsed legacy of personal estate, and a lapsed devise of real estate, in reference to falling into the residuary bequest, see ante, 4 Kent, 541, 542, and notes; Brown *v.* Higgs, 4 Ves. (Sumner's ed.) 708, note (*b*); S. C. 5 Ves. (Sumner's ed.) 495, note (*b*); Young *v.* Robinson, 11 Gill & J. 328; Doe *v.* Edlin, 4 Adol. & E. 582; Cambridge *v.* Rous, 8 Ves. (Sumner's ed.) 12 *a*, note (*b*); Van Kleeck *v.* Dutch Church, 6 Paige, 600.

[3] See as to residuary and specific devises, Anderson *v.* Anderson, 31 N. J. Eq. 560.

to B., B. takes exactly that which he would have taken under a specific devise of Whiteacre and no more; and, consequently, if the devise to A. fail, from its being devoted to charity, or from the devisee being dead at the time, or from his subsequent death in the testator's lifetime, B. can no more take, by virtue of his residuary devise, the interest so given, or intended to be given, to A., than he could have done under a specific devise of another property (*c*). Nor is this * proposition at all shaken by the rule (presently discussed), that a residuary disposition of real estate will carry all the contingent or reversionary interest which a specific devise may leave undisposed of; since it is clear, upon the very same reasoning, that, in such a case, the residuary disposition is to be read as a specific devise of the interest not comprehended in the former devise. *646

Its operation in regard to specific lapsed devises;

In the application of this principle to the case of lapsed devises, the writer is not aware of any opposing decision since Goodright *v.* Opie (*d*), where the judges were equally divided on a question, whether the share of one of several tenants in common in fee, dying in the testator's lifetime, belonged to the heir or residuary devisee. The point was afterwards settled in favor of the heir, in the cases of Wright *v.* Hall (*e*), and Roe *v.* Fludd (*f*); in the latter of which the two judges who had been of a contrary opinion in Goodright *v.* Opie, concurred (*g*).[1]

— and specific devises void *ab initio*.

The principle, however, as applied to devises void *ab initio*, seems to be encountered by some observations which fell from the Court of K. B. in Doe d. Stewart *v.* Sheffield (*h*). The testator devised certain premises to the sisters of H., as tenants in common in fee; and, by a subsequent clause, he devised to S. certain other real estates, and all his other lands and hereditaments, whatsoever and wheresoever the same might be, which he was in any manner entitled to or interested in, *and not thereinbefore disposed of*, to hold to him, his heirs, &c. There had been three sisters of H., but, at the date of the will, only one was living, who, therefore, was clearly entitled to the whole, she being the sole representative of the class, and the court so decided; but, in delivering his judgment, Lord Ellenborough said: "But even if S. (*i.e.* the surviving

Dictum in Doe *v.* Sheffield examined.

(*c*) Goodright *v* Opie, 8 Mod. 123; Wright *v.* Hall, Fortesc. 182; S. C. nom. Wright *v.* Horne, 8 Mod. 224; Roe *v.* Fludd, Fort. 184; Sprig *v.* Sprig, 2 Vern. 394; Doe d. Morris *v.* Underdown, Willes, 293; Watson *v.* Earl of Lincoln, Amb. 325; Oke *v.* Heath, 1 Ves. 141; Cambridge *v.* Rous, 8 Ves. 25; Jones *v.* Mitchell, 1 S. & St. 290.

(*d*) 8 Mod. 123.

(*e*) Fort. 182; S. C. nom. Wright *v.* Horne, 8 Mod. 224.

(*f*) Fort. 184. (*g*) Willes, 299. (*h*) 13 East, 527.

[1] Deford *v.* Deford, 36 Md. 168; Rea *v.* Twilley, 35 Md. 409; Yeaton *v.* Roberts, 28 N. H. 459; Yard *v.* Murray, 86 Penn. St. 113; Massey's Appeal, 88 Penn. St. 470. So at common law in Massachusetts, Prescott *v.* Prescott, 7 Met. 141, 145. But the rule has been changed by statute; and both lapsed or void legacies and devises fall into the residue. Ib.; Thaver *v.* Wellington, 9 Allen, 283; Blaney *v.* Blaney, 1 Cush. 107. Void and lapsed devises stand upon the same footing as to the rights of the heir. Tongue *v.* Nutwell, 13 Md. 415.

sister) were not entitled to take the whole, the heir at law could not be entitled to any part of the residue undisposed of; for this is not the case of a lapsed legacy, but the residuary devisee is to take all other his lands, hereditaments, and premises, whatsoever and wheresoever, *not thereinbefore disposed of, &c., and all other his real and personal estate whatsoever*, in the most comprehensive terms. Then, admitting the law to be as stated in the cases cited on the part of the heir at law, with respect to lapsed legacies, this is not a lapsed legacy." Le Blanc, *647 and Bayley, JJ., both concurred in this * doctrine; the former, however, appearing to think the case stronger in favor of the residuary devisee, without the words "not before disposed of," though he thought him entitled either way (*i*).

Operation of a residuary devise considered;

It is clear, therefore, that, had *all* the devisees been dead at the time of making the will, the court would have held the residuary devisee to be entitled. Such a doctrine seems to be irreconcilable with the principle already adverted to, which teaches that a residuary devise is a specific disposition of whatever the will does not purport to dispose of, as exemplified in the case of lapsed devises, between which and the case of a void devise there seems to be no substantial distinction; for the testator conceives himself to have disposed of the property comprised in the void devise, and, therefore, does not intend the residuary devise to extend to it. It is moreover inconsistent with the decisions discussed in the last chapter, in which specific sums given out of real estate devised to be sold, and which were void *ab initio*, have been held to belong to the heir, and not to the residuary devisee of the fund (*k*).

—in relation to partial and contingent devise;

But it must be observed, that, if the specific devise comprise only a partial or contingent interest in the lands, leaving an ulterior or alternate interest undisposed of, which would, in the absence of disposition, descend to the heir, such undisposed-of interest will, even in a will made before 1838, pass by a general residuary devise.

—devises of partial interests;

Thus, where a person, by such a will, devised certain lands to A. for life or in tail, and the residue of his lands to B. and his heirs; B., under this devise, took the reversion in fee not included in the devise to A. (*l*); and, consequently, if A.

[(*i*) Williams *v.* Goodtitle d. David, as reported 10 B. & Cr. 895, seemed to favor this doctrine; but that report is incorrect, see ante, p. 201, n.]

(*k*) Jones *v.* Mitchell, 1 S. & St. 293; see also Cruse *v.* Barley, 3 P. W. 20; Collins *v.* Wakeman, 2 Ves. Jr. 683; Gibbs *v.* Rumsey, 2 V. & B. 294, all stated ante. ["The rule is, where the intention of the testator is to devise the residue exclusive of a part given away, the residuary devisee shall not take that part in any event;" per Lord Camden, Gravenor *v.* Hallum, Amb. 645, ante, p. 347. Wood, V.-C., felt "some difficulty in reconciling Doe *v.* Sheffield" with this rule, Smith *v.* Lomas, 33 L. J. Ch. 582, and gave no countenance to the distinction suggested by Romilly, M. R., in Garner *v.* Hannyngton, 22 Beav. 627, between a devise (as in that case) of "all other my real and personal estate" and one (as in Doe *v.* Sheffield) of "property not hereinbefore disposed of."]

(*l*) Wheeler *v.* Waldron, Allen, 28, 3 P. W. 63, n.; Cooke *v.* Gerrard, 1 Lev. 212; Rooke *v.* Rooke, 2 Vern. 461, 1 Eq. Ca. Ab. 210, pl. 17; Willows *v.* Lydcot, 2 Vent. 285, 3 Mod. 229; see also Doe d. Briscoe *v.* Clarke, 2 B. & P. N. R. 343; Bennett *v.* Lowe, 7 Bing. 535, 5 Moo. & P. 485; [Saumarez *v.* Saumarez, 4 My. & C. 331.]

died in the lifetime of the testator, he became, at the testator's death, tenant in fee in possession.

So, where a testator devised that A. and his heirs should sell * his lands for payment of debts or other purposes, not exhaust- *648 ing the whole beneficial interest, and devised the residue of his real estate to B.; the latter devise carried the beneficial interest not comprised in the former (*m*).

The same doctrine, it is clear, applied to executory and contingent devises in fee; for if an estate in fee were devised to a person on the happening of a certain event, it is obvious that the alternative fee depending on the converse event is undisposed of, and, therefore, is an interest on which the residuary clause will operate. Thus, if a testator devised, in case his personal estate should be insufficient to pay his debts (*n*), certain lands to A. and his heirs, in trust to sell and pay them, and devised the residue of his estate to B.; the devise to B. carried the legal fee, in the event of the personal estate being sufficient to pay the debts (*o*).

— executory devises in fee;

So (*p*), if a testator devised real estate to A. for life, remainder to A.'s children living at his decease in fee, and the residue of his lands to B., it is clear, that, if A. died, either in the testator's lifetime or after his decease, without leaving a child surviving him, B. would be entitled under the residuary devise.

— contingent devises in fee.

In Doe d. Wells *v.* Scott (*q*), a testator devised certain lands to A. and his heirs, provided that he or his heirs did, within six months after his the testator's death, convey a certain copyhold estate to B. and his children; and, in default, he gave the said lands to B. for life, remainder to his children living at his decease, and their heirs, as tenants in common; and the testator devised all the residue of his lands to C. and D., their heirs and assigns as tenants in common. A. and B. both died unmarried in the testator's lifetime. It was held, that the specific devise was incomplete as a disposition of the whole absolute fee, *inasmuch as it did not dispose of the interest which remained to be disposed of if A. should not assure the copyhold estate to B., and B. should die without children;* and the necessary consequence was, * that the interest depending on *649 those contingencies passed by the general residuary clause (*r*).

Alternative fee undisposed of in event.

(*m*) White *v.* Vitty, 2 Russ. 484, 4 Russ. 584; see also Goodtitle d. Hart *v.* Knott, Cowp. 43.

(*n*) But the validity of such a devise may be questioned, [unless it is to be presumed that the sufficiency or insufficiency will be ascertained within such a time as to preclude the operation of the rule against perpetuities. In Rimington *v.* Cannon, 12 C. B. 18, a devise depending on the insufficiency of a *real* estate devised to *executors* in trust for payment of debts, was held good, the presumption being that the question of sufficiency would be ascertained within one year after the testator's death. It is scarcely necessary to observe that this is a different question from that mentioned post, Ch. XXV. sect. 2, *ad fin.* and discussed Lewis, Perpet. 622—638, namely, whether a devise *after payment* of debts is good.]

(*o*) Goodtitle d. Hart *v.* Knott, Cowp. 43.

(*p*) Willes, 300; Doe d. Moreton *v.* Fossick, 1 B. & Ad. 186.

(*q*) 3 M. & Sel. 300; [see also Vick *v.* Sueter, 3 Ell. & Bl. 219.]

(*r*) Lord Ellenborough, in deciding Doe *v.* Scott, fully recognized the principle stated by Willes, C. J., in Doe *v.* Underdown, that, in regard to devises, the intent of a testator is to

It is clear, according to the authorities, and was so assumed by the court, that, in the events which had happened, the children of B., to whom the lands were specifically devised in fee, on breach of the condition by A., would, surviving the testator and their parent, have taken the fee. If, therefore, B. had left children, whether they had died in the testator's lifetime or not, inasmuch as the devise to them had become absolute *in event*, the residuary devisees would clearly have been excluded, precisely in the same manner as if the devise to the children had been absolute *in its creation*. Upon the same principle, the contrary event having happened, the residuary devisees were entitled, as they would have been under a specific alternative devise expressly applied to that event.

Remark on Doe *v.* Scott.

[And a contingent remainder being an interest which has, or had (*s*), an inherent liability to fail, as well through the event upon which it is limited not happening before the determination of the prior particular estate, as through its not happening at all, the interest, which upon a failure of the former kind is left undisposed of by the specific devise, has been held to pass by a residuary devise in the same will (*t*).]

Contingent remainder failing by destruction of particular estate.

But if, after carving out a partial or contingent interest, the testator limit the reversion in fee, or the alternative fee, to his own heirs, such devise, though inoperative in law to break the descent, until the recent enactment on this point (*x*), is considered to indicate an intention to exclude this property from the residuary clause; and, accordingly, such reversion devolves to the heir (*y*).

Effect of devise to the testator's own heirs in excluding a reversion from a general devise.

The mere fact, however, that the devisee of the partial or contingent interest specifically devised, is also the general residuary devisee, will not exclude him from taking the remaining interest in such lands in the latter character (*z*).

*650 * [If the will contains alternative contingent remainders in fee, the reversion, if not otherwise disposed of, vests in the heir pending the contingency, and if the will contains a residuary devise will pass by it during the same period. Thus

Destination of reversion during sus-

be taken *as things stood at the time of making his will;* and that the residuary devise must be taken to mean the residue of the lands *then* undevised.

[(*s*) Before 8 & 9 Vict. c. 106, s. 8, and 40 & 41 Vict. c. 33.

(*t*) Perceval *v.* Perceval, L. R. 5 Eq. 386. Upjohn *v.* Upjohn, 7 Beav. 59, is difficult to reconcile with the general current of authority. In that case there were three contingencies: first, if a certain purchase could be and was completed; secondly, if it could not; thirdly, if it could but was not; of these the first and second were provided for; but in the opinion of the M. R. the third, which actually happened, was not: yet he held the property did not pass by the residuary devise.]

(*x*) 3 & 4 Will. 4, c. 106, s. 12.

(*y*) Amesbury *v.* Brown, cited 2 W. Bl. 739; Robinson *v.* Knight, 2 Ed. 155; Smith d. Davis *v.* Saunders, 2 W. Bl. 736, Cowp. 420.

(*z*) Morgan *v.* Surman, 1 Taunt. 289: The position in the text is rather an inference from, than a point expressly decided in, this case; [see also Williams *v.* Goodtitle d. David, 10 B. & Cr. 895; Saumarez *v.* Saumarez, 4 My. & C. 331; Ridgeway *v.* Munkittrick, 1 D. & War. 90; Egerton *v.* Massey, 3 C. B. N. S. 338.

in Egerton *v.* Massey (*u*), where a testatrix devised estate to her niece A. for life, with remainder to her niece's children living at her death in fee, and for want of such child then to P. in fee; and gave all the residue of her estate and effects not thereinbefore disposed of to her said niece in fee: it was held that the reversion in fee which, but for the residuary devise, would have vested in the heir at law pending the contingency, passed by that devise to A.] Dispense of alternative contingencies.

The points embraced by the preceding positions can scarcely arise under wills which are subject to the act 1 Vict. c. 26, s. 25, which expressly provides, that, unless a contrary intention shall appear by the will, real estate, or the interest in real estate, comprised in any void or lapsed devise, shall be included in the residuary devise, if any; and as such act (s. 3) extends generally the devising power of a testator to all the real estates to which he shall be entitled at his decease; and, moreover (s. 24), makes the will, with reference to the real and personal estate comprised in it, speak from that period, the result of the whole is, that any testator who dies leaving a will made or republished since 1837, containing a general or residuary devise of real estate, which takes effect, must be completely testate in regard to every portion of his real estate to which he is entitled at his decease, whensoever acquired, and whether originally intended to have been otherwise specifically disposed of or not, if such intention should, for any reason whatever, fail of effect. Extent of general devise under 1 Vict. c. 26.

[A gift of "all other land" (*a*), or "all land not hereinbefore devised" (*b*), is a mere gift of residue, and shows no intention, within the act, to exclude lapsed specific gifts, although it gives an estate for life to the same person as is named specific devisee in fee (*c*). What will not limit a general or residuary devise;

* On the other hand, where a testator erroneously stated that a specified part of his property belonged to A., and *therefore* gave all his property to B. and nothing to A., the specified part was held to be undisposed of (*d*). And where A. was entitled as heir at law to freehold houses, of which wrongful possession was taken by another; A. then died without having ever been in possession, having devised "all real estate (if any) of which she might die seised." It was held that "seised" was a purely technical word, and had no secondary or popular meaning; consequently, as A. had never been *651 — what will.

(*u*) 3 C. B. N. S. 338. (A. who never had a child) executed a conveyance of the estate which, as the reversion was vested in her by the residuary devise, destroyed the contingent remainders.

(*a*) Cogswell *v.* Armstrong, 2 K. & J. 227.

(*b*) Green *v.* Dunn, 20 Beav. 6. See also Culsha *v.* Cheese, 7 Hare, 236; Carter *v.* Haswell, 26 L. J. Ch. 576; Burton *v.* Newbery, 1 Ch. D. 241.

(*c*) Green *v.* Dunn, supra.

(*d*) Circuitt *v.* Perry, 23 Beav. 275. Cf. Doe d. Howell *v.* Thomas, 1 M. & Gr. 335, 344, post, 655. And see analogous cases on exclusion from general or residuary bequests of personalty, Ch. XXIII.

seised of the houses in the technical sense, they did not pass by the devise (*e*).

Particular residue.

And the devise of a particular residue, as of the rest of a testator's lands in a particular parish, following a gift of a certain part in that parish, is not within sect. 25, which requires a proper residuary devise, *i.e.* so worded as to apply to all land of the testator that is not otherwise disposed of, and assumes that there can be only one "residuary devise" in a will (*f*). A particular residue may indeed, upon failure of the gift of a part, include that part, if the testator has used language showing an intention to that effect. But such intention must be shown: whereas in the case of a proper residuary devise the act says it shall be presumed (*g*).

Effect of residuary devise failing as to aliquot share.

If a general residuary devise itself fails to take complete effect, the property will, to that extent, be undisposed of.[1] As where a testator devised land to several in certain shares, as tenants in common, and devised the residue of his real estates to the same persons in the same proportions: some of the specific devisees died in the testator's lifetime, whereupon their shares fell into the residue; but so much of the same shares as came back to them (so to speak), under the residuary devise lapsed to the heir (*h*).]

Future general devise does not carry immediate income.

And here, it may be observed, that, where a specific devise is to take effect *in futuro*, so that, at the death of the testator, there is no person actually entitled to the immediate income, the rents and profits will, until the devise vests in possession, pass *652 * under the residuary clause, if any (*i*)[2], and, should the will contain no such clause, will descend to the testator's heir at law (*k*); and it is immaterial whether the future devise in question be vested or contingent. [So] if the residuary devise itself be contingent or future, *i.e.* deferred in point of enjoyment, the income accruing in the interval from the residuary real estate [does not pass by such devise, but is undisposed of and goes to the heir (*l*).] A residuary bequest of personalty, it is well known, does

(*e*) Leach *v.* Jay, 9 Ch. D. 42.

(*f*) Springett *v.* Jennings, L. R. 10 Eq. 488, 6 Ch. 333. See also Re Brown, 1 K. & J. 522, stated post, s. 5, *ad fin.*

(*g*) Ib.

(*h*) Greated *v.* Greated, 26 Beav. 621. The same rule prevails in case of personalty, Skrymsher *v.* Northcote, 1 Sw. 566, post, Ch. XXIII.

(*i*) Stephens *v.* Stephens, Ca. t. Talb. 228;] Duffield *v.* Duffield, 3 Bli. N. S. 621, [1 Dow & Cl. 395; (nor would this result have been varied by the residue being devised upon trust for sale, ib.); Holmes *v.* Prescott, 10 Jur. N. S. 507, 33 L. J. Ch. 264; Re Mowlem, L. R. 18 Eq. 9 (gift to child *en ventre*).

(*k*) Hopkins *v.* Hopkins, Ca. t. Talb. 44;] Bullock *v.* Stones, 2 Ves. 521; [Wills *v.* Wills, 1 D. & War. 439.

(*l*) Hopkins *v.* Hopkins, Ca. t. Talb. 44, extr. from R. L Hawkins, Construction of Wills, App. I.; Hodgson *v.* Bective, 1 H. & M. 376, 10 H. L. Ca. 656 (but not appealed on this point).]

[1] Burnet *v.* Burnet, 30 N. J. Eq. 595.

[2] But see Brailsford *v.* Heyward, 2 Desaus. 32.

(though contingent in its terms) carry the prior income (*m*).[1] [And the distinction between real and personal estate has been said to flow from the very nature (under the old law) of a residuary devise; for being confined to what the testator had when he made his will, it was as specific as if the property was particularly described (*n*). It is still more clearly deducible from the rule of law that the freehold cannot be in abeyance (*o*). And the profits necessarily go with the estate (*p*). It is impossible, in the absence of any words clearly leading to what the court considers judicially to imply a gift of the intermediate rents (*q*), that any such gift can be introduced into the testator's will. Neither the persons waiting until the executory devise shall take effect, nor the person who shall first come into *esse* when the executory devise has taken effect, nor all the persons who may be interested under the series of devises following that executory devise, by way of accumulation (of the rents) can establish their claim (*r*). And the rule is the same with regard to trusts (*s*).

*653 * But if] the real and personal estates are blended in one gift, it is considered to denote an intention that both species of property shall be subject to the rule applicable to personalty. Thus in Genery *v.* Fitzgerald (*t*), Lord Eldon decided that a gift of all the residue of the real and personal estate to the eldest of three persons who should attain twenty-one, charged with a sum of money to the others if they should attain that age, comprised the rents accruing between the testator's decease and the attainment by the devisee of the prescribed age. He said: "The general principles are these: When personal estate is given to A. at

Otherwise if real and personal estate are blended in same devise.

(*m*) Green *v.* Ekins, 2 Atk. 472; Trevanion *v.* Vivian, 2 Ves. 430; [*i.e.* until accumulation is stopped by the law: thenceforth it goes to the next of kin. Bective *v.* Hodgson, 10 H. L. Ca. 656, 671; Wade-Gery *v.* Handley, 1 Ch. D. 653, 3 ib. 374. And it makes no difference that the personalty or an aliquot share of it is to be laid out in realty: the interim income is still income of personalty, and follows the trust of the *corpus*. Bective *v.* Hodgson, supra.] But a future specific bequest does not carry income. Wyndham *v.* Wyndham, 3 B. C. C. 57; Shaw *v.* Cunliffe, 4 B. C. C. 144; 2 Rop. Leg. by Wh. 276.

[(*n*) By Wood, V.-C., 1 H. & M. 396.

(*o*) See acc. per Lord Westbury, 10 H. L. Ca. 665.

(*p*) 1 Atk. 424, 2 Atk. 476, Co. Lit. 55 b. n. (8).

(*q*) For examples of such a gift in a shifting clause, see Turton *v.* Lambarde, 1 D. F. & J. 495; D'Eyncourt *v.* Gregory, 34 Beav. 36.

(*r*) Per Wood, V.-C., 1 H. & M. 392; and see Sir E. Sugden's remarks in Wills *v.* Wills, 1 D & War. 451, 452, upon Duffield *v.* Elwes, 2 S. & St. 544; and ante, p. 575. Sidney *v.* Wilmer, 4 D. J. & S. 84, contra, is not law, 3 Ch. D. 374.

(*s*) Per Lord Talbot, Hopkins *v.* Hopkins, supra, cited by Sugden, C., 1 D. & War. 455; Re Eddel's Trust, L. R. 11 Eq. 559; Wade-Gery *v.* Handley, 1 Ch. D. 653, 3 Ch. D. 374.]

(*t*) Jac. 468; see also Gibson *v.* Montfort, 1 Ves. 490; Glanville *v.* Glanville, 2 Mer. 38; Ackers *v.* Phipps, 5 Sim. 44, 9 Bli. N. S. 431, 3 Cl. & Fin. 665; [Lachlan *v.* Reynolds, 9 Hare, 796. But in acting upon this rule care must be taken to see that there is in fact a blending of the real and personal estate and not merely a gift of one, by reference to *some* of the trusts declared of the other. Hodgson *v.* Bective, 1 H. & M. 397. Distinguish also between a postponed or contingent gift of the residue, and a particular interest to commence *in futuro* in a fund already constituted, which latter does not carry intermediate income even of personalty. Talbot *v.* Jevers, L. R. 20 Eq. 255; Weatherall *v.* Thornburgh, 8 Ch. D. 261. See also Re Drakeley's Estate, 19 Beav. 395; Marriott *v.* Turner, 20 Beav. 557; Re Sanderson's Trust, 3 K. & J. 510.

[1] Shelton *v.* Shelton, 1 Wash. 53; Fleming *v.* Bolling, 3 Call, 75.

twenty-one, that will carry the intermediate interest. If a testator gives his estate, Blackacre, at a future period, that will not carry the intermediate rents and profits; but where he mixes up real and personal estate in one clause, the question must be whether he does not show an intention that the same rule must operate on both."

It should be observed that this question regarding intermediate income of residuary real estate is not affected by the act 1 Vict. c. 26, s. 24 (*u*).

II. It remains to be considered whether reversions will pass under a general devise of lands.[1] In regard to this question, an undisposed-of interest which, on his decease, would become a reversion left in the testator after other dispositions of his own will, is obviously distinguishable from a reversion of which he is the owner at the time of his will (*x*); but they have been generally treated as belonging to the same class and sufficiently approximate in principle to warrant at least their juxtaposition.

Operation of a general devise on reversions.

Reversions in fee, then, will pass under a general devise of *654 lands or hereditaments (*y*), although the testator be seised of * real estates in possession to satisfy the words of the devise (a fact, however, which, in regard to wills made since 1837, would be immaterial); and although he may have been ignorant when he made his will of his having such a disposable interest (*z*); or it may have been unlikely, from its remoteness or liability to be defeated by the act of another, ever to fall into possession, as in the case of a reversion expectant on an estate tail (*a*).

It has been even held that a testator's reversion in fee in settled lands will pass under a devise of his "*lands not settled* (*b*)," or of his lands and hereditaments "*out of settlement* (*c*)," or "*in*

Devise of lands "not settled," in-

(*u*) Hodgson *v.* Bective, 1 H. & M. 396 (will dated 1853).

(*x*) See Tennent *v.* Tennent, 1 Jo. & Lat. 388.]

(*y*) Chester *v.* Chester, 3 P. W 56; Pain *v.* Ridout, 3 Atk. 486; Atkyns *v.* Atkyns, Cowp. 808, 3 B. P. C. Toml. 408; see also Doe d. Crump *v.* Sparkes, 4 D. & Ry. 246.

(*z*) Persons not professionally informed do not readily apprehend the alienable nature of reversionary contingent interests.

(*a*) Dalby *v* Champernon, Skinn. 631, where, however, it was controlled by the context.

(*b*) Cooke *v.* Gerrard, 1 Lev. 212.

(*c*) Strode *v.* Russell, 2 Vern. 621, 1 Eq. Ca. Ab. 210, pl. 18, 3 Ch. Rep. 169, and (nom. Falkland *v.* Lytton), 3 B. P. C. Toml. 24.

[1] It has been established from the earliest period that a reversion in fee however remote, and though clearly not in contemplation of the testator, passes by general words in a will, even though there are other lands to satisfy the words of the devise. Glover *v.* Spendlove, 4 Bro. C. C. (Perkins's ed.) 338, Mr. Eden's note (*a*), and cases cited; Steel *v.* Cook, 1 Met. 281. See Yeomans *v.* Stevens, 2 Allen, 349. In this case it was held that a gift of the residue of all the testator's estate, real and personal, after his wife shall have taken her thirds, no direct provision for her being made in the will, includes the reversion of the land assigned to her in dower, if there are no other words in the will to show that such was not the intention. But, though general words of this nature are sufficient to carry a reversion, yet their effect may be restrained, either by expressions directly controlling them, or by the clear intention of the testator, to be collected from the whole of the will. Ib. As to words of apparent exception, it has been frequently contended, with great apparent force and reason, that they restrained the effect of the general clause, and that the testator ought thereby to be considered as intending to prevent some lands from passing, which, were it not for such clause, would have been otherwise included. It has, however, been frequently decided that words of exception will not have that effect. Ib.; Cruger *v.* Heyward, 2 Desaus. 422.

the towns of L., M. and N., or elsewhere, not by him formerly settled or thereby disposed of (d)." The argument in these cases was, that, although certain estates in those lands were settled, yet that the reversion was not, and consequently it fell within the restrictive terms of the testator's description.

cludes unsettled reversion in settled lands.

So, in Glover *v.* Spendlove (*e*), where A. on his marriage having settled certain lands on himself for life, remainder to B., his intended wife, for life, remainder to their first and other sons in tail male, remainders over, reversion to himself in fee, by his will devised to his daughters in fee "all his lands *not settled in jointure upon his wife;*" Lord Thurlow held, without hesitation, that the reversion passed by the will.

It is true that, in Goodtitle d. Daniel *v.* Miles (*f*), where the same words occurred, Lord Ellenborough seemed to think they were descriptive of the *corpus* of the lands, and not of the devisor's interest. He distinguished the other cases on account of the variation of expression; and Glover *v.* Spendlove, on the ground that there the testator had no son, and therefore "had, for all the purposes of substantial benefit, the fee expectant on his wife's life-estate, she being then alive;" but his Lordship's reasoning on this point is evidently untenable, [and the opinion of the court was expressly rested upon grounds strong enough, in their judgment, to support it, even supposing the words in question to be insufficient of themselves to restrain the effect of the general words.]

If Lord Ellenborough's observations could be considered as * throwing a shade over the doctrine, it has been completely dis- *655 sipated by Att.-Gen. *v.* Vigor (*g*), where Lord Eldon expressed a decided opinion that the reversion in lands, settled on the marriage of the testator's son with Lady K., passed by a devise of all the testator's lands, *which he had not settled, or agreed to settle or assure, to the use of his said son and the issue male of his body, upon his marriage with Lady K. his wife;* [and by Incorporated Society *v.* Richards (*h*), where the testator — having upon his marriage agreed to settle certain estates in trust for himself for life, remainder to provide a jointure for his wife, remainder to his issue in tail, remainder to himself in fee — devised all his *unsettled* real estate to his wife for life, remainder over, and Sir E. Sugden, C., held that the reversion passed as part of the unsettled estates.]

Though the rule of construction established by the preceding cases has been much condemned, as savoring of extreme technicality and inimical to popular notions and probable intention (*i*); they have, it

(*d*) Chester *v.* Chester, 3 P. W. 56, 2 Eq. Ca. Ab. 330, pl. 9.
(*e*) 4 B. C. C. 337. (*f*) 6 East, 494, stated post, p. 660. (*g*) 8 Ves. 256, 272.
[(*h*) 1 D. & War. 258; see also Jones *v.* Skinner, 5 L. J. N. S. Ch. 87; Crowe *v.* Noble, Sm. & Bat. 12.]
(*i*) Sir J. Mansfield, in Morgan *v.* Surman, 1 Taunt. 292, characterized Chester *v.* Chester as "a shocking decision;" but he admitted it had been followed by numerous others; [and see the rule defended by Sir E. Sugden, 1 Dr. & War. 285; and by Pepys, M. R., 5 L. J. N. S. Ch. 87.]

is conceived, placed it beyond the reach of controversy. [They also show that the possession by the testator at the date of his will of lands, no estate or interest in which has been settled, and to which the devise is applicable, will not exclude the operation of the will.]

"Lands not before devised."

On a principle not very dissimilar, it has been held, that a devise of lands "not before devised," or "not before disposed of," carries the reversion in lands which the testator had previously devised for life (*k*).

Force of general devise not restrained by ambiguous expressions.

The inclination of the courts at the present day not to exclude a reversion from a general devise upon slight or equivocal grounds, is strongly illustrated by Doe d. Howell *v.* Thomas (*l*), in which a reversion in fee in an estate limited to the testator's first and other sons in strict settlement was held to pass under a devise of estates over which the testator had a power of disposal, though in another part of the will he referred to the estate in question *as property over which he had no power*. [And in Ridgeway *v.* Munkittrick (*m*), where a testator directed his trus-
*656 tees * to let a certain mill, and also dispose of his stock in trade and *other properties* to the best advantage, Sir E. Sugden held that the mill was included in the term "*other* properties."]

Whether inapt limitations will exclude a reversion.

But the great question which has been agitated, in regard to the operation of a general devise upon a reversion is, whether the inaptitude of *some* of the limitations be a ground for their exclusion.

Where there is other real estate;

In reference to this question, it is proper to consider separately those cases in which there are other lands to which the limitations in question are applicable, and those in which the reversion is the only property of the testator that the devise could apply to.

— where not.

Inaptitude of limitations no ground of exclusion, in cases of former class.

With regard to the first, it is quite clear that the impossibility of some of the limitations operating on the reversionary interest, will not have the effect of excluding it from the devise; as the limitations inapplicable to the reversion will be considered as referring exclusively to the other lands, and the other limitations as applicable to the whole *referendo singula singulis*.

Doe *v.* Weatherby.

Thus, in Doe d. Earl Cholmondeley *v.* Weatherby (*n*), where a reversioner in fee, having also other lands, devised his real estate generally, charged with annuities to three persons for their lives, one of whom was tenant for life of the lands in which the devisor had the reversion, and as to whom, therefore, the charge in respect of those lands was void, it was held that the reversion passed; for though

(*k*) Rooke *v.* Rooke, 2 Vern. 461, 1 Eq. Ca. Ab. 210, pl. 17; Willows *v.* Lydcot, 2 Vent. 285, 3 Mod. 229; [Taaffe *v.* Ferrall, 10 Ir. Ch. Rep. 183;] but see Hyley *v.* Hyley, 3 Modd. 228. (*l*) 1 Scott, N. R. 359, 1 M. & Gr. 335. [(*m*) 1 D. & War. 84.]
(*n*) 11 East, 322; S. P. Doe d. Morcton *v.* Fossick, 1 B. & Ad. 186.

that annuity could not be charged upon this particular property, there was other real estate which might be charged with it. Referring, then, the charge of the three annuities to the several properties devised by the residuary clause, *singula singulis*, the charge would attach upon all the estates as to two of the annuities, and upon all but this reversion as to the three.

[So, in William d. Hughes *v.* Thomas (*o*), where a testator having a reversion in fee expectant on an estate tail in another person, and having also other lands in possession, after several specific devises, gave all the residue of his estate and effects real and personal whatsoever and wheresoever, after payment of his debts, legacies and funeral expenses, to his wife absolutely; it was at first argued that the charge of debts legacies and funeral expenses showed that the testator could not have contemplated a distant reversion; but the argument was afterwards abandoned, and it was held to be quite clear that the reversion was included.] William *v.* Thomas.

To this principle may also be referred the case of Freeman *v.* * Duke of Chandos (*p*), where A., having the reversion in fee of estates in Gloucester and Worcester which were settled on his marriage, and of other estates in two other counties which were not included in that settlement, devised all his lands and hereditaments in the counties of Gloucester and Worcester, and elsewhere in the kingdom of England; and all his estates or interest in reversion, remainder, or expectancy, *subject to certain charges and to certain limitations, to his brothers and their respective first and other sons, in and by his marriage settlement, bearing date, &c., expressed*, in trust, in case himself and his brothers should all die without issue male of their bodies, or his brother should die before twenty-one, for certain persons. It was contended that from these words it was manifest that the testator had no other than the settled estates in his contemplation; but it was held that the reversion in the other lands passed. *657 Freeman *v.* Duke of Chandos.

So, in Doe d. Nethercote *v.* Bartle (*q*), where a man, having in the parish of A. lands of which he was tenant in fee, and also lands which had been settled to the use of himself for life, remainder to his wife for life, with remainder to their issue in tail, *leaving the ultimate reversion in himself* (both of which were in his own occupation), devised unto his wife all his freehold and copyhold lands of which he was then in the immediate possession, lying in the several parishes of A. and B., and also all his reversionary estate expectant on the death of his mother in other lands in A. and B., to his said wife for Doe *v.* Bartle.

[(*o*) 12 East, 141.]

(*p*) Cowp. 363. The report of this case is very defective: it neither states the uses to which the property in question was subject, nor the nature of those limited by the will; see also Strong *v.* Teatt, post, p. 658, which read in this place for the reason assigned, n. (*x*).

(*q*) 5 B. & Ald. 492: [and see Ford *v.* Ford, 6 Hare, 486; Honywood *v.* Honywood, 2 Y. & C. C. C. 471. The latter case appears contrary to the authorities, but the ground of the decision (which is not stated) may have been that the devise of the reversion was revoked by subsequent conveyance.]

life; remainder to his daughter in fee. It was held that the reversion in the settled lands passed, although the wife was tenant for life, and the daughter tenant in tail in remainder of those lands, under the settlement.

Conclusion from the cases.

These decisions have established, that the inapplicability of some of the limitations will not exclude a reversion, if there be other lands upon which those limitations can operate. And the same rule of construction has been applied even to deeds (*r*).

Mostyn v. Champneys.

In Mostyn *v.* Champneys (*s*), an attempt was made to exclude a reversion in fee expectant on an estate tail from a devise of all the testator's real estate whatsoever and wheresoever *658 *over which * he had any disposing power* to trustees for a term for raising debts, funeral charges and legacies, on the ground that the testator himself was tenant in tail of the lands in question; and that he could not intend to describe such a remote reversion as property over which he had a disposing power, he having taken no steps to enlarge his estate tail, as he might have done, into a fee-simple. The testator had other real estate in possession, to which it was admitted the devise in question extended. The Court of C. P. certified that, the words of the devise being sufficient to include the reversion, and no intention to exclude it being expressed, or necessarily implied from other parts of the will, such reversion passed.

Rule, where the reversion is the only property subject to the general devise.

But the other class of cases, namely, where the reversion is the only real estate of the testator upon which the general devise can operate (the will being of course made before 1838), is susceptible of a different train of reasoning, and is certainly environed with more difficulty, both upon principle and the authorities. There being no other lands to which the inapplicable limitations can be referred, the argument for the exclusion afforded by their introduction is obviously stronger; but, on the other hand, is met by the argument that the testator must have intended the devise to operate upon *some* property; for, as he could, under the old testamentary law, only dispose of the lands of which he was seised at the time of making his will, he was always to be supposed to have a specific subject in his contemplation when he made a devise, however general in its terms (*t*). The question, then, was, whether a testator was rather to be presumed to subject to certain limitations, property, which *some* of those limitations could never reach, or to make a devise which must necessarily be *altogether* inoperative. It will be seen that the early decisions incline against, and the latter in favor of, the application of the devise to the reversion in such cases.

Strong v. Teatt.

Thus, in Strong *v.* Teatt (*u*), where C., having on the marriage of his son H. settled the manor of A., in the county of T., on himself for life, remainder to H. for life, remainder to the

(*r*) Doe *v.* Jeyes, 1 B. & Ad. 593.
(*s*) 1 Scott, 293, 1 Bing. N. C. 341.
(*t*) See Hockley *v.* Mawbey, 1 Ves. Jr. 152.
(*u*) 2 Burr. 912, affirmed in D. P., 3 B. P. C. Toml. 219.

first and other sons of the marriage in tail, with reversion to himself in fee; and having issue three other sons, A., J., and T.; by his will, devised certain lands of which he was seised in fee in possession, and all other his lands, tenements and hereditaments in the counties of T. and M. (*x*), to the use of his son A. for life; * remainder to his first and other sons in tail male; and so on to the sons J., T., and H., and their sons in succession; and provided that if it should happen that his sons H. and A. should both die without issue male in the lifetime of his son J. *whereby the estate settled upon H. upon his marriage would descend upon J.*, then that his said son J. should not take any estate or interest in the lands thereinbefore devised to him; but that the same should go to T. The question was, whether the reversion in the settled lands passed. Lord Mansfield was of opinion that the latter clause was conclusive that the testator did not mean the reversion to pass; for, if it had, it could never "*descend*" upon J., which was the event provided for. *659 *660

There were certainly strong grounds in this case for the restricted construction.

In Roe d. James *v.* Avis (*y*), a reversion in fee expectant on an estate tail [in another person] was held not to pass under a devise of all the residue of the testatrix's real estate and effects *to be sold as soon as might be after her death and her funeral expenses to be paid thereout*, and the overplus (if any) to be divided between A. and B., on the ground that the purpose to which the proceeds of the sale were to be applied, namely, the payment of funeral expenses, showed that the testatrix meant to dispose of something which might be sold immediately. Roe *v.* Avis. Remote reversion excluded from trust for immediate sale.

This reasoning is evidently unsatisfactory. A reversion expectant on an estate tail is not absolutely unsalable, though it may be of little value; and, if capable of being sold at all, why may it not be disposed of to pay funeral expenses as well as for any other purpose?

Lord Eldon (*z*) has spoken of this case with disapprobation, and as the unsuccessful argument for the exclusion of the reversion in Mostyn *v.* Champneys (*a*), stated under the former division, was principally based on its authority, that case must be considered to have completely overturned it, if indeed the task had not been performed by antecedent adjudications (*b*). Roe *v.* Avis overruled.

Another instance of the restrictive construction occurs in Goodtitle d. Daniel *v.* Miles (*c*), where, on the marriage of A. with B., lands had been settled [by A.'s father] to the use of A. for life; remainder to B. for life for her jointure; remainder * to the heirs of the body of B. by A. to be begotten; remainder to the right heirs of A. A. survived his wife, having had by her two daugh- Goodtitle *v.* Miles. *660

(*x*) He had another estate in T., besides that before described, and which, therefore, would satisfy the word "other." (*y*) 4 T. R. 605. (*z*) 15 Ves. 403.
(*a*) 1 Scott. 293, 1 Bing. N. C. 341, ante, p. 657.
[(*b*) See acc. per Parke, B., 6 Ex. 47; post, p. 662, n. (*k*).] (*c*) 6 East, 493.

ters, C. and D., who survived him, and were his heirs at law. By his will, A. devised to his daughter C., *and to the heirs of her body lawfully begotten*, certain freehold lands of which he was seised in fee in possession, and all other his freehold, copyhold and leasehold lands, which he should be possessed of, or entitled to, at the time of his decease, *and which were not settled in jointure on his late wife;* the said daughter and the heirs of her body paying thereout to his daughter D. 15*l.* yearly during her life. And in case his daughter C. should happen to die, and leave no issue of her body, he devised the lands to his daughter D., for life, and, after her decease, to her children then living; and, for want of such issue, then over. The devisor had no real estate other than lands expressly devised, besides the reversion in question. The question was, whether the reversion passed. The Court of K. B. held that it did not: they admitted that the general words, if unrestrained, would carry the reversion, but as the daughters had estates tail in the settled lands, so that the testator had no disposable interest, unless they both died without issue, if these lands were included the devise to C. in tail was necessarily inoperative (*d*); since she had an estate of the same duration under the settlement: she would then be tenant in tail general under the will, expectant on the determination of an estate tail general already subsisting in herself under the settlement. The same observation applied to the devise to his daughter D. for life, remainder to her children, which could not possibly take effect. Upon this ground, and adverting also to the restriction of the devise to lands "not settled in jointure on his wife" (*e*), the court held that the reversion did not pass.

Reversion excluded by inaptitude of some of the limitations.

So far the cases certainly favor the restrictive construction; but Church *v.* Mundy (*f*), gives a new complexion to the doctrine on this subject. M. having a reversion in fee expectant on an estate tail in his brother C., devised all his real and personal estate to his wife for life; and if she should die leaving no issue, then in trust for C., his heirs, &c.; and in case C. should not be then living, to be at the disposal of the testator's wife. The testator had no other real estate. Sir W. Grant, M. R., held, that the * reversion did not pass, conceiving that the testator could not intend to comprehend in that devise any estate but such as his wife might take for life, and C. might enjoy afterwards, which was impossible as to this reversion; for, until the death of C., without issue, it could not fall in. But Lord Eldon reversed this decree (*g*): "The question is (he said) whether, as the purposes of this will are such, to which this subject cannot be so conveniently applied as a present interest in possession, not in remainder, the testator is to be considered as meaning nothing by this

Church *v.* Mundy, as decided by Sir W. Grant.

*661

Decree at the Rolls reversed by Lord Eldon.

[(*d*) See Badger *v.* Lloyd, 1 Salk. 232.] (*e*) As to which, see ante, p. 654.

(*f*) 12 Ves. 426; see also Att.-Gen. *v.* Vigor, 8 Ves. 256, where the point seemed too clear to admit of a question, the devise being simply to two persons in fee, of lands, in which they had successively chattel interests determinable with their respective lives. (*g*) 15 Ves. 396.

clause. In every case of this sort, the testator had some property, which was the foundation of an argument, that property which could be conveniently applied should pass, and that which could not be conveniently applied should not pass. That conclusion is very much confirmed by this will; adverting to the different situations in which the testator's family may be at his decease, particularly that the tenant in tail might not be living. If the testator had been asked whether he meant to dispose of his reversion, if his brother should be living, his answer would have been, that he intended to dispose of all he could dispose of; to take the chance for his wife and children; the instrument itself supposing that his brother may die before him: and disposing in terms that can apply to nothing besides this property. If the event of his brother's death within a week, without barring the entail, had been put to him, he would have answered, that, in that event, he intended to pass the property; and he would not have thought it necessary to republish his will; which, if the words are sufficient to carry this property, would not be necessary." . . . . . "I am strongly influenced towards the opinion, that a court of justice is not by conjecture to take out of the effect of general words, property, which those words are always considered as comprehending. *The best rule of construction is that which takes the words to comprehend a subject which falls within their usual sense, unless there is something like declaration plain to the contrary; and surely that is the safest course, when, as there is no other subject to which they can be applied, the testator must, if he does not mean that, be considered as having no meaning.*"[1]

Reversion included notwithstanding inapplicable limitations.

Lord Eldon's statement of the general rule.

It is evident, therefore, that he considered the improbability that the testator should intend to include a reversion in a devise, having limitations, some of which could never operate upon that reversion, as less violent than that he should make a devise without having any real estate upon which all the limitations could * operate: and even if it be said that these general devises are *662 frequently made by testators, without having in view any specific property, as the fact undoubtedly is, yet this does not add much to the force of the argument for the exclusion; for it shows that the testator used the general clause for the purpose of including any property which he might inadvertently leave undisposed of; and if he were told that he had such a reversion, but which could not be affected by some of the limitations of the devise, his answer would be, then let it be operated upon by the others.

Remarks on Church *v.* Mundy.

It should be observed, that Church *v.* Mundy has been referred to by Sir W. Grant (whose decree was reversed in that case (*h*)), as depending on its particular circumstances; namely, that if the brother had died before the testator, an event which

Sir W. Grant's view of Church *v.* Mundy.

[(*h*) See Sir W. Grant's judgment in Welby *v.* Welby, 2 V. & B. 187.

[1] See Glover *v.* Spendlove, 4 Bro. C. C. (Perkins's ed.) 338, note (*a*)

his will expressly contemplated, the devise would at the moment of the testator's death have had its complete operation in favor of the wife; and was considered by him as not necessarily deciding, that where A., tenant for life, with remainder to B. in tail, with reversion to himself in fee, devised to B. (the tenant in tail) for life, with remainder to C., his eldest son, for life, with remainder to the first and other sons of C. in tail, the reversion would pass. The point, however, was only indirectly brought into discussion before the M. R., in the consideration of the question, whether such a reversioner making a devise in these terms, was to be considered as intending to pass his own reversion only, or the *corpus* of the land, inclusive of B.'s interests, so as to raise a case of election against B.: the latter was decided (*i*). Since this period, in every instance in which the question whether a reversion passes by a general devise has been agitated, it has been decided in the affirmative (*k*); and, though in all these cases, there happened to be other real estate to which the limitations inapplicable to the reversion might be referred, yet little or no stress seems to have been laid on that circumstance; and they were decided on the broad ground, that the words of the devise being sufficient to comprise the property, it would pass, without going into the question, whether the testator could be sup-
*663 posed to * have had it actually in his contemplation when he framed the devise, or not.

General conclusion from the cases.

The sound conclusion, then, seems to be, that a general devise will in all cases operate on a reversion or remainder belonging to the testator, notwithstanding the remoteness of such reversion or remainder, as being expectant on an estate tail [1] or otherwise (whether such estate tail be vested in the testator or another), and notwithstanding the inapplicability of some of the limitations or purposes of the devise to the interest in question; and that, too, whether the testator had at the time of the making of the will any other real estate to which such inapplicable limitations or purposes can be applied or not.[2] Indeed, the latter fact would, of course, be wholly immaterial in the case of a will made or republished since 1837, any general devise in which would comprise after-acquired real estate; precluding, therefore, all inquiry into the *then* state of the testator's property, as affording any insight into the intention.[3]

(*i*) See also per Sir G. Turner, Wintour *v.* Clifton, 3 Jur. N. S. 77, 26 L. J. Ch. 223.]

(*k*) *Vide* cases, ante, pp. 655, 656; [and 6 Hare, 494, where Wigram, V.-C., cites and approves of the observations in the text; Alliston *v.* Chapple, 6 Jur. N. S. 288; Taaffe *v.* Ferrall, 10 Ir. Ch. Rep. 183. In Tennent *v.* Tennent, 1 Jo. & Lat. 388, Sir E. Sugden treated Roe *v.* Avis and Goodtitle *v.* Miles as clearly overruled by the current of later authorities.

1 Steel *v.* Cook, 1 Met. 281.

2 Glover *v.* Spendlove, 4 Bro. C. C. (Perkins's ed.) 338, note (*a*).

3 The residuary clause will, under the statutes of Massachusetts, carry the right or possibility of reverter remaining in the donor and his heirs after the creation of an estate on condition subsequent. Brattle Sq. Church *v.* Grant, 3 Gray, 142, 159; Austin *v.* Cambridgeport Parish, 21 Pick. 215; Brigham *v.* Shattuck, 10 Pick. 306; Hayden *v.* Stoughton, 5 Pick. 528. This would not be the case at common law. Brattle Sq. Church *v.* Grant, supra; 4 Kent, 10.

[But if the testator is possessed of a reversion to which none of the limitations are applicable, the question, it is conceived, is by no means the same. Sir W. Grant, indeed, thought there would be no room for arguing such a case; for that would be to say, the reversion passed, although it were so given that nobody could take it (*l*). There seems to be no decision on the point.]

Where none of the limitations are applicable. Opinion of Sir W. Grant.

III. When it was necessary to the operation of a devise of copyholds that they should have been surrendered to the use of the will (*m*), the rule was, that copyholds [so surrendered would pass under a devise of lands, tenements or hereditaments, or other general words descriptive of real estate (*n*); but] that copyholds not so surrendered would not pass under such a devise (*o*), * unless the testator had no freehold lands *664 upon which it might operate; in which last case [as there was a clear intention to pass something, the devise was held in Equity to operate on the copyholds (*p*); in favor, however, of those objects only for whom a surrender was supplied of unsurrendered copyholds expressly mentioned in the will, that is to say,] the testator's creditors (*q*), and also his wife and children (*r*), but not in favor of grandchildren (*s*), unless the testator had placed himself *in loco parentis* (*t*), or natural children (*u*); nor, it seems, even for the wife and children, if the will contained a provision for them (*x*).

Unsurrendered copyholds passed in equity by a general devise — when.

(*l*) Welby *v.* Welby, 2 V. & B. 197. The point was touched upon in argument in Tennent *v.* Tennent, Dru. 161, 1 Jo. & Lat. 379, where, first, the T. estate was entailed on R. J., and then the residue was devised to R., with a direction at his death to entail the subject of disposition on R. J. in the same manner as the T. estate was entailed on him. It was argued that as the prescribed entail would be wholly inoperative upon the reversion in the T. estate, this reversion was not subject to the *direction*; and if not, so neither were certain other estates, which were included with it in the *devise* to R., and which he thus took in fee. But Sugden, C., rejected this argument: he treated the gift to R. and the direction to entail as parts of one devise or series of limitations, so that the case became one where some, not all, of the limitations were inapplicable to the reversion. "It is now settled," he said, "that a reversion in fee will pass under a general devise unless a clear intention to exclude it is shown, though it is limited *in part* to the same uses to which the particular estate is already dedicated." There was thus no decision on the point in question.]

(*m*) See ante, p. 56.

[(*n*) 2 Atk. 85; 1 Ves. 226, 273; 6 Mad. 363, 364; and 2 Powell on Devises by Jarman, p. 123, n.

(*o*) Amb. 274;] 2 Ves. 164; 1 Atk. 387; 3 B. C. C. 188, 2 B. C. C. 64; 15 Ves. 400; also 1 Cox, 247; 13 Ves. 168; 15 ib. 390; 9 Pri. 556. And under a devise of lands *at A.*, copyholds situate there would not pass, if the testator had freeholds at that place, 1 Eq. Ca. Ab. 124, pl. 14.

(*p*) 1 Ves. 215; 1 Atk. 385; 2 Ves. 532; 12 Ves. 426; 15 Ves. 396; 1 V. & B. 406.

(*q*) See infra. ["The execution of a power and the surrender of a copyhold go hand in hand, precisely on the same ground." Per Sir R. P. Arden, Chapman *v.* Gibson, 3 B. C. C. 231; see Sugd. Pow. 530, 8th ed.; Freeman *v.* Freeman, Kay, 479, 5 D. M. & G. 704.]

(*r*) Hardham *v.* Roberts, 1 Vern. 132; Hills *v.* Downton, 5 Ves. 557; [if the interest of the favored individuals was limited, the surrender was supplied *pro tanto* only, and all besides resulted to the customary heir, Marston *v.* Gowan, 3 B. C. C. 170.]

(*s*) Kettle *v.* Townsend, 1 Salk. 187, 1 Eq. Ca. Ab. 123, pl. 8; but see Hills *v.* Downton, 5 Ves. 565, and see 1 P. W. 60.

(*t*) See Perry *v.* Whitehead, 6 Ves. 544. And generally as to a testator placing himself *in loco parentis*, see Powys *v.* Mansfield, 3 My. & C. 359.

(*u*) Fursaker *v.* Robinson, Pre. Ch. 475, 1 Eq. Ca. Ab. 123, pl. 9.

(*x*) Ross *v.* Ross, 1 Eq. Ca. Ab. 124, pl. 14; Lendopp *v.* Eborall, 3 B. C. C. 188; but see Tudor *v.* Anson, 2 Ves. 582; [Wentworth *v.* Cox, 6 Mad. 363.]

Unattested will.

The rule that copyholds would not pass if there were freeholds was held to apply to a case where the will, being attested by two witnesses only, was, under the then existing law, inadequate to pass the freeholds (*y*); the case being, it was considered, not analogous to those in which there were no freeholds, as the failure of the devise arose, not from the absence of intention, but from the positive rule prescribed by the Statute of Frauds.

Effect on construction of statutes dispensing with surrender to the use of will.

Questions of this nature, however, can no longer arise, since the statutes dispensing with the necessity of a surrender to the use of the will (*z*), which have placed freeholds and copyholds *pari passu* in regard to the operation of a general devise, — a point which in a former publication of the writer was strenuously contended for, and is now settled by authority.

Unsurrendered copyholds now pass by general devise.

Thus, in Doe d. Clarke *v.* Ludlam (*a*), where a testator, having both freehold and copyhold estates at C., devised the whole of his real and *665 * personal estates and effects whatsoever and wheresoever, which he might be possessed of at the time of his decease, to A., his heirs and assigns, forever; it was held that the copyholds, as well as the freeholds, passed by the devise. [And in Reeves *v.* Baker (*b*), a devise of "all the rest, residue and remainder of my property," though followed by the words "whether freehold or personal, and wheresoever situate," was held to include copyholds, the latter words being considered to be merely an imperfect enumeration of particulars.]

And the circumstance that some of the limitations and clauses in the will were inapplicable to copyholds (for instance, estates for life, limited without impeachment of waste), would not prevent their passing by such a general devise (*c*), the testator having other property to which the inapplicable clauses might be referred.

Equitable interests in copyholds.

[If the testator had only the equitable estate in copyholds, it did not, at least before the statute 55 Geo. 3, pass by a general devise of lands; for it could not be surrendered, and there was no other clear indication of an intention to pass copyholds (*d*). But it has been said (*e*), that possibly, since the statute, an equitable interest in copyholds would pass under such a general devise, for equity would follow the law; and as, since the statute, general words included legal copyholds (*f*), the same rule might apply in cases of trusts of copyholds.]

(*y*) Sampson *v.* Sampson, 2 V. & B. 337; see also Chapman *v.* Hart, 1 Ves. 270, and 15 Ves. 407. (*z*) 55 Geo. 3, c. 192; 1 Vict. c. 26, ss. 3 and 4.

(*a*) 7 Bing. 275, 5 Moo. & P. 48; see also Edwards *v.* Barnes, 2 Scott, 411; [2 Bing. N. C. 252; Doe d. Edmunds *v.* Llewellin, 2 C. M. & R. 503; Usticke *v.* Peters, 4 K. & J. 437.

(*b*) 18 Beav. 372.

(*c*) Carr *v.* Ellison, 3 Atk. 73;] Weigall *v.* Brome, 6 Sim. 99; see also Borrell *v.* Haigh, 2 Jur. 229; Jackson *v.* Noble, 2 Kee. 590.

[(*d*) Torre *v.* Brown, 5 H. L. Ca. 555, 24 L. J. Ch. 757. (*e*) By Lord Cranworth, ib.

(*f*) Referring to Doe *v.* Ludlam. See also Seaman *v.* Woods, 24 Beav. 372, where this point seems to have been assumed in favor of the devisee. The devise was of "all the estate of whatever kind or nature."]

Lord Eldon, in White *v.* Vitty (*g*), suggested whether, as the act of 55 Geo. 3, c. 192, makes a surrender unnecessary for a devise of copyholds, a surrender to the use of the will could now be considered as any evidence of intention that copyholds should pass by a general devise; and, certainly, if unsurrendered copyholds had been held not to pass in Doe *v.* Ludlam, it might have been a question whether the same principle did not apply to surrendered copyholds; but, fortunately, the sound decision of the Court of C. P. in that case precludes any such question. However, it was deemed expedient to provide expressly by 1 Vict. c. 26, s. 26, that copyhold estates shall pass, together with freeholds, under a general devise.

Provision in 1 Vict. c. 26.

*The rule of construction established by Doe *v.* Ludlam has been held not to apply to a will the execution of which was *prior* to the statute 55 Geo. 3, c. 192, though the testator was living when it was passed, and consequently a surrender to the use of the will was dispensed with; as the *subsequent* alteration of the law could not throw any light on the testator's intention when he made his will, and therefore ought not to exert any influence on its construction (*h*). *666

Before the statute dispensing with surrenders to the use of the will, an exception to the rule that unsurrendered copyholds would not pass with freeholds under a general devise, occurred where the devise was for payment of debts, and the freeholds alone were inadequate to the payment of them (*i*); the inference being, that the testator, who must be presumed to have intended to provide a sufficient fund, meant the copyholds (which then were not assets for the payment of debts) to be included (*k*).

Exception where devise was for payment of debts.

Now, however, these cases of lands charged with debts no longer exist as a distinct class; but with regard to them, also, the statute has introduced an alteration as to the order of the application of freeholds and copyholds so charged. Thus, suppose the testator charge his lands generally with the payment of his debts, and then devise a freehold estate to A. and a copyhold estate to B.; A.'s freehold would, according to the construction established before the statute, have been applied in the first instance, and then B.'s copyhold (*l*); but now it is clear they would be applicable *pari passu*, and in proportion to their respective value, as was the rule before the statute, where the copyholds were surrendered (*m*).

Effect of the new doctrine upon these cases, suggested.

Under a general devise of *copyhold* lands unsurrendered copyholds were held to pass even before the statute of 55 Geo. 3 (*n*); although the testator had other copyholds which were surrendered (*o*). In order to restrain the devise to the surren-

General devise of *copyholds*.

(*g*) 2 Russ. 488.
(*h*) Doe d. Smith *v.* Bird, 5 B. & Ad. 695.
(*i*) 1 P. W. 443; 3 ib. 322; Cas. t. Talb. 78; 1 B. C. C. 273; 3 ib. 257; 2 Cox, 397; 12 Ves. 136; 13 Ves. 168; 15 Ves. 393.
(*k*) See 15 Ves. 394.
(*l*) Coombes *v.* Gibson, 1 B. C. C. 273.
(*m*) Growcock *v.* Smith, 2 Cox, 397.
(*n*) Byas *v.* Byas, 2 Ves. 164; Frank *v.* Standish, 1 B. C. C. 588, n., 15 Ves. 391, n.
(*o*) Blunt *v.* Clitherow, 10 Ves. 589.

dered copyholds in such a case, it was necessary to show restrictive words (*p*); which brings us to a question much discussed, namely, whether a reference to the fact of the testator having surrendered the copyholds, restricts the devise to copyholds so surrendered.

Restrictive effect of reference to copyholds as surrendered.

*667 * In Banks *v.* Denshaw (*q*), Lord Hardwicke thought that a devise of freehold and copyhold lands ("having surrendered the copyhold part thereof to the use of my will") did not restrict the devise to surrendered copyholds. On the other hand, in Gascoigne *v.* Barker (*r*), he held that a devise of all the testator's lands, freehold and copyhold, in the parish of Chiswick, and elsewhere, in the county of Middlesex ("which I have surrendered to the use of my will"), was restricted by the parenthetical clause to the copyholds surrendered. In Wilson *v.* Mount (*s*), Sir R. P. Arden, M. R., on the authority of the last case, held that a devise of all the testator's freehold and copyhold lands ("the copyhold whereof I have surrendered to the use of my will"), was confined to surrendered copyholds.

But, in a more recent case (*t*), Sir J. Leach, V.-C., held that the words ("and which I have surrendered to the use of this my will"), following a devise of copyhold lands, did not restrict it to surrendered copyholds. He said the expression was affirmative and not exceptive, and that the copulative "and" distinguished the case from Wilson *v.* Mount (*u*). [And in another case (*x*) he came to the same conclusion upon the words, "the copyhold part there having been duly surrendered to the uses of this my will." Even this case he though different from that before Sir R. P. Arden, who, he said, considered himself as yielding to authority in making a decision "which had not given universal satisfaction."]

So refined are the distinctions which these cases present. It seems to be clear, however, that, if *all* the testator's copyholds be unsurrendered, no expressions of this kind will restrict the devise, as the effect would then necessarily be to render it wholly inoperative (*y*).

IV. The next inquiry is, whether property, in which the testator is possessed of a term of years only, will pass by a

Leaseholds for years, when they

*668 * general devise. The rule on this subject, of which the early case of Rose *v.* Bartlett (*z*) is the well-

(*p*) Wilson *v.* Mount, 3 Ves. 191. (*q*) 3 Atk. 585, 1 Ves. 63.

(*r*) 3 Atk. 8; see also King's Head Inn case, cited 1 Ves. 63, 121. (*s*) 3 Ves. 191.

(*t*) Strutt *v.* Finch, 2 S. & St. 229; but see also Pullin *v.* Pullin, 10 J. B. Moo. 464, 3 Bing. 47, and other cases cited post, Ch. XXIV.

[(*u*) The M. R. said (3 Ves, 193), that the words in Gascoigne *v.* Barker were, "and which," &c., according to the R. L. Therefore, even this slender distinction disappears.

(*x*) Oxenforth *v.* Cawkwell, 2 S. & St. 558. It is remarkable that the customary heir did not contend that the alleged devisees, being the testator's nephews, were not within the equity extended to creditors, wives and children; or, at least, that the nephews were not put to prove that the testator had placed himself *in loco parentis*.]

(*y*) Rumbold *v.* Rumbold, 3 Ves. 65; Wilson *v.* Mount, ib. 194; [Hills *v.* Downton, 5 Ves. 557.]

(*z*) Cro. Car. 293; [the rule was also applicable to a *grant* of land by deed, but, it would seem, with some variations arising out of the different natures of the instruments, Shep. Touch. 88, 91, 92; Doe *v.* Williams, 1 H. Bl. 25; Francis *v.* Minton, L. R. 2 C. P. 543.

known leading authority, is, that "where a man hath lands in fee and lands for years, and deviseth all his *lands and tenements*, the fee simple lands pass only, and not the leases for years; but if he hath no fee simple, the lease for years passeth, for otherwise the will should be merely void." [1]

pass under general devise.

Both these propositions are law at the present day, in reference to wills made before the year 1838. The former indeed was long *vexata quæstio;* and the reluctance to assent to it arose from the conviction, that it subverted the intention of testators, who, it is obvious, employ general words of this nature in a comprehensive sense, and without having in view the purely technical distinction respecting the quality of the estate.

One of the earliest authorities is Davis *v.* Gibbs (*a*), where a testatrix devised all her *lands*, *tenements*, *hereditaments* and real estate, in Kent, Essex, Bucks, Bedfordshire, and elsewhere in England, which she was any ways seised of *or entitled to*, to A. and B. for their lives equally; and after their decease she devised her said real estate to *the right heirs* of the said A. and B., to *them and their heirs*, as tenants in common. The testatrix bequeathed all the residue of her personal estate, and all her mortgages, bonds, specialties and credits, to A. and B. The testatrix had fee-simple lands in Kent, a mortgage of a term in Essex, and a statute in Bucks. It was therefore held that the mortgage term and statute did not pass.

Held not to pass with freeholds, under a devise of lands, tenements and hereditaments.

Taking the circumstance of the enumeration of the counties into consideration, Davis *v.* Gibbs is certainly a strong decision in favor of the rule; though this would have had greater weight if the testatrix had had freehold lands in all the specified counties except those in which the chattel interests were situated, which does not appear to have been the case. It is not stated that she had either freehold or chattel property in Bedfordshire.

Observation on Davis *v.* Gibbs.

The rule [was established beyond dispute by numerous decisions (*b*), and] was not negatived by the circumstance that the * will was inoperative as to the freehold estate, from defect of execution (*c*). *669

Rule not varied though will not executed to pass freeholds.

So, in Watkins *v.* Lea (*d*), Lord Eldon held that a renewable copyhold estate for lives, distributable as personal estate by the custom of the manor, and held in trust to be surrendered as the testator, his executors, administrators and assigns,

Copyhold estate distributable by custom as personalty.

(*a*) 3 P. W. 26, 2 Eq. Ca. Ab. 326, pl. 34, Fitzgibb. 116.

(*b*) Knotsford *v.* Gardiner, 2 Atk. 450, where the devise was of "estates;" Pistol *v.* Riccardson (limitation in tail), 1 H. Bl. 26, n., more fully 2 P. W. 459, n. by Cox to Addis *v.* Clement; Thompson *v.* Lawley, 2 B. & P. 303, where Lord Eldon reviewed the authorities and fully recognized the rule. See also Whitaker *v.* Ambler, 1 Ed. 151, where, however, the expression was "real estates," which, it should seem, would, independently of the rule in question, exclude leaseholds for years; see also 6 Sim. 99; [and Parker *v.* Marchant, 5 M. & Gr. 498, 2 Y. & C. C. C. 279.]

(*c*) Chapman *v.* Hart, 1 Ves. 271; see also Sampson *v.* Sampson, 2 V. & B. 337.

(*d*) 6 Ves. 633.

[1] Taylor *v.* Taylor, 47 Md. 295.

should direct, did not pass under a devise of freehold and copyhold estates, the testator having both freeholds and copyholds of inheritance. The limitations were inapplicable, being in strict settlement, so that the first tenant in tail would have taken the absolute property, though an infant; and there was no fund for renewal.

Inapplicability of words of limitation to personal estate.

In all the cases hitherto cited except Chapman *v.* Hart, which is very briefly stated, the words of limitation were applicable exclusively to real estate; a circumstance which the judges always seemed glad to throw into their arguments in support of their decision. Considering, however, that these cases were all decided upon the authority of the general rule in Rose *v.* Bartlett, and that that rule recognizes no such limitation of the principle, it seems impossible to restrict it to such cases. This observation, however, only applies where there is an *absence* of words of limitation; for if words of limitation adapted to a chattel interest are used, they might possibly be considered as demonstrating an intention to include the leaseholds; though certainly no decision has gone this length, without some aid from the context.

Words of limitation adapted to a chattel interest.

Rule yields to demonstration of intention apparent on the context.

The rule will of course yield to an indication of the testator's intention; and, therefore, if the will contained evidence that he meant the leaseholds to pass with freeholds under a general devise, it will be so construed. The struggle, however, has been to determine what amounts to such evidence of intent.

In Hartley *v.* Hurle (*e*), a testator devised all his messuages, lands, tenements and hereditaments, to trustees, their heirs, *executors*, *administrators* and *assigns*, *according to their several and respective estates and interests therein;* and in another part of the will the trust for the application of the rents was declared to be "*subject to ground-rents and other outgoings;*" Sir R. P. Arden, M. R., thought the intention to include the leaseholds was sufficiently demonstrated: the word "ground-rents," he said, placed it beyond doubt. [And in Swift *v.* Swift (*f*) *670 leaseholds were * held to pass by a devise of "real estate at F. forever, or otherwise according to the several and respective natures and tenures thereof."]

Effect of a charge exceeding the value of freehold.

In Doe d. Belasyse *v.* Lucan (*g*), Lord Ellenborough and Le Blanc, J., considered the imposition of a charge to which the freehold lands alone were inadequate, to be a ground for extending a general devise to copyholds. The principle, if admissible, would be equally applicable to the cases under consideration; but such inadequacy can only influence the construction, if it exist at the time of the making of the will.

The fact of the freehold and leasehold lands having been blended and let together for a long period, and that of the latter being renewable, have sometimes been relied upon, as favoring the extension of the

(e) 5 Ves. 540. [(*f*) 1 D. F. & J. 160.] (*g*) 9 East, 448.

devise to leaseholds. Under such circumstances, an entire farm composed partly of freehold and partly of leasehold lands, was held in Lane *v.* Stanhope (*h*), to pass by a devise of all the testator's "manors, messuages or tenements, houses, *farms*, lands, woodlands, hereditaments and real estate," unto A. for life, and then to his first and other sons in strict settlement; and so to other persons, with remainder to B. and his heirs and assigns forever. The testator bequeathed the residue of his money and personal estate to A. The respective lands had been always treated as forming one entire farm, and had been let together at one integral rent, which was reserved to the testator and his heirs. The court adverted to the inconvenience of splitting the farm, on account of the apportionment of the rent and the power of distress; and observed, that the first words of the residuary bequest applied to money, and it therefore could not be supposed that the testator intended to recur to land, he having already used words sufficient to comprise every species of landed property (*i*); that the word used was "farms," which, in its general signification, means that which is held by a tenant (*k*); and that the lease being renewable, the testator might have considered himself to have a sort of inheritance in it.

Farm composed of freehold and leasehold, held to pass under the word "farms."

The limitations were inapplicable to leaseholds; but Lord Kenyon thought that circumstance not entitled to much weight. *671 The occurrence of the word "farms" was considered to distinguish the case from Pistol *v.* Riccardson. Lord Eldon, in Thompson *v.* Lawley, referred to these several points in the case, and especially the last, which he seems to have regarded as the soundest ground of the decision.

The rule in question has been considered as excluded [by a devise of "land" containing a specified quantity where the quantity could not be made up without the leaseholds (*l*); by] a devise of all the messuages, lands and tenements, in the parish of D., "which I am now *possessed of or any ways interested in*" (*m*); and by a devise of "all my manors, messuages, lands, tenements, *mines of coal*, lead and other mines, rectories, advowsons, tithes, *rents* and hereditaments whatsoever, situate in the county of Cumberland," though the testator had freeholds in that county, [chiefly because the words were

Rule excluded.

Devise by acreage.

Words "possessed of."

Devise of "mines and rents."

(*h*) 6 T. R. 345. See also Doe d. Belasyse *v.* Lucan, 9 East, 448 (where the Court of K. B. inclined to think that copyholds would pass under the word *farms*, with freeholds); [Hobson *v.* Blackburn, 1 My. & K. 571 (where the limitations were applicable to freeholds only, but the leasehold part was accessible only through the freehold); Goodman *v.* Edwards, 2 My. & K. 759; Swift *v.* Swift, 1 D. F. & J. 160.] In Arkell *v.* Fletcher, 10 Sim. 299, upon the whole will, leaseholds were held *not* to pass by the word "farms."

(*i*) This argument assumes the question.

(*k*) Lord Kenyon, however, relied much less on the word *farm* than Grose and Lawrence, JJ.

[(*l*) Goodman *v.* Edwards, 2 My. & K. 759.]

(*m*) Addis *v.* Clement, 2 P. W. 456. See also Dixon *v.* Dawson, 2 S. & St. 327 [which, however, turned chiefly on the special wording of a direction how to keep the accounts; and see *contra* Davenport *v.* Coltman, 12 Sim. 588. The words "interested in or entitled to" were held insufficient, Pistol *v.* Riccardson, 2 P. W. 459, n.]

not "lands and tenements" merely, but "rents and mines of coal;" and the leaseholds had mostly been demised as *coal mines and levels at rents* (*n*). And Eyre, B., refused to apply the rule to a devise of tithes (*o*). But the last three cases were disapproved of by Lord Eldon (*p*).

Devise of tithes.

Of course, the fact of the testator having in his lifetime parted with the freeholds which he had when he made his will, so that *in event* the devise had nothing but leaseholds to operate upon, cannot vary the application of the rule; inasmuch as the intention of the testator at the period of *making the will*, is the point to be ascertained, and which cannot be elucidated by subsequent events. Nor is there any distinction between leaseholds acquired before and after the making of the will, in reference to the rule under consideration.

Time of making the will the period of inquiring whether the testator has freeholds.

Leases *for lives*, being freehold interests, clearly will pass under a general devise, with freeholds of inheritance, unless an intention to exclude them can be collected from the context. In one case (*q*) it was contended that they did not pass with freeholds of inheritance, under a general devise of lands *to uses in strict* * *settlement*, on account of the inapplicability of the limitations, it being impossible to entail them,[1] but the will contained other grounds of exclusion. And in subsequent cases it was decided that freeholds for lives *did* pass by a general devise, though in one (*qa*) the devise contained limitations in tail, and the testator was also seised of freeholds of inheritance; and in another (*r*), although some of the limitations were inapplicable, being remainders expectant on life-estates, which were given to persons who were the *cestuis que vie* in the leases.

Leaseholds for lives not within the rule in Rose *v.* Bartlett.

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Whether leaseholds for years pass with *copyholds* of inheritance, under a general devise, seems doubtful. In Roe d. Pye *v.* Bird (*s*), the question was whether a mortgage term passed with copyholds, under a devise of all that his (testator's) estate in B. to M. and her heirs; and it was held that it did pass, principally on the ground that the leasehold and copyhold lands had been held together for a great number of years, and that the testator had contracted for the purchase of the equity of redemption in both. It is singular enough that this case was argued as falling within the rule of Rose *v.* Bartlett. The better opinion seems to be, that the rule which has been generally denounced as subverting the intention of testators will not be carried beyond its letter. The question, indeed, as we shall presently see, cannot arise under a will made or republished since 1837.

Whether term of years will pass with copyholds of inheritance.

(*n*) Lowther *v.* Cavendish, Amb. 356, better 1 Ed. 99. [But Lord Northington said he would have decided differently if there had been a bequest of personal estate. 1 Ed. 152.]
(*o*) Turner *v.* Husler, 1 B. C. C. 78. (*p*) In Thompson *v.* Lawley, 2 B. & P. 315.
(*q*) Sheffield *v.* Mulgrave, 5 T. R. 571, 2 Ves. Jr. 526.
(*qa*) Fitzroy *v.* Howard, 3 Russ. 225.
(*r*) Weigall *v.* Brome, 6 Sim. 99. (*s*) 2 W. Bl. 1301.

[1] See Minnis *v.* Aylett, 1 Wash. 300; Watkins *v.* Lea, 6 Ves. 633.

The second branch of the proposition in Rose *v.* Bartlett, "that if the devisor hath no fee simple lands, the lease for years passeth," has been the subject of little controversy, as it gives effect to what is generally the intention of the testator in all these cases.

Leaseholds will pass where there is no freehold.

It has even been held (*t*), that where a man devised all his "*freehold* houses in Aldersgate-street," *to A. and his heirs*, and he had some leasehold but no freehold houses there, the leaseholds passed, it being the plain intention of the will to pass *some* houses, and the word "freehold" should rather be rejected than the will rendered void. [And as such a gift points to a specific property as then belonging to the testator the construction of it is not affected by sect. 24 of 1 Vict. c. 26 (*u*).]

"Freehold houses in A." extended to leaseholds.

Also since 1 Vict. c. 26, s. 24.

The exclusion of leaseholds from a general devise, where the * testator has freeholds, founded as it is on *673 a distinction purely technical, has been considered to militate so strongly against intention, that this rule of construction has been abrogated by the act 1 Vict. c. 26; s. 26 of which provides, 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 (*x*) 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.

1 Vict. c. 26, s. 26. Leaseholds pass by a general devise.

[The burden of proof is thus shifted to those who assert that leaseholds do not pass by a devise of "lands;" and the proof must appear on the will itself. The subject was much discussed in Wilson *v.* Eden (*y*), where a testator, after bequeathing his personal estate to A. absolutely, devised all his messuages, lands, tenements and hereditaments situate at or near W., and other specified places in the county of D., and at other places in the county of Y., and all other his real estates in the said counties and elsewhere in Great Britain, to uses in strict settlement in favor of A. and his issue. Lord Langdale, M. R., thought that renewable chattel leaseholds situate near W., and contiguous to, and occupied with, the freeholds, were not included in this devise: not only were uses in strict settlement inapplicable in their integrity to leaseholds, but the ambiguity of the word "land" was removed by the subsequent

Unless a contrary intention appears by the will.

Wilson *v.* Eden.

(*t*) Day *v.* Trig. 1 P. W. 286; Doe d. Dunning *v.* Lord Cranstoun, 7 M. & Wels. 1.
[(*u*) Nelson *v.* Hopkins, 21 L. J. Ch. 410. As to s. 24 of 1 Vict. c. 26, see ante, Ch. X.
(*x*) *I.e.* would before the act, see judgment in Wilson *v.* Eden, 5 Ex. 752.
(*y*) 11 Beav. 237, 5 Ex. 752, 14 Beav. 317, 18 Q. B. 474, 16 Beav. 153.

words "other *real* estates." So that the case did not come within the act (*z*). But on a case from Chancery the Courts of Exchequer and Q. B. successively came to the opposite conclusion. Lord Campbell observed that if (as was admitted) the devise of lands at or near W., taken by itself, was within the act (*a*), he could not understand
*674 * why it was the less so because of the use of the subsequent words. Accordingly, it was decided by Sir J. Romilly that the leaseholds passed; he remarked that though general words might be cut down by the effect of previous enumeration, yet it was new to him to say that those general words cut down the prior enumeration.

But in Prescott *v.* Barker (*b*), a testator having freeholds in the county of B., and freeholds and leaseholds in the county of M., devised his "mansion house, land and hereditaments in the counties of B. and M., and all other lands and hereditaments in England," to uses in strict settlement. During the minority of any tenant in tail by purchase, the trustees, after providing for his maintenance, were to accumulate the rents, and if he attained majority or died leaving issue inheritable under the entail, to pay the accumulations to him; if not, to invest them in the purchase of freehold lands, tenements and hereditaments, to be settled to the same uses as were by the will declared of the said hereditaments thereinbefore devised in strict settlement. A power of sale and exchange was given to the trustees, and they were to invest money arising thence in the purchase of freehold lands or hereditaments, to be settled to the same uses, or of leaseholds or copyholds convenient to be held therewith, the leaseholds and copyholds to be settled on corresponding trusts, but so that the leaseholds should not vest absolutely in a tenant in tail by purchase unless he attained majority, but if he died under age, should devolve as if they had been freeholds. And the testator bequeathed the residue of his personal estate upon trusts corresponding to the uses of the hereditaments devised in strict settlement, with a similar proviso to prevent the absolute vesting of it in any tenant in tail of those hereditaments by purchase who should die under age. It was held that the leaseholds in the county of M. passed not by the devise of lands, &c., in strict settlement, but by the residuary bequest, and therefore did not vest absolutely in a tenant in tail by purchase dying under age. It was admitted that after Wilson *v.* Eden (with which in this respect the court did not seem perfectly satisfied), the uses in strict settlement were not alone sufficient to exclude the leaseholds from the devise: but whereas (said Lord Selborne) in that case there was a gift of land in strict settlement to one set of persons, and a gift of the personal estate absolutely to another

Prescott *v.* Barker.

(*z*) See also per K. Bruce, V.-C., Parker *v.* Marchant, 2 Y. & C. C. C. 282.

(*a*) It is stated in the report that seventy-two acres of the leaseholds were on the northern side of a high ridge, the greater portion being on the southern side, and that the former were two miles from the house and estate at W. It is not stated whether they were disconnected. If they were, it might be a little difficult to reconcile the decision as to the seventy-two acres with Doe d. Ashforth *v.* Bower, 3 B. & Ad. 453.

(*b*) L. R. 9 Ch. 174.

person (*c*), here there was on the whole will the most perfect * evidence of intention to keep the whole estate, personal as well *675 as real, together. Whenever leaseholds or personal property were expressly dealt with, they were subjected to a proviso that they should not vest absolutely in any tenant in tail by purchase who should die under age; whereas, if leaseholds passed by the devise in strict settlement, they vested absolutely in the first tenant in tail on his birth (for in this devise there was no such proviso); a result which it was moreover difficult to reconcile with the direction that during the minority of such tenant in tail the trustees should accumulate the rents, and in case he died under age invest them in the purchase of *freeholds* to be settled to the same uses as the devised freeholds — a direction which would in the event mentioned take them away from the tenant in tail.

General devise of "real estate," where no freeholds.

In Wilson *v.* Eden, Lord Langdale was clearly of opinion, and (for the purpose, at least, of the ultimate decision) it was assumed by the other judges, that the act had not the effect of making leaseholds pass by a general devise of "real estate." And in Turner *v.* Turner (*d*), the point appears to have been so decided by Sir J. Parker, V.-C. The testatrix in that case had no freeholds; but since the act this is no test. It is remarkable that the question, whether a devise of real estate (generally) would have passed leaseholds if the testator had no freeholds, appears never to have distinctly arisen before the act (*e*).

Devise of "real estate at A."

But if the devise were of "real estate at A.," there can be little doubt that leaseholds at A. would have passed under the old law if the testator had had no freeholds there; and notwithstanding that the words appear rather to point to specific property, it seems to have been assumed since the act, that this is a "general devise" within the meaning of sect. 26.

Moase *v.* White.

Thus, in Moase *v.* White (*f*), a testator having freeholds and long leaseholds at E., and long leaseholds but no freeholds at W., devised and bequeathed the residue of his real and personal estate, in trust to convert his "residuary personal estate (except leaseholds)," and out of the income thereof and "the rents and profits of his real estate" to pay a life-annuity to his wife and * accumulate the surplus: after her death, "as to all his real estate at E. and W.," in trust for J. and his issue in strict settlement. And "as to his leasehold messuages, lands and hereditaments at M." in trust "as nearly as the different tenure would allow according to the limitations thereinbefore declared of his real estate at E. and W.," with *676

(*c*) This is not quite accurate: see the case supra.

(*d*) 21 L. J. Ch. 843, 20 L. T. 30. In Gully *v.* Davis, L. R. 10 Eq. 562, leaseholds were held to pass by a general devise of "real estate." There were no freeholds; but how is this material since s. 24 of the act? Moreover, the case turned on the admission (by demurrer) that the testator thought his leaseholds were freeholds: whether it was right to admit such a fact as evidence on a question of construction, *qu.*

(*e*) See ante, p. 669, n. (*b*).

(*f*) 3 Ch. D. 763. See also Best *v.* Standeven, W. N. 1872, p. 44.

a proviso to prevent his leaseholds vesting absolutely in any tenant in tail dying under age. After the death of his wife "the residue of his real estate, including the residue of his leasehold estate," was to be sold, and the produce, with the produce of his residuary personalty, divided among the children of his sister. It was argued that the leaseholds at E. and W. did not pass by the gift of real estate in those places, for that the expression "my personal estate except leaseholds" showed that the testator considered leaseholds to be personal and not real estate. But it was answered, that having no freeholds at W., he must necessarily have intended his leaseholds there to pass as "real estate," and that such would have been the construction even before the act: the attempt to show that he considered leaseholds not to be real estate therefore failed. The act then came in, and made the devise operate also on the leaseholds at E. Sir J. Bacon, V.-C., held that the leaseholds at E., as well as those at W., passed as "real estate" in those places, and not as parts of the residuary personal estate.

Specific devise of "freehold" where no freehold;

And leaseholds will still, as before the act, pass even as "freehold," if the devise is clearly specific in form, and the testator has at the date of his will no freehold property to answer the description (*g*).]

General devise operates as an appointment — when.

V. The remaining question is, whether a devise or bequest in general terms will operate as an execution of a power of appointment over real or personal estate.[1] This point, in regard to the former, depends on the fact which, we have seen, determines the applicability of such a devise to leaseholds,

(*g*) Nelson *v.* Hopkins, 21 L. J. Ch. 410. In Stone *v.* Greening, 13 Sim. 390, testator began by devising "all his real estates and all his leasehold estates" to trustees, in trust "as to his freehold messuage, farm lands and hereditaments in the county of B." in one way, and as to "his personal estate" in another: showing that he did not understand leaseholds to be included in "real estates," much less in "freehold." But the case was heard as a short cause.

[1] It is laid down in the later American cases, contrary to the early English rule, that where there is a general power of disposal, a general bequest or devise is presumed to include an exercise of the power, if there be nothing to show a contrary intent; and this presumption is decisive in a case where the general power of disposal is accompanied by the beneficial use of the property made the subject of the power, and where the power is created by the testator. Amory *v.* Meredith, 7 Allen, 397; Willard *v.* Ware, 10 Allen, 263; Funk *v.* Eggleston, 92 Ill. 515, 539; Andrews *v.* Brunefield, 32 Miss. 108; White *v.* Hicks, 33 N. Y. 383. See Bangs *v.* Smith, 98 Mass. 270; Hollister *v.* Shaw, 46 Conn. 248; Bolton *v.* De Peyster, 25 Barb. 539, 564. Collier's Will, 40 Mo. 287, 329. White *v.* Hicks, 33 N. Y. 383, 407; Reilly *v.* Chouquette, 18 Mo. 220; In re Wilkinson, L. R. 4 Ch. 587; Wilday *v.* Barnett, L. R. 6 Eq. 193; Van Wert *v.* Benedict, 1 Bradf. 114. This subject is discussed by Mr. Justice Story in Blagge *v.* Miles, 1 Story, 426, where he gives three tests of intended execution of a power: (1) where there has been *some* reference in the will, or other instrument, to the powers; (2) or a reference to the property which is the subject on which it is to be executed; (3) or where the provision of the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, where it would have no operation, except as an execution of the power. He adds that these are not all the cases, and that it is always open to inquire into the intention under all the circumstances; while he agrees that "the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation." And it has uniformly been held that a mere residuary clause shows no sufficient indication of intention to execute a power. See also Hoar, J., in Amory *v.* Meredith, 7 Allen, 397, 399. The earlier rule (which was based on Clere's case, 6 Coke, 17), as derived from the cases which had

namely, whether there is any other subject for its operation. Thus, if a testator, by a will made before, and not republished on or since the 1st of January, 1838, devises all his hereditaments or real estate, and it appears that he had no real estate at the time of its execution, *but that he had a testamentary power over real estate, the *677 devise will operate as an appointment under such power (*h*). [And a devise by a married woman who was not shown to be entitled at the date of her will to any separate real estate (upon which alone the will could have operated as a devise of *property*), took effect as an appointment under such a power (*i*).[1] Parke, B., said it could not be intended that she had other property which she could devise, being a married woman.] Will of *feme coverte.*

On the other hand, if the testator had real estate on which the will could operate, it will be presumed, that the devise was made with a view to such property, and not as an exercise of the power (*k*), even though the terms descriptive of the subject-matter of disposition are rather more extensive than is required to comprise the testator's own property. Thus, where a testator having real estate, and also a power over real estate, devised all his "messuages, lands, tenements and

(*h*) Wallop *v.* Lord Portsmouth, Sugd. Pow. p. 916. 8th ed.]; Standen *v.* Standen, 2 Ves. Jr. 589; [affirmed in D. P. 6 B. P. C. Toml. 193, nom. Standen *v.* Macnab. But an argument against such an operation is furnished if the testator has by the same will expressly exercised other powers vested in him; Att.-Gen. *v.* Vigor, 8 Ves. 294.

(*i*) Curteis *v.* Kenrick, 3 M. & Wel. 461, 9 Sim. 443.]

(*k*) Sir Edward Clere's case, 6 Co. 176; Ex parte Caswall, 1 Atk. 559. [The burthen lies upon the party claiming under the alleged appointment to prove that the testator had no other real estate. Doe d. Caldecott *v.* Johnson, 7 M. & Gr. 1047.]

been decided when he wrote, is thus stated by Mr. Chancellor Kent: "The power may be executed without reciting it, or even referring to it, provided the act shows that the donee had in view the subject of the power." If there were no reference to the power, the will operated as an appointment under the power, provided it could not have effect without the power. The intent in this view must be so clear that no other can reasonably be inferred; and if the will does not refer to a power, or the subject of it, and if the words of the will may be satisfied without supplying an intention to execute the power, then, unless the intent to execute the power be clearly expressed, it is not an execution of it. 4 Kent, 334, 335. See also Mory *v.* Michael, 18 Md. 227, 241; Johnson *v.* Stanton, 30 Conn. 297; Bingham's Appeal, 64 Penn. St. 345; Coryell *v.* Dunton, 7 Penn. St. 530; Bradish *v.* Gibbs, 3 Johns. Ch. 523, 551. By the later English authorities, however, as by the later American, it is held under the Wills Act of 1 Vict. c. 26, §§ 24, 27, that a will containing a general devise or bequest, and made before or after the creation of a general power to appoint by will, and remaining unrevoked at the testator's death, is a good execution of the power. Boyes *v.* Cook, L. R. 14 Ch. D. 52. In determining whether the will, in a case of doubt, is an execution of the power, the circumstances surrounding the testator at the time of its execution only can be regarded: subsequent facts cannot be considered. Ib., overruling In re Ruding's Settlement, L. R. 14 Eq. 266. See Thomas *v.* Jones, 2 Johns. & H. 475; Funk *v.* Eggleston, 92 Ill. 515, 545, that when the subject of the power is real estate, the condition of the property and other facts *dehors* the will may be regarded in solving the doubt. Under the English act, as has been intimated above, it is held that a will may operate as an execution of a power subsequently created. Boyes *v.* Cook, supra; Cofield *v.* Pollard, 3 Jur. N. S. 1203; Patch *v.* Shore, 2 Dr. & S. 589; Hodsdon *v.* Dancer, 16 W. R. 1101. A testator can, however, execute by will only such powers as are in existence at his death, and therefore he cannot execute a power contained in the will of a person who survives him. Thus, if A. bequeaths property to such person as B. shall by deed or will appoint, B.'s will is no execution of this power if he predecease A. Jones *v.* Southall, 32 Beav. 31. Where there are two wills, one before and one after the creation of the power which is directed to be executed by the last will of the donee, and the later will purports to be the *last* will, but does not refer in any way to the prior one, it is a question of intention which is to be considered as the last will and an execution of the power. Pettinger *v.* Ambler, L. R. 1 Eq. 510. See post, p. 686.

[1] Ferrier *v.* Jay, L. R. 10 Eq. 550.

hereditaments," the power was held not to be exercised, though the property of the testator consisted of houses only (*l*). It has also been decided, that where a testator who had freehold property, and a power over freeholds and copyholds, devised his freehold and copyhold estates, the devise operated as an execution of the power with respect to the copyholds (there being no other property of this description on which it could operate), but not as to the freeholds (*m*).

General devise which would operate on real estate, not necessarily sufficient to exercise power.

And here it may be observed, that a clause of disposition, framed in general but rather equivocal terms, and not very distinctly comprising real estate, may not amount to an exercise of a power of appointment, though it might have been held to embrace realty to avoid intestacy. Thus where (*n*)[1] a testator, by a will attested by three witnesses, devised all his estate and effects of whatever denomination; Sir T. Plumer, M. R., held, that though these words would have passed *678 any real estate of * which the testator might have happened to be seised, they did not demonstrate an intention to exercise a power over real estate.

As to devises of property answering to a certain locality.

The principles regulating the construction of general devises, in regard to the subject now under consideration, for the most part apply to devises of lands circumscribed by locality. Thus, if a testator devises all his lands in the parishes of A. and B., having lands in A. only, and a power over lands in A. and also in B., the devise will exercise the power over the lands in B., but not the power over those in A. (*o*). And where a testatrix, being seised in fee of an undivided moiety of lands in Surrey, the other moiety in which had been limited to her for life, with remainder to such uses as she by deed or will should appoint, devised all her freehold estates in the county of Surrey, this devise was held to be satisfied by embracing the first-mentioned moiety, and did not operate as an appointment of the second (*p*).

General bequest does not, under old law, exercise power over personalty.

The ground on which a general devise has been held to operate as an appointment of real estate, it is obvious, does not apply to personalty (*q*); for as a will of personal estate comprises whatever property of this description a testator dies possessed of, without regard to the period of its acquisition, it is not necessarily to be presumed that the testator had any

(*l*) Hoste *v.* Blackman, 6 Mad. 190.

[(*m*) Lewis *v.* Llewellyn, T. & R. 104. [But if the estate subject to the power be specifically dealt with, the power, though not referred to, will be executed. Davies *v.* Davies, 4 Jur. N. S. 1291.]

(*n*) Jones *v.* Curry, 1 Sw. 66. [As to which see Sug. Pow. p. 342, 8th ed.]

(*o*) Napier *v.* Napier, 1 Sim. 28.

(*p*) Roake *v.* Denn, 4 Bli. N. S. 1. See also Doe *v.* Roake, 2 Bing. 497; Denn *v.* Roake, 5 B. & Cr. 720; [Wildbore *v.* Gregory, L. R. 12 Eq. 482.]

(*q*) Leaseholds, of course, are undistinguishable from other personal estate in this respect, though in some cases they have most inconsiderately been treated as governed by the same principle as devises of freehold estates. See Grant *v.* Lynam, 4 Russ. 296, [and Tanner *v.* Elworthy, 4 Beav. 487.]

[1] Wildbore *v.* Gregory, L. R. 12 Eq. 482.

specific property in his view when he made it: and therefore, even if it should happen that the testator had no other disposable property at the time of making his will, or at his death, than the subject of the power (*r*), or that its exclusion from the will will leave nothing for the residuary clause to operate upon, or will leave the personal estate inadequate to the payment of pecuniary legacies, still the will does not operate as an appointment under the power (*s*).

Distinction where the testatrix is *f. c.*

And the circumstance that the donee being a married woman has no general testamentary capacity (but who may have separate estate, which is disposable by will) has been held not to constitute a ground for varying the construction (*t*). [But it must be observed that in all the cases where it was so held it appeared * that in fact the married woman at the time of making her will had separate estate which would or might pass by the general bequest; and it seems that unless this is proved affirmatively the bequest will operate as an appointment (*u*). Nor is this unreasonable: for though after-acquired separate estate would also pass by the will, the acquisition of it (even now that the means of acquiring it are multiplied by the Married Women's Property Act, 1870), cannot be assumed to be in the contemplation of the married woman as confidently as the future acquisition of personalty may be, and is, assumed to be within the view of a male or unmarried donee. But the mere fact that the married woman has or has not, *at the time of her death* other disposable property ought not to affect the question whether the will was intended to be an execution of the power.] *679

What denotes intention to exercise power over personalty.

Of course, if an intention to exercise a power by a general or residuary bequest, can be collected by implication from the whole instrument, such construction will prevail (*x*);[1] but it has been held, that the bequest of a sum of money, corresponding in amount to that which is the subject of the power, raises no such inference, though the testator, when he made his will, was not possessed of any other property affording a fund for payment; as it is possible that he may have calculated on the future acquisition of property adequate to satisfy the legacy (*y*). For the same reason, the mention of "money in the funds" in a general be-

(*r*) Buckland *v.* Barton, 2 H. Bl. 136; Langham *v.* Nenny, 3 Ves. 467; Croft *v.* Slee, 4 Ves. 60; Bradley *v.* Westcott, 13 Ves. 445.

(*s*) Andrews *v.* Emmot, 3 B. C. C. 297; Bennett *v.* Aburrow, 8 Ves. 609.

(*t*) Lovell *v.* Knight, 3 Sim. 275; [Lempriere *v.* Valpy, 5 Sim. 108; Evans *v.* Evans, 23 Beav. 1.

(*u*) Shelford *v.* Acland, 23 Beav. 10 (which was decided on this ground, though the will was since 1837, and was therefore a good appointment under 1 Vict. c. 26, s. 27); Att.-Gen. *v.* Wilkinson, L. R. 2 Eq. 816.]

(*x*) Hunloke *v.* Gell, 1 R. & My. 515.

(*y*) Jones *v.* Tucker, 2 Mer. 533; [Davies *v.* Thorns, 3 De G. & S. 347.]

[1] See Att.-Gen. *v.* Wilkinson, L. R. 3 Eq. 816; Heyer *v.* Burger, 1 Hoff. 2; Bradish *v.* Gibbs, 3 Johns. Ch. 523. If a married woman, having a testamentary power of appointment, makes a will, it must be intended to be an exercise of the power, although it contains no reference to it. Churchill *v.* Dibben, 9 Sim. 447; Heyer *v.* Burger, 1 Hoff. 2. But see where she gave all to her husband Lempriere *v.* Valpy, 5 Sim. 108; Lovell *v.* Knight, 3 Sim. 275; Bradish *v.* Gibbs, 3 Johns. Ch. 523.

quest of personal estate, and the fact of the testator having no stock of his own at the date of the will, will not cause such bequest to operate as an appointment of stock over which the testator had a general power of disposition (*z*).

On the other hand [a gift of pecuniary legacies, followed by a general bequest of "all the rest and residue of *my* Bank stock, goods, &c., and all other property, &c., excepting 50*l.* of *my* Bank stock," contained in the will of a testator who had a power to appoint a sum of Bank stock, has been held] to denote an intention to include in such bequest the residue of the stock which was subject to the power [and to *680 charge it with the legacies (*a*). * Here, the expression, *my* Bank stock, joined with the other terms in the will, was *primâ facie* evidence that the testator was pointing to a specific existing fund; parol evidence was therefore admissible, to show whether he had any such fund of his own to which the bequest was applicable; and this being proved in the negative, the decision was inevitable. And it may be stated as a general rule, that where the bequest is on the face of the will thus specific, and it is ascertained by parol (in that case legitimate) evidence that the testator has no other such fund, the power will (other things attended to) be well executed (*b*). Beyond this], of course, parol evidence cannot be adduced to influence the construction in any of these cases (*c*).

What denotes intention to exercise power over personalty.

[Again, where (*d*) a testatrix bequeathed certain pecuniary legacies and gave "all the residue of her property of whatever kind and over which she had any power of appointment or disposition," it was held, on a principle discussed in another chapter (*e*), that the legacies were charged on the whole residue, including the subject of the power, out of which, therefore, the pecuniary legacies were payable in due order. And where a testatrix with a special power bequeathed certain legacies to strangers, and then gave specific parts of the fund subject to the power to objects, and "as to all the residue of her personal estate whatsoever and wheresoever after payment of her debts, funeral and testamentary expenses, *and the before-mentioned legacies*," she gave the same to persons who were also objects of the power, it was held, by Sir L. Shadwell, V.-C., that the remainder of the fund, which was the subject of the power, was well appointed by the residuary gift; the funds over

(*z*) Webb *v.* Honnor, 1 J. & W. 352.

(*a*) Walter *v.* Mackie. 4 Russ. 76; [Re Davids' Trusts, Johns. 495. In the former case it was also decided that leaseholds subject to the same power passed by the words "other property." This part of the decision was questioned by Pepys, M. R., Hughes *v.* Turner, 3 My. & K. 697; but see Standen *v.* Macnab, 6 B. P. C. Toml. 193, decreeing the *personal* estate to pass with the real; and see Sugd. Pow. 321, 8th ed.; Harvey *v.* Stracey, 1 Drew. 73.

(*b*) Sayer *v.* Sayer, 7 Hare, 381, 3 Mac. & G. 607; Horwood *v.* Griffith, 4 D. M. & G. 708; Rooke *v.* Rooke, 2 Dr. & Sm. 38; Re Gratwick's Trusts, L. R. 1 Eq. 177.]

(*c*) Standen *v.* Standen, 2 Ves. Jr. 589. And as to the subject generally, see further Sugd. Pow. 8th ed. 289, 2 Chance on Powers, 83.

[(*d*) Gainsford *v.* Dunn, L. R. 17 Eq. 405. This case seems inconsistent with, but would probably be preferred to, Lowe *v.* Pennington, 10 L. J. Ch. 83 (cor. Cottenham, C.)

(*e*) Ch. XLV. s. 1.

which she had the power being *alone* made (by the gift of the specific parts) applicable to satisfy some of those legacies (*f*). But the V.-C. thought that if it had been a gift of all the residue simply, the power would not have been an exercise of the power (*g*).

Devise of all that testator has power to dispose of, executes a power.

A general devise of "all *my* real and personal estate and * effects whatsoever whereof I have power to dis- *681 pose," or the like, will generally be taken not as a mere superfluous mention of the ordinary powers which, as owner, the testator has of disposing of his own property, but as a reference to any power which he may possess of appointing property not strictly his own. Real (*h*) and personal (*i*) property here stand on the same footing, and the power is held to be executed whether the gift would or would not otherwise be inoperative. A contrary intention (which will of course prevail if shown by the will) is not inferred from the circumstance of the testator having in some respects exceeded his power, as (where the power is special) by directing his debts to be paid out of the subject of disposition (*k*); or by giving to non-objects (*l*); or by giving the object an absolute interest, the power authorizing the gift of a life-estate only (*m*).

Whether the testator had or had not another power, which the provisions in question do not exceed, is of little moment. If he had not, the exceeded power, being the only one, is necessarily pointed at (*n*); if he had, the provisions which are excessive as to one may be referred exclusively to the other, and so both powers may be held well executed. An example of the latter kind is found in Thornton *v.* Thornton (*o*), where a testator, having distinct powers over separate funds, one to appoint among his children subject to an interest in his wife during widowhood, the other to appoint to his wife a life-interest in a fund which, subject thereto, was held in trust for his children equally at twenty-one, "gave, devised and bequeathed all his property over which he had any disposing power" in trust for his wife for life for her separate use, remainder to his children equally at twenty-one, and on failure of such children over; and it was held, by Sir R. Malins, V.-C., that *reddendo singula singulis* both powers were well executed.

Unless a contrary intention appears.

But a devise of "all my real estate over which I have any disposing power" by a testator who had real estate of his own, was held not to be an exercise of a special power, where, if it had been, it would have defeated certain interests under the settle-

(*f*) Elliott *v.* Elliott, 15 Sim. 321. And see Re Comber's Trusts, 14 W. R. 172; and Reid *v.* Reid, 25 Beav. 469, where the subject of a power was held to pass by a general bequest by virtue of an exception therefrom of a specific part of the subject.

(*g*) See acc. Butler *v.* Gray, L. R. 5 Ch. 26.

(*h*) Bailey *v.* Lloyd, 5 Russ. 330; Cowx *v.* Foster, 1 J. & H. 31.

(*i*) Ferrier *v.* Jay, L. R. 10 Eq. 550.

(*k*) Bailey *v.* Lloyd, Cowx *v.* Foster, Ferrier *v.* Jay, supra.

(*l*) Pidgely *v.* Pidgely, 1 Coll. 255

(*m*) Re Teape's Trusts, L. R. 16 Eq. 442. Clogstoun *v.* Walcott, 13 Sim. 523, and the dicta in Hope *v.* Hope, 5 Gif. 13, *contra*, are overruled.

(*n*) Re Teape's Trusts, Cowx *v.* Foster, supra. (*o*) L. R. 20 Eq. 599.

ment creating the power, which interests the testator treated as
*682 to take effect after his death (*p*). And where a testatrix, * after specifically devising an estate of her own] devised "all other the lands which she had power to dispose of," it was held, that a share of money to arise by sale of lands, over which money she had merely a power of appointment, did not pass (*q*).

[And a power of revocation and new appointment requires some stronger evidence of an intention to exercise it than is required by a power of appointment. Thus, in Pomfret *v.* Perring (*r*), where a testatrix having a power under her marriage settlement, and another under her father's will, executed the latter by deed reserving a power of revocation and new appointment; and then by will gave and appointed all the real and personal estate which she might at her death be entitled to, or by virtue of the power contained in the settlement *or otherwise* have power to appoint; it was held that the power of revocation and new appointment was not exercised, though if the will had shown an intention to exist, which, without so construing the words, could not be effectuated, they might have been so construed.]

General reference to powers does not include power of revocation.

The preceding doctrines, however, [so far as they relate to *general* powers,] do not apply to wills made or republished since 1837, the act 1 Vict. c. 26, s. 27, having provided, 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 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.[1]

What amounts to an appointment in wills made or republished since 1837.

[A power is not the less general within the meaning of this section, because it is to be executed by will only, and not by deed. The words "in any manner he may think proper"
*683 refer * to the extent of the power in regard to the

Power general though only testamentary.

(*p*) Cooke *v.* Cunliffe, 17 Q. B. 245.]
(*q*) Adams *v.* Austen, 3 Russ. 461. [But the lands were still unsold at the date of the will: see Standen *v.* Standen, 2 Ves. Jr. 589.
(*r*) 5 D. M. & G 775.

1 As to the object of the statute, see In re Wilkinson, L. R. 4 Ch. 588, 590. On the distinction between "power" and "property," see Amory *v.* Meredith, 7 Allen, 397.

objects, and not to the mode in which it is to be exercised (*s*). But a general gift will not be deemed an exercise of a power of revocation and new appointment, unless the gift would otherwise be wholly inoperative (*t*).

General pecuniary legacies are "bequests of personal property described in a general manner," and operate under this section as appointments, so far as the subject of the power is required in aid of the testator's own estate for payment of the legacies (*u*). To the same extent a direction to pay the testator's debts will operate as an appointment (*x*). And although in the cases where these points were decided executors had also been appointed, that circumstance does not appear to be essential (*y*). "It seems not unreasonable to hold that a testator having a general power and directing a certain application of his property must be taken in all cases to exercise the power to the extent to which the direction is effectual" (*z*). But "it has not yet been decided that an appointment of an executor without more would make the fund assets: and so to hold would appear to give a very unnatural construction to the section" (*a*).

Pecuniary legacies are appointments within s. 27; and directions to pay debts.

The effect of this section is to reverse the old rule and to throw on those who deny that a general devise or bequest executes a general power the burthen of proving by what appears on the face of the will the testator's intention that it shall not do so (*b*). The fact that an appointment has been actually made, will not show an intention to exclude the appointed property from a general residuary gift, where the appointment fails by lapse (*c*), or through uncertainty (*d*). And where the property was overridden by a power to sell and re-invest to the same uses, and, after the execution of the will, the property was sold accordingly: it was held, that the express appointment was adeemed, but that the substituted property passed by the residuary devise in the will (*e*). The effect of the residuary gift upon the void or imperfect particular appointment is analogous to its effect upon a * void or imperfect particular bequest: and the *684 suggestion of a learned judge (*f*), that the gift of a partial interest (as a life-estate) in the subject of a power is so absolutely incon-

How a contrary intention may appear.

(*s*) Hawthorn *v.* Shedden, 3 Sm. & Gif. 303; Lefevre *v.* Freeland, 24 Beav. 403; Re Powell's Trusts, 39 L. J. Ch. 188.

(*t*) Palmer *v.* Newell, 20 Beav. 38.

(*u*) Hawthorn *v.* Shedden, 3 Sm. & Gif. 293; Wilday *v.* Barnett, L R. 6 Eq. 193; Re Wilkinson, L. R. 8 Eq. 487, 4 Ch. 587; notwithstanding Hurlstone *v.* Ashton, 11 Jur. N. S. 725.

(*x*) Att.-Gen. *v.* Brackenbury, 1 H. & C. 782; Laing *v.* Cowan, 24 Beav. 112.

(*y*) Per Wickens, V.-C., Re Davies' Trusts, L. R. 13 Eq. 166. (*z*) Ib.

(*a*) Ib. Stuart, V.-C., thought otherwise, 3 Sm. & Gif. 304.

(*b*) Walker *v.* Banks, 1 Jur. N. S. 606.

(*c*) Re Spooner, 2 Sim. N. S. 129.

(*d*) Bernard *v.* Minshull, Johns. 276. See also Hickson *v.* Wolfe, 9 Ir. Ch. Rep. 144.

(*e*) Gale *v.* Gale, 21 Beav. 349. But as to the ademption, *vide ante*, p. 163.

(*f*) Wood, V.-C., Scriven *v.* Sandom, 2 J. & H. 745. See Hopewell *v.* Ackland, Scott *v.* Alberry, Roe *v.* Gilbert, Day *v.* Daveron, all stated in next chapter, where remainders in fee were held to pass by general residuary devises to the same persons to whom life-estates in the same property were specifically devised in a former part of the will. See also ante, p. 649, n. (*z*); p. 650, n. (*e*); and Bush *v.* Cowan, 32 Beav. 228.

sistent with an appointment of the entire interest to the same person as to show an intention to exclude it from a residuary bequest to that person, would probably not be followed.

And in Hutchins *v.* Osborne (*g*), where leaseholds were settled on the testator's wife for life, and after her death as he should appoint, and in default of appointment for (in effect) his next of kin by statute, it was held that a general residuary gift of the testator's property "subject, as to such parts thereof as are comprised in my marriage settlement, to the said settlement and the trusts thereby declared, and which settlement I hereby ratify and confirm in all respects," operated as an execution of the power notwithstanding the reference to the settlement, which was explained by the wife having a life-interest in the property.

Moss *v.* Harter. Effect where appointment would defeat testator's own settlement.

On the other hand, in Moss *v.* Harter (*h*), where by voluntary settlement personalty was settled as the settlor should appoint generally, and in default on himself for life, and after on several named persons. The settlor then under his power executed a deed appointing part of the fund; and afterwards made a will by which he bequeathed his residue "not otherwise effectually disposed of." It was held by Sir J. Stuart, V.-C., that this bequest did not include the unappointed portion of the settled fund, on the ground that the whole fund was in fact "effectually disposed of" by the partial appointment, and, so far as that did not extend, by the limitation in default contained in the settlement. It was argued strongly against this construction that the words "not otherwise effectually disposed of" must be read "not otherwise *by the will* effectually disposed of:" but the V.-C. thought that this would be to violate the express language of the will. He added that it was probably the intention of the legislature that s. 27 should apply only to cases *685 like Cox *v.* Chamberlain (*i*), * where the power was in such ample terms as to amount to absolute property. The terms of the section, however, are certainly of more extensive import.

Remarks on Moss *v.* Harter.

With reference to this decision, Lord St. Leonards says (*k*): "The case is not without difficulty; but where the property is, as in this case, settled by the testator himself upon others in default of appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will which can be satisfied by other property, to be an execution of the power." Although the act requires that, to be effectual, the intention not to execute the power shall appear *by the will*, that cannot mean to the exclusion of the instrument creating the power. The will, if it is to exercise the power,

(*g*) 4 K. & J. 252, 3 De G. & J. 142; see also, as to the confirmation of the settlement, Lake *v.* Currie, 2 D. M. & G. 536. And see Atherton *v.* Langford, 25 Beav. 5, where an expressed intention that lands over which the testator had a power should not be included in his will, but should go according to the settlement, was held not to prevent a share in the lands vested in the testator in default of the exercise by him of the power from passing under the residuary gift in his will.

(*h*) 2 Sm. & Gif. 458. (*i*) 4 Ves. 631. (*k*) Sug. Pow. p. 305, 8th ed.

becomes part of the instrument creating the power, and both must be read together to collect the intention truly. This must be borne in mind when the question (noticed in a former page (*l*)) is, whether by the combined operation of ss. 24, 27 a general power is exercised by a previously executed will.

Thus, where (*m*) a testator specifically devised certain freehold, copyhold, and leasehold estates, and gave all other the real and personal estate which he should be entitled to at his death, or over which he had or should have any power to dispose on certain trusts; then, by voluntary settlement, dated August, 1862, he conveyed the specified freehold estates and all other his freehold estate to C. and A. and their heirs in trust for himself for life, remainder to E. for life, remainder as he "by his last will or any codicil thereto should appoint," and in default for E. in fee; and he assigned his leasehold and personal estate on trusts for the benefit of E. In November, 1862, by testamentary instrument commencing "This is my last will," he, in pursuance of the power in the settlement, charged the freeholds with an annuity, and devised all his copyholds to C., and appointed C. and A. executors, but made no other disposition. Both wills had been proved. It was held by Lord Romilly, M. R., that he must look at the settlement and the testamentary instrument together to understand the matter properly; and seeing that the testator had made a "last will" after the date of the settlement, he held that the previous will had no operation under * the power; though if there had been no such *686 subsequent will he would have held that the former will was an execution of the power — meaning, apparently, that this would, in that event, have been *de facto* the "last will." Settlement *after* will.

Where, by marriage settlement, a testatrix had power to appoint estates A. and B., and made her will reciting the power and giving A. to one person, and "all other the hereditaments comprised in the settlement not hereinbefore disposed of" to another; she then by codicil revoked the appointment of estate A. and appointed it on charitable trusts, which were void. It was held that estate A. did not pass by the appointment of "all other hereditaments," &c., for that this was not a general or residuary gift, but clearly specific(*n*). And a gift by a married woman of the "residue of her separate property" was, of course, held not to include a lapsed share of a fund over which she had a general power (*o*). Particular residue is not within s. 27.

If the residuary gift itself fail either wholly or partially, and either through lapse, or through an original incompleteness of disposition, it would seem on principle that the property included under the power ought to go as if there had been Effect where residuary gift fails.

(*l*) P. 336.
(*m*) Pettinger *v.* Ambler, L. R. 1 Eq. 510. See also Re Ruding's Settlement, L. R. 14 Eq. 266, the authority of which, however, is impaired by the admission of parol evidence of *intention*.
(*n*) Re Brown, 1 K. & J. 522. And see Springett *v.* Jennings, ante, p. 651.
(*o*) Wilkinson *v.* Schneider, L. R. 9 Eq. 423, 429.

no appointment, or (as the case may be) an incomplete appointment (*p*). And the point was so decided by Sir J. Wickens, V.-C., in a case where the residue was given direct to the beneficiary, without the intervention of a trustee (*q*). But where the residue is given (and the subject of the power is thus appointed) to the donee's executors (*r*), or to other persons (*s*) as trustees, it has been held that the subject of the power is thus taken completely out of the instrument creating the power, and made part of the appointor's own estate, that the trusts take effect as simple bequests out of that estate, and that if any of them fail, the undisposed-of interest belongs to the next of kin of the appointor. Sir R. Kindersley thought the case of a married woman appointor was distinguishable; since, as part of her estate, she would be incompetent to dispose of it, and he could not impute to her an intention of so dealing with the fund as to make all the trusts declared *687 by her nugatory; the trusts must * have been intended to take effect under the power, and consequently whatever was ill-appointed went as in default of appointment (*t*). But Sir W. James, V.-C., disregarded the distinction (*u*). He said it was not a question of intention at all, it was a question of resulting trust, if anything, and the fund resulted for the benefit of those who would be entitled if it were the appointor's property, — which assumes that the fund *has* by the appointment become part of the appointor's estate.

1 Vict. c. 26, s. 27, applies to wills of married women.

The applicability of this section to the construction of the wills of married women has been disputed, but without success. Their testamentary capacity is not enlarged by the statute, but their wills, when made, have the benefit of the more liberal rules of interpretation laid down by it (*x*).

Effect of the act on general powers over realty.

Lake *v.* Currie.

In Lake *v.* Currie (*y*), it was contended that s. 24 of the Wills Act, which makes the will speak with regard to the real as well as the personal property comprised in it from the date of the testator's death, prevents a general devise of real estate from operating under s. 27 as an exercise of a general power over lands, although the testator has no other lands when he makes his will, on the ground that any lands which he may afterwards acquire and hold at his death will pass by such a devise, and that so this case is assimilated to a general bequest of personalty before the act. But to this Lord St. Leonards answered: "So far from operating in that way, the statute evidently meant to enlarge and give greater effect to dispositions by will. To hold that the old law is restricted and

(*p*) Per Wickens, V.-C., L. R. 13 Eq. 166.
(*q*) Re Davies' Trusts, L. R. 13 Eq. 163. The testatrix appointed an executor.
(*r*) Chamberlain *v.* Hutchinson, 22 Beav. 444. See also Brickenden *v.* Williams, L. R. 7 Eq. 310; Wilkinson *v.* Schneider, L. R. 9 Eq. 423. Cf. Bristow *v.* Skirrow, L. R. 10 Eq. 1.
(*s*) Lefevre *v.* Freeland, 24 Beav. 403.
(*t*) Hoare *v.* Osborne, 33 L. J. Ch. 586.
(*u*) Wilkinson *v.* Schneider and Brickenden *v.* Williams, supra.
(*x*) Bernard *v.* Minshull, Johns. 276; Thomas *v.* Jones, 2 J. & H. 475, 1 D. J. & S. 63; Noble *v.* Willock, L. R. 8 Ch. 778, 7 H. L. 581.
(*y*) 2 D. M. & G. 536.

that cases, which before the late act would be considered a due execution of the power, are not so now, would, I think, be utterly incompatible with the whole scope of the act. The statute says, that the devise shall operate as an execution of the power 'unless a contrary intention shall appear by the will:' it is absolutely necessary, therefore, now to show a contrary intention to exclude the execution of the power, where under the old law you must, to give effect to the will, have shown an intention to exercise the power; the new law is therefore stronger for the appointees than the old law." The same reasoning will obviously apply in cases where the testator has lands of his own besides those which are subject to the power.

*Special powers to appoint in favor of a particular class, as children (*a*), or kindred (*b*), are not within this section, and the question whether such powers are executed by a general devise or bequest still depends on the old law;[1] but with this exception, that if the question arises with regard to a special power over realty, an argument against its execution founded on s. 24, as in Lake *v.* Currie, will not be amenable to the answer furnished in that case by s. 27, for the latter section does not apply to such a power.] *688

Does not apply to special powers.

It will be remembered that all peculiarities in the execution of testamentary appointments are abolished by s. 10, which makes a will attested according to the statutes sufficient for, as well as requisite to, the validity of all such appointments, without distinction.

Execution of testamentary appointments under new law.

(*a*) Cloves *v.* Awdry, 12 Beav. 604; Pidgely *v.* Pidgely, 1 Coll. 255; Elliott *v.* Elliot, 15 Sim. 321; Cronin *v.* Roche, 8 Ir. Ch. Rep. 103.
(*b*) Hawthorn *v.* Shedden, 3 Sm. & Gif. 306: Re Caplin's Will, 2 Dr. & Sm. 527.]

[1] Re Gratwick, 35 Beav. 15.

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* CHAPTER XXI.

DEVISES BY MORTGAGEES AND TRUSTEES.

I. *In regard to the beneficial Interest in Mortgages. As to the Extinction of the Charge by Union of Character of Mortgagor and Mortgagee.*
II. *Operation of General Devise on the Legal Estate of Mortgagee or Trustee.*
III. *Whether Devisee of Trustee can exercise the Powers given to the Trustee.*

Devises by mortgagees.

As mortgages are of a complex nature, involving on the one hand a personal debt, with all the claims and obligations incident to the relation of creditor and debtor, and on the other an interest in real estate for the purpose of securing the debt absolute at law after forfeiture, but redeemable in equity, it follows that the testamentary disposition of a mortgagee presents two distinct subjects for consideration.[1]

Whether beneficial interest in mortgage will pass under devise of lands.

I. With respect to *the beneficial interest in the mortgage*, it is clear that a general devise of lands will not commonly have the effect of including it (*a*). The contrary, indeed, is laid down by a respectable writer (*b*), but his position is not warranted by either authority or principle. The case of Ex parte Sergison (*c*), cited by him, does not support it; for the devisee was executor and residuary *legatee*, and consequently entitled, *in that character*, to the beneficial interest in the mortgage; besides, the only question in the case related to the *legal estate* in the lands (*d*). The position is opposed, too, by the established principle of equity, which considers the mortgagee as holding the land

Principle governing the cases.

(*a*) Strode *v.* Russell, 2 Vern. 621, 3 Ch. Rep. 169. 2 Vent. 851, 3 P. W. 61; [Casborne *v.* Scarfe, 1 Atk. 605 and n. by Sanders, 2 J. & W. 194.]
(*b*) 1 Rob. on Wills, 3d ed. 403. (*c*) 4 Ves. 147, stated post, p. 693.
(*d*) Mr. Roberts evidently confounds the two questions; his positions are applicable to neither.

[1] Lands held by the testator as mortgagee or trustee will pass by the usual general words in a will, unless it can be collected from the language of the will, or the purposes and objects of the testator, that the intention was otherwise. Ram on Assets, c 4, § 7. pp. 68, 69; Duke of Leeds *v.* Munday, 3 Ves. (Sumner's ed.) 348, note (*a*); 4 Kent, 538, 539; Jackson *v.* Delancy, 13 Johns. 537; Wall *v.* Bright, 1 Jac. & W. 494; Galliers *v.* Moss, 9 Barn. & C. 267; Braybroke *v.* Inskip, 8 Ves. 417; Lindsell *v.* Thacker, 12 Sim. 178; Heath *v.* Knapp, 4 Barr, 228. See Cogdell *v.* Cogdell, 3 Desaus. 346. But a gift of all the testator's right, title and interest in land held by him as mortgagee is a gift of personalty only, passing no title in the land. Martin *v.* Smith, 124 Mass. 111.

in a fiduciary character only, and the estate as still substantially belonging to the mortgagor. The person taking the mortgaged lands therefore by devise or descent, from the deceased mortgagee, it is obvious, is a trustee for the person * entitled to the money or *690 debt, by virtue of the will or otherwise (*e*), unless, of course, both these interests happen to unite in the same person.

Effect of devise of mortgaged lands on beneficial interest.

Nor is it, I apprehend, universally true, that an express devise of the lands, or (which seems to be the same in effect) a devise of all the testator's lands in a particular place, he having no other than mortgaged lands there, will carry the beneficial interest to the devisee, though the affirmative has been sometimes laid down in very unqualified terms (*f*).

Fact of the mortgagee being in possession.

It is observable that in the cases cited in support of the doctrine referred to, *the testator was in possession* at the time (*g*), and in most of them the operation of the devise was not called in question, the only point being as to the right of redemption. The fact of such possession, particularly where it has been of long continuance, and accompanied with acts of ownership, certainly strongly favors the supposition that the testator, in expressly devising the property, means to give the beneficial interest. Having himself enjoyed the property beneficially, he can hardly but intend that his devisee's enjoyment should be of the same nature, especially where it is given not to the devisee simply in fee, but to several persons consecutively for limited estates (*h*). The testator, too, may be ignorant whether the right of redemption, on which the nature of the property depends, be barred or not, and may therefore choose to avoid using any expressions which might be construed into a recognition of it (*i*). Indeed, in such cases there would be strong ground to contend that the beneficial interest would pass, even under a general devise of lands, especially if there were no other lands to satisfy the devise, a circumstance, however, which would be immaterial, in regard to a will which is governed by the *existing* law.

In Martin d. Weston *v.* Mowlin (*k*), Lord Mansfield held that a copyhold estate, of which the testator was in possession as mortgagee, did not pass under a devise of all his "lands, tenements and hereditaments, within and parcel of the manor of W.," the surrender to the use of the will referring to the property as subject to a condition of redemption and resurrender; and the will *containing a recital that the mortgagor stood indebted to him*, * and giving her time for payment of *691 the debt. It appeared, moreover, that the testator was seised of other lands, also surrendered to the use of his will, in the manor of W.

(*e*) Att.-Gen. *v.* Meyrick, 2 Ves. 44.
(*f*) 1 Pow. Mortg. Cov. Ed. 409.
(*g*) Clarke *v.* Abbott, 2 Eq. Ca. Ab. 606, Barn. Ch. Rep. 457. In How *v.* Vigures, 1 Ch. Rep. 32, this fact, though not stated, seems very probable, as the object of the suit was to foreclose. (*h*) Woodhouse *v.* Meredith, 1 Mer. 450.
(*i*) But now see Stat. 37 & 38 Vict. c. 57, s. 7. (*k*) 2 Burr. 977.

Beneficial interest in mortgage, held to pass under devise of lands in K.

In Woodhouse *v.* Meredith (*l*), Sir W. Grant held that the testator's beneficial interest in leasehold property at K., of which he was in possession as mortgagee, and of which an assignment in trust for sale had been executed to him, passed under a devise of all his freehold, copyhold and leasehold messuages, farms, lands and tenements whatsoever and wheresoever, in the county of H. *and the town of K.*, to various limitations, the testator having no other than the mortgaged lands at K., though the will contained a subsequent devise of all estates vested in him as mortgagee or trustee, but which was satisfied by other lands of which the testator was seised as mortgagee. The same observation applied to the bequest of securities for money, which also occurred (*m*).

It is observable that the M. R. considered, from the nature of the limitations and provisions in the will (which consisted of successive estates for life, with an estate interposed in trustees to preserve contingent remainders), that, if the property passed at all, it was the beneficial interest, and not the mere legal estate, which was disposed of.

Cases suggested in which devise of mortgage estate would not carry beneficial interest.

But cases might be suggested in which an express devise of lands, even by a mortgagee in possession, would not carry the beneficial interest; for instance, if the will contained a specific bequest of the mortgage debt, which would show that the devisee of the land was intended to be a trustee for the legatee. But it is clear that a general bequest of mortgages or securities for money would not have such effect (*n*), for, as such a bequest would pass after-acquired property of this description, the testator is not necessarily presumed to have any specific subject in his contemplation when he makes his will.

[In Bowen *v.* Barlow (*o*) an owner in fee demised a piece of land for a term of years to B., who assigned the term by way of mortgage to the lessor, and afterwards built four houses on the land. The lessor then made his will, and thereby devised his four freehold houses specifically on one set of trusts, and bequeathed his personal estate on another set; at his death he was in possession as mortgagee; and it was held *692 that the mortgage * debt was a distinct subject from the reversion, and did not pass by the devise, but by the bequest of personal estate: that the debt was charged on the term, that the term was merged at law, and that the testator had entered into possession, were immaterial facts, the equity of redemption remaining unbarred.]

Devise of land contracted to be sold, held not to pass benefit of the contract.

And here it may be observed, that a devise by a testator to his wife of an estate which he had "lately contracted to sell to A." has been held to be a mere devise of the legal estate, to enable her to carry the contract into execution, and did not entitle the devisee to the purchase-money (*p*).

(*l*) 1 Mer. 450. (*m*) But as to which see next note.
(*n*) See judgment of Lawrence, J., in Doe d. Freestone *v.* Parratt, 5 T. R. 652; and Lord Eldon's in Thompson *v.* Lawley, 2 B. & P. 314.
[(*o*) L. R. 11 Eq. 454, 8 Ch. 171.] (*p*) Knollys *v.* Shepherd, cited 1 J. & W. 499, ante, p. 56.

Upon the whole, it is clear that the proposition which states an express devise of mortgaged lands will carry the beneficial interest in the mortgage, must be received with some qualification.

Passes by word "mortgages."

That the benefit of a mortgage will pass by the word "mortgages," collocated with other personal chattels, is perfectly clear (*q*).

Charge when extinguished by union of character of mortgagor and mortgagee.

In conclusion of this branch of the subject, it may be observed, that where a person having a mortgage or other charge upon lands becomes himself entitled to the *inheritance* of the lands so charged, a question frequently arises between his representatives, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest occurs, whether the charge be kept on foot or not, it will be extinguished in equity by force of the presumed intention, unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him (*r*). But if a purpose beneficial to the owner can be answered by keeping the charge on foot, as if he be an infant, so that the charge would (under the old law allowing infants to bequeath personal estate) be disposable by him, though the land would not (*s*), or a beneficial use might have been made of it against a * subsequent incumbrancer (*t*), or the other creditors of the person from whom the party derived the onerated estate (*u*); in these and similar cases, equity will consider the charge as subsisting, although it may have become merged by mere operation of law (*x*).[1] *693

(*q*) Att.-Gen. *v.* Bowyer, 3 Ves. 714; Dicks *v.* Lambert, 4 Ves. 730.

(*r*) Price *v.* Gibson, 2 Ed. 115; Donisthorpe *v.* Porter, ib. 162, Amb. 600; Lord Compton *v.* Oxenden, 2 Ves. Jr. 261; [Johnson *v.* Webster, 4 D. M. & G. 474. The union of interest must happen in the lifetime of the party, and no other person must at that time have any interest in the charge, Tucker *v.* Loveridge, 1 Gif. 377, 2 De G. & J. 650; Wilkes *v.* Collin, L. R. 8 Eq. 338. General powers to appoint the land and the charge, which (in default) are respectively limited to the heirs and next of kin of the donee, do not produce the required union, Clifford *v.* Clifford, 9 Hare, 675.]

(*s*) Thomas *v.* Kemish, 2 Vern. 348, 1 Eq. Ca. Ab. 269, pl. 9.

(*t*) Gwillim *v.* Holland, July 29, 1741, cit. 2 Ves. Jr. 263.

(*u*) Forbes *v.* Moffatt, 18 Ves. 384; [Lord Clarendon *v.* Barham, 1 Y. & C. C. C. 688; Davis *v.* Barrett, 14 Beav. 542; see Wigsell *v.* Wigsell, 2 S. & St. 364. The relative values of the estate and such other charges will not generally be inquired into; but semb. the charges must be substantial, per Wood, V.-C., Richards *v.* Richards, Johns. 767.]

(*x*) See Sir W. Grant's judgment in Forbes *v.* Moffatt. [Those cases, where the charge and the inheritance become united by descent or devise, are to be distinguished from Greswold *v.* Marsham, 2 Ch. Ca. 170; Mocatta *v.* Murgatroyd, 1 P. W. 393; Toulmin *v.* Steere, 3 Mer. 210, as to which, see 1 Ll. & Go. 251, 1 D. M. & G. 244.]

[1] See 4 Kent, 102; James *v.* Johnson, 6 Johns. Ch. 417; James *v.* Morey, 2 Cowen, 246; Gardner *v.* Astor, 3 Johns. Ch. 53; Starr *v.* Ellis, 6 Johns. Ch. 393; Freeman *v.* Paul, 3 Greenl. 260; Gibson *v.* Crehore, 3 Pick. 475. In Savage *v.* Hall, 12 Gray, 363, 365, Mr. Justice Dewey, having cited Gibson *v.* Crehore, supra; Hunt *v.* Hunt, 14 Pick. 374; Freeman *v.* M'Gaw, 15 Pick. 82; and Brown *v.* Lapham, 3 Cush. 551, said that those cases fully sustained the right of the owner of the equity of redemption to be the assignee of the mortgage; that it may be transferred by a deed of quitclaim, and that such assignment, when thus taken, did not extinguish the mortgage. Merger was considered not to take effect where the manifest interest of the party taking such conveyance was to ac-

And the same rule obtains in favor of the creditors of the person in whom these interests centre (*y*). So, if mesne estates intervene between the charge and the estate of inheritance of the person entitled to it, the charge will subsist (*z*).

Operation of a general devise on legal estate.

II. We now proceed to consider the operation of a general devise on real estate vested in the testator as mortgagee or trustee. The rule at length established, after much fluctuation of authority, is, that such property *will* pass under a general devise of lands, unless a contrary intention can be collected from the testator's expressions, or from the purposes or limitations to which he has devoted the subject of disposition.[1] And it is clear that the circumstance of there being other property to which the devise is applicable, is no ground of exclusion.

Legal estate held to pass.

Thus, in an early case (*a*), it is laid down, that if a man had but the trust of a mortgage of lands in D. and had other lands in D., by a devise of all his lands in D. the trust would pass.

Ex parte Sergison.

In Ex parte Sergison (*b*), a mortgagee in fee devised all the rest, residue and remainder of his estate, both real and personal, and of what nature or kind soever and wheresoever, not thereinbefore specifically given, devised and bequeathed, to A., his heirs, executors, administrators and assigns, forever, on the side of his mother, and appointed A. executor. A. was an infant. On petition for an order for him to convey under stat. 7 Anne, c. 19, Sir R. P. Arden, M. R., was of opinion that the legal estate in the mortgaged lands passed by the devise, though, as the infant was executor, *694 and therefore entitled to the money, *he could not compel him to convey. Lord Loughborough also inclined to think that the estate passed by the devise; and it was stated at the bar that this corresponded with the opinion of Lord Northington and Lord Thurlow, who had overruled Lord Hardwicke's dictum in

Opinions of Lord Northington, Lord

(*y*) Powell *v.* Morgan, cit. 2 Vern. 208. See also Lord Northington's judgment in Donisthorpe *v.* Porter, 2 Ed. 162; [Pears *v.* Weightman, 2 Jur. N. S. 586.]

(*z*) Wyndham *v.* Earl of Egremont, Amb. 753. As to the evidence required to rebut the presumption of extinguishment, see Tyrwhitt *v.* Tyrwhitt, 32 Beav. 244, and cases there cited.

(*a*) Littleton's case, 2 Vent. 351. See also Marlow *v.* Smith, 2 P. W. 198.

(*b*) 4 Ves. 147.

quire the mortgage interest. Especially was the merger not to take effect when the interest of the party required that he should continue to hold his two different titles distinct to protect him against some other interest which might affect the two estates in case they were held to be merged. See New England Jewelry Company *v.* Merriam, 2 Allen, 390; Strong *v.* Converse, 8 Allen, 557; McCabe *v.* Swap, 14 Allen, 188, and the remarks of Mr. Justice Wells concerning merger on p. 191 of that case.

[1] See Jackson *v.* Delancy, 13 Johns. 537; Heath *v.* Knapp, 4 Penn. St. 228; Cogdell *v.* Cogdell, 3 Desaus. 346; 4 Kent, 538, 539; In re Packman, L. R. 1 Ch. D. 214; In re Brown, L. R. 3 Ch. D. 156; Martin *v.* Laverton, L. R. 9 Eq. 563. It was held in Gibbes *v.* Holmes, 10 Rich. Eq. 484, that under a devise by a mortgagee, not in possession, of mortgaged premises, the devisee takes the mortgage and all the securities by which the title to the premises is to be sustained. See Woods *v.* Moore, 4 Sandf. 579.

Casborne *v.* Scarfe (*c*). In the principal case, however, *the heir*, under the circumstances, was ordered to convey; the L. C. observing, that the infant devisee, when he was of age, might join, which would give a title *quâcunque viâ*. Thurlow, and Sir R. P. Arden.

In Att.-Gen. *v.* Buller (*d*), lands of which the testator was trustee were held *not* to pass under a devise whereby the testator, after devising for the payment of his debts and other moneys, his lands and hereditaments in very general terms, unto his sons J. B. and F. B. and their heirs, forever, added: "And all the rest and residue of my goods, chattels, rights, credits, *and all my real* and personal *estate not hereby before given*, devised and bequeathed, and all my right, property and interest therein, by law or equity, I do give, devise, and bequeath unto my sons J. B. and F. B." (*e*), whom also he appointed executors. Lord Loughborough assented to the statement at the bar, that the rule was that general words would *not* pass trust estates, unless there appeared to be an intention that they should pass: in allusion to which Lord Eldon, in Lord Braybroke *v.* Inskip (*f*), observed that he did not know, in his experience, of any case in which the proposition was laid down so strong one way or the other. The language of Lord Thurlow, in Pickering *v.* Vowles (*g*), notwithstanding what is said in Ex parte Sergison of his opinion, certainly seemed to favor the same doctrine. Att.-Gen. *v.* Buller. Decisions against the operation of general devise.

In Ex parte Brettell (*h*), too, Lord Eldon was of opinion, that an estate of which the testator was mortgagee in fee in trust for another person, did not pass under a devise of all the rest of his estate and effects whatsoever and wheresoever, and of what *nature or kind soever, unto G. H., his heirs, executors, administrators and assigns, forever, to and for his and their own proper use and behoof. Ex parte Brettell. *695

Of this case, however, it is sufficient to observe, that the very learned judge by whom it was decided warrants us in regarding it as no authority on the general question, his Lordship having, on a subsequent occasion (*i*), remarked that "it came on on petition, *and perhaps was not so attentively considered as the importance of the point required.*"

The preceding cases had left the subject in some degree of doubt.

(*c*) 1 Atk. 605. But it has been suggested that his Lordship may have referred to the beneficial interest (see Mr. Sanders's note); and, perhaps, in regard even to the legal estate, the position is not erroneous, as a devise, in the terms supposed, would confer only a life estate; and it has never been held that a general devise conferring less than a fee would operate to pass estates vested in the testator as mortgagee or trustee. Such a question, of course, is less likely to arise now that under a will made or republished since 1837, an unrestricted devise will carry the fee. [In Greenwood *v.* Wakeford, 1 Beav. 576, it was held that the legal estate of lands vested in a surviving trustee during the life of a married woman, passed by a devise of "all the lands and hereditaments vested in him as trustee or mortgagee in fee," the question apparently being whether the words, "in fee" referred as well to "trustee" as to "mortgagee."]

(*d*) 5 Ves. 340.

(*e*) The direction to pay debts, &c., it will be observed, does not extend to the latter devise.

(*f*) 8 Ves. 435, stated infra.

(*g*) 1 B. C. C. 197.

(*h*) 6 Ves. 577.

(*i*) 8 Ves. 434.

Rule finally established in Lord Braybroke *v.* Inskip.

But the present doctrine was finally established by Lord Braybroke *v.* Inskip (*k*), where real estate having been devised to trustees, upon trust to pay debts, and settle the estates to certain uses; the question was, whether the estate passed by the will of the heir of the surviving trustee, who gave and devised *all his real estates whatsoever and wheresoever, unto his wife G., her heirs and assigns, forever*, and gave all his personal estate to her; and appointed his said wife and B. executrix and executor. The heirs at law were two infants and a married woman. Lord Eldon held that the legal estate passed by the will. After reviewing the cases, he stated the rule to be, that *trust estates would pass under a general devise, unless it could be collected, from expressions in the will, or purposes or objects of the testator, that he did not mean that they should pass.*[1] In this case he observed there was no one circumstance to cut down the effect of the devise.

Trust estates will pass under a general devise containing nothing inconsistent.

It seems that Lord Loughborough, notwithstanding the opinion expressed by him in Att.-Gen. *v.* Buller, concurred in the rule laid down in the last case (*l*).

It should be noticed that Lord Eldon, in the course of his judgment in Lord Braybroke *v.* Inskip, frequently adverts to, and even lays some stress upon, the circumstance of the heirs at law being under a disability to convey, and the consequent inconvenience of permitting the legal estate to descend to them; and more than once observes, that the *quantum* of convenience is to be estimated on each will. This ingredient, it is submitted, would render the rule most difficult of general application. If the "weighing of inconveniences" were to be made on every particular will (the relative situation of the heir and devisee being thrown into the scale), it would be impossible in any case to ascertain the effect of such a general devise without evidence of these facts, and * where such evidence was inaccessible (as it inevitably must be in regard to wills occurring in the early period of a title), the operation of the devise must always be uncertain; and, moreover, the facts, when discovered, might present such an apparent balance of inconveniences, as to render it difficult to say on which side they preponderated. Besides, if the inquiry as to the relative situation of the devisee and heir refer, as it necessarily must, to the period of the *making* of the will, it is obvious that such an alteration may have taken place in that situation, between the period in question and the death of the testator, as would render the application of such a test not only not beneficial, but actually mischievous, even in the particular cases for the sake of which the general inconvenience attendant on a fluctuating and uncertain rule is to be

Lord Braybroke *v.* Inskip.

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(*k*) 8 Ves. 417. (*l*) 8 Ves. 437.

[1] 4 Kent, 538, 539; Jackson *v.* Delancy, 13 Johns. 537.

incurred. But such a principle of construction, it is conceived, is inconsistent with authority, no less than with general convenience; since all the cases which state the rule to be that trust estates will pass under a general devise, unless the purposes be inconsistent, decisively negative the introduction of any additional circumstances into the subject of consideration. To engraft such a qualification is to change the rule. It is at variance, also, with the principle on which Lord Eldon, in one instance (*m*), disclaimed making the coverture and infancy of devisees a ground for holding that they took beneficially, and not as trustees. In fine, his observations in Braybroke *v.* Inskip seem to be merely thrown in to give additional weight to a judgment which, independently of any such reasoning, stands upon irrefragable grounds, and has (we shall see) governed the subsequent decisions upon this subject.

Bainbridge *v.* Lord Ashburton.

Thus, in Bainbridge *v.* Lord Ashburton (*n*), where the surviving trustee under a will, after devising certain specific real estates to various persons, gave and devised all his real estates, not thereinbefore otherwise disposed of, unto his godson, his heirs, executors, administrators and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit. It was held that the trust estate passed under the devise: Alderson, B., remarked (in reference to Lord Eldon's reasoning in Ex parte Brettell) that it would be a very minute distinction to draw any line between the words "benefit" and "behoof."

Reservation of power of appointment.

* It is clear that the fact of the testator having reserved to the devisee a power of appointment does not constitute a ground for excluding trust estates. Thus, in Ex parte Shaw (*o*), where the devise was in the following words: "I give, devise and bequeath unto my dear wife Ann, to hold to her my said wife, her heirs, executors, administrators and assigns, according to the nature and quality thereof respectively, for all my estate and interest therein, to and for her own absolute use and benefit, *and to be disposed of by her, by deed, will or otherwise, as she my said wife may think fit;*" and the testator appointed his wife sole executrix: Sir L. Shadwell, V.-C., held that an estate vested in the testator as trustee passed by this devise. *697

What will exclude trust estates from a general devise.

The converse of the rule established by the preceding cases is equally clear; namely, that if the property comprised in the general devise be subjected to the payment of debts, legacies, annuities, or any other species of charge (*p*), or the will contain any limitations or provisions to which it cannot be supposed

(*m*) King *v.* Denison, 1 V. & B. 275, supra pp. 571, 572.

(*n*) 2 Y. & C. 347; [and see Sharpe *v.* Sharpe, 17 L. J. Ch. 384, 12 Jur. 598; Langford *v.* Auger, 4 Hare, 313.]

(*o*) 8 Sim. 159; [but *qu.* was any power created?]

(*p*) Wynne *v.* Littleton, 2 Ch. Rep. 51, 1 Vern. 3. (but as to this see 1 Cov. Pow. Mortg. 414); Roe d. Reade *v.* Reade, 8 T. R. 118; Ex parte Morgan, 10 Ves. 101; [Rackham *v.* Siddall, 16 Sim. 297, 1 Mac. & G. 607; Hope *v.* Liddell, 21 Beav. 183; Re Bellis' Trusts, 5 Ch.

Charges of debts, executory limitations, &c., will exclude trust estates.

that the testator intended to subject property not beneficially his own, as uses in strict settlement (*q*), or executory limitations (*r*); or a trust for sale (*s*), [or for a charity (*t*), or for the separate use of a married woman (*u*), or for an unascertained class (*v*); or words of severance making the devisees tenants in common, with a clause of accruer amongst them (*x*),] the mortgage or trust lands will *not* pass. [And considering the inconvenience *698 arising from the devolution of a trust estate in shares * it would seem that the words of severance alone are sufficient to exclude it from a general devise (*y*).]

And it is wholly immaterial whether the testator has other lands to which the devise can be applied or not; for in these cases the courts have not adopted the principle applicable to reversions, that, where there are other lands, to which the inconsistent limitations can be referred, they apply exclusively to those lands, *reddendo singula singulis* (*z*).

Devise confined to mortgages in which the devisor had the beneficial interest.

In Ex parte Morgan (*a*), Lord Eldon held, that lands of which the testator had merely the legal estate, as heir at law of the preceding mortgagee, did *not* pass under a devise to trustees of "all such real estates as are now vested in me by way of mortgage, the better to enable them my said trustees, and the survivor of them, and the executors and administrators of such survivor, to *recover, get in and receive the principal moneys and interest*, which may be due thereon."

The rule under consideration, of course, does not deny the power of a testator to limit estates vested in him as mortgagee or trustee to uses in strict settlement or in any other manner equally inconsistent with a due regard to the testator's duty as mortgage creditor or trustee: it merely refuses to see an intention so to do in a general devise. Should a testator unequivocally devise an estate vested in him as mort-

D. 504. The foregoing are cases of trust estates. The following are cases of mortgage], Duke of Leeds *v.* Munday, 3 Ves. 348; Re Horsfall, M'Clel. & Y. 292; [Doe d. Roylance *v.* Lightfoot, 8 M. & Wels. 553; Re Packman and Moss, 1 Ch. D. 214. As to Re Stevens' Will, L. R. 6 Eq. 597, *vide post*, p. 701.]

(*q*) Thompson *v.* Grant, 4 Mad. 438; Att.-Gen. *v.* Vigor, 8 Ves. 276; overruling Ex parte Bowes, cited 1 Atk. 605, n., by Sanders, where Lord Hardwicke held that a general devise of real estate in S. K. and M. and elsewhere in England to certain uses, under which an infant was then entitled to an estate tail, passed the legal estate in lands of which the devisor was mortgagee in fee; [but see Burdus *v.* Dixon, 4 Jur. N. S. 967, where the testator had attempted to make the mortgaged property his own, by a pretended sale to another, who was a trustee for the testator, and the legal estate was held to pass notwithstanding the uses and trusts.

(*r*) Per Lord Eldon, Braybroke *v.* Inskip, 8 Ves. 434.]

(*s*) Re Marshall, 9 Sim. 555.

[(*t*) Att.-Gen. *v.* Vigor, 8 Ves. 276.

(*u*) Lindsell *v.* Thacker, 12 Sim. 178. See, however, per Kindersley, V.-C., Lewis *v.* Mathews, L. R. 2 Eq. 181.

(*v*) Re Finney's Estate, 3 Gif. 465.

(*x*) Thirtle *v.* Vaughan, 2 W. R. 632, 24 L. T. 5; Martin *v.* Laverton, L. R. 9 Eq. 563.

(*y*) Martin *v.* Laverton, L. R. 9 Eq. 568, per Malins, V.-C. Ex parte Whiteacre, 1 Sand. Uses, 359, n. is sometimes cited *contra*, but the devise contained the words "mortgages and securities," as to which *vide infra*.

(*z*) 5 Ch. D. 508, notwithstanding 3 Ch. D. 156.]

(*a*) 10 Ves. 101. [And see Re Smith's Estate, 4 Ch. D. 70; Re Morley's Will, 10 Hare, 293.

gagee or trustee in the manner suggested, the intention must prevail;[1] and it would be left to the persons who may become damnified by such a proceeding to obtain satisfaction out of the estate of the deceased testator (*b*).[2]

Words "mortgages" and "securities for money" pass the legal estate.

Whether lands held by a testator as mortgagee will pass by the words "mortgages" or "securities for money" has been the *subject of much controversy. The affirmative was supposed to have been decided in the early case of Cryps *v.* Grysil (*c*); and although on an examination of the record (*d*), it appeared that the will contained, in addition to the word "mortgages," other expressions more unequivocally applying to the land, [yet the *ratio decidendi* was that the word "mortgages" made a good devise of the lands. And it is now settled] that the words "mortgages," "securities for money," and similar expressions, will comprise the entire benefit of the mortgage security (including the inheritance in the lands (*e*)), unless a contrary intention appears by the context; [and that the fact of those words being found among terms descriptive exclusively of personal estate (*f*) and followed by a limitation to executors and administrators only, and not to heirs, or by a charge of debts and legacies (*g*), or a trust for sale (*h*), or for several as tenants in common (*i*), will not affect the construction. The broad principle is, that the testator meant to substitute the object of his bounty in his own place as mortgagee, and to enable him to enforce payment of the mortgage money by giving him the legal estate in the mortgaged lands (*j*).[3]

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But further, in Doe d. Guest *v.* Bennett (*k*), where a testator made

(*b*) If, after a contract for sale, but before completion, the vendor dies leaving an infant heir, or having by will, executed before the date of the contract, devised the estate to a person incompetent to convey, the vendor's estate will not have to bear the costs of the suit rendered necessary to complete the conveyance, Hanson *v.* Lake, 2 Y. & C. C. C. 328; Hinder *v.* Streeton, 10 Hare, 18, 16 Jur. 650; Re Manchester and Southport Railway Company, 19 Beav. 365; Bannerman *v.* Clarke, 3 Drew. 632: overruling Prytharch *v.* Havard, 6 Sim. 9; Midland Counties Railway Company *v.* Westcomb, 11 Sim. 57; Eastern Counties Railway Company *v.* Tuffnell, 3 Rail. C. 133. But if *after* contract to sell the vendor execute such a will, the costs of suit will be thrown on his estate, Wortham *v.* Lord Dacre, 2 K. & J. 437; Purser *v.* Darby, 4 K. & J. 41.]

(*c*) Cro. Car. 37.

(*d*) See 9 B. & Cr. 282.

[(*e*) Before as well since the stat. 1 Vict. c. 26, see Renvoize *v.* Cooper, 6 Mad. 371; Silberschildt *v.* Schiott, 3 V. & B. 49, per Sir W. Grant; Re Walker's Estate, 21 L. J. Ch. 674; Knight *v.* Robinson, 2 K. & J. 503; Rippen *v.* Priest, 13 C. B. N. S. 308; but the old case of Wilkinson *v.* Merryland, Cro. Car. 449, is *contra*.

(*f*) Renvoize *v.* Cooper, 6 Mad. 371; Re King's Mortgage, 5 De G. & S. 644.

(*g*) Re Field, 9 Hare, 414; Re King's Mortgage, 5 De G. & S. 644; Rippen *v.* Priest, 13 C. B. N. S. 308; Knight *v.* Robinson, 2 K. & J. 503.

(*h*) Ex parte Barber, 5 Sim. 451.

(*i*) Ex parte Whiteacre, Rolls, 22 July, 1807, 1 Sand. Uses and Trusts, 359, n.

(*j*) The special grounds relied on in Ex parte Barber, 5 Sim. 451, and Mather *v.* Thomas, 6 Sim. 115, were therefore not essential. Sylvester *v.* Jarman, 10 Pri. 78, and Galliers *v.* Moss, 9 B. & Cr. 267, are overruled: so is Ex parte Gorfett, 19 L. J. Ch. 173, 14 Jur. 53, unless it can be distinguished on the ground that the security was in the form of a trust for sale, *sed qu.*

(*k*) 6 Exch. 892.

[1] Jackson *v.* Delancy, 13 Johns. 537.

[2] Ib.

[3] See Mather *v.* Thomas, 10 Bing. 44.

Devise "that A. shall receive money on mortgage," or "on securities."

his will as follows: "I leave my wife *to receive* all monies upon mortgages and on notes out at interest, and at her decease I leave my niece to pay my wife's debts and to take all that remains of my property, land or personal property;" the Court of Exchequer held that the wife took the legal estate in the mortgaged property. Parke, B., said: "The words 'to receive all moneys upon mortgage,' in my opinion, pass the security, that is, the legal estate on which the money was secured. It must be assumed that the testator intended the wife to receive the money and to possess all the powers necessary for the purpose of re-
*700 * covering it; and therefore she is entitled to bring ejectment for that purpose." Alderson, B., was of the same opinion, adverting also to the devise to the niece of all that remained of the property, land or personal property, as implying that the wife was to have the whole of that which was devised to the niece in remainder.

And in Re Arrowsmith's Trusts (*l*), a mortgagee in fee devised to a trustee all his real and personal estate in trust, after payment of his debts and funeral expenses, to permit his wife to receive the rents of his real estate and the interest of all sums due on mortgage, bond, note or other security, for her life, and at her death *to get in* all debts owing to him on any security and to pay a legacy to his son A.; and on the death of the wife, the testator gave a certain house and the residue of his real and personal estate to his son B.; it was held by K. Bruce and Turner, L. JJ., that the legal estate in the mortgaged property passed to the trustee, that construction being necessary to give full dominion over the mortgaged estate for the purpose of carrying into execution the trusts of the will. K. Bruce, L. J., said: "I take occasion to express my entire concurrence in the judgment of Parke, B., in Doe *v.* Bennett."

Sir R. Kindersley, however, held that the legal estate did not pass by a gift of "money in the funds and on securities." He thought Doe *v.* Bennett was distinguishable; but if it was meant that a legatee who was to receive the money was also to take the legal estate, he could not concur (*m*). If that principle were to be carried out it would apply to a case where a testator merely left his personal estate to his executors, it being obviously his intention in that case that they should receive the mortgage money (*n*). But hitherto the principle has been confined to cases where the intention has been expressed.

Gift of "money on securities."

As already stated, a general devise of real estate on trust for sale will not include the legal estate in mortgaged property (*o*). But where the real and personal estates are devised and bequeathed together, expressly in trust to sell and get in, the trustees cannot execute these trusts as regards the personalty

Gift of real and personal estates, in trust to sell and get in.

(*l*) 27 L. J. Ch. 704, 4 Jur. N. S. 1123.
(*m*) But see per Grant, M. R., Silberschildt *v.* Schiott, 3 V. & B. 49.
(*n*) Re Cantley (or Cautley), 17 Jur. 124, 22 L. J. Ch. 391. (*o*) Ante, p. 697.

without having dominion over the mortgaged estate; and, though it has never been so held, there is a strong inclination to say that the express trust to sell and get in the *personalty* neutralizes the *restrictive effect which the trust for sale would otherwise *701 have upon the devise of real estate, and to hold that thus the latter devise carries the mortgaged estate (*p*).

But a gift of the real and personal estate charged (as in Re Arrowsmith's Trusts) with debts, or charged with debts and legacies, but not aided by express mention of "mortgages," or "securities," nor by express trust to sell and get in the personalty, will not include the mortgaged estate. Thus, in Doe d. Roylance *v.* Lightfoot (*q*), where a mortgagee devised all his real and personal estates after payment of his debts and legacies to A. and B. as tenants in common in fee; it was held, that the legal estate did not pass by the will, on the ground that the testator could not have intended that estates should pass of which he was seised only as mortgagee, but only those which he had power to subject to his debts and legacies, namely, those which were equitably as well as legally his own.

Gift of real and personal estate subject to debts.

A decision which at first sight seems opposed to this was made in Re Stevens' Will (*r*), where a mortgagee in fee directed all her debts to be paid: she then gave several pecuniary legacies, and as to all the rest and residue of her real and personal estate and effects, she gave the same to J. for her own absolute use and benefit; and appointed other persons executors. The course which the case took deserves notice. On one side it was argued that the charge of debts and legacies affected the testator's own estates and no others (*s*), and therefore did not prevent the legal estate in the mortgaged property passing to J. On the other side this *was not disputed*, so far as concerned the charge of debts; but it was contended that the charge of legacies, being in a different form (*t*), was enough to prevent the legal estate passing; and for this Doe *v.* Lightfoot was cited. But Sir G. Giffard, V.-C., fastening on the admission respecting the charge of debts, decided that the legal estate passed to J. He said: "The charge of legacies is the point insisted on as being a reason why the legal estate should not pass. I quite agree that in this will there is enough to charge both the debts and legacies *on the testa- *702 trix's own real estate, but *if* the charge of debts would not prevent the legal estate in the mortgaged property passing, so neither would the charge of legacies. The modern authorities have extended the cases in which the legal estate in a mortgage has been held to pass.

Re Stevens' Will.

(*p*) See per Jessel, M. R., Lysaght *v.* Edwards, 2 Ch. D. 515, and Re Smith's Estate, 4 Ch. D. 72 ("whatever might have been the case if the mortgage money had belonged to the testator in his own right"); and per Shadwell, V.-C., Ex parte Barber, 5 Sim. 455, where however the word "securities" occurred.

(*q*) 8 M. & W. 553. The statement of the devise is taken verbatim from the report. The tenancy in common was not adverted to.

(*r*) L. R. 6 Eq. 597.

(*s*) The contrary is settled, ante, p. 698.

(*t*) Ex rel.

Here, subject to the charge of debts and legacies, there is an absolute gift to J. I am not precluded by authority from holding that the legal estate passed in this case; and I do not hesitate to say that *in a case such as this* good sense and convenience require that a beneficial gift should carry the legal estate in a mortgage as an incident and a useful and necessary incident to the beneficial ownership. There may be cases where a trust estate would not pass, and yet there would be a plain intention that the legal estate in a mortgage should pass. I am of opinion that on this will there was an intention that the legal estate in the mortgage should pass, and there is nothing to rebut this intention." The V.-C. recognized no distinction between one form of charge and another: so that, it being admitted that the charge of debts did not prevent the legal estate passing, it followed that the charge of legacies had not that effect. *In a case such as that*, Doe *v.* Lightfoot did not preclude him from holding that the legal estate passed. The decision depends on the word "if."

Since Re Stevens' Will the authority of Doe *v.* Lightfoot has been fully recognized (*u*); and in Re Packman and Moss (*x*), where a mortgagee gave and bequeathed all his property, real and personal, to trustees (whom he appointed executors) upon trust, first, to pay debts, and as to the residue on certain trusts for his wife and children, Sir G. Jessel decided that the legal estate did not pass, on this, among other grounds, that the testator's debts could only be paid out of his own property.]

Mortgage terms, when included in a general devise.

Hitherto the point of construction under consideration has been viewed in reference to mortgages *in fee*. With respect to mortgages for terms of years, it is conceived they fall under the principle established by Ross *v.* Bartlett (*y*), that leaseholds for years will not, under the old law, pass by a general devise of lands, unless the testator have no freeholds on which it might operate. If there be no such lands, or the will be subject to the new law, and if the devise contain nothing inconsistent, and there be no specific bequest which will carry the legal interest in the *703 * mortgage term, it is clear that such interest will pass under a general devise. The question, however, could hardly arise on the mere legal interest, since it would vest primarily in the executor, or the administrator *cum testamento annexo*, as part of the testator's personal estate, and it is unlikely that the legatee would claim his assent to the bequest, unless there was ground to contend, that the bequest included the beneficial interest.

Rule as to copyholds.

Estates of copyhold tenure, held by the testator in the character of mortgagee or trustee, are not distinguishable from freeholds, in regard to the effect of a general devise, whether the will

(*u*) By Jessel, M. R., Re Bellis' Trusts, 5 Ch. D. 509.
(*x*) 1 Ch. D. 214. See also Re Horsfall, M'Cl. & Y. 292.]
(*y*) See ante, p. 668.

is subject to the old or new law; supposing, of course, that its antiquity is not such as to exclude it from the operation of the act of 55 Geo. 3, c. 192, which first dispensed with the necessity of a surrender to the use of the will, in regard to testators dying after the passing of the act.

As to devises of lands contracted to be sold by testator.

It has been sometimes a question, how far the principle which governs the construction of devises of lands, vested in a testator as mortgagee or trustee, applies to property which, belonging to him beneficially, he has contracted to sell. In such cases [it is argued], the testator is, in the event of the contract being carried into effect, a trustee for the purchaser: but as this may not happen, and consequently the property may remain unconverted, the trust is of a qualified and contingent nature.[1] It has been decided (*z*), however, that if a testator, *after* having contracted for the sale of an estate, devises it as, All that his estate called A., which he had contracted to sell, the effect is to vest in the devisee the legal estate only, for the purpose of enabling him to carry the contract into effect for the benefit of the executor, *and does not entitle the devisee to the purchase-money.* It is conceived, however (though the point did not arise in the case referred to), that if from any circumstances the contract had proved not to be binding on or had been rescinded by the testator, the devisee would have been entitled to the land, and this (as already hinted) constitutes a difference between the case, and that of a dry mortgage and trust estate, which renders the construction that has been applied to the latter, to a certain extent, inapplicable to the former. Thus, in Wall *v.* Bright (*a*), where a testator, after having contracted for the sale of an estate, devised all his freehold and other his real and leasehold hereditaments and all his personal estate to trustees, upon trust to * sell and dispose *704 of his said hereditaments and personal estate, with the usual powers to give discharges to purchasers, and to invest the purchase-money and hold the funds on certain trusts, Sir T. Plumer, M. R., held, that the contracted-for property passed by the devise: "Though there is a great analogy," he said, "in the reasoning with respect to the will of a naked trustee and that of a constructive trustee, on the ground of the impropriety of their attempting to dispose of the estate; yet for many purposes they stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could, therefore, never have contemplated a disposition of it as his own.[2] In that respect he does not resemble one who

Difference between a vendor and a *mere* trustee.

(*z*) Knollys *v.* Shepherd, cited 1 J. & W. 499, [Sug. Law of Prop. 223.]
(*a*) 1 J. & W. 494.

[1] See 1 Sugden, Vend. and Purch. c. 4. § 1, subsec. 38, *et seq.*; Laws *v.* Bennett, 1 Cox, 167; 14 Ves. 596; Ripley *v.* Waterworth, 7 Ves. 436; Seton *v.* Slade, ib. 265, and note; Craig *v.* Scobie, 3 Wheat. 563, 577; Postell *v.* Postell, 1 Desaus. 173.

[2] Land of which the testator is seised as a naked trustee will not pass by a devise of "all his real estate, whatsoever and whereso-ever," if the purposes of the devise, as to sell and distribute the proceeds, are inconsistent with the trust. Merrit *v.* Farmers' Fire Ins.

has agreed to sell an estate, that, up to the time of the contract, was his. There is this difference at the outset, that the one never had more than the legal estate, while the other was, at one time, both the legal and beneficial owner, and may again become the beneficial owner, if anything should happen to prevent the execution of the contract: and, in the interim between the contract and conveyance, it is possible that much may happen to prevent it. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and provided nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay; he may become bankrupt, then the contract is not performed, and the vendor again becomes the absolute owner; here he differs from a naked trustee, who can never be beneficially entitled. We must not, therefore, pursue the analogy between them too far." . . . "The safest way is to hold that the estate passes, adhering to the words, there not being enough to take it out of them."

Remarks upon Wall *v.* Bright.

In this case, the construction adopted by the court was very convenient, as it enabled the devisees, in performance of the testator's contract, to convey the estate to the purchaser, which otherwise would have descended to an infant, who, in the then state of the law, could not, even with the aid of the Court of Chancery, have made an effectual conveyance to the purchaser. Still, it is to be remembered, that a trust for sale was no less inappropriate to property which had been actually sold, than a devise in strict settlement, or any other such limitations would have been, though, as it confers on the trustees an estate in fee, it happened to be more convenient; and much of the reasoning of *the M. R. would have applied, if the devise had been such as to have rendered it impossible for the devisees, without the aid of the court, to make an effectual conveyance to the purchaser. He does, however, more than once advert to the convenience attending the construction in the particular case; and the prudent practitioner, knowing the influence which such considerations, whether acknowledged or not, do often exert in questions of this nature, will hesitate too readily to assume the application of the same doctrine to cases in which a different result would follow. Nor, indeed, does it seem to be altogether inconsistent with sound principles of construction, especially that rule which has been the subject of discussion in the present chapter, that the fact of the devise being such as to enable the devisee to carry the testator's contract into effect or not, should have some weight in determining whether it was intended to apply to the property (*b*).

*705

(*b*) But in such case the purchase-money would be payable not to the trustees by virtue of the devise, but to the executors as part of the personal estate of the testator, [Eaton *v.* Sanxter, Co., 2 Edw. Ch. 547. But a devise of all the residue of the testator's estate is competent to pass a naked trust, of which there is no disposition in the will, and where there is nothing in the will, or in the circumstances of the case, from which a contrary intent can be inferred. Den d. Wills *v.* Cooper, 25 N. J. 137.

[But, as pointed out by Sir G. Jessel (*c*), if the contract is a valid one, binding on both parties, and continues such at the time of the vendor's death, no subsequent event can affect the question; the property is converted, and the vendor is a constructive trustee; not a bare trustee, for he has a beneficial interest left in him, viz. a lien or charge on the estate for the security of the purchase-money (*d*), but still a trustee. Therefore, where (*e*) a testator by his will, dated 1873, devised all his real estate to A. and B. on trust to sell, and devised the real estate which at his death might be vested in him as trustee to A., and afterwards * entered into a valid contract to sell part *706 of his real estate, it was held by Sir G. Jessel, M. R., that this part passed by the devise of trust estates. He acquiesced in the decision in Wall *v.* Bright, because, viewing the testator as being entitled to the estate simply as a security for his purchase-money, he thought the trustees could not execute the trusts expressly annexed to the personal estate unless they had the legal estate; but he dissented from Sir T. Plumer's definition of the position of a vendor pending the completion of the contract. The sole question was, did a valid contract exist at the testator's death; if the title proved bad, he agreed there was no conversion and no trust; but that was because in contemplation of equity there was in that case no valid contract (*f*); but whether the purchaser was able to pay or not was immaterial; if a contract valid at the vendor's death was cancelled for non-payment of the purchase-money after his death, or for any other cause not affecting the original validity of the contract, the conversion was not therefore undone or the consequent trusteeship annulled.

If the contract is valid at the vendor's death, he is a trustee.

Lysaght *v.* Edwards.

But where the purchase has been completed by payment of the purchase-money and delivery of possession, though the deed of conveyance has not passed the legal estate, the vendor is in the position of a bare trustee, and there is no difficulty in holding that a general devise of lands by the vendor in a

Distinction where purchase-money paid and possession given.

6 Sim. 517; so that this construction (as was observed by Jessel, M. R., 2 Ch. D. 520) could not be maintained where the proceeds of the real estate and the personal estate were given beneficially to different persons.

(*c*) 2 Ch. D. 507.

(*d*) In Goold *v.* Teague, 5 Jur. N. S. 116, it was held that such a lien did not pass by a bequest of securities for money. But the case is questioned. Sug. V. & P. p. 684.

(*e*) 2 Ch. D. 499. *Purser* v. *Darby.* — In Purser *v.* Darby, 4 K. & J. 41, the testator, after contracting to sell an estate, specifically devised it, so that, of course, it could not pass by a devise of his mortgage and trust estates contained in another part of the will. But it was said by Wood, V.-C., that he had held — and the decision had been since affirmed — "that where there is merely a constructive and not an express trust, a devise of trust estates does not supersede the necessity of a decree." The decision referred to by the V.-C. appears not to be reported. The meaning of the dictum is supposed by Jessel, M. R., to be only that where a person under disability would take the estate if the contract were not established in a court of equity, there the purchaser cannot safely complete without establishing the validity of the contract by decree, 2 Ch D. 511. And generally a vesting order will not be made under the trustee acts without suit. Re Carpenter, Kay, 418. But it is otherwise where the purchase-money has been paid, Re Cuming, L. R. 5 Ch. 72; Re Crowe's Mortgage, L. R. 13 Eq. 26; Re Russell, 12 Jur. N. S. 224. In the last case reliance was also placed on the sale being compulsory; *sed qu.*

(*f*) But assuming the purchaser to know this, he might very well be in doubt whether he had an enforceable title, and might therefore make his will with a dubious aspect.

manner inconsistent with his duties as trustee (charged, for instance, with the payment of his debts) will not include the legal estate (*g*).]

Effect on devise by mortgagee, of subsequent foreclosure.

Where a mortgage in fee is foreclosed subsequently to the making of a will, it is clear that the equity of redemption so acquired will not pass by a will made before and not republished on or since the 1st of January, 1838; and it has been determined, that the period of foreclosure is the date of the final order of the court, following default of payment on the day appointed, and not the date of the decree (*h*).[1] But though the equity of redemption *subsequently* acquired by foreclosure will not pass by the will, it is clear that the devise of the *legal estate* takes effect, notwithstanding the mere acquisition of the equity of redemption, by this or any other means. Where, however, such equity is purchased by the mortgagee, and he and the mortgagor in the usual manner join in conveying *707 the property to a releasee * to uses to prevent dower, for the benefit of the former, the devise, being in a will which is subject to the old law, will be revoked (*i*).

In one instance (*j*) Sir W. Grant held, that an estate devised after foreclosure passed by a description applicable to it only as a mortgage; on the ground that the intention, though inaccurately expressed, appeared upon the whole will to give the interest in the land. And Sir L. Shadwell, V.-C., came to the same conclusion, upon the same devise (*k*). This was simply a question of intention, as the testator might of course, if he chose, continue to describe it as mortgaged property; and it would pass, unless an intention appeared that the devisee should be entitled only in case it retained its mortgage character. [But a mere general devise of "all estates whereof he is seised as mortgagee," by a testator, who afterwards purchases the equity of redemption, shows no such intention. The result here is ademption (*l*).]

Inquiry whether equity of redemption be barred, material, when.

It is obvious that the question, whether lands are comprised in a general devise, must frequently depend on the fact, whether the testator had or had not at the time acquired the equity of redemption by length of possession and non-recognition of any adverse title (*m*). A question of this kind occurred on the will of Sir George Downing (*n*); and it was

(*g*) Dimes *v.* Grand Junction Canal Company, 9 Q. B. 490, 3 H. L. Ca. 794.]
(*h*) Thompson *v.* Grant, 4 Mad. 438.
(*i*) Antè, p. 155. (*j*) Silberschildt *v.* Schiott, 3 V. & B. 45.
(*k*) Le Gros *v.* Cockerell, 5 Sim. 384.
[(*l*) Yardley *v.* Holland, L. R. 20 Eq. 428.]
(*m*) Now see stat. 3 & 4 Will. 4, c. 27, s. 28, and 1 Vict. c. 28; 2 Hayes's Introd., 5th ed. 275 and 282; [37 and 38 Vict. c. 57, s. 7.]
(*n*) Att.-Gen. *v.* Bowyer, 3 Ves. 714, 5 Ves. 300; Att.-Gen. *v.* Vigor, 8 Ves. 256. [See also Burdus *v.* Dixon, 4 Jur. N. S. 967, ante, p. 697, n.]

1 See Brigham *v.* Winchester, 1 Met. 390; Ballard *v.* Carter, 5 Pick. 115; Fay *v.* Cheney, 14 Pick. 399; Dewey *v.* Van Deusen, 4 Pick. 19; Swift *v.* Edson, 5 Conn. 531; Van Waggenen *v.* Brown, 26 N. J. 196.

held, that lands comprised in a certain old mortgage in fee, purchased by the testator, passed under a general devise; it being considered, that from the length of possession, under the circumstances, a release of the equity of redemption was to be presumed.[1] As to mortgages in fee (before 1 Vict. c. 26);

With respect to mortgages for years the question would be somewhat different; the point, if material at all, being, whether the equity of redemption was acquired, not at the date of the will, but at the testator's decease; since they would pass under a bequest of property of that denomination to which they belonged at the latter period. Thus, suppose a will to contain a bequest of mortgages to A., and of leasehold generally to B., a mortgage for years, which was redeemable at the date of the will, and which would at that period have passed under the former bequest, having become, by continued possession *in the lifetime of the testator*, or by express contract, irredeemable, * would, by this change in the nature of the property, pass under the bequest of the leaseholds. Such, it may be collected, was the opinion of Lord Eldon, in Att.-Gen. *v.* Vigor (*o*); and it seems necessarily to result from the acknowledged principle, that a general bequest of chattels of a particular species, carries all the chattels of that kind, which the testator is possessed of at the time of his decease. And the same principle, of course, would apply even to mortgages in fee, if the will containing the devise in question were made or republished on or since the 1st of January, 1838. —mortgages for years; *708 —in fee (since 1 Vict. c. 26).

[By the Vendor and Purchaser Act, 1874, it is enacted (s. 4) that the legal personal representative of a mortgagee of freeholds or of copyholds to which the mortgagee has been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption or an assurance upon trust; and by s. 5 (as amended by the Land Transfer Act, 1875, s. 48), upon the death of a bare trustee, intestate as to any corporeal or 37 & 38 Vict. c. 78, ss. 4, 5. 38 & 39 Vict. c. 87, s. 48.

(*o*) 8 Ves. 276.

[1] It was held in Dexter *v.* Arnold, 3 Sumn. 152, that the general rule in equity is, that twenty years' exclusive possession by a mortgagee is a bar to the equity of redemption. But courts of equity will allow the redemption of a mortgage, under peculiar circumstances, even after the lapse of more than twenty years. The acts of a mortgagee within twenty years, admitting the title to be a mortgage, are sufficient to keep open the equity. So, also, are solemn recitals and acknowledgments of the mortgage, in deeds and other written transactions with third persons. See upon the general subject 4 Kent, 186, 187; Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Kane *v.* Bloodgood, 7 John. Ch. 90; Slee *v.* Manhattan Co., 1 Paige, 48; Lamar *v.* Jones, 3 Harr. & M'H. 328; Elmendorf *v.* Taylor, 10 Wheat. 168; Hughes *v.* Edwards, 9 Wheat. 497, 498; Crittenden *v.* Brainard, 2 Root, 485; Martin *v.* Bowker, 19 Vt. 526; Gunn *v.* Brantley, 21 Ala. 633; Richmond *v.* Aiken, 25 Vt. 324; Haskill *v.* Bailey, 22 Conn. 569; Robinson *v.* Fife, 3 Ohio St. 557; Coates *v.* Woodworth, 13 Ill. 654; Field *v.* Wilson, 6 B. Mon. 479; Shadwell N. C. 6 Sim. 378; 2 Story Eq. Jur. § 1028, *a. b.*; Ayres *v.* Waite, 10 Cush. 72; Phillips *v.* Sinclair, 20 Me. 269; Blethen *v.* Dwinal, 35 Me. 556; Hurd *v.* Coleman, 42 Me. 182; Gates *v.* Jacob, 1 B. Mon. 306; Cromwell *v.* Banks &c., 2 Wall. Jr. 569.

incorporeal hereditament of which he was seised in fee-simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.

As regards a mortgagee, this act is confined to the single case of payment of the debt; it does not enable the legal personal representative to convey or surrender in case of a transfer (*p*). The effect of the mortgagee's will on the legal estate will therefore still come frequently in question. As regards trust estates, the act applies only when a bare trustee dies intestate. His legal personal representative takes his estate, and not merely (like the representative of a mortgagee) power to convey it. If there is no representative, the estate descends in the mean time to the heir (*q*).

Effect of the acts; as to mortgagees; as to trustees.

"Bare trustee" is not a term of art, but it has been decided to mean one who has no beneficial interest in the trust estate, and, therefore, to exclude a vendor before payment of the purchase-money (*r*). It would also seem to exclude a trustee with active duties which have not been performed, and the performance of which has not been effectually dispensed with (*s*).]

Who is a "bare" trustee?

*709 *III. A devise of estates vested in the testator as trustee or mortgagee is [commonly] found in [modern] wills. 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 (*t*). [But the reasons given for the supposition are not entirely satisfactory. They are, first, that there are many cases in which it would be highly inconvenient that the trust estate should be permitted to descend to the heir, as where he is infant, lunatic or bankrupt. Secondly, it is said that if the heir (or *hæres natus*) is trusted to perform the fiduciary duties, why should not the devisee (or *hæres factus* (*u*)) be equally trusted; both being equally unknown to the author of the trust, and the one being by no possibility the object of personal confidence any more than the other?

Whether trusteeship passes to devisees of trust estates.

An argument of this nature was urged without success in the leading case of Cole *v.* Wade (*x*), where a testator gave his real and personal estate to A. and B. (whom he appointed his executors), their executors, administrators and assigns, in trust for such of his relations as they should think proper; and declared that, resting

Cole *v.* Wade.

[(*p*) Re Brooks' mortgage, 46 L. J. Ch. 865.
(*q*) Christie *v.* Ovington, 1 Ch. D. 279. (*r*) Morgan *v.* Swansea, 9 Ch. D. 582.
(*s*) Per Hall, V.-C., 1 Ch. D. 281; but Jessel, M. R., doubted whether a trustee without interest was not a bare trustee, although he had active duties to perform, 9 Ch. D. 585.
(*t*) It is also said that the rule in Braybroke *v.* Inskip, ante, p. 695, supposes the same thing; and that if it is wrong for a trustee to devise his trust estate, the courts were wrong in reading a general devise, uncontrolled by the context, as including such an estate.
(*u*) But this term is unknown to the English law. Hogan *v.* Jackson, Cowp. 305.
(*x*) 16 Ves. 27, affirmed 19 Ves. 424; see also Att.-Gen. *v.* Doyley, 2 Eq. Ca. Ab. 194; Fordyce *v.* Bridges, 2 Phill. 497.

perfectly satisfied with the honor and justice of his said trustees and executors, he wished everything relative to that disposition, as well who were his relations as in what proportions they should take, should be entirely in the discretion of the said trustees and executors, and the heirs, executors and administrators of the survivor of them; and for the better division of his estate he directed his trustees and executors and the survivor of them, and the heirs, executors and administrators of such survivor, if they should think proper, to sell or mortgage the estates or such parts thereof as they in their discretion should think proper: and the testator further directed the said A. and B., or the survivor of them, or the heirs, executors or administrators of such survivor, to convey and pay the whole to his relations in manner aforesaid within a stated time. The surviving trustee devised and bequeathed the real and personal estates of the first testator to C. and D. upon the existing * trusts. Sir W. Grant, M. R., held that C. *710 and D. were not competent to exercise the discretionary power of selection and distribution given by the first will: that the power did not pass with the estate; and that it was only *quasi personæ designatæ* that it could go to the heir. He observed that it was said the words were to be understood in the same sense as in the limitation of an estate, and imported that the person taking the estate should also exercise the discretionary power: but the testator had not said so.

The question has generally arisen upon trusts or powers of sale which, though to some extent discretionary (*y*), partake largely of a ministerial character.

Thus] in Cooke *v.* Crawford (*z*), where 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 survivor or survivors 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.

Cooke *v.* Crawford.

Devisee of trust estate held unable to make a title to a purchaser.

(*y*) See Clarke *v.* The Panopticon, 4 Drew. 29; Lewin, on Trusts, Ch. II., where Fearne, P. W. 313, is cited *contra.*]

(*z*) 13 Sim. 91.

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 the vendor's testator was an unauthorized act. ["It is plain," he said, "that the persons whom the surviving trustee has thought proper to appoint to execute the trusts of the testator's will, are persons *711 to whom no authority was given * for that purpose by the testator; and there is no case in which a person not mentioned by the party creating the trust has been held entitled to execute it." He observed, that the testator had not used the word "assigns" in the clause creating the trust for sale, and concluded by saying that he saw no difference between a conveyance by act *inter vivos* and a devise, and that his own decision in Bradford *v.* Belfield (*a*), if acquiesced in, and if not, then the authority of Townsend *v.* Wilson (*b*) was binding on the point.]

This case contradicts previous opinions and practice, and goes to establish a rule most inconvenient in its operation. [But its operation is narrowed by the distinction pointed out by the V.-C., and since generally adopted, between cases where the testator has expressly empowered the "assigns" of the trustee to perform the trusts, and those where he has not. Thus in Titley *v.* Wolstenholme (*c*), where real and personal estate was devised to A., B. and C., their heirs, executors, administrators and assigns, upon certain trusts; and it was declared that the trusts should be performed by the said trustees, and the survivors and survivor of them, his or her heirs and *assigns*. The surviving trustee devised the trust estates: and upon the distinction furnished by the word "assigns," Lord Langdale, M. R., held, that the trust estates were well vested in the devisee *upon the trusts of the original will*, and therefore refused to appoint new trustees in their place.

Titley *v.* Wolstenholme.

Devisee held competent where trusts to be executed by the trustee and his *assigns*.

In Mortimer *v.* Ireland (*d*), a testator appointed A. and B. executors and trustees of his property (which appears to have been entirely personal); B. survived A., and by will gave to C. all the trust property, upon the trusts declared by the first testator, and appointed C. and D. his executors. Sir J. Wigram, V.-C., and upon appeal (*e*), Lord Cottenham, decided that the appointment of C. as trustee was unauthorized, and, upon the application of the *cestuis que trustent*, ordered the appointment of new trustees. The L. C. said:

Mortimer *v.* Ireland.

(*a*) 2 Sim. 264, where 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 had conveyed the estate. [But Lord Langdale, M. R., drew a distinction between such an assignment and a devise, infra p. 715.]

(*b*) 1 B. & Ald. 608, 3 Mad. 261; this case decided that a *power* of sale reserved to three persons and *their heirs* was not well executed by two survivors.

[(c) 7 Beav. 425.

(*d*) 6 Hare, 196.

(*e*) 11 Jur. 721, 16 L. J. Ch. 416.

"Whether the property is real or personal estate is no matter; for suppose a man appoints * a trustee of real and personal estate *712
simpliciter, adding nothing more, this cannot make his representative a trustee. The case before the M. R. was quite different, for there the court proceeded on the intention manifested, that the trusts should be performed by the assigns of the survivor. The property may vest in the representative, but that is quite another question from his being trustee. The testator may select the heir to succeed to the trust, but he only can do so. Here, then, are two persons appointed trustees; both die; thus there is no trustee, and it is for the court to appoint new ones. The testator having given no indication, the court must refer it to the Master."

In Ockleston *v.* Heap (*f*), a testator appointed A. and B. executors and trustees, and gave all his real and personal estate to his said trustees, their heirs, executors, administrators and assigns, upon trust to sell and dispose thereof at their discretion; and he declared that "the receipts of his trustees or their survivor should be sufficient," and declared the trusts of the proceeds. A. renounced and disclaimed; and B. by will devised all trust estates vested in him to C. and D.; and the *cestui que trusts* took proceedings for the appointment of new trustees on the ground that it was doubtful under Cooke *v.* Crawford whether the devisees of B. could act in the trusts. Sir J. K. Bruce, V.-C., said: "What I should have done if Titley *v.* Wolstenholme had come before me, I need not say, nor am I sure. I think that in the present case there must be a decree for the appointment of new trustees in the usual form." Ockleston *v.* Heap.

No reasons for this opinion are reported. The devise being to the trustees, "their heirs and assigns" followed immediately by the words "upon trust to sell" seemed to authorize a sale by the same persons, including the assigns, as were named in the devise. The power of giving receipts, it is true, was confined to the trustees or the survivor; but although powers or trusts for sale, given to heirs, have not been extended to assigns by the mention of assigns in the receipt clause (*g*), it has never been held that the principal trust or power is to be restricted by the accessory. The V.-C.'s disparaging allusion to Titley *v.* Wolstenholme is neutralized by his own question respecting the word "assigns" in the case next stated, and is outweighed by the decision in Hall *v.* May (*h*), where Sir W. P. Wood, V.-C., decreed * specific performance against a purchaser from the devisee, the original trust containing the word "assigns." Remark on Ockleston *v.* Heap. *713

(*f*) 1 De G. & S. 640.

(*g*) Townsend *v.* Wilson, 1 B. & Ald. 608; Hall *v.* Dewes, Jac. 190; Bradford *v.* Belfield, 2 Sim. 264.

(*h*) 3 K. & J. 585. See also Ashton *v.* Wood, 3 Sm. & Gif. 436. In Hall *v.* May, there was a power to appoint new trustees, which the V.-C. thought strengthened the conclusion drawn from the word "assigns" that the devisee was competent to execute the trust for sale. On the word "assigns," see further, Saloway *v.* Strawbridge, 1 K. & J. 371, 7 D. M. & G. 594.

In Wilson *v.* Bennett (*i*), the devise was to A., B. and C., their heirs, executors and administrators, upon certain trusts; and "the said trustees and the survivors or survivor of them, his heirs, executors or administrators," were empowered to sell. C. survived his co-trustees, and devised the property to D. and E., who contracted to sell: but Sir J. K. Bruce, V.-C., held, that their title was too doubtful to force upon a purchaser, and asked whether there was any case deciding that "heirs" included "assigns." It was afterwards discovered that D. was the heir at law of C., and the case was then brought before Sir J. Parker, V.-C., who held that the title was still bad, on the ground that the testator intended the power or trust to be executed by the person who had the estate, whereas this had been devised away from D. the heir, to D. and E. He said Cooke *v.* Crawford stood upon the ground that a trust cannot be delegated to persons not contemplated in its original creation (*k*). This was followed in Macdonald *v.* Walker (*l*) by Sir J. Romilly, M. R., who said however that the doctrine of Cooke *v.* Crawford was a most inconvenient one, and involved this consequence, that, if since the Wills Act (*m*) the surviving trustee devised the trust estate to his heir, though he was the very person contemplated, and had the estate, yet he could not exercise the trust because he took the estate by devise and not by descent.

Wilson *v.* Bennett.

Macdonald *v.* Walker.

In Re Burtt (*n*), where leaseholds were bequeathed to A. and B., *their executors and administrators*, upon trust to dispose of the rents and profits as directed by the will, and after the death of A. the surviving trustee bequeathed all estates vested in him as trustee to M. and N. to hold upon the same trusts, and appointed his wife and M. and N. executors: it was held by Sir R. Kindersley, V.-C., that neither M. and N. alone as trustees, nor M. and N. jointly with the wife executrix, could exercise the trusts. He said the testator had himself declared that his executors as such should not be trustees, and by the bequest had *taken away the legal estate* from those who ought otherwise to have been the trustees.

In re Burtt.

*714 * With respect to this case it will be noticed that until assent the trust estate vested in the executors and executrix. Being, then, the persons contemplated by the founder of the trust, and having the estate duly vested in them, were they not competent to act as trustees? Could it rest with the surviving trustee to say that, although thus qualified, they should not act? However, executors could not generally be advised to answer these questions themselves, and to withhold their assent, without the direction of the court.

Remark on Re Burtt.

In Stevens *v.* Austen (*o*), the will was a close counterpart of the will

(*i*) 20 L. J. Ch. 379, 15 Jur. 912. (*k*) 5 De G. & S. 475. (*l*) 14 Beav. 556.
(*m*) *Qu.* Inheritance Act? ante, p. 75. (*n*) 1 Drew. 319.
(*o*) 30 L. J. Q. B. 212, dub. Blackburn, J., who observed that all the cases in Chancery had been attempts to force the title on a purchaser.

in Cooke *v.* Crawford, and the surviving trustee having devised the trust estate, the devisee contracted to sell it. In an action by the purchaser to recover his deposit, it was held in Q. B. that the court was bound by previous decisions, and that the word "assigns" being omitted from the original trust, the devisee could not make a good title. Stevens *v.* Austen.

The cases therefore support, but certainly do not extend, the doctrine of Cooke *v.* Crawford; and, though it was suggested in the last case that a Court of Error might take a different view, the lapse of time since the doctrine was first admitted would be a serious objection to reversing it now. Result of the cases.

In modern wills, the trust is generally made exercisable by the assigns as well as by the heir of the trustee; a course which obviates the somewhat delicate question whether a devise by a trustee whose assigns are not so authorized is a breach of trust. In Cooke *v.* Crawford, Sir L. Shadwell said: "It is plain that when C. (who had become the sole trustee), thought fit to devise the legal estate that was vested in him, he did an act which he was not authorized to do. And here I must enter my protest against the proposition, which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is, that it is not beneficial to the testator's estate that he should be allowed to dispose of it to whomsoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend; for in so doing he acts in accordance with the devise made to him. If he devises the estate, I am inclined to think that the court, if it were urged so to do, would order the costs of getting the legal estate out of the devisee to be borne by * the assets of the trustee (*p*). I see no substantial distinction between a conveyance by act *inter vivos* and a devise; for the latter is nothing but a *post-mortem* conveyance; and if the one is unlawful, the other must be unlawful." But Lord Langdale thought otherwise. In his opinion, there was a clear distinction between a trustee conveying away the trust estate and relieving himself of the trust of his own authority during his own life, and assigning it by way of devise, which took effect only when there must be a transmission of the estate to some one not personally trusted by the author of the trust, and when, but for the devise, it might vest in infants, married women, bankrupts or persons out of the jurisdiction. He could not see his way to the conclusion that, in the case contemplated (*q*), a devise by the trustee was a breach of trust (*r*). Sir J. Parker, V.-C., propounded (*s*) a narrower and Whether it be a breach of trust to devise trust estates where the devisees cannot exercise the trusts. *715

(*p*) *Qu.* whether this would set matters right, see dictum of Romilly, M. R., Macdonald *v.* Walker, cited ante, p. 713.
(*q*) *I.e.* the case of a trust to be executed by A. "or his heirs."
(*r*) 7 Beav. 435. (*s*) 5 De G. & S. 479.

more difficult rule, viz. that the question in every case was whether the devise was in accordance with the title under which the trustee held; it might often be the duty of a man in such circumstances, having the legal estate, to take care that it did not vest in a lunatic, or in a person out of the jurisdiction, or in any other person who ought not to be a trustee, and for that purpose to devise it. The safest course for the trustee would be that taken in Beasley *v.* Wilkinson (*t*), where the devise was of all trust estates "which he could devise without breach of trust."]

(*t*) 13 Jur. 649; but the original trusts are not reported, except, shortly, that they were for sale.]

*CHAPTER XXII. *716

WHAT GENERAL WORDS CARRY REAL ESTATE.

I. *Words* "Estate" *and* "Property," *and other such Terms — where restrained by Association with more limited Expressions to Articles* ejusdem generis.
II. *Where not restrained by such Association.*
III. *Whether restrained by Collocation with Executorship.*
IV. *Whether restrained by the Nature of Limitations.*
V. *General untechnical Words held to pass Lands.*
VI. *Words descriptive of Personalty only, held, by force of Context, to include Real Estate.*

I. It is obvious that the question, whether real estate passes under a devise, cannot occur, unless the testator has either used terms not properly and technically descriptive of such property, or else, though using terms properly applicable thereto, has created doubt by their position, or their improper use in other parts of the will. General expressions, when collocated with words descriptive of personal estate, are sometimes restrained by that association to subjects of the same species, agreeably to the maxim *noscitur a sociis;* and accordingly we find many instances, *especially among the early authorities*, in which the word *estate*, and other such terms clearly capable, *viribus suis*, of comprehending real estate (*a*), have been restrained by the context to personalty.[1]

Words "estate," "property," &c., capable of carrying real estate.

Restrained by association with personalty in following cases.

(*a*) Barnes *v.* Patch, 8 Ves. 604.

[1] See Bullard *v.* Goffe, 20 Pick. 257; Birdsall *v.* Applegate, 1 Spencer, 244; Clark *v.* Hyman, 1 Dev. 382; McChesney *v.* Bruce, 1 Md. 347. The word "estate" is generally sufficient to pass land. Deering *v.* Tucker, 55 Me. 284; Godfrey *v.* Humphrey, 18 Pick. 537; Putnam *v.* Emerson, 7 Met. 333. But where a testator made a will in which personal property only was mentioned, and there remained some not specifically bequeathed, and there were no words showing an intention to devise all his estate, it was held that a devise giving to B. "all the residue of his furniture and *estate*, whatever and wherever it was," did not give the real estate. Bullard *v.* Goffe, 20 Pick. 252. See Dole *v.* Johnson, 3 Allen, 364: Ingell *v.* Nooney, 2 Pick. 362. However, the term "property" or "estate" will in general embrace both realty and personalty, and will be construed to describe the quantity of interest, or the subject of it, or both, as may be required by the context of the will. Priester *v.* Priester, 13 Rich. 361; Turbett *v.* Turbett, 3 Yeates, 187; Jackson *v.* Delancey, 11 Johns. 365; Jackson *v.* Merrill, 6 Johns. 191: Godfrey *v.* Humphrey, 18 Pick. 539. Thus, it appeared in a recent case that a lady had died seised of personal and real estate. Some of the realty she had bought, and the rest thereof with personalty she had received under a will of her brother. She made a will, in which she constituted A. her "residuary legatee," and proceeded as follows: Of "the property bequeathed me by my brother, and the property I have in expectation from my sister, and any other property that may come into my possession, I will and bequeath" to A. one fourth, and the rest to others. The court decided that it was the intention of the testatrix to dispose of both her real and personal estate, notwithstanding the fact that she had mentioned the property received from her brother as "bequeathed," and had made A. her "residuary

"Goods, chattels, leases, *estates, mortgages,*" &c.

Thus, in Wilkinson *v.* Merryland (*b*), one having lands in A., B. and C., the latter being a forfeited mortgage in fee, devised the lands in A. and B. to several persons and their heirs, and legacies to other persons; and then devised all the rest of his goods, chattels, leases, *estates*, *mortgages*, debts, ready money, plate and other goods whereof he was possessed, unto his wife, after his debts and legacies were paid, and made her executrix. It was urged, that the fee-simple in the lands in C. passed by the words "estates" and "mortgages." But the court (Croke, Jones and Berkeley) were of opinion, [without deciding the point,] that these words, being coupled with personal things, must have *717 meant estates and mortgages for years, and rather by * reason of the words "whereof I am possessed" (*c*), which were applicable more properly to personal than to real estate.

"*Estate*, goods and chattels."

So, in Cliffe *v.* Gibbons (*d*), Lord Cowper expressed an opinion, that a devise of all the testator's "*estate*, goods and chattels," did not pass land where there had been no mention of land before; but that it did where land had been devised in a preceding part of the will. The former proposition is clearly inconsistent with several decisions, particularly Tanner *v.* Morse (*e*), and Doe d. Wall *v.* Langlands (*f*), stated in the sequel.

"Estate and chattels, real and personal."

In Marchant *v.* Twisden (*g*), a testator, after bequeathing several pecuniary legacies, devised thus: "All the rest and residue of my *estate* and chattels, *real* and personal, I give and devise to my wife, whom I make to be my executrix." The Lord Keeper held that the lands did not pass; for, in the first part of the will, the testator having given only legacies, and not lands, by the residue of his "estate" must be intended estate of the same nature as that before devised. The devise was, as if he had said, "all the rest of my estate, whether chattels real or personal."

Remark on Marchant *v.* Twisden.

No case has gone so far as this in restraining the word *estate*. Nothing was more obvious than to consider the word "real" as applying to "estate," and "personal" to "chattels," corresponding as they respectively do in local order; and such,

(*b*) Cro. Car. 447, 449, Sir W. Jones, 380.
(*c*) But, as to these words, see Hogan *v.* Jackson, Cowp. 299; Pitman *v.* Stevens, 15 East, 505; Noel *v.* Hoy, 5 Mad. 38; [Davenport *v.* Coltman, 12 Sim. 588; Evans *v.* Jones, 46 L. J. Ex. 280 (all stated post); Warner *v.* Warner, 15 Jur. 141; Stokes *v.* Salomons, 9 Hare, 81.]
(*d*) 2 Ld. Raym. 1326 [2 Eq. Ca. Ab. 301, pl. 17.]
(*e*) Cas. t. Talb. 284, post, s. 2.
(*f*) 14 East, 370, post, s. 2.
(*g*) Gilb. Eq. Ca. 30, [1 Eq. Ca. Ab. 211, pl. 22.]

legatee." Laing *v.* Barbour, 119 Mass. 523. See also Doe *v.* Lainchburg, 11 East, 290; Doe *v.* Morgan, 6 Barn & C. 512; Edwards *v.* Barnes, 2 Bing. N. C. 252; Hardacre *v.* Nash, 5 T. R. 716; Day *v.* Daveson, 12 Sim. 200; Evans *v.* Crosbie, 15 Sim. 600; Davenport *v.* Coltman, 9 Mees. & W. 481. When the words "property" and "estate" have been held to be limited to personalty, it has been where there were qualifying words, or where these general terms were so connected or mixed with words expressing only things personal as to limit their meaning. Hunt *v.* Hunt, 4 Gray, 190, 193. See further as to the word "estate," Ewin *v.* Park, 3 Head, 713; Terry *v.* Wiggins, 47 N. Y. 512; Taylor *v.* Dodd, 58 N. Y. 335; Archer *v.* Deneale, 1 Pet. 585.

it is confidently apprehended, would be the construction of the devise at this day. Indeed, in subsequent cases, the real estate, we shall see, has been held to pass by words of far inferior force (*h*).

The next authority for the restricted construction is Doe d. Bunny *v.* Rout (*i*), where the words of the will were as follows: "I devise my just debts of every sort, with my funeral expenses, to be paid and properly discharged by my executrix hereinafter named; and subject thereto I give and bequeath unto my sister A. R. all my stock in trade, household goods, wearing apparel, ready money, securities for money, *and every other thing, my property, of what nature or kind soever*, to and for her own proper use and disposal;" and the testator appointed A. R. * executrix. The Court of C. P. held, that an intention *718 to pass land could not be clearly collected from these words.

"Stock in trade, &c. and every other thing, *my property*, of what nature or kind soever."

It deserves notice, that in the three last cases, in which the words "estate," and "property," were confined to personal estate, in consequence of the *society* in which they were found, there was no preceding devise or mention of real estate; a circumstance which, though not conclusive, was in each instance adverted to, and has generally been considered as having weight in the exclusion of real estate, by demonstrating that the testator had not property of that species in his contemplation when he made his will.

As to fact of will containing no other mention of real estate.

In Woollam *v.* Kenworthy (*k*), however, the word "estate" in a residuary clause was restricted to personal property, by the controlling effect of the context, although the will contained a specific devise of lands. The testator, after devising a fee-farm rent to trustees, upon formal trusts for sale, and directing his household furniture, &c., to be sold, declared, as to the money to arise from the sale of the rent thereinbefore devised in trust to be sold, as also the moneys to arise from the sale of his household furniture, &c., "*and from all other his estate and effects, of what nature or kind soever, and wheresoever*," that the same should be chargeable with his legacies; and the residue divided into shares, which the testator bequeathed to various persons. There was the usual authority to the trustees to give receipts to the purchasers *of the fee-farm rent*. [It will be observed that there was no actual devise or direction for sale of the "estate," and] Lord Eldon, after premising that the question whether the words "all my estate and effects" will include real estate or not, depends, first, on the immediate context of the will, secondly, on the general form and scheme of the will as

Words "estate and effects" restricted to personalty by the context.

(*h*) Hogan *v.* Jackson, Cowp. 299; Hopewell *v.* Ackland, 1 Com. 164; Huxtep *v.* Brooman, 1 B. C. C. 437; Pitman *v.* Stephens, 15 East, 505, all stated post. (*i*) 7 Taunt. 79.

(*k*) 9 Ves. 137. [In Sanderson *v.* Dobson, 1 Ex. 141, the word "estate" was held to be restricted by the context; but the Court of C. P. held *contra*, 7 C. B. 81, and this was followed by Wood, V.-C., Dobson *v.* Bowness, L. R. 5 Eq. 404, same will.]

demonstrating the intention, held, that the testator who had actually devised certain real estate to trustees upon particular trusts for sale, could not be understood to mean that another estate should be clothed with the same trusts in the hands of the heir, by the mere insertion of the word "estate."[1]

In Bebb *v.* Penoyre (*l*), real estate was held not to be included in a devise of *the rest and residue*, on the ground of the restraining *719 effect of the immediate context, although there was a * previous devise of land in the same will. The testator, after various devises and bequests, concluded his will in the following words: "I order the lease of my house, with all the furniture (except the eight worked chairs), to be sold, and *all the rest and residue* to be divided among the four daughters of A., share and share alike; and I appoint C. and D. executors." It was contended, that the reversion in fee (*m*) of a moiety of certain houses devised by the will for the life of the devisee, passed by the words "rest and residue." But Lord Ellenborough thought that these words, in the place in which they stood, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate. He considered the division ordered was to be made by the executors immediately afterwards named.[2]

"Rest and residue" held not to include real estate, notwithstanding previous devise of land.

In the two next cases the general words were followed by an enumeration of particulars, which were held to be explanatory and restrictive of the prior expressions. Thus, in Timewell *v.* Perkins, where (*n*) a testator devised in these words: "All those my freehold lands, with the messuages, &c., now in the occupation of L., and all other the rest and residue and remainder of my *estate*, consisting in ready money, plate, jewels, leases, judgments, mortgages, *or in any other thing whatsoever or wheresoever*, I give unto A. H. and her assigns forever." In the preamble of the will occurred the clause, "as touching the [temporal(*o*)] estate with which it hath pleased God to bless me, I dispose thereof as follows." The question was, whether land not described in the will passed under the residuary clause. Fortescue, J., held that it did not, relying on the analogy of the case to Wilkinson *v.* Merryland.

"Estate" followed by an enumeration of particulars explanatory and restrictive of it.

In the case just stated, there was a preceding specific devise of land;

(*l*) 11 East, 160. [But see now Attree *v.* Attree, L. R. 11 Eq. 280; Smyth *v.* Smyth, 8 Ch. D. 561.]

(*m*) As to the operation of these words to carry a fee, see Ch. XXXIII. s. 4.

(*n*) 2 Atk. 102; see also Doe *v.* Rout, 7 Taunt. 79, ante, p. 717.

[(*o*) As to this word see Tanner *v.* Wise, 3 P. W. 295.]

1 See Birdsall *v.* Applegate, 1 Spencer, 244.

2 But in a case where the testator used the following words: "I direct that all the remainder of the rents, profits, and residue of my estate, be divided between A., B., and C.," it was held that the premises in question, being a four-acre lot not specifically disposed of, passed to the devisees. Den *v.* Drew, 2 Green, 68.

but the intention to confine the word "estate" to personalty was inferred from the subsequent explanatory words of description; which, however, were themselves followed by expressions scarcely less strong than many which have been held sufficient to include real estate (*p*). Timewell *v.* Perkins is unquestionably a strong case, and has generally been much relied upon as an authority for the restricted construction on subsequent occasions.[1]

Remark on Timewell *v.* Perkins.

* So, in Roe d. Helling *v.* Yeud (*q*), where a testator, after giving certain legacies [added "Item, I give to A., B., C., D. and E., whom I appoint my executors], and to whom I give *all the remainder of my property whatever and wheresoever*, to be equally divided amongst them, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, debts, and demands, or any I may hereafter make by codicil to this my will, all my goods, stock, bills, bonds, book debts and securities in the Witham Drainage, in Lincolnshire, and funded property." The question was whether real estate passed. The court held that it did not; considering that the enumeration at the end of the clause was explanatory of the words "remainder of my property" (*r*).[2] *720

"Property" restrained by subsequent explanatory particulars.

Timewell *v.* Perkins, and Roe *v.* Yeud, were much relied upon by Gibbs, C. J., in Doe *v.* Rout (*s*), already stated.

[It is a wholly different question, where a will contains two distinct devises, either of which would alone be sufficient to carry the property, under which of the two it shall be held to pass. Thus in Chapman *v.* Prickett (*t*), where a testator entitled to copyholds, which he had surrendered to the use of his will, devised his "freehold messuages stock in the funds money and debts and all shares or *property* of which he might die possessed or entitled to" to trustees in trust to pay the rents of his freeholds and leaseholds and the dividends of his stock and shares to his wife for life, and afterwards to make division by sale or otherwise of his said freeholds, and to transfer all stock or shares his property estate and effects equally among his children. By codicil he devised his *copyhold* estate to his wife for a term, and afterwards directed it to be sold "for the benefit of his children as directed by the will," but did not actually devise the copyhold to the trustees. It was held that no estate in the copyholds passed to the trustees by

Copyholds excluded from a gift of "property" by subsequent disposition of "copyholds."

(*p*) See Hopewell *v.* Ackland, 1 Com. 164 [and Wilce *v.* Wilce, 7 Bing. 664], stated post.
(*q*) 2 B. & P. N. R. 214. ["It seems that the words beginning 'whom I appoint,' and ending with 'this my will,' are to be construed as included in a parenthesis." Ib. 215, n.
(*r*) But observe the tone of Eord Ellenborough's remarks on this case in Doe *v.* Langlands, 14 East, 373.] (*s*) 7 Taunt. 79, ante, p. 717.
[(*t*) 6 Bing. 602. See also Acheson *v.* Fair, 3 D. & War. 512, which is analogous to Wilde *v.* Holtzmeyer, 5 Ves. 811.

1 See Bullard *v.* Goffe, 20 Pick. 252, 257.
2 See Godfrey *v.* Humphrey, 18 Pick. 539; Jackson *v.* Housel, 17 John. 281.

the word "property" in the will.[1] Tindal, C. J., observed that the general effect of the disposition of the copyhold by the codicil was the same as that of the freehold which had already passed by the will, viz., that the wife of the testator should receive the rents and profits during her life, and after her death a sale should take place and a *721 division be * made among the children. So that the disposition of the copyhold made by the codicil was unnecessary, except upon the supposition that the testator thought he had not disposed of it by the will.

And it has been elsewhere noticed as an established rule that a gift once clearly expressed in a will shall not be cut down by ambiguous expressions contained in a codicil. It was mainly on this principle that in Molyneux *v.* Rowe (*u*), a devise of "real estate" to A. was held not to be affected by a codicil by which the testator gave "all his estate, household furniture, linen, china, and all other his personal property" to B.]

Clear gift of realty in will not cut down by gift of "estate, furniture," &c., in codicil.

II. But it is not to be inferred from the preceding cases, that the words *estate* and *property*, and others of the like import, when accompanied by words descriptive of personal estate merely, are by that association invariably restricted to property *ejusdem generis*.[2] On the contrary, the presumption generally is against such a construction, as it supposes the testator to use words in another sense than that which judicial construction has given to them, and frequently in a sense which is fully expressed in the context, and therefore renders them inoperative. It should be observed, however, that the circumstance of there being other words adequate to carry the whole personal estate, always affords an argument for making the words under consideration include land, since the contrary construction reduces them to silence; an argument upon which, it will be seen, great stress was laid by Lord Hardwicke, in Tilley *v.* Simpson (*x*), stated in the sequel. But it must be remembered that the fact of the word being wanted to give completeness to the disposition of the personal estate, does not raise so strong an argument in favor of the restrictive construction: since there is no reason why a testator should not have used the words for both purposes (*y*).

Estate, property, &c., when *not* restricted to personalty.

(*u*) 8 D. M. & G. 368, diss. Turner, L. J.] (*x*) 2 T. R. 659, n., post, p. 722.

[(*y*) Kindersley, V.-C., laid down the rule generally, that if the other words were not sufficient to comprise the whole personal estate the word "estate" would not embrace realty, D'Almaine *v.* Moseley, 1 Drew. 632; but although Lord Hardwicke's remarks in Tilley *v.* Simpson certainly favor this doctrine, the modern cases are founded on a principle which is inconsistent with it; see particularly Lord Brougham's judgment in Mayor of Hamilton *v.* Hodsdon, 6 Moo. P. C. C. 76, 11 Jur. 193; and Scott *v.* Alberry, Com. 337, stated p. 722, is an express decision to the contrary.]

1 See Brown *v.* Dysinger, 1 Rawle, 408.

2 Clark *v.* Hyman, 1 Dev. 382. The words "my property," where there are no other words to explain or control them, are sufficient to pass all the real and personal estate of the testator. Jackson *v.* Housel, 17 Johns. 281. See Den *v.* Payne, 5 Hayw. 104. "All my property of every description," carries money, choses in action, and everything of which the testator has a right to dispose. Hurdle *v.* Outlaw, 2 Jones, Eq. 75. See Howland *v.* Howland, 100 Mass. 222.

The following cases seem fully to sustain the position, that to warrant the confining of the word "estate" and other such expressions to personal estate, there must be a clear indication of * an intention in the will so to confine them; *722 for where this indication has been wanting, or has been less clear than in the preceding cases, the words have been held to be used in their proper, *i.e.* their unrestricted sense.[1]

Cases in which general words have been held to be unrestricted.

Thus, in Terrell *v.* Page (*z*), where the testator bequeathed certain legacies, and devised some lands, and then devised as follows: "All the rest and residue of my money, goods, and chattels, *and other estate whatsoever*,[2] I give to J. S., whom I make my executor;" it was held that the lands not previously devised passed under the latter clause.

"Money, goods, and chattels, *and other estate.*"

So, in Scott *v.* Alberry (*a*), where the testator, "as touching the worldly estate it had pleased God to bestow" upon him, devised in these words: "I give to my cousin T. S., all that my parcel of land lying in W. A. Item, I give to my said cousin T. S., my wearing apparel, linen, books, *with all other my estate whatsoever and wheresoever*, not hereinbefore given and bequeathed; and him, the said T. S., I make the sole executor of this my will for performing the same." The question was, whether the reversion in fee in the lands in W. A., before devised to T. S. (*b*), which were copyhold surrendered to the use of testator's will, passed under the latter devise; and it was held that it did.

"Wearing apparel, &c., *with all other my estate.*"

Again, in Tilley *v.* Simpson (*c*), where a testator, after declaring his intention to dispose of all his worldly estate, and making several devises to different persons, devised *all the rest and residue of his money, goods, chattels and estate whatsoever;* Lord Hardwicke held that the fee passed: he said, where the court had restrained the word "estate" to personal estate only, it had been where the intention of the testator that it should be so used had appeared; as where it had stood coupled with a particular description of part of the personal estate, as a bequest of all mortgages, household goods, and estate, in which the preceding words were not a full description of the personal estate; that if the testator had said, "All the rest and residue of my personal estate and estates whatsoever,"

"Residue of money, goods, chattels, and *estate* whatsoever."

(*z*) 1 Ch. Cas. 262, 1 Eq. Ca. Ab. 209, c. 11.

(*a*) Com. 337, 8 Vin. Ab. 229, pl. 14; [see also Awbrey *v.* Middleton, 4 Vin. Ab. 460, pl. 15, 2 Eq. Ab. 497, pl. 16.] (*b*) As to indefinite devises, see Ch. XXXIII.

(*c*) In Chancery, 1746, before Lord Hardwicke, stated 2 T. R. 659, n.; and see 1 Cox, 362.

[1] Hunt *v.* Hunt, 4 Gray, 190, 193; Bullard *v.* Goffe, 20 Pick. 252; Laing *v.* Barbour, 119 Mass. 523, 525; ante, p. 716, note. See also Smith *v.* Smith, 17 Gratt. 276; Rossetter *v.* Simmons, 6 Serg. & R. 456; Andrews *v.* Brumfield, 32 Miss. 117; Morris *v.* Henderson, 37 Miss. 505; Sutton *v.* Wood, Cam. & N. 205; Jackson *v.* Housel, 17 Johns. 281; Wheeler *v.* Dunlap, 13 B. Mon. 293; Harper *v.* Blean, 3 Watts, 471; Turbett *v.* Turbett, 3 Yeates, 187; Morrison *v.* Semple, 6 Binn. 97; Godfrey *v.* Humphrey, 18 Pick. 539; Korn *v.* Cutler, 26 Conn. 4.

[2] See Midland Counties R. Co. *v.* Oswin, 1 Colly. Ch. 74.

a real estate would have passed (*d*); that this bequest amounted to the same, for the word "chattels" is as full a description of the
*723 personal estate as the * words "*personal estate;*" that therefore, *when he had used words comprehending all his personal estate, and then made use of the word "estate," that word would carry a real estate.* That the word "whatsoever" was used here, which was the same as if he had said *of whatever kind it be;* and, if that had been the case, it would most certainly have carried the real estate. He observed that Terrell *v.* Page was very material to the present question, and he thought could not be distinguished: the only difference was, in that case there was the word "other," which he did not think could distinguish it. If the devise had been, *and all the rest and residue of my household goods, mortgages and all other estate*, he did not think the words would have extended to the testator's real estate.

Lord Hardwicke's reliance upon the fact, that the other words were adequate to describe the personal estate.

So, in Jongsma *v.* Jongsma (*e*), where a testator gave to his executors "all his goods, *estates*, bonds, debts, to be sold." The question was, whether this would pass a copyhold estate surrendered to the use of the will. Sir Lloyd Kenyon, M. R., said that, according to the case of Tilley *v.* Simpson (*f*), wherever the word "estate" or "estates" was restrained to personalty, it was done upon the ground of the testator's showing his intention by joining it with words which related to personalty only; but, on the other hand, *where such other words were in themselves sufficient to pass all the personal estate, then, in order to give some effect to the word "estate," it was holden to pass realty.* In this case, the word "goods" seemed to be sufficiently comprehensive; and the copyhold, therefore, passed by the word "estates."

"Goods, estates, bonds, debts."

In Hogan *v.* Jackson (*g*), a testator, after commencing his will with the words "as to my worldly substance," devised certain lands to his mother M. for life: and, after giving certain legacies, to be raised out of those lands, concluded as follows: "I give and bequeath unto my dearly beloved mother M. all the remainder and residue of *all the effects, both real and personal, which I shall die possessed of.*" It was contended that the words "real effects" meant real chattels, and that the words "bequeath," "effects" and "possessed," were applicable rather to personal than real property; but the court held that the clause amounted to a disposition of the whole of the testator's real and personal estate.

Residue of "effects, real and personal," after an express devise of lands.

*724 * This is a strong decision, and has been much cited in subse-

[(*d*) As to this, see Jones *v.* Robinson, 3 C. P. D. 344.]

(*e*) 1 Cox, 362; see also Smith *v.* Coffin, 2 H. Bl. 445; Roe d. Penwarden *v.* Gilbert, 3 Br. & B. 85; Churchill *v.* Dibben, 9 Sim. 447, n.; [King *v.* Shrives, 4 Moo. & Sc. 149, 5 Sim. 461.]

(*f*) Which he denominated Tiddy *v.* Simms.

(*g*) Cowp. 299, 3 B. P. C. Toml. 388; [see also Lord Torrington *v.* Bowman, 22 L. J. Ch. 236, where there was no previous devise of land.]

quent cases. [Then, and long after, it was held to be] clear that the word *effects*, without *real*, would not, *proprio vigore*, comprehend land, though followed by the words, "of what nature, kind or quality soever" (*h*). Remark on Hogan *v.* Jackson.

In Grayson *v.* Atkinson (*i*), a testator, prefacing his will with the expression, "as to all my temporal estate," gave certain legacies, and directed A. to sell any part of his real and personal estate for the payment of his debts and legacies; and, as to all the rest of his "*goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements,* share in the Copperas Works," &c., he gave the same to A. Lord Hardwicke held that this devise carried a fee, though he did not think that the words "goods and chattels, real and personal," would have included the lands, if the devisor had not gone on to explain himself by the subsequent words, "as houses," &c. (*k*); ["all the rest," &c., he thought plainly related to something mentioned before, and that mentioned before which he was about to dispose of was, "all his temporal estate," which passed a fee when the testator had one.] [1] "Goods and chattels, real and personal, as houses," &c.

In Fletcher *v.* Smiton (*l*), a testator, after directing all his debts to be paid, gave to M., his wife, all his household goods, &c., and a legacy and annuity; and then proceeded as follows: "The profits of my four shares in the Corn Market during her life; also the income and profit of my estate as follows, during her life, as follows, my lands lying, &c. (enumerating them), as also the residue of my personal estate to be laid out in bank annuities; and then my wife to have the income, during her life only, of this and the estates before mentioned; and after her decease, as follows: I give to W. the income of my four shares in the Corn Market for his natural life; and all the rest of *my estates*, with all moneys in securities, to be divided in equal shares, to" B. C., &c. The question was, whether the reversionary interest in the shares of the Corn Market, which were freehold of inheritance, passed to B. C., &c. It was contended that it did not; for that the word "estates" in the last clause * must have the same signification with the same *725 word in the first clause, where it could not possibly extend to the Corn Market; but the court, relying much on Tilley *v.* Simpson, held that the reversion in fee passed.[2] Realty passed by the word "estates," although the word was before used exclusively of the particular subject.

In Smith *v.* Coffin (*m*), a testator, after prefacing his will with the

(*h*) Camfield *v.* Gilbert, 3 East, 516; Doe d. Chillcott *v.* White, 1 East, 33; Macnamara *v.* Lord Whitworth, Coop. 241; [Doe d. Hick *v.* Dring, 2 M. & Sel. 448; Doe d. Haw. *v.* Earles, 15 M. & Wels. 450. But see cases post, s. 6.] (*i*) 1 Wils. 333.

(*k*) If, without the words houses, &c., the devise would not have carried real estate, it is difficult to find a satisfactory ground for giving to the devisee the *fee*. His Lordship seems to have relied more upon the introductory words for this purpose than is consistent with later authorities. See infra. (*l*) 2 T. R. 656. (*m*) 2 H. Bl. 445.

[1] See Furguson *v.* Zepp, 4, Wash. C. C. 645.

[2] See Godfrey *v.* Humphrey, 18 Pick. 539; Barnes *v.* Patch, 8 Ves. (Sumner, 604.)

"Goods and chattels, rights, credits, personal, and *testamentary estate*," held to pass land.

words, "as to my worldly estate," &c., and devising certain freehold lands, gave and bequeathed all the residue of his "goods and chattels, rights, credits, *personal and testamentary estate whatsoever*," to his wife, for her own use and disposal. The real estate was held to pass. And where (*n*) there were again the prefatory expressions, "as to my temporal estates and effects," and a devise of all the testator's lands to J. G., the reversion in fee in those lands was held to pass to him under these words: "And all the rest and residue of my goods and chattels *personal and testamentary estate and effects whatsoever*, I give and bequeath unto the said J. G., whom I make whole and sole executor."

By confining the devise to personal estate, in the two preceding cases, the words "and testamentary" would have been rendered inoperative.

Residue of "money, stock, *property*, and effects," held to carry a fee.

So, in Doe d. Andrew *v.* Lainchbury (*o*), where a testator said, — "As to the little money and effects with which the Almighty has intrusted me, I dispose thereof as follows;" and, after several devises of land, concluded thus: "And as to all the rest, residue and remainder of my money, stock, *property and effects*, of what kind or nature soever, at the time of my decease, I leave and bequeath the same, and every part thereof, unto my nephew J. and my niece S., for to be equally divided between them, share and share alike; and I do hereby also appoint my said nephew J., and my said niece S., executor and executrix, and likewise joint and equal residuary legatees," &c.; it was held that real estate passed, which construction Lord Ellenborough considered to be strengthened by the circumstance of the testator having, in a preceding part of his will, directed money to be laid out in the purchase of land, "to be added to his other adjoining *property*," which he said gave a standard of his meaning of the word "property," and showed that he meant by it real estate.[1]

"Freehold and leasehold, money, stock, goods, chattels, and other *property*," held to pass copyholds.

[Much reliance was placed on this decision in Edwards *v.* Barnes (*p*), where a testator "gave, devised and bequeathed to *726 * his wife all his freehold and leasehold, and all his money, securities for money, stock in government funds, goods, chattels and all other his *property* whatsoever and wheresoever, to hold the same unto and for the use of his said wife, her heirs, executors," &c. The Court of C. B. were of opinion that copyholds, which had been surrendered to the use of the will, passed by the expression "all other his property."

A valuable judgment was delivered by Lord Brougham in a case (*q*),

(*n*) Roe d. Penwarden *v.* Gilbert, 3 Br. & B. 85 (the marginal note omits the material word); [see also Doe d. Evans *v.* Walker, 15 Q. B. 28.]
(*o*) 11 East, 290. [(*p*) 2 Bing. N. C. 252.
(*q*) Mayor, &c. of Hamilton *v.* Hodsdon, 6 Moo. P. C. C. 76, 11 Jur. 193.]

[1] See Jackson *v.* Housel, 17 John. 281; Howland *v.* Howland, 100 Mass. 222, where "property" was construed to mean real estate alone.

where a testator directed any shares he might have in a vessel to be sold "for the benefit of his estate." And after making some specific devises of "houses and lands," in some of which the fee was not exhausted, and bequeathing to his wife certain specific chattels "which she had from her father's estate," he gave "all the remainder of his estate that was then in his possession or might thereafter be his" to his wife; and directed "his estate," after payment of debts and legacies, to be "kept together" until the time thereby appointed for "dividing" it; and declared his wife entitled, in a certain event, to one third of "his personal estate." It was argued that the trusts and purposes of the will showed the testator's mind to be directed to personal estate only, and that he had himself supplied a vocabulary for the interpretation of the term estate. Lord Brougham observed (in effect) that "estate" meant both realty and personalty, and that the realty was not to be excluded merely because there was personalty upon which the term could operate; that, when realty was meant to be excluded, the expression *personal* estate was used; and that the will was to be construed *reddendo singula singulis*, by which method all parts of it became consistent; so that there was not that clear intent on the will to restrict the meaning of the term estate which was necessary to prevent its natural operation in comprising realty as well as personalty. The unexhausted reversion was therefore held to pass.] [1]

"Estate" held to pass realty notwithstanding context.

In most of the preceding cases the will contained specific devises of land; a circumstance which, as before observed, always favors the extension of the subsequent general words to property of the same description; but the cases do not warrant the considering the absence of the circumstance as conclusively establishing the exclusion of real estate from such terms, though associated with words descriptive of personal property only. On *the contrary, real estate has sometimes been held to pass in cases of this nature. *727

Circumstance of there being a prior devise of lands.

Thus, in Tanner *v.* Morse (*r*), real estate was held to pass under the following words: "As to my temporal estate, I bequeath to my nephew T. (who was the heir at law) the sum of 50*l.*;" then follow several legacies: "And *all the rest and residue of my estate, goods and chattels whatsoever*, I give and bequeath to my beloved wife M. C., whom I make my full and sole executrix." Lords King and Talbot laid much stress upon the words "temporal estate," in the introductory clause [to which it was said the words "rest and residue" must have relation].

Although no such devise, lands passed in following cases.

Residue of "*estate*, goods and chattels."

So, in Doe. d. Wall *v.* Langlands (*s*), where a testator after giving

(*r*) Cas. t. Talb. 284, [3 P. W. 295; see also Lumley *v.* May, Pre. Ch. 37.]
(*s*) 14 East, 370.

[1] See Blagge *v.* Miles, 1 Story, 426, 455.

Residue of "my property, goods and chattels."

several pecuniary legacies, bequeathed as follows: "To R. D., and E. W., I give and bequeath *the residue of my property, goods and chattels*, to be divided equally between them, share and share alike;" it was contended, that the word "property" was restrained by the subsequent words, the clause being read *videlicet*, "my goods and chattels;" but Lord Ellenborough held that the more obvious and natural sense was, that they are to be taken *cumulatively*, that is, as *property and goods and chattels*, and, consequently, that the real estate passed under the former word.

"all my property and effects."

Again, in Doe d. Morgan *v.* Morgan (*t*), where a testator, after bequeathing two pecuniary legacies, devised as follows: "All my *property* and effects of all claims that I shall have, I give to my brother J. M., but my mother is at liberty to give 1,000*l.* of my property where she please." It was contended, that the gift of the pecuniary legacies, the use of the word "effects" conjunctively with "property," and the clause respecting the 1,000*l.*, showed that the testator, by the latter term, intended to denote personal estate only; but the court held that the real estate passed.[1]

A similar construction prevailed in Doe d. Evans *v.* Evans (*u*), where a testator, after bequeathing certain articles of personal estate, *728 gave, bequeathed and devised to his wife A., all his *money, securities for money, goods, chattels, *estate* and effects, of what nature or kind soever, and wheresoever the same might or should be at the time of his death.

"All the rest."

[In Attree *v.* Attree (*x*), a testatrix gave a certain house and garden (which were leasehold) to A., then bequeathed several pecuniary legacies, and proceeded, "And all the rest to be divided between the daughters of B." It was held by Sir. J. Romilly, that "rest" included the rest of all the property, real as well as personal. And in Smyth *v.* Smyth (*y*), where a testator made his will thus, "I give to A. 100*l.*, also to B. 50*l.*; and lastly, I give my sheep and all the rest, residue, moneys, chattels and all other my effects to be equally divided among my four brothers (naming them), whom I appoint executors;" it was held by Sir R. Malins, V.-C., that "rest and residue" were sufficient to carry real estate, and were not cut down by the subsequent enumeration. Indeed, he thought the realty would pass under the word "effects" alone.]

(*t*) 6 B. & Cr. 512, 9 D. & Ry. 633; see also Bradford *v.* Belfield, 2 Sim. 264.

(*u*) 9 Ad. & Ell. 720, 1 Per. & D. 472; [and in D'Almaine *v.* Moseley, 1 Drew. 633; Kindersley, V.-C., said he thought no indication of intention was afforded by the absence of a previous gift of real estate. It seems also, from the case in the text, and Dobson *v.* Bowness, L. R. 5 Eq. 404, that such words as "wheresoever the same might be," &c., are not (as sometimes argued) to be understood as showing that the testator contemplated shifting or changeable property only.

(*x*) L. R. 11 Eq. 280.

(*y*) 8 Ch. D. 561. As to the word "effects," *vide post*, s. 6.

[1] See Hurdle *v.* Outlaw, 2 Jones, Eq. 75.

The last five cases are certainly important authorities, and [with others since decided (*z*),] they demonstrate the inclination of the courts at the present day, to hold lands to pass under words capable *per se* of comprehending them, notwithstanding their association with terms applicable to personalty only.[1] To reconcile all the cases would require the adoption of some very subtle and unsubstantial distinctions; but the preceding review will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction prevailed. [The old rule is in fact reversed; for it is now settled that words such as "property" and "estate," capable of including real with personal estate, will not be deprived of their full force without evidence that they were intended to be used in a more confined sense (*a*), whereas formerly the burden of proof was on the other side (*b*).]

General remark on preceding cases.

III. Sometimes words adequate to comprise land have been * confined to personal estate, from their association with the legatee's nomination to the executorship, which has been considered as explanatory and restrictive of the general expressions to that species of property which was connected with the character of executor. *729

Devise associated with nomination to executorship.

As in Shaw *v.* Bull (*c*), where one seised in fee of five messuages, by will devised two to his wife for life, remainder to his two daughters in fee; the third messuage to his wife and her heirs; the fourth to his wife and her heirs, she paying his legacies, in case his goods and chattels did not answer them all; and, if she did not make provision for the payment of his legacies in her lifetime, that it should be lawful for the legatee, after her death, to sell the said messuage, to satisfy the legacies out of the value thereof. Then followed this clause, on which the question arose: "And all the overplus of my estate to be at my wife's disposal, and make her my executrix." Blencowe, J., said, if he had at first devised to his wife all

"Overplus of my estate" restricted to

(*z*) Midland Counties Railway Company *v.* Oswin, 1 Coll. 74; O'Toole *v.* Browne, 3 Ell. & Bl. 572 (in which it was decided that under 1 Vict. c. 26, after-purchased lands passed by similar words); Patterson *v.* Huddart, 17 Beav. 210; Re Greenwich Hospital, 20 Beav. 458; Gyett *v.* Williams, 2 J. & H. 429; Hamilton *v.* Buckmaster, L. R. 3 Eq. 323 (in none of which was there a devise of lands specifically); Footner *v.* Cooper, 2 Drew. 7; Meeds *v.* Wood, 19 Beav. 210; Hawksworth *v.* Hawksworth, 27 Beav. 1; Dobson *v.* Bowness, L. R. 5 Eq. 404.

(*a*) See per Bayley, J., Doe *v.* Morgan, 6 B. & Cr. 512; Patterson *v.* Huddart, 17 Beav. 212.

(*b*) See per Trevor, C. J., Shaw *v.* Bull, 2 Eq. Ca. Ab. 320, 321.]

(*c*) 12 Mod. 592, 2 Eq. Ca. Ab. 320, pl. 8.

[1] In Dobson *v.* Bowness, L. R. 5 Eq. 404, it appeared that a testator by will, in 1805, after making specific bequests of freehold and household estate, gave certain specific chattels, and bequeathed as follows: "I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death," to trustees, "their executors, administrators, and assigns," upon trust for sale. He then made a bequest of his ready money arising from sale of lands, securities for money, and all sums due to him at his decease. The testator was, at the date of his will and at the time of his decease, seised of certain freehold estate, which he did not mention in his will. It was held that such freehold estate passed by the words, "all the rest of my estate." See Sanderson *v.* Dobson, 1 Ex. 141; Harper *v.* Blean, 3 Watts, 474.

personalty by this association.

his estate, this (the fifth) house would have passed to her; but compare this clause with the subsequent words, "and I make her my executrix," it shows that his intent was to grant her such estate as she was capable of as executrix. He considered "overplus" to refer to the price of the house, after payment of legacies.

Remark on Shaw *v.* Bull.

It is to be observed, however, that this construction renders the words in question nugatory, since the appointment of the wife to be executrix was itself, in the then state of the law, a disposition of the whole personal estate; a species of argument to which great attention is paid at this day, for in modern cases no principle is more conspicuous than an anxiety to give effect to every word of the will. It is impossible to reconcile this case with the general current of authorities (*d*).

Although it is indisputably clear that the word *lands* will carry real estate, notwithstanding it be collocated with words descriptive of personal property only (*e*); yet in several early cases (*f*) it has been decided, that where a testator appoints another executor of all his goods, *lands*, &c., he refers to such lands as the person may take as executor, namely, leaseholds; and accordingly real estate does not pass. Thus, in Piggot *v.* Penrice (*g*), freehold lands *730 were held not to pass under the * words, "I make my niece *executrix of all my goods, lands and chattels*," although the testator had no leaseholds (*h*). It was said that by this construction the word lands was not (as objected) useless, and to be rejected; for that, in all probability, there might be rents in arrear of those lands, which would pass to the niece by her being made executrix. This explanation, however, fails to show that any efficient signification was given to the word "lands," since it is clear the executorship would have entitled the niece to the arrear of rent. The word "chattels" too, was sufficient to pass any leasehold lands of which the testator might have been possessed at his death.

"Executrix of all my goods, *lands* and chattels."

In Doe d. Gillard *v.* Gillard (*i*), real estate was held to pass under the words, "I do make, constitute and appoint R. G. my whole and sole *executor of all my lands forever, and leasehold property* here or at Beeston." The question principally agitated was, whether the restrictive words "here or at Beeston," applied to both freehold and leasehold, or to leasehold lands only; and it was held that they were confined to the

"Executor of all my *lands* forever and leasehold property," not so restricted.

(*d*) See Noel *v.* Hoy, 5 Mad. 38, stated next page.
(*e*) Roe d. Walker *v.* Walker, 3 B. & P. 375, stated post, p. 748.
(*f*) 1 Roll. Ab. 613, 1 Eq. Ca. Ab. 209, pl. 12; see also Clements *v.* Cassye, Noy, 48.
(*g*) Pre. Ch. 471, 1 Eq. Ca. Ab. 209, pl. 13.
(*h*) This circumstance does not seem to be very material; for, as such a bequest operates upon all the leaseholds of the testator *at his death*, the fact of his having or not having any such at that period, does not mark his intention *at the making* of the will. See Lord Eldon's judgment in Wright *v.* Atkyns, as reported Coop. 111, see p. 123; but as to which see Ch. XXIX.
(*i*) 5 B. & Ald. 785; and see Marret *v.* Sly, 2 Sid. 75, ante, p. 357, n.

latter, and that the devise of the freehold lands was general, without any local restriction.

Whatever opinion may be formed of the case of Piggot *v.* Penrice, it is not necessarily overruled by this case, where the will contained additional expressions, strongly aiding the construction adopted.

So, in Noel *v.* Hoy (*k*), a copyhold estate surrendered to the use of the will was held to pass under the following disposition: "In respect of worldly affairs, I cannot better manifest my love and attachment to my family, than in nominating (which I hereby do) my dearly beloved and most amiable wife A. F. M., the sole executrix of this my will, thereby *bequeathing* to her *all the property of whatever description or sort that I may die possessed of*, to be by her appropriated in any manner she may think proper, for the maintenance of herself and such of my children," &c. Sir J. Leach, V.-C., thought that the criticism upon the words "possessed of," and "appropriated," on which had been founded the argument for excluding the copyholds was too nice.

"All the property I may die possessed of," held to include land.

*Again, in Thomas *v.* Phelps (*l*), where the testator, as to his worldly estate, gave, devised and disposed of the same as follows: and then, after giving some pecuniary legacies, proceded in these words: "I also give and bequeath the lease of the colliery of L. to my son J. P.; him and my daughter E. P. I do make, constitute and appoint my joint executor and executrix of this my last will and testament, *of all that I possess in any way belonging to me, by them freely to be enjoyed or possessed of whatsoever nature or manner it may be*, only my household furniture, which I give to my daughter who lives the longest single, and after her decease or marriage to be sold and equally divided between my remaining children," &c. Sir J. Leach, M. R., held, that the real estate passed by this devise, the words being equivalent to a gift of all the testator's property. He observed, that the exception of the household furniture was of little weight; for where the prior words imported real as well as personal estate, it mattered not that the exception to the gift happened to be of personal chattels only (*m*). *731

"All that I possess in any way belonging to me."

So, in Doe d. Pratt *v.* Pratt (*n*), where a testator directed that his debts and funeral expenses should be paid by his executor thereinafter named; and after giving two life-annuities of 2*l.* 10*s.* each, and a legacy of 5*s.* to J. P., his heir at law, he appointed W. P. *whole and sole executor of all his houses and lands situate at F.:* it was held, after an exten-

(*k*) 5 Mad. 38.

(*l*) 4 Russ. 348.

[(*m*) See also Steignes *v.* Steignes, Mos. 296; such an exception, though of little weight to show what is excluded (see however Camfield *v.* Gilbert, 3 East, 516, 2 M. & Sel. 454), is strong to prove what is intended to be included in the gift from which the exception is made; see Davenport *v.* Coltman, 12 Sim. 588, 598, 603; and see Hotham *v.* Sutton, 15 Ves. 319, and other cases cited therewith, post, Ch. XXIII.; Marshall *v.* Hopkins, 15 East, 309.]

(*n*) 6 Ad. & El. 180; [and see Doe d. Hickman *v.* Hazlewood, ib. 167; Day *v.* Daveron, 12 Sim. 200, stated post, p. 740.]

sive review of the authorities, that the houses and land at F. passed to W. P., and that he took an estate in fee.

These cases evince that little attention is now to be paid to the circumstance of the association of the devise with the appointment of the devisee to the executorship, as confining it to personal estate, if the words of the devise will fairly bear a wider construction,[1] and Thomas *v.* Phelps also shows that an exception of articles of personalty affords no ground for cutting down the general words of the devise.

General remark on preceding cases.

IV. The introduction of limitations and expressions inapplicable to real estate has sometimes been made a ground for *excluding such estate from words of general description, capable, *ex vi terminorum*, of comprehending property of that species.

Inapplicability of limitations, where restrictive. *732

In Doe d. Spearing *v.* Buckner (*o*), a testator prefaced his will with the words, "As to my estate and effects, both real and personal, I dispose thereof in manner following." Then, after giving some pecuniary legacies, and an annuity, which he charged on a freehold messuage in W., he concluded as follows: "All the rest, residue and remainder of my *estate* and effects of any and what nature or kind soever or wheresoever, I give and bequeath the same unto C. B., and J. R., *their executors or administrators*, in trust that they shall from time to time *add the interest thereof to the principal*, so as to accumulate the same, as it is my will that the said residue shall not be *paid or payable*, but at the time and in the manner and to the several persons, as the said principal sum of 4,000*l.* (which was a legacy before given) is before directed to be paid." It was held, notwithstanding the introductory words, that the real estate of the testator did not pass under this clause. Lord Kenyon observed, that the limitation to executors and administrators, and particularly the direction to add the interest *thereof* to the principal, were wholly inapplicable to a real estate.

"Estate," restrained to personalty by the nature of the trusts.

So, in Doe d. Hurrell *v.* Hurrell (*p*), a testator gave certain pecuniary legacies; and after payment thereof, and of his just debts, funeral, testamentary and incidental expenses, gave and bequeathed all the rest and *residue of his estate and effects* whatsoever and wheresoever unto A. and B., their *executors, administrators and assigns*, upon trust that they should out of *such residue of the moneys and effects* that he should die possessed of, carry on, manage and cultivate the farm then in his possession, for the remainder of his term, for the joint advantage of his children (naming them), and at the expiration of the said term, upon further trust *to sell such residue of his estate and effects, or such effects as*

(*o*) 6 T. R. 610. (*p*) 5 B. & Ald. 18.

[1] Kellogg *v.* Blair, 6 Met. 322; Godfrey *v.* Humphrey, 18 Pick. 537; Tracey *v.* Kilborn, 3 Cush. 557.

should then be upon his farm, and divide the money among his five children. It was held that, notwithstanding the generality of the words, the nature of the trust clearly showed that the testator meant to bequeath his personal property only. It was said, that by directing the trustee at the expiration of his term, to sell such residue of his estate and effects, *or such effects as should be upon his said farm*, the testator had himself furnished a comment upon the words, "the residue of his estate and * effects," and manifested that by those words *733 he meant only such estate and effects as constituted personal property.

[The case of Pogson *v.* Thomas (*q*), is probably referable to this principle. A testatrix, after making some specific devises to certain persons, "their heirs, executors, administrators, and assigns," according to the different tenures, and bequeathing a sum of money to trustees, "their executors," &c., declared that "as to all the residue of her estate and effects wheresoever and whatsoever, she gave and bequeathed the same" to the said trustees, "their executors, administrators and assigns," in trust for her sons equally; or if but one son, then in trust for him, "his executors and administrators." The Court of C. P. (*r*), on a case from Chancery, certified (in effect) that real estate was not included in the residuary gift.

Residue of "estate and effects to trustees, their *executors*," &c., held not to include real estate.

In Doe *v.* Hurrell (*s*), Lord Tenterden said, that the circumstance of the limitation being to executors and administrators and not to heirs, though not to be altogether rejected in construing a will, was not very strongly to be relied on. In Pogson *v.* Thomas, the testator had used the word "heirs" in previous devises, unequivocally relating to real estate; and the contrast deserves notice (*t*); but it appears insufficient of itself to support the decision.

Remark on Pogson *v.* Thomas.

At all events] the mere introduction into some of the clauses relating to the subject-matter of disposition, of expressions inapplicable to real property, will not in all cases confine the word "estate" to personal estate.

"Estate" not so restrained.

As in Doe d. Burkitt *v.* Chapman (*u*), where a testator devised specifically certain parts of his real and personal property, and then devised and bequeathed *all the rest and residue of his estate, of what nature or kind soever*, to C. for life; and, after her decease, directed that the same should be divided between certain persons; providing that, in case of their dying before

Inapplicable expressions not restrictive of words "residue of my estate."

[(*q*) 6 Bing. N. C. 337; see per Shadwell, V.-C., 12 Sim. 204. A gift of *land* to A., his executors, &c., will give A. the fee. Rose d. Vere *v.* Hill, 3 Burr. 1881, Fearne, Posth. 144.

(*r*) *Absente* Tindal, C. J.

(*s*) 5 B. & Ald. 18; see also O'Toole *v.* Brown, 3 Ell. & Bl. 572; Patterson *v.* Huddart, 17 Beav. 210. So a limitation to "heirs and assigns" will not prevent a gift of "property," including personal estate. Robinson *v.* Webb, 17 Beav. 260.

(*t*) Buchanan *v.* Harrison, 31 L. J. Ch. 74; 8 Jur. N. S. 965; Longley *v.* Longley, L. R. 13 Eq. 133.]

(*u*) 1 H. Bl. 223.

their being entitled "*to have and receive*" their shares, their children should stand in the place of his or her parent; and that the share, *734 on a certain event, *should be paid to their guardians;* it was * contended that these provisions being applicable to personal estate only, the devise must be restrained to such estate; but Lord Loughborough and the Court of C. P. held that they could not so restrain the general and comprehensive terms used, and therefore that the real estate passed.

Remark on Doe *v.* Chapman

The expressions in this case were similar to some of those on which the argument for the restricted construction was founded in Doe *v.* Buckner; but it wanted others. Another difference between the cases is, that there all the preceding gifts related to personal estate, except, indeed, an annuity, which was charged on a freehold messuage; but, in Doe *v.* Chapman, there were devises of land in a prior part of the will. In Doe *v.* Buckner, however, the testator, in the exordium to his will, intimated an intention to dispose of all his real estate, which did not occur in Doe *v.* Chapman. This circumstance, it will be observed, has had various degrees of importance assigned to it. Most of the judges who have held the real estate to pass, have thrown it into the argument. It certainly shows that the testator commenced his will with the intention not to die intestate with respect to any portion of his property; but does not supersede the necessity of that intention being subsequently carried into effect by an actual disposition (*x*).

As to clause intimating an intention to dispose of the whole estate.

The cases under consideration often present questions extremely embarrassing to a judge or practitioner, and different minds will almost unavoidably form different opinions as to the weight to be ascribed to particular expressions or circumstances of inapplicability as excluding the real estate (*y*); of which we have an instance in the next case, where two judges came to opposite conclusions on the same will.

In Newland *v.* Majoribanks (*z*), a testator having real estate in Jamaica, by his will, after charging his debts upon his real estate, bequeathed certain pecuniary legacies; and, *735 as to all the * rest, residue and remainder of his *estate, of what nature or kind the same might be*; and of which he might be possessed or interested in at the time of his decease, he gave, devised and bequeathed the same to

Diversity of judicial opinion on the excluding power of expressions applying only to personalty.

[(*x*) See 2 Ed. 145, n. (*a*); Gulliver *v.* Poyntz, 3 Wils. 141, 2 W. Bl. 726; Smith *v.* Coffin, 2 H. Bl. 450; Grayson *v.* Atkinson, 1 Wils. 333; Pocock *v.* Bishop of Lincoln, 3 Br. & B. 41; Doe *v.* Gilbert, ib. 85; Saddler *v.* Turner, 8 Ves. 617; Doe *v.* Dring, 2 M. & Sel. 448, 456; Bradford *v.* Belfield, 2 Sim. 272; Sutton *v.* Sharp, 1 Russ, 149; Wilce *v.* Wilce, 7 Bing. 664; and particularly Hughes *v.* Pritchard, 6 Ch. D. 24. The absence of such a clause was relied on in Roe *v.* Yeud, 2 B. & P. N. R. 214; Doe *v.* Rout, 7 Taunt. 79, 84; but stated by Lord Hardwicke in Crichton *v.* Symes, 3 Atk. 61, to afford no indication of intention.]

(*y*) The present chapter exhibits the necessity of perspicuity in this particular. If the testator intend the will to be confined to personal property, it should be clearly so expressed; and, if not, as is more generally the case, words technically adapted to describe the real estate should be employed; and in every case general equivocal expressions are to be avoided.

(*z*) 5 Taunt. 268.

A., B. and C., their *heirs and assigns*, *forever*, upon trust *to place the same in some* public or private *fund upon good security*, and to receive the annual interest or produce thereof for ten years, in trust to *place the same out again* annually, so that the interest might become a principal; and that, at the expiration of such ten years, then that his trustees, their heirs or assigns, or the major part of them, should pay and apply the annual interest of the whole of the *principal money* in the erection of a free-school. Sir James Mansfield, C. J., was of opinion, that though the words used were sufficient to comprehend the realty, yet that they were restrained to personal estate by the subsequent part which referred to personalty only. "Land (he said) could not be placed out, nor securities changed." Heath, J., on the contrary, thought that the words were insufficient to control the preceding devise; but as the learned judge was of opinion, that the trustees took a term of ten years only, which were expired, it was unnecessary to decide the point.

[Modern decisions have placed this question on a surer footing. Thus, in Saumarez *v.* Saumarez (*a*), a testator, after giving certain directions about his dwelling-house, gave to his son R. his freehold land in D. (without words of limitation), and directed that the *residue of his property*, which he might leave at his death, might be divided between him and his two sisters in equal proportions, subject to the following restrictions. The testator then directed his son's portion to be *placed* in the names of trustees, and the *interest* to be paid to him (he being already tenant for life of the land). After his death his *share* to be divided between his children, and *placed* in the names of trustees, with a power to employ the *interest* for their maintenance and part of the *capital* for their advancement; and at their age of twenty-five to *transfer* the whole to them: with certain ulterior limitations in case R. died without issue. Lord Cottenham, notwithstanding the inapplicability of the trusts to real estate, held that the reversion of the estate in D. passed by the residuary * clause, and that the trusts and limitations must be applied distributively to the real and personal estate. "In considering gifts of residue," he said, "whether of real or personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such igno-

Realty held to pass notwithstanding trusts in terms applicable only to personalty.

Saumarez *v.* Saumarez.

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[(*a*) 4 My. & C. 331. See also Morrison *v.* Hoppe, 4 De G. & S. 234; Stokes *v.* Salomons, 9 Hare, 75; Hunter *v.* Pugh, 4 Jur. 571; Mayor, &c. of Hamilton *v.* Hodsdon, 6 Moo. P. C. C. 73, 11 Jur. 193, stated ante, p. 726; D'Almaine *v.* Moseley, 1 Drew. 629; Fullerton *v.* Martin, 22 L. J. Ch. 893, 17 Jur. 778; Streatfield *v.* Cooper, 27 Beav. 338; Morris *v.* Lloyd, 3 H. & C. 141; Hamilton *v.* Buckmaster, L. R. 3 Eq. 327; Lloyd *v.* Lloyd, L. R. 7 Eq. 458.

rance is manifested upon the face of the will, unless the expressions manifesting it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense." And, applying himself to the particular will before him, he said: "The circumstance of the testator using expressions and giving directions applicable only to the personal estate may prove that he did not at the time consider or was not aware that this fee would be part of the residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property."

Trusts applicable exclusively to personalty held to prevent realty passing.

Coard *v.* Holderness.

Nevertheless, in Coard *v.* Holderness (*b*), where a testator, after bequeathing some legacies, "gave, bequeathed, and disposed of all *estate, effects and property* whatsoever and wheresoever, which he was then or should at his decease be possessed of or entitled to, or over which he had any right or power of disposition, to A., B., and C., *their executors and administrators*, on trust to divide into five eqnal parts or shares;" and then gave directions respecting the *income* and *principal* of the respective parts or shares *or legacies*, and the *balance*, after deducting certain specified sums; and as to one share (intended for a son who was absent), he provided that he should claim it of the testator's executors, or the survivors, &c., *or other his legal personal representative* for the time being within a given period, with directions to accumulate the share in the mean time. Sir J. Romilly, M. R., admitted that the words "estate, effects, and property" taken alone were sufficient to include real estate, and that it lay on the heir to show that they were cut down; but he held that this was shown by the whole context, and that only personal estate *737 *was included. He relied on the absence of any word peculiarly applicable to real estate, as "heir," "devise," "rent," or the like; on the limitation to executors and administrators (*c*); on the use of other terms, stated above, especially adapted to personal estate; and on the authority of Doe *v.* Buckner (*d*); and notwithstanding Lord Cottenham's clear statement of the gronnd of his own decision in Saumarez *v.* Saumarez, the M. R. referred it to the preceding gift for life of the D. estate, as showing that the testator actually intended to include the reversion in the residue (*e*).]

Sir J. Romilly's view of Saumarez *v.* Saumarez.

(*b*) 20 Beav. 147.

(*c*) But see per Lord Tenderden in Doe *v.* Hurrell, 5 B. & Ald. 18, ante, p. 732.

(*d*) 6 T. R. 610. But of this case it was said by Sir R. Kindersley, in Fullerton *v.* Martin, 22 L. J. Ch. 894, that it would be decided differently at the present day, and that the grounds of Lord Kenyon's decision would not now be sufficient to warrant such a conclusion.

(*e*) In support of this view of Lord Cottenham's decision the M. R. cites Turner, V.-C., in Stokes *v.* Salomons, 9 Hare, 83, where the V.-C. says that the prior gift showed that the testator had "real estate" in his mind. This is translated by the M. R. into "*that* estate." If this is the true view of Saumarez *v.* Saumarez the decision was of course: yet on another oc-

In some cases where the words of the devise to trustees have been sufficiently ample to include real estate, but the trusts have applied to personalty only, the legal estate in the realty has been held to pass by the devise, with a resulting trust to the heir.

As in Dunnage *v.* White (*f*), where the testator, after devising certain real estate, and bequeathing some pecuniary legacies, proceeded as follows: "And all the rest, residue and remainder of my *estate or effects*, *whatsoever and wheresoever*, *of what nature or kind soever*, I give, *devise* (*g*), and bequeath unto my said trustees and executors after named and appointed upon the trusts following: that is to say, that they my said executors do and shall, as soon as may be conveniently after my decease, make sale and absolutely dispose of my *household goods and stock in trade*, by public auction, for the most money that can be *had or gotten for the same; and also do and shall, with all *738 convenient speed, collect in all *debts* due and owing to me at the time of my decease, together with all *moneys* owing or belonging to me upon mortgage, bond, bill, note, specialties, simple contract, or otherwise howsoever; and when the same shall be so collected and got in, to divide the same into six parts or shares, and *to pay* the same, when so divided, in manner following: that is to say, four equal sixth parts thereof to certain persons named, and the remaining two sixth parts thereof to *invest* in the public stocks or funds," &c. Sir T. Plumer, M. R., held it impossible not to construe the devise as comprising the real estate; but that the testator having given both the real and personal property to the trustees, and having only said what was to be done with the personalty (for not a word of the disposition of the beneficial interest referred to real estate), the consequence was the trust of the realty resulted to the heir at law (*h*).

"Estate or effects" held to include land, but trusts of will confined to personalty.

Resulting trust for the heir.

V. In some cases, real estate has been held to pass under words, even more vague and informal than any which have yet been the subject of consideration. Thus, in Hopewell *v.*

Real estate held to pass

casion the M. R. said it was a "very strong" one, 19 Beav. 224. Other judges have not agreed with the M. R. in his view of the decision. It was relied upon by Turner, V.-C. in Stokes *v.* Salomons (where there was no prior gift of land or real estate); and was thus referred to by Wood, V.-C., Buchanan *v.* Harrison, 31 L. J. Ch. 82; "Lord Cottenham says, and I entirely follow the reasoning, that where the testator used the word property he only meant personal estate, but he did mean to dispose of all his property whatever it was. He believed he was passing the whole of his estate, but believed it was personal property."]

(*f*) 1 J. & W. 583. [See also Longley *v.* Longley, L. R. 13 Eq. 133; with which cf. Hamilton *v.* Buckmaster, L. R. 3 Eq. 327.]

(*g*) That this word, when applied to *effects* alone, will not carry real estates, see Camfield *v.* Gilbert, 3 East, 516; [but see Phillips *v.* Beal, 25 Beav. 25. Conversely, the word "bequeath" will not be sufficient to confine the effect of a gift otherwise capable of including real estate. Whicker *v.* Hume, 14 Beav. 518; Gyett *v.* Williams, 2 J. & H. 436.]

(*h*) It seems to have been overlooked in this case, that the freehold farm, in respect to which the question arose, had been contracted to be purchased by the testator before he made his will, *but had never been conveyed to him*; so that there was no legal estate in the testator upon which that part of the decision which gave the estate to the trustees could operate.

by vague and informal words.

"Whatsoever else I have not before disposed of."

Ackland (*i*), where the testator devised as follows: "I devise all my lands, tenements, and hereditaments to A. Item, I devise all my goods and chattels, moneys, debts, and *whatsoever else I have* (*in the world* (*k*)) *not before disposed of*, to the said A., he paying my debts and legacies; and make him executor." Trevor, C. J., held, that by these words an estate in fee passed; for it could not have any effect upon the personal estate, because that was given away as fully as possible by the words precedent; therefore it must extend to the remainders in the real estate.

The reasoning of the C. J. deserves attention, though the point seems not to have been necessary to the construction that the devisee took a fee; for the prior devise was clearly adequate to carry all the lands, and the charge upon the devisee would enlarge his estate in those lands to a fee (*l*).

"All I am worth" held to carry land.

So, in Huxtep *v.* Brooman (*m*), the words "all I *739 am worth" * were held to comprise land in the will of a very illiterate testator in these terms: "This being my last will and testament, I give and bequeath to Mary, daughter of M. H., and likewise to the son and daughter of S. T., all the overplus of my money; and likewise beg of my executor that he will pay into the hands of the above children's friends all the money that is due to me on settling my father's account. Friday: I give and bequeath to them *all I am worth*, except 20*l.* which I give to my executor, M. T. B."

Remark on Huxtep *v.* Brooman.

This case may be considered as exhibiting the extreme point to which the decisions have gone, in applying general informal words to real estate. Nothing could be more comprehensive or more untechnical than the expression here used. The case was cited with approbation by Gibbs, C. J., in Doe *v.* Rout (*n*), [and by the Court of Exchequer in Davenport *v.* Coltman (*o*), where it was said never to have been doubted. The only apparent exception is a dictum of Sir E. Sugden, to the effect that it might be a little difficult to support it (*p*).]

"All that I shall die possessed of, real and personal," held to pass realty.

In Pitman *v.* Stevens (*q*), the testator devised as follows: "I give and bequeath *all that I shall die possessed of, real and personal, of what nature and kind soever*, after my just debts are paid: I do hereby appoint P. my residuary legatee and executor:" and, in a subsequent part of his will, he desired his legatee and executor to let his sister be interred in a certain vault, and recommended him to do something handsome for the testator's

(*i*) Salk. 239, 1 Com. 164.
(*k*) These words do not occur in Salkeld.
(*l*) See post, Chap. XXXIII.
(*m*) 1 B. C. C. 437. So, as to the words "I make A. my sole heir;" Taylor *v.* Webb, Sty. 301, 307, 319; 2 Sid. 75, ante, p. 357, n.
(*n*) 7 Taunt. 81. ante, p. 717.
[(*o*) 9 M. & Wels. 481.
(*p*) 1 D. & War. 439.]
(*q*) 15 East, 505.

brother-in-law at his death, or when he should want anything to live on: it was held that P. took a fee in the real estate.

In Barclay *v.* Collett (*r*), it was held, that a devise to trustees of the residue of the testator's real and personal estate comprised a freehold messuage, not included in the specific devises of the will, though the trusts expressed were so indefinite and uncertain as to render it impossible for the trustees to act without the aid of a Court of Equity.

So, in Wilce *v.* Wilce (*s*), where a testator commenced his will as follows: "As touching such worldly property, wherewith it hath pleased God to bless me in this world, I give, devise and dispose of the same in the following manner and form." He then proceeded to make several dispositions of land and goods, and concluded with the following residuary clause: "All the *rest of my worldly goods, bills, bonds, notes, book debts and *740 ready money, *and everything else I die possessed of*, I give to my son George, whom I make my whole and sole executor." It was held, on the authority of the preceding cases, especially Smith *v.* Coffin (*t*), that certain real estate, not included in the specific devises, passed by this clause to the testator's son George, and that he took the fee. [Seeing what was the testator's intention, as disclosed by the preamble, the court could not but say he had employed sufficient words to carry it into effect (*u*).

"Everything else I die possessed of."

And in Evans *v.* Jones (*x*), where a testatrix appointed his wife executrix, and continued: "First, I give and bequeath to my said wife all my household furniture, linen, glass, china, plate, farming stock, and all my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, *or whatever I may be possessed of* at the time of my decease." It was held that the testator's real estate passed to the wife. The court (Cleasby and Pollock, BB.) observed that the words whatever "I may be possessed of at my decease" taken by themselves would carry the real estate, and were not to be read as the concluding portion of an enumeration of the particulars of the personal estate, but as introducing a new subject of gift. The previous words being sufficient to pass the whole personal estate, the words which followed would be inoperative unless they carried real estate.

In Day *v.* Daveron (*y*), a testator gave his house M. to his wife (without words of limitation), and his house N. to his wife for life, together with his household goods, &c.; but if she married again, (which she did not do), "the above property was to become the property" of his daughter for life, remainder to her children: but if his wife remained unmarried, then, after her death, he gave house N. to the

(*r*) 6 Scott, 408, 4 Bing. N. C. 658. (*s*) 5 M. & Pay. 682, 7 Bing. 664.
(*t*) Ante, p. 725.
[(*u*) But as to its carrying the fee, see Ch. XXXIII.
(*x*) 46 L. J. Ex. 280. See also Warner *v.* Warner, 15 Jur. 141; Phillips *v.* Beal, 25 Beav. 25.
(*y*) 12 Sim. 200; Warren *v.* Newton, Dru. 464.

daughter for her life and her children. The testator then went on: "I appoint my wife executrix and residuary legatee to all other property I may possess at my decease. . . . Now concerning my funded property, I hereby" give one moiety to the wife and the other to the daughter. Sir L. Shadwell held that the wife, under the residuary clause, took the remainder in house M. He thought it clear, that *741 this clause did not refer to personal property; for * the testator almost immediately afterwards spoke of his funded property in a distinct sentence.

"I appoint my wife executrix and residuary legatee to all other property I may possess at my decease."

In Davenport *v.* Coltman (*z*), a testator, after certain pecuniary legacies, bequeathed to his wife for her life his freehold house at C., together with the use of plate, &c., and of interest of stock; and declared that, "at her decease, it was his will that A. and B. should divide equally between them, *as residuary legatees, whatever he might die possessed of*, except what was already mentioned in favor of others." And after appointing executors, he authorized them to sell certain leaseholds immediately; "but the house at C. must not be sold as long as my wife lives." On a case from Chancery, the Court of Exchequer certified their opinion that A. and B. were entitled in fee-simple to the whole real estate of the testator at the death of the wife, subject, as to the house at C., to the wife's life-estate. They relied partly on the generality of the expression, "whatever I may die possessed of," which they thought was not to be limited to personal estate, being, in their opinion, equivalent to "all I am worth" (*a*), or, "all I have" (*b*); but they also relied on the direction to postpone the sale of the house at C., which could only refer to a sale for convenience of division between A. and B. according to the terms of the residuary clause, and that if any real property was included in that clause, all must be so. Sir L. Shadwell, V.-C., confirmed the certificate; observing that besides the terms "whatever I shall die possessed of" (which he thought would comprehend estates in fee-simple), there was an exception of "what was already mentioned in favor of others," and that one of the things already mentioned was the possession of the freehold house for the life of the wife.]

"A. and B. to take as residuary legatees whatever I may die possessed of."

On the other hand, in Monk *v.* Mawdsley (*c*), where a testatrix, in a will made under a power, after bequeathing several pecuniary legacies, proceeded thus: "I give, devise and bequeath to my husband P. M. my two fields and house in the township of Great Neston, likewise the remainder of my personalty, *and all I may die possessed of at the time of my death*, after the above bequests are fully discharged, my just debts paid, funeral expenses, and proving

"All I may die possessed of," held not to pass realty.

(*z*) 9 M. & Wels. 481, 12 Sim. 588. (*a*) Huxtep *v.* Brooman, 1 B. C. C. 437.
(*b*) See per Bayley, J., Doe *v.* Morgan, 6 B. & Cr. 518, 9 D. & Ry. 633.]
(*c*) 1 Sim. 286. [Compare remarks by the same judge upon the word 'possessed" in Noel *v.* Hoy, and Thomas *v.* Phelps, ante p. 730. The concluding distinction between real and personal estate is removed by 1 Vict. c. 26, s. 3.

this my last will and testament. I nominate and appoint A. K., and my husband P. M., trustees and *executors of this my *742
last will and testament." Sir J. Leach, V.-C., held that the fee in the Neston estate did not pass by these words. The argument for the husband, he observed, was, that these words would have no effect, unless they operated to carry the fee of the Neston estate, the whole personalty passing by the prior expression; but he knew of no case in which words had been held to carry a fee-simple, because they would otherwise be mere surplusage and repetition. He relied much on the words "possessed of," as being applicable exclusively to personal estate, especially when coupled with the words "at the time of my decease," which could not refer to real estate (*d*).

So, in Henderson *v.* Farbridge (*e*), it was contended, that the equity of redemption in a copyhold estate passed under the following words, in a letter from the deceased (who was abroad in a military capacity) to his mother. After giving some directions respecting the rents of the property in question, he said: "Provided I should die, "All my effects."
or be slain in the wars, or by any other means before my return, I give and bequeath *all my effects* (after paying of every due demand) to you for life, and then to go to my younger sister Ann." In another letter to his mother, he made very affectionate mention of his sister Ann, and added these words: "If anything should "What little I have to call my own."
happen to me in this country, *what little I have left to call my own* may be useful to her." Lord Gifford, M. R., was of opinion that, treating these papers as testamentary, the words were inadequate to pass property of the nature of real estate.

[In Maitland *v.* Adair (*f*), a testator devised his estate at T. to his nephew A., and bequeathed money legacies to several other "My fortune" confined to personalty by context.
relations; and by a codicil directed his undisposed-of money to be divided among his said relations in the proportion he had *bequeathed* (*g*) the other part of his *fortune*. Lord Rosslyn held that the word "fortune" must mean money legacies, and that A. was not entitled to a share in respect of the value of the T. estate.]

* VI. It remains to be observed, that words appli- *743
cable exclusively to personal estate have sometimes, by force of the context, been held to include land. This frequently happens where an expression is evidently used as referential to and synonymous with an anterior word, clearly

Words descriptive of personal estate only held to carry land — when.

(*d*) Followed in Cook *v.* Jaggard, L. R. 1 Ex. 125, though there the words were "or whatever I may be possessed of or *entitled to*." The court distinguished the case from Wilce *v.* Wilce, supra, by reason of the words being "or whatever" instead of "and whatever": *sed qu.*, and see Evans *v.* Jones, supra. As to another distinction suggested by Channell, B., during the argument, it is to be observed that a devisee for life of specific lands has frequently been held to take the remainder in fee of the same lands under informal words in a subsequent residuary clause. See Hopewell *v.* Ackland, ante, p. 738; and the following cases where the residuary devises contained the word "estate" or "property": Scott *v.* Alberry, ante, p. 722; Roe *v.* Gilbert, ante, p. 725; Day *v.* Daveron, ante, p. 740; Saumarez *v.* Saumarez, ante, p. 735.]
(*e*) 1 Russ. 479. [(*f*) 3 Ves. 231. (*g*) As to this word, *vide ante*, p. 737, n. (*g*).]

descriptive of real estate; in which case its extent of operation is measured, not by its own inherent strength, but by the import of its synonym.

Word *legacy* held to refer to real estate antecedently devised.

Thus, in Hope d. Brown *v.* Taylor (*h*), where a testator, after devising certain lands to A., B. and C., and giving pecuniary legacies to B. and C., provided that, if either of the persons before named died without issue, then *the said* legacy should be divided equally between them that were alive: it was held that the word "legacy" in this clause extended to the land before devised. Foster, J., observed that one of the persons named had no pecuniary legacy.

Word "legacies" held to refer to realty before devised.

So, in Hardacre *v.* Nash (*i*), where a testator, after bequeathing two legacies of 150*l.* each to his son and daughter, gave all his real and personal estate to his wife for life, and at her death a copyhold and freehold estate to his son, and a copyhold messuage to the daughter; adding, "but if either or both of my children should die before the decease of my wife, then *those legacies* which are here left them shall return unto my wife for her sole use and benefit, and for her to dispose of freely as she might think fit." It was contended that the word *legacies* here referred to pecuniary legacies, and those only; but the Court of K. B. held that it extended to the real estate devised to the children; and, consequently, that on the death of the son in the lifetime of the widow she became entitled to the property given to him.

"I appoint A. residuary legatee," held to carry real estate.

[So, the words "residuary legatee," though properly applicable to personalty only (*k*), are sufficient to designate the person who is to take the realty if the context shows an intention so to use them; as in Hughes *v.* Pritchard (*l*), where *744 a testator began *thus: "As to my estate which God has bestowed on me, I do make this my last will and testament as follows (that is to say):" he then devised certain freehold land to A. for life with remainder over, and another freehold farm to B. for life with other remainders over; next he gave pecuniary legacies, then a specific legacy, and afterwards more pecuniary legacies, "and I make A., C. and D. my residuary legatees:" it was held by Jessel, M. R., and James and Bramwell, L. JJ., that the testator's real estate not specifically devised passed to A., C. and D. Sir G.

(*h*) 1 Burr. 268.

(*i*) 5 T. R. 716; [see also Brady *v.* Cubitt, Dougl. 31, 40.] As to the words "share," "share aforesaid," "portion," and similar expressions, as applying to one or more of several preceding subjects, *vide* Doe d. Stopford *v.* Stopford, 5 East, 501; Hardman *v.* Johnson, 3 Mer. 348; Doe d. Gibson *v.* Gell, 2 B. & Cr. 680, 4 D. & Ry. 387; Doe d. Driver *v.* Bowling, 5 B. & Ald. 722; [Scrivener *v.* Smith, 2 D. M. & G. 399.

(*k*) Doe d. Roberts *v.* Roberts, 7 M. & Wels. 382; Lea *v.* Grundy, 1 Jur. N. S. 953; Windus *v.* Windus, 21 Beav. 373, aff. 6 D. M. & G. 549, diss. K. Bruce, L. J.

(*l*) 6 Ch. D. 24. See also Pitman *v.* Stevens, ante, p. 739; Alleyne *v.* Alleyne, 2 Jo. & Lat. 544, per Sugden, C.; Evans *v.* Crosbie, 15 Sim. 600. And see Singleton *v.* Tomlinson, 3 App. Ca. 404, stated ante, p. 628; Wildes *v.* Davies, 1 Sm. & Gif. 475; in each of which the surplus proceeds of converted realty were held on the context to pass to persons appointed "residuary legatees."]

Jessel agreed that an appointment of residuary legatees standing alone in a will would be a gift of the personal estate only; but he said, "Looking at the preliminary words, the testator, as it seems to me, has told us in express terms that he has disposed by his will of all his property. That being so, and finding in the will a disposition of parts of his property with that appointment of residuary legatees, why are we not to say that the expressions in the former part of the will are entitled to as much consideration as the expressions in the latter part, and that he intended those three persons to take the residue of his property." Sir W. James asked, during the argument, whether there was any case where such words as "I appoint, &c." had been held not to pass real estate, if there had been previous gifts of real estate in the will.]

Upon the principle already stated, the word *effects* (though applicable strictly to personalty only (*m*) has been held to comprehend the several particulars before mentioned, consisting of both real and personal estate.

"Said effects," held to comprehend land previously mentioned.

As in Doe d. Chillcott *v.* White (*n*), where a testator after making several pecuniary bequests, devised to A. the income of a certain cottage, and to E. the half of a certain estate; and all the residue of his goods, chattels, rights, credits, personal and testamentary estate, and also his lands, tenements and hereditaments, he gave to his wife for life, whom he made sole executrix; and he allowed her to give what she thought proper of "her *said effects*" to her sisters, the said A. and E., for their lives; and, after the above lives were expired, he gave all his lands to J., who was his heir at law: it was held that the power of the widow extended to all the real and personal estate given to her for life, including the cottage in which A. had a life-interest.

Word "effects" held, upon the whole will, to extend to real estate.

* So, in Marquess of Titchfield *v.* Horncastle (*o*), where the testator directed all his debts and funeral and testamentary expenses to be paid; and bequeathed all his furniture and goods, linen, plate and books to his brother J. He gave to Ruth Chambers an annuity payable out of his real and personal estate, adding "and this my executors hereinafter named will contrive." Then after giving several legacies, he gave and bequeathed all the residue of his goods and chattels, personal estate, *effects of what nature and kind soever* (*p*), to trustees, directing them to take an inventory of all his goods and chattels, of whatsoever nature they might be; but not to dispose of nor sell any part, not even the books until the death of his brother, then the whole of the effects, &c., to be sold, and the money arising therefrom to be considered the *745

(*m*) Camfield *v.* Gilbert, 3 East, 516; Doe d. Hick *v.* Dring, 2 M. & Sel. 448; [Doe d. Haw *v.* Earles, 15 M. & Wels. 450; but see per Malins, V.-C., Smyth *v.* Smyth, 8 Ch. D. 561.]

(*n*) 1 East, 33.

(*o*) 2 Jur. 610. [See also Milsome *v.* Long, 3 Jur. N. S. 1073; Phillips *v.* Beal, 25 Beav. 25.

(*p*) But as to these words following the word "effects," see Doe *v.* Dring, 2 M. & Sel. 454.]

property of the noble person thereinafter bequeathed to. And the testator further directed that no part of the real property he had in houses, land, &c., should be disposed of at the time of his decease. And then (after many intervening directions concerning his personal estate) he declared his determination, that his brother should have the whole of the profits arising from his estates, as rents, interest, dividends, as they arose, for his maintenance, subject to the control and management of his trustees, and that he should have the entire use of his furniture, in short everything; adding "And I further will and direct, that my said trustees, on the demise of my brother, shall stand seised and possessed of such moneys *and effects*, upon trust to pay the same to the noble Marquess of Titchfield to his own entire use; [and as I have no relations that I know of entitled to a single sixpence from me, unless Mrs. M., my brother's widow, and she has ample provision from the family, I trust that his lordship will not therefore hesitate in accepting the *property* which may remain after my brother's demise."]

Criticism on the word "effects."

Lord Langdale, M. R., held, that the testator's real estate passed under this clause. "Much has been said in argument," he said, "as to the meaning of the word 'effects,' which was understood by Lord Mansfield to mean much the same thing as worldly substance, although certainly in subsequent cases the courts have inclined to consider that word in its proper or natural interpretation to be confined to personal estate, unless there are other words in the context to control that meaning; I do not express any opinion

*746 * on that, although *I am not aware of any reason why the word should not be applicable to the 'effects' generally arising from a man's industry, whether consisting of personal or real estate;* but it is not now necessary to express an opinion on so refined a point of construction. The testator intended that his debts should be paid; and after that was done, that his brother should enjoy what remained of his real and personal property for his life, and after his brother's death, he did not intend any relation to have any part of his property, but he did intend that his property should go to the plaintiff. He subjected the whole of his property to the payment of debts. Then the annuity given to Ruth Chambers was to be paid out of his real and personal estate, which his executors were to contrive. His executors were to contrive the mode of payment of the annuity out of the real and personal estate. They were, therefore, to have some estate or power to enable them to do that. The testator afterwards, it appears to me, gives directions as to the whole of the property which was producing income. He gives directions as to his real property. Nothing was to be sold during the life of his brother. His property was realized — perhaps it might be right to say, 'effected' — at the time of his death, and he meant it to remain so until his brother's death. Taking the whole of the will together, it does appear to me that the testator has given all his real and personal estate to the trustees, for the benefit of his brother, during

his life, and has directed that, at his death, all shall be converted into money, and paid to the plaintiff." [The M. R. then read the concluding passage in the will, and added: "These words might be said to mean the property before mentioned; but it is the property 'remaining after my brother's decease;' and though it is not necessary to attach to this sentence the effect of a new devise, it certainly explains what was before given."]

So, in Den d. Franklin *v.* Trout (*q*), where the devise was to * E. of "all my estate and effects whatsoever and wheresoever, which I shall be possessed of or entitled to at the time of my decease," in trust to pay funeral expenses and debts. The testator then subjected his "*said effects bequeathed to E.* to the following *legacies*," and went on to enumerate certain pecuniary legacies, *and gave to S. a house in W.* He directed that all the above legacies should be paid out of his effects by the said E. within twelve months after his decease, and then gave and bequeathed all the residue and remainder of his *said effects* to the said E., her heirs and assigns, forever. It was held, that she took the remainder in fee in the house devised to S. (which was the testator's

*747 "Said effects bequeathed to E.," referred to land before devised.

(*q*) 15 East, 394. As to the effect of some referential expressions of frequent occurrence, — "as aforesaid," see [Walsh *v.* Peterson, 3 Atk. 194; Davis *v.* Norton, 2 P. W. 390;] Weddell *v.* Munday, 6 Ves. 341; Sibley *v.* Perry, 7 Ves. 522; Meredith *v.* Meredith, 10 East, 503; "as before," Macnamara *v.* Lord Whitworth, Coop. 241; "in like manner," [per Levinz, J., 1 Mod. 100;] Roe d. Aistrop *v.* Aistrop, 2 Bl. 1228; [Doughty *v.* Saltwell, 15 Sim. 640; Lewis *v.* Puxley, 16 M. & Wels. 733; Davies *v.* Hopkins, 2 Beav. 276; Tyndale *v.* Wilkinson, 23 Beav. 74; "in manner aforesaid," Co. Lit. 20 b; Doe d. Woodall *v.* Woodall, 3 C. B. 349; Milsom *v.* Awdry, 5 Ves. 465; Lumley *v.* Robbins, 10 Hare, 621; Bessant *v.* Noble, 26 L. J. Ch. 236; Mountain *v.* Young, 18 Jur. 769;] "on the same terms or conditions," Goodtitle d. Cross *v.* Woodhull, Willes, 592; Longdon *v.* Simpson, 12 Ves. 295; ["subject to the same restrictions," Barber *v.* Barber, 1 Jur. 915; Ross *v.* Ross, 2 Coll. 269;] and other expressions of reference to some antecedent clause or provision; [Co. Lit. 9 b;] Shanley *v.* Baker, 4 Ves. 732; Roe d. Wren *v.* Clayton, 6 East, 628; see also Younge *v.* Coombe, 4 Ves. 101; [Dillon *v.* Harris, 4 Bli. N. S. 329; Re Kendall, 14 Beav. 608; Shawe *v.* Cunliffe, 4 B. C. C. 144; Doe *v.* Maxey, 12 East, 589. It is to be collected from the cases that where the gift is absolute such referential expressions determine generally not *who* shall take a legacy, but *how* the legatees shall take. Where, for instance, a legacy is given to such of a class as are living at the death of the testator equally as tenants in common, and there follows a gift to the children of A., "in the same manner," all children of A. take whether living at that time or not. See Yardley *v.* Yardley, 26 Beav. 38; Pigott *v.* Wilder, ib. 90; Wilder's Trusts, 27 Beav. 418; Archer *v.* Legg, 31 Beav. 187: otherwise, if the words be "at the same time and in the same manner," Swift *v.* Swift, 32 L. J. Ch. 479. On the other hand, when the principal gift is to A. for life, with remainder, another gift to A., or to B., or to the remainder-man, "in the same manner" (or the like) will generally import the same (or corresponding) limitations and remainders, Davies *v.* Hopkins, 2 Beav. 276; Re Colshead's will, 2 De G. & J. 690; Re Palmer, 3 H. & N. 26; Sweeting *v.* Prideaux, 2 Ch. D. 413; Minton *v.* Kirwood, L. R. 3 Ch. 614 (where "same uses" were held to include powers to appoint uses); Heasman *v.* Pearse, L. R. 11 Eq. 522; Giles *v.* Melsom, L. R. 6 C. P. 532, 6 H. L. 24 ("so specifically devised"). And gifts in settlement to several stocks, the first fully expressed, with ulterior trust for the other stocks, and the other gifts being "on like and corresponding trusts," were read *mutatis mutandis*, Surtees *v.* Hopkinson, L. R. 4 Eq. 98. In Ord *v.* Ord, L. R. 2 Eq. 393, a devise to A. "on the same conditions as he holds" Blackacre, was held to refer to conditions in A.'s marriage settlement (though not referred to) there being no others. If lands be devised to the same uses and trusts and with the same powers, &c. as other lands already settled, the powers will be exercisable by the trustees of the settlement not of the will, Taylor *v.* Miles, 28 Beav. 411. In Auldjo *v.* Wallace, 31 Beav. 193, a bequest of "200*l.* a year to be invested in the same manner as" a sum of consols previously given was held to mean a fund producing that income. In Murton *v.* Markby, 18 Beav. 196, a bequest of leaseholds upon the same trusts, &c., as those declared of the *moneys to arise* by sale of property previously given upon trust for sale was held to subject the leaseholds to the trust for sale.

only real property), by this devise. Lord Ellenborough relied much on the testator having included the house among the enumerated legacies, by which he had explained himself to describe that property under the denomination of "effects" and "legacies."

"Worldly goods" held on the context to pass real estate.

[Again, the phrase "worldly goods," though properly applicable only to personal estate, will include the realty if aided by the context. Thus, in Wright *v.* Shel-
*748 ton (*r*), where a testator gave * to trustees "all his *worldly goods* of what nature and kind soever and wheresoever they might be found upon the trusts undermentioned; his wife to have possession while she lived, but if she married, to quit possession: all his debts and legacies to be paid out of his personal estate and W. close. To his son A. 20*l.* and H. close: to his children B., C. and D. the rest of his *worldly goods:*" it was held by Sir W. P. Wood, V.-C., that the real estate was included in the gift of "worldly goods." "If," he said, "we were to turn 'worldly goods' into 'personal estate,' it would not make the sentence read better. The second 'all' must refer to the same property as the first — viz. all that was given to the trustees, which certainly includes some premises to be quitted. There were no leaseholds. If the premises are to be included in that word 'all,' then the 'all' here referred to must correspond with 'all the worldly goods' given to the other parties."

"Personal estates," held sufficient upon the context to pass realty.

Even the expression "personal estates" (*s*) will carry realty if the testator has clearly shown his intention that it shall do so. As in Doe d. Tofield *v.* Tofield (*t*), where, after some pecuniary bequests and a particular devise of realty, the testator proceeded to give to his wife "all his stock, &c., ready money, &c., and *personal estates* whatsoever and wheresoever, subject nevertheless to the above legacies," during widowhood: but if she married she was to resign "all his *personal estates* to the aftermentioned legatees in manner following: first, he gave and bequeathed to J. the house and premises in which he the testator then dwelt, with the closes adjoining," to hold in fee; "and the remaining of his personal estates" to other persons in fee. The Court of K. B. were clearly of opinion that the wife took the real estates for her life.]

The preceding cases, in which words, in themselves clearly inapplicable to real estate, have been held to extend thereto by force of the context, are the exact converse of those discussed in the first division of the present chapter.

But in Roe d. Walker *v.* Walker (*u*), a testator devised to his wife a

(*r*) 18 Jur. 445.

(*s*) In "personal estate and property" or "personal property, estate and effects" the word "personal" will generally override the whole, Buchanan *v.* Harrison, 31 L. J. Ch. 74, 8 Jur. N. S. 965; Belaney *v.* Belaney, L. R. 2 Eq. 210, 2 Ch. 138; Jones *v.* Robinson, 3 C. P. D. 344.

(*t*) 11 East, 246. See also Cadman *v.* Cadman, L. R. 13 Eq. 470.]

(*u*) 3 B. & P. 375. [Cf. Lethbridge *v.* Kirkman; 25 L. J. Q. B. 89, 2 Jur. N. S. 372.

certain house, with all his *lands, goods and chattels*, whatsoever and wheresoever, for her life; and if his aforesaid wife should die before his sons H. and R. came to the age of fifteen, * then that his *house, lands, goods and chattels*, that is to say, the rents arising from the same, should be employed in bringing them up, until the age of fifteen. The testator then declared his will to be, that his aforesaid *house, goods and chattels*, equally should be divided between all his sons and daughters that should be living at that time, share and share alike. It was held, that under the last devise, the lands did not pass.

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"Said house, goods, and chattels," (omitting the word lands before used,) did not pass lands.

It will be observed that in Doe d. Chilcott *v.* White and in Den d. Franklin *v.* Trout the word "effects" was used as synonymous with, and descriptive of the same subject as, the anterior expressions, which unquestionably comprised real estate; but in Roe *v.* Walker the testator had in the third devise adopted precisely the same phraseology as in the first and second, with the omission of a single word, and that word the only one which applied to the land. It was too much, therefore, to infer that these words, with so material an omission, were intended to describe the same subject as the preceding expressions, however reasonable might be *the conjecture* that the omission was undesigned. If the testator in the third gift had used terms of description not exactly corresponding, so far as they went, with those of the preceding devises, the difficulty of adopting this construction might not have been so insuperable. It would not then have imposed upon the court the necessity of treating the same words in the several gifts as descriptive of a different subject.

Remark on Doe *v.* White, Den *v.* Trout, and Roe *v.* Walker.

[But though a devise in terms properly and *primâ facie* applicable to personalty only may thus embrace real estate where the context refers to, or otherwise speaks of the subject, or any part of the subject of the devise, in terms applicable exclusively to real estate; yet no such incontestable argument arises where the context contains words, which, though they properly comprehend real estate if a contrary intention is not shown by the will (*e.g.* property, estate), are nevertheless flexible and liable to be influenced by more precise terms of description. Thus, in Doe d. Haw *v.* Earles (*x*), where one devised as follows: "I dispose of all my *effects* as follows: all my household goods, live stock, furniture, plate, wearing apparel and other *effects* at this time in my possession, *or that* hereafter may become my *property*, to my wife:" and a second husband was to have no power of disposition over "any part of the property which was then or might thereafter be in his (the testator's) possession." Platt, B., * admitting that the word "effects" alone could not include real estate, was induced by the context to think the testator had here used "effects" as synony- *750

Words properly descriptive of personalty only, not extended to realty by ambiguous expressions.

(*x*) 15 M. & Wels. 450. And see Barnaby *v.* Tassell, L. R. 11 Eq. 363.]

mous with the word "property," and that real estate passed. But Pollock, C. B. and Parke, B., were of opinion that there was nothing in the will to extend the natural meaning of the word "effects," which they held meant personal things only. "He disposes of all his effects," said Parke, B., "*as follows:* The words 'all my household goods, &c. and other effects now or hereafter to become my property,' carry the case no further; only such effects as are or may be his property pass." And the provision that the second husband should have no power of disposition over the property meant only, he thought, that whatever property was left to the wife should be for her separate use. "The property means only the property before devised, that is, effects merely."]

*CHAPTER XXIII. *751

WHAT WORDS WILL COMPRISE THE GENERAL PERSONAL ESTATE.[1]

Extent of words "Goods," "Chattels," "Effects," "Things" — Restrictive effect of Association with more limited Terms — Residuary Bequest — General Residue held to pass by word "Money," and other informal words.

Word "effects," "goods," or "chattels," whether it comprises entire personal estate.

THE word *effects* (*a*), and even the word *goods* (*b*), or *chattels* (*c*), will, it seems, comprise the entire personal estate of a testator, unless restrained by the context within narrower limits.[2] Where, however, such general expressions stand immediately associated with less comprehensive words, they have been sometimes restrained to articles *ejusdem generis;* the specified effects being considered as denoting the species of property, which the larger term was intended to comprise; and this upon a principle, evidently analogous to that on which (as we have seen) the words "estate" and "property" have been confined to personalty by their juxtaposition with words descriptive of that species of property.[3]

Words "and all things" restricted by prior terms of description.

As in Cook *v.* Oakley (*d*), where the testator (who was a sailor on ship-board) gave to his mother if alive his gold rings, buttons and chest of clothes, and to his loving friend F. (a shipmate), his red box, arrack *and all things not before bequeathed*, and made him sole executor. Sir J. Trevor, M. R., held, that the testator's share in a leasehold estate did not pass by these words.

The circumstance of a specific or pecuniary legacy being given to

(*a*) Cowp. 299, 15 Ves. 507.

(*b*) See Portman *v.* Willis, Cro. El. 386, where it was held that leaseholds passed under a bequest of "the residue of my goods." See also Anon., 1 P. W. 267.

(*c*) Co. Lit. 118, a.; [Tilley *v.* Simpson, 2 T. R. 659, n., per Lord Hardwicke. In Gower *v.* Gower, Amb. 612, 2 Ed. 201, running horses were held to pass as "goods and chattels."]

(*d*) 1 P. W. 302; see also Boon *v.* Cornforth, 2 Ves. 278; Cavendish *v.* Cavendish, 1 B. C. C. 467; Porter *v.* Tournay, 3 Ves. 311; [Hunt *v.* Hort, 3 B. C. C. 311; Re Ludlow, 1 Sw. & Tr. 29.]

[1] A most industrious collection of authorities upon this subject will be found in 2 Williams, Ex. c. 2, § 34.

[2] See Stuart *v.* Bute, 3 Ves. (Sumner) 212, note (*a*); Porter *v.* Tournay, 3 Ves. (Sumner) 310, note (*a*); Rawlings *v.* Jennings, 13 Ves. (Sumner) 857, note (*a*); Stuckey *v.* Stuckey, 1 Hill, Ch. 309.

[3] Ante, p. 716, note.

the same legatee (*e*), or of the general bequest being followed *752 *by dispositions of particular portions of the personal property to other persons, has commonly been considered to favor the supposition, that such bequest was not to comprise the general residue.

Thus, in Rawlings *v.* Jennings (*f*), where the testator gave to his wife certain bank stock, together with all his "household furniture *and effects, of what nature or kind soever*,"[1] that he might be possessed of at the time of his decease; and then bequeathed certain stock and money legacies to other persons, Sir W. Grant, M. R., held, that the bequest to the wife was confined to articles of the nature of those specified, and did not comprise the general residue; observing, that part of the property being given to her afterwards (*g*), the word "effects" must receive a more limited interpretation.

Word "*effects*" restrained by subsequent bequest to same person.

The words here were very general, but the manner in which the testator, after making the bequest in question, had gone on to give specific and pecuniary legacies (though he did not complete the disposition of his personal estate by a residuary clause), seemed hardly reconcilable with the supposition, that the prior gift to the wife was intended to embrace the general residue, as it is more natural, though certainly not invariable, for a testator to reserve his residuary disposition until the end of his will (*h*). Had the decision rested solely on the bequest of the bank stock to the wife, its soundness would have been questionable; for the argument, that the express gift of part shows that a legatee is not to take the remainder, admits of this answer, that the testator may have intended to place him in the favored position of a specific legatee *pro tanto* (*i*).

Remark on Rawlings *v.* Jennings.

[Again, in Wrench *v.* Jutting (*k*), where a testator bequeathed "all his household furniture, plate, linen, china, books, *753 pictures *and all other goods of whatever kind to A.," and then proceeded to direct that certain specified particulars of his property should be divided, after pay-

Word "goods" restrained by subsequent gifts.

(*e*) See p. 718, note to Strafford *v.* Berridge. (*f*) 13 Ves. 39.

(*g*) But, according to the statement of the will in the report, the only other bequest to the wife is of the bank stock, which is *anterior*. [In Parker *v.* Marchant, 1 Y. & C. C. C. 304, K. Bruce, V.-C., observed upon this case, that perhaps the word "household" belonged to the word "effects" as much as to the word "furniture;" which would of course have a restrictive effect, Marshall *v.* Bentley, 1 Jur. N. S. 260; Newman *v.* Newman, 26 Beav. 220, and compare Michell *v.* Michell, stated post.]

(*h*) See 1 Russ. 149; [1 Y. & C. C. C. 301.]

(*i*) And, accordingly, see Leighton *v.* Bailie, 3 My. & K. 267, post; [Hearne *v.* Wigginton, 6 Mad. 119, post; Brooke *v.* Turner, 7 Sim. 671; Rose *v.* Rose, 17 Ves. 351.

(*k*) 3 Beav. 521. In Collier *v.* Squire, 3 Russ. 467, it was held that stock did not pass under a bequest of the testator's house, with all his household furniture, plate, china, books, linen and every other *article* belonging to him, both in and out of his house, and which might not be in his will mentioned; the M. R. remarking that the testator could scarcely say of stock that it *might* not be mentioned or included in the articles specified.

[1] Richardson *v.* Hall, 124 Mass. 228; Kelly *v.* Powlet, Ambl. 605; Cremorne *v.* Antrobus, 5 Russ. 312, 319; Birch *v.* Dawson, 2 Ad. & E. 37; Paton *v.* Sheppard, 10 Sim. 186; Cole *v.* Fitzgerald, 1 Sim. & S. 189; Fitzgerald *v.* Field, 1 Russ. 427; Field *v.* Peckett, 29 Beav. 576; Tefft *v.* Tillinghast, 7 R. I. 434; Hoopes's Estate, 1 Brewst. 462; Bunn *v.* Winthrop, 1 Johns. Ch. 329; Hoopes's Appeal, 60 Penn. St. 220.

ment of his debts, as "follows: 50*l.* to B.; 100*l.* to C., &c.; 3,000*l.* to 4,000*l.*, or whatever remaining sum or sums, to A." Lord Langdale, M. R., said, that if the first clause had been the only one in the will, there would have been strong reason for extending the operation of the words "all other goods," &c.; but that the testator did not intend all his estate to pass was shown by his subsequently stating what were his intentions as to a particular part of it. Those words must, therefore, be restricted to goods *ejusdem generis*.

In each of the two last cases, the dispositions of particular portions of the personal property, which followed the disputed clause, comprised a gift to the same person who was entitled under the first clause; that, at least, was the ground (however unsupported by the actual fact) upon which Sir W. Grant expressly went in the case before him; and where other persons are alone contemplated in the subsequent dispositions, the argument in favor of the restrictive construction is much weakened: for, as before observed, though the residuary clause is usually, it need not necessarily be, the last in the will: and any particular bequest which follows that clause may, if made to different legatees, reasonably be read as an exception out of the property comprised in it (*l*).] Remark on preceding cases.

A more forcible argument in favor of the restricted construction, however, occurs where the testator has added to the equivocal words in question terms descriptive of a particular species of property, which those words in their larger sense would comprehend (*m*). In such case, the adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory; and make the testator employ additional language, without any additional meaning. Subsequent explanatory restrictive expressions.

Thus, in Timewell *v.* Perkins (*n*), where the will was in the following words: "I give to M. T. all mortgages, ground *rents, judgments, &c., *whatever I have or shall have at my death*, as plate, jewels, linen, household goods, coach and horses, for her use." Fortescue, J., held, that goldsmiths' notes and bank bills did not pass under the bequest: for though there was no doubt but the general words, *whatever I have or shall have at my death*, would have passed them; yet the particular words which followed, "as plate, jewels," &c., confined and restrained them to things of the same nature; he said it was so laid down in Strafford *v.* Berridge (*o*). *754

(*l*) See Rogers *v.* Thomas, 2 Kee. 8; Martin *v.* Glover, 1 Coll. 269; Arnold *v.* Arnold, 2 My. & K. 365. "A well established rule of construction," per Jessel, M. R. 2 Ch. D. 513.

(*m*) An assignment of "all household goods, &c., and other estate and effects, of or to which" the assignor is "*now* possessed or entitled," or "belonging or due" to him, was held not to pass a contingent interest under a will, Pope *v.* Whitcombe, 3 Russ. 124; Re Wright's Trusts, 15 Beav. 367; but the ground of these decisions is distinct from that treated of in the text; see, too, Ivison *v.* Gassiot, 3 D. M. & G. 958.]

(*n*) 2 Atk. 103. [But was not "as" (plate, &c.) equivalent merely to "*exempli gratia*," and less restrictive even than subsequent enumeration, as to which see Bridge *v.* Bridge, stated post, p. 759?

(*o*) Mos. 208,] 1 Eq. Ca. Ab. 201, pl. 14. A. bequeathed all his *goods*, chattels, *household*

So, in Crichton *v.* Symes (*p*), where a testatrix bequeathed to A. and B., all her *goods*, wearing apparel, of what nature and kind soever, except her gold watch.[1] Lord Hardwicke was of opinion, that the words were not intended to be a residuary clause; observing, that the testatrix afterwards gave a legacy of 50*l.* to her executor, and that there was not the word *residue*. It had been insisted, he said, that the words "wearing apparel" explained the testatrix's meaning, as if she had said, "all my goods, (to wit) my wearing apparel;" but wearing apparel must be construed the same as *and* wearing apparel, for there was no occasion to introduce wearing apparel, in order to except the gold watch, for if she had said "all my goods, except my gold watch," it would have done as well; and it was his opinion, that, as the words stood in the will, she intended to give only her wearing apparel, ornaments of her person, *household* goods and furniture, and no other parts of her personal estate; the testatrix here meant to give, not only what was properly clothes,

"Goods, wearing apparel, of what nature and kind soever, except my gold watch."

*755 *but the ornaments of her person, and the exception of the gold watch showed the latitude of the expression.

[So, in Steignes *v.* Steignes (*q*), where the testator gave to his wife, "besides all movables, plate, jewels, pictures, linen, &c. (except three books of miniatures and his whole library), 6,000*l.* South Sea stock:" Sir J. Jekyll, M. R., said, that by the bequest of 6,000*l.* stock,[2] besides all the movables, the testator had shown, that, in his understanding of the word, "movables" would not comprehend stock.[3] The consequence was, that though the word, if unrestrained by the context, would take in the whole purely personal estate, yet here it must be confined to corporeal movables, to the exclusion of all matters of a like nature with the stock. Moreover, the testator had given away his debts in another clause (*r*).]

"Movables, plate, linen, &c. S. S. stock."

atuff, furniture, and *other things*, which were then, or should be, *in* his house at the time of his death. Decreed, that money in the house did not pass; for, by the words *other things*, should be intended things of like nature and species with those before mentioned; see also [Sanders *v.* Earle, 2 Ch. Rep. 98, cited in] *Anon.*, Finch, 8, where a bequest of all the goods and chattels, plate, jewels, household stuff and stock upon the ground, in and belonging to the testator's house in N., was held not to include a sum of money found in the house; Roberts *v.* Kuffin, 2 Atk. 113, where a bequest of all goods and things of every kind and sort whatever, which should be found in a certain closet, was held not to comprise a sum of money found in the closet; [and Gibbs *v.* Lawrence, 7 Jur. N. S. 134, 30 L. J. Ch. 170.] In Sanders *v.* Earle, and Roberts *v.* Kuffin, some stress was laid on the fact of a pecuniary legacy being bequeathed to the same legatee; [as to which, however, see ante, p. 752, n. (*i*).]

The several preceding cases illustrate the application of the principle stated in the text, to bequests of personal movable property answering to a certain locality. [Swinfen *v.* Swinfen, 29 Beav. 207, where money and live and dead stock passed under a gift of "furniture and other movable goods here;" and Kennedy *v.* Keily, 28 Beav. 223, where horses and carriages kept in the stable passed under a gift of a "house and all buildings belonging to me, furniture and what the said buildings may contain;" illustrates the modern tendency to reject a restricted construction. A gift of all in a certain locality "or elsewhere" includes the general personal estate, Re Scarborough, 30 L. J. Prob. 85, 6 Jur. N. S. 1166.]

(*p*) 3 Atk. 61. [(*q*) Mos. 296.

(*r*) The M. R. also said that the words, "plate, jewels, pictures, linen," would not con-

[1] See Kendall *v.* Kendall, 4 Russ. 360; Gooch *v.* Gooch, 33 Me. 535.

[2] See Emery *v.* Wason, 107 Mass. 507; Hurdle *v.* Outlaw, 2 Jones Eq. 75; Adams *v.* Jones, 6 Jones Eq. 221.

[3] See Penniman *v.* French, 17 Pick. 404; Wood *v.* George, 6 Dana, 343.

In some instances, however, the argument in favor of the restricted construction, founded on subsequent expressions, descriptive of a particular species of property, has not been allowed to prevail against the force of the previous general words.

Subsequent expressions held not to be restrictive.

Thus, in Bennett *v.* Bachelor (*s*), where a testator bequeathed unto P. (to whom he had before devised real estates, and had also given specific legacies) all his household goods, books, linen, wearing apparel, and all other, not before bequeathed, *goods and chattels that he should be in possession of at the day of his decease*, except the plate and legacies before and thereafter given and bequeathed; and he also bequeathed to the said P. all moneys due from his (the testator's) tenants, and other persons. Lord Thurlow held, that the whole residue passed by the bequest; observing, in reference to the latter words, that the testator might not know that the debts would pass by the words "goods and chattels."

Exception, where explanatory of doubtful words.

A conclusive ground for giving to equivocal words their larger signification, occurs where the bequest contains an exception of *certain things, which such bequest, according to its restricted construction, would not comprise; the testator having in such a case afforded a key or explanation to his own ambiguous language, by showing that he considered that the bequest would, without the exception, have included the excepted articles. This question has generally arisen under gifts of goods and chattels, restricted to a certain locality; but the principle, it is obvious, is equally applicable to bequests not so restricted. *756

Thus, in Hotham *v.* Sutton (*t*), where A. having two sons and a daughter, B., C. and D., after bequeathing for their benefit a sum of 12,700*l.* Consols, gave all the residue of her personal estate and effects to her youngest children, C. and D., as therein mentioned. A. on the day of making her will executed a codicil, and revoked so much of her will as related to the bequest to her son C., of a share of her "plate,

fine the generality of the word "movables," though they were only corporeal things, for "&c." must signify, *et cætera mobilia*. Nor was the sense of it restrained by the exception. "*Et cætera*" having no substantive expressed, is more dependent for its meaning on the context than "other effects." In Chapman *v.* Chapman, 4 Ch. D. 800, where a testator directed his widow to pay his debts, and then bequeathed to her "all his money, cattle, farming implements, &c., she paying" certain legacies, it was held by Jessel, M. R., that she took everything; see also Gover *v.* Davis, 29 Beav. 225. In Newman *v.* Newman, 26 Beav. 220, and Barnaby *v.* Tassell, L. R. 11 Eq. 363, "etc." was held to mean other things *ejusdem generis*, and in Twining *v.* Powell, 2 Coll. 266, other things before mentioned.]

(*s*) 3 B. C. C. 29, 1 Ves. Jr. 63; see also Flemming *v.* Burrows, 1 Russ. 276, post, p. 758.

(*t*) 15 Ves. 319. Cf. Flemming *v.* Brook, 1 Sch. & Lef. 318, where Lord Redesdale, on the authority of Moore *v.* Moore, 1 B. C. C. 127, held, that a bequest of "all my property, of whatever nature or kind the same may be, that may be found in A.'s house, except a bond of B. in my writing-box," did not pass a mortgage security, and another bond and certain bankers' receipts, which were in the house, on the ground, that choses in action had no locality for this purpose (a doctrine which is now well settled, 1 Ves. 273, 1 B. C. C. 127, 129, n.; [7 Beav. 1; but see 29 L. J. Ch. 486]); and his Lordship being of opinion that an exception in the will of one security was not sufficient evidence of the testator's intention to pass all the other choses in action.

"Household goods and other effects, money excepted."

linen, household goods, *and other effects (money excepted)*," and gave the whole thereof to her daughter. The question was, whether the revocation extended to the general residuary personal estate, or whether the words "and other effects" were not restrained by the prior terms to articles *ejusdem generis*. Lord Eldon decided in favor of the former construction. He observed: "The doctrine appears now to be settled, that the words 'other effects' in general, mean effects *ejusdem generis*. I cannot help entertaining a strong doubt, whether this testatrix, if asked whether she meant effects *ejusdem generis*, or contemplated the share of all which she had considered her effects in the will, would not have answered that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented as *ejusdem generis* with plate, linen and household goods. The express exception of money out of the other effects shows her understanding, that it would have passed by those words; that express words were required to exclude it, and by force of that exclusion of the excepted article, she says, she thought the words of her bequest would carry things *non ejusdem* *757 *generis*. This disposition must, * therefore, be taken to comprehend all that she has not excluded, which is money only" (*u*).

Lord Eldon's statement of general rule.

It will be observed, that Lord Eldon, in the last case, lays it down, that the words "other effects," in general, mean effects *ejusdem generis* (*x*); but such a position seems scarcely to accord with some subsequent decisions about to be stated; one of which, it will be seen, was determined by the same judge who decided Rawlings *v.* Jennings (*y*), which case certainly carried the restricted construction to its extreme point; and probably was in Lord Eldon's view, when he advanced the above dictum.

"And all effects whatsoever," not restricted by association with more limited terms.

Thus, in Campbell *v.* Prescott (*z*), where a testator gave to his sons A. and J. all his sugar-house, cupola and merchandise stock, with jewels, plate, household goods, furniture, *and all effects whatsoever*, and appointed them executors; Sir W. Grant, M. R., held, that the whole personalty passed under this clause; remarking, that there was no case for the restrictive sense attempted to be put upon the words "all my effects whatsoever."

"Plate, &c., and effects that I shall die possessed of."

So, in Michell *v.* Michell (*a*), Sir J. Leach, V.-C., held, that the personal estate of a testator passed under a bequest of all and singular his plate, linen, china, household goods, and furni- *758 ture (*b*), * *and effects that he should die possessed of.* He considered that this construction of the word

[(*u*) See also Bland *v.* Lamb, 2 J. & W. 399, 409; Re Crawhall's Trusts, 2 Jur. N. S. 892, 895, 8 D. M. & G. 480; Reid *v.* Reid, 25 Beav. 469; cf. Re Hull's Estate, 21 Beav. 314.

(*x*) So per Lord Redesdale, Stuart *v.* M. of Bute, 1 Dow, 84, 87.]

(*y*) Ante, p. 752. (*z*) 15 Ves. 503. (*a*) 5 Mad. 69.

(*b*) The words "household goods," or "furniture," will include pictures hung up, and plate and house linen; [Amb. 605, 2 P. W. 419, 5 Russ. 312;] unless these words are used

"effects" was aided by the subsequent words, "that I shall die possessed of," and observed, that the expression was not household goods, furniture and effects; but household goods *and* furniture *and* effects," which imported a distinct sense in the word "effects."

[And in Hearne *v.* Wigginton (*c*), before the same judge, where, after giving several pecuniary legacies, a testator bequeathed his wearing apparel to A.; and to B. and C. two large silver spoons, one silver cream jug, six tea-spoons, one pair silver buckles; *and all his other effects* he willed to D. to be sold for his benefit: D. was held to be clearly entitled to the general residue, although some of the particulars comprehended in it were not strictly speaking the subject of sale.]

"Spoons, &c., to A., and all other effects to B."

Again, in Flemming *v.* Burrows (*d*), where a testator, after commencing his will with the words "As for such temporal estate as God in his mercy hath bestowed upon me, I give and dispose of the same as followeth;" devised certain lands to his natural son D., adding, "likewise my furniture, plate, books, and live stock, *or whatever else I may then be possessed of at my decease*, also my shipping and ropery concerns at W. and H," he paying the debts. It was contended that these words were to be confined to articles *ejusdem generis* with those specified before, *i.e.* furniture, &c., with which they stood immediately associated, and also on the ground of their being followed by the mention of specific articles, which were already included, if the previous words amounted to a

"Or whatever else I may then be possessed of."

elsewhere in the will in contradistinction thereto; Pre. Ch. 251; [also prize medals, coins and trinkets, if framed and hung, or otherwise disposed for ornament, 21 L. T. 40, 5 Russ. 321, 29 Beav. 573;] but not books, 3 Atk. 201, Amb. 605, [Mos. 112, 5 Russ. 321; (unless an intention to include them appear by the context, 10 Beav. 462, 3 Russ. 301, 11 W. R. 417; and they have been held to pass as articles of domestic use or ornament, 12 Sim. 303, which brings them within the definition of "furniture," Amb. 610, *sed qu.*);] nor wines [or other consumable articles;] 3 Ves. 311, [3 P. W. 334;] nor goods belonging to the testator in the way of, [or used in carrying on] trade: 2 P. W. 302, 1 Ves. 97, Amb. 611, [7 D. M. & G. 55; nor farming stock, 3 Jo. & Lat. 727, 29 L. J. Ch. 875; nor, in general, tenants' fixtures, *i.e.* they will generally pass with the testator's interest in the house, Mos. 112, 10 Ch. D. 13. In Paton *v.* Sheppard, 10 Sim. 186, the house had been settled *without* the tenant's fixtures, and these were held to pass to the legatee of the furniture as against the residuary legatees. Under the terms "household furniture, implements of household and articles of vertu," telescopes have been held to pass, 2 De G. & S. 425; as to a bust, *quære*, 1 Beav. 189.] The words "household furniture and other household effects," it seems, extend to all that is in the house for use, consumption or ornament, and have been held to comprise pistols, apparatus for turning, models, pictures, organ, parrot, books, wines and liquors, but not a pony or cow, or a fowling-piece, unless used for domestic defence; [Cole *v.* Fitzgerald, 1 S. & St. 189, 3 Russ. 301, and n.; Stone *v.* Parker, 29 L. J. Ch. 874; nor articles exclusively of personal ornament, 2 K. & J. 635. But the circumstance that the article has been sent away for repair or sale, will not exclude it, 2 Jur. N. S. 514.] As to the words "live and dead stock," see 3 Ves. 311, 3 Mer. 190, [12 Beav. 357, 11 W. R. 417 (where books and wine were held included.)] Growing crops, it seems, will pass under a bequest of stock of a farm, 6 East, 604, n.; or stock upon a farm, 8 East, 339; [but see 5 Russ. 12;] and see 1 Roper on Leg., by White, 249. ["Movables," unrestrained, will take in all pure personalty, Mos. 296; and articles *temporarily* removed from a place will pass as articles *in* that place, 4 B. C. C. 537, 2 Jur. N. S 514; but not articles permanently removed, 3 Mad. 276, 21 Beav. 548, 1 Jur. N. S. 250; nor articles intended to be, but never yet, taken thither, 2 De G. & S. 425; (but see 3 Ch. D. 302). "My freehold house and property situate in W. road," was held not to carry chattels temporarily on ground near the house, 2 Gif. 277. Under a gift of "plant and goodwill," the house of business held at rack-rent was decided to pass, Blake *v.* Shaw, Johns. 732.

(*c*) 6 Mad. 119.]

(*d*) 1 Russ. 276; see also Sutton *v.* Sharp, ib. 145.

general residuary gift; but Lord Gifford, M. R., held, on the authority of and the reasoning in Bennett *v.* Bachelor (*e*), that these circumstances were inadequate to restrain the generality of the bequest.

[In Arnold *v.* Arnold (*f*), the testator, who was in India and made his will there, "bequeathed to his wife 1,000*l.*; also his wines and property in England," and gave other legacies. Lord *Cottenham, then M. R., held that all the testator's property in England (which consisted of wines, stock, cash at his banker's, and other particulars), went to the wife. It was obvious, he said, that the mere enumeration of particular articles, followed by a general bequest, did not of necessity restrict the general bequest, because a testator often threw in such specific words, and then wound up the catalogue with some comprehensive expression for the very purpose of preventing the bequest from being so restricted.

"Wines and property." *759

Lord Cottenham's statement of the general rule.

Lord Cottenham's statement of the general rule is the exact contrary of that cited from Hotham *v.* Sutton, and is now generally accepted. "The mere enumeration of some items before the words 'other effects' does not alter the proper meaning of those words" (*g*).

In Parker v. Marchant (*h*), it was noticed by Sir J. K. Bruce, V.-C., as a circumstance favoring the unrestricted construction that the general terms there followed the specific. But, as already shown (*i*), a contrary order does not necessarily lead to a contrary result: and in Fisher v. Hepburn (*k*), where a testator expressed himself as follows: "As to all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, canal shares, plate, linen, china and furniture, I give, devise and bequeath the same to my wife, for her own use and benefit;" Sir J. Romilly, M. R., held the wife entitled to the general residue. "The latter words," he said (*l*), "are not words of restriction; they are rather words of enlargement. The object was to exclude nothing. Such an enumeration under a *videlicet*, a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles." The case here referred to

Special terms *following* the general, not necessarily restrictive.

Defective enumeration.

(*e*) Ante, p. 755.

[(*f*) 2 My. & K. 365.

(*g*) Per Jessel, M. R., Hodgson *v.* Jex, 2 Ch. D. 122. See also Parker *v.* Marchant, 1 Y. & C. C. C. 290, 1 Phil. 356; Read *v.* Hodgens, 7 Ir. Eq. Rep. 17; Baker *v.* Mason, 2 Jur. N. S. 539; Re Cadge, L. R. 1 P. & D. 543; Harris *v.* James, 12 W. R. 509; Stratton *v.* Hillas, 2 D. & War. 51, a very special case. Where the expression which follows the specific enumeration is unambiguous, as "all other the rest of my *personal estate*," there is still greater difficulty in limiting its meaning, Martin *v.* Glover, 1 Coll. 269; Nugee *v.* Chapman, 29 Beav. 290.

(*h*) 1 Y. & C. C. C. 295, 301. See also by the same judge 1 D. F. & J. 416; and by Romilly, M. R., Re Kendall, 14 Beav. 611. It is singular that this circumstance which these learned judges thought was in favor of the larger construction was stated by Lord Lyndhurst to be essential to the restricted construction; see Lewis *v.* Rogers, 1 C. M. & R. 52 (decd).

(*i*) Bennett *v.* Bachelor, ante, p. 755.

(*k*) 14 Beav. 627. See also Kendall *v.* Kendall, 4 Russ. 360; Avison *v.* Simpson, Johns. 43.

(*l*) Citing Sir W. Grant, Cambridge *v.* Rous, 8 Ves. 26.

by the M. R. was probably that of Bridge *v.* Bridge (*m*), *where *760
a testator, after bequeathing certain legacies, gave the remainder of his estate, viz., his Bank stock, India stock, and S. S. stock and S. S. annuities, to A., and made him sole executor. Lord King held that the words under the *videlicet* did not restrain the general words, "but were added by way of enumeration or description of the main particulars whereof the estate consisted; and the rather, because immediately after follow the words, 'and I do hereby make him sole executor.'" And in a similar case (*n*), Sir W. P. Wood, V.-C., said, "The strong presumption is that the testator did not mean to do only what he might have effectually done by giving the enumerated articles simply." It scarcely need be added that it is immaterial that the enumeration comprises trivial things only, and omits all the important items of the personal estate. To hold the contrary would involve the admission of evidence to prove what the testator's personal estate consists of at the date of the will; which we have before seen is inadmissible (*o*).]

These cases indicate the disposition of the judges of the present day to adhere to the sound rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense. General remark on preceding cases.

It is to be observed, however, that in all the preceding cases, there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favor of the restricted construction, which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent and effective.

To this ground may be referred the case of Woolcomb *v.* Woolcomb (*p*), where the testator gave to his wife all the furniture of *his parsonage house, and all his plate, household *761 goods *and other goods* (except books and papers), and all his stock within doors and without, and all his corn, wood, and other goods, belonging to his parsonage house; and gave the residue of his personal estate to J. The question was, whether ready money, cash, and bonds, should pass to the wife. It was contended, that the Effect where will also contains general residuary clause.

(*m*) 8 Vin. Abr. Devise, O. b., pl. 13; and see Chalmers *v.* Storil, 2 V. & B. 222; Nicholas *v.* Nicholas, Taml. 269; Ellis *v.* Selby, 7 Sim. 352; Everall *v.* Browne, 1 Sm. & Gif. 368; Choyce *v.* Ottey, 10 Hare, 443; Banks *v.* Thornton, 11 Hare, 176; Re Goodyar, 1 Sw. & Tr. 127, 4 Jur. N. S. 1243; Gover *v.* Davis, 29 Beav. 222; Dean *v.* Gibson, L. R. 3 Eq. 713; King *v.* George, 4 Ch. D. 435, 5 Ch. D. 627. See also Reeves *v.* Baker, 18 Beav. 372; Armstrong *v.* Buckland, ib. 204. In Att.-Gen. *v.* Wiltshere, 16 Sim. 36, the general terms, "all the property of which I am possessed," were held to be restricted to property in a particular place by force of the context, especially by the sentence "the property above referred to is at A." And in Enohin *v.* Wylie, 1 D. F. & J. 410, 10 H. L. Ca. 1, "all my capital in ready money and bank billets" was held a description of a limited part of the testator's capital, not a case of enumeration. See also Stooke *v.* Stooke, 35 Beav. 396. And see Slingsby *v.* Grainger, 7 H. L. Ca. 273.

(*n*) Dean *v.* Gibson, L. R. 3 Eq. 717. (*o*) King *v.* George, 5 Ch. D. 627.]

(*p*) 3 P. Wms. 112, Cox's ed.; [see Marks *v.* Solomons, 19 L. J. Ch. 555.

devise of all the testator's goods should carry all his personal estate; *omnia bona* being words of the largest extent and signification, with regard to personals. To which it was answered, that if the devise of all the testator's goods were to be taken in so large a sense it would disappoint the bequest of the residue; that the words "other goods" should be understood to signify things *ejusdem generis* with *household* goods, in order that the whole will might take effect. And of that opinion was Lord King.

[So in Lamphier *v.* Despard (*q*), where a testator, after devising certain real estates to his wife, bequeathed to her "all his household furniture, plate, house-linen, and all other chattel property that he might die seised or possessed of;" and after giving various legacies, he appointed A. his executor and residuary legatee; Sir E. Sugden held that all other chattel property meant all *ejusdem generis;* relying partly on the subsequent residuary gift. He thought, however, that the words would clearly not pass money; so that the clause could not be a general bequest of the entire personal estate.

Effect of a general bequest of residue.

A residuary gift of personal estate (*r*) carries not only everything not in terms disposed of, but everything that in the event turns out to be not well disposed of. A presumption arises for the residuary legatee against every one except the particular legatee: for a testator is supposed to give his personalty away from the former only for the sake of the latter (*s*). It has been said, that, to take a bequest of the residue out of the general rule, very special words are required (*t*), and accordingly a residuary bequest of property "not specifically given," following various specific and general legacies, will include lapsed specific legacies (*u*). And a *762 gift of all a testator's personal estate, *except* certain *specific sums of stock and money, followed by a bequest of those particulars, was held, in Evans *v.* Jones (*x*), to include some of the specific legacies which had failed. And in James *v.* Irving (*y*), where the bequest was of "everything real and personal, &c., *except* the S. shares, which were not to be sold until after the death of A.:" Lord Langdale, M. R., held, that the exception of the shares was only for the purpose of postponing the sale, and that they passed by the bequest.

So, in Markham *v.* Ivatt (*z*), a gift of "all the residue of my freehold and leasehold hereditaments, estate and premises, whatsoever and

(*q*) 2 D. & War. 59; see also Stuart *v.* Marquis of Bute, 1 Dow, 73; Barrett *v.* White, 24 L. J. Ch. 724, 1 Jur. N. S. 652; Mullins *v.* Smith, 1 Dr. & Sm. 204; Gibbs *v.* Lawrence, 7 Jur. N. S. 134, 30 L. J. Ch. 170. (*r*) As to real estate see ante, p. 645.

(*s*) Per Sir W. Grant, Cambridge *v.* Rous, 8 Ves. 25; see also Leake *v.* Robinson, 2 Mer. 393; Reynolds *v.* Kortwright, 18 Beav. 427.

(*t*) Per Lord Eldon, Bland *v.* Lamb, 2 J. & W. 406; see also Cunningham *v.* Murray, 1 De G & S. 366, rev. on app. 12 Jur. 547.

(*u*) Roberts *v.* Cooke, 16 Ves. 451; see also Clowes *v.* Clowes, 9 Sim. 403.

(*x*) 2 Coll. 516.

(*y*) 10 Beav. 276; see also Dobson *v.* Banks, 32 Beav. 259; Read *v.* Hodgens, 7 Ir. Eq. Rep. 17; Sheffield *v.* Lord Orrery, 3 Atk. 286; Thompson *v.* Whitelock, 4 De G. & J. 490.

(*z*) 20 Beav. 579.

wheresoever, not hereinbefore otherwise disposed of," was held not to be confined by a previous direction, that a reversionary interest in certain specified leaseholds should "form the residue of her leasehold estates," but that other leasehold property also passed thereby. And in Bernard *v.* Minshull (*a*), where under a general power of appointment (*b*), a married woman bequeathed the whole fund to her husband, but requested him after reserving a specified part for his own use, to dispose of the rest as would best carry out her wishes often expressed to him; and then bequeathed all other her property to her husband. The trust having failed for uncertainty, it was held that the husband was entitled not only to the sum which he was specially allowed to reserve, but also under the residuary clause (which, under s. 27 of the Wills Act, operated as an appointment) to the entire remainder of the fund.

What will suffice to exclude any portion of the personalty from a residuary gift.

However, if the words of the will show that the testator intended the residuary bequest to have a limited effect, the presumption in favor of the residuary legatee will, of course, be effectually rebutted; the difficulty in these, as in most other cases, being not in discovering the principle but in applying it to particular wills.

In Davers *v.* Dewes (*c*) a testator gave part of his plate to A., and declared that he intended to dispose of the residue thereof, and of the goods and furniture in C. house, by a codicil; he then bequeathed the residue of his personal estate whatsoever not before disposed of, or reserved to be disposed of by his codicil, to A. He made two codicils without disposing of the reserved * articles; but Lord King held, that being expressly reserved to be disposed of by a codicil, those articles could not pass by the devise of the residuum by the will. *763

Again, in Att.-Gen. *v.* Johnston (*d*), where, after giving legacies to a considerable amount, the testator gave to a hospital 100*l.*, "that is, if there remained enough of his personal estate to satisfy it; but if not, or in case there remained but little, then the 100*l.* to the hospital should not be paid; and the *small remainder* of his personal estate should be left to his executor," in trust for charity schools; "so as it was likewise his will, that if his personal estate should sufficiently reach towards satisfying all the legacies by him bequeathed and above mentioned, that his said executor should also dispose of the remainder in favor of" the charity schools. Lord Camden held that legacies to a large amount which had lapsed did not pass by the residuary bequest. He looked upon the bequest to be specific, contingent, and conditional; that is, "In case my estate turns out to pay all my other legacies, and there should be a little more, then I give that little."

(*a*) Johns. 276. (*b*) Vide ante, p. 682.
(*c*) 3 P. W. 40. See also Ludlow *v.* Stevenson, 1 De G. & J. 496 (gift of "property not otherwise disposed of" restricted by context).
(*d*) Amb 577.

And in Wainman *v.* Field (*e*) (which on account of the similarity of the *form* of the bequest to that in Evans *v.* Jones (*f*), well illustrates the rule), a testator bequeathed to trustees all his personal estate (except such parts as were particularly disposed of, "and also except such leasehold estates as he should be entitled to at his decease; which leasehold estates he declared it to be his intention to exonerate from the payment of his debts and legacies"), upon trust to pay debts, funeral expenses, and legacies; "and in case there should be any residue of his said personal estate (except as aforesaid) beyond what should be sufficient for the payment of his said debts and legacies," he gave the same to A. The will then contained a devise of the testator's freehold estates, and a bequest of his leaseholds, which was void for remoteness: and the question being whether the leaseholds passed by the residuary bequest, Sir W. P. Wood, V.-C., held that they did not. "The testator excepts the leaseholds," he said, "for the reason that he wishes to exonerate them from the payment of his debts and legacies, and not for the purpose of making a particular bequest of them." And again, "The testator had both an intention to bequeath those leaseholds for other purposes, and a negative intention not to give them for those particular purposes" (*i.e.* for payment of debts and legacies).

*764 * To hold that the negative intention was independent of the intention to bequeath, may seem a rigid construction. But, being made, it marks the distinction in principle between this case and Evans *v.* Jones, and James *v.* Irving (*g*).

Effect of failure of bequest of an aliquot part of residue.

When the disposition of an aliquot part of the residue itself fails from any cause, that part will not go in augmentation of the remaining parts, as a residue of residue, but will devolve as undisposed of. In illustration of this well-settled rule it will suffice to mention the case of Skrymsher *v.* Northcote (*h*), where a testator gave his residuary estate equally between his two daughters; but in the event (which happened) of either of them dying and leaving no children, then out of the moiety of the one so dying he gave 500*l.* to H., and "the remainder of that moiety" to the other sister. The testator revoked the gift of 500*l.* without making any fresh disposition of it, and Sir T. Plumer, M. R., held that it went to the next of kin. "Residue," he said, "means all of which no effectual disposition is made by the will, *other than* the residuary clause. In the instance of a residue given in moieties, to hold that one moiety lapsing shall accrue to the other, would be to hold that a gift of a moiety shall eventually carry the whole."

And this rule has been held to prevail, though the testator directed that in a certain event (which happened) the aliquot part should sink

(*e*) Kay, 507; see also Russell *v.* Clowes, 2 Coll. 648.
(*f*) 2 Coll. 516, ante, p. 762.
(*g*) Ante, p. 762.
(*h*) 1 Sw. 566; see also Lloyd *v.* Lloyd, 4 Beav. 231; Green *v.* Pertwee, 5 Hare, 249; Gibson *v.* Hale, 17 Sim. 129; Simmons *v.* Rudall, 1 Sim. N. S. 115.

into the residue and be disposed of accordingly; this not being equivalent to saying it should belong to the other residuary legatees (*i*). But it is a mere question of intention, and in Evans *v.* Field (*k*), where a testatrix directed her executors to stand possessed of her residuary personal estate, after satisfying legacies, *and also of so much of her personal estate the trusts whereof should fail*, upon trust for division in elevenths, one share being separately given to each one of eleven named persons. One of these died before the testatrix, and it was held by Sir L. Shadwell, V.-C., that the whole residue went to the other ten. He said the gift of the residue was in the first place among the eleven; but then the testatrix directed that so much of her personal estate, the trusts whereof should fail, should be disposed of according to the same trusts; and one share having lapsed, he thought the necessary effect of that direction was to make the residue divisible into ten parts instead of eleven (*l*).

* It has already been observed (*m*) that a general bequest of *765
chattels of a particular species carries all the chattels of that kind which the testator is possessed of at the time of his death; as, mortgages, stocks or furniture. Thus, a gift of "any small sum remaining in the bank after my funeral expenses have been paid," was held to carry the testatrix's balance at her banker's at the time of her death, although, in the mean time, it had increased from 480*l.* to 1,370*l.*, and notwithstanding the word "small" (*n*). In the fluctuating character of the property comprised in it such a bequest resembles a general bequest of all the personal estate, and, by analogy to a bequest of the latter kind, a bequest of a particular residue is held to include all the particular kind which in event is not otherwise disposed of. Thus, in De Trafford *v.* Tempest (*o*), where a testator gave to his widow certain chattels which, at his decease, might be in or about his house at T., and bequeathed to his son all his household and other furniture, plate and chattels, not thereinbefore otherwise disposed of, which at his decease might be in or about his said house; and afterwards bequeathed his residuary estate to other persons: the widow died before the testator, and it was held by Sir J. Romilly, M. R., that the chattels, whereof the bequest to the widow had lapsed, fell into the particular residue and passed to the son.

General bequest of particular residue.

But where a testator is dealing with a fund which he estimates at a certain amount, it is indifferent whether, after disposing of certain portions, he specifies the remainder by stating its amount or by comprising it under the term "residue." In

Effect of a gift of the "residue" of a definite sum;

(*i*) Humble *v.* Shore, 7 Hare, 247; Lightfoot *v.* Burstall, 1 H. & M. 546.
(*k*) 8 L. J. N. S. 264.
(*l*) Semb. by the lapsed share being divided into elevenths, and one of those elevenths again subdivided, *ad infin.* as in Atkinson *v.* Jones, Johns. 246.
(*m*) Ante, p. 691.
(*n*) Page *v.* Young, L. R. 19 Eq. 501.
(*o*) 21 Beav. 564, and see Mitchell *v.* M'Isaac, 18 Jur. 672.

either case, if the disposition of any portion fails, it will lapse, and not pass as part of the "residue" (*p*).

— of a fund of unascertained amount.

This construction depends on the fund being ascertained, or rather on its being so treated by the testator. Where this is not the case, the general rule as to the comprehensiveness of a particular residue prevails. Thus, in Falkner *v.* Butler (*q*), where a testatrix, having under her deceased husband's will special power to appoint the residue of his personal estate, appointed several legacies, including one to a stranger, and then appointed "the *766 * residue of her husband's estate after payment of the legacies;" it was held that the residue carried the ill-appointed legacy. It is to be observed that here, although when the testatrix made her will her husband's estate may have consisted of an ascertained sum (*r*), she did not so refer to it. The material circumstance was, therefore, wanting to show that she was parcelling out a fixed sum in definite proportions.

Where ascertained fund is subject to unascertained charges.

And in Petre *v.* Petre (*s*), where a testator, having a general power over a sum of 7,100*l.* stock, gave certain money legacies thereout, and the residue, after deducting the legacies, to his son; the fund having by the appointment become subject to debts, and the amount it would produce by a sale being uncertain till it was sold, Sir J. Romilly held the gift of the residue to be not specific, but merely residuary, and subject to all the incidents of a common residue (*t*). After adverting to the rule in Page *v.* Leapingwell, he continued: "In this case, so far from knowing the amount of the fund, the testator could have no conception of it; for it was impossible to ascertain the amount until the fund had been realized by a sale and the charges on it known. If, in this case, the testator thought he was dealing with 7,100*l.* sterling, and he had divided it into different proportions, the loss would then fall on all the persons interested in proportion to their shares, although the last portion was called 'the residue,' but that is not the case here."

An express charge of debts on the fund shows that a testator does not mean the legatee of "residue" to take a definite proportion of the fund, the debts being of altogether uncertain amount (*u*). But it does

(*p*) Easum *v.* Appleford, 5 My. & Cr. 56; Page *v.* Leapingwell, 18 Ves. 463; Wright *v.* Weston, 26 Beav. 429; Re Jeaffreson's Trusts, L. R. 2 Eq. 276 (part appointed to a stranger to power). According to Hunt *v.* Berkeley, Mos. 47, the lapsed legacy would pass by a general residuary bequest in the same will.

(*q*) Amb. 514.

(*r*) *Vide* per Wood, V.-C., Johns. 206.

(*s*) 14 Beav. 197.

(*t*) If the fund falls short of the estimated amount, all must abate ratably, Page *v.* Leapingwell, supra; Haslewood *v.* Green, 28 Beav. 1; Elwes *v.* Causton, 30 Beav. 554; Walpole *v.* Apthorp, L. R. 4 Eq. 37; Miller *v.* Huddlestone, L. R. 6 Eq. 65. If the remainder is not given at all, the case is different, and the specific portions are payable in full, Booth *v.* Alington, 6 D. M. & G. 613. Where, as often happens, the question arises upon an appointment, and the fund is insufficient for all the particular gifts, but one of them lapses — here, as between the appointees and those entitled in default, the lapsed appointment goes to augment the others and to prevent abatement, Eales *v.* Drake, 1 Ch. D. 217.

(*u*) Harley *v.* Moon, 1 Dr. & Sm. 623; Baker *v.* Farmer, L. R. 3 Ch. 537. So of any other indefinite charge or payment, as, for restoring a church, Champney *v.* Davy, 11 Ch. D. 949.

not appear that the charge of debts which, by a rule of law only, and not by express provision, attached to the fund in Petre *v.* Petre, was essential to the decision in that case, even if it could properly be permitted to weigh. In the case put by the M. R. at the close of the remarks cited above from his judgment, the debts would still have been a *charge on the fund; yet, he said, in that case the *767 residue would have borne only a proportion of the loss. Hence it would seem that wherever there is a gift of money legacies out of a specified sum of stock, followed by a gift of the "residue," this will be a true residue, the amount of it being necessarily uncertain until the stock is actually sold (*x*). The intention is placed beyond doubt if, to a proper description of the fund, the testator adds "or other the stocks or securities in which the same may hereafter be invested" (*y*).

Again, in Oke *v.* Heath (*z*), where a testatrix had power to appoint 4,000*l.*, and she appointed the *whole* sum to A., and "the residue of what she had power to dispose of" to B., the gift of residue had nothing to operate upon, except what might fail to take effect under the previous appointment. A. died before the testatrix: B. therefore took the 4,000*l.* So where the testator provided that if a particular gift should fail in a specified manner, it should fall into the residue of the fund, and then bequeathed the residue of the fund, he was held by Sir J. Bacon, V.-C., to have shown that he used the word "residue" in its proper sense, so as to include another particular gift which had failed in a manner different from that specified (*a*). And, in Re Harries' Trust (*b*), where a testatrix having a power to appoint 2,000*l.* secured by policy, and all bonuses and other moneys payable thereunder, appointed 1,000*l.* to A., 1,000*l.* to B., and the residue, after payment of the said sums, to be divided among the testator's younger sons, with subsidiary clauses regarding "the said residuary moneys and premises;" A. died before the testator, and it was held by Sir W. Wood, V.-C., upon the whole of the will, that the lapsed sum, as well as the bonuses, passed under the gift of "residue."]

"Residue," of ascertained fund explained by context.

Sometimes it has been a question, whether the word "residue" comprises the general personal estate, or is confined to the undisposed-of portion of a certain property or fund, which the testator had just before made applicable to specific and partial purposes.

"Residue" whether confined to particular fund.

As in Boys *v.* Morgan (*c*), where the testator, after bequeathing

(*x*) See acc. Vivian *v.* Mortlock, 21 Beav. 252; Carter *v.* Taggart, 16 Sim. 423.
(*y*) De Lisle *v.* Hodges, L. R. 17 Eq. 440. (*z*) 1 Ves. 135, Johns. 205.
(*a*) Re Meredith's Trusts, 3 Ch. D. 757. See also Carter *v.* Taggart, 16 Sim. 423 (as to the 600*l.* consols). (*b*) Johns. 199.]
(*c*) 3 My. & Cr. 661; see also Crooke *v.* De Vandes, 9 Ves. 197, [11 Ves. 330; Newman *v.* Newman, 26 Beav. 218. Wilde *v.* Holtzmeyer, 5 Ves. 811, Wilson *v.* Wilson, 11 Jur. 794, and Holford *v.* Wood, 4 Ves. 76, are examples of a restricted construction of the words "all I am possessed of," "remainder," and "personal estate;" see also Att.-Gen. *v.* Goulding, 2 B. C. C. 428.

*768 * certain property to E. M., and directing her to avoid expenses in his funeral, added, "I guess there will be found sufficient in my bankers' hands to defray and discharge my debts, which I hereby desire Mrs. E. M. to do, *and keep the residue for her own will and pleasure.*" Lord Cottenham decided that the word "residue" was not (as contended) confined to the fund in question. He thought he was precluded from so limiting the term by the context of the will; from the whole of which it appeared, that the testator had assumed that the legatee would be the person interested in the bulk of his estate. He also adverted to the direction to pay the debts, which were by law a charge on the general estate, out of the fund in question.

[But where in a will divided into paragraphs, each dealing with particular items, one paragraph directed debts and funeral expenses to be paid out of specified funds, "the remainder to be equally divided to my children;" it was held by Sir R. Malins, V.-C., that, as a general rule, where a will disposes of a variety of property, and winds up with a gift of the remainder or residue, it is a gift of the general residue, but that here the form of the will showed that the testator meant to give only the remainder of the particular funds with which he was dealing in that paragraph (*d*).]

As words, in themselves the most general and comprehensive, may, we have seen, be narrowed by their juxtaposition with more limited expressions, so on the same principle, terms which, in their strict and proper acceptation, apply to a particular species of personalty only, have been held, by force of the context, to embrace the general residue.

Word "money" held to extend to general residue.

In several instances, the word "money" (*e*) (which *769 is often popularly used in a vague and * inaccurate sense, as synonymous with *property*), has received this construction.[1] [The result has generally been due

(*d*) Jull *v.* Jacobs, 3 Ch. D. 703; see also Clifford *v.* Arundell, 1 D. F. & J. 307, where, in a deed, "other money in the hands of the trustees" was upon the context confined to income, exclusive of principal moneys.]

(*e*) In its strict acceptation "money" will, it seems, extend to bank notes, Ambler, 280; and no doubt to Exchequer bills and other documents payable to bearer; probably also to bills of exchange indorsed in blank, 1 B. & P. 648, 651, 4 B. & Ald. 1, and see 1 Rop. on Leg., by White, 252. [It will extend to money in the hands of an agent, L. R. 8 Eq. 434; and it was held in Shelmer's case, Gilb. Eq. Rep. 200, that money lent on mortgage passed by a bequest of "money belonging to a testatrix at her death:" for "money," said Gilbert, C. B., "is a genus that comprehends two species, viz. ready money and money due, *i.e.* the money

1 A bequest of "money" does not pass bonds, mortgages, promissory notes, or other securities, unless the will clearly indicate an intention to that effect. The term is to be understood in its ordinary sense of gold or silver or currency. Beatty *v.* Lalor, 15 N. J. Eq. 108. See Morton *v.* Perry, 1 Met. 446. On the other hand, "money" may represent the entire personal estate. Stratton *v.* Hillas, 2 Dru. & War. 51. "All my accounts" has been held not to include deposits in a savings bank. Gale *v.* Drake, 51 N. H. 78. On the other hand, it has been held that a provision requiring the executor to "sell all my property" and divide the same between A., B. and C., did not show a failure of intention to give such parties notes and money of the testator. But other parts of the will were appealed to as supporting this view. Cate *v.* Cranor, 30 Ind. 292. As to what will pass notes, see Mathes *v.* Smart, 51 N. H. 438; S. C. 49 N. H. 107; Penniman *v.* French, 17 Pick. 404; Mann *v.* Mann, 1 Johns. Ch. 231.

either, first, to the testator having directed his funeral expenses, debts or legacies (which ordinarily constitute a charge on the general residue) to be paid out of the "money;" or, secondly, where he has shown a clear intention to make a complete disposition of all his personalty, and that intention can only be effected by adopting the enlarged interpretation of the word "money." For it is clear that if the word be used without any explanatory context, it will be construed in its strict sense (*f*); *à fortiori*, if * the express purpose of the bequest be inconsistent with the notion that the testator could have intended so to apply the property alleged to be comprised in it. *770

in the owner's own hands, and his money in the hands of anybody else." But in Re Mason's will, 34 Beav. 494, a legacy due from another testator's estate was held not to pass by a bequest of "money and securities for money," "*because it was only a debt.*" See also Byrom *v.* Brandreth, L. R. 16 Eq. 475. However, a bequest of "money due to me" will pass such a legacy if the estate out of which it is payable has been got in by the executor so as to constitute a debt from him, Bainbridge *v.* Bainbridge, 9 Sim. 16: otherwise, if the estate has not been so got in, Martin *v.* Hobson, L. R. 8 Ch. 401. "Money due to me" will also include moneys under a policy on testator's own life, Petty *v.* Willson, L. R. 4 Ch. 574, and damages to which he was entitled, though the amount was unascertained at his death, Bide *v.* Harrison, L. R. 17 Eq. 76. But not money to be paid for a service not completed at the testator's death, Stephenson *v.* Dowson, 3 Beav. 342. Nor will money in the hands of a stakeholder to abide an event which does not happen in the testator's lifetime, pass by a bequest of his "money," 7 D. M. & G. 55.] In Moore *v.* Moore, 1 B. C. C. 127, it was held, that a bequest of "all my goods and chattels in Suffolk" did not comprise bonds in the testator's house, which was in that county, they having no locality for this purpose, though constituting *bona notabilia*. [And, since all choses in action (except Bank of England notes, Amb. 68, 7 Sim. 671; but not excepting country bank notes, 7 Sim. 671) are equally incapable of acquiring a locality, 7 Beav. 1, it follows that none of the choses in action mentioned above as ordinarily included in the term "money," can pass by a bequest of money in a particular place. Although money at a banker's is in fact a debt due from the banker, 2 H. L. Ca. 31, and will pass under a bequest of "debts," 1 Mer. 541, n., 1 Phil. 361, 16 M. & Wels. 321; yet the terms "ready money," or "money in hand," do also sufficiently describe such money, and generally will pass it, 1 Jur. 401, 1 Y. & C. C. C. 290, 1 Phill. 356, 5 Russ. 12; but not money in the hands of an agent, 1 Y. & C. C. C. 230, 3 Jo. & Lat. 565 (see however 11 Sim. 55, and 23 L. J. Ch. 496); nor unreceived dividends on stock, the warrants for which have neither been received nor demanded, 3 De G. & S. 462. Money in a banker's hands on a deposit account, whether originally withdrawable at pleasure, on producing the deposit note, or after expiration of notice to withdraw, will also pass by a bequest of "money," or "ready money," 7 D. M. & G. 55, Johns. 49. "Cash" is a stricter term than money. In Beales *v.* Crisford, 13 Sim. 592, it was held that a promissory note, payable to order, was not included in "cash or moneys so called" (*i.e.* "cash or money commonly called cash"). Nor would it pass as "ready money," Johns. 49.

(*f*) See Shelmer's case, Gilb. Eq. Rep. 202; Hotham *v.* Sutton, 15 Ves. 327; Read *v.* Hodgens, 7 Ir. Eq. Rep. 17; Lowe *v.* Thomas, Kay, 369, affirmed 5 D. M. & G. 315; Larner *v.* Larner, 3 Drew, 704; Cowling *v.* Cowling, 26 Beav. 449; Williams *v.* Williams, 8 Ch. D. 789. So a legacy of stock does not come within the description of a "pecuniary legacy," Douglas *v.* Congreve, 1 Kee. 410; though in Barclay *v.* Maskelyne, 5 Jur. N. S. 12, stock legacies were held upon the context to be within a clause revoking "all moneys bequeathed" to the legatees.] But the words "securities for money" will include stock in the funds even without the aid of the context, 4 Ves. 725, 1 S. & St. 500, [1 Jur. 234, 21 L. J. Ch. 843; but not bank stock, L. R. 8 Eq. 434, nor shares in an insurance, 21 L. J. Ch. 843, or canal company, 10 Beav. 547, L. R. 8 Eq. 434; nor an I O U given for goods sold, 1 Jo. & Lat. 475, 23 L. J. C. P. 137; nor a banker's deposit note, L. R. 19 Eq. 222; nor a legacy due from another testator's estate, 34 Beav. 494.] But a bill of exchange or promissory note is a "security for money" in the legal and proper sense of the words, 1 Jo. & Lat. 475; (see, however, as to a promissory note 4 Y. & C. 572): so is a bond, 3 D. J. & S. 577, and a judgment, L. R. 8 Ex. 37; and a policy of assurance on the life of a debtor is a "security," and will pass as a "debenture," 1 Ll. & Go. 291. "The funds," or "the public funds" generally means funded securities guaranteed by the government, — as consols, reduced annuities, long annuities, 27 L. J. Ch. 448; and "foreign funds" has been held to mean securities guaranteed by foreign governments, 23 Beav. 543, L. R. 10 Eq. 39, 5 Ch. D. 710. But "funds" will not include bank stock, 7 H. L. Ca. 273; nor East India stock, under 3 & 4 Will. 4, c. 85, 4 K. & J. 704; nor unfunded Exchequer Bills, 8 L. J. O. S. Ch. 38; unless there is nothing more appropriate to answer the bequest, 16 Beav. 300. As to Irish government debentures, see 2 D. & War. 239.

As where an officer on service, after bequeathing two small legacies, and directing his portmanteau and other articles to be sent home, desired that "the remainder of his money and effects should be expended in purchasing a suitable present for his godson," it was held that a reversionary interest in stock did not pass (*g*).

Where testator has charged funeral expenses on "money."

Of the first class of cases alluded to, we have an instance] in Legge *v.* Asgill (*h*), where a testatrix, after bequeathing 200*l.* long annuities amongst several persons in specific legacies, proceeded to give a debt of 2,935*l.* due to her, to A. for her separate use; and added, "*I believe there will be sufficient money to pay my funeral expenses*," which she desired might be plain. The testatrix afterwards made a codicil to her will, commencing with the following words: "*If there is any money left unemployed*, I desire it may be given in charity. My watch and piano-forte I give to C. The most useful of my clothes to be given to my present servant," and she concluded with some directions respecting the key of a trunk. The question was, whether the general residue, including the reversion of one fourth of a sum of 10,000*l.* secured by a settlement, passed by these words. Lord Eldon considered that under the will, and especially having regard to the charge of the funeral expenses, the word "money" was intended to comprise the entire personal estate; and that it was impossible to put a different construction upon the same word in the codicil.

[So, in Rogers *v.* Thomas (*i*), where a testatrix, after giving *771 various pecuniary and specific legacies, "bequeathed to the *inhabitants of T. Row *all which might remain of her money* after her lawful debts and legacies were paid;" and she went on to give other specific and pecuniary legacies: Lord Langdale, M. R., considered the charge of debts and legacies sufficient evidence of the testatrix's intention to include the general residue in the bequest of "all which might remain of her money."

Where there is a bequest of legacies, and a gift of the residue of testator's *moneys*.

It seems, indeed, that where a bequest of legacies, primarily payable out of the general estate is followed by a gift of the residue or remainder of the testator's "money," the latter gift comprehends the general residue, although the testator has not *expressly* charged the legacies on his "money." Thus, in] Dowson *v.* Gaskoin (*k*), where a testatrix, after bequeathing certain specific and pecuniary legacies, concluded her will as follows: "I appoint A. and B. my executors, and bequeath 200*l.* to each for

(*g*) Borton *v.* Dunbar, 1 Gif. 221, 2 D. F. & J. 338. Converse case — declared purpose too large for strict construction of "money," Prichard *v.* Prichard, L. R. 11 Eq. 232, stated p. 772.

(*h*) T. & R. 265, n., [and cited 4 Russ. 369.

(*i*) 2 Kee. 3; see also Kendall *v.* Kendall, 4 Russ. 360; Phillips *v.* Eastwood, 1 Ll. & Go. 291; Barrett *v.* White, 1 Jur. N. S. 652, 24 L. J. Ch. 724; Grosvenor *v.* Durston, 25 Beav. 99; Stocks *v.* Barré, Johns. 54. But this principle will not govern cases where the bequest following such charge is of *ready* money, Re Powell, Johns. 49.]

(*k*) 2 Kee. 14.

their trouble, and whatever remains of money I bequeath to E. D.'s five children." At the date of the testatrix's will and of her death, her personal estate consisted principally of stock, which, it was contended, would not pass under the word money; but Lord Langdale observed that the [words "whatever remains of money" must signify a remainder at some time, or after some operation upon the sum of which the remainder was contemplated. Was it to be the sum existing at the date of the will, or the remainder of that sum, or of any subsequent sum which might exist at the death of the testatrix, or after payment of her debts and legacies? There was no intimation that she intended the money (literally so called) to be first applied in payment of debts and legacies; and no reason could be given why the court was to apply it first, or to make an apportionment for the purpose of wholly or partially defeating what seemed to be the intention of the testatrix. And he decided that the stock in question passed by the will (*l*).

But the inference to be drawn from the charge of debts is not conclusive; since the testator may have intended so to charge the specific gift of "money" (*m*): and therefore if the will contains a distinct residuary clause, or otherwise gives evidence that the word is used in its strict sense, the enlarged construction is inadmissible notwithstanding the charge. Thus, in Willis *v.* * Plaskett (*n*), where a testatrix made her will as follows: "I first direct my funeral expenses to be paid, and the remainder of what moneys I die possessed of to be equally divided between A. and B. I also give to the said A. all my wearing apparel, trinkets and all other property whatsoever and wheresoever that I may die possessed of:" Lord Langdale, M. R., said that when a testator directed the payment of his funeral expenses, there was an inference that he was referring to his general personal estate; but that, having regard to the other parts of this will, he was prevented from giving to the word "moneys" its extended meaning. *772

Not if there be a distinct residuary bequest.

The second class of cases indicated above is illustrated by Waite *v.* Coombes (*o*), where a testator, after declaring himself desirous of making a settlement of his affairs, appointed A. and B. his "executors to take and receive all *moneys* that might be in his possession or due to him at the time of his decease, and to prosecute for the recovery of the same, if necessary,

Where there is a clear intent to dispose of the whole personal estate.

[(*l*) See also Lynn *v.* Kerridge, West's Ca. t. Hardwicke, 172 (a strong case, as there was there a general residuary bequest); Lowe *v.* Thomas, 5 D. M. & G. 319; Langdale *v.* Whitfield, 4 K. & J. 426, 436. These cases appear to overrule Gosden *v.* Dotterill, 1 My. & K. 56. (*m*) Per Leach, M. R., Collier *v.* Squire, 3 Russ. 475.

(*n*) 4 Beav. 208; and see Williams *v.* Williams, 8 Ch. D. 789 (gift of residue in will not cut down by gift of "money" in codicil); Re Mason's Will, 34 Beav. 494. Cf. Barrett *v.* White, 1 Jur. N. S. 652, 24 L. J. Ch. 724; and consider Chapman *v.* Reynolds, 28 Beav. 221, especially with reference to the weight there attributed to the fact that the testatrix had no "money" in the strict sense.

(*o*) 5 De G. & S. 676. As to the weight allowed to the fact that *at the time of his death* the testator had little besides the consols, *qu.*: and see Gosden *v.* Dotterill, 1 My. & K. 56, which on this point is good law. If the gift is specific such evidence is admissible, Gallini *v.* Noble, 3 Mer. 691.

to be by them placed in the British funds or otherwise laid out" upon security and held in trust: Sir J. Parker, V.-C., thought the whole will pointed to a complete disposition of the personal estate, and that, at all events, a sum of consols passed under the word "moneys." It was argued that the direction "to place in the British funds" proved that the testator could not have meant to include the consols in the bequest of "moneys," that direction being wholly inapplicable to them; but the V.-C. thought, that to consider that this direction destroyed the generalty of the word "moneys," as applicable to the stock, would be to take advantage of a slip of the testator in wording his will, while his meaning was obvious; that if he intended his executors to invest moneys not then invested, *à fortiori* he must have intended moneys which he had himself invested to pass by the will, if the words were sufficient to carry them, as he (the V.-C.) thought they were (*p*).

Residue, including *leaseholds*, held to pass as "money."

And in Prichard *v.* Prichard (*q*), where a testator *773 appointed an * executor and declared that the income arising from his principal money should be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or marriage to be divided among them; it was held by Sir R. Malins, V.-C., that the declared purpose of the gift showed that the whole personal estate was intended to pass, *including leaseholds.*

Where the context shows that the testator means, by "money" his general personal estate, special words should be found to exclude any part of it (*r*).

But if the context shows that the word is used in its strict sense, it will not receive the more popular construction, merely on the strength of even an expressed intention to dispose of all the estate.] Thus, in Ommanney *v.* Butcher (*s*), where a testator, after commencing his will in the following form: "I, A. B., considering in what manner I should have my fortune disposed of, in case of my death, do make this my will:"—bequeathed numerous stock and a few money legacies; and after disposing of some books and other specific articles, he directed the remainder of his books, and his jewels, plate and household furniture to be sold; and desired that his clothes and linen might be divided between his servants: he then gave a small pecuniary legacy to his executors, and added, "*in case there is any money remaining*, I should wish it to be given in private charity." Sir T. Plumer, M. R., was of opinion that the concluding clause did not comprehend the general residue; but was to be considered as applying to the residue of the produce of those articles which the testator had

Unless forbidden by the context.

(*p*) But the mere fact of "money" being so disposed of (*e.g.* to one for life, with limitations over), as to necessitate an investment, will not suffice to extend the natural import of the word, Lowe *v.* Thomas, Kay, 369, 5 D. M. & G. 315; Larner *v.* Larner, 3 Drew. 704; Williams *v.* Williams, 8 Ch. D. 789. (*q*) L. R. 11 Eq. 232.

(*r*) See per Kindersley, V.-C., Barrett *v.* White, 1 Jur. N. S. 652, 24 L. J. Ch. 724.]

(*s*) T. & R. 260.

directed to be sold, after providing for the payments which were ordered to be made. It will be seen that the clause directing the sale and the clause disposing of the "money" did not stand in immediate connection; [and the M. R. owned there was difficulty in knowing what the testator meant: but he relied on the circumstance, that, up to a certain extent, all the dispositions in the will were legacies of stock; the testator therefore had distinguished where he meant stock to be the subject of his disposition, and the context showed that in the clause in question he was not adverting to the stock. To construe the word "money" to mean stock would be to alter the words of the will contrary to the context.

Other cases of the extended use of "money."

The modes in which a testator may attach a particular * meaning to the word "money" are, of course, *774 various. In Glendening *v.* Glendening (*t*), a testator bequeathed to his wife "the interest of his money and the use of his goods (*u*) for her life:" at her death he gave various pecuniary legacies, "and the remainder of his property to be equally divided between his brothers and sisters; his wardrobe to be equally divided between his brothers:" Lord Langdale, M. R., held that the wife was entitled to a life-interest in the general residue (consisting of money in the funds, a small sum of cash, and a few chattels), except the wardrobe. "He gives the interest of the money, and the use of his goods to his wife for life; and at her death he gives certain pecuniary legacies, and the remainder of his property to his brothers and sisters. What is the time to which he here refers? I think that, looking at the structure of this will, it refers to the wife's death."

"Money" enlarged to a qualified extent.

The word "money" may of course receive from the context a meaning larger than that which properly belongs to it, but short of comprehending the general residue. Thus, where a testator bequeathed stock specifically to one for life, and afterwards left "this money" to B. in trust to pay certain portions of the stock to B. and others (not exhausting the stock), and gave "any surplus money" to B.: it was held, that B. took the undisposed-of stock (*x*).]

So, in Hastings *v.* Hane (*y*), where a testator, after bequeathing certain specific and pecuniary legacies, directed A. and B. to "divide equally any moneys which may remain *to my account* after payment of the aforesaid sums and my debts." It appeared that the testator had certain accounts with his bankers and other persons; and Sir L. Shadwell, V.-C., held that the bequest was confined to the balances owing to the testator on these accounts, and did not comprise the general residue, observing that he was bound to give a meaning to the words "to my account."

[And in Stooke *v.* Stooke (*z*), where a testator gave a house and

[(*t*) 9 Beav. 324. See also Whateley *v* Spooner, 3 K. & J. 546.
(*u*) No reliance appears to have been placed by the court on this word.
(*x*) Newman *v.* Newman, 26 Beav. 218.] (*y*) 6 Sim. 67. [(*z*) 35 Beav. 396.

300*l.* of lawful money to his daughter E., and "the remainder of all his moneys," in whatever it may be — in bonds or consols or anything else, to his wife. Sir J. Romilly held that the wife took all sums secured by any species of security, including a life policy, but not leaseholds, nor furniture, plate, &c. The M. R. said: "If a testator gives
*775 matters which are not money, in the * ordinary acceptation of the term, and afterwards gives 'all other my moneys,' he applies that expression to things which are not strictly money, and consequently things not of that character pass under the gift. Thus, if a testator gives 'Whiteacre and all the rest of his money,' he means all his property, for he treats Whiteacre as money" (*a*). So, any narrower term than "money," *e.g.*, "my money in the S. bonds" may comprehend more than would be signified by that expression alone, if it is given as the "remainder" of something else, no part of which was in the S. bonds (*b*). The degree of comprehensiveness must in each case be decided by the context (*c*).]

Other cases may be adduced, in which the general residue of a testator's personal estate has been held to pass under very informal words.

Informal words held to pass general residue.

As in Leighton *v.* Bailie (*d*), where a testatrix made the following indorsement on one of her testamentary papers: "I think there will be something left after funeral expenses, &c. paid, to give to W. B., now at school, towards equipping him to any profession." By another testamentary paper she bequeathed the sum of 500*l.* to W. B. It was held by Sir J. Leach, M. R., that under the indorsed memorandum, W. B. was the general residuary legatee.[1]

[Again, in Hodgkinson *v.* Barrow (*e*), a testator having several children by different marriages, gave his real and personal estate to trustees upon trusts that did not exhaust the whole interest, but "confiding in them to fulfil any memorandum he might attach" to his will: by a codicil, after reciting the settlement made on his second marriage, "he directed that whatever sums might come to the children of that marriage, or the children of his former marriage, with the exception of such sums as might come in right of their respective mothers, that his trustees would take the whole of his real and personal property into their

(*a*) See also Montagu *v.* Earl of Sandwich, 33 Beav. 324; and per Lord Eldon, Gaskell *v.* Harman, 11 Ves. 504. The word "other," or the like, is the essential word, Collins *v.* Collins, L. R. 12 Eq. 455.

(*b*) Patrick *v.* Yeatherd, 33 L. J. Ch. 286. "In S. bonds" might here be read as *falsa demonstratio*.

(*c*) Langdale *v.* Whitfield, 4 K. & J. 436.]

(*d*) 3 My. & K. 267; [see Surtees *v.* Hopkinson, 18 L. J. Ch. 188; Wiggins *v.* Wiggins, 2 Sim. N. S. 229; Duhamel *v.* Ardovin, 2 Ves. 162.

(*e*) 2 Phill. 578.]

[1] In case of the devise of a residuum to a tenant for life with remainders, the presumption is that the testator intended that the whole residue should at his death be converted into money and enjoyed, after payment of claims, according to the terms of limitation, as a fund. Brooks *v.* Brooks, 12 S. Car. 422, 444. But this presumption would be rebutted by the expression of an intention that the sale should be postponed until after the death of the life tenant. That would show a desire that the life tenant should have the specific enjoyment of the property itself. Ib.; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Glover *v.* Hearst, 10 Rich. Eq. 329. See also Finley *v.* Hunter, 3 Strob. Eq. 78; Robertson *v.* Collier, 1 Hill, Ch. 370.

consideration, and have an estimate made" — "and his will was to divide to every child its due share and proportion, also taking into consideration" moneys received by the children by way of advancement. Lord Cottenham held, reversing the decision of *the V.-C., that the reversionary interest in the real and personal property passed by the codicil. *776

And in Re Bassett's Estate (*f*), where legacies were given, and the will then went on, "after these legacies and my funeral expenses are paid, I leave to my sister A. without any power or control of her husband; in case of her death to be equally divided amongst her children or grandchildren:" it was held that this was a good gift of the residue.]

(*f*) L. R. 14 Eq. 54.

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*CHAPTER XXIV.

FORCE AND EXTENT OF PARTICULAR WORDS OF DESCRIPTION.

THE most comprehensive words of description applicable to real estate are *tenements* and *hereditaments;* as they include every species of realty, as well corporeal as incorporeal (*a*).[1]

"Tenements and hereditaments," include what.

The word "lands"[2] is not equally extensive; for though, generally, it includes as well the surface of the ground as every thing that is on and under it, as houses and other buildings (*b*), mines, &c., yet it seems that the term will not, *proprio vigore*, comprehend incorporeal hereditaments, as advowsons, tithes, &c., unless there is no other real estate to satisfy the words of the devise (a circumstance, however, which in regard to wills made or republished since 1837, would be immaterial). Thus, it seems that if a man devised all his lands in A. and he has no other real estate there than tithes, they will pass (*c*). So if he devises a certain manor, and has only a fee farm rent issuing out of it, such rent will pass (*d*).

"Lands."

But though a devise of *lands* will, unaided by the context, carry *houses* (*e*), or rather the land on which the houses are built; yet of course this does not hold where the testator evidently uses the term in contradistinction to *house*.

Whether it includes houses.

As where (*f*) A. having a messuage at L. and a messuage and lands at W. devised his house at L. with all other his lands, meadows, pastures, with their appurtenances, lying in W., the house at W. was held not to pass.

The observation is equally applicable to other words of description, any of which may be diverted from their ordinary signification, by being placed in contrast or opposition to others (*g*).

*778 *The word *premises* properly denotes that which is before men-

[(*a*) Co. Lit. 6 a, 19 b, 20 a, 154 a.]
(*b*) Ewer *v.* Heydon, Moore, 359, pl. 491.
(*c*) See Ritch *v.* Sanders, Styles, 261.
(*d*) Inchley *v.* Robinson, 2 Leon. 41, pl. 57. [That a rent-charge or rent-seck will not generally pass by devise of "lands," see West *v.* Lawday, 11 H. L. Ca. 375, *per cur.*
(*e*) Co. Lit. 4 a.]
(*f*) Heydon's Will, 2 And. 123; Cro. El. 476, 658 (Ewer *v.* Heydon).
(*g*) See Hockley *v.* Mawbey, 1 Ves. Jr. 143; and Doe d. Ryall *v.* Bell, 8 T. R. 579, stated post.

[1] See 3 Kent, Com. 401. [2] Ib.

tioned, and in this view, its comprehensiveness is of course measured by that of the expression to which it refers (*h*).

"Premises."

Thus (*i*), where a testator devised a certain messuage and the furniture in it to A. for life, and after A.'s decease, gave the said messuage *and premises* to B., the latter devise was held to carry the furniture as well as the messuage to B., on the ground that the word *premises* included all that went before. [But the word is vulgarly used, without reference to what is before mentioned, in the general sense of houses, land and the like; and it was said by Wilde, C. J. (*k*), that a gift of premises at A. would pass land there.]

"Messuage" includes curtilage, garden, and orchard.

The word *messuage* has been variously construed; sometimes a greater and sometimes a less degree of comprehensiveness having been attributed to it.

In an early case (*l*) it is laid down, that the grant of a messuage did not include a garden, but was confined to the house, "and the circuit thereof," and it was thought that the words "messuage or tenement" must receive the same construction, the word "tenement" being in such case used as synonymous with messuage; it was said, however, that it would have been otherwise if the expression had been messuage *and* tenement: indeed, one of the judges (Weston) expressed an opinion, that a garden would pass by the name of a messuage *or* tenement, if they had been held together; [and in Carden *v.* Tuck (*m*), a devise of a messuage was held to include the garden as well as the curtilage (*n*), the garden being, as was said, as well for necessity as pleasure. So, in Smith *v.* Martin (*o*), it was held that a * garden might be said to be parcel of a house, and by that name would pass in a conveyance.] *779

(*h*) Doe d. Biddulph *v.* Meakin, 1 East, 456. This doctrine was advanced in the judgment, and is indeed unquestionable; but the case did not turn precisely on the question. A. devised a messuage or tenement, lands, buildings and premises, then in his own possession, and all other his real estate whatsoever, to his wife for life. And after her decease, he devised *the said messuage or tenements, buildings, lands and premises*, to his son W. in fee. The question was, whether the devise to W. included all that was given to the wife, or only the premises in his own occupation; and it was held, that it included all. The point, therefore, was not so much, whether the word "premises" included the whole antecedent subject, as whether the testator, having used precisely the same words as those by which he had described the property in his own occupation, was not to be understood to mean to confine the devise in question to that property. If the devise were not so restrained, there were other words sufficient to carry the reversion in dispute, without calling in aid the word *premises*.

(*i*) Sandford *v.* Irby, [4 L. J. Ch. O. S. 23,] cor. Lord Gifford, M. R.; [see Doe d. Bailey *v.* Sloggett, 5 Exch. 107.

(*k*) Doe d. Heming *v.* Willetts, 7 C. B. 709; and see Ross *v.* Veal, 1 Jur. N. S. 751; Lethbridge *v.* Lethbridge, 3 D. F. & J. 523; Hibon *v.* Hibon, 32 L. J. Ch. 374, 9 Jur. N. S. 511.]

(*l*) Moore, 24, pl. 82, [Dal. 29.

(*m*) Cro. El. 89, 3 Leon, 214, pl. 283 (Chard *v.* Tuck).

(*n*) As to what is a curtilage, see Marson *v.* London, Chatham and Dover Rail. Co., L. R. 6 Eq. 101.

(*o*) 2 Saund. 400; see also Hill *v.* Grange, Plowd. 170 a; Bettisworth's Case, 2 Rep. 32 a. It has been held that "house" in s. 92 of the L. C. Act includes all that would pass by the grant of a "house"—includes therefore a garden, though partly used for trade purposes. Salter *v.* Metropolitan Rail. Co., L. R. 9 Eq. 432 (nursery garden), but not if wholly so used, Falkner *v.* Somerset and Dorset Rail. Co., L. R. 16 Eq. 458 (market garden). See also Grosvenor *v.* Hampstead Junction Rail. Co., 1 De G. & J. 446; Fergusson *v.* Brighton Rail. Co., 33 Beav. 105, aff. 33 L. J. Ch. 29; Steele *v.* Midland Rail. Co., L. R. 1 Ch. 275; Richards *v.* Swansea Improvement Com., 9 Ch. D. 425.

In Hearn *v.* Allen (*p*), two acres of land [occupied with the messuage, but distant four miles from it,] were held *not* to pass under a devise of a messuage *cum pertinentiis*. On the other hand, in Gulliver d. Jefferies *v.* Poyntz (*q*), two closes of meadow and six acres of arable land were held to pass under a devise of "three messuages, with all houses, barns, stables, stalls, &c., that stand upon or belong to the said messuages." The property had, it seems, been conveyed to the testator by the description of "a messuage or tenement with the appurtenances;" but it is clear, that extrinsic evidence of this nature was inadmissible to enlarge the established import of the words of the devise (*r*). The influence which this circumstance appears to have had in the determination certainly weakens its authority, and it is probable that the same construction would not now be adopted. At this day, indeed, the distinction suggested in the early cases (*s*) between *messuage* and *house*, in regard to the greater comprehensiveness of the former, is not to be relied on (*t*);[1] and it is clear, that even the word messuage would not now be held to carry land beyond a homestead or orchard, though contiguous to, or enjoyed with it (*u*).

"House."

In Doe d. Clements *v.* Collins (*v*), it was held, that under a devise of "the house I live in and garden,"[2] stables and a yard, which were in a ring fence that enclosed the whole, and a coal pen which was on the opposite side of the road near the house, and both which were in the testator's own occupation, were included. The coal pen was used in his trade, as well as for the *780 *purposes of his family. It was admitted, that the question as to the coal pen was doubtful; but, considering that it was in the testator's own occupation, was used by him partly for domestic purposes, and was annexed to no other tenement, the court thought it passed.[3]

"House I live in and garden."

There is indeed a case (*x*), in which a devise of the testator's house

(*p*) Cro. Car. 57; S. C. Litt. Rep. 5 nom. Kene *v.* Allen.
(*q*) 2 W. Bl. 726, 3 Wils. 141.
(*r*) Doe d. Brown *v.* Brown, 11 East, 441, ante, p. 417.
(*s*) Thomas *v.* Lane, 2 Ch. Ca. 26, Keilw. 57, where it is said that *messuage* extends to the curtilage, though not to the garden; but that *domus* comprises only buildings.
(*t*) See Mr. Justice Ashurst's judgment in Doe d. Clements *v.* Collins, 2 T. R. 502; and Co. Lit. 5 b, where Lord Coke says, "By the grant of a messuage or house, *messuagium*, the orchard, garden and curtilage do pass; and so an acre or more may pass by the name of a house." See also King *v.* Wycombe Rail. Co., 28 Beav. 104.]
(*u*) See Roe d. Walker *v.* Walker, 3 B. & P. 375; also Shepp. Touchst. 94.
(*v*) 2 T. R. 498; [Ashurst, J., seems to treat the case as if the word "appurtenances" had been in the will, ib. p. 502. See observations on the case by Turner, L. J., L. R. 1 Ch. 291.]
(*x*) Blackborn *v.* Edgley, 1 P. W. 600, 2 Eq. Ca. Ab. 324, pl. 27.

[1] Bennet *v.* Bittle, 4 Rawle, 339; Rogers *v.* Smith, 4 Penn. St. 93.

[2] A testatrix who owned a house in S., with a yard and a garden, and also owned several lots of land adjacent to the house and garden, with buildings on them, which were held by tenants, made this devise: "I give unto M. my house and land in S., now occupied by me." It was held that M. took none of the land or buildings occupied by tenants at the date of the will. Brown *v.* Saltonstall, 3 Met. 423.

[3] The word "house" in a will has been held synonymous with "messuage," and to convey all within the curtilage, without the words *cum pertinentibus* superadded. Bennet

at C. was held to include land; on the ground, it should seem, that the devisee was directed to be at the charge of housekeeping, servants' wages and coach-horses, to the number that the testator had maintained; and it appearing that he had a small piece of land, which he had employed to raise hay and corn for the house, and which was ploughed with the coach-horses (*y*). The court, therefore, thought that as everything was to be carried on as it was in his lifetime, and the same style of living observed, the lands, the profits whereof had been used to be applied to the maintenance of the house, should continue to be so applied.

Case in which "house" was held to include land.

However strong these circumstances may be as affording conjecture, they seem not to amount to that species of evidence on which to found a judicial exposition of the testator's intention (*z*). ["House" will include whatever is necessary for the convenient occupation of it, but not all that the occupier finds it convenient to occupy with it (*a*).

But where a testator directed his trustees to erect a mansion house, and suitable offices fit for the residence of the owner of his estates (which were worth about 15,000*l.* per annum), on some convenient spot, the question being whether this will authorized the formation of a garden and pleasure grounds; Sir L. Shadwell, V.-C., said that, knowing something, as he did, of what the residence of a country gentleman ought to be, it would be the grossest of all possible absurdities if it were to be held that a bare mansion house and offices, erected out of a muddy field, should be considered a fit residence for the owner of such an estate. And he thought there must of necessity be accommodation in the way of pleasure grounds, and a pretty approach in which every English eye took a delight (*b*).

Direction to erect mansion house held to include formation of suitable grounds.

So much for the comprehensiveness of the word house. The converse question is, what kind of tenement will satisfy this and *other similar terms. In Doe d. Hubbard v. Hubbard (*c*), it was held, that the word "cottage" (defined by Lord Coke (*d*) to be a little house without land to it) was satisfied by a tenement partitioned off from a larger cottage and having a separate entrance, though not including an upper room under the same roof.]

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"House," "cottage," what amounts to.

It has been sometimes a question what will pass under the denomination of *appurtenances* to a messuage or house. [Strictly speaking, land cannot be appurtenant to a house (*e*) or to

"Appurtenances."

(*y*) The court assumed that there was a direction that the horses should continue to plough the lands; but the will, as stated in the report, contains no such clause.

(*z*) See 2 B. & P. 308.

[(*a*) Steele *v.* Midland Rail. Co., L. R. 1 Ch. 275.

(*b*) Lombe *v.* Stoughton, 18 L. J. Ch. 400.

(*c*) 15 Q. B. 227.

(*d*) Co. Lit. 56 b. "A cottage is a small dwelling-house," Doe *v.* Sotheron, 2 B. & Ad. 638.

(*e*) Plowd. 169 a, 170. *A fortiori* if one be freehold, the other copyhold, Yates *v.* Clincard, Cro. El. 704.

v. Bittle, 4 Rawle, 339; Rogers *v.* Smith, 4 Barr, 93. Where land was conveyed, by a deed, with all the buildings standing thereon, except the brick factory, the land on which the factory stood, and the water privilege appurtenant thereto, did not pass by the deed. Allen *v.* Scott, 21 Pick. 25.

other land (*f*).[1] But in Boocher *v.* Samford (*g*), where a testator devised "the tenement with the appurtenances in which H. B. dwelleth in Ebley," it was held, that lands that had been held at one rent with the house sixty years passed, though not strictly appurtenant.][2] And in Doe d. Lempriere *v.* Martin (*h*), a devise of the testator's copyhold messuage, with all outhouses, gardens, and appurtenances to the same belonging, situate at F., and then in his own possession, was held to include a small piece of land, being the site of several cottages pulled down by the testator, who had laid the ground open to his court-yard, and then occupied it with the house, though his estate in the two was different.

Gardens, &c. held to pass as "appurtenances" to a house.

But in a subsequent case (*i*), a direction by the testator that his steward should enjoy his mansion house *with the appurtenances*, for one year after his death, was held to extend to orchards, but not to fifty or sixty acres of land, which the testator had kept in his own hands with the house. And this construction was corroborated by the fact of there being, in another part of the same will, a devise of this property "with the lands and grounds," also "with the appurtenances," showing that the testator had the distinction in view. Eyre, C. J., said if this had not been so, and if they had found a house situated in a park, which had been always occupied with it, being, as it were, an integral part of the thing, it might have proved the intention of the testator to pass the whole together.

This would be carrying the construction of the word very far; [and seems to have been put only for the sake of argument.]

*782 * It is not to be doubted, that whatever is necessary to the commodious enjoyment of the house will in general pass under the word "appurtenances" (*k*); *à fortiori*, if then actually enjoyed with it by the person in whose occupation the house is described to be; though in some of the cases more weight has been given to this circumstance than it seems fairly entitled to. It is not likely that at this day the word would be carried beyond its ordinary acceptation.[3] [It has a definite meaning, and though it may be enlarged by the context, the burden of proof lies on those who so contend (*l*).

(*f*) Co. Lit. 121 b; 8 B. & Cr. 141; 6 Bing. 161. (*g*) Cro. El. 113.]
(*h*) 2 W. Bl. 1148; but see Hearn *v.* Allen, Cro. Car. 57, 708.
(*i*) Buck d. Whalley *v.* Nurton, 1 B. & P. 53; see also Harwood *v.* Higham, Godb. 40.
(*k*) See Nicholas *v.* Chamberlain. Cro. Jac. 121; Hobson *v.* Blackburn, 1 My. & K. 571; [for this purpose, however, the word is generally unnecessary, Steele *v.* Midland Rail. Co., L. R. 1 Ch. 275.
(*l*) See acc. Evans *v.* Angell, 26 Beav. 202; Lister *v.* Pickford, 34 Beav. 576 (in both of which "appurtenances" was construed strictly); Smith *v.* Ridgway, L. R. 1 Ex. 46, 331; also per Parke, B., Pheysey *v.* Vicary, 16 M. & W. 494.

[1] Lansing *v.* Wiswall, 5 Denio, 213. As to the effect of a devise of a mill site, and what passes with it, see Matter of Water Communication, 4 Edw. Ch. 545; Lee *v.* Woodward, 2 Taylor, 100; Nitzell *v.* Paschall, 3 Rawle, 76; Blaine *v.* Chambers, 1 Serg. & R. 169.

[2] Otis *v.* Smith, 9 Pick. 293. See Leonard *v.* White, 7 Mass. 6; Eliot *v.* Carter, 12 Pick. 436, 441.

[3] See Otis *v.* Smith, 9 Pick. 295; Jackson *v.* White, 8 Johns. 59; Eliot *v.* Carter, 12 Pick. 436, 441.

There is, however, a difference between the devise of a house and the *appurtenances*, and of a house with the *lands appertaining thereto*. It is clear, that by the latter expression *some* lands are intended, and therefore the primary sense of the word appertaining is excluded. Thus in Hill *v.* Grange (*m*), it was held that the demise of a messuage "with all lands appertaining thereto," comprised all lands usually occupied with or lying near to the messuage; for when "appertaining" was placed with the said other words, it could not be taken in any other sense, and therefore it should there be taken, not according to the true definition of it, because that did not stand with the matter, but in such sense as the party intended it. And in Hearn *v.* Allen (*n*), the court, while holding that the lands there in dispute were not included by the term "*cum pertinentiis*," said it would have been otherwise if it had been "*cum terris pertinentibus*."] "Lands appertaining to" a house, &c.

The construction of the words "thereunto belonging," which are not words of art (*o*), has often come under discussion. "Thereunto belonging."

Thus, in Ongley *v.* Chambers (*p*), where a testator devised the * rectory or parsonage of Minster, with the messuages, lands, *783
tenements, tithes, hereditaments and all and singular other the premises *thereunto belonging*, with the appurtenances; it was held that, by the effect of these words, the devise operated on certain lands which had been purchased by the owners of the rectory between the years 1607 and 1632, and had been since uninterruptedly occupied with it, and had been in various leases described as belonging to the rectory; for though not, strictly speaking, appurtenant to the rectory, they had become, by unity of title and concurrent occupation, joined to the rectory, and might be taken in popular acceptation as belonging thereto. Lord Gifford, C. J., referred to several old cases and text books in which it was laid down that lands, which had been occupied with a house for ten or twelve or even five or six years, might pass as parcel of or as belonging to such house.

So, in Doe d. Gore *v.* Langton (*q*), where a testator, in 1801, devised all his "manor or reputed manor of Barrow Minchin, in the county of Somerset, together with the mansion-house, called Barrow Court, thereto belonging, and the park; and also all and singular his freehold messuages, lands, tenements and Devise of manor and lands thereunto belonging.

(*m*) Plowd. 170 a.

(*n*) Cro. Car. 57, ante, p. 779; see also Gennings *v.* Lake, Cro. Car. 168; Higham *v.* Baker, Cro. El. 16, per Anderson, C. J.

(*o*) Per Pollock, C. B., Maitland *v.* Mackinnon, 1 H. & C. 607.]

(*p*) 8 J. B. Moo. 665, 1 Bing. 483; see also Doe *v.* Holtom, 5 Nev. & M. 391, 4 Ad. & Ell. 76; [Bodenham *v.* Pritchard, 1 B. & Cr. 350 ("lands thereto belonging *as* now enjoyed by me"); with which cf. Polden *v.* Bastard, L. R. 1 Q. B. 156, where a discontinuous easement over other property of the testator was held not to pass by devise of a cottage *as* now in the occupation of A. In Marshall *v.* Hopkins, 15 East, 309, a house and nineteen acres of land, all held by the testator under one title, and which at a former period of his ownership had been, but at the date of the will were not, in one and the same occupation, were held to pass by a devise of "all that my messuage, dwelling-house or tenement, with all lands, hereditaments and appurtenances thereto belonging."] (*q*) 2 B. & Ad. 680.

hereditaments *thereunto belonging*, situaté in the parish of Barrow Minchin and Barrow Gurney," to certain uses. The testator gave to his executors all arrears of rent which should be due from any tenant or tenants of his *estate in the parish of Barrow*, upon trust to lay out the same in repairing the farm-houses and buildings appurtenant thereto, and in draining the lands. The testator also charged two small annuities on *his estate at Barrow*. The question was, whether the devise comprised a farm, which had been purchased by the testator in 1800, and which was situate in the parish of Barrow Minchin and Barrow Gurney, and adjoined to and was in some parts intermixed with the ancient Barrow estate. Lord Tenterden, C. J., considered that the words "thereunto belonging" were to be referred to the manor, and not to the park. These words are, he observed, in common speech, of different import, according to the subject of which they are spoken. If we speak of a farm or a field with reference to the ownership, we say it belongs to such a one, meaning thereby that it is the property of that person (*r*); if with reference to any estate of a particular name, *784 we say it belongs to such an estate, * as to the Britton Ferry estate, meaning that it is parcel of that estate; if with reference to its locality, we say it belongs to such a parish or township, meaning that it is situate in and a part of that parish or township; and so with reference to a manor, we say it belongs to such a manor, meaning that it is situate in or part of that manor, in the ordinary and popular sense of the word "part," and not in the strictly legal sense, as part of the demesnes of the manor, or as holden of the manor or of the lord thereof. He adverted to the fact (which had been proved in evidence), that the gamekeeper of the manor had, both before and after the purchase of the lands in question, been in the habit of shooting over them. Having regard to this circumstance (which he considered important, as showing that the lands belonged to the manor in the popular sense to which he had alluded), and having regard also to the circumstance, that the bequest of the rents in arrear to be expended in repairing and improving any part of the estate, and the charge of the annuities, would clearly comprise the lands in question (which the testator could not intend to be united to the rest of the property for some purposes, and not for all), the court came to the conclusion that the farm in question passed.

"Thereto adjoining."

[In Josh *v.* Josh (*s*), the question was what passed by the description of "the piece of land adjoining" a house and premises previously described; whether it comprised several contiguous fields, each one situated beyond the other, and forming with the house and premises the whole of the testator's real property, or was limited to the single field next to the house and premises: and it was held to comprise the whole. Cockburn, C. J., observed that the testator did

[(*r*) In Kennedy *v.* Keily, 28 Beav. 223, a bequest of the lease of a house with all buildings belonging to *me* was held to pass stables occupied with the house by the testator though under a different title. (*s*) 5 C. B. N. S. 454.

not say the piece of *my* land, but simply the piece of land; and that the words "thereto adjoining" were as consistent with the larger construction as with the other; for the whole of the land was in the strictest sense adjoining, for it was all contiguous.]

The word *farm*[1] is construed according to its obvious meaning [as including houses, lands and tenements (*t*), of every tenure (*u*). "Farm."

In determining what property is comprehended in the terms used to describe the subject of devise, frequent recourse is had to two rules of construction, one of which is expressed by the maxim "Falsa demonstratio non nocet cum de corpore constat," the other by the maxim "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram." *Falsa demonstratio non nocet.*

*The first rule means that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only" (*x*). Thus, in Day *v.* Trig (*y*), where one devised "all his freehold houses in Aldersgate-street, London," having in fact only leasehold houses there, it was held that the word "freehold" should rather be rejected than the will be wholly void, and that the leasehold houses should pass. *785 Meaning of the rule. Devise of "freehold houses in A. street, London." The word freehold rejected.

So, in Blague *v.* Gold (*z*), where a testator, having two houses in A., one called "The Corner House," in the tenure of B. and N., the other adjoining thereto and in the tenure of H., devised "his house called 'The Corner House' in A., in the tenure of B. and H.:" the testator having no house in the joint tenure of B. and H., it was held that the description by tenure was mere surplusage and might be rejected. "House called 'the corner-house' in A., in the tenure of B." The tenure rejected.

Again, in Doe d. Dunning *v.* Lord Cranstoun (*a*), where a testator

(*t*) Co. Lit. 5 a.
(*u*) Doe d. Belasyse *v.* Lucan, 9 East, 448.
(*x*) Per Alderson, B., Morrell *v.* Fisher, 4 Exch. 591; see also Wigram, Wills, pl. 67.
(*y*) 1 P. W. 286; and see Cox *v.* Bennett, L. R. 6 Eq. 422.
(*z*) Cro. Car. 447, 473.
(*a*) 7 M. & Wels. 1; see also Welby *v.* Welby, 2 V. & B. 187; Denn d. Wilkins *v.* Kemeys, 9 East, 366; Vicars Choral of Lichfield *v.* Eyres, Sir W. Jo. 435, Cro. Car. 546, 2 Roll. Ab. 52, pl. 26. So in England *v.* Downs, 2 Beav. 523, 536, where there was an assignment of all the household goods, and all other the effects of the assignor, the particulars whereof were stated to be set forth in an inventory thereunto annexed, and there was in fact no inventory, it was held, the deed was not void for want of it, and that the chattels might be ascertained *aliunde*. See also Whateley *v.* Spooner, 3 K. & J. 542.

[1] "The word 'farm' is one of large import both in England and in America, though, perhaps, somewhat different in the two countries. In the former, it commonly implies estate leased; but as to the term, it is said to be a collective word, consisting of divers things gathered into one, as a messuage, land, meadow, pasture, wood, common, &c. In this country, a man is generally the owner of his farm, and it is a parcel of land used, occupied, managed, and controlled by one proprietor." Shaw, C. J., in Aldrich *v.* Gaskill, 10 Cush. 155. See note 1, next page.

Leaseholds misdescribed as freehold held to pass.

recited that one part of his *freehold* lands, namely, those lands which he held in the parishes of A., B. and C., were held for a considerable period of time by his father's ancestors in the male line, bearing the name and arms of D., as hereditary proprietors of the same; he therefore devised "the *freehold* lands, which he held in the three parishes aforesaid," to M. The testator had lands in each of the three parishes named, answering to the given description in every respect except that in the parishes of B. and C. there were leaseholds only. Upon the principle stated above, the Court of Exchequer held that the leaseholds passed by the will.

In the application, however, of the principle contained in this rule, the courts have not confined themselves to cases which are strictly within its terms. It is often found, on a disclosure of the *facts of the case, that of two particulars of which the description is composed, each separately finds some corresponding subject, but] the one is applicable to a larger portion of the testator's property than the other, thereby raising the question whether the more limited term be restrictive of the other, [or expressive only of a suggestion or affirmation. It is a mere question of construction; for it is clear that, if the answer be that the more limited term is merely suggestive or affirmative, it will be disregarded in deciding upon the quantity to be considered as covered by the description.

Extension of the rule.

*786

Question where parts of the description are not co-extensive.

Now if the testator describe the subject of the devise as an entire subject, and in terms of sufficient certainty as his *farm* called A., or his *house* in a particular place, or his B. estate, or the like, then, although he adds a clause to the effect that the farm, house or estate is in the occupation of a particular tenant, or is situate in a particular county, and it turns out that such clause is true only of a part of the farm, or house, or estate, the entire subject may well pass, unrestricted by the additional clause, if such a construction be in accordance with the general intent of the testator (*b*).][1]

Limited term rejected where property is described as an entire subject;

Thus in Goodtitle d. Radford *v.* Southern (*c*), where a testator devised

(*b*) See per Lord Ellenborough, Roe d. Conolly *v.* Vernon, 5 East, 80.]

(*c*) 1 M. & Sel. 299; see also Paul *v.* Paul, 2 Burr. 1089, 1 W. Bl. 255; [Whitfield *v.* Langdale, 1 Ch. D. 61, as to "Hookland" and "Tickeridge." In the same case it was held that a devise of a "messuage and lands called Claggetts and Sievelands" carried the whole of Claggetts farm, upon evidence that this farm included Claggetts and Sievelands *and a good deal more, sed qu.* *Qu.* also as to the exclusion of the wood from Tickeridge.]

1 Hammond *v.* Ridgely, 5 Harr. & J. 245; Dorsey *v.* Hammond, 1 Harr. & J. 190. Two separate tracts of land owned by the testator, and occupied together by him, were held to pass under a devise of his plantation in Bradshaw *v.* Ellis, 2 Dev. & B. Eq. 20. See Hampton *v.* Cowles, 4 Dev. & B. 16. A devise of "the farm whereon I now live, consisting of about one hundred and thirty acres, with all the buildings thereon," may pass a tract of land not immediately adjacent to that on which the testator lived, although the two exceeded one hundred and thirty acres, and although there were some buildings on the said tract of land; and portions of it, as of other parts of the farm, were occasionally let to tenants, for years or at will, and rent received from them; the evidence showing that said tract was once a part of the testator's farm, and not showing that it had ever been severed from it. Aldrich *v.* Gaskill, 10 Cush. 155.

all that his farm, called *Trogues Farm*, situate in the parish of D., *now in the occupation of A. C.* The question was, whether two closes, part of *Trogues Farm*, but *not* in the occupation of A. C., passed by this devise. It was held that the devise comprehended the whole of *Trogues Farm*, which was a plain and certain description, and was not affected by the defective description of the occupation. —as "my farm."

So, in Down *v.* Down (*d*), where A. devised all his farm and lands, called *Colt's-foot Farm*, situate in or near the parishes of D., W. and T., *now on lease to Mary Field, at the yearly rent of* 150*l.* It was held that a close of seven acres, called *William-spring*, which was a part of *Colt's-foot Farm*, but was excepted out of *Mary Field's* lease, as well as out of a subsequent lease granted by the testator to another person, passed (*e*)[1] the court * being of opinion that it was the intention of the testator to pass the whole of the farm, and not that only which was in the occupation of *Mary Field*.[2] *787

But though a devise of "my farm called A. in the occupation of B." is not, under these circumstances, limited to that part of the farm which is in the occupation of B., yet perhaps it does not follow that the same construction would be given to a devise of "all my farm in the occupation of B. called A." In this case, the reference to the occupancy forms the primary substantive part of the description, and the name is merely an addition. Thus, in the early case of Woodden *v.* Osbourn (*f*), where A., having lands called *Hayes* Lands, which extended into two vills, *Cokefield* and *Cranfield*, devised all his lands in *Cokefield* called *Hayes* Lands, to J. S., it seems to have been held that the part which was in *Cranfield* did not pass. Unless a reference to locality be more restrictive than a reference to occupation (*g*), this case seems to warrant the distinction suggested. [It is to be observed, however, that Popham, C. J., and Gawdy and Yelverton, JJ., went on to say, that if the words had been "all his lands called *Hayes* Lands in *Cokefield*" (thus reversing the order), nothing had passed but the land in *Cokefield* (*h*). Distinction where the reference to the occupancy precedes that to the name (?).

(*d*) 1 J. B. Moo. 80, 7 Taunt. 343.

(*e*) The farm consisted of about 172 acres.

(*f*) Cro. El. 674; S. C. nom. Tuttesham *v.* Roberts, Cro. Jac. 22; and Lord Ellenborough's judgment in Roe d. Conolly *v.* Vernon, 5 East, 78. The principal point in the case in Croke seems to have been whether the Hayes Lands, being so restricted in the devise to J. S., was subject to the same restriction in a subsequent devise of it as Hayes Lands generally; and the decision, of course, was in the affirmative. As to words of description being narrowed by the effect of the general context, see Doe d. Harris *v.* Greathed, 8 East, 91.

(*g*) See Doe d. Beach *v.* Earl of Jersey, 1 B. & Ald. 550, stated infra.

[(*h*) In Stukeley *v.* Butler, Hob. 171, it is said, "It is vain to imagine one part before another; for though words can neither be written nor spoken at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence;" see also Doe *v.* Galloway, 5 B. & Ad. 50.

[1] Under a devise of "a lot of about one acre of land, be it more or less, adjoining land of B. and lands of W," it was held that the devisee took the whole lot, although it was nearly ten acres, in Bear *v.* Bear, 13 Penn. St. 529. See M'Clanahan *v.* Kennedy, 1 J. J. Marsh. 332.

[2] See Aldrich *v.* Gaskill, 10 Cush. 155.

And, on the other hand, a distinction for this purpose between a reference to locality and a reference to occupation is discountenanced by the case of Doe d. Beach *v.* Earl of Jersey (*i*).

Where subject of devise described as "a house" followed by terms applicable to part only.

Next, with regard to the devise of a "house," it was decided in Chamberlaine *v.* Turner (*k*), where a testator devised "the house or tenement wherein W. N. dwelt, called the White Swan, in Old-street," and it appeared that W. N. occupied only the entry or alley of the said house and three *788 upper rooms in the *same, divers other persons occupying other parts, that the whole house passed (*l*).

"Estate."

An instance of the similar use and effect of the word "estate" is presented by Doe d. Beach *v.* Earl of Jersey (*m*), where A. devised all that her "*Britton Ferry* estate, with all the manors, advowsons, messuages, buildings, lands, tenements and hereditaments thereunto belonging, and of which the same consists." In a subsequent part of the will, after describing another estate, she added, "which, as well as my *B. F.* estate, is situate, lying and being in the county of Glamorgan." It turned out that part of the *B. F.* estate was situate in the county of Brecon; but it was found by special verdict that the whole had been known by the name of the *Britton Ferry* estate for fifty years before the death of the testatrix; and it was held that the whole passed (*n*).

"Messuages and lands called The D."

The same principle is illustrated by Hardwick *v.* Hardwick (*o*), where the devise was of "the messuages, lands and premises called The Dyffrydd, situate in the parish of K., now in the occupation of E.;" although part of "The Dyffrydd" was not in the parish of K., and other part was not in the occupation of E., yet the whole was held to pass: and by Travers *v.* Blundell (*p*), where a testator, having had under his father's will power to appoint "all that part of R.'s estate purchased by me, situate at P., consisting of" six specified closes, appointed "all that part of the property comprised in my late father's will as *is therein described as* that part of R.'s estate purchased by my father, situate at P., consisting of," and then specifying four only of the six closes; it was held that all six were well appointed. The appointment was of a certain *corpus* or subject as described by the father's will, and

"All that estate as described in the will of A."

(*i*) 1 B. & Ald. 550, 3 B. & Cr. 870.

(*k*) Cro. Car. 129. The court seems to have treated the case as if the words had been "in the occupation of W. N.," which might perhaps be restrictive, where the terms actually used would not: see per Lord Hardwicke, 3 Atk. 9; see also Doe d. Hubbard *v.* Hubbard, 15 Q. B. 227; per Erle, J., and Lord Campbell, C. J.

(*l*) See also Re Midland Rail. Co., 34 Beav. 525, stated ante, p. 334; Hibon *v.* Hibon, 32 L. J. Ch. 374, 9 Jur. N. S. 511 ("house and premises").

(*m*) 1 B. & Ald. 550.]

(*n*) Observe the agreement between the principle of these cases and that of those which are cited in connection with the subject of uncertainty, as illustrative of the rule that a *false* addition does not vitiate a devise; see also Doe *v.* Nickless, 4 Jur. 660.

[(*o*) L. R. 16 Eq. 168, explaining Pedley *v.* Dodds, L. R. 2 Eq. 819.

(*p*) 6 Ch. D. 436. See also Cunningham *v.* Butler, 3 Gif. 37; and cf. West *v.* Lawday, 11 H. L. Ca. 375.

representing that description to be in certain specified terms; one of the terms specified differed from the corresponding term of the description actually contained in the father's will, and, not being needed for the ascertainment of the subject, was rejected as *falsa demonstratio*.

Different construction in Hall *v.* Fisher.

A different construction, however, prevailed in Hall *v.* Fisher (*q*), * where a testator, by will dated 1841, *789 devised "all that *freehold* farm called the Wick Farm, in Headington, containing 200 acres or thereabouts, occupied by William Eeley as tenant thereof to me." It appeared that the person from whom the testator claimed the Wick Farm, which was all freehold, had sold a small portion of it, but had continued to occupy it as part of the Wick Farm, under a demise from the purchasers, and to treat it as such, and that the testator had let the whole to W. Eeley. There was therefore a sufficiently certain description, in accordance with the testator's undoubted intention, and corresponding in every particular but the word freehold with the actual state of the property; but Sir J. K. Bruce, V.-C., said he could not view the case as one of *falsa demonstratio*; that if the word "freehold" had been omitted, the probability was, the leasehold in question would have been held to pass; but that there was a subject here which properly answered the description given in the will. This case goes to show that words descriptive of tenure, and forming the primary part of the description, are more restrictive than those which describe locality or occupation. But the case has been questioned (*r*).]

Subsequent reference to occupancy does not extend devise.

As a subsequent reference to the occupancy does not limit a devise of a farm by name to the lands so occupied, it is clear that it would not, under such circumstances, enlarge a devise in which the occupancy extended to lands not included in the name. Consequently, under a devise of "my *Trogues* Farm, in the occupation of A.," lands of another farm in the occupation of A. would unquestionably not pass; and this hypothesis agrees with the principle of a class of decisions stated in the sequel (*s*).

Words not rejected, if required to prevent the devise being contradictory to another.

[Parts of a description which, if the will contained no other devise than that to which they belong, would be rejected as *falsa demonstratio*, sometimes derive a restrictive force from another devise in the same will, with which they would otherwise stand in contradiction. Thus, in Higham *v.* Baker (*t*), where a testator devised his farm called Whiteacre, and the lands to the same belonging, then in the tenure of W., to A., and devised his farm called Blackacre, and the lands to the same belonging, to B.; and it appeared that there were 100 acres of land belonging to

(*q*) 1 Coll. 47. See also Emuss *v.* Smith, 2 De G. & S. 722, stated ante, p. 328, n.

(*r*) By Lord Selborne, L. R. 16 Eq. 177, who also (ib.) questions Stone *v.* Greening, 13 Sim. 390, which is shortly stated ante, p. 676, n.]

(*s*) See Doe d. Tyrrell *v.* Lyford, 4 M. & Sel. 550; [Hall *v.* Fisher, 1 Coll. 47; Doe d. Renow *v.* Ashley, 10 Q. B. 663.

(*t*) Cro. El. 16.]

Whiteacre, and no land belonging to Blackacre, but that the
*790 * testator had let Whiteacre with 60 acres of the land belonging to it, and the remaining 40 acres with Blackacre: it was clear that only so much of the land belonging to Whiteacre as was in the tenure of W. was devised to A.

So in] Press *v.* Parker (*u*), where a testator devised to A. his messuage in the parish of H., wherein he then lived, with the yard, back estate and premises thereunto belonging, *part of which was in his (the testator's) own occupation*, and other part whereof was in the occupation of C. and M.; and he devised to B. his front messuage in K. street, in the parish of H. aforesaid, with the appurtenances, *then in the occupation of E.*, with a right of way to the yard adjoining, and the use of the pump, &c., in the yard. The question was whether a coal-cellar passed to A. or B. It was within the range of the house devised to B., but was in the occupation of the testator, who had put up a partition between it and B.'s premises, the entrance being from his own house. It was held that the cellar, being in the testator's occupation, passed to A.; the intention, it was thought, being manifest to give to A. whatever was so occupied. [But Best, C. J., said if the latter devise had stood alone, the words *in the occupation of E.* might have been deemed mere words of description.]

Whether devise passed all that was occupied by the person described.

In connection with the subject of the construction of words referring to occupancy, it may be here observed, that in Doe d. Templeman *v.* Martin (*x*), where a testator devised all his messuage, the Ark Cottage, gardens and lands at S., rented to Mrs. S., *and others;* and it was attempted to confine the devise to a particular property at S., forming a distinct purchase made by the testator, of which Mrs. S. was the principal occupant; the devise was held to comprise all the land situate at S., by whomsoever rented, including a considerable farm, in the occupation of a tenant, not Mrs. S.; the suggestion, that the testator could scarcely mean to describe a large property in such terms (omitting the name of the tenant), not being allowed to prevail against the clear import of the words of the will.

It is to be observed that in the foregoing cases where terms of occupancy [or locality] were not allowed by reason of their inapplicability to particular portions of the subject to exclude them from the devise, those portions bore but a small proportion to the whole. [But in Whitfield *v.* Langdale (*y*), an erroneous
*791 statement * of the acreage as being "by estimation 80 acres, more or less," was not permitted to exclude any portion of the "farm" devised, although the real quantity

Limited term rejected though applicable to large proportion.

(*u*) 10 J. B. Moo. 158, 2 Bing. 456.
(*x*) 4 B. & Ad. 770; [conf. Chester *v.* Chester, 3 P. W. 55, where an attempt was made to limit the sense of "elsewhere" by reference to previously specified places.
(*y*) 1 Ch. D. 61.

was 175 acres, and as to a small part of the disputed lands there was a mistake also made in the locality.

But, secondly, if] the property is not described by a name comprehending the whole (*z*), a different rule seems to prevail: [for it is a well-settled canon of construction,] that where a given subject is devised, and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject.

Devise of property not described as a whole is confined to what exactly answers it.

As in Roe d. Ryall *v.* Bell (*a*), where a testator devised all his copyhold estates situate at G., *which he became entitled to on the decease of his father*. The fact was, that on the death of his father, the testator had taken possession of two copyhold estates at G.; one which his father had in his lifetime surrendered to him in fee, but of which he (the father) had retained possession until his death, and another which descended to the testator as heir. It was held, that as the latter estate was sufficient to satisfy the words, the former did not pass (*b*).

Again, it has been held (*c*), that a devise of lands at W., in the parish of C., "*which I purchased of S.*," did not include lands not at W., though purchased of S. in the parish of C. And in Roe d. Conolly *v.* Vernon (*d*), a surrender to the use of the * testator's will of all *792 the lands, &c., situate in certain specified places, which he held of the manor of W., *being of the yearly rent to the lord in the whole* of 4*l.* 10*s.* 8½*d.*, *and compounded for*, was held to be confined to copyholds compounded for, though the rent specified exceeded the amount of rent paid for the compounded copyholds, but did not correspond with the amount paid for the whole.

So, in Doe d. Parkin *v.* Parkin (*e*), where a testator, seised of a house and five acres of land in his own occupation, and of an inn and nine acres of land in the same place, not so occupied, devised all his messuages, tenements, lands, grounds, hereditaments and premises situate

(*z*) That this circumstance, however, is not absolutely essential, but that the same result may follow from a precise description of the property, either by the names of the closes or by their metes and bounds, appears from Doe d. Smith *v.* Galloway, 5 B. & Ad. 43. E conv. a particular description of parcels will restrict general terms, Griffiths *v.* Penson, 9 Jur. 385; Maitland *v.* Mackinnon, 1 H. & C. 607.]

(*a*) 8 T. R. 579; see also Wills *v.* Sayers, 4 Mad. 409; [Doe d. Gillard *v.* Gillard, 5 B. & Ald. 785; and see the rule exemplified in cases treated of ante, p. 423; but see Doe d. Newton *v.* Taylor, 7 B. & C. 384, where a devise by A. of her moiety of all her late father's messuages, &c., situate, &c., was held to extend as well to lands which had been the property of the father, and had been devised by him to a granddaughter, from whom they had descended to the testatrix, as to those which had descended to her immediately from him. In this case, the terms used were equally applicable to both properties.

(*b*) See also Wilkinson *v.* Bewicke, 1 Eq. Rep. 12.] But a devise of lands, which the testator had from time to time "purchased," has been held to apply to lands which he had received in exchange, and not (as contended) to be confined to those which he had bought with money; the word "purchase" admitting, it was considered, of application to what was purchased for money or lands, Doe d. Meyrick *v.* Meyrick, 1 Cr. & M. 820.

(*c*) Doe d. Tyrrell *v.* Lyford, 4 M. & Sel. 550. (*d*) 5 East, 51.

(*e*) 5 Taunt. 321; [doubted in White *v.* Birch, 36 L. J. Ch. 174, *sed qu.*]

at or in the township of A., in the parish of B., and then in his own occupation, with the appurtenances, to certain uses, the court held that these words were clearly restrictive, and, consequently, that the inn did not pass.[1]

In Pullin *v.* Pullin (*f*), a testator, reciting that he was seised in fee of divers freehold lands in the parish of St. Mary, Islington, and of certain copyholds within and holden of the manor of the Prebendary of Islington, *and all which lands, &c. were subject to a mortgage thereof made by him to R.* (minutely referring to the mortgage), gave and devised all his said freehold and copyhold lands and hereditaments; it was held that twenty-one acres of freehold land in Islington, *not in mortgage to R.*, did not pass under this devise, but were included in a general devise in a subsequent part of the will of the residue of his freehold, copyhold and leasehold estate; the court being of opinion that the testator intended to confine the former devise to the property in mortgage to R. It seems that a contrary construction would have left the residuary clause nothing to operate upon; but this circumstance was not relied on, and seems indeed entitled to little weight, as the clause embraces copyholds as well as freeholds, and the testator had no copyholds except those in mortgage. The testator's expressions certainly indicated that he considered the mortgage as extending over the whole subject devised.

[And in Morrell *v.* Fisher (*g*), where a testator devised "all his leasehold farm-house, homestead, lands and tenements at Headington, held under Magdalen College, Oxford, and then in the possession of T. B. as tenant to him," it was contended, that two pieces of land at *793 Headington, containing together twelve * acres and being leasehold, held of the College, but not in the possession of T. B., passed by this devise. But the Court of Exchequer were of a contrary opinion, there being other lands which fully answered the description.]

This principle is applicable [to descriptions of property by its tenure, as freehold, copyhold or leasehold (*h*); and generally to all terms of the description of property, personal (*i*) as well as real, but it] has most frequently been applied to terms of local description. Thus, if a testator

(*f*) 10 J. B. Moo. 464, 3 Bing. 47; see also Wilson *v.* Mount, 3 Ves. 191.

[(*g*) 4 Exch. 591; and see Homer *v.* Homer, 8 Ch. D. 758 (land at Stock Green).

(*h*) Doe *v.* Brown, 11 East, 441; Quennell *v.* Turner, 13 Beav. 240. But where besides a fee-simple estate in one part and a leasehold interest in a second part of a block of buildings in A. street and B. court, a testator had in a third part of the same block a leasehold interest in possession, and (subject to an intermediate reversionary term) the ultimate reversion in fee; and devised his "freehold messuages in A. street and B. court;" it was held that everything passed in which he had the fee, and that as he had the fee in the third part, although he had another sort of interest in it besides, yet it passed, being sufficiently denoted as the thing intended, Mathew *v.* Mathew, L. R. 4 Eq. 278.

(*i*) Ridge *v.* Newton, 2 D. & War. 239; Quennell *v.* Turner, 13 Beav. 240; Oakes *v.* Oakes, 9 Hare, 666 (but as to "shares" in a company being identical with "stock," see now Morrice *v.* Aylmer, L. R. 10 Ch. 148, 7 H. L. 717); Mayberv *v.* Brooking, 7 D. M. & G. 673; Slingsby *v.* Grainger, 7 H. L. Ca. 273; Gilliat *v.* Gilliat, 28 Beav. 481; Ex parte Kirk, 5 Ch. D. 800.]

[1] Jackson *v.* Moyer, 13 Johns. 531; Brown *v.* Saltonstall, 3 Met. 423; Allen *v.* Richards, 5 Pick. 512; Hampton *v.* Cowles, 4 Dev. & B. 16; Jackson *v.* Sill, 11 Johns. 211.

have property *in*, and property *contiguous to* a particular street, parish or county, it is clear that a devise of houses or buildings in that street, parish or county will carry the former to the exclusion of the latter (*j*). [So in Webber *v.* Stanley (*k*), where a testatrix first charged her Welsh estates with a sum of money as "an addition to her Tedworth estates thereinafter devised," then gave her mansion-house at Tedworth, in the county of Hants, and all her manors, farms, lands, &c., in the county of Hants, devised to her by her husband (subject to the annuities charged thereon by his will), and all other her hereditaments in the county of Hants, "all which hereditaments in the county of Hants were thereinafter described as her Tedworth estates," to uses in strict settlement, and she subsequently referred to "her *said* Tedworth estates:" it appeared that the husband, being owner of property in Hants and Wilts, together known as "the Tedworth Estate," had devised to the testatrix all his estates at or near Tedworth, charged with certain annuities: it also appeared that there was only one manor in Hants, but several in Wilts, that some of the farms of "the Tedworth Estate" lay partly in one county and * partly in another, *794 and that the charges thrown on the devised property were or might become out of all proportion to the value of the Hants property. It was held in C. P. that the words "in the county of Hants" were not *falsa demonstratio*, but confined the devise to lands in that county. Erle, C. J., delivered judgment and "laid down the law with a clearness and authority which cannot be strengthened or added to" (*ka*): there was a property which every part of the description fitted, and on which every word of it had full effect: if the testatrix had devised "her Tedworth estates" simply, that would have sufficed; but that phrase was never used by her without referring to the definition (her "said" Tedworth estates), which confined it to property in Hants. As to the word "manors" (in the plural), it occurred only in a sweeping general clause; and as to the charges, a similar disproportion had been disregarded in Doe d. Templeman *v.* Martin (*l*); and such considerations could not outweigh the clear words of the devise.] Webber *v.* Stanley.

So, in Doe d. Ashforth *v.* Bower (*m*), where a testator devised all his messuages, tenements or dwelling-houses, and buildings, situate *at*, *in or near* Snig Hill, in Sheffield, which he had lately purchased from the Duke of Norfolk. The testator "At, in or near," how construed.

(*j*) See Doe d. Browne *v.* Greening, 3 M. & Sel. 171; [Pogson *v.* Thomas, 6 Bing. N. C. 337; Smith *v.* Ridgway, L. R. 1 Ex. 46, 331; Evans *v.* Angell, 26 Beav. 202; Lister *v.* Pickford, 34 Beav. 576. But where a house, with the appurtenances, is described to be in a certain place, lands *quasi appurtenant* to the house may pass, though not in that place, Boocher *v.* Samford, Cro. El. 113; and see Moser *v.* Platt, 14 Sim. 95.

(*k*) 16 C. B. N. S. 698, virtually overruling Stanley *v.* Stanley, 2 J. & H. 491, on same will. (*ka*) Per Willes, J., in Smith *v.* Ridgway, L. R. 1 Ex. 332.

(*l*) 4 B. & Ad. 771.]

(*m*) 3 B. & Ad. 453. [See also Attwater *v.* Attwater, 18 Beav. 330. The case of Newton *v.* Lucas, 6 Sim. 54, is generally cited in support of the same position; but the final decision was given, under the particular circumstances, in favor of the greater comprehensiveness of the devise, 1 My. & Cr. 391.]

had six houses at Sheffield, all purchased from the Duke, and comprised in one conveyance, four of which houses were distant about twenty yards from Snig Hill, and the remaining two about four hundred yards therefrom. The testator had redeemed the land tax for all the houses by one contract. It was held, that the devise did not comprise the two latter houses, part only of the description applying to them, and *there being other houses to which the whole of the description did apply.*

Description applied to a subject not strictly falling within it, for want of a more appropriate one.

But if the testator had no property in the street named, a contiguous property may pass. Thus, in Doe d. Humphreys *v.* Roberts (*n*), where a testator devised all that his messuage or dwelling-house, with the appurtenances, situate in High-street, in the town of Holywell, wherein his mother inhabited, and nearly opposite to the White-horse inn, together with the shop adjoining the said messuage, *and all and* *795 *every his buildings and * hereditaments in the same street* to A. It appeared that the testator had only one house in High-street, and that was occupied by his mother; but he had two cottages in the lane called Bakehouse-lane, behind the house, from which it was separated by a road wide enough to admit carriages; but there was no thoroughfare in the lane, and the only entrance to it was out of High-street, under an arch a little below the testator's house. It was held that these cottages passed under the devise, the court relying much on the fact that the testator had no other property which could answer to that part of the description; and there being, it was thought, a clear intention to pass some property in the street in addition to the house; and as there was no access to them but from the street, it was considered that the cottages might, without much impropriety, be described as situate in the street.

It is observable, that if the cottages in question had not passed under this devise, there was a general clause which would have comprised them, so that the construction was not induced by an anxiety to avoid intestacy.

Devise of lands in one county not applied to lands in another county.

It is clear however that where a testator having lands in a certain county, devises all his estates in another county, in which he has actually no property, the lands in the former county will not pass; though the result be (the will being subject to the old law) to suppose the testator to make a devise which could have no effect (*o*).

And though a testator may show by the context of his will, that he uses a local appellation in a peculiar and extraordinary sense, yet this hypothesis will not be adopted upon slight and equivocal grounds. Thus, where (*p*) the devise was of a testator's lands, "in Leverington,"

(*n*) 5 B. & Ald. 407; [Baddeley *v.* Gingell, 1 Exch. 319; Goodright d. Lamb *v.* Pears, 11 East, 58; Nightingall *v.* Smith, 1 Exch. 879; Doe d. Campton *v.* Carpenter, 16 Q. B. 181.]

(*o*) Miller *v.* Travers, 1 Moo. & Sc. 342, [8 Bing. 244; Pogson *v.* Thomas, 6 Bing. N. C. 337; Moser *v.* Platt, 14 Sim. 95.]

(*p*) Doe d. Edwards *v.* Johnson, 5 Nev. & M. 281.

and it appeared that there was within the parish of this name a district called Leverington's Parson's Drove, for which a chapel of ease had long ago been endowed, and that the testator had lands in the parish which were within the chapelry, and lands in the parish which were not; it was contended, that this devise was to be confined to the latter, on the ground that the testator had himself distinguished the parish and the chapelry by describing himself to be "of Leverington," and one of his devisees as being of "Leverington's Parson's Drove:" but the court held, that the lands in the parish, whether in the chapelry or not, passed by the devise; * Lord Denman observing, that *796 though if the description of locality had been "Leverington's Parson's Drove," that would have been exclusive of every other part of the parish; yet the use of the larger term did not exclude the less.

[But in a case (*q*) where a man was seised of land in a vill and in two hamlets of the same vill, and devised all his lands being in the vill, and in one of the two hamlets by name, it was held that nothing of the land in the other hamlet should pass; for the naming of the one hamlet argued his intent fully.]

In regard to proximity, it has been decided that a devise of estates, situate "in or *near* Latchingdon, near Maldon," did not include a close which was situate four or six miles from Latchingdon, and *in* the town of Maldon (*r*). "Estates in or near L., near M."

[Some minute but not unserviceable criticism was devoted to the words "at or within" in Homer *v.* Homer (*s*), where, among other devises of distinct properties, one "in the parish of" A., another "in the parish of" B., and a third "in the parish of" C., a testator devised "his manor of D., and all his messuages, tenements and lands *at or within* D. then in the occupation of J. S." The testator had two farms, the greater part of which was in the parish (which was co-extensive with the manor) of D., but a small part of each was in an adjoining parish, separated from the bulk, in the one case by a hedge (which was close to the church of D.), in the other by a high road. It was held by Fry, J., that the outlying portions did not pass by the devise. The true meaning of "at," when applied to a place which might include a farm, was, in his opinion, "within," *i.e.* in the present case within the *parish* of D., and "at or within" meant "at," that is to say, "within." But his decision was reversed by the L. JJ., who held that D. meant the place so called, not the parish of D. They thought it would be an inaccuracy in language to speak of houses or lands "at" a place the bounds of which were at the same time expressly or impliedly indicated, *e.g.* "at" a county, or "at" a parish: "Lands at or within D."

[(*q*) Anon., 3 Dy. 261, pl. 27. In the parish of Street were two vills, viz. Street and Walton; by fine levied of "all his lands in Street," land in Walton did not pass, Stock *v.* Fox, Cro. Jac. 120. But this is explained to have been because the law then took notice only of civil, not (unless named) of ecclesiastical, divisions, 4 Crui. Dig. p. 265.]

(*r*) Doe d. Dell *v.* Pigott, 1 J. B. Moo. 274, 7 Taunt. 552; see also Doe *v.* Bower, 3 B. & Ad. 453.

[(*s*) 8 Ch. D. 758.

but that "at" was the appropriate preposition when speaking of lands with reference to localities as to which no such bounds were indicated, *e.g.* "at" a town, or "at" a village; hence in the present case the
797 proper meaning of the words was at or within, not the parish, but a more indefinite district taking its name from the church of D. (there being in the parish no village, but only scattered houses); and that this was made plainer by the almost pointed absence from this particular devise of the word "parish." Thus "at or within" meant "whether at or within," and each word had its proper meaning.]

Sometimes the application of the principle in question is embarrassed by the circumstance, that the terms of description, though not applicable to any property of the testator, precisely answer to the property of some other person. For instance, a testator having a manor, called North Dale, in A., devises his manor, called South Dale, in A. Now, supposing that there was in A. no manor of South Dale, the authorities would authorize the application of the devise to the manor of North Dale; but if it should turn out that there was in A. a manor called South Dale, belonging to some other person, it might be contended that the testator conceived himself to have some devisable interest in the manor of South Dale, and intended to devise that interest, or in respect of wills operating under the present law, he might have contemplated the subsequent acquisition of a devisable interest in such manor.

Effect where there is property of another answering to the description.

[A devise of the rents and profits (*t*) or of the income (*u*) of lands passes the land itself both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits (*x*). And since the act 1 Vict. c. 26, such a devise carries the fee-simple (*y*); but before that act it carried no more than an estate for life unless words of inheritance were added (*z*). But] where a testator, seised or possessed of a reversion in fee or for years, to which rent was incident, devised or bequeathed his "ground rent," not only the rent, but the reversion would pass (*a*);[1] as he was considered, when speaking
*798 of the ground * rent, to mean by that term all the reversionary interest, of which the rent was the immediate fruit.

Devise of "rents and profits" passes the land.

"Ground rent" held to include reversion.

(*t*) Co. Lit. 4 b; Parker *v.* Plummer, Cro. El. 190; South *v.* Alleine, 1 Salk. 228; Doe **d.** Goldin *v.* Lakeman, 2 B. & Ad. 42; Johnson *v.* Arnold, 1 Ves. 171; Baines *v.* Dixon, ib. 42.

(*u*) Mannox *v.* Greener, L. R. 14 Eq. 456.

(*x*) Per Lord Cranworth, Blann *v.* Bell, 2 D. M. & G. 781.

(*y*) Plenty *v.* West, 6 C. B. 201; Mannox *v.* Greener, L. R. 14 Eq. 456. So an indefinite bequest of the income of personal estate passes the absolute interest, Humphrey *v.* Humphrey, 1 Sim. N. S. 536; Watkins *v.* Weston, 32 Beav. 238, 3 D. J. & S. 434 (leaseholds); Buchanan *v.* Harrison, 8 Jur. N. S. 965, 31 L. J. Ch. 74 (indefinite gift of income cut down by context); Re Andrew's Will, 27 Beav. 608 (gift of interest to A., and if he dies without issue, over).

(*z*) Hodson *v.* Ball, 14 Sim. 571, and see Belt *v.* Mitchelson, Belt's Suppl. to Vesey, sen. 227.]

(*a*) Kerry *v.* Derrick, Moore, 771, Cro. Jac. 104: Maundy *v.* Maundy, 2 Stra. 1020, 2 Barn. K. B. 202, Ca. temp. Hard. 142, Fitz. 70, 288; Kay *v.* Laxon, 1 B. C. C. 76; [and see Ashton *v.* Adamson, 1 Dr. & War. 198.

[1] See Den *v.* Drew, 14 N. J. 68.

[A devise of rents and profits[1] includes an advowson (*b*); and with it of course the right of presentation in case the living is vacant; unless the will devotes the "rents and profits" wholly to purposes which can be answered only by money or money's worth, as the augmentation of poor livings (*c*), investment in lands (*d*), or the maintenance of children, and accumulation of surplus (*e*); in which case the right of presentation, not being the subject of profit, will result to the heir. If the living is full the future right of presentation may be sold for the purposes of the will, like any other fruit of property (*f*).

Advowson will pass under "rents and profits."

A devise of the "free use" (*g*), or of the "use and occupation" (*h*) of land, passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use or occupation of the property, unless the context clearly calls for the more limited construction (*i*).]

Devise of "use and occupation."

It is clear that customary estates, held by copy of court roll, although not at the will of the lord as in the case of proper copyholds, will pass under the denomination of copyholds, and not, unless from special circumstances, under that of freeholds (*k*).

Customary freeholds pass as copyholds.

Where (*l*) a testator, having a fee-simple in possession in one moiety of lands called H., and the reversion in fee in the other, devised "All that my part, purpart and portion of and in the tenement called H.," with other lands, "and the reversion and reversions, remainder and remainders, rents, issues and profits thereof," it was held, that both moieties passed.

Question whether one moicty or both moieties passed.

(*b*) Earl of Albemarle *v.* Rogers, 2 Ves. Jr. 477, 7 B. P. C. Toml. 522; Sherrard *v.* Lord Harborough, Amb. 167, per L. C. (*c*) Kensey *v.* Langham, Ca. temp. Talb. 143.
(*d*) Sherrard *v.* Lord Harborough, Amb. 165. (*e*) Martin *v.* Martin, 12 Sim. 579.
(*f*) Cooke *v.* Cholmondeley, 3 Drew. 1; Cust *v.* Middleton, 11 W. R. 456, 9 Jur. N. S. 709. (*g*) Cook *v.* Gerrard, 1 Saund. 181, 186, e.
(*h*) Whittome *v.* Lamb, 12 M. & Wels. 813; Rabbeth *v.* Squire, 19 Beav. 70, 4 De G. & J. 406; Mannox *v.* Greener, L. R. 14 Eq. 456. "Occupation is not living and residing:" per Lord Eldon, Fillingham *v.* Bromley, T. & R. 536.
(*i*) Maclaren *v.* Stainton, 4 Jur. N. S. 199, 27 L. J. Ch. 442; Stone *v.* Parker, 29 ib. 874.]
(*k*) Roe d. Conolly *v.* Vernon, 5 East, 83; Doe d. Cook *v.* Danvers, 7 East, 299.
(*l*) Doe d. Phillips *v.* Phillips, 1 T. R. 105.

[1] Upon the effect of a gift of rents and profits, or income and interest, whether of realty or of personalty, see Frances's Estate, 75 Penn. St. 220; Drusadow *v.* Wilde, 63 Penn. St. 170; Van Rensselaer *v.* Dunkin, 24 Penn. St. 252; Garret *v.* Rex, 6 Watts, 14; Parker's Appeal, 61 Penn. St. 478; Hatch *v.* Bassett, 52 N. Y. 359; Patterson *v.* Ellis, 11 Wend. 260; Thompson *v.* Schenck, 16 Ind. 194; Jones *v.* Stites, 19 N. J. Eq. 324; Den *v.* Manners, Spencer, 142; Mason *v.* Tuckerton Church, 12 C. E. Green, 47; Earl *v.* Rowe, 35 Me. 414; Ayer *v.* Ayer, 128 Mass. 575; Bowers *v.* Porter, 4 Pick. 198, 204; Reed *v.* Reed, 9 Mass. 372.

*799 * CHAPTER XXV.

DEVISES AND BEQUESTS, WHETHER VESTED OR CONTINGENT.

I. *General Rule in regard to Vesting.*
II. *Devises construed to be vested, notwithstanding Expressions of a contrary aspect.*
III. *Devises contingent by express Terms, notwithstanding absurd consequences.*
IV. *Question, whether Contingency applies to one or all of several Limitations.*
V. *Vesting of Legacies charged on Land.*
VI. ———— *Personal Legacies.*
VII. ———— *Residuary Bequests.*

I. THE law is said to favor the vesting of estates (*a*)[1]; the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favor of a person *in esse* simply (*i.e.* without any intimation of a desire to suspend or postpone its operation), confers an immediately vested interest.

General rule as to vesting.

If words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of postponing the vesting or point merely to the deferred possession or enjoyment.[2]

[(*a*) The same principle prevails in the law of Scotland, Carlton *v.* Thompson, L. R. 1 Sc. Ap. 232; Taylor *v.* Graham, 3 App. Ca. 1287.]

[1] See, among the many cases to this effect, Pike *v.* Stephenson, 99 Mass. 188; Olney *v.* Hull, 21 Pick. 311, 314; Shattuck *v.* Stedman, 2 Pick. 468, 469; Ferson *v.* Dodge, 23 Pick. 287; 4 Kent, 202-206; Moore *v.* Lyons, 25 Wend. 119; Toms *v.* Williams, 41 Mich. 552; Collier's Will, 40 Mo. 287; Watkins *v.* Quarles, 23 Ark. 179; McCall's Appeal, 86 Penn. St. 254; King *v.* King, 1 Watts & S. 205. But the favor shown to vested interests is not to be so far pressed as to defeat the intent of the testator. Richardson *v.* Wheatland, 7 Met. 171. And while there has been some variance among the authorities concerning the legal distinctions between vested and contingent estates, they chiefly agree, first, in favoring the vesting of interests, and, secondly, in treating future interests as vested where there is any present vested interest in the income of the property. Toms *v.* Williams, 41 Mich. 552, 565; Rogers *v.* Rogers, 11 R. I. 38; Dale *v.* White, 33 Conn. 294; and many other cases. A contingent interest in real and personal estate may so vest that it will go to the real and personal representative of the person interested, if he dies before the happening of the contingency. Winslow *v.* Goodwin, 7 Met. 363. Where, however, the existence of the donee at a particular time makes part of the contingency, the interest cannot descend. Ib. p. 379. See post, p. 866, note 1.

[2] Of course it matters not that the estate given is "to be set apart," or payment made, to the donee at a future time. The estate is still vested. Higgins *v.* Waller, 57 Ala. 396; Dale *v.* White, 33 Conn. 294. But see Jones *v.* Massey, 9 Rich. N. S. 376.

It may be stated as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. Thus, where a testator devises lands to A. for life, and after his decease to B. in fee, the respective estates of A. and B. (between whom the entire fee-simple is parcelled out) are both vested at the instant of the death of the testator, the only difference * between the devisees being, that the estate of the one is *800 in possession, and that of the other is in remainder.[1]

Devises of reversions and remainders.

On the same principle, where a person who is entitled to a reversion or remainder in fee, expectant on an estate tail in himself, or in any other person, by his will devises the property in question, in the event of the person who is tenant in tail dying without issue, this is construed as an immediate disposition of the testator's reversion or remainder; though, upon the face of the will, the devise presents the aspect of an executory gift, to arise on a general failure of issue, which would clearly be void (*b*), unless, indeed, the will were made or republished since 1837, in which case the words would refer to issue living at the death. If the contingency described corresponds precisely with the event which determines the existing estate tail, no difficulty exists in applying this rule of construction; but it frequently happens, that the terms used by the testator do not completely answer to the event in question; as, for instance, where the reference is to issue generally, and the subsisting estate is restricted to issue of a particular marriage or sex. In such cases, the reasonable conclusion would seem to be that the discrepancy arises merely from an inaccuracy in the description of the reversion or remainder, and that it does not show a different interest to have been in the testator's contemplation; and such, accordingly, seems to have been the prevailing doctrine of the cases (*c*).[2]

It is to be observed, also, that where *a remainder* is limited *in*

(*b*) Ante, p. 254.

(*c*) Wellington *v.* Wellington, 1 W. Bl. 645, 4 Burr. 2165, post; French *v.* Caddell, 3 B. P. C. Toml. 257, post; Jones *v.* Morgan, Fea. C. R. 329; Lytton *v.* Lytton, 4 B. C. C. 441; Egerton *v.* Jones, 3 Sim. 409. The case of Banks *v.* Holme, 1 Russ. 394, n., indeed, favors a more rigid construction; but Lord Eldon's strictures upon this case, in Morse *v.* Lord Ormonde, 1 Russ. 405, afford ground to infer that it did not coincide with his own opinion. The strict rule there adopted certainly exacts from testators more of technical correctness than it has been usual to require, and clearly would not now be followed; [see further as to the above cases, Ch. XL., s. 3, pt. 5, and Ch. XLI.]

[1] King *v.* King, 1 Watts & S. 207; Ross *v.* Drake, 37 Penn. St. 373; Lantz *v.* Trusles, 37 Penn. St. 482; Womrath *v.* McCormick, 51 Penn. St. 504; Throop *v.* Williams, 5 Conn. 98; Fay *v.* Sylvester, 2 Gray, 171; Bartow *v.* Bigelow, 4 Gray, 353; Pike *v.* Stephenson, 99 Mass. 188; Brown *v.* Lawrence, 3 Cush. 390; Wight *v.* Shaw, 5 Cush. 56; White *v.* Curtis, 12 Gray, 54; Doe *v.* Considine, 6 Wall. 458; Smith *v.* Bell, 6 Peters, 69. See Weston *v.* Weston, 125 Mass. 268.

[2] See Hall *v.* Chaffee, 14 N. H. 215.

Words in default, or for want, of object of prior estates, how construed.

default or *for want* of the object or objects of the preceding limitation, these words mean, on the failure or determination of the prior estate or estates, and do not (as literally construed they would) render the ulterior estate contingent on the event of such prior object or objects not coming into existence. In short, they signify all that is comprehended in the word "remainder," being merely an expression employed by the testator in carrying on the series of limitations (*d*). The ulterior estate, *801 therefore, is *a vested remainder, absolutely expectant on the failure or determination of the prior estate.

Thus, it has been decided (*e*) that, where lands are devised to the first and other sons of A. successively in tail, *and, in default of such sons*, to the daughters of A. in tail, although it should happen that A. has a son or sons, yet on his or their subsequently dying without issue, the devise in remainder to the daughters takes effect.

So, where (*f*) a testator devised to E. for life, and, after her decease, to the first and every other son of her body lawfully to be begotten, the elder to be preferred to the younger, and, for want of such sons, to the daughter or daughters of E., share and share alike, *and in default of such issue of E.*, then to M.; it was held, that the devise to M. was a vested remainder, expectant on the determination of the prior successive life-estates of E. and her sons and daughters (the will being subject to the old law), and those estates having expired *by the death of E.'s only daughter*, M.'s remainder fell into possession.

Again, where (*g*) A. devised certain lands to D. for life; remainder to a trustee, to preserve contingent remainders; remainder to the first and other sons of D. and their heirs, *and for want of such issue*, to J. for life with remainders over; it was held that the sons of D. took successive estates tail, with a vested remainder.

It is clear too, that where real estate is devised to A. in tail, and, in case he shall die without issue, then to B. in fee, and it happens that A. dies in the testator's lifetime, leaving issue, the ulterior devise to B. is held to take effect, although, literally, the contingency on which such devise is made dependent has not occurred; the intention being, it is considered, that the ulterior devise shall confer a vested remainder on

(*d*) *Whether Words importing Failure of Issue refer to Determination of subsisting Estates tail.* — In a former publication, the writer contented himself with simply stating this position, and a single case in support and illustration of it, conceiving that the rule of construction was too well established to be called in question; but subsequent experience taught him that it has not obtained so ready and unanimous an assent in the profession as, from the state of the authorities, was to have been expected. Indeed, even so recently as Ashley *v.* Ashley, 6 Sim. 358, the master reported that, under a devise to A. for life, with remainder to her children, and, for want of such issue to B., the devise to B. failed on A. having a child, — a conclusion which the V.-C. appears to have regarded as too plainly untenable for serious refutation. The reluctance to acquiesce in a construction at once so reasonable, and so well sustained by authority, is remarkable, but probably is to be ascribed to the yet lingering influence of the long-exploded case of Keene *v.* Dickson, 1 B. & P. 254, n., where a contrary construction prevailed; and serves to show that the uncertainty produced by contradictory decisions is not easily dispelled.

(*e*) Doe *v.* Dacre, 1 B. & P. 250, 8 T. R. 112, [Hayes' Principles, p. 35.]

(*f*) Goodright *v.* Jones, 4 M. & Sel. 88.

(*g*) Lewis *v.* Waters, 6 East, 336. [See also Hennessey *v.* Bray, 33 Beav. 96.

B., which is *absolutely to take effect in possession on any event which removes the prior * estate out of the way* (*h*). The case just sug- *802
gested, however, cannot now arise under a will made or republished since 1837, as a devise in tail contained in such a will does not lapse by the death of the devisee in the testator's lifetime, leaving issue.

Where, however, the ulterior estate is expressed to arise on a contingent determination of the preceding interest, and the prior gift does in event take effect, but is afterwards determined in a mode different from that which is so expressed by the testator, the ulterior gift fails.

Rule where prior estate takes effect, but is determined in a different manner.

As where (*i*) the devise was to A. for life, remainder to his first and other sons in tail, on condition that he and his issue male should assume a particular name, and in case he or they refused, then that devise to be void, and in such case the testator devised the lands over. A. survived the testator, complied with the condition, and then died without issue; and it was held in B. R., on a case from Chancery, and ultimately in D. P., that the limitation over did not arise (*k*).

An exception to this rule, however, may seem to exist in a case which deserves especial attention, on account of the frequency of its occurrence, namely, where a testator makes a devise to his widow for life, if she shall so long continue a widow, *and if she shall marry*, then over; in which the established construction is, that the devise over is not dependent on the contingency of the widow's marrying again, but takes effect, at all events, on the determination of her estate, whether by marriage or death.[1]

Devise during widowhood, with devise over on marriage.

In Luxford *v.* Cheeke (*l*), which is a leading authority for this doctrine, the testator devised to his wife for life, *if she should not marry again, but if she did*, then that his son H. should presently after his mother's marriage enjoy the premises to him and the heirs of his body, with remainders over. The widow died without marrying again; but it was held, that the remainder took effect.

Devise over extended by implication to determination by death.

* Gordon *v.* Adolphus (*m*) was a case of the same kind. The *803
bequest was to the testator's wife "during her natural life, that

(*h*) Hutton *v.* Simpson, 2 Vern. 722; Hodgson *v.* Ambrose, Doug. 337.]

(*i*) Amhurst *v.* Donelly, 8 Vin. Ab. 221, pl. 21, 5 B. P. C. Toml. 254; see also Sheffield *v.* Lord Orrery, 3 Atk. 282, post, p. 803.

(*k*) Compare this case with Avelyn *v.* Ward, 1 Ves. 420, and Doe *v.* Scott, 3 M. & Sel. 300, stated ante, p. 648, in which the lapse of a prior estate, on whose contingent determination the subsequent estate was to arise, was held not to defeat the subsequent estate. In order to reconcile these cases with Amhurst *v.* Donelly, we must infer that, in the latter case, had the estate of A. and his sons failed by lapse, the devise over would have taken effect. *Pari ratione*, it must be concluded, that had the prior devisee in those cases survived the testator and performed the condition, the devise over (if the whole interest had not been absorbed as it was by the first devisee) would not have taken effect. (*l*) 3 Lev. 125.

(*m*) 3 B. P. C. Toml. 306; [see also Brown *v.* Cutter, T. Raym. 427.]

[1] See Green *v.* Davidson, 4 Baxter, 488; Hughes *v.* Boyd, 2 Sneed, 512; Thomson *v.* Ludington, 104 Mass. 193; Olney *v.* Hull, 21 Pick. 311; Ferson *v.* Dodge, 23 Pick. 287; Bates *v.* Webb, 8 Mass. 458; Whitney *v.* Whitney, 14 Mass. 88; Parsons *v.* Winslow, 6 Mass. 169; Chappel *v.* Avery, 6 Conn. 31.

is to say, so long as she shall continue unmarried; *but in case she shall choose to marry*, then and in that case" it was to be for the immediate use of the testator's daughter, and in case she should die without leaving issue, then over; and it was held by Lord Camden, and afterwards in D. P., that the bequest over was not contingent on the event of the marriage of the wife.

In these cases, therefore, the widow takes an estate *durante viduitate*, and the gifts over are vested remainders absolutely expectant on that estate, being to take effect at all events on its determination, and not conditional limitations dependent on the contingent determination of a prior estate for life.

In Lady Fry's case (*n*), Lord Hale said, it was all one as if the estate had been devised to the widow for life, and if she married, then to remain, which had been but an estate *quamdiu sola vixerit.* If, however, the devise had been framed in the manner suggested by this eminent and excellent judge, the case would have been brought into very close resemblance to Sheffield *v.* Lord Orrery (*o*), where a different construction prevailed. There A. devised his house, &c., to his wife for life, upon this express condition only, that *if she should marry again*, then the house, &c., should go forthwith to his eldest son and his issue. Lord Hardwicke held, that it was a contingent limitation to the son, to take effect only on the wife's marrying again. In Luxford *v.* Cheeke, he said, the penning was different; there, after the devise, were added these words, "if she do not marry again," which restrained the original limitation, and were the same as if they had been to the wife for life, "if she so long continued a widow." Here there were no such words in the original limitation; and though he added, "but I do not lay much weight on this," and proceeded to comment on other grounds for the construction, yet the remarks above quoted have always been considered as pointing out the true principle of the decision.

Devise over on marriage again, strictly construed.

On the whole, then, the distinction would seem to be, that where the circumstance of not marrying again is interwoven into the original gift, the testator, having thus, in the first instance, created an estate *durante viduitate*, must generally be considered, when he subsequently refers to the marriage, to describe the *determination *by any means* of that estate, and, consequently, the gift over is a vested remainder expectant thereon (*p*). On the other hand, where a testator first gives an absolute estate for life, and then engrafts thereon a devise over to take effect on the marriage of such devisee for life, the conclusion is, that the devise over is not to take effect unless the contingency happens (*q*). [And the con-

General conclusion from the cases.

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(*n*) 1 Vent. 203; see also Jordan *v.* Holkham, Amb. 209, where Lord Hardwicke took a distinction between a devise during widowhood, and if she married again within a limited time.

(*o*) 3 Atk. 282.

[(*p*) See acc. Browne *v.* Hammond, Johns. 210, 213: Underhill *v.* Roden, 2 Ch. D. 494.

(*q*) The question whether the event of not marrying is or is not interwoven in the original

struction being that the limitations over take effect, at all events, on the determination of the widow's estate, whether by marriage or death, it is not displaced by the circumstance that some of those limitations (*e.g.* a provision for the widow during the remainder of her life, expressly in case she marries), can only take effect in the event of her marrying: although she should not marry, the other limitations will still take effect as vested remainders expectant upon her death (*r*).

Devise over on bankruptcy, &c. extended by implication to case of death.

A similar construction prevails where the prior gift is to a spinster until marriage (*s*), or to a person until he becomes bankrupt (*t*), with a gift over in case of marriage or bankruptcy. In these cases also the remainder will generally take effect at all events on the determination of the prior estate.]

*805

Devises vested, notwithstanding expressions of seeming contingency.

* II. The construction which reads words that are seemingly creative of a future interest, as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting, has obtained, in some instances, where the terms in which the posterior gift is framed import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A. shall attain the age of twenty-one years, and if or when he shall attain that age, then to him in fee, this is construed as conferring on A. a vested estate in fee-simple, subject to the prior chattel interest given to the trustees, and, consequently,

gift, may be difficult of solution. In Meeds *v.* Wood, 19 Beav. 215, a testator gave real estate to his executor in trust for E. for her life, and directed the executor to pay her the rents every six months, "provided that if E. should marry," then over. The M. R. admitted the distinction taken in the text, but thought the direction to the executor to pay E. the rents limited the previous gift to so long as she remained a spinster, since "it was obvious the testator intended the rents to be paid to her herself," and if she married, she would no longer be entitled to receive them, except by the intervention of a trust for her separate use, which was inconsistent with the intention; he therefore held that the gift over took effect on the death of E., though she had never been married. In Bainbridge *v.* Cream, 16 Beav. 25, where a testator gave lands to his wife for life, but if she married again he revoked them, and at her death or second marriage gave the lands to trustees for sale, the produce to be divided among certain persons (naming them), "or such of them as should be living at the *death* of his wife;" the wife married again, and the trustees sold; and it was held by the M. R. that the proceeds were divisible immediately, notwithstanding the widow was still living.]

In one case a devise which, in express terms, extended to widowhood only, was held to be enlarged by implication to the period of the vesting in possession of a remainder limited thereon. The devise was to the testator's wife for her life, provided she remained a widow; but if she married a second husband, to I., *when he should attain his age of twenty-three years;* and it was held, that the widow had an estate till I. attained twenty-three, though she married again, Doe d. Dean and Chapter of Westminster *v.* Freeman, 1 T. R. 389, 2 Chitty's Cas. temp. Lord Mansfield, 498.

[(*r*) Underhill *v.* Roden, 2 Ch. D. 494. See also Eaton *v.* Hewitt, 2 Dr. & Sm. 184; Wardroper *v.* Cutfield, 33 L. J. Ch. 605. In Pile *v.* Salter, 5 Sim. 411, it was held that a gift to the widow of one third of the *corpus* "if she married again" (following a life-interest in the whole during widowhood) was necessarily contingent, "it would be absurd to give her one third of the property *in the event of her death*." But this was disapproved and the absurdity denied by Jessel, M. R., in Underhill *v.* Roden.

(*s*) Eaton *v.* Hewitt, 2 Dr. & Sm. 184; Wardroper *v.* Cutfield, 33 L. J. 605.

(*t*) Etches *v.* Etches, 3 Drew. 441.

on A.'s death, under the prescribed age, the property descends to his heir at law; though it is quite clear (*u*) that a devise to A., *if* or *when* he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only.

Boraston's case.

A leading authority for this construction is Boraston's case (*x*),[1] which was as follows: A testator devised land to A. and B. for eight years, and after the said term, the land to remain to his executors, for the performance of his will, till such time as H. should accomplish his age of twenty-one years; and *when* the said H. should come to his age of twenty-one, then to him, his heirs and assigns forever. H. died under twenty-one. It was contended, that the remainder was not to vest in him, unless he attained the prescribed age; but the court held it to be vested immediately, the case being, it was said, nothing else in effect than a devise to the executors, till H. attained the age of twenty-one, remainder to H. in fee; and that the adverbs of time, *when*, &c., did not make any thing necessary to precede the settling *806 * (*i.e.* the vesting) of the remainder, but merely expressed the time when it should take effect in possession.[2]

Word "when" referred to determination of prior estate.

So in Doe d. Cadogan *v.* Ewart (*y*), where a testator devised his real estate to trustees, upon trust for his wife during widowhood, and after her decease or marriage again, upon trust to apply the rents towards the maintenance of his daughter, *until she should attain the age of twenty-five years, and from and after attaining that age*, then upon trust for his said daughter, her heirs and assigns forever; but in case his said daughter should depart this life without leaving issue, then the testator devised the said real estate

Words "from and after" similarly construed.

(*u*) Grant's case, cited 10 Co. 50; Sugd. Law of Prop. 291; Alexander *v.* Alexander, 16 C. B. 59; and per James, L. J., Andrew *v.* Andrew, 1 Ch. D. 417. However, the decision of this last point was expressly avoided by the judges in Phipps *v.* Ackers, 9 Cl. & F. 583; and see Tapscott *v.* Newcombe, 6 Jur. 755; and Simmonds *v.* Cock, 29 Beav. 455 (stated below.)]

(*x*) 3 Rep. 19; see also Manfield *v.* Dugard, 1 Eq. Ca. Ab. 195, pl. 4 Gilb. Eq. Rep. 36; [Doe d. Morris *v.* Underdown, Willes, 293;] Goodtitle d. Hayward *v.* Whitby, 1 Burr. 228; Denn d. Satterthwaite *v.* Satterthwaite, 1 W. Bl. 519; Doe d. Weedon *v.* Lea, 3 T. R. 41; Doe d. Wight *v.* Cundall, 9 East, 400; Edwards *v.* Symonds, 6 Taunt. 213; [Farmer *v.* Francis, 2 Bing. 151]; Goodright d. Revell *v.* Parker, 1 M. & Sel. 692 (leaseholds); Warter *v.* Hutchinson, 5 Moore. 143, 2 B. & Bing. 349, 3 D. & Ry. 58, 1 B. & C. R. 721; [Jackson *v.* Majoribanks, 12 Sim. 93; Milroy *v* Milroy, 14 Sim. 48; Parkin *v.* Knight, 15 Sim. 83; James *v.* Lord Wynford, 1 Sm. & Gif. 40; Smith *v.* Spencer, 6 D. M. & G. 631; but see Bastin *v.* Watts, 3 Beav. 97, where, however, the point was not argued; and Blagrove *v.* Hancock, 16 Sim. 371, where the V.-C. did not notice the question.]

(*y*) 7 Ad. & El. 636, 3 Nev. & P. 197.

[1] See Scott *v.* Logan, 23 Ark. 352; Roome *v.* Phillips, 24 N. Y. 465; Meyer *v.* Eisler, 29 Md. 32; Rivers *v.* Fripp, 4 Rich. Eq. 276; Collier's Will, 40 Mo. 287; Cowdin *v.* Perry, 11 Pick. 503, 508; Livingston *v.* Greene, 52 N. Y. 118; S. C. 6 Lans. 50.

[2] A devise of all the residue of the testator's real estate, "where the devisee shall have attained" certain age, will pass the rents and profits from the death of the testator, till the time when the devisee comes into possession: if the estate vests in the heir in the mean time, he will be a trustee of the rents and profits for the devisee. Rogers *v.* Ross, 4 John. Ch. 388. See Hobson *v.* Yancey, 2 Gratt. 73. It is said that the words "as," "when," "if," "provided," or "at," referring to a particular time for the bestowal of a gift, are in England words of contingency, in the absence of language indicating a different intention. Colt *v.* Hubbard, 33 Conn. 281. But this rule of construction is not fully accepted in this country. Ib.

over. The daughter, after the decease of the widow, and before she attained the age of twenty-five years, suffered a common recovery; and it was held, that such recovery was effectual to acquire the equitable fee-simple, she having a *vested* estate tail in equity at the time.

Remark on preceding cases.

It is observable, that in the greater number of the cited cases, the prior interest was created for the benefit of the ulterior devisee; but this circumstance does not seem to vary the principle, for the material fact, and that which constitutes the special characteristic of this class of cases, is, that there is a prior interest extending over the whole period for which the devise in question is postponed. It is therefore in effect a devise of the whole estate *instanter* to B., with the exception of a partial interest carved out for some (no matter what) purpose.[1]

Words of apparent contingency referred to the possession merely.

Another exemplification of the principle in question occurs in those cases where a testator, after giving an estate or interest for life, proceeds to dispose of the ulterior interest in terms which, literally construed, would seem to make such ulterior interest depend on the fact of the prior interest taking effect; in such cases it is considered that the testator merely uses these expressions of apparent contingency as descriptive of the state of events under which he conceives the ulterior gift will fall into possession (the supposition being, that the successive interests will take effect in the order in which they are expressed), and not with the design of making the vesting of the posterior gift depend on the fact of the prior tenant for life happening to live to become entitled in possession.

Thus, in Webb *v.* Hearing (*z*), where a testator devised to his son F. after the death of his wife; *and if his three daughters, or either of them, should overlive their mother and F., their brother, and his heirs* (which was construed to mean heirs of his body), they to enjoy the same houses for the term of their lives, remainder to R. and J.; it was held, that the remainder to R. and J. was not contingent on the event of the daughters surviving their mother and brother; the words only showed when it should commence.[2]

Words of apparent contingency referred to possession merely.

(*z*) Cro. Jac. 415. According to the facts represented, it does not appear that the remainder, if contingent, was defeated, as only two of the daughters are stated to have died in the lifetime of their brother.

[1] See Tayloe *v.* Mosher, 29 Md. 443; Mining *v.* Batdorff, 5 Barr, 503; Collier's Will, 40 Mo. 287; Roome *v.* Phillips, 24 N. Y. 463; Ackerman *v.* Gorton, 67 N. Y. 63; Danforth *v.* Talbot, 7 B. Mon. 623; Rogers *v.* Rogers, 11 R. I. 38; Thrasher *v.* Ingram, 32 Ala. 645; Rivers *v.* Fripp, 4 Rich. Eq. 276; Watkins *v.* Quarles, 23 Ark. 179; Harris *v.* Alderson, 4 Sneed, 250; Hancock *v.* Titus, 39 Miss. 224; Linton *v.* Laycock, 33 Ohio St. 128.

[2] A gift to A. in fee "and in case of his death" to B. refers to A.'s death in the lifetime of the testator. Briggs *v.* Shaw, 9 Allen, 517; Howe *v.* Pillans, 2 Mylne & K. 20, 21. So, too, it is held that the words "after," and "upon the death of," and like words, do not make a contingency, but merely indicate when an estate shall take effect in possession. Livingston *v.* Greene, 52 N. Y. 118; Moore *v.* Lyons, 25 Wend. 119; Chew's Appeal, 37 Penn. St. 23; Womrath *v.* McCormick, 51 Penn. St. 504; Doe *v.* Considine, 6 Wall. 458; Pike *v.* Stephenson, 99 Mass. 188; Brown *v.* Lawrence, 3 Cush. 390; White *v.* Curtis, 12 Gray, 54.

So, in an early case (*a*), where the devise was to K. in tail, remainder to J. for life, and in another clause it was declared, that "if K. died without issue, *and J. be then deceased*," then, and not otherwise, the testator gave the land to N. and his heirs; the Lord Keeper, it is said, decreed it for N., although J. survived K., because the words "if J. be then deceased," seemed to be put in to express the testator's meaning, that J. should be sure to have it for her life, and that N. should not have it till she was dead; and also to show when N. should have it in possession.

So, in Pearsall *v.* Simpson (*b*), where a legacy was given in trust for the testatrix's sisters and their children; and after the deaths of both her said sisters and their children, if any, to pay the interest to her brother-in-law, S., during his life, and from and after his decease, *in case he should become entitled to such interest*, then over to some cousins. Though S. died in the lifetime of the testatrix's sisters, it was held that the gift to the cousins took effect, Sir W. Grant, M. R., being of opinion that it was not contingent on the event of the sister's husband becoming entitled to the interest. "It was doubtful (he said) whether S. would live to become entitled to the interest. The testatrix, giving the capital over after his death, recollects that he may not live to take the interest; but if he does, she makes his death the period at which the cousins are to take. It is not a condition precedent, but fixing the period at which the legatees over shall take, if *he* ever takes."

Remark on Pearsall *v.* Simpson.

Here no violence was done to the obvious meaning of the words, as it is impossible to read the whole sentence continuously, "from and after his decease, in case he should become entitled to such interest," without seeing that the words of contingency, "in case," &c., refer merely to the period of possession, denoting that that should take place at his death, if he happened to live to become entitled.

So, in Massey *v.* Hudson (*c*), where a testator devised to his *808 * wife for life, charged with an annuity to E., subject also to 300*l.* to be paid to V., her executors, administrators or assigns, within twelve months after the decease of E., *in case the said E. should happen to survive testator's wife*, with interest from the death of E. E. died in the testator's lifetime, and in the lifetime of his wife. Sir W. Grant, M. R., thought it too clear for argument, that the words, "in case E. shall survive my wife," did not constitute the condition on which the legacy was to become payable, but only related to the time of payment, which was, in that event, to be postponed to the end of a twelvemonth after the death of E.

(*a*) Anon., 2 Vent. 363. (*b*) 15 Ves. 29.

(*c*) 2 Mer. 130. [See also Key *v.* Key, 4 D. M. & G. 73; Wright *v.* Wright, 21 L. J. Ch. 775; Walmsley *v.* Vaughan, 1 De G. & J. 124; Tuer *v.* Turner, 18 Beav. 185; Re Betty Smith's Trusts, L. R. 1 Eq. 79; Bolton *v.* Bolton, L. R. 5 Ex. 145; Edgworth *v.* Edgworth, L. R. 4 H. L. 35; Leadbeater *v.* Cross, 2 Q. B. D. 18.] Compare these and the preceding cases with Holmes *v.* Cradock, 3 Ves. 317, stated post; [and see Davis *v.* Norton, 2 P. W. 390, first point.

[The case of Franks *v.* Price (*d*) presents an instance both of an apparent and of a real contingency in the same will. There a testator devised to A., B., &c., for their lives, with remainder to M. and N. for their lives, share and share alike; "and in case either of them should, *after the deaths of A., B.*, &c., die without issue," then to the survivor for life; and if M. "should, after the deaths of A., B., &c., die *before N., leaving issue male of his body*," then one moiety of the estates was to go as therein mentioned; "and in case of such death in manner aforesaid of M. before N., and M.'s leaving issue male," the testator gave one moiety of his personal estate to be laid out in land, to be conveyed and settled to the uses thereinbefore directed of his real estates, "on the issue of M., *on the contingency* aforesaid." The testator made a similar disposition, *mutatis mutandis*, of the other moiety in case of the death of N. after the deaths of A., B., &c., leaving issue male. Lord Langdale thought that the words "after the deaths of A., B., &c.," did not import contingency, but were merely words of reference, showing that the gifts then in course of expression were subject to the prior gifts, and were not to have effect in possession till those prior gifts became satisfied or inoperative; but from the words used with reference to the event of M. dying before N., leaving issue male, and with reference to the event of N. dying before M., leaving issue male, and even from the care taken to repeat the words as applied to the case of M. and N. respectively, it appeared to him that the words must have their natural meaning, and be taken to provide only for the precise cases which were expressly described.

* The result of the authorities is thus summed up by Sir W. P. Wood, V.-C. (*e*). "The true way of testing limitations of that nature is this: can the words, which in form import contingency, be read as equivalent to 'subject to the interests previously limited'? Take the simplest case: a limitation to A. for life, remainder to B. for life, and upon the decease of B. *if A. be dead*, then to C. in fee. There the limitation to C. is apparently made contingent on the event of A.'s dying in the lifetime of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interest previously limited to him, the court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, *subject to A.'s life-interest* (*if any*), to C. in fee. That is an intelligible principle of construction; but in order to its application, the condition upon which the limitation over is made dependent must involve no incident but what is essential to the determination of the interests previously limited. For instance, if the limitation be to A. for life, remainder to B. for life, 'and if, at the death of B., A. shall have died under the age of twenty-one,' or 'without children,' then to C. in fee, here in either case room is left for contingency. The condi- *809

Sir W. P. Wood's statement of the result of the authorities.

(*d*) 3 Beav. 182, 5 Bing. N. C. 37, 6 Scott, 710.
(*e*) Maddison *v.* Chapman, 4 K. & J. 719.]

tion of A.'s dying in the first case under twenty-one, and in the second, without children, is an event which may or may not have happened when the life-estates in A. and B. are determined; and until it has happened, the limitation over is contingent, not merely in appearance but actually. To these cases, therefore, the principle of construction I have referred to would obviously not apply."]

Devise if A. shall attain twenty-one contingent; — otherwise if a limitation over in alternative event.

And although (as already hinted) there is no doubt that a devise to a person, [when, or] if he shall live to attain, [or at,] a particular age, standing alone, would be contingent; yet if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at the age it should become absolute and indefeasible; the interest in question, therefore, is construed to vest *instanter* (*f*).[1]

*810 *Thus, in Edwards *v.* Hammond (*g*), where A. surrendered the reversion in fee in customary lands to the use of himself for life, and, after his decease, to the use of his son H. and his heirs and assigns forever, *if it should happen that he should live until he attained the age of twenty-one years*, provided always, and under the condition, nevertheless, that *if H. died before he attained that age*, then the premises to remain to A. in fee; it was held, that though upon the first words this seemed to be a condition precedent, yet upon all the words taken together it was an immediate devise to H., subject to be defeated upon a condition subsequent, if he did not attain the age of twenty-one years.[2]

To A. when he attains twenty-one, and if he die before, then over.

The same construction prevailed in Doe d. Hunt *v.* Moore (*h*), where the devise was to M. "*when* he attains the age of twenty-one years," to hold to him, his heirs and assigns forever; *but in case he should die before he attained* the age of *twenty-one* years, then over; Lord Ellenborough observed, that this being an immediate devise, and not, as in some of the other cases, a remainder, formed no substantial ground of distinction. The

(*f*) Even independently of this particular rule, it is obvious that a limitation over disposing of the property to another, in case of the prior devisee dying under certain circumstances, always supplies an argument in favor of the prior devisee taking an immediately vested interest, Smither *v.* Willock, 9 Ves. 233; Peyton *v.* Bury, 2 P. W. 626; Murkin *v.* Phillipson, 3 My. & K. 257; [per Wood, V.-C., L. R. 3 Eq. 322;] though the contrary is sometimes contended.

(*g*) 3 Lev. 132, 2 Show. 398, and stated from the record, 1 B. & P. N. R. 324, n.

(*h*) 14 East, 601.

1 A gift in trust for children who being sons or a son attain the age of twenty-five years, or being daughters or a daughter attain the age of twenty-one or marry, gives a contingent estate to an only son, dependent upon his attaining the age of twenty-five years. Dewar *v.* Brooke, L. R. 14 Ch. D. 529, distinguishing Fox *v.* Fox, L. R. 19 Eq. 286, where the trust was for sons "as and when" they attained a certain age. And it was intimated that Fox *v.* Fox was in conflict with In re Ashmore, L. R. 9 Eq. 99.

2 Hughes *v.* Hughes, 12 B. Mon. 117; Raney *v.* Heath, 2 Pat. & H. 219; Roome *v.* Phillips, 24 N. Y. 465.

estate vested immediately, whether there was any particular interest carved out of it to take effect in possession in the mean time or not.

Again, in Doe d. Roake *v.* Nowell (*i*), where the devise was to the testator's nephew R. for life, and on his death to and amongst his children equally *at the age of twenty-one*, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one; and in case R. should die without issue, or such issue should die *before twenty-one*, then over. R. levied a fine during the minority of his children, which raised the question whether their shares were contingent or vested, or, in other words, whether they were destructible by the act of R. or not. It was held in B. R., and ultimately in D. P., that the remainders were vested in the children on their births.

To children at twenty-one, with devise over on death under twenty-one.

[This case shows that the rule applies where the devise is to a class.]

The rule, it seems, applies not only where the devise over is limited so as to take effect simply and exclusively on the failure *of the event on which the prior devise is apparently made contingent, but also where some other event is associated.

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Effect where another event is associated.

Thus, in Bromfield *v.* Crowder (*j*), the devise was to certain persons for life, and at the decease of them or the longer liver of them to J. if he should live to attain the age of twenty-one years; and in case he died before he attained that age, *and his brother C. should survive him*, then over. On a case from the Rolls, the Court of C. P. certified that J. took a vested fee. Sir J. Mansfield, C. J., relied much on the authority of Edwards *v.* Hammond, which he said was on all fours with this. [So that if *either* event happens, the prior devise becomes absolute (*k*).]

The construction also obtains where the lands are devised to trustees, upon trust to convey to limitations of the nature of those under consideration.

Doctrine of preceding cases applicable to executory trusts.

Thus, in Phipps *v.* Williams (*l*), where a testator devised his real estates to trustees, upon trust to convey certain lands to his godson A. when and so soon as he should attain his age of twenty-one years; *but in case he should depart this life before he should attain the said age of twenty-one years, without leaving issue of his body*, then the lands in question were to go according to the disposition of his

(*i*) 1 M. & Sel. 327, 5 Dow, 202; see also Doe d. Dolley *v.* Ward, 9 Ad. & El. 582, 1 P. & Dav. 568; [Greene *v.* Potter, 2 Y. & C. C. C. 517.]

(*j*) 1 B. & P. N. R. 313; [affirmed in D. P., see 14 East, 604, Sugd. Law of Prop. 286. See also Whitter *v.* Bremridge, L. R. 2 Eq. 736; Finch *v.* Lane, L. R. 10 Eq. 501.

(*k*) Re Thomson's Trusts, L. R. 11 Eq. 146 (legacy). Cf. Malcolm *v.* O'Callaghan, 2 Mad. 349.]

(*l*) 5 Sim. 44 [9 Cl. & F. 583 (Phipps *v.* Ackers); Stanley *v.* Stanley, 16 Ves. 491. So where personal estate is directed to be invested in the purchase of land, Jackson *v.* Majoribanks, 12 Sim. 93.

residuary estate. Sir L. Shadwell, V.-C., on the authority of the preceding cases, held that A. took an immediate interest under this devise, observing that the only distinction here was that the legal estate was vested in trustees, which made no substantial difference.

[In Finch *v.* Lane (*m*), the rule was applied to a case where the apparent contingency was, not the devisee attaining a particular age, but his surviving the person to whom a prior life-estate was devised. The devise was to the testator's wife for life, with remainder, as to part, to his brother for life, and from and immediately after the death of the wife, subject to the brother's interest in the part, to M. in fee if she should be living at the death of the wife, but if M. should die before the wife without leaving issue, then to other persons: M. died before the widow, but left issue; and it was held by Lord Romilly, that the case was governed by Phipps *v.* Ackers, and that M. took a vested remainder.

Whether it is applicable where the event is unconnected with the age of the devisee.

*812 * On the other hand, in Doe d. Planner *v.* Scudamore (*n*), where a testator devised to his brother A. for life, and after the death of A., to B. in fee, in case she should survive A., but not otherwise, and in case B. should die before A., then to A. in fee; it was held in C. P. that the remainder to B. was contingent, and that it had been destroyed by a fine levied by A. Edwards *v.* Hammond (which was the only case of this class then decided) was held not to be applicable, on the ground, stated by Lord Eldon, C. J., that it was there "matter of necessary implication that the estate should vest in the eldest son during his infancy, for whatever might be the construction of the prior words it was clearly expressed that, unless the son died before twenty-one, the estate should not remain to the surrenderor" (*o*).

But in Bromfield *v.* Crowder it was expressly declared that the circumstance of the devise over being in that case to a stranger made no difference (*p*); for it was clear that the testator meant no one to take his estate unless in the event of J. dying under twenty-one. And this opinion is borne out by the other decisions. At all events the distinction taken by Lord Eldon was independent of the nature of the contingency; and the rule of construction appears to be as reasonably applicable where the contingency is that of the devisee being alive when the remainder naturally falls into possession, as where it is the attainment by him of the age which presumably in the testator's mind qualifies him for the possession and legal control.

It will have been seen, however, that in Finch *v.* Lane the devisee was an ascertained individual. Where this is not the case, and the contingency does not exactly fit on to the prior interest, there is greater difficulty in applying the rule. Thus in Price *v.* Hall (*q*), where after a

(*m*) L. R. 10 Eq. 501. (*n*) 2 B. & P. 289.
(*o*) *Vide ante*, p. 533. But this ground, or a nearly identical one, would have existed also in Doe *v.* Scudamore if A., who was the testator's heir, was heir presumptive at the date of the will. (*p*) 1 B. & P. N. R. 325. (*q*) L. R. 5 Eq. 399.]

life-estate to A. the remainder was to the children of B. if he (B.) should leave any, and if he left none, over: A. died before B.; and it was held by Sir W. P. Wood, V.-C., that the case was not within the rule. He observed that in Edwards *v.* Hammond and that class of cases, "the gift was to children on attaining a particular age, and the only words of contingency were that if the particular age was not attained, the estate was to go over, the effect of which was that although the estate vested immediately it did not vest indefeasibly until the particular age had been attained. But in * this case the contingency *813 which is introduced does not fit in with the prior interest. In Doe *v.* Nowell all the class was distinctly ascertained and indicated. . . . It is not here a gift to ascertained persons with a gift over, but there was a clear intention that the class should not be ascertained until the death of B., and that all those children who survived B., and those only, should take. By treating it as a remainder vesting immediately in the children living at the death of the tenant for life, it might happen that those children might all die in the lifetime of B., and yet be absolutely entitled, to the exclusion of after-born children who survived B. This was the very class of events not intended by the testator. He meant to give to any children of B. whom B. might leave living at his death. That was the particular period pointed out for ascertaining the class." The result was that the remainder was contingent, and failed for want of a particular estate to support it.]

And it is impossible to hold the devise to vest immediately, by the application of the doctrine in question, in opposition to an express declaration that the devisees shall not take vested interests until a certain age, especially if even the devise over, which supplies the argument for neutralizing this clause, is itself not without expressions which favor the suspension of the vesting.

Construction controlled by express declaration that devisees shall not take vested interests.

Thus, where (*r*) a testator devised a certain estate to his wife during her widowhood, remainder to A. (his nephew) for life, remainder to the children of A. in fee, as tenants in common, and if there should be no child of A. living at his wife's death or second marriage, then over; and, by a codicil of even date, the testator directed that neither A. nor any issue of A., should, *by virtue of his will, take or be considered as entitled to a vested interest, unless they should respectively attain the age of twenty-one years;* and that, in case of the death of any of such children under such age, then the share of such child or children so dying should go to the surviving brothers and sisters, or brother or sister, their, his, or her heirs and assigns, *upon their respectively attaining the age of twenty-one years.* It was contended that the testator, by the clause respecting the vesting, intended not to postpone the vesting, but merely to declare when the shares should become absolute and

(*r*) Russel *v.* Buchanan, 7 Sim. 628, 2 Cr. & Mee. 561; compare Bland *v.* Williams, 3 My. & K. 411, stated post.

indefeasible, as was shown by the survivorship clause, which otherwise was superfluous, and, accordingly, that the children took vested *814 interests, subject to be divested on their * dying under twenty-one. The Court of Exchequer, however (on a case from Chancery), certified an opinion that the vesting was postponed until the age of twenty-one.[1] Sir L. Shadwell, V.-C., on confirming the certificate, observed that the concluding words showed that the testator had the same intention at the end as at the beginning of the instrument.

The rule of construction under consideration is also excluded by a declaration that the devisee shall take a vested interest at the future period, as such a declaration obviously carries with it an implied negation of an earlier period of vesting (*s*).

Declaration postponing earlier vesting, by fixing a future period.

Nor, it seems, does the rule apply where the attainment of the prescribed age is not the only circumstance by which the testator marks the time at which it shall be determined whether the estate shall vest or finally become liable to be divested; but there is a preliminary act to be done by the devisee, in the nature of a condition precedent, before his title accrues. Thus, in Phipps *v.* Williams (*t*), the residue of the real estate was devised to trustees, upon trust to accumulate the rents until C. should attain the age of twenty-four years, and then to convey unto C., *upon his securing certain annuities* (therein bequeathed) to the satisfaction of the trustees, the legal estate in the testator's freehold, copyhold, and leasehold hereditaments; but in case the said C. should depart this life before he attained the age of twenty-four years, without leaving issue, then upon certain other trusts. Sir L. Shadwell, V.-C., held, upon the principle above suggested, that the devisee derived no interest under the trust, until the attainment of the prescribed age, and the performance of the condition. [Upon appeal, Lord Brougham held, that as the terms of the devise involved no more than the law would have implied, namely, that the devisee must take subject to the annuities, there was no condition precedent, or indeed subsequent either: he admitted, however, that, if there had been, it would have made a great difference in the argument (*t*).]

Rule of preceding cases not applicable where condition is to be performed by devisee.

But though the devise over has been generally considered as the characteristic of these cases, yet the construction was adopted in Snow *v.* Poulden (*u*), where there was no such devise, the words of the will being, "The rest of my prop-

Whether there need be an express gift over.

(*s*) Glanvill *v.* Glanvill, 2 Mer. 38; [but see further on this point, s. 6 of this Ch. *ad fin.*]
(*t*) 5 Sim. 44, [3 Cl. & Fin. 665, 9 Bli. N. S. 430 (Aekers *v.* Phipps).] (*u*) 1 Kee. 186.

[1] In Thomson *v.* Ludington, 104 Mass. 193, it appeared that a testator by his will gave his estate to his widow during her life or widowhood, and at her decease or marriage "to such of my children as shall then be living, share and share alike; the names of my said children are A., B., C., D., and E., to them and to their heirs and assigns forever." B. survived the testator, but died before the death or marriage of the widow, and left a child born in the testator's lifetime, and it was held that the child had no interest in the estate. The same was decided in Olney *v.* Hull, 21 Pick. 311; Leighton *v.* Leighton, 58 Me. 63; Emerson *v.* Cutler, 14 Pick. 108. See Nash *v.* Nash, 12 Allen, 345.

erty to be invested in land, and given to my grandson; when of age, to have a commission in the army regulars at twenty-one; to remain in * the army seven years, *and not to be of age to receive this* *815 *until he attains his twenty-fifth year*, and to be entitled to him and his male heirs, bearing the name of F. forever." Lord Langdale, M. R., held, that the grandson took an immediate vested interest as tenant in tail in the land to be purchased, subject to be divested if he should not attain twenty-five; and, consequently, that the rents were applicable to his benefit during his minority.

[No reasons are reported; but the express direction that the property should be "given to" the grandson may well have been taken to constitute an immediate devise independently of the subsequent clause postponing the right of "receipt." But in the two cases next stated there was no such independent gift, nor any express gift over on death before the prescribed age (*x*). Thus, in Simmonds *v.* Cock (*y*) the testator gave the rents and income of his real and personal estate to his wife for life, and after her death he gave all his real and personal estate unto and to the use of his sons A., B., and C., and his granddaughter D., provided she lived to attain the age of twenty-one years, their respective heirs, &c., absolutely. It was held that the share of D. vested in her immediately, to be divested if she died under age. A devise to A. "provided she marries my nephew on or before attaining twenty-one," or "provided she goes to Rome before she attains twenty-one," would, said the M. R., give a vested interest, subject to a condition subsequent: why a devise to A. "provided she lived to attain twenty-one" should not also be a condition subsequent he could not understand.

Simmonds *v.* Cock.

Again, in Andrew *v.* Andrew (*z*), where a testator devised lands to his son T. for life, "and from and after his decease unto his eldest son if he shall have arrived at the age of twenty-one, or so soon as he shall arrive at that age; and in default of his having a son, then to the eldest son of testator's son H. forever;" it was held by Sir C. Hall, V.-C., that nothing vested in the eldest son of T. until he attained the prescribed age, because there was no express gift over on his dying under that age. The intermediate rents therefore were undisposed of. But this was reversed by the L. JJ. Sir W. James observed that it must be conceded that the words of gift to T.'s eldest son standing alone would have been a mere gift of a future contingent interest. But they were preceded by the life-estate to T. and * followed by the words "and in default of his having a son I give and bequeath the same to the eldest son of H. forever;" words which had uniformly been held to mean that the estate was not to go over as long as there was any issue male, and which therefore conferred an estate tail male on T., subject to the previous estate to his

Andrew *v.* Andrew.

*816

[(*x*) And see Peard *v.* Kekewich, 15 Beav. 166; Attwater *v.* Attwater, 18 Beav. 330.
(*y*) 29 Beav. 455. (*z*) 1 Ch. D. 410. See also Jull *v.* Jacobs, 3 Ch. D. 703, 713.

eldest son (*b*). "There is a long category of cases, from very early times, down to a very recent decision of the M. R. (*c*), in which the words 'if,' 'when,' 'so soon as,' have been held from the context not to import contingency in the sense of a condition precedent to the vesting, but to mean a proviso or condition subsequent, operating as a defeasance of an estate vested, and we should be well warranted by the authorities in so dealing with this case, *inasmuch as the limitations were plainly intended to make a complete settlement* of the property to one for life, then to his eldest son on his attaining twenty-one, with a remainder (*qu.*) over to the other descendants (which would necessarily take effect on that son's dying under the prescribed age) with an ultimate remainder over to another branch of the family. But all doubt and difficulty are removed by the fact that the gift is actually expressed to be what without the express words we should have implied it to be, viz., that the gift is expressed to be '*from* and after' the death of T. A man cannot have an estate 'from the death' if he is not to have it for several years after the death, and possibly not at all; and to construe the words as contingent we should have to strike out the word 'from,' and that in order to make for the testator a most unreasonable will. But taking the word 'from' in its natural meaning, and taking the words apparently contingent to have the meaning which has been so often given to them in so many cases, the whole thing becomes sensible and intelligible. The limitations, therefore, have to be read thus: 'To T. for life, remainder to T.'s eldest son in fee (*d*), with an executory devise in tail to T. if that son should die under twenty-one.'"

The decision thus turned on the force attributed to the expression "from and after the death;" an expression generally regarded as being equivalent merely to "remainder." The authorities to which the L. J. alluded were probably those which had been cited in argument, viz., Bromfield *v.* Crowder, and others of that class. But save *817 for the principle that words * apparently contingent may be controlled by the context, they are not very closely in point. In them (*e*) the vesting was inferred from the gift over: in Andrew *v.* Andrew the gift over was inferred from the pre-supposed vesting (*f*). Alexander *v.* Alexander (*g*) was not cited. There, a testator by will, in 1813, devised his "freehold estate at V." to his son T. for life, "and from and immediately after his decease" the testator devised "the

(*b*) See Ch. XXXVIII.

(*c*) Semb. Simmonds *v.* Cock; Muskett *v.* Eaton, 1 Ch. D. 435, stated post, was not then reported.

(*d*) The will bore date 1832, but the fee was held to pass by virtue of the *implied* gift over on death under age. See Ch. XXXIII. (*e*) Except in Simmonds *v.* Cock.

(*f*) Referring to an argument at the bar, the L. J. added: "It assumes that the estate to the son *did not vest on* the father's death. But we hold that it did *so* vest." This impliedly asserts that the estate was contingent on the son surviving the father; and some other parts of the judgment, particularly where the words "have an estate" are applied to the two different events of T.'s death and the son attaining twenty-one, would suggest the same construction. But the expressions in question must probably be regarded as mere inaccuracies; as also must the expression "remainder" when used of an estate coming after the son's fee-simple.

(*g*) 16 C. B. 59.

same unto the second son of the body of my son T. on his attaining the age of twenty-one years, but in default of there being a second son of the body of my son T., then I devise them to the second son of the body of my son C. on his attaining twenty-one, but in default of there being a second son of the body of my son C. then I devise the same to the second daughter of my son C. on her attaining the age of twenty-one, but in default of there being a second daughter of my son C., then to the right heirs of my son T." Here the limitations appear as plainly as in Andrew *v.* Andrew to have been intended to make a complete settlement of the property, and the gift to the second son was expressed to be, "from and after" the death of the tenant for life. But it was held that the devise to the second son of T. was a contingent remainder, not a vested estate in fee defeasible on his death under the prescribed age.

Thus the most recent cases show little of the indisposition to extend the doctrine of Doe *v.* Moore which has sometimes been professed (*h*), and which had in the mean time led to the establishment of a very material distinction between a devise to an individual or to a class, if or when he or they attain twenty-one, with a gift over on death under that age, and a devise to "such of a class as shall attain twenty-one," with a corresponding gift over. Thus in Festing *v.* Allen (*i*), where there was a devise to the use of the testator's granddaughter for life, and from and after her decease to the use of her children who should attain the age of twenty-one years, if more than one, in equal shares as tenants in common in fee, and if but one, then to that one in * fee; and for want of such issue, over. It was *818 contended, on the authority of Phipps *v.* Ackers, that the children took vested estates in fee, subject only to be divested partially in case of other children coming into being, or wholly in case of death under twenty-one. But Rolfe, B., who delivered the judgment of the court, said that in Phipps *v.* Ackers, and the cases there referred to, there was an absolute gift to some ascertained person or persons, and the courts held that words accompanying the gift, though apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously vested should be divested, and pass from the first devisee into some other channel; but that here there was no gift to any person who did not answer the whole of the requisite description, and no one who had not attained twenty-one was an object of the testator's bounty any more than a person who was not a child of the granddaughter. Even if there were no authority establishing this to be a substantial distinction the court would not feel inclined to extend the doctrine of Doe *v.* Moore, and Phipps *v.* Ackers to cases not precisely

Distinction between gift to children *at* twenty-one, and one to children *who attain* twenty-one.

Festing *v.* Allen.

(*h*) 9 Cl. & Fin. 592.

(*i*) 12 M. & Wels. 279, 5 Hare, 573.

similar. But in fact this distinction in a great measure formed the ground of the decision of Duffield *v.* Duffield (*i*) in D. P., and Russel *v.* Buchanan. It was therefore decided that, as no child of the granddaughter had attained twenty-one when her estate determined, the remainder was defeated for want of a particular estate to support it (*k*).

Again, in Bull *v.* Pritchard (*l*), where a testator devised his freehold estates to trustees, in trust for his daughter M. during her life, for her separate use, and after her decease, he directed his trustees to convey the said estates "unto and equally between and among all and every the child and children of his said daughter M. who should live to *819 attain the age of twenty-three * years," in fee as tenants in common; "and, if there should be but one such child, then to such one child" in fee; "but, in case there should be no such child or children, or, being such, all of them should die under the age of twenty-three years without lawful issue, then upon trust" to convey to the persons therein named, Sir J. Wigram, V.-C., said there were two classes of cases; one, where the devise was to a party at a given age, and the property was given over if he died under that age; the other, where the description of the devisee was such as to make the given age part of that description; and he held that this case fell under the second class. It was not, he added, necessary for him to say whether greater violence would be done to the language of the will in that case than was done in some of the cases of the first class, as, for example, in Doe *v.* Moore (*m*): the two cases were *in principle* widely different from each other. The V.-C. also held, that a clause contained in the will, directing the trustees to apply each child's share, or so much thereof as they might deem necessary, towards their maintenance, did not vary the case.

But there are no words so plain but they may be controlled by the context (*n*): and in Muskett *v.* Eaton (*o*), where a testatrix devised a farm to A. for life, and in the event of his leaving a lawful son born, or to be born in due time after his decease, who should live to attain the age of twenty-one years, unto such son and his heirs if he should live to attain the age of twenty-one years; but if A. should die without leaving

(*i*) 1 D. & Cl. 268, 314, 3 Bli. N. S. 260. See also Newman *v.* Newman, 10 Sim. 51; Wills *v.* Wills, 1 D. & War. 439.

(*k*) But as there were infant children who might attain twenty-one, the event on which the alternative remainder was limited had not happened, so that this remainder also failed. See now 40 & 41 Vict. c. 33, stated post, Ch. XXVI.

(*l*) 5 Hare, 567. See also Stead *v.* Platt, 18 Beav. 50; Holmes *v.* Prescott, 33 L. J. Ch. 264, 10 Jur. N. S. 507 (in which Wood V.-C. examined the authorities); Perceval *v.* Perceval, L. R. 9 Eq. 386 (same will); Rhodes *v.* Whitehead, 2 Dr. & Sm. 532; Re Eddel's Trusts, L. R. 11 Eq. 559; Brackenbury *v.* Gibbons, 2 Ch. D. 417 (where, however, there was no gift over). These cases have virtually overruled Browne *v.* Browne, 3 Sm. & Gif. 568; Riley *v.* Garnett, 3 De G. & S. 629; Doe d. Bills *v.* Hopkinson, 5 Q. B. 223, as to which see per Wood, V.-C., in *ex parte* Styan, Johns. 387, and in Holmes *v.* Prescott, supra, and post Ch. XL. s. 3.

(*m*) See also, per Sir W. Grant, M. R., Leake *v.* Robinson, 2 Mer. 386.

(*n*) Per Wood, V.-C., Holmes *v.* Prescott, 33 L. J. Ch. 271.

(*o*) 1 Ch. D. 435.

a son who should live to attain the age of twenty-one years, then after the death of A., to B. and his heirs. A. died, leaving an infant son; and Sir G. Jessel, M. R., held that the case was not within the rule in Festing *v.* Allen. He said: "The testatrix must be taken to have known the course of nature, and if the child had been born within nine months after the death of the tenant for life, he *could* not have been twenty-one at the time when the particular estate determined. It is quite impossible that she could have intended the attainment of the age of twenty-one to be part of the description of the person to take. Therefore, in my opinion, the son takes a vested estate subject to be divested in the event of his dying under twenty-one."

*It will be observed that the actual words of gift (*p*) are "to such son if he shall live to attain twenty-one," and that "such son" must here mean "son of A. born or to be born," exclusive of the qualification "who shall live to attain twenty-one," because the testator goes on to add that very qualification, so far as he intends it to be one — "if he shall attain twenty-one." So that on this ground alone the case was not within Festing *v.* Allen. The intention was made by the M. R. to depend on the rule of law which reqnires a continuing particular estate to support a contingent remainder: there was nothing else to suggest that the testatrix intended that the devisee should be twenty-one at the time when the particular estate determined. Generally, it is only when the words of the will are ambiguous that the construction of them can properly be governed by such considerations. The rule itself is now abolished by statute (*q*).] *820

It was at one period doubted whether a devise to a person *after* payment of debts was not contingent until the debts were paid; but it is now well established that such a devise confers an immediately vested interest, the words of apparent postponement being considered only as creating a charge (*r*).

Devises *after* payment of debts.

The several preceding classes of cases clearly demonstrate that the courts will not construe a remainder to be contingent, merely on account of the inaccurate and inartificial use of expressions importing contingency, if the nature of the limitations affords ground for concluding that they were not used with a view to suspend the vesting. Such cases may be considered, however, as exceptions to the general rule; and, agreeably to the maxim, *exceptio probat regulam*, they confirm, rather than oppose, the doctrine that devises limited in clear and express terms of contingency do not take effect, unless the events upon which they are made dependent happen, which cases we now proceed to consider.

General remark on preceding cases.

(*p*) See also Bradley *v.* Barlow, 5 Hare, 589, where the clear terms of contingency occurred in the maintenance clause, not in the gift of the legacy.

(*q*) 40 & 41 Vict. c. 33. See Ch. XXVI.]

(*r*) Barnardiston *v.* Carter, 1 P. W. 505, 509, 3 B. P. C. Toml. 64; see also Bagshaw *v.* Spencer, 1 Ves. 142; and some very able opinions stated 1 Coll. Jur. 214. Those of Lord Eldon (then Sir John Scott) and Mr. Fearne, are particularly worthy of attention.

III. The first remark suggested by this class of cases is, that an estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead, and *821 however * inconsistent with what it may be *conjectured* would have been the testator's actual meaning, if his attention had been drawn to those consequences.[1]

Estates limited in clear terms of contingency.

Thus, in Denn d. Radcliffe *v.* Bagshaw (*s*), where the devise was to the testator's only daughter M. for life, and after her decease to the first son of her body, *if living at the time of her death*, and the heirs male of such first son, remainder to the other sons successively in tail, in like manner, remainder to testator's nephew in tail. M. had issue an only son, *who died in her lifetime*, leaving issue. Whether such issue was entitled under the devise in tail (*t*) to this first son, was the question. It was contended for him, that the testator must have intended that the nephew, who was otherwise amply provided for by him, should not take until failure of all the descendants of his daughter; and that, to accomplish this intention, the court would either construe the estate of the daughter to be an estate tail, or hold that an estate tail vested in the son on his birth; and that the words, "if living at the time of her death," merely marked the period when the remainder should commence in possession, as in the cases before discussed. But the court (reluctantly, on account of the hardship of the case (*u*)), decided, that the son not having survived his mother, his estate never arose. Lord Kenyon observed, that the cases cited for him proceeded on informal words; whereas here correct and technical expressions were used throughout (*x*).

So, in Holmes *v.* Cradock (*y*), where a testator devised freehold, copyhold, and leasehold estates to F., his heirs, &c., upon trust to pay testator's wife an annuity of 100*l.* for her life, and to pay the residue of the annual profits to testator's son W. during the life of his mother; and if his son should happen to die before his mother, without leaving a widow or

Devises held to be contingent, notwithstanding absurd consequence.

(*s*) 6 T. R. 512; see also Wingrave *v.* Palgrave, 1 P. W. 401 (arising on the limitation of a term in a settlement). (*t*) For such it clearly would have been. See infra.

(*u*) *Suggestions to Persons taking Instructions for Wills as to suspending the Vesting.* — Persons taking instructions for wills, in which the vesting is to depend on the devisee or legatee attaining a particular age or living to a given period, should carefully ascertain that the possibility of his dying in the mean time, *leaving issue*, is in the testator's contemplation. It is probable that in general this event is overlooked; and that if the testator's attention were drawn to the circumstance, he would either make the interest vest in the legatee, in case of his dying leaving issue before the prescribed age or period, or else substitute the issue in such event. [(*x*) Cf. Jenkins *v.* Hughes, 8 H. L. Ca. 571, an informal will.]

(*y*) 3 Ves. 317; [see also Vick *v.* Sueter, 3 Ell. & Bl. 219.]

[1] See ante, p. 814, note 1. In Nash *v.* Nash, 12 Allen, 345, the question arose whether a contingent gift of land to such of the testator's children as should be living at the death of their mother would pass to an assignee in bankruptcy under the United States bankrupt law of 1841. It had been decided that such an interest would not pass to the assignee under the bankrupt law of 1800. Krumbaar *v.* Burt, 2 Wash. C C. 406. On the other hand, such an interest would go to the assignee under the English bankrupt act and under the Massachusetts statute of insolvency. Higden *v.* Williamsnn, 3 P. Wms. 132, Gardner *v.* Hooper, 3 Gray, 398; Winslow *v.* Goodwin, 7 Met. 363. And it was decided that the assignee might take under the law of 1841. Nash *v.* Nash, supra.

child, then in trust to pay all such profits to her for life, and subject to the said trusts, that the said F. should stand seised to the use of the testator's said son, his heirs and assigns, forever, subject and chargeable with * the legacies thereinafter given. In a subse- *822 quent clause he proceeded thus: "And if my son shall die, *leaving my wife*, without leaving a wife or any child, after his death *and my wife's*, I give and bequeath," certain legacies, "which I charge upon my real estate, hereinbefore limited to my son and his heirs." The son survived his mother, and died without leaving wife or child; and Sir R. P. Arden, M. R., held, that the legacies did not arise, on the ground that he was not warranted in totally rejecting words, unless they were repugnant to the clear intention manifested in other parts of the will (*z*).

So, in Shuldam *v.* Smith, lessee of Matthews (*a*), where a testator devised to certain persons for life, and after the death of the survivor unto all and every the children of his late sister C., by her three several husbands (naming them), *that should be then living*, and to their heirs and assigns, equally to be divided between them as tenants in common, and not as joint-tenants: *and if there should be but one such child, and no issue of any of the other children then living*, then, and in that case, he devised his real estate unto such surviving child, his or her heirs and assigns forever. At the death of the surviving tenant for life, one child of C. only was living, but there was issue of several of the other children. It was held in D. P. that in this event the remainder in fee was undisposed of. Lord Eldon said, you cannot, by implication or supplying words, give the whole to one child, in an event in which the testator has said, that such one child shall not have it (*b*), nor devise the estate into different aliquot parts between one child and the issue of the others, where the testator has not told you what aliquot part is to be given to one, and what to the issue of the others. Lord Redesdale observed, that the testator had provided for the event of there being more than one child, and that of there being only one and no issue of the others then living. The third event, however, was that which had happened, and in that event there was no disposition.

* [And in Madison *v.* Chapman (*c*), where a testator directed *823 that, when the youngest of his two daughters had attained

(*z*) *Remark on Holmes* v. *Cradock.* — But was there not ground to contend, on the principle of Pearsall *v.* Simpson, and that class of cases (ante, p. 807), that the devise might be read "if my son shall die without leaving a wife or child, then after his decease, *and after my wife's decease, if he shall die leaving my wife*"? There can be little doubt that Sir W. Grant would so have construed it. It is observable that neither Webb *v.* Hearing, nor the anonymous case in Ventris, 363, was cited to Sir R. P. Arden, who relied much on Calthorpe *v.* Gough, cit. 3 B. C. C. 395, and Doe *v.* Brabrant, 3 B. C. C. 393, 4 T. R. 703.

(*a*) 6 Dow, 22, [Sug. Law of Prop. 416; see also Parsons *v.* Parsons, 5 Ves. 578; Dicken *v.* Clarke, 2 Y. & C. 572; Clarke *v* Butler, 13 Sim. 401; Lenox *v.* Lenox, 10 Sim. 400.]

(*b*) That is, not expressly, but constructively by giving to one, if there should be no issue of the others; for it is observable that, if it had stood upon the former part of the devise alone, the sole surviving child would clearly have taken.

[(*c*) 4 K. & J. 709. See also Coulthurst *v.* Carter, 15 Beav. 421, fourth point; Pride *v.* Fooks, 3 De G. & J. 252.

Limitation over construed strictly and held to fail, event not having happened.

twenty-one, his real and personal estate should be divided into three equal parts, one part to be for his wife, and one of the remaining two for each daughter; at his wife's decease her share to be equally divided between his two daughters; provided, that if either of his two daughters should die before a division of his property should have been made, and having no surviving issue, then the part of the deceased should go to the surviving sister. By a codicil, the testator provided that *if both his children should die in their minority* (*d*), and leave no issue, then in such case, and in such case only, he gave the whole of his property to his wife for life with remainder over. The elder daughter attained twenty-one, but both died before the younger attained that age, and without having been married. It was held by Sir W. P. Wood, V.-C., that whether the interests under the will were vested or not (*e*), and whether a reasonable motive could or could not be assigned for the condition upon which the testator had made the limitation over in the codicil to depend, that condition must be construed strictly, and that, this event not having happened, the limitation over failed. "The condition," said the V.-C. (viz. the death of the elder daughter during minority), "is not merely an event essential to the determination of the interest previously given to her, but involves a further incident, which may or may not have happened when that estate is determined (*f*). When I find a testator expressing this varied contingency, by his will giving an interest which may be determined by a death after minority, and by his codicil making a limitation over which is only to take effect in the event of death during minority, it is impossible to know what he intended, or to foresee what he would have said had it been called to his attention that the two limitations did not coincide."]

Where testator devises upon contingency, misconceiving the extent of his power of disposition.

The same rigid rule of construction prevails, where a testator has disposed of an estate in a certain event only, under the erroneous impression, that his power of disposition is confined to such contingency.

Thus, in Doe d. Vessey *v.* Wilkinson (*g*), where *824 lands had been * settled on A. for life, remainder to trustees, to raise, in case W. or any of his issue should be living at her (A.'s) death, 1,000*l.* for such persons as A. should appoint, remainder to W. for his life, remainder to his children in tail, remainder to A. in fee. A. by will, reciting the settlement, gave the 1,000*l.* in case W. or any of his issue should be living at the time of her death, to B. She then proceeded to declare, that "*in case neither the said W., nor any issue of his, should be living at the time of her*

(*d*) "Minority" was construed in its ordinary sense; not, as contended for, the period until the youngest daughter attained twenty-one.
(*e*) The court, however, thought they were vested.
(*f*) See ante, p. 809.] (*g*) 2 T. R. 209.

decease, by which event the premises would devolve upon her and her heirs," then she gave the same to trustees for 500 years, to raise certain sums of money within six months after her decease; and from and after the expiration or other sooner determination of the said term, and subject thereto, the testatrix gave the premises to her brother for life, with remainder to her (testatrix's) daughter C. in fee; but if she died before twenty-one and without issue, to her son-in-law B. in fee, he paying certain legacies. W. *survived the testatrix*, and afterwards died without issue; and the question was, whether in that event the devises took effect. The court agreed that the limitation of the term was void in event; and Grose, J., and Ashurst, J., held that the devise of the inheritance was dependent on the same contingency. Buller, J., did not deny effect to the words of contingency, but confined them to the term, holding it to be a vested devise of the inheritance, subject to a contingent term (*h*). The argument that the testatrix might not be aware of her power to dispose of the estate, in case of the death of W. without issue after her death, and that, had she been so, the whole of the will showed that she would have given it to W., was conclusively answered by Grose, J., who said that, "if she was not aware of her power to give, she did not intend to give; and then the law gives it to the heir, and we cannot take it from him. If she had known her power to dispose of it, she possibly would have given it, and probably might, but she has not said so; and if we were to say so, it would be our will, and not hers."

Where holding the devise to be contingent, will defeat the declared object of the testator.

Still, however, where the construing of the devise to be contingent, in accordance with the letter of the will, would have the effect of rendering nugatory a purpose clearly expressed by the testator, the court will struggle to avoid such a construction.

Thus, in Bradford *v.* Foley (*i*), where the devise was in trust * for the testator's son for life, and after his decease unto *825 the first and every other son which he (the son) should have by any future wife in tail; remainder to the daughters of such future marriage in fee; with a proviso, that if his son should thereafter marry with any woman related in blood to M. his then wife, all the above uses, so far as they related to the issue of such future marriage, should cease and determine, it being the testator's steadfast resolution, to hinder that no person any ways of kin to her in blood, or born or descended from any such person, should inherit any part of his said estate; and *in such case*, notwithstanding there should be issue of his said son by such future marriage, living at the time of his (testator's) decease, it was his will that neither they, nor either of them, should take any thing under his will; *but that* the trustees should stand seised to

(*h*) As to this point, see infra, s. 4.
(*i*) Doug. 63. This case seems to be exactly the converse of Driver d. Frank *v.* Frank, 3 M. & Sel. 25.

the use of his (the testator's) brother's children, living at his decease, and their heirs; and in case they should all die in his lifetime, or after his decease, without issue, then he devised his said real estate to his own right heirs: he meant such heirs only as should be in no ways related in blood to the said M., all of whom he thereby excluded from any right, title, or benefit, from his estate (*k*). The son died without marrying again. It was contended, that in this event the ulterior estates never arose; but the court held, that the testator's brother's children were tenants in tail. Lord Mansfield said nothing could be clearer than that the testator meant that no child of M. should take in any event; and yet, according to that argument, such child, if there had been one, must have taken (as heir at law).

Remark on Bradford *v.* Foley.

The words in this case were certainly very strong, and to a judge less disposed than Lord Mansfield to relax the strict rules of construction, they probably would have appeared to present an insuperable difficulty to holding the testator's brother's children to take in any other event than that of the son's future marriage, especially as this construction extended the devise beyond what was absolutely necessary to effectuate the testator's professed object, namely, the exclusion of the obnoxious persons. He might have intended the devise in question to take effect only in case such persons came *in esse*. The case, however, stands distin-
*826 guished from the others before noticed, in the fact, * that the devise in its literal terms was inconsistent with a scheme, not merely conjectured, but avowed by the testator (*l*).

[So in Quicke *v.* Leach (*m*), a testator devised lands to his wife until his son J. attained the age of twenty-five, "and in case his said son should attain his age of twenty-five and he (testator) should have any other child or children of his body living at the time of his death or that should be afterwards born alive," he devised his lands to trustees for 1,000 years upon the trusts thereinafter expressed; and subject thereto, to his son J. for life with remainders over in strict settlement. The trusts of the term were declared to be for raising 5,000*l.* as portions for the testator's children, other than the eldest, that he might happen to leave at his death; but if all his children except an eldest should die before their respective ages of twenty-five and twenty-one, then the sum of 5,000*l.* was not to be raised; "provided always, that in case I shall leave no younger child or children, or being such, all of them shall die before the said respective ages of twenty-five or twenty-one years, or in case the said sum of 5,000*l.* be raised, then the said

(*k*) It seems that these words would not have amounted to a devise to the persons next in descent. Goodtitle *d.* Bailey *v.* Pugh, 3 B. P. C. Toml. 454. Consequently, a son or other relation of M., being the testator's heir, would have taken the reversion by descent, notwithstanding this clause. Nothing will exclude the heir, but an actual disposition to some other person [ante, p. 623].

(*l*) This case is given by Fearne (C. R. 234), as an example of a limitation after a preceding estate, which preceding estate depends on a contingency which never happens, taking effect notwithstanding.

(*m*) 13 M. & W. 218.

term of 1,000 years shall cease, determine and be utterly void." J. attained the age of twenty-five, and was the only child whom the testator left surviving him. The question was whether the devise of the term had failed. It was held that it had not; for there were two circumstances by which the testator had satisfactorily shown that he intended the term to take effect at his death in all events; first, the clause of cesser provided that the term should cease on certain contingencies, one of which was the testator's not leaving any younger child. Such a proviso would be useless and unmeaning if, unless he left a younger child, the term was never to come into existence. A term which never existed could not possibly cease (*n*). The other circumstance was this: One of the trusts of the term was, that if the testator's wife should die before J. attained twenty-five, the trustees should allow him a sum not exceeding 400*l.* per annum for maintenance. This trust could only be performed by means of the term, and therefore necessarily pre-supposed its existence: and it was a trust not made to depend by any * necessary or reasonable construction of the *827 words used on the event of there being a younger child.]

Vested gift not divested, unless all the events happen.

As a devise expressly made to take effect on a contingency will not arise unless such contingency happen, it follows *à fortiori* that an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted devise happen (*o*). And this, it is to be observed, applies as well in regard to events which respect the personal qualification of the substituted devisee, as those which are collateral to him. In every case the original devise remains in force, until the title of the substituted devisee is complete. Thus, if a devise be made to A., to be divested on a given event in favor of persons unborn or unascertained, it will not be affected by the happening of the event described, unless, also, the object of the substituted gift come *in esse*, and answer the qualification which the testator has annexed thereto.

Thus, in Harrison *v.* Foreman (*p*), where a fund was bequeathed to A. for life, and after her decease to P. and S. in equal moieties; and in case of the death of either of them in the lifetime of A., then the whole to the survivor *living at her decease*. Both died in her lifetime; and Sir R. P. Arden, M. R., held, that the original gift was not defeated.

So, in Sturgess *v.* Pearson (*q*), it was held, that a gift to a person for

(*n*) But the term was to "cease, determine and be *void*" upon any one of three events: 1, there being no younger children; 2, their dying under age; or, 3, the money having been raised. Might not the words have been read distributively?

[(*o*) Co. Lit. 219 b]; Doe *v.* Cooke, 7 East, 269, ante, p. 521; Doe *v.* Rawding, 2 B. & Ald. 441, ante, p. 522; see also Doe d. Usher *v.* Jessep, 12 East. 288; [Wall *v.* Tomlinson, 16 Ves. 413; Vulliamy *v.* Huskisson, 3 Y. & C. 80.] (*p*) 5 Ves. 207.

(*q*) 4 Mad. 411; [Kimberley *v.* Tew, 4 D. & War. 139; Masters *v.* Scales, 13 Beav. 60; Peters *v.* Dipple, 12 Sim. 101; Clarke *v.* Lubbock, 1 Y. & C. C. C. 492; Eaton *v.* Barker, 2 Coll. 124; Benn *v.* Dixon, 16 Sim. 21; Walker *v.* Simpson, 1 K. & J. 719;] and see Hulme *v.* Hulme, 9 Sim. 644, stated post, Ch. XXVI.

life, and after his death to his three children, *or such of them as should be living at the time of his death*, conferred a vested interest on the children, subject to be divested only in favor of those (*r*) who should be living at the prescribed period; so that if all the children died in the lifetime of the tenant for life, the shares of the whole devolved to their respective representatives.

And the same construction has sometimes been applied in cases, where the intention that the survivors (in whose favor the original gift was divested) should be living at the time of distribution, was less clearly marked.

As, in Browne *v.* Lord Kenyon (*s*), where the testatrix gave *828 * 1,000*l.* to which she was entitled by virtue of a deed of settlement (and which it seems was charged upon land), upon trust for several persons successively for life, and after the death of the survivor, upon trust to pay the principal to C.; but "if he be then dead" (which event happened), then to his two brothers in equal shares, *or the whole to the survivor of them.* Both the brothers survived the testator, and died pending the prior life-interests. Sir J. Leach, V.-C., held, that they took vested interests at the death of the testator, subject to be divested *if one only should survive the tenants for life;* though he intimated a doubt whether the testatrix did mean that either brother should take any interest without surviving the tenants for life; but his Honor said, the force of the expression was otherwise.

Devise not divested by contingent clause which fails.

So, in Belk *v.* Slack (*t*), where a testator gave the residue of his real and personal estate to trustees, upon trust for A. for life, and after the decease of A. and B. he gave the same to C. and D., to be equally divided between them, share and share alike, *or to the survivor or survivors of them.* C. and D. both died in the lifetime of A. and B.; and it was held that their respective representatives were entitled to the several moieties of the residue.

[Where by the word "survivor" is denoted, not one who shall be living at a defined point of time, but only one of several devisees who outlives the other or others, the construction is of course inapplicable. Thus, in White *v.* Baker (*u*), where the gift was to A. for life, and after his death to B. and C. equally, and in case of the death of either of them in the lifetime of A., the whole to the survivor of them; it was held that the word "survivor" referred to the event of one of the two persons, B. and C., surviving the other, and consequently that on the death of B. in the lifetime of A., the whole vested indefeasibly in C., although the latter also died before A.

[(*r*) Re Clark's Trusts, L. R. 9 Eq. 378.] (*s*) 3 Mad. 410.

(*t*) 1 Kee. 238; see also Jackson *v.* Noble, 2 Kee. 590; [Aspinall *v.* Audus, 7 M. & Gr. 912; Littlejohns *v.* Household, 21 Beav. 29; Page *v.* May, 24 Beav. 323 (correcting Macdonald *v.* Bryce, 16 Beav. 581); Cambridge *v.* Rous, 25 Beav. 415; and see and consider Gibson *v.* Hale, 17 Sim. 129.

(*u*) 2 D. F. & J. 55. See this case cited again, Ch. XLVII. s. 3, where gifts to "survivors" are treated at large.

The strictness of construction put upon a gift divesting a previous vested interest is further exemplified by Templeman *v.* Warrington (*x*), where a testatrix bequeathed her residue in trust for A. for life, and after her death in trust for her children; but * in case there *829 should be but one child at A.'s death then to go to that one, and on failure of issue, as A. should appoint. A. had eleven children, three of whom died in her lifetime; and it was held that as there were more children than one living at A.'s death, the deceased children were not divested of the interests which they took under the primary gift.

And in Strother *v.* Dutton (*y*), where a testator gave to his daughter R. 1,000*l.* to be invested and the interest to be paid to her for her life, and at her death to be called in and distributed equally amongst her children; "in case any lawful children are living from son or daughter being dead, the issue of their marriage, that such child or children shall be equally entitled to the part or share their parent would be entitled to if they had been living." R. had several children, of whom four died in her lifetime without issue; and it was held that the shares which vested in them on their births, were not divested; for the gift in favor of the issue of the children who had issue, did not affect the shares of the children who died without leaving issue.

The principle of the foregoing authorities prevails not only where the original gift is vested, but also where it is contingent, provided the contingency be not such as to prevent the contingent interest from being transmissible (*z*).

It will be observed that if a prior devise creates an estate tail, the owner of it, if it be vested, may, by executing a disentailing deed, defeat the gift over; but this is no reason for importing the contingency into the prior gift in order to preserve the gift over (*a*).]

Where a gift to several persons or such of them as shall be living at a certain time, is followed by limitations over in case of their dying under alternative circumstances (for instance, under twenty-one leaving issue, and under twenty-one without issue), these executory gifts are held to apply only to the shares of objects who are living at the prescribed period; to decide otherwise would be to reduce the words, "or such of them as shall be then living," to silence (*b*).

(*x*) 13 Sim. 267; see also Bromhead *v.* Hunt, 2 J. & W. 459; Gordon *v.* Hope, 3 De G. & S. 351; and Terrell *v.* Cooke, 5 L. J. Ch. N.S. 68; Re Minor's Trust, 28 Beav. 50 (settlement); Corneck *v.* Wadman, L. R. 7 Eq. 80. See also Skey *v.* Barnes, 3 Mer. 334; Hope *v.* Potter, 3 K. & J. 212; Malcolm *v.* Malcolm, 21 Beav. 225.

(*y*) 1 De G. & J. 675. See also Baldwin *v.* Rogers, 3 D. M. & G. 649; Etches *v.* Etches, 3 Drew, 447, 2d point; Re Bennett's Trusts, 3 K. & J. 280; but cf. Stuart *v.* Cockerell, L. R. 5 Ch. 713; Read *v.* Gooding, 21 Beav. 478.

(*z*) Wagstaff *v.* Crosby, 2 Coll. 746; Re Sanders' Trusts, L. R. 1 Eq. 675 (dissenting from Willis *v.* Plaskett, 4 Beav. 208). When contingent interests are transmissible, and when not, is pointed out at the close of this chapter.

(*a*) Davies *v.* Richards, 13 C. B. N. S. 69, 861.]

(*b*) Howes *v.* Herring, 1 M'Cl. & Y. 295. The rule, that estates vested are not to be divested unless all the events upon which the property is given over happen, seems to have been generally adhered to, although an absurd and whimsical intention be thereby imputed to the testator. See Graves *v.* Bainbridge, 1 Ves. Jr. 562. [But where the original gift is in ambiguous terms which *may* import contingency, the conclusion that this is their true import is

*830 * IV. When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations.

Question, whether contingency confined to particular estate, or extends to a series of limitations.

Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorize a distinction between them (*c*).

In Moody *v.* Walters, the limitations in a marriage settlement were to the husband and wife successively for life, remainder to the first and other sons in tail male; with remainder, *in case he (the husband) should die without leaving any issue male then born, and alive, and leaving his wife with child*, to such after-born child or children, if a son or sons: remainder to the brother of the settlor for 120 years, if he should so long live; remainder to trustees for preserving contingent remainders; remainder to his first and other sons in tail male, with reversion to the settlor in fee. Lord Eldon expressed a strong opinion (though the case was not decided on the point), that the husband having died, leaving a son, the limitation to the posthumous son would not (if there had been one) have arisen, and that the ulterior limitations failed with it. Such, he thought, would have been the construction, had it been a will.

Contingency held to extend to whole line of limitations.

Instances in which a contingency has been restricted to the immediate estate are of two kinds. First, where the words of *831 * contingency are referable to, and evidently spring from, an intention which the testator has expressed in regard to that estate, by way of distinction from the others.

Contingency confined to particular estate.

As, in Horton *v.* Whittaker (*d*), where A., by his will, declared his desire to provide for his sisters; but considering that his sister M., wife of W., was already well provided for during

Where the words are referable to

aided by the improbability of the testator intending to make the vesting or indefeasibility of a legacy to a class, depend on whether one or two only of the class survive a given period. Shum *v.* Hobbs, 3 Drew. 101; Daniel *v.* Gossett, 19 Beav. 478 (as to which, however, see L. R. 7 Eq. 82); Selby *v.* Whittaker, 6 Ch. D. 239.]

(*c*) Davis *v.* Norton, 2 P. W. 390; Doe d. Watson *v.* Shipphard, Doug. 75, stated Fea. C. R. 236; Moody *v.* Walters, 16 Ves. 283: [Toldervy *v.* Colt, 1 Y. & C. 240, 627, 1 M. & Wels. 250; the same rule applies to personalty, Lett *v.* Randall, 10 Sim. 112; Fitzhenry *v.* Bonner, 2 Drew. 36; Cattley *v.* Vincent, 15 Beav. 198; Gray *v.* Golding, 6 Jur. N. S. 474.]

(*d*) 1 T. R. 346; see also Napper *v.* Sanders, Hutt. 119; Bradford *v.* Foley, Doug. 63, stated ante, p. 824; [Doe d. Lees *v.* Ford, 2 Ell. & Bl. 970; Doutty *v.* Laver, 14 Jur. 188; Darby *v.* Darby, 18 Beav. 412; Eaton *v.* Hewitt, 2 Dr. & Sm. 184.]

the life of her husband, and therefore would not, *unless she happened to survive him*, want any assistance to enable her to live in the world, he devised his estates to trustees, in trust during the life of M., to pay the rents to his (the testator's) sisters T. and B.; and after the decease of W., *in case his (the testator's) sister M. should be then living*, in trust as to one third, to the use of the said M. for life; and as to the other two thirds, to the other two sisters respectively for life; remainder, as to each third, to the respective sons of each successively in tail, with remainders over. M. died in the lifetime of her husband; and the question was, whether the remainders did not fail by this event; but it was held, that the contingency affected her own life estate only, and did not extend to the ulterior limitations.

particular estate only.

Secondly. The contingency is restricted to the particular estate with which it stands associated, where the ulterior limitations do not follow such contingent estate in one uninterrupted series, in the nature of remainders, but assume the form of substantive independent gifts. As, in Lethieullier *v.* Tracy (*e*), where A. devised land to his daughter for life, remainder to her first and other sons in tail; and, if she should depart this life without issue of her body *living at her death*, then he devised the land to trustees and their heirs, until N. should attain twenty-one, upon certain trusts. *Item — the testator gave and devised* the land in question to N., after he should have attained his age of twenty-one years, for his life, with remainders over. Lord Hardwicke held, that the contingency of the daughter dying without issue *living at her death* affected only the estate limited to the trustees until N. attained twenty-one, and not the subsequent limitations. He took the words, "Item — I give and devise," &c., as a substantive devise, and not at all relative to the former devise to the trustees, on the contingency of the daughter dying without issue at her death.

Where the limitations of ulterior estates stand as independent gifts.

* So, in Pearson *v.* Rutter (*f*), where a testator devised his *832 messuage and farm at S. to trustees in trust for his grandson Robert in tail, and if he should die under age and without issue, then in trust for the testator's son Richard for his life, and after his decease, in trust for M. during widowhood, "and subject to the trusts hereinbefore thereof declared," in trust for A. and B.; Robert died without issue, but having attained twenty-one, so that the trusts in favor of Richard and M. failed (*g*); but Lord Cranworth held, that the ultimate trust was to be read independently of the former clause, upon the same principle that, in the case of Lethieullier *v.* Tracy, the "item" clause was treated as a fresh departure, and a start upon a new disposition.

(*e*) 3 Atk. 774, Amb. 204; and see Aislabie *v.* Rice, 3 Mad. 256. 3 J. B. Moo. 358, 8 Taunt. 459, stated infra; but see Doe *v.* Wilkinson, 2 T. R. 209, ante, p. 823.

[(*f*) 3 D. M. & G. 398; approved by Lord St. Leonards, and not appealed on this point. Grey *v.* Pearson, 6 H. L. Ca. 61, 103.

(*g*) *Vide ante*, p. 511.

And in Boosey *v.* Gardener (*h*), where a testator bequeathed to his two sisters the interest of his Long Annuities for their lives, and in case of one or both of their deaths before his, he gave the whole interest in Long Annuities to his brother for life; at his death the testator gave half of the capital to his niece A., his brother's daughter, to help to bring her up, till she attained the age of twenty-one, then to receive half the capital; *likewise* the testator bequeathed to his nephew S., his brother's son, if not further family, the other half; in case of further family, to be divided between them, not dividing the half left to A.: it was held that the bequest to the niece and nephew, was not contingent upon the deaths of the sisters in the testator's lifetime. Turner, L. J., was not prepared to say, that if the question had depended only on the disposition in favor of the niece immediately following on the disposition in favor of the testator's brother, the interest of A. might not properly have been held to depend on the contingency, but that the disposition in favor of the nephew could not, upon a sound construction of the will, and having regard to the foregoing authorities, be held to be governed by the words of contingency, so far as the nephew was concerned; and if not as to him, neither could the disposition in favor of the niece; for the two dispositions were connected together, and formed part of one scheme.

It is not, however, to be assumed that whenever the word "item," or "likewise," begins a sentence, it creates a complete severance of all that follows from the previously expressed *833 * contingency. It cannot be put higher than this, that such expressions make a *primâ facie* case for the disconnection, which the context of the will may either maintain or rebut. In Lethieullier *v.* Tracy, Lord Hardwicke said that if the legal estate had been given to the daughter and her issue, and then after these words the whole had been given to trustees, and all the subsequent limitations had been only declarations of that trust, in such case these words (of contingency) would have extended to the whole.

Observations on word "item."

And in Paylor *v.* Pegg (*i*), where a testator gave to trustees in trust for his son until he attained twenty-one, or was able to make a will himself, all his estate, lands, &c., and after a specific bequest of furniture to his wife, the testator bequeathed to her 20*l.* a year so long as she should continue his widow if his son were living, and if his son should die before twenty-one, he empowered his wife to hold his estate for her life, if she continued his widow, but if she should intermarry, he gave her only 10*l.* a year for her life, if his son should be then living. *Likewise* he empowered two other trustees at the death of his wife to sell his real and personal estate, and distribute the proceeds to his wife, his nephews and nieces, and others. It was

Effect of word "likewise."

(*h*) 5 D. M. & G. 122. See also Quicke *v.* Leach, 13 M. & Wels. 218; Sheffield *v.* Earl of Coventry, 2 D. M. & G. 551.
(*i*) 24 Beav. 105.

held by the M. R., notwithstanding the word "likewise," that the power of sale was governed by the same contingency as the gift to the widow, viz. the death of the son under twenty-one. He was satisfied it was not the intention of the L. JJ., in Boosey *v.* Gardener, to decide that wherever the word "likewise" occurred, the contingency which governed the previous gift was not to govern that which followed, if the subject-matter was clearly connected.]

V. The same general principles which regulate the vesting of devises of real estate apply, to a considerable extent, to gifts of personalty.[1] Whatever difference exists between them, has arisen from the application to the latter of certain doctrines borrowed from the civil law, which have not obtained in regard to real estate,[2] having been introduced by the Ecclesiastical Courts, who [formerly (*k*)] possessed, in common with Courts of Equity, a jurisdiction for the recovery of legacies and distributive shares of personal estate. Pecuniary legacies charged on land (*l*) are, so * far as they come out of the real estate, to be *834 considered as dispositions *pro tanto* of that species of property (*m*).[3]

Vesting of bequests of personal estate.

Pecuniary legacies charged on land.

A pecuniary legacy, whether charged on land or not, given to a person *in esse* simply, *i.e.* without any postponement of payment, is, of course, vested immediately on the testator's decease. In regard to sums payable out of land *in futuro*, the old rule was, that, whether charged on the real estate primarily, or in aid of the personalty, they could not be raised out of the land if the devisee died before the time of payment (*n*); but this doctrine has undergone some modification; and the established distinction now is, that, if the payment be postponed *with reference to the circumstances of the devisee of the money*, as in the case of a legacy to A., to be paid to him at his age of twenty-one years, the charge fails, as formerly, unless the devisee lives to the time of payment (*o*); and that too, though interest in the mean time be given for

Distinction where payment is postponed with reference to circumstances personal to

(*k*) This jurisdiction was abolished by 20 & 21 Vict. c. 77, s. 23.

(*l*) Leaseholds are not land for this purpose, Re Hudsons, 1 Dru. 6; nor is money to arise from the sale of land, Re Hart's Trusts, 3 De G. & J. 195; Turner *v.* Buck, L. R. 18 Eq. 301.

(*m*) Duke of Chandos *v.* Talbot, 2 P. W. 602; Jennings *v.* Looks, ib. 276; Prowse *v.* Abingdon, 1 Atk. 482; Re Hudsons, 1 Dru. 6.]

(*n*) 2 Vern. 439; Pre. Ch. 195; 1 Eq. Ca. Ab. 267, pl. 2; [Pre. Ch. 290;] 3 Atk. 112; 1 Atk. 482. The ground of this rule, it should seem, was that the inheritance might not be unnecessarily burthened.

(o) Gawler *v.* Standerwicke, 1 B. C. C. 105 n., 2 Cox, 15; Harrison *v.* Naylor, 3 B. C. C. 108, 2 Cox, 247; Phipps *v.* Lord Mulgrave, 3 Ves. 613; but see Jackson *v.* Farrand, 2 Vern. 424, [1 Eq. Ca. Ab. 268, pl. 8; this case is said to have been termed anomalous by Lord Hardwicke. Cotton *v.* Cotton, ib. n., 1 Atk. 486.]

[1] See Ferson *v.* Dodge, 23 Pick. 287. The law favors the vesting of legacies as well as of devises, and will not declare them contingent unless the provisions of the will show that the testator so intended. Foster *v.* Holland, 56 Ala. 474, 480.

[2] See May *v.* Wood, 3 Bro. C. C. (Perkins) 474, note (*b*).

[3] See Brown *v.* Grimes, 60 Ala. 647.

devisee, and where for convenience of the estate.

maintenance (*p*). But, on the other hand, if the postponement of payment appear to have *reference to the situation or convenience of the estate*, as, if land be devised to A. for life, remainder to B. in fee, charged with a legacy to C., payable at the death of A., the legacy will vest *instanter;* and, consequently, if C. die before the day of payment, his representatives will be entitled; the raising of the money being evidently deferred until the decease of A., in order that he may in the mean time enjoy the land free from *835 the burthen (*q*).[1] But either of these * rules of construction, of course, will yield to an expression of a contrary intention. Thus, even where the payment is made to depend on a contingency,

(*p*) Pearce *v.* Loman, 3 Ves. 135; [Gawler *v.* Standerwicke, *ubi supra;* Parker *v.* Hodgson, 30 L. J. Ch. 590.]

(*q*) 3 P. W. 414; Cas. t. Talb. 117; 1 Eq. Ca. Ab. 112, pl. 10; Com. Rep. 716; 2 Atk. 127, 507; 3 Atk. 319; 1 Ves. 44; Amb. 167, 230, 266, 575; 1 B. C. C. 119, n., 124, n., 192, n.; Dick. 529; 1 B. C. C. 119; ib. 191; 9 Ves. 6; 4 Sim. 294; 2 Y. & C. 539; [2 Y. & C. C. C. 134; 3 Hare, 86; 7 Hare, 334; 1 M. D. & D. 418; 2 M. D. & D. 177; 1 H. L. Ca. 43, 57; and see Remnant *v.* Hood, 2 D. F. & J. 396.] In Oakeley *v.* Kitchener, in Chancery, March 1827 (with a MS. note of which the writer has been favored), a testator devised to his wife an annuity for her life out of his real estate, and, subject thereto, devised his real estate to trustees for 500 years to raise his debts and legacies. He gave a legacy of 1,000*l.* to each of his four younger children, payable at twenty-one, as to sons, and twenty-one or marriage, as to a daughter, with interest in the mean time, to be applied for their maintenance. He also gave them a further legacy of 1,000*l.* each to be paid *within six months after the death of the wife*, payable at twenty-one, or marriage, as before, with interest from her death. There was (though the fact does not appear to be very material) a gift over of the respective legacies on the death of the sons before twenty-one, without issue, or the daughters unmarried, to the survivors. It was held, that the vesting of the second series of legacies was not postponed until the decease of the wife, and, therefore, did not fail by the decease of the children during her life.

This case, it will be perceived, agrees with the general distinction stated in the text, as the charge was evidently postponed until the death of the annuitant for the convenience of the estate. [See also Brown *v.* Wooler, 2 Y. & C. C. C. 134. Of course it makes no difference in the construction, that the remainder-man, whose interest is charged with the legacy, dies before the tenant for life. The interest passes *cum onere* to the heir. Morgan *v.* Gardiner, 1 B. C. C. 193, n. But in Taylor *v.* Lambert, 2 Ch. D. 177, a legacy, charged on land devised to A. in fee, but not to be raised "until A. come into actual possession of the M. estate" (of which he was then tenant for life in remainder), failed through A. dying before the tenant for life in possession of that estate. The "convenient" time was always *uncertain* and never arrived. See analogous rule as to personalty, Atkins *v.* Hiccocks, 1 Atk. 500, post, p. 839.]

[1] Birdsall *v.* Hewlett, 1 Paige, 32; Harris *v.* Fly, 7 Paige, 421; Loder *v.* Hatfield, 71 N. Y. 92, 102; Fuller *v.* Winthrop, 3 Allen, 51; Bowker *v.* Bowker, 9 Cush. 519; Port *v.* Herbert, 12 C. E. Green, 540; S. C. 11 C. E. Green, 278; Collier's Will, 40 Mo. 287; Stone *v.* Massey, 2 Yeates, 363. Where payment is deferred, either on account of some interest in the subject being given to a person on whose death the gift is to take effect, or some difficulty attending the collecting the testator's effects, the bequest is considered as independent of the time named, and the legacy is vested at the death of the testator. Dawson *v.* Killet, 1 Bro. C. C. (Perkins's ed.) 124, note of Mr. Eden; Kibler *v.* Whiteman, 2 Harring. 401; Donner's Appeal, 2 Watts & S. 372; Birdsall *v.* Hewlett, 1 Paige, 32; Eldridge *v.* Eldridge, 9 Cush. 516; Childs *v.* Russell, 11 Met. 16. But where time is annexed to the substance of the legacy, it does not vest before the period mentioned. Dawson *v.* Killet, 1 Bro. C. C. (Perkins's ed.) 124, note of Mr. Eden; Furness *v.* Fox, 1 Cush. 134; Eldridge *v.* Eldridge, 9 Cush. 518. As to the distinction upon the point between the bequest of a residue and the bequest of a particular legacy, see Monkhouse *v.* Holme, 1 Bro. C. C. (Perkins's ed.) 298. As to the effect when interest is given before the time of payment, see Walcott *v.* Hall, 2 Bro. C. C. (Perkins's ed.) 305, and note (*b*); when maintenance, Pulsford *v.* Hunter, 3 Bro. C. C. (Perkins's ed.) 416, and notes; Hoath *v.* Hoath, 2 Bro. C. C. (Perkins's ed.) 3, and notes. A legacy will be considered as vested where the interest of the legacy is directed to be paid to the legatee until he receives the principal. Gifford *v.* Thorn, 1 Stockt. 702. A legacy to be paid when the legatee attains majority is vested, and should be paid to a trustee designated by the will. Caldwell *v.* Kinkead, 1 B. Mon. 231; Lister *v.* Bradley, 1 Hare, 10. See post, p. 837, note.

which might, abstractedly viewed, appear to spring from considerations personal to the legatee, as in the case of a sum of money directed to be raised for a person at the age of twenty-one; yet the vesting will take place immediately on the testator's decease, if such be the declared intention (*r*). And if such intention, though not expressly intimated, can be collected from the context, the exclusion of either rule will be no less complete.

Gift over in one event favors vesting in all other events.

And here it may be observed, that it is a circumstance always in favor of the immediate vesting, that the testator has expressly given over the legacy to another in the event of the legatee dying under certain circumstances; the inference being, in such case, that the legacy is meant to be raised out of the land for the benefit of the original legatee, in every event, except that on which it was expressly given to the substituted legatee (*s*).

On the same principle, where a testator provides that, in the event of his legatee, or one of the legatees, if more than one, dying in his own lifetime, the legacies should not sink into the land, but be raised for the benefit of some other persons, — a * strong argument is *836 naturally suggested, that the testator must intend the legacies to be raised for the benefit of the legatee absolutely, or, in other words, that he should take a vested interest in case he does survive the testator (*t*).

[And, on the other hand, although the time of payment may appear to be fixed with a view to the convenience of the estate, for instance, six months after the death of an annuitant, yet, if the direction be to pay at that time to the legatees, "or such of them as shall be then living," it is clear that the representatives of one who dies before the annuitant cannot claim a share in the fund (*u*). And a gift thus, "I bequeath from and after the death of" an annuitant (annexing the time to the gift itself), is not a present gift with postponed payment, but a postponed gift (*v*).]

Sometimes a difficulty occurs in determining at what period a sum of

(*r*) Watkins *v.* Cheek, 2 S. & St. 199.

(*s*) *Murkin* v. *Phillipson.* Murkin *v.* Phillipson, 3 My & K. 257, where A. bequeathed to his six grandchildren the sum of 50*l.* each, when the youngest should come of age, they to receive the interest in the mean time, when a certain estate should be sold, adding, "if either of those children should not live to come of age, nor have an heir born in wedlock, the said 50*l.* to be equally divided among the surviving children." One of the grandchildren attained twenty-one, married, and afterwards died, during the minority of the youngest grandchild, leaving a child. Sir J. Leach, M. R., thought that though there was, in terms, no gift until the youngest grandchild attained twenty-one, yet as interest was given in the meantime, and payment was postponed for the convenience of the estate, the interests were vested; and his Honor assented to the argument (which had been strongly urged at the bar), that as the ulterior gift showed that the legacy was intended not to sink into the land, if the legatee died under age, leaving a child, *à fortiori* it could not be meant that the legacy should sink into the land in the event of the legatee attaining-twenty-one, and afterwards dying, leaving a child.

(*t*) Lowther *v.* Condon, 2 Atk. 127, 130.

[(*u*) Goodman *v* Drury, 21 L. J. Ch. 680; see Bruce *v.* Charlton, 13 Sim. 65.

(*v*) Re Cartledge, 29 Beav. 583.]

When payable, no time of payment being fixed.

money charged on land is to be raised, from the absence of expressions fixing the time of payment.[1] The cases on this subject are not all reconcilable (*x*), but it seems that, generally, in such a case, the devisee would be entitled to have the money raised immediately. In Cowper *v.* Scott (*y*), 1,500*l.* was to be raised, *within* six years after the testator's decease, out of the rents and profits, and interest at 4*l.* per cent in the mean time, for his two youngest daughters, one of whom dying under age, and within the six years, it was held to belong to her representative, on the ground that there was no precise appointment when it should be paid; the six years being mentioned as the ultimate time, and it was to be paid as much sooner as it could. But, if the testator have only a reversion in the lands charged, it is probable that the money would be held not to be raisable until the reversion fell into possession. This principle has prevailed in several cases in regard to annuities (*z*).

Charges on reversions.

VI. We now proceed to consider the rules which regulate the vesting of personal legacies (*a*), the payment of which is *837 *postponed to a period subsequent to the decease of the testator. A leading distinction is, that if futurity is annexed to the *substance* of the gift, the vesting is suspended; but if it appears to relate to the time of payment only the legacy vests *instanter*.[2] Thus, where a sum of

Vesting of personal legacies.

Distinction where time is annexed to substance of gift, and

(*x*) See Cox's note to Duke of Chandos *v.* Talbot, 2 P. W. 612; but it is observable, that the cases there cited as decided on the principle that portions "do not vest, if the children die before they want them," arose in reference to portions under settlements, where the effect of holding the portions to vest *instanter* would have been to give them to the father, in the event of the children dying at a very early age, contrary to the obvious spirit and design of such provisions. [And see Butler's note IV. to Fearne, C. R. 557.]

(*y*) 3 P. W. 119; see also Wilson *v.* Spencer, 3 P. W. 172; [Emes *v.* Hancock, 2 Atk. 507; Hodgson *v.* Rawson, 1 Ves. 44.] Norfolk *v.* Gifford, 2 Vern. 208, [as explained in Raithby's note, went on a different ground.]

(*z*) Ager *v.* Pool, Dyer, 371 b; Turner *v.* Probyn, 1 Anstr. 66.

[(*a*) Including bequests of money to arise by sale of land. Re Hart's Trusts, 3 De G. & J. 195.]

[1] A testator devised to his son M. B. the farm on which said M. B. lived, and the stock, &c., "by his paying" to D. B., another son, one hundred dollars a year for seven years, without interest, the first payment to be made in one year from the decease of the testator. It was held that upon the acceptance by M. B. of the devise to him, the legacy to D. B. vested, so that, on the death of D. B. before the expiration of the seven years, his administrator could receive the payment for the years that remained. Bowker *v.* Bowker, 9 Cush. 519. See Furness *v.* Fox, 1 Cush. 134.

[1] Loder *v.* Hatfield, 71 N. Y. 92; Gifford *v.* Thorn, 1 Stockt. 702. If the words "payable" or "to be paid" are omitted, and the legacy is given *at* twenty-one, or *if*, *when*, *in case*, or *provided*, the legatee attains twenty-one, or at any other future definite period, this confers on him a contingent interest, which depends for its vesting, and its transmissibility to his executors or representatives, in the absence of evidence showing a different intention, on his being alive at the period specified. See Bunch *v.* Hurst, 3 Desaus. 286; Perry *n.* Rhodes, 2 Murph. 140; Marsh *v.* Wheeler, 2 Edw. Ch. 156; Caldwell *v.* Kinkead, 1 B. Mon. 231; Lister *v.* Bradley, 1 Hare, 10; Vize *v.* Stoney, 2 Dru. & Walsh, 659; Watson *v.* Hayes, 9 Sim. 500; Chesnut *v.* Strong, 1 Hill, Ch. 123; Kibler *v.* Whiteman, 2 Harring. 401; Breedon *v.* Tugman, 3 Mylne & K. 289; Clapp *v.* Stoughton, 10 Pick. 463; Booth *v.* Booth, 4 Ves. (Sumner's ed.) 399, n. (*a*); Mackell *v.* Winter, 3 Ves. (Sumner's ed.) 236; Batsford *v.* Kebbell, ib. 363; Shattuck *v.* Stedman, 2 Pick. 468. A man by his will devised real estate to three illegitimate sons, "if they should live to come of age." It was held that during their minority it went to the heir at law. Jackson *v.* Winne, 7 Wend. 47. See Butcher *v.* Leach, 5 Beav. 392. A legacy, when the legatee shall attain

money is bequeathed to a person at the age of twenty-one years (*b*), or at the expiration of a definite period (say ten years) from the decease of the testator (*c*), the vesting, not the payment merely, is deferred; and, consequently, if the legatee dies before the period in question, the legacy fails. But if the legacy is, in the first instance, given to the legatee, and is then directed *to be paid* at the age of twenty-one years, or at the end of ten years after the testator's decease, the legacy vests immediately, so that, in the event of the legatee dying before the time of payment, it devolves to his representative (*d*). As, in Sidney *v.* Vaughan (*e*), where a testatrix bequeathed to A. 100*l.*, to be paid to him within six months after he should have served his apprenticeship to which he was then bound. A. did not serve out his apprenticeship, but ran away from his master, and, after the expiration of the term, died intestate. It was held in D. P. that A.'s administratrix was entitled to the legacy, with interest from the expiration of six months. where to time of payment only.

So, in Chaffers *v.* Abell (*f*), where a testator bequeathed certain sums of stock to trustees, to pay 40*l.* per annum to his daughter M. for life, and, after her decease, "to pay, assign and transfer the sum of 1,000*l.* stock equally amongst all and every the child and children of M., share and share alike, *to be paid and transferred to them when and so soon as the*

(*b*) Onslow *v.* South, 1 Eq. Ca. Ab. 295, pl. 6; Cruse *v.* Barley, 3 P. W. 20; [Re Wrangham's Trust, 1 Dr. & Sm. 358.]

(*c*) Smell *v.* Dee, 2 Salk. 415; [see also Bruce *v.* Charlton, 13 Sim. 65. Compare Bromley *v.* Wright, 7 Hare, 339, post, p. 841.]

(*d*) Cloberry *v.* Lampen, 2 Ch. Cas. 155, 2 Freem. 24; Stapleton *v.* Cheales, 2 Vern. 673, Pre. Ch. 317; Harvey *v.* Harvey, 2 P. W. 21; Jackson *v.* Jackson, 1 Ves. 217.

[(*e*) 2 B. P. C. Toml. 254.] It seems that if no interest were made payable on the legacy, the representative must wait until the legatee, if living, would have attained his majority; but if it carried interest, he would be entitled immediately. See Crickett *v.* Dolby, 3 Ves. 13; Feltham *v.* Feltham, 2 P. W. 271.

(*f*) 3 Jur. 577; [see also Wadley *v.* North, 3 Ves. 364; Williams *v.* Clark, 4 De G. & S. 472; Edmunds *v.* Waugh, 4 Drew. 275; Brocklebank *v.* Johnson, 20 Beav. 205; whence it appears that the court is always anxious to find a gift independent of the direction to pay, or a direction to set apart a fund for payment of the legacy. But see Shum *v.* Hobbs, 3 Drew. 93.

twenty-one, may, in like manner, be controlled by the apparent intention to postpone the possession only, not the vesting. Branstrom *v.* Wilkinson, 7 Ves. (Sumner's ed.) 421, and note (*a*). See Chaworth *v.* Hooper, 1 Bro. C. C. (Perkins's ed.) 82, n.; Green *v.* Pigot, ib. 103, and notes; Walcott *v.* Hall, 2 Bro. C. C. (Perkins's ed.) 305, and notes; Benyon *v.* Maddison, 2 Bro. C. C. C. (Perkins's ed.) 75–78, notes; Shattuck *v.* Stedman, 2 Pick. 468; Scott *v.* Price, 2 Serg & R. 59; Bunch *v.* Hurst, 3 Desaus. 286; Fonbl. Eq. b. 4, pt. 1, c. 2, § 4, n. (*k*); O'Driscoll *v.* Koger, 2 Desaus. 295; Kerlin *v.* Bull, 1 Dall 175. Generally speaking, indeed, a legacy to be *paid* when the legatee attains majority is vested. Caldwell *v.* Kinkead, 1 B. Mon. 231; Lister *v.* Bradley, 1 Hare, 10; Rofe *v.* Sowerby, Toml. 376; Dawson *v.* Killet, 1 Bro. C. C. (Perkins's ed.) 123, n. (*a*); Barnes *v.* Allen, ib. 182, n. (*b*); Corbin *v.* Wilson, 2 Ash. 178; Gregg *v.* Bethea, 6 Porter, 9; Reed *v.* Buckley, 5 Watts & S. 517; Johnson *v.* Baker, 3 Murph. 318; Roberts *v.* Brinker, 4 Dana, 570. A legacy to one, "if he shall arrive at the age of twenty-one years, then to be paid over to him by my executor," is not a contingent but a vested legacy. Furness *v.* Fox, 1 Cush. 134. But this rule of construction may be controlled by evidence of a different intent of the testator appearing in other parts of the will. Eldridge *v.* Eldridge, 9 Cush. 516. A testator bequeathed $1,000 to one of his granddaughters "at twenty-one years of age," and further provided for her support out of this legacy during her minority, and by a subsequent clause in the will the testator bequeathed the same sum to this granddaughter, "when she becomes of age," excepting what might be necessary for her support during her minority. The granddaughter died under age. It was held that her administrator was entitled to maintain an action for such portion of her legacy, with interest, as had not been paid over for her use during her lifetime. Eldridge *v.* Eldridge, supra.

youngest should attain his or her age of twenty-one years (*g*); and directed that, after the decease of his daughter, the dividends should be
*838 applied for the maintenance of the children. At the death of * the testator, M. had four children, one of whom died before the youngest attained twenty-one. The youngest alone survived M. Sir L. Shadwell, V.-C., held that the four children took vested interests in the stock. There was, he observed, in the first place, a clear gift to all the children in the shape of a direction to pay and transfer, followed by another direction to pay and transfer, "*when and so soon as the youngest of such children should attain his or her age of twenty-one years.*"

Superadded words of division or distribution.

Words directing division or distribution between two or more objects at a future time, fall under the same consideration as a direction to pay; and, therefore, where they are engrafted on a gift, which would, without these superadded expressions, confer an immediate interest, they do not postpone the vesting. Thus, a bequest to A. and B. of 3,000*l.*, Navy 5*l.* per cents, and all dividends and proceeds arising therefrom, to be equally divided between them, when they should arrive at twenty-four years of age, has been held to vest the stock immediately in the legatees (*h*).

[The same rule prevails where payment is in terms postponed until the testator's debts are satisfied (*i*), or his assets realized (*k*), or an outstanding security is got in (*l*), or until certain real estate is sold (*m*), or money directed by the will to be laid out in the purchase of land is so laid out (*n*). And an immediate gift to several is not made contingent by a superadded direction for distribution between them equally as three barristers should think fit, the discretion not extending to authorize any alteration in the extent of the interests given to the legatees (*o*).

Immaterial that the words of division *precede* those of gift.

It is of course immaterial whether the gift precedes or follows the direction to pay. Therefore, where a testator bequeathed a sum of money to trustees, in trust for his daughter for life, and after her death in trust to pay the same unto or between or amongst all and every the children of his daughter, as and when they should respectively attain the age of twenty-one,
*839 share and share alike, "to whom I give and bequeath the * same accordingly," Lord Cottenham held the legacy vested in the children on their birth (*p*).

(*g*) This is said to mean "when the youngest child that lives to the age of twenty-one attains that age." Ford *v.* Rawlins, 1 S. & St. 328; Evans *v.* Pilkington, 10 Sim. 412; see Castle *v.* Eate, 7 Beav. 296.]

(*h*) May *v.* Wood, 3 B. C. C. 471. [(*i*) Small *v.* Wing, 5 B. P. C. Toml. 66.

(*k*) Gaskell *v.* Harman, 6 Ves. 159, 11 Ves. 489. The position in the text seems to be warranted by Lord Eldon's observations in this case. The case itself was an extremely special one. (*l*) Wood *v.* Penoyre, 13 Ves. 325, a.

(*m*) Stuart *v.* Bruere, 6 Ves. 529, n.; and see Tily *v.* Smith, 1 Coll. 434.

(*n*) Sitwell *v.* Bernard, 6 Ves. 522; see also Hutcheon *v.* Mannington, 4 B. C. C. 491, n., 1 Ves. Jr. 365; Entwistle *v.* Markland, 6 Ves. 528, n.; Whiting *v.* Force, 2 Beav. 571; Lucas *v.* Carline, ib. 367; Re Dodgson's Trust, 1 Drew. 440.

(*o*) Kavanagh *v.* Morland, cited by Wood, V.-C., in Maddison *v.* Chapman, 4 K. & J. 715.

(*p*) Re Bartholomew, 1 Mac. & G. 354; and see Livesey *v.* Livesey, 3 Russ. 287, 542; King *v.* Isaacson, 1 Sm. & G. 371.

But if it is clear from the language of the will that the attainment of a certain age is made a condition precedent to the vesting of a legacy, such legacy will be contingent notwithstanding a gift of the legacy distinct from the direction to pay; so that a gift to A., to be paid *in case* he attained the age of twenty-one *and not otherwise*, is contingent upon A.'s attaining that age (*q*). So, where a testator clearly expressed his intention that the benefits given by his will should not vest till his debts were paid (*r*), or until a sale directed thereby should be completed (*s*), or until assets in a foreign country should be actually remitted to the legatee (*t*), the intention was carried into execution, and the vesting as well as payment was held to be postponed (*u*).

The rule yields to a clear contrary intention.

And in all cases where] the payment or distribution is deferred not merely (as in the cases noticed above) until the lapse of a definite interval of time, which will [or ought to] certainly arrive, but until an event which may or may not happen, the effect, it should seem, is to render the legacy itself contingent. This distinction was recognized in Atkins *v.* Hiccocks (*x*), where a sum of 200*l.* was bequeathed to A., to be paid at her marriage, or three months afterwards, provided she married with consent; and Lord Hardwicke held that A. having died unmarried, her representative was not entitled to the legacy.

Legacy in uncertain event.

It should seem, too, that, where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift.

Rule where the only gift is in the direction to pay, &c.

* Thus in a leading case (*y*), where a testator gave certain real *840

(*q*) Knight *v.* Cameron, 14 Ves 389; Lister *v.* Bradley, 1 Hare, 10; Heath *v.* Perry, 3 Atk. 101. See also Hunter *v.* Judd, 4 Sim. 455.

(*r*) Bernard *v.* Mountague, 1 Mer. 422.

(*s*) Elwin *v.* Elwin, 8 Ves. 546; Faulkener *v.* Hollingsworth, cit. ib. 558.

(*t*) Law *v.* Thompson, 4 Russ. 92.

(*u*) But not necessarily to the time when the debts have been *actually* paid, or the sale completed; for the court will inquire when these purposes might, in a due course of administration, have been effected, and consider the legacies vested from that period. See the cases cited above, and see Small *v.* Wing, 5 B. P. C. Toml. 74; Astley *v.* E. of Essex, L. R. 6 Ch. 898. In Birds *v.* Askey, 24 Beav. 615, where there was a residuary gift, "after satisfying the trusts" of the will, to A. *if then living*, — one of the trusts being in favor of A. himself for life, — and it was decided that this meant if A. was living after provision had been made for the due execution of the will, the M. R. held that this was a duty which fell on the executors immediately on the testator's decease, and that the residue vested in A. at that time.]

(*x*) 1 Atk. 500; [and see Ellis *v.* Ellis. 1 Sch. & Lef. 1; Morgan *v.* Morgan, 4 De G. & S. 164. Compare] Booth *v.* Booth, 4 Ves. 399, post, s. 7; [and West *v.* West, 4 Gif. 198 (legacy on marriage with consent of *guardians* was construed to require consent only to marriage under age).]

(*y*) Leake *v.* Robinson, 2 Mer. 363; [Meredith *v.* Tooke, Hov. Sup. Ves. Jr. 324; Murray *v.* Tancred, 10 Sim. 465; Mair *v.* Quilter, 2 Y. & C. C. C. 465; Boughton *v.* James, 1 Coll. 26; Walker *v.* Mower, 16 Beav. 365; Gardiner *v.* Slater, 25 Beav. 509; Locke *v.* Lamb, L. R. 4 Eq. 372. By the position in the text it is not to be understood, that the gift of a legacy under the form of a direction to pay at a future time, or upon a given event, is less favorable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a like event; but that a distinction is to be taken between these two cases on the one hand, and the case, mentioned above, of a gift of a legacy, with a superadded direction to pay at a future time, or

and personal property to trustees, upon trust, in a certain event, to pay, apply, and transfer the same unto and amongst all and every the brothers and sisters of R., share and share alike, *upon his, her or their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage with consent;* and the trustees were authorized to apply the rents, profits, and interest, or so much as they should think proper, for the maintenance of such brothers and sisters in the mean time. Sir W. Grant, M. R., held that this was not a case in which the enjoyment only was postponed; the direction to pay was the gift, and that gift was only to attach to children that should attain twenty-five.

So, where (*z*) a testator left for his wife's use certain furniture, &c., adding, "which I desire may be distributed amongst our children, on the youngest attaining twenty-one years, at her and my executor's discretion; such part being nevertheless reserved for her own use as may be thought convenient, and at her death to be distributed as above directed;" Sir J. Leach, V.-C., on the principle above stated, held, that children who died [infants (*a*)] before the youngest attained twenty-one, took no interest.

Effect where payment is postponed for convenience of fund.

But even though there be no other gift than in the direction to pay or distribute *in futuro;* yet if such payment or distribution appear to be postponed for the convenience of the fund or property,[1] the vesting will not be deferred until the period in question. Thus, where a sum of stock is bequeathed to A. for life; and, after his decease, to trustees, upon trust to sell (*b*) and pay and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D.; as the payment or distribution *841 is evidently deferred until the decease of A., for * the purpose of giving precedence to his life-interest, the ulterior legatees take a vested interest at the decease of the testator (*c*). [This doctrine prevails as well in gifts to a class (*d*) as to individuals.

Words seemingly contin-

Thus, in Blamire *v.* Geldart (*e*), a testator bequeathed to his nephew A. 200*l.* consols at his (the testator's) wife's decease, and made her his residuary legatee; and Sir W. Grant, M. R.,

upon a given event, on the other hand. Per Wigram, V.-C., 2 Hare, 17, 18. Still a direction to pay may help with other indications to show that the legacy is intended not to vest till payment. per Jessel, M. R., 6 Ch. D. 246.]

(*z*) Ford *v.* Rawlins, 1 S. & St. 328.

[(*a*) See Leeming *v.* Sherratt, 2 Hare, 14, stated post.

(*b*) Such sale is generally intended only to facilitate the distribution. Bromley *v.* Wright, 7 Hare, 225; Day *v.* Day, 1 Drew. 569; Bayley *v.* Bishop, 9 Ves. 6; Parker *v.* Sowerby, 1 Drew. 488, 17 Jur 752; Hodges *v.* Grant, L. R. 4 Eq. 140.

(*c*) Halifax *v.* Wilson, 16 Ves. 171; Chaffers *v.* Abell, 3 Jur. 578; Watson *v.* Watson, 11 Sim. 73; Baynes *v.* Prevost, 8 Jur. 506; Packham *v.* Gregory, 4 Hare, 396; Re Wilson, 14 Jur. 263; Salmon *v.* Green. 11 Beav. 453; Homer *v.* Gould, 1 Sim. N. S. 541; Marshall *v.* Bentley, 1 Jur. N. S. 786; Strother *v.* Dutton, 1 De G. & J. 675; Re Bright's Trust, 21 Beav. 67; M'Lachlan *v.* Taitt, 28 Beav. 402. (*d*) Smith *v.* Palmer, 7 Hare, 225.

(*e*) 16 Ves. 314; see also Medlicott *v.* Bowes, 1 Ves. 207.

[1] Ante, p. 835, note 1.

held that A.'s legacy vested immediately on the testator's death, the wife, as residuary legatee, taking a life-interest in that stock, so given to A.

gent referred to the determination of a prior gift.

So, in Cousins *v.* Schroder (*f*), where a testator gave his real and personal property to his wife, for her life, and directed that, at the end of twelve months next after his death, 1,000*l.* should be invested in the names of trustees, in trust to pay the dividends to his daughter for life, and upon her decease to divide the capital amongst all the children of his daughter as they should attain the age of twenty-one; and he directed, that at the end of twelve months next after the decease of his wife, the further sum of 1,000*l.* should be laid out for the benefit of his daughter and her children upon the like trusts as the first 1,000*l.*; Sir L. Shadwell, V.-C., held that if the children lived to attain twenty-one they were capable of taking both sums of 1,000*l.*, although they died before the time of payment.

Again, in Bromley *v.* Wright (*g*), a testator devised his real and personal estate to trustees, in trust for his wife for life, and after her decease, in trust within or at the expiration of ten years from her decease, or from his own decease if he survived her, to sell and convert, and to invest the proceeds; the income of the fund so produced, and the rents and profits until the sale, to be held on the after-mentioned trusts. The testator then gave to A. an annuity of 100*l.*, for the term of ten years after the decease of the survivor of himself and his wife, for the use of A. and B., and in case of * the decease of *842 either of them, then for the survivor; and at the expiration of the term of ten years, he gave to A., if then living, 2,000*l.*, but if she should be then dead, to B., and the will contained a gift of the residue. A. and B. survived the testator, and both died before the expiration of the ten years; it was held by Sir J. Wigram, V.-C., that the legacies of A. and B. were vested; observing that the words of contingency were obviously introduced with a view to provide for a case between A. and B., and not between them and the estate: the postponement of the legacy was for the convenience of the estate, and was not personal to the legatees (*h*).

A gift over in case of the legatee's death before the period of distribution will not generally prevent the application of this doctrine (*i*).]

On the same principle, the mere introduction into an ulterior gift of new words of disposition has no effect in postponing the vesting. Thus, where a testator bequeaths personalty to

Occurrence of new words of gift.

(*f*) 4 Sim. 23

(*g*) 7 Hare, 334. But see Beck *v.* Burn, 7 Beav. 492: Chevaux *v.* Aislabie, 13 Sim. 71; Davidson *v.* Procter, 19 L. J. Ch. 395, which appear to be undistinguishable from, and inconsistent with, the other cases. Beck *v.* Burn was doubted by Kindersley, V.-C., in Parker *v.* Sowerby, 17 Jur. 752; and by Romilly, M. R., in Adams *v.* Robarts, 25 Beav. 658; and though constantly cited, appears never to have been followed.

(*h*) Compare Parr *v.* Parr, 1 My. & K. 647, where, on a bequest of residue to be settled on A., so as to "devolve" in case of her death on her children, and if she should have none, then that she should bequeath it as she thought fit, it was held, that only those children who survived A. were entitled. (*i*) Shrimpton *v.* Shrimpton, 31 Beav. 425.]

trustees, in trust for A. for life, adding, "and after her decease, then I give," &c., these words do not postpone the gift to the posterior legatee until the decease of A., but merely show that that is the period at which it will take effect in possession (*k*).

Gift seemingly contingent vested by gift of intermediate interest.

So, where a legacy is given to a person if, or provided, or in case, or when (for it matters not which of these words is used (*l*)), he attains the age of twenty-one years (*m*), or marries (*n*), though such legacy standing alone and unexplained would clearly be contingent, *i.e.* would be liable to failure in case of the legatee dying before the prescribed age or event; yet if the interest accruing in the interval between the death of the testator and the future period in question is appropriated to the benefit of the legatee, it is held, in analogy to the doctrine of Boraston's case (*o*), that the words of futurity and contingency refer to the possession only, and that the gift amounts, in substance, to an absolute vested legacy, divided into two distinct portions or interests for the purpose of postponing, not the vesting, but the possession only.[1] Thus, in *843 Hanson *v.* Graham (*p*), where A. gave to his * grandchildren B., C., and D., 500*l.* 4*l.* per cent anns. apiece, *when* they should respectively attain their ages of twenty-one years, or day or days of marriage, which should first happen with consent, and directed that the interest of the said bank anns. should be laid out for the benefit of the grandchildren till they should attain their respective ages of twenty-one years, or day or days of marriage; Sir W. Grant, M. R., after a full and able examination of the authorities, held, on the principle above stated, that the legacies vested at the death of the testator.

So, in Lane *v.* Goudge (*q*), where A. bequeathed certain 3*l.* per cent consols to L. for his (L.'s) second daughter, that he should have born, for her education till she should attain the age of twenty-one years; and, after she should attain to the said age of twenty-one years, the testator gave the said interest to her and her heirs forever, she being christened Z. The second daughter was christened Z., and was held to be absolutely entitled, though she died at the age of seventeen (*r*).

(*k*) Benyon *v.* Maddison, 2 B. C. C. 75.
(*l*) 6 Ves. 243.
(*m*) Atkinson *v.* Turner, 2 Atk. 41; Knight *v.* Cameron, 14 Ves. 389.
(*n*) Elton *v.* Elton, 3 Atk. 504.
(*o*) Ante, p. 805.
(*p*) 6 Ves. 239.
(*q*) 9 Ves. 225; see also 7 Ves. 421; [2 Freem. 24; Pre. Ch. 317; 13 Sim. 418; 1 Coll. 281; 2 Sm. & Gif. 212; 2 J. & H. 122.]
(*r*) See also Love *v.* L'Estrange, 5 B. P. C. Toml. 59; [Boulton *v.* Pilcher, 29 Beav. 633; Bird *v.* Maybury, 33 Beav. 351; Hardcastle *v.* Hardcastle, 1 H. & M. 405; Re Peek's Trusts, L. R. 16 Eq. 221.] Compare these cases with Batsford *v.* Kebbell, 3 Ves. 363, where A. bequeathed to E. the dividends, which should become due after her death, upon 500*l.* 3*l.* per cents, until he should arrive at the full age of thirty-two years, *at which time* she directed her executors to transfer to him the principal sum for his own use. Lord Loughborough held, that the legacy

[1] It is laid down that the fact that interest is given until a legacy becomes payable is one of the strongest marks of a vested legacy. Fuller *v.* Winthrop, 3 Allen, 51, 60; Hoath *v.* Hoath, 2 Brown, C. C. 3; Hanson *v.* Graham, 6 Ves. 239; Stapleton *v.* Chule, 2 Vern. 673.

[So, where (*s*) a testator bequeathed to each of his daughters 1,800*l.* to be paid upon their respective days of marriage, subject to certain conditions in the will mentioned, together with interest from the time of his decease; Lord Clare, C. Ir., held that the legacies were vested. And, in Vize *v.* Stoney (*t*), Sir E. Sugden, *C. Ir., so *844 decided the same point, — "A legacy," he said, "cannot be more or less contingent: the law recognizes nothing between a contingent and a vested legacy." Therefore, whatever the nature of the event, a gift of the intermediate interest has always the same effect.]

A gift of interest, *eo nomine*, obviously is difficult to be reconciled with the suspension of the vesting,[1] because interest is a premium or compensation for the forbearance of principal, to which it supposes a title; and it makes no difference that it is directed to be applied for maintenance (*u*). But a mere allowance for maintenance out of, and of less amount than the interest, has, it seems, no such influence on the construction (*x*). [And a discretionary trust to apply for maintenance the whole of the interest, or so much as the trustees think fit, has generally been considered and held to be equally ineffectual (*y*). It is still only a gift of so much as is required for maintenance; and the unapplied surplus, if any, will not belong to the legatee, but will follow the fate of the principal (*z*). It would be

Gift of the whole interest favors vesting.

failed by the death of E. under thirty-two; observing, that the testatrix had drawn a clear distinction between the dividends and the capital. See also [Billingsley *v.* Wills, 3 Atk. 219;] Sansbury *v.* Read, 12 Ves. 75; Ford *v.* Rawlins, 1 S. & St. 328, ante, p. 840. These cases have been commonly considered as decided on the principle, that, where the interest or dividends alone are the subject of bequest until a particular time, and the principal is then, *for the first time*, to be taken out of it, the intermediate gift of the interest or dividends will not vest the capital: 1 Rop. Leg. p. 581, White's ed.; [Spencer *v.* Wilson, L. R. 16 Eq. 501.] It must not too readily be assumed, however, that any given case falls within the principle, as the courts have evinced no great inclination to extend it; and, in truth, in some of the cases of this class, the difference of expression was very slight. [And in Westwood *v.* Southey, 2 Sim. N. S. 192, Kindersley, V.-C., denied the existence of any such principle. It was suggested by Arden, M. R., 3 Ves. 367, that Batsford *v.* Kebbell was to be referred to the circumstance that the gift of principal was postponed to a more advanced age than that at which the law would put the legatee in possession. Such a postponement is of course ineffectual after twenty-one, if the legacy is vested. But this distinction has not been recognized. Wood, V.-C., lays it down as clear, that a gift of income until twenty-five, with a gift of principal at that age, vests at once, L. R. 3 Eq. 320.

(*s*) Keily *v.* Monck, 3 Ridg. P. C. 205.

(*t*) 2 D. & Wal. 659, 1 D. & War. 337.]

(*u*) Fonnereau *v.* Fonnereau, 3 Atk. 645; Hoath *v.* Hoath, 2 B. C. C. 3. See also 1 Russ. 220; 1 Taml. 18; [1 Hare, 10; 3 De G. & J. 195; 3 K. & J. 503; 1 H. & M. 411; 29 Beav. 604; 31 Beav. 425; L. R. 19 Eq. 286. Taylor *v.* Bacon, 8 Sim. 100, and Re Ashmore's Trusts, L. R. 9 Eq. 99, are *contra*. In the latter case, James, V.-C., relied on Pulsford *v.* Hunter, 3 B. C. C. 416, which has generally (see 2 Mer. 386) been considered an authority only for the position for which it is cited below, n. (*x*). The report is obscure; but it is very improbable that Lord Thurlow (whose decision it is, but of which there seems to be no entry in R. L.) intended to overrule his own previous decision in Hoath *v.* Hoath, 2 B. C. C. 3, where he held that "giving the interest for maintenance was precisely the same thing" as giving the interest *simpliciter*. The previously established rule was recognized in Fox *v.* Fox, L. R. 19 Eq. 286.]

(*x*) Pulsford *v.* Hunter, 3 B. C. C. 416; see Leake *v.* Robinson, 2 Mer. 387.

[(*y*) Leake *v.* Robinson, 2 Mer. 363, 381, 384.

(*z*) See judgment of Wood, V.-C., Re Sanderson's Trusts, 3 K. & J. 507, 508, 509.

[1] See Walcott *v.* Hall, 2 Bro. C. C. (Perkins's ed.) 305, and note (*b*); Hoath *v.* Hoath, ib. 3.

otherwise if the trust could be construed as a gift of the whole interest, at all events: and in Fox *v.* Fox (*a*), Sir G. Jessel did so construe it, and consequently held the legacy to be vested, "and not the less so because there was a discretion to apply less." But, whatever may be thought of this construction, it is inapplicable where the *845 * surplus is directed to be accumulated and is then blended in one gift with the principal (*b*).] An annual allowance for maintenance, [although equal in amount to the interest, will not, unless given as interest upon the legacy, make the legacy vested: the gifts are perfectly distinct, and the title to the annual allowance actually given could not be affected by the interest on the legacy not amounting to so large a sum (*c*).

Gift of interest for the whole of the intermediate time implied from direction how to apply it during part of the time.

In Davies *v.* Fisher (*d*), where a testatrix bequeathed her residuary personal estate in trust for A. for life, and after his death in trust for his children, as they severally attained the age of twenty-five years, the income to be applied *by their guardians* during their respective *minorities* for their maintenance; Lord Langdale, M. R., thought that although there was no distinct gift of the interest yet that such a gift was to be implied from the direction to apply it during minorities. "The inference or implication," he said, "arises from the direction to apply the interest; and, although the direction is limited to the minorities, it is not necessary, or I think reasonable, to limit the inference or implication in like manner, or to the mere time to which the direction applies. At that time the mode of enjoyment expressly directed will cease, but I do not think that it is therefore to be concluded that there is to be no enjoyment." He therefore held that on this ground alone the children would have taken vested interests. But the case did not rest entirely on this ground (*e*); and even if it did, it would not be an authority that a gift of interest arising during a part only of the interval before the time of payment vests the legacy. There are dicta opposed to such a doctrine (*f*); and in the case itself a gift of interest during the whole interval was (as will have been seen) supplied by implica-

(*a*) L. R. 19 Eq. 286, relying on Harrison *v.* Grimwood, 12 Beav. 192, where, however, the trust for maintenance (during *part* of the interval) was only one of several combined grounds for the decision. Eccles *v.* Birkett, 4 De G. & S. 105, is open to a similar observation, having regard especially to the contrast between the clearly contingent words "children *who*, &c." and the more equivocal "as and when," and to the exception of two children by name — as to which last point see 1 Drew. 496; but no reasons are reported. A dictum of Turner, V.-C., in Re Rouse's Estate, 9 Hare, 649, has also been sometimes cited to the same effect; but it proceeds on a questionable interpretation of what Lord Kenyon said in Wynch *v.* Wynch, 1 Cox, 433, imputing to the latter the doctrine that a gift *out of* income for maintenance vests a legacy. The V.-C.'s decision is referable to other grounds. post, p. 848.

(*b*) Re Grimshaw's Trusts, 11 Ch. D. 406. See Knight *v.* Knight, post, p. 847. *Secus* if the case comes within Saunders *v.* Vautier, Cr. & Ph. 240, post.

(*c*) Watson *v.* Hayes, 5 My. & C. 125; and see Livesey *v.* Livesey, 3 Russ. 287.

(*d*) 5 Beav. 201. In Milroy *v.* Milroy, 14 Sim. 48, the word "minority" was held to mean the whole interval until the youngest child attained twenty-five. See Maddison *v.* Chapman, 4 K. & J. 709, 3 De G. & J. 536; Lloyd *v.* Lloyd, stated next page.

(*e*) See S. C., post, s. 7.

(*f*) Per Wood, V.-C., L. R. 3 Eq. 321; per Romilly, M. R., 31 Beav. 302.

tion (*g*), a construction which might often be found convenient to fill up a gap in such cases.

A gift of the interest operates as well where the legacy is to a class, as where it is to an individual (*h*), provided that each member of the class has a distinct title to the interest of his own * share. But where the interest is given *846 as a common fund for the maintenance of all the members of the class, until all have attained the prescribed age, it does not vest the legacy. Thus, in Lloyd *v.* Lloyd (*i*), the testator devised lands to trustees upon trust for his daughter for her life, and after her death upon trust to apply the rents "for and towards the maintenance, education and benefit of all and every the child and children of his said daughter during their minority, and when and as soon as all such children, if more than one, should have attained the age of twenty-one years, upon trust to sell the lands, and pay the money arising therefrom to and amongst all and every such child or children, share and share alike, if more than one, and if but one then the whole to such only child." Sir W. P. Wood, V.-C., treated it as settled that a gift in that form, without the gift of income, vested only in such as attained twenty-one (*j*). Then, did the gift of income vest it sooner? He thought not. The V.-C. appears to have read the words "during their minority," as meaning while any child was under age, so that a child having attained twenty-one still continued entitled to a share of income; and he thought it was plain the testator never intended that on a child dying under twenty-one, its representatives should receive its share of income until all attained twenty-one, and that this view took it out of the rule in Hanson *v.* Graham, that shares were vested when all intermediate interest and profits were given to the legatees.

Gift of interest operates on legacy to a class.

But although the gift of *corpus* be in this form, yet if the intermediate income be given direct to the children until the youngest attains twenty-one, no common fund is created; each child is entitled to the income of his own share of *corpus*, the gift of which is consequently vested (*k*).

However, a testator is not to be denied the power of giving interest without vesting the legacy, if such be his intention. Thus, in Re Bulley's Estate (*l*), where residue was bequeathed in trust for A. for life, and after her death, "to be paid to her surviving children in equal shares, as soon as they shall come to the ages of twenty-two years respectively, and not

Gift of interest will not vest the legacy where a contrary intention appears.

(*g*) In Tatham *v.* Vernon, 29 Beav. 604, this was so expressed, viz. a gift to children at twenty-five, with gift of interest "in the mean time," for their maintenance "during minority." (*h*) See references, p. 844, n. (*u*).

(*i*) 3 K. & J. 20; and see Vorley *v.* Richardson, 8 D. M. & G. 126, 129, 130; Re Hunter's Trusts, L. R. 3 Eq. 298; Davenhill *v.* Davenhill, 5 W. R. 18; Bickford *v.* Chalker, 2 Drew. 327; and per Sir J. Romilly, Sanders *v.* Miller, 25 Beav. 156. *A fortiori* if the trustees have power to exclude some of the class from all maintenance, Re Barnshaw's Trusts, 15 W. R. 378. (*j*) See Leeming *v.* Sherratt, 1 Drew. 488, at the end of this chapter.

(*k*) Re Grove's Trusts, 3 Gif. 575.

(*l*) 11 Jur. N. S. 847.]

to go to their heirs or assigns or to any other person or persons
*847 on any pretence * whatsoever; that is to say, the share of each child which may die after the death of A. and before it arrives at the age of twenty-two years shall go among the others who may arrive" at that age; "and if any of the said children shall be under twenty-two after the death of A. then my will is that only the interest of the share of such child shall be paid to it or for its benefit until it arrives at the age of twenty-two;" it was held by Stuart, V.-C., and on appeal by K. Bruce and Turner, L.JJ., that only those children who attained twenty-two were intended to share.]

Where vesting of interest as well as principal is postponed, legacy contingent.

Where (*m*) the principal and interest are so undistinguishably blended in the bequest that both must vest, or both be contingent, of course no argument in favor of the vesting of the principal can be drawn from the gift of the interest. Thus, where a testator gave to each of the daughters of K., as soon as they attained the age of twenty-one years, the sum of 200*l.*, with interest at the rate of 5*l.* per cent per annum, Sir J. Leach, V.-C., held that there was no gift either of principal or interest until the daughter attained twenty-one.

But the construction which suspends the vesting of the interest as well as the principal, inconvenient as it evidently is, will not be adopted, unless the intention be very clear. Thus, in Breedon *v.* Tugman (*n*), where a testator bequeathed one third of his personal property to his wife; another third to his son, to be laid out in an annuity; and the other third to his daughter, adding, "and in case of my decease, to have the interest therein and principal when she arrives at the age of twenty-five years;" it was contended that the words "in case of my decease," imported contingency, and which, as in Knight *v.* Knight, extended to the interest as well as the principal, and that neither of them was vested until the age of twenty-five; but Sir J. Leach, M. R., said that this was plainly an absolute gift to the daughter, and that the payment only was postponed; the testator meant not to qualify or restrict the nature of the previous gift, but to distinguish between the time when she was to receive the interest, and the time when she was to receive the principal.

So a direction subjoined to a simple bequest of stock, that the
*848 "interest" shall be added to the "principal" [or * accumulated] till the legatee attains twenty-one, has been held not to suspend the vesting, though there were vague expressions in the residuary clause of the testator's expectation that the annuities (which term, it was contended, pointed to the interest on the legacies) might fall in (*o*).

(*m*) Knight *v.* Knight, 2 S. & St. 490; [Re Thruston, 17 Sim. 21; Chance *v.* Chance, 16 Beav. 572; Morgan *v.* Morgan, 4 De G. & S. 164. Butcher *v.* Leach, 5 Beav. 392, is, perhaps, referable to this principle: *sed qu.*]

(*n*) 3 My. & K. 289. This is the case of a residue, and therefore may seem to belong to the next section; but as the ground of decision seemed to connect it with Knight *v.* Knight, it has been stated here.

(o) Stretch *v.* Watkins, 1 Mad. 253. [See also Blease *v.* Burgh, 2 Beav. 226; Josselyn *v.* Josselyn, 9 Sim. 63; Bull *v.* Johns, Taml. 513; Oppenheim *v.* Henry, 10 Hare, 441.

Effect where apparently contingent gift must be severed from the estate immediately.

Again, a legacy to be severed from the general estate *instanter*, for the use and benefit of a legatee, is a very different thing from a legacy to be severed from the estate only on the happening of a particular event. Therefore, in Saunders *v.* Vautier (*p*), where a testator bequeathed his E. I. stock to trustees upon trust to accumulate the dividends until A. should attain his age of twenty-five years, and then to transfer the principal with the accumulated dividend to A., his executors, administrators and assigns, absolutely; it was contended on the authority of Knight *v.* Knight, that the legacy was contingent on A. attaining the specified age; but Lord Cottenham, on the principle stated above, held it vested, and decreed payment to A. when he was twenty-one years of age.

Rule in Boraston's case applies to personalty.

It has also been held that a bequest to a person, if or when he attains a particular age, will be vested, if the whole intermediate interest, though not given to the legatee himself, is expressly disposed of in the mean time for the immediate benefit or furtherance of some other person or object. It is only an exception out of the whole property meant to vest in the legatee, whose interest is, therefore, in the nature of a remainder which vests immediately, and its actual enjoyment only is postponed. This is in conformity with the principle of Boraston's case (*q*), which, according to Sir W. Grant, M. R. (*r*), there was no ground to say ought to have been differently decided if it had occurred as to a pecuniary legacy.

Thus, in Lane *v.* Goudge (*s*), where one of the bequests was to L. till his (L.'s) second daughter should attain the age of twenty-one years, and after she should attain that age to her absolutely; the same judge held that, supposing the gift to L. was for his *own and not for his daughter's benefit (and there was nothing but conjecture for a contrary supposition), yet that the daughter took a vested interest. *849

Effect of an express direction when the legacy is to "vest."

If the testator has himself subjoined to the gift a declaration that it shall vest at a stated period, and if there be nothing in the context to show that the word "vest" is to be taken otherwise than in its strictly legal sense, all discussion is of course precluded; for a legacy cannot vest at two different periods (*t*). But a question generally arises in these cases as to the real meaning to be attributed to the word. If the testator has in other

(*p*) Cr. & Ph. 240. See also Greet *v.* Greet, 5 Beav. 123; Lister *v.* Bradley, 1 Hare, 10; Love *v.* L'Estrange, 5 B. P. C. Toml. 59, cit. 6 Ves. 248; Thruston *v.* Anstey, 27 Beav. 335; Oddie *v.* Brown, 4 De G. & J. 185, 194; Re Rouse's Estate, 9 Hare, 649; Dundas *v.* Wolfe-Murray, 1 H. & M. 425. So, although in one event the legacy is expressly given back to residue, Pearson *v.* Dolman, L. R. 3 Eq. 315. But compare Festing *v.* Allen, 5 Hare, 577, and Gotch *v.* Foster, L. R. 5 Eq. 311, suggesting the limits of the doctrine.

(*q*) 3 Co. 16, ante, p. 805.

(*r*) 6 Ves. 247. In Laxton *v.* Eedle, 19 Beav. 323, there is a contrary dictum of the M. R., which, however, appears unnecessary to the decision of that case.

(*s*) 9 Ves. 225.

(*t*) Glanvill *v.* Glanvill, 2 Mer. 38; Comport *v.* Austen, 12 Sim. 246; Wakefield *v.* Dyott, 4 Jur. N. S. 1098.

In what cases "vested" means "indefeasible."

parts of the will treated the fund bequeathed as belonging to the legatee and spoken of his *share* therein before the specified period (*u*), or if he has given over the fund in case the legatee dies before the time named without issue, from which it is to be inferred that the legatee is to retain it in every other case (*x*), the natural conclusion is, that the word is to be read as meaning "payable" or "indefeasible," and that the gift is vested, liable only to be divested on a particular contingency. A gift over before the time named, or before attaining "a vested interest," *simpliciter*, although indecisive perhaps by itself (*y*), tends strongly to the same conclusion (*z*). The possibility of the legatee so dying, and of his leaving issue, who, if the legacy is strictly contingent and does not devolve to them from their parent, are otherwise altogether (*a*) or in some probable event (*b*) unprovided for by the will, has in these, as in many other cases, furnished a powerful motive for adopting a more liberal interpretation. Where, upon the parent so dying, the legacy is expressly given to his issue, this motive is wanting, and the court will be slow to depart from the primary meaning of the word "vest," and of *850 associated expressions the natural import of which is *contingency (*c*). So, if the will gives the issue the chance of taking through their parent, as if the legacy is directed to vest in the legatee on his attaining a specified age, or dying leaving issue (*d*). A gift of the interest until the arrival of the time named also favors the less strict construction upon principles already explained (*e*). But if the interest is to be accumulated and paid at the same time as the principal fund (*f*); [or if by the context a distinction is drawn between the terms "vested" and "payable" (*g*), the word "vest" must have its proper meaning.

In what cases literally construed.

(*u*) Berkeley *v.* Swinburne, 16 Sim. 275 (residue); Poole *v.* Bott, 11 Hare, 33 (real estate); Walker *v.* Simpson, 1 K. & J. 713; Barnet *v.* Barnet, 29 Beav. 239; Armytage *v.* Wilkinson, 3 App. Ca. 355 ("absolute vesting").

(*x*) Taylor *v.* Frobisher, 5 De G. & S. 191. Lord Hardwicke seems to have used the word in this sense in Haughton *v.* Harrison, 2 Atk. 330.

(*y*) Glanvill *v.* Glanvill, 2 Mer. 38; Re Blakemore's Settlement, 20 Beav. 214; Re Morse's Settlement, 21 Beav. 174. The last two cases were upon deeds, and moreover proceeded upon the questionable distinction drawn by Leach, M. R., 3 My. & K. 411, between a gift over under age, and a gift over under age and without issue. See post, p. 857, n. (*g*).

(*z*) Re Baxter's Trusts, 10 Jur. N. S. 845. Cf. Pickford *v.* Brown, 2 K. & J. 426, where the gift over itself contained expressions favoring the suspension of vesting, as in Russel *v.* Buchanan, ante, p. 813.

(*a*) Taylor *v.* Frobisher, 5 De G. & S. 191.

(*b*) Re Edmondson's Estate, L. R. 5 Eq. 389.

(*c*) Rowland *v.* Tawney, 26 Beav. 67; and see Comport *v.* Austen, 12 Sim. 246; Selby *v.* Whittaker, 6 Ch. D. 249.

(*d*) Re Thatcher's Trusts, 26 Beav. 365.

(*e*) Simpson *v.* Peach, L. R. 16 Eq. 208 ("payable" and "vested" exchanged meanings).

(*f*) Re Thruston, 17 Sim. 21; see also Griffith *v.* Blunt, 4 Beav. 248.

[(*g*) Ellis *v.* Maxwell, 12 Beav. 104; see also Parkin *v.* Hodgkinson, 15 Sim 293; Re Thatcher's Trusts, 26 Beav. 365; Re Colley's Trusts, L. R. 1 Eq. 496, where the strict construction was assumed. In Sillick *v.* Booth, 1 Y. & C. C. C. 121, and King *v.* Cullen, 2 De. G. & S. 252, the context gave to the word "vested" in a gift over upon death before vesting a sense corresponding to the word "payable" used in the primary gift. "Paid" was held to mean "vested" in Martineau *v.* Rogers, 8 D. M. & G. 328. And sometimes where both words occur, they are held to be used indiscriminately, Re Baxter's Trusts, 10 Jur. N. S. 845.

See further on the meaning of "vested" in gifts over in case of the legatee dying before retaining a "vested" interest, Ch. XLIX.

Where the bequest is in the first instance to a restricted class, as to children *who* shall survive A., a direction that the legacy shall vest, say, at the age of twenty-one, will not generally enlarge the class, but only impose a further condition of enjoyment on the class already defined (*h*). But where the direction was that the legacy should vest in "the children," thus giving a new description without the previous restriction, the restriction was held to be neutralized (*i*). So, where the bequest was to such of the children as should attain twenty-five, and it was declared that if any child attained twenty-one and died before twenty-five his share should vest at his death, the shares were held to vest at twenty-one (*k*).]

VII. It has been generally thought that a very clear intention must be indicated, in order to postpone the vesting under a residuary bequest,[1] since intestaey is often the consequence of holding it to be contingent, or, at least (and this is the material consideration), such *may be* its effect; for, in construing wills, we must look indifferently at actual and possible events.

Vesting of residuary bequests.

Possible as well as actual events to be regarded.

Among the numerous cases which may be cited as illustrative *of the leaning of the courts towards the vesting of residuary *851 bequests, is Booth *v.* Booth (*m*), where A. bequeathed the resi-

(*h*) Re Payne, 25 Beav. 556; Re Parr's Trusts, 41 L. J. Ch. 170; Bickford *v.* Chalker, 2 Drew. 327; Williams *v.* Haythorne, L. R. 6 Ch. 782 (though it was residue and another clause became surplusage).

(*i*) Jackson *v.* Dover, 2 H. & M. 209 (residue).

(*k*) Mappin *v.* Mappin, W. N. 1877, p. 207 (residue).]

(*m*) 4 Ves. 399. [See also West *v.* West, 4 Gif. 198; and] compare Atkins *v.* Hiccocks, ante, p. 839; observing that there the bequest was pecuniary, and there was no gift of the interest in the meantime, [nor any gift over.] The disinclination so to construe a will as to make a testator die partially intestate, was also admitted in Lett *v.* Randall, 10 Sim. 112, where, however, the V.-C. considered himself forced into this undesirable conclusion by the ambiguity of the will; the testator having, in a certain event, made a bequest of the share of a deceased daughter to children *then* living in such a manner as to leave it doubtful whether he referred to the period of his own death, the death of his wife, or the happening of the contingency. [And see per Romilly, M. R. 33 Beav. 396, which may be set against 14 Beav. 461.]

Word "then," to what period it refers. — Here it may be noticed, that where (as often occurs) life-interests are bequeathed to several persons in succession, terminating with a gift to children, or any other class of objects *then* living, the word "then" is held to point to the period of the death of the person last named (whether he is or is not the survivor of the several legatees for life), and is not considered as referring to the period of the determination of the several prior interests; Archer *v.* Jegon, 8 Sim. 448; [Wollaston's Settlement, 27 Beav. 642; and the construction is the same though the person last named die in the testator's lifetime, Olney *v.* Bates, 3 Drew. 319; and see Hetherington *v.* Oakman, 2 Y. & C. C. C. 299; Harvey *v.* Harvey, 3 Jur. 949; Cain *v.* Teare, 7 Jur. 567; Widdicombe *v.* Muller, 1 Drew. 443; Cormack *v.* Copous, 17 Beav. 397; Gill *v.* Barrett, 29 Beav. 372. Compare Gaskell *v.* Holmes, 3 Hare, 438; Coulthurst *v.* Carter, 15 Beav. 421; Re Edgington's Trusts, 3 Drew. 202; Re Deighton's Settled Estates, 2 Ch. D. 783 (where, if "then" had been referred to the last antecedent, a life-estate just before given to the widow would have been defeated). In Heasman *v.* Pearse, L. R. 7 Ch. 275, the words "then living" occurred in two distinct gifts to children of A., one of an original share, the other of an accruing share, and followed in the one case the mention of one event, in the other the mention of another event; but the same class of children were held by James, L. J., entitled to both gifts on the ground that "it would be unreasonable to give the words a different meaning" in the two clauses.]

[1] See Monkhouse *v.* Holme, 1 Bro. C. C. (Perkins's ed.) 300, 301, and note (*s*); Hanson *v.* Graham, 6 Ves. 248.

due of his estate to trustees, upon trust to pay the dividends equally between his great-nieces B. and C., until their respective marriages, and from and after their respective marriages, to transfer their respective moieties. Sir R. P. Arden, M. R., held that B. acquired a vested interest, although she died without having been married; his Honor relying much on the circumstance that it was the bequest of a residue.

So, in Jones *v.* Mackilwain (*n*), where a testator gave to trustees all his real and personal estate, upon trust for sale, and as to one moiety of the produce for the benefit of his daughter A. during her life, and after her decease, upon trust to pay to her husband B. an annuity of 100*l.* during his life, and to apply the remainder of the annual income of the said moiety for and towards the maintenance of all and every the child and children of A., until they should severally attain his and their ages or age of twenty-one years, and as to all the said principal moneys or produce of the testator's said real and personal estate *as and when they and each and every of them should attain his, her, and their re-*
*852 *spective * age or ages of twenty-one years*, in trust to pay and dispose of the same unto and amongst all and every *such* child and children. A. had two sons, both of whom died under twenty-one, and Lord Gifford, M. R., held that they respectively acquired vested interests; adverting to the fact of its being a residuary bequest, and that the yearly income was given to the children until the prescribed age.

After clear immediate gift, vesting not postponed by equivocal terms.

It seems that where the testator first gives the residue in terms which would, beyond all question, confer a vested interest, the addition of equivocal expressions of a contrary tendency will not suspend the vesting.[1] Thus, where (*o*) A. by his will gave unto the children of his sister the whole of his real and personal estate (subject to certain legacies), and afterwards expressed his desire that the children should be educated with the yearly interest of whatever portion of his estate might fall to each child's lot or share, *and such portion not to be otherwise claimed or inherited, directly or indirectly, until the children arrived at the age of twenty-two years*, whether married or single — Sir R. P. Arden, M. R., held that the subsequent vague words were not sufficient to control the prior clear words; but the meaning was, that the legacy should be absolute, and that the legatees should not have the command of the principal till the age of twenty-two; and he laid some stress on the fact of the interest being given for maintenance.

So, where (*p*) a testator, after disposing of his real and personal estate in strict settlement, added that none of the devisees should take

(*n*) 1 Russ. 220.

(*o*) Dodson *v.* Hay, 3 B. C. C. 404–409. See also Stretch *v.* Watkins, 1 Mad. 253; [Brocklebank *v.* Johnson, 20 Beav. 205; but see Shum *v.* Hobbs, 3 Drew. 93.]

(*p*) Montgomerie *v.* Woodley, 5 Ves. 522. [It is not competent for a testator to defer the receipt by the legatee of a legacy absolutely vested in him beyond the age of legal majority; Re Jacob's Will, 29 Beav. 402; Gosling *v.* Gosling, Johns. 265.]

[1] Eldridge *v.* Eldridge, 9 Cush. 516.

or come into possession before the age of twenty-five, this was held to refer to the actual possession only, and not to postpone the vesting.

But where the terms of the original gift in favor of a class are ambiguous in regard to the period of vesting, a clear intention to suspend the vesting, manifested in carrying on the gift to the class in the event of its consisting of a single object, will be decisive of the construction; as it is hardly supposable that the testator could mean to create a difference of this nature between a plurality of objects and an individual object. Thus, where (*q*) *A. gave the residue of his estate, real and personal, to trustees, as to one third, in trust for his daughter S. for life, and after her decease for the child or children of his said daughter, if more than one share and share alike, to be paid, assigned and transferred to them by his trustees upon their respectively attaining the age of twenty-five years; but in case S. should leave but one child her surviving, then the whole of such one third part *should become the property of such only child upon his or her attaining the age of twenty-five years*, and be transmissible to his or her heirs, executors or administrators; and in case his said daughter should leave no child her surviving, or in case she should leave a child or children who should not attain the age of twenty-five years, then over. Sir L. Shadwell, V.-C., held that the gift, in case the daughter should leave one child only her surviving, was clearly contingent on that child attaining the age of twenty-five; and the same construction, he observed, must be put on the gift, in case she should leave more than one. *853

But subsequent words may be explanatory where the preceding are ambiguous.

[The same argument would, without doubt, apply to a case where the ambiguity existed in the gift to the single object, the original gift in favor of the class being clearly conditional. But where no such ambiguity exists, it is of course not allowable, by inference from the collective gift, to import a contingency into the gift to the individual. This were to add words to the will, not to explain terms already existing in it; a course not warranted by the apparent singularity of the distinction made by the testator (*r*).

King *v.* Isaacson (*s*) was the converse of Judd *v.* Judd; the question being, whether a clearly vested bequest to the single object imparted its own nature to ambiguous expressions contained in the prior gift to the class, when consisting of many. The testator gave the residue of his real and personal estate to trustees, in trust, as to two thirds of the annual proceeds, for A. for life, and as to the remaining one third, in trust for B. for her life; and in trust, after the decease of A. and B., or either of them, to convey, pay, assign, transfer and make over all the residue, in the shares following, *i.e.* upon the decease of A., to convey,

(*q*) Judd *v.* Judd, 3 Sim. 525; [see also Tracey *v.* Butcher, 24 Beav. 438; Knox *v.* Wells, 2 H. & M. 674 (as to the children surviving their father James); Madden *v.* Ikin, 2 Dr. & Sim. 207; Merry *v.* Hill, L. R. 8 Eq. 619: per Lord Selborne, L. R. 16 Eq. 271, 272.

(*r*) Walker *v.* Mower, 16 Beav. 365; Johnson *v.* Foulds, L. R. 5 Eq. 268.

(*s*) 1 Sm. & Gif. 371.

&c., two thirds unto and among all and every the child or children of A. as and when they should severally attain twenty-one, as
*854 tenants in common; and if there should be but one child * of A., then to such only child, and to whom he gave the same accordingly: with similar trusts of the remaining third, *mutatis mutandis*, for the children of B. Sir J. Stuart, V.-C., considering the general indisposition to hold a bequest contingent, and looking to the absolute gift to an only child (which was clearly vested (*t*)), and to the direction to convey, which, he thought, was to be observed immediately on the decease of a tenant for life, held that the children took vested interests on the testator's death.]

Attainment of particular age made part of the description of the objects.

The vesting is obviously postponed where the attainment to a particular age is introduced into and made a constituent part of the description or character of the objects of the gift; as where the bequest is to *the* children *who* shall attain, or to *such* children *as* shall attain the age of twenty-one years; there being in such case no gift, except to the persons who answer the qualification which the testator has annexed to the enjoyment of his bounty (*u*). [So, where the bequest is to the children *if* or *when* they attain the particular age.] So clear, indeed, is this point, that any difficulty can scarcely occur under a gift framed in the terms suggested, unless it is occasioned by and grows out of the context, which not unfrequently explains away and neutralizes the expressions which standing alone would clearly suspend the vesting. [But here a distinction, analogous to that which exists in devises of real estate, must be observed between the former terms of bequest noticed above and the latter, as regards the explicitness of context required to control them.] For instance, if a testator, after giving to ["the children," or to "all the children," "*if*" or "*when*" they] attain a certain age, goes on to dispose of the property in case there is no child who does attain the prescribed age, he affords a plausible ground for the argument (founded on Edwards *v.* Hammond and that class of cases (*x*)), that the subsequent words explain the sense in which he intended the prior words to be understood, namely, that the interest of the legatees was merely liable to be divested in the event described; in other words, was to become absolute at, not to be postponed until, the prescribed age. [But a gift to "*such of* the children *as*," or to "*the* children *who*" attain the age, is a gift to a restricted class; and, to admit children who do not attain the age, the context must be one capable not only of explaining
*855 * an ambiguity regarding the interests intended for the members of the described class, but also of enlarging the class itself.] [1]

(*t*) See Re Bartholomew, 1 Mac. & G. 354, ante, p. 839.]
(*u*) See Newman *v.* Newman, 10 Sim. 51; [Hatfield *v.* Pryme, 2 Coll. 204.]
(*x*) Ante, p. 810.

[1] As to the words "when," "as," "if," and "provided," see Colt *v.* Hubbard, 33 Conn. 281. And see further as to this paragraph of the text, Snow *v.* Snow, 49 Me. 159; Leeds *v.* Wakefield, 10 Gray, 514; Moore *v.* Smith, 9 Watts, 403; Clayton *v.* Somers, 12 C. E. Green, 230.

We have an example of [the latter] species of disposition in Bull *v.* Pritchard (*y*), where a testator bequeathed the residue of his personal estate to trustees, in trust for his daughter M. for life, and after her decease to pay or transfer the same unto and among all and every the child and children of M. *who should live to attain the age of twenty-three years*, with benefit of survivorship in case of the death of any of them under the age of twenty-three years, as tenants in common; and if there should be but one such child, then to such only child; and in case there should be no such child, *or, being such, all should die under the age of twenty-three*, then over to the testator's brothers and sisters. The trustees were empowered to lay out and apply the interest of each child's respective share, or so much thereof as they might think necessary towards their maintenance, notwithstanding such child's share should not be then absolutely vested. Lord Gifford, M. R., was of opinion that those children alone who attained the age of twenty-three were to take, and therefore the gift was void for remoteness; observing, that the attainment of the age of twenty-three years was made a condition precedent to the vesting of any interest in the children, [and distinguishing the case from those where the gift was to children when or if they attained a certain age.] Bull *v.* Pritchard.

The propriety of this determination has been questioned (*z*); and perhaps looking at the gift over in connection with the direction to apply the interest of the children's *shares* for their maintenance until they became *absolutely* vested, there was ground to contend that the children took immediately subject to be divested on their respectively dying under the prescribed age. [But the case is to be referred to the distinction noted by the M. R. in his judgment (*a*).]

Another case in which the vesting was held to be postponed, notwithstanding some expressions in the context apparently favorable to the immediate vesting,[1] is Vawdry *v.* Geddes (*b*), where A. gave the residue of her estate and effects equally between her four sisters, and directed that, on the death of her * sisters, the interest of their respective shares should, at the discretion of her executors, be applied in the maintenance or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years, *and, upon any of their attainment to that age, they should be entitled to their proportion* *856

Gift on attaining certain age, held contingent.

(*y*) 1 Russ. 213. (*z*) 3 M. & K. 417.

[(*a*) The author does not refer, and appears to have attached little value to this distinction; which, however, has since been fully recognized. He goes on (1st ed. p. 772) to suggest that the case cannot be treated as an adjudication as to the period of vesting: *sed qu.*: for the decree declared the next of kin entitled; whereas M. was living, and might have had children, who, if the gift was vested and consequently not remote, would have been entitled.]

(*b*) 1 R. & My. 203.

[1] If on construing the whole will it clearly appears, that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executors or administrators, if the legatee dies before the period of payment; although the words "to be paid" or "payable at," or other terms of immediate gift be employed in the will. Howes *v.* Herring, 1 M'Clel. & Y. 295; Hunter *v.* Judd, 4 Sim. 455. See also Mackie *v.* Alston, 2 Desaus. 362; Jones *v.* Price, 3 Desaus. 165.

of their mother's share of the principal, and in case of any of their decease under that age, leaving lawful issue, such issue should be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto. There was also a bequest in favor of the other children of the testator's sisters, in case of the death of any under twenty-two, without issue, or, being such, they should die before the principal of their respective shares should become payable. Sir J. Leach, M. R., held that the vesting was postponed until the age of twenty-two, and therefore that the gift was too remote. He thought that the case was governed by Leake *v.* Robinson (*d*); and that, even if the income had been expressly given to the children until they attained twenty-two, the shares would not have vested. He observed, that where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely when the testator has expressly given the legacy over in the event of the death of the legatee before a particular period.

Remarks on Vawdry *v.* Geddes.

But did not the gift over, to which his Honor here refers, suggest a strong argument for the immediate vesting? Where a testator directs that, on a given event, the "shares" of persons before named shall go in a certain manner, there seems ground to infer that, in the alternative event, the property is to be retained by the legatees; *à fortiori*, where there are cross executory gifts disposing of the "shares" of dying objects in an event in which, if the vesting be postponed, they would have no shares for the clause to operate upon. The construction adopted in the case just stated rendered the terms of the clause of substitution (for such it clearly was) inaccurate throughout (*e*).

*857 *More weight, in favor of the immediate vesting, seems to have been ascribed to the argument derived from the gift over, in Bland *v.* Williams (*f*), where the testator bequeathed the residue of his estate and effects to trustees, upon trust to receive the annual income thereof, and thereout pay unto his daughter an annuity, and, after her decease, upon trust to apply the income, or a sufficient part thereof, for the maintenance of the children of his daughter until they should

Bland *v.* Williams.

Vesting immediate by explanatory effect of gift over.

(*d*) Ante, pp. 265, 840.

(*e*) See also Mackell *v.* Winter, 3 Ves. 236, and Barker *v.* Lea, T. & R. 413, in both which residuary bequests to children, on their attaining a particular age, were held to be contingent in the interim, though, in each case, there was a bequest over in the event of the legatee's dying before the prescribed age; and in the former, the postponement seemed to refer to the time of payment rather than to the gift itself; [while in the latter there was a gift of the whole income for the maintenance of the legatees.] In these cases, the leaning, often avowed, to the vesting of residuary bequests, was but very faintly discernible; and one cannot help suspecting that the judgment of the court was somewhat biassed by the actual event, which rendered the adopted construction convenient. If intestacy had happened to be produced by the postponement of the vesting in each instance, the adjudication probably would have been different.

(*f*) 3 My. & K. 411.

severally attain their ages of twenty-four years; and when and as they should respectively attain that age, then upon trust to pay, transfer, and convey all the said residue of his estate, with the interest, dividends, and proceeds thereof, as should not have been applied for their maintenance, equally unto and amongst all her said children, *when and as they should severally and respectively attain their said age of twenty-four years;* and in case any or either of her said children should happen to die before having attained that age, and without leaving lawful issue of his or her body, then in trust to pay, assign, transfer, and convey all the said residue of his estate unto *such of her said children as should live to attain his, her, or their respective ages of twenty-four years*, share and share alike, if more than one, and if but one, then the whole to that one child; but in case all and every of *her said children should happen to die under that age, and without leaving lawful issue*, as aforesaid, then upon trust to pay the annual income thereof unto certain persons. It was contended, that, under the trusts in favor of the daughter's children, the vesting was postponed until the age of twenty-four, and, consequently, the gift was too remote. Sir J. Leach, M. R., however, held that the legatees acquired immediate vested interests: "Whether, in a gift of this nature," he said, "the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age (*g*). In this
* case, the gift over is not simply upon the death under twenty- *858
four, but upon the death under twenty-four without leaving issue.
If, upon a death under twenty-four, at whatever age, issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest, with an executory devise over, in case of death under twenty-four without leaving issue: all the cases upon the subject, except the one before Lord Gifford (*i.e.* Bull *v.* Pritchard) are reconcilable with this distinction."

It is submitted, however, that [even if Bull *v.* Pritchard were not otherwise distinguishable] his Honor's own decision in Vawdry *v.* Geddes (*h*), as well as that of his predecessor in Barker *v.* Lea (*i*), if brought to the test of the principle of

Remark on Bland *v.* Williams.

(*g*) Why not? A gift over to take effect simply on the event alternative to that on which the prior gift was apparently made to vest, *may* surely have the effect (if such be the intention collected from the whole will) of explaining that the original gift was to be divested in favor of the ulterior substituted legatee on the happening of the prescribed event. This, we may venture to affirm, would, with very little aid from the context, be generally the construction. No such distinction as the M. R. suggests is discoverable in the cases cited ante (p. 810), in which, under a devise to A., if he shall attain the age of twenty-one years, with a devise over, in case he shall die under that age, the devise over is (we have seen) held to denote that the prior words (instead of suspending the vesting *ab initio*) point merely at the period when it becomes absolute. The principle of these cases obviously applies to residuary bequests framed in such terms. [Where real and personal estates are included in the same gift, and the real estate is held to be vested, the personal property follows the same construction, Farmer *v.* Francis, 2 S. & St. 505; Tapscott *v.* Newcombe, 6 Jur. 755; James *v.* Lord Wynford, 1 Sm. & Gif. 40. And Parker, V.-C., 5 De G. & S. 200, said that the M. R.'s distinction was not meant to be of general application, but referred only to the will then before him.]

(*h*) Ante, p. 855. (*i*) Ante, p. 856, n.

construction here propounded, would be found no less difficult to sustain than Bull *v.* Pritchard, for the reasons already suggested. It would certainly be a convenient rule of construction to say, that whenever, under a residuary bequest to children as a class, the vesting is, in the first instance, postponed to a given age, and this is accompanied by a direction that the intermediate interest [or a sufficient part of it] shall be applied for their maintenance; after which the testator proceeds to dispose of the shares of children dying under the age in question, either absolutely or upon some contingency, to the survivors, or to children, or any other person; the gift over is to be considered as explaining the testator's intention to be, that, under the preceding words, the *absolute* ownership only should be suspended until the prescribed age, and that, in the mean time, the legatees should take vested interests, with a liability to be divested on the happening of the prescribed event; [and the tendency of the modern decisions on bequests in this form, whether residuary or not, is almost uniformly in favor of such a rule.

Gift over held to favor vesting.

Thus in Taylor *v.* Frobisher (*k*), a testatrix directed *859 1,000*l.* to * be held in trust to invest until the same should be payable as thereinafter mentioned, and to pay the income to A. for life, and from and after her decease to pay the principal unto, between or amongst all and every the child and children of A. in equal shares, or if but one such child then to such one, to be a vested interest or vested interests on their respectively attaining the age of thirty years; and if any child should die under that age without lawful issue, his or her share, as well original as accruing, to go to the survivors, and become vested at the same age as the original shares; there was a trust, after A.'s death until the shares of such child or children should become vested and payable, out of the income of the 1,000*l.* to apply for their maintenance so much as to the trustees seemed meet, not exceeding the interest of the expectant share of such child or children in the principal; and if all the children of A. should die under the age of thirty years without issue, then over. It was held by Sir J. Parker, V.-C., that "vested" must be read "indefeasible," and that the children took vested interests liable to be divested on death under thirty. He thought the conclusion to be drawn from the clause of accruer and from what followed it was irresistible, that a child dying under thirty retained his share in every event except where it was expressly given over. He added that Bull *v.* Pritchard was no exception to the rule as stated by Sir J. Leach, for in that case the gift was not to all the children, but only to a particular class, those, namely, who should attain twenty-three.

[(*k*) 5 De G. & S. 191. See also Ridgway *v.* Ridgway, 4 De G. & S. 271, better rep. 21 L. J. Ch. 256; Carver *v.* Burgess, 18 Beav. 541, 551, 7 D. M. & G. 96; Pearman *v.* Pearman, 33 Beav. 394; Knox *v.* Wels. 2 H. & M. 674; Wetherell *v.* Wetherell, 1 D. J. & S. 134; Whitter *v.* Bremridge, L. R. 2 Eq. 736.

So in Davies *v.* Fisher (*l*), where a testatrix gave the residue of her personal estate to trustees, in trust for W. D. for life, and after his decease, in trust for the children of the said W. D. as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one then the whole to such one child, the income to be applied during *their respective minorities* by the guardian for the time being of such children for their maintenance; and in case no child of the said W. D. should live to attain the age of twenty-five years, then in trust as therein mentioned. Lord Langdale, M. R., held that the children of W. D. took an immediate vested interest in the residue. The decision was, indeed, in a great measure, founded on the gift of the intermediate interest (*m*); * but as to *860 the argument resting on the dicta of Sir J. Leach in Vawdry *v.* Geddes and Bland *v.* Williams, that the gift over prevented the residue from vesting in the mean time, he cited authorities to show that such a proposition was untenable (*n*); and observed that, on the contrary, the gift over afforded some evidence of an intention to divest after a previous vesting.

But a gift over limited to take effect on an event different from that upon which the primary gift depends, will not generally be construed as of itself indicating such an intention (*o*), though it is sometimes called in aid of other arguments in favor of that construction (*p*); for a gift over in *any* one event always helps the construction that until that event happens, the legacy is vested (*q*).

Gift over on event different from event mentioned in primary gift.

The distinction drawn in Bull *v.* Pritchard between a gift to a class *if* or *when* they attain a specified age, and a gift to *such of* a class *as* attain a specified age, has been fully recognized in subsequent cases; and gifts over (*r*), and gifts of intermediate interest (*s*), which have been held to vest a bequest of the first kind in all the members of the class immediately, will generally, where the bequest is in the latter form, be treated not as enlarging the class, but only as regulating the mode or conditions in or upon which the members of it are to enjoy the bequest (*t*). But, as already noticed, there are no words that may not be explained away by

Distinction where the gift is to *such of* a class as attain given age.

(*l*) 5 Beav. 201; see also Harrison *v.* Grimwood, 12 Beav. 192; Thomas *v.* Wilberforce, 31 Beav. 299; Fox *v.* Fox, L. R. 19 Eq. 286, 291; Re Baxter's Trusts, 10 Jur. N. S. 845.

(*m*) See ante, p. 845.

(*n*) Skey *v.* Barnes, 3 Mer. 340; see also Davidson *v.* Dallas, 14 Ves. 576; Heron *v.* Stokes, 2 D. & War. 115, per Sugden, C.

(*o*) Re Wrangham's Trust. 1 Dr. & Sm. 358; Chadwick *v.* Greenall. 3 Gif. 221.

(*p*) Bree *v.* Perfect, 1 Coll. 128; Lang *v.* Pugh, 1 Y. & C. C. C. 718, 724, 725; Ingram *v.* Suckling, 7 W. R. 386.

(*q*) Pearson *v.* Dolman, L. R. 3 Eq. 322.

(*r*) Bute *v.* Harman, 16 Beav. 168, n., correcting 9 Beav. 320.

(*s*) Southern *v.* Wollaston, 16 Beav. 166.

(*t*) See also cases cited ante, p. 850, n. (*h*). In Bradley *v.* Barlow, 5 Hare, 589, the interest was given to "such children as," &c., and the principal to "all the children when and as," &c., and there being no necessary intendment that principal and interest were to go to the same persons, the gift of principal was held vested.

the context, and the restrictive effect of a gift to *such of* the children as attain a given age will be obviated by a direction that the legacy shall vest in a larger class or at an earlier age (*u*).]

Contingent interest transmissible — when.

Here it may be observed that a contingent interest will or will not be transmissible to the personal representatives of the legatee, according to the nature of the contingency on which it is dependent.[1] If the gift is to children who shall live to attain a certain age, or shall survive a given period or event, the *861 death * of any child pending the contingency has obviously the effect of striking the name of such deceased child out of the class of presumptive objects (*x*); and, consequently, such an interest can never devolve to representatives, as it becomes vested and transmissible at the same instant of time. Where, however, the contingency on which the vesting depends is a collateral event, irrespective of attainment to a given age and surviving a given period, the death of any child pending the contingency works no such exclusion; but simply substitutes and lets in the legatee's representative for himself.

Thus, where (*y*) a testator bequeaths his personal estate to A., and if he shall die without leaving issue, then over to B.; in the event of B. surviving the testator, and afterwards dying in the lifetime of A., testate or intestate, his contingent or executory interest will devolve to his executor or administrator (as the case may be).

[So, in Leeming *v.* Sherratt (*z*), where a testator gave his freehold and the residue of his personal property to trustees, upon trust to sell the freehold and get in the personal property, and to pay and divide the money arising therefrom, so soon as his youngest child should attain the age of twenty-one, unto and equally amongst his children, and in case of the death of any of the children leaving issue, such issue were to take the share which the parent so dying would have been entitled to have; Sir J. Wigram, V.-C., held that a child who attained his majority, but died before the youngest attained twenty-one, was, nevertheless, entitled to a share of the fund. The trustees, he said, are trustees of the residue for all the testator's children upon the happening of an event, which in fact has happened, namely, the youngest child attaining twenty-one. He added, that if there was any case which decided as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards hap-

(*u*) Jackson *v.* Dover, 2 H. & M. 209; Mappin *v.* Mappin, W. N. 1877, p. 207; both cited ante, p. 850.

(*x*) Read *v.* Gooding, 21 Beav. 478; Sheffield *v.* Kennett, 27 Beav. 207, 4 De G. & J. 593; Re Watson's Trusts, L. R. 10 Eq. 36; and see Re Heath's Settlement, 23 Beav. 193.]

(*y*) Pinbury *v.* Elkin, 2 Vern. 758, 766; King *v.* Withers, Cas. t. Talb. 117, 3 B. P. C. Toml. 135; Wilson *v.* Bayly, ib. 195; Barnes *v.* Allen, 1 B. C. C. 181.

[(*z*) 2 Hare, 14. See also Boulton *v.* Beard, 3 D. M. & G. 608; Brocklebank *v.* Johnson, 20 Beav. 205; Re Smith's Will, ib. 197; McLachlan *v.* Taitt, 28 Beav. 407, 2 D. F. & J. 449.

1 See Winslow *v.* Goodwin, 7 Met. 363; post, p. 866, note 1.

pened, did not confer upon those children an interest transmissible to their representatives, merely because they died before the event happened, he was satisfied that case must be at variance with other authorities.

*The child whose share was in question in the last case had *862 attained the age of twenty-one, and the V.-C. thought that as the testator had postponed the division of the residue until his youngest child attained that age, no child who did not attain that age could have been intended to take a share therein (*a*). But if the bequest be not to a class but to named individuals, it seems the rule is different. Thus, in Cooper *v.* Cooper (*b*), a testator devised his real estate to trustees upon trust to raise out of the rents and profits an annuity of 100*l.* for his wife, and to apply the remainder for the maintenance of his said children (the testator had previously named them) till the youngest should attain twenty-one; then upon trust to sell subject to the annuity, and pay the moneys arising therefrom unto and between his said children in manner following, that is to say, unto his said eldest son two fifth parts, and one fifth part to each of his other children (naming them). One of the children died under twenty-one. It was held by Sir J. Romilly, M. R., that the children's shares were vested at the testator's death, and were not contingent on their attaining twenty-one. He distinguished Leeming *v.* Sherratt on the ground that the class who were there to take were the children who had attained twenty-one; that this was clear by the circumstance that the gift of the residue was not to take effect until the whole of the class had attained twenty-one, and therefore the class was to be ascertained at that time. Here if the devise had stopped at the word children, the case would have been governed by Leeming *v.* Sherratt, but the testator went on to say "in the shares and proportions following, that is to say." It was not, therefore, a gift to a class, but on the happening of a particular event, the residue was to be divided into four unequal shares to be given to four named individuals; and he observed that (unlike what would have been the case if the gift had been to a class) the share of the deceased child, if not vested in her, was undisposed of by the will; and he considered it to be a gift, on the youngest attaining twenty-one, to four specified persons, and that the circumstance *that they consti- *863 tuted a class for whose maintenance the income of the fund was to be devoted before the happening of the event did not convert them into a fresh and distinct class. If, however, after such a bequest

(*a*) See also Parker *v.* Sowerby, 1 Drew. 488, 496, fuller 17 Jur. 752; Lloyd *v.* Lloyd, 3 K. & J. 20, stated ante, p. 846. In the last case the V.-C. is reported to have said, "The distribution is to be among those who shall be receiving the rents and profits when the youngest attains twenty-one," which would have excluded those who attained twenty-one but died before the youngest attained that age: but he had just before said, "the testator must be understood as saying, 'I intend this for the benefit of all those children who attain twenty-one,' which is in conformity with Leeming *v.* Sherratt."

(*b*) 29 Beav. 229; Re Smith's Will, 20 Beav. 197.

nominatim, the shares of any of the legatees who die before the youngest attains twenty-one are given over in every event, as, to issue if there are any, but if none to survivors, it is clear nothing is intended to vest until the period of distribution even in a legatee who attains twenty-one (*c*).][1]

(*c*) Re Hunter's Trusts, L. R. 1 Eq. 295.]

[1] When an estate devised is defeasible and no time is fixed at which it is to become absolute, and the property itself is given, and not merely the use, if there be any intermediate period between the death of the testator and the death of the donee, at which the estate may fairly be considered absolute, that time is adopted. For example, in case of a gift to A. if he arrives at age, but if he dies without leaving a child, the property to go to B., the intermediate period is adopted, and the gift becomes absolute in A. at his majority. Hilliard *v.* Kearney, Busb. Eq. 221; Burton *v.* Conigland, 82 N. Car. 99; Home *v.* Pillans, 2 Mylne & K. 15, 22. If there be no intermediate period, and the alternative is either to adopt the time of the testator's death or the death of the donee, whenever it may happen, as the period at which the estate is to become absolute, the former period will be adopted unless there be words to forbid, or some consideration to turn the scale in favor of the death of the donee. For example, in case of a gift to A., but in case of his death to B., the time of the testator's death is adopted as the period at which the gift to A. becomes absolute. Ib. And this principle applies alike to personal and to real estate. Burton *v.* Conigland, supra; Davis *v.* Parker, 69 N. Car. 271.

*CHAPTER XXVI. *864

EXECUTORY DEVISES AND BEQUESTS.

AN executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder;[1] for it is well settled (and, indeed, has been remarked as a rule without an exception), that when a devise is capable, *according to the state of the objects at the death of the testator*, of taking effect as a remainder, it shall not be construed to be an executory devise (*a*). It is necessary, therefore, in treating of this species of estate, first, to ascertain what constitutes a remainder. A remainder may be described to be an estate which is so limited as to be immediately expectant on the natural determination of a particular estate of freehold, limited by the same instrument.[2] It follows, that every devise of a future interest, which is not preceded by an estate of freehold, created by the same will (*b*) (whether consisting of one or more testamentary papers), or which, being so preceded, is limited to take effect *before* or *after*, and not *at* the expiration of such prior estate or freehold, is an executory devise.[3]

Executory devise — what.

The first mentioned species of executory estate occurs, as well where the devise is future in its operation, from the non-existence of the object at the death of the testator, as where it is future in the express

(*a*) Purefoy *v.* Rogers, 2 Lev. 39, 2 Saund. 380; Reeve *v.* Long, Carth. 310; Goodright *v.* Cornish, 4 Mod. 258. [But this rule is now qualified by stat. 40 & 41 Vict. c. 33, presently noticed.]

(*b*) See Key *v.* Gamble, 2 Jones, 123; Moore *v.* Parker, 1 Ld. Raym. 37, Skinn. 558; Doe *v.* Earl of Scarborough, 3 Ad. & El. 2, 897.

[1] 4 Kent, 263; Heath *v.* Heath, 1 Bro. C. C. (Perkins's ed.) 148, and note (*a*); Nightingale *v.* Burrell, 15 Pick. 110-115; Holm *v.* Low, 4 Met. 190; Vedder *v.* Evertson, 3 Paige, 281; Ferson *v.* Dodge, 23 Pick. 287; Jackson *v.* Christman, 4 Wend. 277; Jackson *v.* Thompson, 6 Cowen, 178; Wilkes *v.* Lion, 2 Cowen, 333; Jackson *v* Staats, 11 Johns. 337; Fosdick *v.* Cornell, 1 Johns. 440; Anderson *v.* Jackson, 16 Johns. 382; Moffatt *v.* Strong, 10 Johns. 12; Jackson *v.* Bull, 10 Johns. 19; Jackson *v.* Robins, 16 Johns. 537; S. C. 15 Johns. 169; Jackson *v.* Delancy, 13 Johns. 537; Ide *v.* Ide, 5 Mass. 500, 502; Annable *v.* Patch, 3 Pick. 360.

[2] A remainder may be limited upon a possibility, but the possibility must be *potentia propinqua*, such as death, or death without issue, or coverture, or the like. Therefore, a remainder to a corporation which is not in being at the time of the limitation is void, though it be erected during the particular estate. Anshutz *v.* Miller, 81 Penn. St. 212, 216; Fearne, Conting. Rem. 250, 251.

[3] See Wells *v.* Ritter, 6 Whart. 208; Moore *v.* Howe, 4 T. B. Mon. 199; Beard *v.* Rowan, 1 M'Lean, 135.

Devise executory for want of a preceeding freehold.

terms of its limitation.[1] Thus, a devise to the children of A., who happens to have no child at the death of the testator (*c*), or to the heirs of the body of A., a person then living, is executory (*d*), for the reason suggested. The creation of a term of years, determinable with the life of the ancestor, to whose heirs the subsequent limitation is made, of course does *865 * not vary the principle; a chattel interest being inadequate to support a contingent remainder (*e*). Thus, if lands are devised to A. for ninety-nine years, if he shall so long live, remainder to the heirs of the body of A., the fee-simple, subject to the term, descends to the heir at law of the testator during the life of A., at whose decease an estate tail vests in the heir of his body by executory devise. So, a devise to a person or persons, whether *in esse* or not, to take effect at a given period after the death of the testator, as to A. at the death of B. (a stranger), or at six months from the testator's decease, obviously belongs to the class of limitations under consideration (*f*).

Devise executory, notwithstanding prior freehold.

With respect to the cases in which the devise is executory, notwithstanding the creation of a prior estate of freehold, it is to be observed, that to constitute the ulterior limitation an executory devise in such a case, the precedent estate must not be merely *liable* to be determined before the ulterior limitation takes effect (as such liability only renders the remainder contingent), but it must be *necessarily* determinable before the taking effect of the ulterior devise. Thus, a devise to A. for life, and, after his decease, to the unborn children of B., is a contingent remainder in such children, because as A. *may* live until B. has a child, there is not necessarily any interval between the two estates; but, under a devise to A. for life, and after his decease, *and one day*, to the children of B., the children would take by executory devise, and the interval of a day, which would be undisposed of, would belong to the residuary devisee (*g*), if any, or if not, to the heir.[2]

It is an obvious consequence of the general principle before laid down, that where the event which gives birth to the ulterior limitation, abruptly determines and breaks off the preceding estate, the limitation is executory, inasmuch as it is essential to the constitution of a remain-

(*c*) Hopkins *v.* Hopkins, Cas. t. Talb. 44; Stephens *v.* Stephens, ib. 228; Gore *v.* Gore, 2 P. W. 28, 2 Stra. 958; Bullock *v.* Stones, 2 Ves. 521.

(*d*) Snowe *v.* Cutler, 1 Lev. 135, T. Raym. 162; Doe *v.* Carleton, 1 Wills. 225; Harris *v.* Barnes, 4 Burr. 2157; Doe d. Fonnereau *v.* Fonnereau, Dougl. 487; Doe d. Mussell *v.* Morgan, 3 T. R. 763.

(*e*) *Vide supra*, n. (*d*).

(*f*) Reding *v.* Stone, 8 Vin. Ab. 215, pl. 5; and see Clarke *v.* Smith, 1 Lutw. 798.

(*g*) Supra, p. 645.

[1] Wells *v.* Ritter, 3 Whart. 208; Moore *v.* Howe, 4 T. B. Mon. 199; Beard *v.* Rowan, 1 McLean, 135; Miller *v.* Chittenden, 4 Iowa, 252.

[2] See Miller *v.* Chittenden, 4 Iowa, 252. A devise to the testator's brothers' and sisters' children abroad that may first come to this country, provided they came within six years after they hear of his death, of certain lands, otherwise to their heirs, is an executory devise, and the freehold descends to the heirs of the heirs of the devisor until the condition is fulfilled. Chambers *v.* Wilson, 2 Watts, 495; Miller *v.* Chittenden, 4 Iowa, 252; Morton *v.* Funk, 6 Penn. St. 483.

der, that it wait for the regular expiration of such estate.[1] Thus, in the case of a devise to A. for life, or in tail, with a limitation over to B., in case A. shall become entitled in possession to a certain estate, or shall omit to assume a certain name, this is an executory devise to B. (*h*).

It will be apparent from what has been stated, that every *devise to a person in derogation of, or substitution for, a pre- *866 ceding estate in fee-simple, is an executory limitation. Thus, in the case of a devise to A. and his heirs, and if he shall die under twenty-one and without issue (*i.e.* without issue living at his death), or if he shall die without issue living B., then to B.; in each of these cases the devise to B. is executory (*i*),[2] in the same manner as if the fee, instead of being limited to A., had been suffered to descend to the heir at law of the testator, and the property had been simply devised to B. on either of such

Executory devise in derogation of a preceding fee.

(*h*) Nicholl *v.* Nicholl, 2 W. Bl. 1159; Nicolls *v.* Sheffield, 2 B. C. C. 215; Doe d. Heneage *v.* Heneage, 4 T. R. 13; Carr *v.* Earl of Erroll, 6 East, 58; Stanley *v.* Stanley, 16 Ves. 491; Doe d. Kenrick *v.* Beauclerk, 11 East, 657.

(*i*) Cro. Jac. 592; Palm. 131; Gilb. 393; 2 Mod. 289; Pre. Ch. 67; ib. 486; 10 Mod. 419; Cas. t. Talb. 228; 8 Vin. Ab. 112, pl. 38; 1 B. C. C. 147; 3 T. R. 143; 2 B. & P. 324; 10 East, 460; 1 B. & Ald. 530; ib. 713; 2 B. & Ald. 441; [1 Eq. Ca. Ab. 186, pl. 1; 1 Wils. 105; Fea. C. R. 396; 10 B. & Cr. 201.] Many of these cases are stated supra.

[1] Brattle Square Church *v.* Grant, 3 Gray, 150; Nightingale *v.* Burrell, 15 Pick. 110. One of the essential differences between the legal effect of a remainder and an executory devise may be seen in the fact that a remainder consequent upon an estate tail may be barred by the tenant in tail, while an executory devise in a similar case would be beyond the control of the prior taker. That operates to determine the prior estate and to substitute another in its place. Nightingale *v.* Burrell, supra; Southerland *v.* Cox, 3 Dev. 394; Smith *v.* Hunter, 23 Ind. 580; McRee *v.* Means, 34 Ala. 349; Moffat *v.* Strong, 10 Johns. 12; Jackson *v.* Bull, 10 Johns. 19. As to the mode of distinguishing between such estates, see Nightingale *v.* Burrell; Hall *v.* Priest, 6 Gray, 18, 20, 21; Ide *v.* Ide, 5 Mass. 500; Parker *v.* Parker, 5 Met. 134; Hawley *v.* Northampton, 8 Mass. 41; Fisk *v.* Keene, 35 Me. 349; Holm *v.* Low, 4 Met. 190; Ferson *v.* Dodge, 23 Pick. 287; Miller *v.* Chittenden, 4 Iowa, 252; Ramsdell *v.* Ramsdell, 21 Me. 293; Van Vechten *v.* Pearson, 5 Paige, 512; Lorillard *v.* Coster, 5 Paige, 172; Hawley *v.* James, 5 Paige, 318; Van Vechten *v.* Van Veghten, 8 Paige, 104; Anderson *v.* Jackson, 16 Johns. 388; Willis *v.* Bucher, 3 Wash. 369. That a future interest in lands, which can take effect as a remainder, shall not take effect as an executory devise, see Wolfe *v.* Van Nostrand, 2 Comst. 436; Johnson *v.* Valentine, 4 Sandf. 36; Leslie *v.* Marshall, 31 Barb. 560; Stehman *v.* Stehman, 1 Watts, 466; Waddell *v.* Rattew, 5 Rawle, 231; Manderson *v.* Lukens, 23 Penn. St. 31; Taylor *v.* Taylor, 63 Penn. St. 481; Parker *v.* Parker, 5 Met. 134; Randolph *v.* Wendel, 4 Sneed, 646; Fisk *v.* Keene, 35 Me. 349, 354, 355; Arnold *v.* Brown, 7 R. I. 188; Burleigh *v.* Clough, 52 N. H. 267. A limitation over on the event of the devisee dying without leaving a child living at the time of her death, or any other definite failure of issue, is good as an executory devise. Att.-Gen. *v.* Wallace, 7 B. Mon. 611; Burfoot *v.* Burfoots, 2 Leigh, 119; Moore *v.* Howe, 4 T. B. Mon. 199; Trumbull *v.* Gibbons, 22 N. J. 117; Eby *v.* Eby, 5 Barr, 461; McRee *v.* Means, 34 Ala. 349; Hart *v.* Thompson, 3 B. Mon. 482. So a devise to N., "his heirs and assigns forever; but in case he should die before he arrives to lawful age, or have lawful issue, then" over, &c., creates an estate in fee, with a limitation over by way of executory devise. Den *v.* Taylor, 2 South. 413. As to the transmissible rights of an executory devisee before the happening of the contingency on which his estate is dependent, see Kean *v.* Roe, 2 Harr. (Del.) 103; Lewis *v.* Smith, 1 Ired. 145; ante, p. 837, note 2, p. 861. And see further consideration of executory devises in Mitchell *v.* Long, 80 Penn. St. 516; Rupp *v.* Eberly, 79 Penn. St. 141; Smith *v.* Hunter, 23 Ind. 580; Dunn *v.* Bank of Mobile, 2 Ala. 152; Holm *v.* Low, 4 Met. 190; Booker *v.* Booker, 5 Humph. 505; Norris *v.* Johnston, 17 Gratt. 8; Hilleary *v.* Hilleary, 26 Md. 275; Jackson *v.* Chew, 12 Wheat. 153; Heard *v.* Horton, 1 Denio, 165; Guernsey *v.* Guernsey, 36 N. Y. 267; ante, p. 837, note 2.

[2] Den *v.* Taylor, 2 South. 413; Barnitz *v.* Casey, 7 Cranch, 456; Vedder *v.* Evertson, 3 Paige, 281.

events; the only difference being, that in one case the property shifts, on the happening of the contingency, from the prior devisee, and in the other, from the heir of the testator to the devisee of the executory interest. No species of executory limitation is of such frequent occurrence as those which are limited in defeasance of a prior estate in fee.[1]

The short but comprehensive definition of an executory devise before given, will be found to comprise every class of limitations of this nature, and, perhaps, will be more easily understood and remembered by the student, than the more elaborate classification which has been generally presented to him. A learned writer, whose labors on this subject are well known to the profession (*k*), has added to the distribution of the cases adopted by Mr. Fearne (*l*), several classes, two of which, though they clearly fall within the terms by which this species of interest has been before described, are sufficiently peculiar to entitle them to distinct notice.

First, Where an estate tail, or an estate in fee-simple, is in *867 * some event reduced to an estate for life. As where (*m*) a testator devised real estate to his two daughters, their heirs and assigns; but if either of them should marry without the consent of his executors, the daughter so marrying should have an estate for life therein; if either of them should die unmarried, then R. to take it, paying the other daughter 500*l*. It was held, that on one of the daughters marrying without consent, her estate was cut down to an estate for life.

Estate in fee or in tail reduced to an estate for life.

Secondly, Where an estate is limited in derogation of a preceding estate, and in *partial* exclusion of the same. As where (*n*) a testator devised certain lands to his son B. in fee, and other lands to his son C. in fee, subject to a proviso, that if either of his sons should die before marriage, or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, &c., unto such of his said two sons as

Estate partially defeated by executory limitation.

(*k*) 2 Prest. Treat. on Abstracts, 139.

(*l*) For which see Doe *v.* Carleton, 1 Wils. 225; [Fea. C. R. 400.] These two classes of cases show that Mr. Fearne's position (C. R. 251 and 530, 8th ed.), "that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the remainder," must be received with some qualification. A condition properly so called, namely, which descends upon the heir, necessarily determines the whole estate, which is subject to it; but it is difficult to perceive upon what principle any objection can be advanced to an executory devise, to take effect in partial derogation of a preceding estate, on the ground that it defeats that estate in part only; and it is observable, that, in all the cases cited by this able writer in illustration of his doctrine, the limitation over was either defective in the terms of its creation (on which, however, some remarks will be found in the sequel (see Corbet's case, 1 Rep. 83 b; and other cases observed upon, Ch. XXVII. s. 2)), or was repugnant to the nature and incidents of the estate on which it was engrafted; or was contrary to the rule of law fixing the period within which such interests must be limited to arise.

(*m*) Wright *v.* Wright, 1 Ves. 409, Fea. C. R. 500.

(*n*) Hanbury *v.* Cockrell, 1 Roll. Ab. 835, Fea. C. R. 396.

[1] See Eaton *v.* Straw, 18 N. H. 330; Hill *v.* Hill, 4 Barb. 419; Buist *v.* Dawes, 4 Strobh. Eq. 37. As to the effect of the absence of a gift over in these cases, see McNeely *v.* McNeely, 82 N. Car. 183; Nunnery *v.* Carter, 5 Jones Eq. 370.

should the other survive. It was held, that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, as one of them had attained twenty-one, and died unmarried, the survivor was entitled to his moiety for life.

As this case simply affirmed the validity of the devise over for life, leaving untouched the destination of the ulterior interest, it cannot, perhaps, be treated as a direct adjudication on the point for which it is here cited, [namely, that the estate originally devised was affected only to the extent necessary for the introduction of the life-interest, and subject thereto remained in the prior devisee:] yet, upon principle, there can be, it is conceived, no doubt as to the doctrine in question; and which, indeed, has now the support of [an express decision in its favor (*o*); as well as of another] case which appears to have decided, that where a devise in fee is followed by an executory limitation in fee, in favor of an object or class of objects not *in esse*, and who, in event, never come into existence, the first devise remains absolute.

Remark on Hanbury *v.* Cockrell.

Effect where executory gift never takes effect.

The case last alluded to is Jackson *v.* Noble (*p*), where a testator gave real a personal estate to his daughter A., and to two other persons, upon trust to permit A. to receive the rents and interest for life, for her separate use, and, after her decease, in * trust to convey to her heirs, executors, *868 &c.; but in case A. should marry, and have no child or children, then the property to belong to B.; or in case of his decease before A., then to his children. A. married, but had no child: B. died in her lifetime, without issue. Lord Langdale, M. R., held, that A. took an absolute equitable estate, with an executory gift over to B. and his children, and that B., having died in the lifetime of A., leaving no child, the title of A. remained undefeated.

Substituted devise failing first devise held to be absolute.

[This case has indeed been referred to the narrower ground that the contingency there contemplated on which the gift over was to take effect had not happened (*q*); and it seems that however reasonable the rule above suggested as being deducible from it, the case cannot with certainty be relied on to that extent; while the more general inference that in all cases where the executory devise is void from any cause whatever the prior devise is absolute, is contradicted by Doe d. Blomfield *v.* Eyre (*r*), where M. S. having an exclusive power of appointing lands by will amongst her children, appointed them to

Contrary rule settled

[(*o*) Gatenby *v.* Morgan, 1 Q. B. D. 685.] (*p*) 2 Kee. 590.

[(*q*) By Kindersley, V.-C., Robinson *v.* Wood, post. Lord Langdale thus expressed himself: "The question is whether the particular event on which the vested estate was to be devested can now happen; and having regard to the intention of the testator, and the words in which the gift over is expressed, I am of opinion that the gift over was to take effect only in the event of A. marrying and dying without issue in the lifetime of B. or of such child or children as he might happen to leave; and as B. died in A.'s lifetime and had no child, I think that the contingent executory gift cannot take effect, and that the estate already vested in A. cannot now be devested." (*r*) 5 C. B. 713.

by Doe d. Blomfield v. Eyre.

her eldest son, J. B., in fee; but if J. B. and his brother both died before her husband, then she appointed the estate to her father-in-law (a stranger to the power) in fee. J. B. and his brother both died in their father's lifetime, and it was held in the Exchequer Chamber, that although the father could not take, yet the son lost the estate. Parke, B., delivered the judgment of the court, and after premising that the question was the same, whether it arose upon an ordinary devise or upon an appointment under a power, he said: "If a testator seised in fee were to devise a real estate to A. B. in fee, and to direct that, in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely was perfectly clear that if A. B. should die in the lifetime of J. S. he, or rather his heirs, would lose the estate. The testator could not give to the charity without taking away from the devisee. The testator, therefore, in such a case, by his will said, 'If A. B. dies in the lifetime of J. S., I do not mean that he or his heirs should any longer have the estate.' That which *869 defeated * the estate of J. B. was the death of himself and his brother in his father's lifetime, not the giving over the estate to strangers."

The case put by Parke, B., of a devise over to a charity, afterwards came before Sir R. Kindersley, V.-C., who felt himself bound to decide it in conformity with Doe *v.* Eyre, though not approving of the doctrine of that case. He thought a strong argument against it might have been found in the statute (*s*), which declared all gifts to charity, not made as therein provided, void to all intents and purposes; he also thought it very difficult to reconcile Jackson *v.* Noble with Doe *v.* Eyre, but concluded that the ground of the decision in the former was that the contemplated contingency had not happened (*t*).

Exception where substituted gift is void for remoteness.

But to the rule thus laid down in Doe *v.* Eyre, the case of a gift over which is to defeat a prior devise in a too remote event forms an exception (*u*), since the law refuses permission to await that event for any purpose; so that the prior gift must, of necessity, remain absolute.] [1]

Same rules as to personalty where executory gift is for life only.

On the same principle as that which governs devises of realty it would seem to follow, that, if personal estate were bequeathed in terms which, standing alone, would confer the absolute interest, and there followed a bequest over in a certain event to a person for life, the first legatee would, subject to such executory gift for life, be absolutely entitled. It might appear to be a further deduction from this doctrine, that if the second

(*s*) 9 Geo. 2, c. 36, s. 3.
(*t*) Robinson *v.* Wood, 4 Jur. N. S. 625, 27 L. J. Ch. 726. See Sug. Pow. 514, 8th ed., where Doe *v.* Eyre is approved. But see Ridgway *v.* Woodhouse, 7 Beav. 437.
(*u*) Sug. Pow. 514, 8th ed.]

[1] Brattle Square Church *v.* Grant, 3 Gray, 150.

gift were a contingent bequest of the entire interest in the property, and not for life only, and such contingent and substituted bequest failed in event, the prior legacy, in derogation of which the same was to take effect, would remain absolute; and Taylor *v.* Langford (*x*) seems to lend some countenance to the *hypothesis. [Even where there was in the first place a distinct *870 clause declaring that in a certain event the previous gift should be forfeited, and then followed a gift over in the same event, which gift failed for remoteness, Sir C. Hall, V.-C., said: "When you find a forfeiture clause associated with a gift over, is it not reasonable to read them together?" and he refused to read one separately from the other (*y*). However, in O'Mahoney *v.* Burdett (*z*), where a legacy was bequeathed to A. for life, remainder to her daughter; but if the daughter should die unmarried or without children, then to B.; B. died in the testator's lifetime, and afterwards the daughter died without ever having a child. Doe *v.* Eyre and Jackson *v.* Noble were cited, and it was held in D. P. that the gift to the daughter was defeated, although the gift over had failed by lapse. Lord Selborne said "he had doubted whether, under the circumstances, the effect of the divesting clause was not wholly evacuated, in the same way as if there had been a blank in the will for the name of the substituted legatee; but that the argument on that point and the authority cited by the respondent (*qu.* appellant) had satisfied him that the lapse of a contingent gift, by way of substitution, to a person named who might have survived the testator, operated (when the contingency had happened on which the gift to the person was made to depend) for the benefit of the residuary legatee or next of kin." It seems, therefore, that Doe *v.* Eyre furnishes the rule as well for personal as for real estate.

—where executory gift never takes effect.

(*x*) 3 Ves. 119. See also Harrison *v.* Foreman, 5 Ves. 207, and other cases stated ante, 827 *et seq.* But Joslin *v.* Hammond, 3 My. & K. 110, shows that too much caution cannot be exercised in forming any such conclusion. In that case, a testator bequeathed to his wife A., whom he appointed executrix, the whole of his property, on condition of her paying to his mother 130*l.* per annum during her life, and added, "at the death of my dear wife A., the whole of the property to be equally divided amongst those of my children who may survive her;" and should his wife marry again, the testator directed that each of his children at the age of twenty-four be paid 400*l.*; should she not marry, he left them implicitly to her kind and indulgent care. No child of the testator survived the widow. It was contended, therefore, that the widow was absolutely entitled, on the ground that the absolute interest which she would have taken under the first words of the will, was cut down to a life-interest only in a certain event which had not happened; but Sir J. Leach considered that, upon the whole context of the will, it was the intention of the testator that in no event the wife should have other than a life-estate. "If," said his Honor, "at her death, a child or children survived her, they were to take the property between them; but he has not provided for the case of all the children dying during the life of his wife, and that event having happened, he has so far died intestate. It is not a probable intention to be imputed to the testator, that, if his children died in the lifetime of his wife, leaving families, his widow, on her second marriage, should enjoy the whole property." His Honor did not advert to the annuity to the mother. [See Lassence *v.* Tierney, 1 Mac. & G. 551.

(*y*) Hodgson *v.* Halford, 11 Ch. D. 959, 963. Though this was a case of remoteness (which is an exception to the rule founded on Doe *v.* Eyre; see Courtier *v.* Oram, 21 Beav. 91; Webster *v.* Parr, 26 Beav. 236), the V.-C.'s observation was in answer to an argument (for which, however, there appears to have been insufficient ground) that though the gift over was remote the clause of forfeiture was not, and that the latter might operate alone.

(*z*) L. R. 7 H. L. 388, 407.

Exception where children substituted on death of original legatees.

An exception exists however in those cases (which are of frequent occurrence) where personalty is bequeathed to individuals or to a class, to come into possession at a future period (as, after a life-estate to A.), and in case any of them should die before the period of distribution, then to their children; here, the original gift is divested only in the case of those *871 who have * children. Thus in Smither *v.* Willock (*a*), where there was a bequest to the testator's wife for her life, and after her death to his brothers and sisters, named in the will, in equal shares; but in case of the death of any of them in the lifetime of the wife, the shares of him or her so dying were to be divided between his or her children: one of the testator's brothers died in the widow's lifetime, without having ever had a child; and Sir W. Grant declared his share to be vested, subject to be devested only in the event of his death in the lifetime of the widow, leaving children: and consequently, that event not having happened, his representative was entitled.]

Effect where absolute interests are first given, and then trusts declared of shares of certain objects.

It seems too, that, where a testator, in the first instance, divides his property among his children, and then proceeds to declare certain trusts of his daughters' shares in favor of themselves and their children, these trusts are considered as defeating only *pro tanto* the absolute interests antecedently given to the daughters in common with the other children.

As, in Whittell *v.* Dudin (*b*), where the testator directed the residue of his property to be equally divided between his wife, and sons and daughters, subject, as to the shares of the daughters, to certain trusts for the benefit of themselves, and their children; Sir T. Plumer, M. R., held that a daughter dying without a child was entitled absolutely under the original bequest, from which it was to be collected that the testator's design was to make an equal division among his children, which would be frustrated if the shares of daughters were to go to the testator's next of kin as undisposed-of property, on their dying without children.

Qualifying trusts operate *pro tanto* only.

And the same construction prevailed in Hulme *v.* Hulme (*c*), where a testator, in the first instance, made an absolute gift to all his children by his second wife, who should be living *872 when * the youngest should attain twenty-one. He then superadded a direction for settling the shares of

(*a*) 9 Ves. 223. See also Hervey *v.* M'Laughlin, 1 Pri. 264; Salisbury *v.* Petty, 3 Pri. 86.]

(*b*) 2 J. & W. 279.

(*c*) 9 Sim. 644. See also Billing *v.* Billing, 5 Sim. 232; [Ring *v.* Hardwick, 2 Beav. 352; Mayer *v.* Townsend, 3 Beav. 443; Winckworth *v.* Winckworth, 8 Beav. 576; Re Forster, 1 M. D. & D. 418, 2 Beav. 177; Arnold *v.* Arnold, 16 Sim. 404; Eaton *v.* Barker, 2 Coll. 124; Dawson *v.* Bourne, 16 Beav. 29; Re Young's Settlement, 18 Beav. 199; Lyddon *v.* Ellison, 19 Beav. 565; Gurney *v.* Goggs, 25 Beav. 334; Re Corbett's Trust, Joh. 591; Norman *v.* Kynaston, 3 D. F. & J. 29. In Mayer *v* Townsend, where the primary gift was absolute to a daughter, followed by a direction to invest in trust for her, for her separate use for life, and after her death to her children, *with power to her to appoint a life-interest to her husband.* It was contended, that the intention could not have been to give her an absolute interest, even if there were no children, because a husband surviving her might take the property absolutely. Lord Langdale apprehended there would be a great deal to say on that point; but it did not arise.

the daughters, upon trust for them for life, and then for their children. One of the daughters having died childless, it was held that her share belonged absolutely to her representatives. Sir L. Shadwell, V.-C., observed: "The absolute gift remains, except so far as the direction for settling the shares of the daughters has taken it away, and it is not taken away in the case of a daughter dying without having children."

[The rule (which applies to shares of males as well as to shares of females (*d*)) is thus stated by Lord Cottenham: "If a testator leave legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee, as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee" (*e*).

Rule for deciding whether there be an absolute gift in the first place.

It is in the determination of this previous question, whether, namely, the gift to the primary legatee is absolute or qualified, that the real difficulty of these cases generally lies. The intention is, of course, to be collected from the whole will. Suppose, for instance, that after the gift to the primary legatee there are gifts over in alternative contingencies exhausting every possible event: this is wholly inconsistent with an intention that there should, in any event, be an absolute gift to the primary legatee. But the point can only be material when the first expressions are ambiguous, for if there is a distinct positive gift, and the intention is express, nothing that afterwards follows can affect the construction of the positive gift; but where the first gift is capable of two constructions, other parts of the will are to be looked at to see what the intention was; and no doubt a disposition of the whole property, under all circumstances that can arise, is an important consideration in putting a construction on ambiguous * expressions. It does not *873 seem possible that the two intentions could exist together: if they are both found in the same will, the court may have to decide which is to prevail (*f*); but if the first is ambiguous and the other is not, the unambiguous expression must have great effect in controlling that which is ambiguous (*g*).

(*d*) Norman *v.* Kynaston, 3 D. F. & J. 29.
(*e*) Lassence *v.* Tierney, 1 Mac. & G. 561.
(*f*) See Findon *v.* Findon, 1 De G. & J. 380; Re Lord Sondes' Will, 2 Sm. & G. 416; Salmon *v.* Salmon, 29 Beav. 27.
(*g*) Per Lord Cottenham, Lassence *v.* Tierney, 1 Mac. & G. 562, 567; Reid *v.* Reid, 25 Beav. 469; Butler *v.* Gray, L. R. 5 Ch. 26. Other cases where the primary gift has been

Gift subject to a power which is extinguished.

Where there is a legacy subject to be defeated by the exercise of a discretionary power, and that power is extinguished, the legacy of course becomes absolute (*h*).]

Executory interests not affected by acts of owner of precedent estate.

The essential quality in executory devises, which gave to the distinction between them and contingent remainders its chief importance [was] this, — that such interests [were and still] are not in general liable to be affected by any alteration in the preceding estate (*i*):[1] while, on the other hand, as the rule was that a contingent remainder must take effect, if at all, at the instant of the determination of the preceding estate, it followed that any act by the owner of the prior estate of freehold, which amounted to a forfeiture of it, produced the destruction of the dependent contingent remainders, the effect being to place them in the same situation as if the preceding estate had regularly expired before the period of vesting. [But their destructibility by such an act is now a doctrine of little practical importance, since, by stat. 8 & 9 Vict. c. 106, s. 8, contingent remainders are made "capable of taking effect notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold in the same manner in all respects as if such determination had not happened."]

Destructibility of contingent remainders; cured by statute.

But it is obvious that a contingent remainder may be of such a nature as to admit the possibility of its continuing in suspense or contingency after the regular determination of the previous *874 *estate of freehold. For instance, suppose freehold lands to be limited to A. for life, with remainder to such of the children of A. as shall attain the age of twenty-one years, it is evident, that if all the children of A. happen to be under age at the time of A.'s decease, the remainder to the children would, according to the rule before referred to, wholly fail [unless preserved by an estate limited to trustees] during the life of A., and the further period of the possible minority of one at least of the children (*k*).[2]

held not absolute are Rucker *v.* Scholefield, 1 H. & M. 36; Scawin *v.* Watson, 10 Beav. 200; Gompertz *v.* Gompertz, 2 Phil. 107; Whitehead *v.* Rennett, 22 L. J. Ch. 1020; Waters *v.* Waters, 26 L. J. Ch. 624; Fullerton *v.* Martin, 1 Dr. & Sm. 31; Savage *v.* Tyers, L. R. 7 Ch. 356; Nevill *v.* Boddam, 28 Beav. 554 (revocation by codicil of absolute gift by will and substitution of qualified gift).

In the following cases the first gift was held absolute: Campbell *v.* Brownrigg, 1 Phil. 301; Lord *v.* Lord, 3 Jur. N. S. 485; Watkins *v.* Weston, 3 D. J. & S. 434 (indefinite gift of rents of leaseholds); McCulloch *v.* McCulloch, 3 Gif. 606; Combe *v.* Hughes, 2 D. J. & S. 657; Martin *v.* Martin, L. R. 2 Eq. 404; Kellett *v.* Kellett, L. R. 3 H. L. 160.

(*h*) Keates *v.* Burton, 14 Ves. 434.]

(*i*) Pells *v.* Brown. Cro. Jac. 590.

[(*k*) Festing *v.* Allen, 12 M. & W. 279; Holmes *v.* Prescott, 33 L. J. Ch. 264; Cunliffe *v.* Brancker, 3 Ch. D. 393.]

1 Ante, p. 866, note 1.

2 A remainder to the children of the tenant for life will not be held to be contingent upon the survivorship by the children of the life-tenant, when there is nothing to indicate an intent to make the interest of the children contingent. Moore *v.* Dimond, 5 R. I. 121.

But every devise operates according to the state of the objects at the death of the testator; so that, if (in the case put), A. died in the lifetime of the testator, the devise to his children would become executory, precisely as if it had been originally limited to them without any preceding freehold (*l*), [and would take effect accordingly.

Nature of limitation sometimes dependent on events happening in testator's lifetime;

The total failure to which such a limitation was liable as a remainder is now prevented by stat. 40 & 41 Vict. c. 33 (2d Aug. 1877), which enacts that "every contingent remainder created by any instrument *executed after the passing of this act*, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining *before* the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise or other executory limitation."

Stat. 40 & 41 Vict. c. 33.

But suppose that A. (in the case already put) survives the testator, and afterwards dies leaving several children, some of whom have already attained the prescribed age, and others not. Here the rule before the act was (*m*), that those children alone took who attained twenty-one before the particular estate determined, to the exclusion of others who might afterwards attain that age. Now what happens in such a case is this: either the contingent remainder in the entirety vests in the child who first attains the age in the lifetime of A., with a liability to open and let in such others as afterwards attain the age in A.'s lifetime — * and this is the commonly received opinion (*n*); or, at latest, the entirety vests, *eo instanti* that the particular estate determines, in all those children who have then attained the age, to the exclusion of those who have not. In either case the particular estate does not determine *before* the contingent remainder vests, and thus the event in which alone the act operates has not happened. *875

It has been suggested that as every infant child *in esse* during the particular estate might by possibility have become entitled to a share by attaining twenty-one during the continuance of the particular estate, such share was a contingent remainder at the time of the determination of the estate, and is consequently saved by the act. But this view seems inconsistent with the nature of a gift to a class: since, under

(*l*) See Hopkins *v.* Hopkins, Cas. t. Talb. 228, 1 Atk. 581, 1 Ves. 268; Doe d. Scott *v.* Roach, 5 M. & Sel. 481.

(*m*) Ante, p. 264.

[(*n*) Fea. C. R. 312; Mogg *v.* Mogg, 1 Mer. 654; 1 Preston Conv. 52, 53; 3 Preston Conv. 555. And see Solicitor's Journ. 1878, pp. 544, 563, 601, 622, 640, 661.]

such a gift, *those only are objects of the gift* who have attained the required qualification when the time for ascertaining the class arrives, — viz. (in the present case) the determination of the particular estate, — and they take the whole.]

Nature of limitation possibly dependent even on subsequent events.

Where the limitation of a future interest, by way of executory devise, is followed by other limitations expectant thereon, in the nature of remainders (which, of course, can only happen where the first executory estate is less than the fee-simple), such subsequent limitations may, it is evident, according to events happening as well after as before the death of the testator, take effect either as remainders or as executory devises. If, by the removal out of the way of the preceding limitation or limitations, by the death of the object or objects, or otherwise, before the happening of the contingency on which the whole line of limitations depends, a subsequent devisee is placed at the head of the train; his estate will, on the happening of such contingency, take effect as an executory devise, though had it retained its original position, such estate would have vested as a remainder.

Thus, in Doe d. Fonnereau *v.* Fonnereau (*o*), where A. devised to the heirs male of the body of T., his eldest son (who had an estate for life by deed), and in default of such issue to his (testator's) second, third, fourth, and fifth sons successively, in tail male; it was held, that, if T. died leaving an heir male of his body, the limitation to A.'s next son took effect as a remainder expectant on the estate tail of such heir male; and that if he died leaving no male issue who survived the testator, it took effect immediately as an executory devise.

*876 * Sometimes a limitation is so framed, as to take effect as a contingent remainder in fee in one event, and as an executory limitation engrafted on an alternative contingent remainder in fee in another event. Thus, in Doe d. Herbert *v.* Selby (*p*), where the devise was to A. for life, and after his decease to his children in fee as tenants in common; and if A. should die without issue, or leaving such issue and such child or children should die under twenty-one or (which was read *and* (*q*)) without issue, then over to B. in fee. A. suffered a common recovery, and *died without issue;* and it was held that, in the event which had happened, the limitation to B. would have taken effect as a contingent remainder, and consequently was destroyed by the recovery.

Effect where one of the several concurrent contingent remainders is subject to an executory devise.

It is not quite accurate to say in such a case as Doe *v.* Selby, that the limitation is a contingent remainder in one event, and an executory devise in the other. There were, in fact, two alternative contingent remainders in fee: one of which was

Observations upon Doe *v.* Selby.

(*o*) Doug. 487; [Hopkins *v.* Hopkins, Fea. C. R. 510.]
(*p*) 4 D. & Ry. 608, 2 B. & Cr. 926.
(*q*) Ante, p. 505; [and see Doe d. Evers *v.* Challis, 18 Q. B. 244.

subject to an executory limitation in favor of the same person, who would have been the object of the alternative remainder. Such a case is clearly distinguishable from that of a devise to A. for life; and if he shall die on the 1st of January, then, from one year afterwards, to B. in fee; but if A. shall die on any other day, then, immediately from the decease of A., to B. in fee. In the first event, the limitation to B. would take effect as an executory devise; and in the second, as a remainder: so that his interest would be destructible or not by the act of A., according to the event.

[Again, in Doe d. Harris *v.* Howell (*r*), where a testator devised real estates to his daughter for life, remainder to her son J. in fee; but in case J. should die before her, and she should have no other child living at her death, then as she should appoint. The daughter and her son both survived the testator, and then the son died before his mother, who afterwards had another son who survived her. It was decided that though the limitation (which, for argument's sake, was supplied by implication (*s*)), to the children of the daughter other than J. could operate only as an executory devise at the time of the testator's death, yet that by J.'s death in his mother's lifetime that limitation was converted into a remainder, and was barred by a fine which had been levied by her.

Executory devise may be changed into a remainder by events subsequent to testator's death.

* But a limitation which has once operated as a contingent remainder can never, after the death of the testator, be changed into an executory devise (*t*).] *877

But not a remainder into an executory devise.

If, in Doe *v.* Selby, the tenant for life had had children, *i.e.* born after the recovery, who had died under twenty-one, and without issue, the case would have raised a question, not, I think, hitherto decided, namely, whether an executory devise engrafted on a contingent remainder in fee, is involved in the destruction of such remainder. If an executory devise were derived out of the estate in defeasance of which it is limited to take effect, it is clear that, in such a case, it would be held to share the fate of the parent limitation out of which it is to spring, and to all the accidents of which it would seem, therefore, to be necessarily subject. *Accessorium sequitur naturam sui principalis* (*u*). It would then present an exception to Mr. Fearne's position, that "an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate *out of which*, or after which, it is limited (*x*);" (to which, indeed, the case of an executory devise, *being preceded by an estate tail, does* [as he remarks himself] clearly form an exception (*y*). But it is conceived, that the notion above suggested, though seemingly

Whether executory limitation to arise out of a contingent remainder is involved in its destruction.

(*r*) 10 B. & Cr. 191.
(*s*) But see ante, p. 561.
(*t*) 2 Prest. Abst. 172; Hopkins *v.* Hopkins, 1 Atk. 581; Mogg *v.* Mogg, 1 Mer. 703, 704, arg., and the decree as to the High Littleton estate.]
(*u*) 3 Inst. 139.
(*x*) Fea. C. R. 418.
(*y*) See ante, p. 254; [Fea. C. R. 423, 424.

countenanced by the terms of this position, is not correct in point of law. An executory devise is not derived out of, or dependent upon, the estate which it supersedes. It is a future substantive, independent limitation to arise on a given event; and the circumstance, that that event involves the failure of the objects of a preceding estate, is merely accidental (*z*).

Effect where defeasible and executory fees become vested in same person.

Here it may be observed, that where the defeasible estate in fee, and the executory fee to arise out of it on a given event, become vested in the same person, the latter is not merged or extinguished in the former, the two interests being successive, and not concurrent. Thus, in Goodtitle d. Vincent *v.* White (*a*), where a testator devised all his estate to his wife, in case his daughter (who became his heir), died under the age of twenty-one years. The wife died intestate; so that the daughter to whom the estate had descended from her father, subject to the executory devise, became also entitled, by descent from her *878 * mother, to the executory interest so created. The daughter died a minor, upon which the heir *ex parte maternâ* claimed the property under the executory limitation, which claim was resisted by the heir *ex parte paternâ*, on the ground that the executory fee had been extinguished by the union of both interests in the person of the daughter. But it was held, that no extinguishment had taken place, and that the maternal heir was entitled (*b*).

Curtesy attaches on a defeasible fee.

An immediate estate in fee, defeasible on the taking effect of an executory limitation, has generally all the incidents of an actual estate in fee-simple in possession, such as curtesy, dower, &c.; the devisee having the inheritance in fee, subject only to a possibility.[1] Therefore, in Buckworth *v.* Thirkell (*c*), where a testator devised lands to trustees and their heirs, in trust for his granddaughter M. until she arrived at the age of twenty-one, or was married; and after she attained her age of twenty-one, or was married, then he gave the lands to M., and her heirs and assigns, forever; but in case M. should die before the age of twenty-one years, and without leaving lawful issue of her body, then over. M. died under age, without leaving issue living at her decease, *but having had a child born alive;* and it was held, that the husband (the father of such child), was entitled to an estate for life as tenant by the curtesy.[2]

(*z*) Cf. Vincent Lee's case, Moor, 269.]

(*a*) 15 East, 174; Same *v.* Same, 2 B. & P. (N. R.) 383. See also Goodright d. Larmer *v.* Searle, 2 Wils. 29; Doe d. Andrew *v.* Hutton, 3 B. & P. 643.

(*b*) The arguments in this case are replete with instructive learning.

(c) 1 Collect. Jur. 332, 3 B. & P. 652, n. [The same rule exists with regard to dower out of an estate tail, after failure of issue. *Secus* of an estate determined by condition at common law, Payne *v.* Samms, 1 Leo. 167, Goulds. 81; Paine's case, 8 Rep. 34, 5 Vin. 315.

[1] Brattle Square Church *v.* Grant, 3 Gray, 150.

[2] Whenever it is clearly the intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void, because it is

[But an exception exists where the prior estate is determined by executory devise over in case of the birth or existence of children who, but for such devise over, would have inherited the parent's estate: and the circumstance of the executory devise being in favor of the children themselves does not alter the case, since they would not, nor ever could, take by inheritance, but by purchase (*d*). Unless estate be such as issue could *in no case* have inherited.

The general right to dower in similar cases is equally well established (*e*), and the same exception must exist here as in regard to curtesy; it being equally necessary in support of either claim that children of the marriage, if any such there be, may by possibility inherit (*f*).] Same rule as to dower.

*No remainders can be limited in real and personal chattels; every future bequest of which, therefore, whether preceded by a partial gift or not, is in its nature executory (*g*). An ulterior bequest of a term for years, after a prior limitation for life, owes its validity to this doctrine; the rule formerly being that, in such a case, the whole interest vested indefeasibly in the first legatee (*h*).[1] *879 Executory bequest.

(*d*) Sumner *v.* Partridge, 2 Atk. 47; Barker *v.* Barker, 2 Sim. 249.
(*e*) Moody *v.* King, 2 Bing. 447; Goodenough *v.* Goodenough, 3 Prest. Abs. 372; Smith *v.* Spencer, 2 Jur. N. S. 778. (*f*) Litt. s. 53.]
(*g*) Fea. C. R. 402.
(*h*) Horton *v.* Horton, Cro. Jac. 74; Woodcock *v.* Woodcock, Cro. El. 795.

inconsistent with the absolute property supposed in the first devisee. And a right in the first devisee to dispose of the estate devised at his pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift. Thus a devise was made to the testator's son P. and his heirs and assigns forever of certain lands, and also of personal estate, with this clause, "and further, it is my will that if my son P. shall die, and leave no lawful heirs, what estate he shall leave to be equally divided between my son J. and my grandson N., to them and their heirs forever," and it was held that the devise over to J. and N. was void, as inconsistent with the absolute unqualified interest in the first devisee. Ide *v.* Ide, 5 Mass. 500; and in Ramsdell *v.* Ramsdell, 21 Me. 288, 293, Shepley, J., said that it had become the settled rule of law that if the devisee or legatee had the absolute right to dispose of the property at pleasure, the devise over was inoperative. See Timewell *v.* Perkins, 2 Atk. 102; Burbank *v.* Whitney, 24 Pick. 146; Jackson *v.* Coleman, 2 Johns. 391; Jackson *v.* Bull, 10 Johns. 19; Jackson *v.* Robbins, 16 Johns. 586; Melson *v.* Cooper, 4 Leigh, 498; Barnard *v.* Bailey, 2 Harring. 56; Burbank *v.* Whitney, 24 Pick. 146; Jackson *v.* Delancy, 13 Johns. 537. But in a case where the testator made a bequest of the residue of his personal property to his wife, with full power to do with it as she pleased, but whatever she might die possessed of, unless she should otherwise order, to be equally divided among certain societies; the wife, having died before the testator, the bequest over was allowed to take effect. Burbank *v.* Whitney, 24 Pick. 146. The result would have been different in case she had survived the testator; ib. See Smith *v.* Bell, Mart. & Y. 302.

[1] At common law there formerly could be no limitation over of a chattel, but a gift for life carried the absolute interest. Then a distinction was taken between the use and the property, and it was held that the use might be given to one for life, and the property afterwards to another, though the devise over of the chattel would be void. That distinction has, however, been discarded, and it is now settled that a gift for life of a chattel is a gift of the use only, and the remainder over is good as an executory devise. This limitation over in remainder is good as to every species of chattels; and there is no difference in that respect between money and any other chattel interest. The general doctrine is well established in England, and it has been very extensively recognized and adopted in this country. See 2 Kent, 352, 353; Moffatt *v.* Strong, 10 Johns. 12; Westcott *v.* Cady, 5 Johns. Ch. 334; Griggs *v.* Dodge, 2 Day, 28; Scott *v.* Price, 2 Serg. & R. 59; Deihl *v.* King, 6 Serg. & R. 29; Royall *v.* Eppes, 2 Munf. 479; Mortimer *v.* Moffatt, 4 Hen. & M. 503; Geiger *v.* Brown, 4 M'Cord, 427; Brummet *v.* Barber, 2 Hill, S. C. 543; Rogers *v.* Ross, 4 Johns. Ch. 388; Kelso *v.* Dickey, 7 Watts & S. 279; Marston *v.* Carter, 12 N. H. 159; Robards *v.* Jones, 4 Ired. 53; State *v.* Norcom, 4 Ired. 255; Swain *v.* Rascoe, 3 Ired. 200; French *v.* Hatch, 8 Foster, 331; Dow *v.* Jewell, 1 Foster, 470; post,

Thus, in Manning's Case (*i*), where a man possessed of a term of years, devised it to B., after the death of A., the testator's wife, and directed that, in the mean time, she should have the use and occupation during her life: it was contended, that the devise to A. during her life gave her the whole term, and that, therefore, the devise over was void; but after much argument, three judges held that B. took not by way of remainder, but by way of executory devise. And it was ruled that there was no difference between a gift of the land itself, and of the use or occupation or profits of the land.[1]

Both courts of Law and courts of Equity have been constantly in the habit of entertaining suits, at the instance of an executory legatee, for the recovery of chattels, real as well as personal, and the latter, of pecuniary legacies, after a prior disposition for life or other partial interest.

Successive interests in personal chattels.

In Hoare *v.* Parker (*k*), an ulterior legatee recovered, by action of trover, certain chattels which the legatee *cestui que trust* for life, since dead, had pledged to a pawnbroker, who had given a valuable consideration without notice; the rule being, that the property does not, unless sold in market overt, follow the possession of chattels capable of being identified (*l*).[2]

(*i*) 8 Rep. 95. See also Doswell *v.* Earle, 12 Ves. 473; Theobalds *v.* Duffoy, 9 Mod. 101; Mallett *v.* Sackford, 8 Vin. Ab. 89, pl. 5. See also Lampett's case, 10 Rep. 47; Catchmay *v.* Nicholas, Finch, 116; Roe d. Bendale *v.* Summerset, 5 Burr. 2608. That personalty may be subjected to the same modifications of ownership, by way of executory gifts, as land, see Martin *v.* Long, 2 Vern. 151; Johnson *v.* Castle, Winch, 116, 8 Vin. Ab. 104, pl. 2.

(*k*) 2 T. R. 376.

(*l*) See Hartop *v.* Hoare, 3 Atk. 44.

Ch. XLVI. A bequest of money for life, and then over, gives only the interest. Field *v.* Hitchcock, 17 Pick. 182. See also Langworthy *v.* Chadwick, 13 Conn. 42; Powell *v.* Brown, 1 Bailey, 100; Betty *v.* Moore, 1 Dana, 237; Morrow *v.* Williams, 3 Dev. 263; Rathbone *v.* Dyckman, 3 Paige, 1; Mazyck *v.* Vanderhorst, Bailey, 48; Postell *v.* Postell, ib. 390; Jones *v.* Sothoron, 10 Gill & J. 187; Dashiell *v.* Dashiell, 2 Harr. & G. 127; Eichelberger *v.* Barnetz, 17 Serg. & R. 293; Newton *v.* Griffith, 1 Harr. & G. 111; Hannan *v.* Osborn, 4 Paige, 336; Henry *v.* Felder, 2 M'Cord, 323; Matthews *v.* Daniel, 2 Hayw. 346; Cudworth *v.* Hall, 3 Desaus. 258; Clifton *v.* Haig, 4 Desaus. 330; Homer *v.* Shelton, 2 Met. 194; Rawlins *v.* Goldfrap, 5 Ves. (Sumner's ed.) 440, Perkins's note (*a*); Cox *v.* Marks, 5 Ired. 361; post, Ch. XLVI. There is an exception to the rule in case of the bequest for life of specific things, such as corn, hay, and fruits, of which the use consists in the consumption. Such a gift is in most cases, of necessity, a gift of the absolute property. See Randall *v.* Russell, 3 Meriv. 194; Evans *v.* Iglehart, 6 Gill & J. 171; Henderson *v.* Vaulx, 10 Yerg. 30; Merrill *v.* Emery, 10 Pick. 512; German *v.* German, 27 Penn. St. 116. If not specifically given, but generally as goods and chattels, with remainder over, the tenant for life is bound to convert them into money, and save the principal for the remainder-man. Patterson *v.* Devlin, 1 M'Mul. 459. See 2 Kent, 353, and notes. Personal property cannot be given to one in tail, with remainder over, nor can an executory bequest be made to take effect upon the termination of an estate tail, because it is too remote. It will be found in all cases, it is said, that where a gift over of personal estate has been maintained, it is where the gift to the first taker, by the terms of the bequest, does not exceed a gift for life. Albee *v.* Carpenter, 12 Cush. 387, Shaw, C. J.; Ellis *v.* Merrimack Bridge, 2 Pick. 243; Homer *v.* Shelton, 2 Met. 194. See Smith *v.* Bell, 6 Peters, 68; Hall *v.* Priest, 6 Gray, 18, 22; ante, "Perpetuities."

[1] See Dunn *v.* Sargent, 101 Mass. 336; Gardner *v.* Hooper, 3 Gray, 398; Winslow *v.* Goodwin, 7 Met. 363; Pike *v.* Stephenson, 99 Mass. 188, 2 Kent, 352, 353; Moffatt *v.* Strong, 10 Johns. 12; Westcott *v.* Cady, 5 Johns. Ch. 334; Rogers *v.* Ross, 4 Johns. 388; French *v.* Hatch, 28 N. H. 331, 352; Gillespie *v.* Miller, 5 Johns. Ch. 21; Marston *v.* Carter, 12 N. H. 159; Ladd *v.* Harvey, 21 N. H. 514; Robards *v.* Jones, 4 Ired. 53; Griggs *v.* Dodge, 2 Day, 28; Taber *v.* Packwood, ib. 52; Scott *v.* Price, 2 Serg. & R. 59; Kelso *v.* Dickey, 7 Watts & S. 279; Deihl *v.* King, 6 Serg. & R. 29; Royall *v.* Eppes, 2 Munf. 479; Logan *v.* Ladson, 1 Desaus. 271; Geiger *v.* Brown, 4 M'Cord, 427.

[2] The estate of a legatee for life of personal property is chargeable, after his death, for such property. French *v.* Hatch, 8 Foster, 331.

Courts of Equity, too, will enforce the actual delivery of specific chattels, which are of such a nature as that the loss cannot be compensated in damages; the value arising from considerations personal to the owner, as plate bearing family inscriptions, &c. (*m*).[1] They will also, during the continuance of the prior interest, protect the rights of the ulterior legatee; but this protection is now confined to compelling the legatee for life * to give an inventory; which, as observed by Lord Thurlow, *880 is more equal justice than requiring security, which was the old rule; as there ought to be danger to require that (*n*).[2]

Equitable remedy for their protection and recovery;

Where the legal title is in trustees, [the creditors of the person beneficially entitled for life cannot seize the chattels even in case of bankruptcy (*o*);] and if they have been taken in execution, the trustees may maintain trover for them (*p*). But where the first taker was clothed with the legal title, and his creditor had taken the chattels (which consisted of plate) in execution; on a bill by the legatee calling for their restoration to the house with which they were bequeathed, and for security and an inventory, Lord Thurlow felt much difficulty. On the one hand, if the court could take away the articles, it was entitling the ulterior legatee to take from him the use, contrary to the testator's intention; and, on the other, if the creditors obtained the plate, they must succeed in applying it differently from the testator's intention; and there was a strong principle of justice for preserving the goods for the benefit of the person entitled, if the court could so secure them. The point, however, was not decided, the case being disposed of on another ground (*q*).

—against bankruptcy.

When trover will lie.

It is clear, at all events, that the ulterior legatee might, on his interest falling into possession, have maintained an action of trover for the plate in question; or, if incapable of being compensated in damages, a suit in equity for its delivery. These cases suggest, that, wherever temporary interests are created in chattels personal, the whole legal property should be vested in trustees.

(*m*) Pusey *v.* Pusey, 1 Vern. 273; Duke of Somerset *v.* Cookson, 3 P. W. 389; Fells *v.* Read, 3 Ves. 70; Lloyd *v.* Loaring, 6 Ves. 773; Lowther *v.* Lowther, 13 Ves. 94; Earl of Macclesfield *v.* Davis, 3 V. & B. 16.

(*n*) 1 B. C. C. 279.

[(*o*) Earl of Shaftesbury *v.* Russell, 1 B. & Cr. 666.]

(*p*) Cadogan *v.* Kennett, Cowp. 432.

(*q*) Foley *v.* Burnell, 1 B. C. C. 274.

[1] See 2 Story, 2 Eq. Jur. §§ 789, 906; Osborn *v.* Bank of U. S., 9 Wheat. 845.

[2] Homer *v.* Shelton, 2 Met. 194; 1 Story Eq. § 604; Foley *v.* Burnell, 1 Bro. C. C. (Perkins's ed.) 279 and notes; Covenhoven *v.* Shuler, 2 Paige, 122, 123; Sutton *v.* Craddock, 1 Ired. Eq. 134; Evans *v.* Iglehart, 6 Gill & J. 171; De Peyster *v.* Clendining, 8 Paige, 295; French *v.* Hatch, 8 Foster, 353; 3 Williams, Ex. (6th Am. ed.) 2005, 1000. But it seems, that security may still be required in a case of real danger that the property may be wasted, secreted, or removed. See Mortimer *v.* Moffatt, 4 Hen. & M. 503; Gardner *v.* Harden, 2 M'Cord, 32; Smith *v.* Daniel, ib. 143; Merril *v.* Johnson, 1 Yerg. 71; Henderson *v.* Vaulx, 10 Yerg. 30; Hudson *v.* Wadsworth, 8 Conn. 348; Langworthy *v.* Chadwick, 13 Conn. 42; Homer *v.* Shelton, 2 Met. 194; 2 Kent, 353, 354. See Judge of Probate *v.* Hardy, 3 N. H. 150, 151, 152; Saunderson *v.* Stearns, 6 Mass. 37; Clark *v.* Clark, 8 Paige, 152.

As personal property of this nature is thus preserved through any number of successive takers, for the benefit of the person entitled to the ulterior and absolute interest, it is evident that bequests of such property are within the dangers of, and are consequently subject to, the rule directed against perpetuities (*r*).

[But there can be no limitations of things the proper use of which lies in their consumption: under a specific (*s*) gift of such things for life or other limited interest the first taker gets the absolute property (*t*). This rule, however, is not generally * applicable to such things where they are the testator's stock in trade (*u*), or where personal use by the tenant for life was not contemplated (*x*).]

Consumable articles cannot be limited.

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(*r*) *Vide ante*, p. 250.

[(*s*) If included in a residuary bequest they would of course be sold, and the interest of the proceeds enjoyed by the tenant for life, 3 Mer. 195.

(*t*) Randall *v.* Russell, 3 Mer. 194; Andrew *v.* Andrew, 1 Coll. 690; Twining *v.* Powell, 2 Coll. 262. This was formerly doubted, see Porter *v.* Tournay, 3 Ves. 314.

(*u*) Phillips *v.* Beal, 32 Beav. 25 (wine); Groves *v.* Wright, 2 K. & J. 347 (farming); Cockayne *v.* Harrison, L. R. 13 Eq. 432 (farming). But in Breton *v.* Mockett, 9 Ch. D. 95, the tenant for life, being expressly exempted from liability on account of diminution, was held to be absolutely entitled; and as to hay, roots and cattle on a stock-feeding farm, see Bryant *v.* Easterson, 5 Jur. N. S. 166.

(*x*) Re Hall's Will, 1 Jur. N. S. 974 (bequest of testator'e wearing apparel to his widow for life).]

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