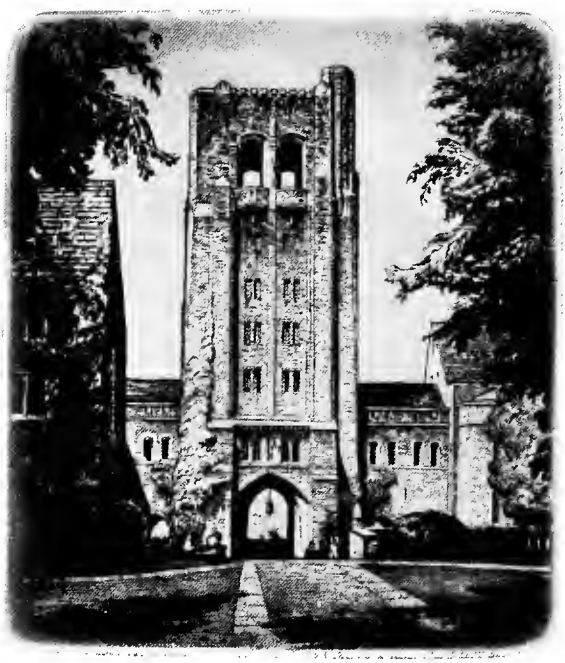

JARMAN ON WILLS.

VOL. II.

A

TREATISE ON WILLS.

By THOMAS JARMAN, Esq.

THE FIFTH EDITION,

BY

LEOPOLD GEORGE GORDON ROBBINS, Esq.

OF LINCOLN'S INN, BARRISTER-AT-LAW.

Sixth American Edition,

BY

MELVILLE M. BIGELOW, Ph.D.

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I. — Conditions whether Precedent or Subsequent. — No precise form of words is necessary, in order to create conditions in wills, any expression disclosing the intention will have that effect.[1] Thus a devise to A., "he paying," or "he to pay 500*l.* within one month after my decease," would be a condition (*a*), for breach *of which the heir might enter (*b*)[2]: unless [*842]

Conditions how created.

(*a*) 1 Co. Lit. 236 b. But the mere expression of an intention accompanying a bequest does not necessarily constitute a condition on which the bequest is to take effect or be defeated, see Yates *v.* University College, London, L. R., 7 H. L. 438.

(*b*) But as to the equitable relief afforded in such cases, see Hayes *v.* Hayes, Finch, 231, and cases cited and commented on, Hayes & Jarm. Conc. Wills, 3d ed. 398, 8th ed. 407;

[1] Booth *v* Baptist Church, 126 N. Y. 215; Sammis *v.* Sammis, 14 R. I. 123; Robinson *v.* Greene, id. 181; Cannon *v.* Apperson, 14 Lea, 553.

[2] Inasmuch as a will has no legal force until after the death of the testator, there can, it seems, be no valid condition, as such, in the instrument which, without notice, shall require of a beneficiary the performance of acts during the lifetime of the testator, such as providing for his support. Colwell *v.* Alger, 5 Gray, 67. It seems clear, however, that a

the property were given over in default by way of executory devise (*c*).

and to the cases there cited, add Paine *v.* Hyde, 4 Beav. 468; Hawkes *v.* Baldwin, 9 Sim. 315; Steuart *v.* Frankland, 16 Jur. 738; Re Hodge's Legacy, L. R., 16 Eq. 92. But what was once deemed a devise upon condition would now be generally construed a devise in fee upon trust, and instead of the heir entering for condition broken, the c. q. t. could enforce the trust, Sug. Pow. 106, 8th ed.; Wright *v.* Wilkins, 2 B. & S. 232. In Re Kirk, Kirk *v.* Kirk, 21 Ch. D. 431, land was devised on condition that the devisee should release a debt due to him from the testator; the devise lapsed by the death of the devisee in the testator's lifetime; it was held by the Court of Appeal that the condition nevertheless bound the land. A condition annexed to a legacy may likewise be enforced, Rees *v.* Engelback, L. R., 12 Eq. 225; Middleton *v.* Windross, L. R., 16 Eq. 212. In Re Wellstead, 25 Beav. 612, a bequest towards the endowment of a church, in consideration of which testator's nephew and his heirs were to nominate every third incumbent, was held not a condition, but a purchase of the right; and the bishop declining to concede the right, the legacy failed. But if a legacy be to A. on condition that he convey a particular estate to B., and A. conveys accordingly, the analogy of purchase will not extend to give him a lien on the estate for his legacy, this being due from the executor, Barker *v.* Barker, L. R., 10 Eq. 438.

(*c*) See Ch. XXVI.

gift made upon agreement with the donee for the performance of certain acts during the testator's lifetime might properly be made, and that failure to perform the agreement might disentitle the donee to the bounty. Burleyson *v.* Whitley, 97 N. C. 295 (citing Lefler *v.* Rowland, Phil. Eq. 143). See Martin *v.* Martin, 131 Mass. 547. So, too, if a condition of similar import were brought by the testator to the notice of the beneficiary, it would seem that the same should be valid. But as such a condition would be unusual, it would devolve upon the party seeking to take advantage of it to show the notice. Clearly the donee would not be bound in the first instance (*i.e.*, before evidence of notice) to prove performance of the condition Colwell *v.* Alger, supra. Of course a testator may in his will provide that a gift shall be conditional, or fail of taking effect, upon some act to be performed by himself personally. Such a provision would not amount to a reservation of a right to alter or revoke the will by an unattested paper (a subject spoken of in Vol. I., p. 98, note). Langdon *v.* Astor, 16 N. Y. 9, 26. See Yates *v.* University College, L. R., 7 H. L. 438; *s. c.* L. R., 8 Ch. 454.

But the mere expression of an intention in the testator to do some act personally (or indeed to have some one else do an act) does not necessarily amount to a condition. L. R., 7 H. L. 438, 444, Lord Cairns. Whether or not a condition has been prescribed is generally (an exception will be mentioned presently), in the absence of unmistakable language, matter of construction to be applied for ascertaining the intention. Id. See Martin *v.* Martin, 131 Mass. 547. Indeed, it has recently been laid down that to an estate already clearly given, it is not possible to annex a condition from words which are capable of being interpreted as mere description of what must occur before the estate given can arise. Edgeworth *v.* Edgeworth, L. R., 4 H. L. 35, 41, Lord Westbury.

Description of itself clearly cannot in general amount to condition. Thus, it has been held that a gift to "one of the executors of this my will" cannot be treated as conditional upon the donee's accepting the position of executor. In re Denby, 3 De G. F. & J. 350. Secus, where it is left to the executor "for his trouble" as such. Lewis *v.* Matthews, L. R., 8 Eq. 277; Slaney *v.* Watney, L. R., 2 Eq. 418; Morris *v.* Kent, 2 Edw. 174. The statement, however, of the Vice-Chancellor in Lewis *v.* Mathews, and the similar one in Jervis *v.* Lawrence, L. R., 8 Eq. 345, and in other cases infra, that a legacy given to an executor, and nothing more, is presumed to have been given in respect of his office, so as to be conditional upon his acceptance, appears to be opposed to the express decision of the Lords Justices in In re Denby, supra; a case not noticed either in Lewis *v.* Mathews or in Jervis *v.* Lawrence. Statements in other cases, like that in Lewis *v.* Mathews, were quoted with approval in Kirkland *v.* Narramore, 105 Mass. 31, where the gift was to a trustee. But the terms of the will there clearly implied a gift to the trustee in office.

It must be admitted, however, that the language of the cases generally supports the proposition fully that a gift to an executor (or perhaps to a testamentary trustee), whether by such designation or not, is presumptively a gift to the party in office; *i. e.*, it is conditional upon his acceptance of the position. See Rothmahler *v.* Cohen, 4 Desaus. 215; Billingslea *v.* Moore, 14 Ga. 370; Abbot *v.* Massie, 3 Ves. Jr. 148; Read *v.* Devaynes, 3 Brown, Ch. 95; Calvert *v.* Sebbon, 4 Beav. 222; Stackpoole *v.* Howell, 13 Ves. 417; Hawkins's Trust, 33 Beav. 570; Angermann *v.* Ford, 29 Beav. 349; In re Reeve's Trusts, 4 Ch. D. 841; *s. c.* 46 L. J. Ch. 412. Still, where the testator's purpose is not expressly declared, the question is often even here one of construction, and, as the cases supra show, it may be decided upon slight indications of intention. See *e. g.*, Bubb *v.* Yelverton, L. R., 13 Eq. 131; In re Reeve's Trusts, supra; Brand *v.* Chaddock, 19 Week. R. 378, Stuart, V.-C.; Gadbury *v.* Sheppard, 27 Miss. 203. But if the Court cannot decide, the gift fails, according to these cases.

Clearly there can be no presumptive con-

Conditions are either precedent or subsequent; in other words, either the performance of them is made to *precede* the vesting of an estate, or the non-performance to *determine* an estate antecedently vested.[1] But though the distinction between these two classes of cases is sufficiently obvious in its consequences; yet it is often difficult, from the ambiguity and

Conditions precedent and subsequent.

dition in the case of a gift to a person under an office or a designation named that he shall assume the same, unless the testator is at least shown to have been interested in having the donee assume it; for there would be no motive for the condition. Parol evidence, it may be added, would doubtless be admissible in all such cases to aid in ascertaining the testator's intention. But though an estate be given in express and apt terms, still if the gift be followed, or indeed if it be preceded, by clear words (not of mere description, but) of condition, the condition must stand if not repugnant to the estate. Edgeworth *v.* Edgeworth, supra, Lord Hatherley; Maddison *v.* Chapman, 4 Kay & J. 709.

Where the question is of the existence of a condition or not, and not between a condition and something else, such as a charge, the language of the will is not construed as conditional unless it is clear that the testator intended that the gift should operate or continue only in a certain event. Skipwith *v.* Cabell, 19 Gratt. 758, 782. If by reasonable interpretation the testator's language can be regarded as meaning that he referred to the contingent event as the reason merely for making the will, then the gift is not conditional. In re Porter, L. R., 2 P. & D. 22, 24; In re Dobson, L. R., 1 P. & D. 88; In re Martin, id. 380; Skipwith *v.* Cabell, supra.

In the English cases just cited the question of the condition went to the existence of the whole will; but it was held in Skipwith *v.* Cabell, supra, that the doctrine declared in them, or rather in In re Dobson, was equally applicable to the case of a particular one of several gifts of a testator. In Skipwith *v.* Cabell the gift in question was thus expressed: "In case of a sudden and unexpected death, I give the remainder of my property," &c. The clause was construed as not creating a conditional gift. Upon the subject of conditional *wills*, see, in addition to the cases above cited, Roberts *v.* Roberts, 2 Swab. & T. 337; In re Winn, id. 147; In re Thorne, 4 Swab. & T. 36; Parsons *v.* Lanor, 1 Ves. Sen. 90; Strauss *v.* Schmidt, 3 Phillim. 209; Ingram *v.* Strong, 2 Phillim. 294; Burton *v.* Collingwood, 4 Hagg. 176; Jacks *v.* Henderson, 1 Desaus. 543; Damon *v.* Damon, 8 Allen, 192; Tarver *v.* Tarver, 9 Peters, 174; Bonner *v.* Young, 68 Ala. 35 (legacy for a particular purpose not conditional); Stewart *v.* Stewart, 5 Conn. 317; Pitkin *v.* Pitkin, 7 Conn. 315; Card *v.* Alexander, 48 Conn. 492 (gift to wife not conditional on her remaining such; divorce not avoiding it); Wagner *v.* McDonald, 2 Har. & J. 346; Likefield *v.* Likefield, 82 Ky. 539; Dougherty *v.* Dougherty, 4 Met. (Ky.) 25; Maxwell *v.* Maxwell, 3 Met. (Ky.) 101; Augustus *v.* Seabolt, id. 155; Cowley *v.* Knapp, 42 N. J. 297; Burleyson *v.* Whitley, 97 N. C. 295; Morrow's Appeal, 116 Penn. St. 440 (citing Todd's Appeal, 2 Watts & S. 145); Ritter's Appeal, 59 Penn. St. 9; Frederick's Appeal, 52 Penn. St. 338; Ex parte Lindsay, 2 Bradf. 204; Thompson *v.* Connor, 3 Bradf. 366.

Within the above-stated rule that to constitute a condition it should be clear that the testator intended the gift to take effect or continue only in a certain event, the gift of property to a town "for the support of the Congregational minister, who shall exercise the duties of that office, where the meeting-house now stands, forever," is not conditional. Brown *v.* Concord, 33 N. H. 285.

[1] There is no distinction in the way of technical words between conditions precedent and conditions subsequent; the distinction is matter of construction, dependent upon the intention of the testator as manifested by the will. See 4 Kent, Com. 124; Finlay *v.* King, 3 Pet. 346. But if a condition may be performed instanter it is held precedent; while if time is required for performance, it is held subsequent. Tappan's Appeal, 52 Conn. 412. But these rules will yield to intention at variance with them.

The legal result of the distinction is in nothing more striking than in the fact (1) that equity cannot interfere to relieve from the consequence of a failure to perform a condition precedent (4 Kent, Com. 125), while nothing is more common than for that court, acting upon motives of conscience and justice, to grant relief when the unperformed condition is subsequent; and (2) that, according to recent authority, not even the consent of the testator himself who has imposed the precedent condition can dispense with it without remodelling the devise or legacy, while the contrary is true of a subsequent condition. Davis *v.* Angel, 31 Beav. 223, 226, Sir John Romilly, M. R.; affirmed on appeal, 4 De G. F. & J. 524, Lord Westbury. The case cited is a forcible illustration of this proposition. The condition of the gift was that the donee should marry A., otherwise over. The donee, with the testator's consent, married B., but it was held that the condition was not dispensed with. Lord Westbury, however, conceded that the case would probably be different where a testator contemplating a future event (after his death) should merely give certain directions concerning, *e. g.*, the marriage of A., and then A. should marry in the testator's lifetime with his consent.

vagueness of the language of the will, to ascertain whether the one or the other is in the testator's contemplation; *i. e.*, whether he intend that a compliance with the requisition which he has chosen to annex to the enjoyment of his bounty shall be a condition of its *acquisition*, or merely of its *retention*.

As on questions of this nature general propositions afford but little assistance in dealing with particular cases of difficulty (*d*), we shall proceed to adduce some instances, first of conditions precedent; and, secondly, of conditions subsequent.

Instances of conditions *precedent*.

In an early case (*e*), where a man devised a term to A. if he lived to the age of twenty-five, and paid to his eldest brother a certain sum of money; it was agreed that no estate passed until that age and payment of the money.

Legacy charged on land given upon marriage with consent.

So where (*f*) A. charged his real estate with 500*l*. to be paid to his sister H. within one month after her marriage, but so as she married with the approbation of his brother J., if living: and, in case she married without [*843] his consent, the 500*l*. was not * to be raised. H. married in the lifetime of J., and without his consent; and it was held that, this being a condition precedent, nothing vested.

Rent-charge upon condition that the devisee releases.

Again, where (*g*) V. devised to his sister A. a rent-charge, to be paid half-yearly out of the rents of his real estate, during her life; and, by a codicil, declared that what he had given to her should be accepted in satisfaction of all she might claim out of his real or personal estate, and upon condition that she released all her right or claim thereto to his executors. The Court held it was a condition precedent, and that an action, which the husband as administrator had brought for the arrears, could not be sustained. Willes, C. J., observed that no words necessarily made a condition precedent; but the same words would make a condition either precedent or subsequent, according to the nature of the thing and the intent of the parties.[1] If, therefore, a man devised one thing in lieu or consideration of another, or agreed to do anything, or pay a sum of money in consideration of a thing to be done, in these cases that which was the consideration was looked upon as a condition precedent. There was (he said) no pretence for saying, in the present case, that the devisee could not perform the condition before the time of payment of the

What makes a condition precedent.

(*d*) But see some general rules laid down by Willes, C. J., in Acherley *v.* Vernon, Willes, 153, infra.

(*e*) Johnson *v.* Castle, cit. Winch, 116. 8 Vin. Ab. 104, pl. 2.

(*f*) Reves *v.* Herne, 5 Vin. Ab. 343, pl. 41.

(*g*) Acherley *v.* Vernon, Willes, 153. See also Gillett *v.* Wray, 1 P. W. 284; Harvey *v.* Aston, 1 Atk. 361, Com. Rep. 726.

[1] See Birmingham *v.* Lesan, 77 Maine, 494; *s. c.* 76 Maine, 482; Merrill *v.* Wiscousin College, 74 Wis. 415. What would be a condition precedent in a deed may be a condition subsequent in a will. Casey *v.* Casey, 55 Vt. 518.

annuity; for the first payment was not to be until six months after the testator's decease, and she might as well release her right in six months, as at any future time. Besides, the penning of the clause afforded another very strong argument that this was intended to be a condition precedent; for all the words were in the present tense. The testator willed that this annuity be accepted in satisfaction and upon condition that "she release," which is just the same as if he had said, "I give her the annuity, she releasing," which expression had been always holden to make a condition precedent, as appeared from Large *v.* Cheshire (*h*), where a man agreed to pay J. S., 50*l.*, he making plain a good estate in certain lands.

Other cases of conditions precedent.

Again, in Randall *v.* Payne (*i*), where a testator, after giving certain legacies to J. and M., added, "If either of these girls should marry into the families of G. or R., and have a son, I give all my estate to him for life (with remainder over); *and if they shall not marry,*" then he gave the same to other persons. * Lord Thurlow held this to be a [*844] condition precedent; and that nothing vested in the devisees over while the performance of the condition by J. or M. was possible, which was during their whole lives (*k*); and that their having married into other families did not preclude the possibility of their performing the condition, as they might survive their first husbands.

So in Lester *v.* Garland (*l*), where L. by his will bequeathed the residue of his personal estate to trustees, upon trust that, in case his sister S. P. should not intermarry with A. before all or any of the shares thereafter given to her children should become payable; and in case his sister should, within six calendar months after his decease, give such security as his trustees should approve of that she would not intermarry with A.; or, in case she should so marry after all or any of the shares bequeathed to her children should be paid to him, her, or them, that she would, within six calendar months after such marriage, pay the amount, or cause such child or children who should have received his, her, or their share or shares, to refund; *then and not otherwise,* the trustees were directed to pay such residuary estate to the eight children of S. P. at the age of twenty-one or marriage, with benefit of survivorship; and the testator provided, that in case his said sister should intermarry with A. before all or any of the shares should be payable, or should refuse to give such security as aforesaid, then he directed 1,000*l.* a-piece only to be paid to the children; and subject thereto, gave his residuary estate to the children of another sister. It was agreed

Computation of time.

(*h*) 1 Vent. 147.
(*i*) 1 B. C. C. 55.
(*k*) As to this, see Page *v.* Hayward, 2 Salk. 571, stated infra, p. 846; Lowe *v.* Manners, 5 B. & Ald. 917; Davis *v.* Angel, 4 D. F. & J. 524.
(*l*) 15 Ves. 248.

Period allowed for performing condition held to be exclusive of the day of testator's death.

that this was a condition precedent; and Sir W. Grant, M. R., considered that the computation of the six months was *inclusive* or *exclusive* of the day of the testator's decease, as the legatee could not reasonably be supposed to have any opportunity of beginning, on the day of L.'s death, the deliberation which was to govern the election ultimately to be made (*m*).

So in Ellis *v.* Ellis (*n*), where a testator bequeathed to his granddaughter, "if she be unmarried, and does not marry without [*845] the consent of my trustees," the sum of 400*l.*; one * moiety to be paid upon her marriage, if her marriage should be made with consent, and the other in one year afterwards; but if she were then married, or should marry without such consent, then the 400*l.* to "sink in the personal fortune." Lord Redesdale was of opinion that marriage was a condition precedent, and that the legacy was wholly contingent until that event.[1]

Cases of conditions *subsequent.*

One of the earliest examples of a condition subsequent in wills is afforded by Woodcock *v.* Woodcock (*o*), where W. devised a leasehold house to J. for her life; and if she died before S. then that S. should have it upon such reasonable composition as should be thought fit by his overseers (*i. e.*, his executors), allowing to his other executors such reasonable rates as should be thought meet by his overseers. It was agreed by the Court that this condition was subsequent, as the overseers might make agreement with him at any time.[2]

(*m*) See also Gorst *v.* Lowndes, 11 Sim, 434.

(*n*) 1 Sch. & Lef. 1. Cf. Wheeler *v.* Bingham, 3 Atk. 364. See further as to conditions precedent, Fry *v.* Porter, 1 Ch. Cas. 138; Semphill *v.* Bayly, Pre. Ch. 562; Pulling *v.* Reddy, 1 Wils. 21; Elton *v.* Elton, id. 159; Garbut *v.* Hilton, 1 Atk. 381; Reynish *v.* Martin, 3 Atk. 330; Long *v.* Dennis, 4 Burr. 2052; Stackpole *v.* Beaumont, 3 Ves. 89, *s. c.* 3 R. R. 52; Latimer's case, Dyer, 596; Atkins *v.* Hiccocks, 1 Atk. 500; Morgan *v.* Morgan, 15 Jur. 319, 20 L. J. Ch. 109.

(*o*) Cro. El. 795.

1 The following cases contain examples of conditions precedent: Nevins *v.* Gourley, 97 Ill. 365; *s. c.* 95 Ill. 206; Marston *v.* Marston, 47 Maine, 495; Minot *v.* Prescott, 14 Mass. 495; Caw *v.* Robertson, 1 Seld. 125; Ely *v.* Ely, 20 N. J. Eq. 43; Reynolds *v.* Denman, id. 218; Campbell *v.* McDonald, 10 Watts, 179; Maddox *v.* Price, 17 Md. 413; Isaac *v.* West, 6 Rand. 652; Vaughan *v.* Vaughan, 30 Ala. 329; Davis *v.* Angel, 31 Beav. 223.

2 When a condition subsequent is followed by a gift over upon non-performance or other breach, it becomes a conditional limitation. 4 Kent, Com. 126. See Brattle Square Church *v.* Grant, 3 Gray, 142; Woodward *v.* Walling, 31 Iowa, 533; Hanna's Appeal, 31 Penn. St. 53; Fox *v.* Phelps, 20 Wend. 437. The practical difference following the estate is that the mere condition does not defeat the estate until entry by the party entitled upon the breach, *i. e.*, the heir in the case of a will; while in the case of a limitation over upon the breach, the limitation itself, in the absence of a different intention, defeats the prior conditional estate, as soon as the breach occurs. 4 Kent, Com. 126. Again, at common law only the heir in the case of a will can take advantage of a breach of condition (id. See Hooper *v.* Cummings, 45 Maine, 359; Bangor *v.* Warren, 34 Maine, 324); while, of course, a stranger can have the benefit (without entry) of a conditional limitation. Id.

But even a condition may, it seems, be such that a breach will alone, without entry, operate to defeat the estate, where the intention of the testator is sufficiently clear to that effect. See Woodward *v.* Walling, supra. In the absence of evidence of such an intention, a provision for the benefit of A. to be carried out by B., a devisee, is regarded as creating a trust or charge upon the land in his favor, rather than a limitation upon the estate devised. Id. Fox *v.* Phelps, 17 Wend. 393;

So, in Popham *v.* Bampfield (*p*), where one R. devised real estate to trustees for payment of debts, and, after his debts paid, then in trust for A. and his heirs male; but declared that A. should have no benefit of this devise, unless his father should settle upon him a

(*p*) 1 Vern. 79, 1 Eq. Ca. Ab. 108, pl. 2.

s. c. 20 Wend. 437; Woods *v.* Woods, 1 Busb. 290; Taft *v.* Morse, 4 Met. 523; Hanna's Appeal, 31 Penn. St. 53; Luckett *v.* White, 10 Gill & J. 480; Sands *v.* Champlin, 1 Story, 376; Ward *v.* Ward, 15 Pick. 511; Sheldon *v.* Purple, id. 528; Veasey *v.* Whitehouse, 10 N. H. 409, Jennings *v.* Jennings, 27 Ill. 518. See also Meakin *v.* Duvall, 43 Md. 372; Donnelly *v.* Edelen, 40 Md. 117.

Indeed, a provision imposing a burden upon the devisee B. in favor of A., such, for example, as that B. shall pay over to A. a certain portion of the valued amount of the property given him, or merely a certain sum "out of the estate," is treated as amounting only to a charge upon the estate, and not as a condition the breach of which will give the heir a right of entry. Fox *v.* Phelps, supra; Taft *v.* Morse, supra.

One of the consequences of this is, that the person for whom the burden is created has a remedy to enforce performance both against the devisee or legatee (Livingston *v.* Gordon, 84 N. Y. 136, vol. i. p. 390, note), and also against all terre-tenants who have purchased the estate with notice of the charge. Taft *v.* Morse, supra. (A mere charge is not a legal interest in the land; and hence, it is said, subsequent holders of the estate would not be liable without notice. Id. Nothing is said, however, of the need of notice to the purchaser in Meakin *v.* Duvall, 43 Md. 372, or in Donnelly *v.* Edelen, 40 Md. 117. The record of the will is sufficient notice.) What makes the requirement a charge in such a case, instead of a condition, is that the payment is to be made "out of the estate" devised. Taft *v.* Morse, supra; Gardner *v.* Gardner, 3 Mason, 178; *s. c.* 12 Wheat. 498. The intention of the testator in such a case is deemed to be to provide a security for the payment, but a security only, for nothing more is required.

Where, however, the testator has not provided a security for compelling the performance of the requirement, then to prevent a failure of his purpose it will be held that the provision amounts to a condition; thus giving a right of entry to the heir upon a breach. Taft *v.* Morse, supra. It is with this qualification that the rule is to be understood that if a man devise land to another ad faciendum or ea intentione that he should do a particular thing, or ad solvendum, this makes a good condition. Coke Litt. 204, 236; Crickmere's Case, Croke Eliz. 146; *s. c.* 1 Leon. 174; Boraston's Case, 3 Coke, 20; Portington's Case, 10 Coke, 41; Taft *v.* Morse, supra.

If the heir should refuse to enter, the remedy, it seems, would be against the devisee personally (to compel payment), to be pursued, according to the more common practice, in equity. Eland *v.* Eland, 1 Beav. 235; *s. c.* 4 Mylne & C. 420; Taft *v.* Morse, supra; Swasey *v.* Little, 7 Pick. 296; Fox *v.* Phelps, 20 Wend. 437, 443; or by an action ex contractu; Gridley *v.* Gridley, 24 N. Y. 130; Spraker *v.* Van Alstyne, 18 Wend. 200; Taft *v.* Morse; Swasey *v.* Little. Or perhaps equity would decree a sale of the property to make payment. Fox *v.* Phelps, supra.

The mere right, under the will, of an executor to sell upon breach by the devisee of the testator's requirement does not, it seems, make the devise technically an estate upon condition or a conditional limitation, if there be no direction that the estate shall vest in the heir or in the executor on default of the devisee. Hanna's Appeal, 31 Penn. St. 53. Indeed, the effect of the decision referred to is that such a right of sale, without further provision, is by implication inconsistent with a right of entry in the heir. Still, a right of that kind given the executor would no doubt suffice for the legatee in a case in which it was not, as to the legatee, virtually nullified, as it was in Hanna's Appeal, by other circumstances. See infra.

The foregoing remarks suppose of course a gift of realty. In the case of a gift of personalty to one who is simply required by the testator to pay a certain sum of money to another, without making the payment a charge or providing for a forfeiture or other penalty upon refusal, the remedy of the intended beneficiary must be confined to proceedings against the donee in personam, since there is no subject-matter for an entry. But there is another aspect of this subject. It sometimes happens that a devise is charged with the payment of legacies, and that there is also left by the testator with his executor a sufficiency of personal assets to pay the legacies. Now it is laid down that the rule even in such a case is that the personalty must, in the absence of evidence of a different intention, be treated as the fund out of which the legacies are to be paid; and it is further held that though such fund be misappropriated by the executor, the disappointed legatee cannot look to the land charged. Hanna's Appeal, 31 Penn. St. 53. The charge upon the land, in this view, appears to be created by way of caution merely, against a possible deficiency of personal assets. But of course this rule will give way to any clear manifestation of intention at variance with it, whether by express language that the land devised is to be treated as the primary fund for satisfying the legacies, or by providing for a forfeiture or a gift over on non-payment. Id. See further as to charging legacies upon land, post.

certain estate; and in default thereof, or if A. died without issue, then over. It was held that this was a condition subsequent, and was performed by the father *devising* his estate to the son.

So, in Peyton *v.* Bury (*q*), where one bequeathed the residue of his personal estate to S., provided she married with the consent of A. and B., his executors in trust, and if S. should marry otherwise, he bequeathed the said residuum to W. A. died; after which S. married without the consent of B. The M. R. observed, it was very clear that, in the nature of the thing, and according to the intention of the testator, this could not be a condition precedent; for, at that rate, the right to the residue might not have vested in any person whatever for twenty or thirty years after the testator's death, since both of the executors might have lived, and S. have continued so long unmarried, during all which time the right to the residue could not be said to be (beneficially) in the executors, they being expressly mentioned to be but executors in trust (*r*). Of this case Sir W. Grant ob-
[*846] served, that the bequest over showed what the testator * meant by making marriage with consent a condition in the previous gift, namely, that marriage without consent was to be a forfeiture (*s*). The case seems somewhat analogous in principle to those (*t*) in which a devise or bequest, if the object shall attain a certain age, with a gift over in case he shall die under that age, has been held to be immediately vested.

Cases of condition subsequent.

Again, in Page *v.* Hayward (*u*), where a testator devised lands to M. and the heirs male of her body, upon condition that she married and had issue male by a Searle; and, in default of both conditions he devised the lands to E. in the same manner, with remainders over: it was held that M. and E. took estates tail, which did not determine by marrying another person, inasmuch as they might survive their first husband, and marry a Searle. In this case the limitation was, in effect, and seems to have been regarded by the Court, as a devise in special tail to M. and E. successively, *i. e.*, to them, and the heirs male of their bodies, begotten by a Searle.

So, in Aislabie *v.* Rice (*x*), where a testator devised certain lands and furniture to H. and her assigns for her life, in case she continued unmarried; and, after her decease, he devised the lands and furniture to such persons as she should by deed or will appoint, and, for want of appointment, then over; but in case H. should marry in the lifetime of the testator's wife, and with her consent, or, after her death, with the consent of A. and B. or the survivor, then H. should enjoy

(*q*) 2 P. W. 626. See also Gulliver *v* Ashby, 4 Burr. 1929, stated post, p. 848.
(*r*) Nor would the intermediate beneficial interest have belonged to them if they had not. It would have gone in augmentation of the contingently disposed of residue.
(*s*) Knight *v.* Cameron, 14 Ves. 392.
(*t*) Ante, Vol. I., pp. 766, 767
(*u*) 2 Salk. 570.
(*x*) 3 Mad. 256.

the lands and furniture in the same manner as she would have done if she had continued unmarried. The testator's wife and A. and B. all died; after which H. married. She and her husband sold the property in question; and the purchaser objecting to the title, Sir W. Grant, M. R., sent a case to the Court of Common Pleas, on the question as to what estate H. took under the will. The Court certified that H. took an estate for life, with a power of appointment over the fee, subject, as to her life estate only, to the condition of her remaining sole and unmarried, which condition was qualified by the proviso, that a marriage with the consent of the persons mentioned should not determine her life estate; that the condition was a condition subsequent, and as the compliance with it was, by the deaths of those persons, become impossible by the act of God, her estate for life became absolute (*y*), and she might * execute the power. [*847] Sir J. Leach, V.-C., in conformity to this certificate, decreed a specific performance of the contract. The Court must, in this case, have considered the limitation as being, in effect, a devise of an entire estate for life, subject to the condition of marrying (if at all) with consent, which being rendered impracticable by the death of the persons whose consent was required, the estate became absolute; not (as the language would seem to imply) a devise of two distinct estates, the one to cease on marriage, under *any* circumstances, and the other to commence on marriage with consent.

Remark on Aislabie *v.* Rice.

Of course, where an interest is given to certain persons, with a direction that, on a prescribed event, as their marriage without consent, it shall be forfeited, such a direction operates merely to divest, and not to prevent the vesting of the interest so given (*z*). So where a rent-charge was given to A. for life, or as long as her conduct was discreet and approved by B., it was held, that the gift was vested and that the condition was subsequent (*a*). And a condition may be subsequent though the estate or interest which it is to defeat is contingent, and can in no case vest before the condition takes effect; for a contingent gift or interest has an existence capable, as well as a vested interest or estate, of being made to cease and become void (*b*).[1]

(*y*) As to this, see infra, p. 850.
(*z*) Lloyd *v.* Branton, 3 Mer. 108.
(*a*) Wynne *v.* Wynne, 2 M. & Gr. 8. See Webb *v.* Grace, 2 Phill. 701.
(*b*) Egerton *v.* Earl Brownlow, 4 H. L. Ca. 1. This case (which involved also a question of public policy) was decided by D. P., upon the advice of Lords Lyndhurst, Brougham, Truro, and St. Leonards, against the opinion of all but two of the Judges, and overruling the decision of Lord Cranworth, V.-C. (1 Sim. N. S. 464), who as L.-C. retained his original opinion.

[1] The following cases may be referred to as containing examples of conditions subsequent: Hooper *v.* Cummings, 45 Maine, 359; Thomas *v.* Record, 47 Maine, 500; Smith *v.* Jewett, 40 N. H. 530; Tilden *v.* Tilden, 13 Gray, 103; Hayden *v.* Stoughton, 5 Pick. 528; Brigham *v.* Shattuck, 10 Pick. 306; Hogeboom *v.* Hall, 24 Wend. 146; Jones *v.* Stites, 19 N. J. Eq. 324; Taylor *v.* Sutton, 15 Ga. 103; Kirkman *v.* Mason, 17 Ala. 134; Lindsey *v.* Lindsey, 45 Ind. 552; Calkins *v.* Smith, 41 Mich. 409; Jennings *v.* Jennings, 27 Ill. 518.

It would seem, from the preceding cases, that the argument in favor of the condition being precedent is stronger where a gross sum of money is to be raised out of land (*c*) than where it is a devise of the land itself; where a pecuniary legacy is given, than a residue (*d*); where the nature of the interest is such as to allow time for the performance of the act before its usufructuary enjoyment commences, than where not (*e*); where the condition is capable of being performed instanter, than where time is requisite for the performance (*f*); while, on the other hand, the circumstance of a definite time being appointed for the [*848] performance of the condition, but none for the vesting * of the estate, favors the supposition of its being a condition subsequent (*g*).[1]

Conclusions from the preceding cases.

II. — Period Allowed for performing Conditions. — It is often difficult, from the absence of declared intention on the point (*h*), to determine what is the period allowed for the performance of a condition; *i. e.*, whether the devisee is bound to perform the act within a convenient time after the vesting of the interest (*i*) or has his whole life for its performance.[2] One of these conclusions seems to be inevi-

Period allowed for performing conditions, whether within convenient time, or donee's whole life.

(*c*) Indeed, such cases seem to fall a fortiori under the principle of the cases (referred to ante, Vol. I. p. 792) in which such charges were held to fail, from the death of the devisee before the time of payment.

(*d*) Peyton *v.* Bury, 2 P. W. 626, ante, p. 845.

(*e*) Acherley *v.* Vernon, Willes, 153.

(*f*) Gulliver d. Corrie *v.* Ashby, 4 Burr. 1940.

(*g*) Thomas *v.* Howell, 1 Salk. 170, as to which, see infra, p. 850: and see per Lord Hardwicke, Avelyn *v.* Ward, 1 Ves. 422; Walker *v.* Walker, 2 D. F. & J. 255, 29 L. J. Ch. 856. See, however, Roundell *v.* Currer, 2 B. C. C. 67; Robinson *v.* Wheelwright, 6 D. M. & G. 535.

(*h*) Or from the ambiguity of the declaration. See, for instance, Langdale *v.* Briggs, 3 Sm. & Gif. 255, 8 D. M. & G. 391; Blagrove *v.* Bradshaw, 4 Drew. 230.

(*i*) This is generally requisite where another is prejudiced by delay. See n. (T 1), 1 Rep. 25 b.

[1] Duddy *v.* Gresham, 2 L. R., Ir. 442. This is especially true where, in addition to time, the consent and approval of others are required in order to carry out the condition. Id. Ball, C.

[2] Contrary to the dictum of Chief Justice Marshall, in Finlay *v.* King, 3 Peters, 346, 376, that, when no time for the performance of a condition is specified in the will, the party has his lifetime. Such appears to be the case only when it is the meaning of the will, either from construction of the language or from the nature of the condition. Clearly, where the condition is precedent (it was subsequent in Finlay *v.* King, though that would probably make no difference), performance must be made within a reasonable time, to be determined by the nature of the case. Drew *v.* Wakefield, 54 Maine, 291; Ward *v.* Patterson, 46 Penn. St. 372; Carter *v.* Carter, 14 Pick. 424; Ross *v.* Tremain, 2 Met. 495.

On the other hand, where time is prescribed for performance, the fact that the conditional devisee or legatee, being e. *g.*, abroad, did not know of the existence of the condition or of the will until the time had expired, gives him no further opportunity. Powell *v.* Rawle, L. R., 18 Eq. 243; Burgess *v.* Robinson, 3 Meriv. 7; In re Hodges's Legacy, L. R., 16 Eq. 92. See Stover's Appeal, 77 Penn. St. 282.

Forfeiture, however, does not necessarily follow unless there is a gift over upon non-performance of the condition. If there be no such disposition, the act, though made precedent by the will, may sometimes be performed afterwards, if a proper reason appear for its non-performance within the time prescribed. Hollinrake *v.* Lister, 1 Russ. 500, 508; Taylor *v.* Popham, 1 Brown, Ch. 167. But this is true only when equity can put the parties in the same situation as if the condition had been performed. Id. The common state-

table, for the nature of the case hardly admits of any other alternative. Page *v.* Hayward (*k*) is an instance of the devisee having his whole life for the performance of the condition; and in Gulliver *v.* Ashby (*l*), where a devise in tail was declared to be upon condition that the devisee assumed a certain name, Ashton, J., thought the devisee had his whole life for taking the name, and Lord Mansfield said that the Court would perhaps incline against the rigor of the forfeiture, though the condition remained unperformed three years after the estate devolved upon the devisee, when he suffered a common recovery, and though some of the expressions in the will certainly favored a more rigid construction; the testator's requisition being, that, whenever it should happen that the estate should come to any of the persons thereinbefore named (there being several successive limitations), the person or persons to whom the same should from *time to time descend or come, did and should "then" [*849] change, &c. But the point was not decided; the Court holding that the plaintiff, who was the next remainderman, was not entitled to take advantage of the breach, if there was one. If the estate was not divested at the time of the recovery, of course such recovery destroyed the condition; which leads us to observe, that to render effectual such conditions imposed upon tenants in tail, they should (so far as is practicable, consistently with the rule against perpetuities) be made to precede the vesting; for, if subsequent, whether accompanied by a devise over or not, they are, as we have seen, liable to be defeated by the act of the person to whose estate they are annexed (*m*). For this reason, Lord Mansfield thought that such a condition annexed to an estate tail could never be meant to be compulsory; and Yates, J., in the last case, said the condition could only operate as a recommendation or desire. But where a condition not to mow a

(*k*) 1 Salk. 570.

(*l*) 1 W. Bl. 607, 4 Burr. 1929. In Davies *v.* Lowndes, 2 Scott, 67, 1 Bing. N. C. 597, in the event of the testator's lawful heir not being found within a year after his decease, he devised certain lands to A., "upon condition he changes his name to S." A. did not change his name to S. within the year, but he did so after the date of a final decree in a suit in Chancery, which gave him the possession of the property; and this was adjudged sufficient. And see Bennett *v.* Bennett, 2 Dr. & Sm. 275.

As to what amounts to a compliance with particular requisitions, see Montague *v.* Beauclerk, 3 B. P. C. Toml. 277; Roe d. Sampson *v.* Down, 2 Chitty's Cas. t. Mansfield, 529; Doe d. Duke of Norfolk *v.* Hawke, 2 East, 481; Tanner *v.* Tebbitt, 2 Y. & C. C. C. 225; Ledward *v.* Hassells, 2 K. & J. 370; Priestly *v.* Holgate, 3 id. 286; Woods *v.* Townley, 11 Hare, 314. Whether neglect amounts to refusal, see 2 East, 487, and Lord Ellenborough's judgment in Doe d. Kenrick *v.* Lord Beauclerk, 11 East, 667; Re Conington's will, 6 Jur. N. S. 992. Condition that A. shall convey on the request of B.; if B. do not make the request in A.'s lifetime, the condition becomes impossible. Doe d. Davies *v.* Davies, 16 Q. B. 951. Option to purchase within one year after the death of tenant for life (who died before testator) held well exercised within one year after testator's death, Evans *v.* Stratford, 1 H. & M. 142.

(*m*) Page *v.* Hayward, 2 Salk. 570; Watson *v.* Earl of Lincoln, Amb. 328; Driver d. Edgar *v.* Edgar, Cowp. 379.

ment that conditions precedent must be strictly complied with to prevent a forfeiture (Nevins *v.* Gourley, 95 Ill. 206), is to be understood with that qualification. Hollinrake *v.* Lister, supra.

park was annexed to an estate *for life*, without any gift over on breach, the condition was enforced by injunction (*n*).

Conditions becoming incapable of performance.

III. — Conditions incapable of Performance. — Conditions precedent and subsequent differ considerably in regard to the effect of events rendering the performance of them impracticable.

If condition be precedent, estate never arises.

It is clear that where a condition *precedent* annexed to a devise of real estate or of a charge on realty becomes impossible to be performed, even though there be no default or laches on the part of the devisee himself, the devise fails (*o*).[1]

Thus where a testator (*p*), being seised in fee of certain lands, and of other lands for life, under the will of C., devised both estates to trustees, to be conveyed to other trustees, to the use of R. (who was tenant in tail next in remainder under the will) for life; remainder to his first and other sons in tail male, remainders over. The devise was upon express condition that R. should within six months suffer a recovery, and bar the remainders in C.'s will, and convey all her estates to such uses, &c., as were declared by his (testator's) will as to his own estates, *and no conveyance of his estates was to be made before R. had suffered the recovery;* and, in default of his suffering such recovery, to convey his (testator's) estates to other uses. [*850] He *also directed R. to take the name of C., and declared this to be a condition precedent to the vesting of his estate. R., on the testator's death, entered, and was preparing to suffer the recovery, when he died. Sir Ll. Kenyon, M. R., appeared to consider this to be in the nature of a condition precedent, and decreed that, the act directed by the testator not being done, the estates created by him never arose. In answer to the argument that there was scarcely an opportunity, and that there was no neglect, and that if it was prevented by the act of God, it should be held as done, his Honor said that there were many cases where the act is rendered impossible to be done, and yet the estate should not vest; as an estate given to A. on condition that he shall enfeoff B. of Whiteacre, and B. refuses to accept, the estate would not vest in A.

So, in Boyce *v.* Boyce (*q*), where a testator devised his houses to trustees, in trust to convey to his daughter M. such one of the houses as she should choose, and to convey and assure all the others which

(*n*) Blagrave *v.* Blagrave, 1 De G. & S. 252.
(*o*) Co. Lit. 206 b.
(*p*) Roundel *v.* Currer, 2 B. C. C. 67; 1 Swanst. 383, n. See also Bertie *v.* Falkland, 3 Ch. Cas, 129, 2 Vern. 340, 1 Eq. Ca. Ab. 110, pl. 10; Robinson *v.* Wheelwright, 6 D. M. & G. 535; Earl of Shrewsbury *v.* Scott, 29 L. J. (C. P.) 34, 6 Jur. N. S. 452, 472.
(*q*) 16 Sim. 476. See also Philpott *v.* St. George's Hospital, 21 Beav. 134.

[1] And in general the fact that the beneficiary-on-condition is not at fault for non-performance of the condition makes no difference. Johnson *v.* Warren, 74 Mich. 491.

M. should not choose to his daughter C.; M. died in the testator's lifetime, and Sir D. Shadwell, V.-C., considering the gift to C. to be of those houses that should remain *provided* M. should choose one of them (*r*), held that the condition having become impossible by M.'s death, the gift to C. failed.

If condition subsequent is incapable of performance, estate becomes absolute.

On the other hand, it is clear that if performance of a condition *subsequent* be rendered impossible,[1] the estate to which it is annexed whether in land or money legacies becomes by that event absolute.

Thus, in Thomas *v.* Howell (*s*), where one devised to his eldest daughter, on condition that she should marry his nephew on or before she attained the age of twenty-one years. The nephew died young; and after his death, the devisee, being then under twenty-one, married another. It was held, that the condition was not broken, its performance having become impossible by the act of God. It is not, indeed, expressly stated in this case that the Court held the condition to be subsequent; but, as it seems fairly to bear that construction, and the decision would otherwise stand opposed to the doctrine under consideration, it may reasonably be inferred that such was the opinion of the Court.

This rule has been often laid down in very general terms, [*851] *sufficient, indeed, to include a case where the property is given over on non-performance: and Graydon *v.* Hicks (*t*) might seem to countenance its application even to such a case. A testator there gave 1,000*l.* to his only daughter M. to be paid at her age of twenty-one, or day of marriage, provided she married with the consent of his executors; but, in case she died before the money became payable upon the conditions aforesaid, then he gave the same over. The executors died. M. afterwards married; and Lord Hardwicke held that, notwithstanding the gift over, the death of the persons whose consent was necessary relieved her from the restriction.

Distinction suggested where there is a gift over.

It does not appear whether the claimant had reached the age of twenty-one: but it will be observed that marriage with consent was not the only condition on which the legacy was to be payable (*u*); it only accelerated the payment; so that it was impossible for the Court to declare, as was asked, that the legacy was forfeited by marriage without consent. This

Remarks on Graydon *v.* Hicks.

(*r*) As to this part of the decision, see ante, Vol. I., p. 335.
(*s*) 1 Salk. 170. See also Aislabie *v.* Rice, 3 Madd. 256, 2 J. B. Moo. 358; Burchett *v.* Woolward, T. & R. 442; Walker *v* Walker, 2 D. F. & J. 255, 29 L. J. Ch. 856 (legacy).
(*t*) 2 Atk. 16. Also Peyton *v.* Bury, 2 P. W. 626; but see infra.
(*u*) See King *v.* Withers, 1 Eq. Ca. Ab. 112, pl. 10.

[1] As by the death, in the lifetime of the testator, of the person who was, after the testator's death, to perform the subsequent condition. Parker *v.* Parker, 123 Mass. 584; Merrill *v.* Emery, 10 Pick. 507, 511; Collett *v.* Collett, 35 Beav. 312. See 4 Kent, Com. 130.

case, therefore, leaves the question untouched (*x*). However, the point was decided in Collett *v.* Collett (*y*), where a testator gave a share of his real and personal estate to his daughter, her heirs, executors, &c., and declared that it should become payable at her age of twenty-one or day of marriage, provided such marriage should be with the consent of his wife; but in [*852] case of *the daughter's death "without having attained twenty-one or been *so* married" then over. The wife died; after which the daughter married, and was still under age. Lord Romilly said the question depended on whether the condition requiring consent was precedent or subsequent. He thought it was subsequent; that the death of the wife having made it impossible, compliance was dispensed with; and that the gift over (in which he read "or" as "and") did not take effect. A doubt had been expressed (he said) whether, in the case of a gift over, the gift over would not take effect if the condition, though a condition subsequent, were not specifically performed, whatever might be the reason of the failure. But he thought Graydon *v.* Hicks was an authority to show that the gift over would not take effect if the performance of the condition had become impossible by the act of God. He thought this was "the proper conclusion to be drawn from the cases which decided that, where the performance of the condition in toto had not taken place because the performance of a portion of the condition had become impossible through no act or default of the person who had to perform it, the performance of that portion of the condition would be dispensed with." He therefore ordered the property to be transferred to the trustees of the daughter's settlement (made under 18 & 19 Vict. c. 43), although she had not attained twenty-one.

The distinction rejected.

So, where the condition is impossible in its creation, as, to go to

(*x*) The reasons for the distinction were thus stated in 1st ed. Where property is devised to a person, with a proviso divesting his estate in favor of another, if he (the first devisee) do not marry A., or do not enfeoff A. of Whiteacre, within a given period, and A in the mean time dies, or refuses to marry the devisee, or be enfeoffed of Whiteacre, these are contingencies inseparably incident to such a condition, and may therefore be supposed to have been in the testator's contemplation when he imposed it; and having said that the estate shall be divested in case the act be not performed (not merely on its not being *attempted* to be performed) he is presumed to mean that it shall be divested if the act, under whatever circumstances, is not performed though it may have been rendered impracticable by events over which the devisee has no control. But it may be said that this reasoning applies to *all* cases of conditions subsequent, as well as those which are *not*, as those which *are*, accompanied by a gift over; and that, in regard to the former, the doctrine in question is fully established. The stronger argument, therefore, in favor of the distinction suggested, because it is applicable exclusively to the latter class of cases, is, that where there is a devise over on non-performance, the Court, by making the estate of the first devisee absolute, would *take the property from the substituted devisee in an event in which the testator has given it to him.* If the gift had been simply to B., in case A. do not marry C., or enfeoff C. of Whiteacre, it could not have been maintained for an instant that B.'s estate did not arise, in the event of the death or refusal of C.; and why should the result be different because A. happens to be the prior devisee? There seems to be no solid ground for treating with such unequal regard these respective objects of the testator's bounty: and the cases on marriage conditions afford (as we shall presently see) abundance of authority for the principle which ascribes this kind of efficiency to a bequest over.

(*y*) 35 Beav. 312.

Rome in a day; or illegal, as to kill a man, or to convey land to a charity;[1] or necessitates the omission of a duty; if the condition is precedent, the devise, being of real estate, is itself void (*z*); if the condition is subsequent, the devise, whether of real or personal estate, is absolute (*a*).

Conditions impossible ab initio or illegal.

But with respect to legacies out of personal estate, the civil law, which in this respect has been adopted by Courts of Equity differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible (*b*), or is made so by the act or default of the testator (*c*), or is illegal as *involving malum prohibitum (*d*), [*853] the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest (*e*), or its impossibility was unknown to the testator (*f*), or the condition which was possible in its creation has since become impossible by the act of God (*g*), or where it is illegal as involving malum in se, in these cases the civil agrees with the common law in holding both gift and condition void (*h*).

Distinctions in case of personal bequest.

Where a legacy is charged both on the real and personal estate, it will, so far as it is payable out of each species of property, be governed by the rules applicable to that species (*i*).

Rule where legacy comes out of both realty and personalty.

Conditions subsequent which are intended to defeat a vested estate or interest, are always construed strictly, and must therefore be so expressed as not to leave any doubt of the precise contingency intended to be provided for. This is a clearly established rule which we have already seen il-

Conditions subsequent are construed strictly.

(*z*) Shep. Touch. 132, 133.

(*a*) Shep. Touch. 132, 133; Co. Lit. 206; Mitchell *v.* Reynolds, 2 P. W. 189; Poor *v.* Mial, 6 Mad. 32 (charity); and the following cases on provisions for separation of husband and wife: — Cartwright *v.* Cartwright, 3 D. M. & G. 982; H *v.* W., 3 K. & J. 382, Bean *v.* Griffiths, 1 Jur. N. S. 1045; Wren *v.* Bradley, 2 De G. & S. 49; Wilkinson *v.* Wilkinson, L. R., 12 Eq. 604. In Shewell *v.* Dwarris, Johns. 172, the condition was upheld on the ground that it had regard only to the state of circumstances at the testator's death and therefore could have no influence on future conduct.

(*b*) 1 Ed. 115, 116; 1 Wils. 160.

(*c*) Darley *v.* Langworthy, 3 B. P. C. Toml. 359; Gath *v.* Burton, 1 Beav. 478.

(*d*) Brown *v.* Peck, 1 Ed. 140; Harvey *v.* Aston, Com. Rep. 738; Wren *v.* Bradley, 2 De G. & S. 49. See Re Moore, Traffard *v.* Machonochie, 39 Ch. D. 128, as to the distinction between gifts on condition of this nature, which condition may be rejected, and gifts by limitation in a way not permitted by law, which are absolutely void.

(*e*) Wms. Exec. 6th ed. p. 1174; Rishton *v.* Cobb, 5 My. & C. 145.

(*f*) 1 Swinb. pt. iv., s. vi., pl. 8, 9.

(*g*) 1 Swinb. pt. iv., s. vi., pl. 14; Lowther *v.* Cavendish, 1 Ed. 99; 1 Rop. Leg. 755, 4th ed. Priestly *v.* Holgate, 3 K. & J. 286.

(*h*) 1 Swinb pt. iv., s. vi., pl. 16.

(*i*) 3 Atk. 335.

[1] Or that a woman shall not live with her husband; such a condition being void on grounds of public policy. Conrad *v.* Long, 33 Mich. 78. But a provision in favor of one in the event of becoming lawfully separated from her husband is held valid. Born *v.* Horstman, 80 Cal. 452 (citing Thayer *v.* Spear, 58 Vt. 327, and distinguishing Brown *v.* Peck, 1 Eden, 140; Wren *v.* Bradley, 2 De G. & S. 49; Conrad *v.* Long, supra).

lustrated in a former chapter(*k*) ; it will suffice here to refer to some of the later cases, in which it has been asserted and followed(*l*).[1]

Here it may be observed, that where the devisee, on whom a condition affecting real estate is imposed, is also the heir-at-law of the testator, it is incumbent on any person who would take advantage of the condition, to give him notice thereof ; for as he has independently of the will, a title by descent, it is not necessarily to be presumed, from his entry on the land, that he is cognizant of the condition (*m*) ; and the fact of notice must be proved ; it will not be inferred (*n*). It is otherwise where the devisee is a stranger ; for as he claims only under the will, he must comply with its provisions, and ignorance of them however * arising is no excuse for non-compliance. And in the case of personalty non-performance of a condition, through ignorance of its existence, always works a forfeiture(*o*).

Devisee, if heir of the testator, must have notice of the condition.

[*854]

IV.—Of Conditions void for Repugnancy, generally.—Conditions that are repugnant to the estate to which they are annexed, are absolutely void.[2] Thus, if a testator, after

Repugnant conditions.

(*k*) Vol. I., p. 784.

(*l*) Clavering *v.* Ellison, 3 Drew. 451, 7 H. L. Ca. 707; Kiallmark *v.* Kiallmark, 26 L. J. Ch. 1; Bean *v.* Griffiths, 1 Jur. N. S. 1045, Langdale *v.* Briggs, 8 D. M. & G. 429, 430; Hervey-Bathurst *v.* Stanley, 4 Ch. D. 272. And see post, pp. 859, 860. It is essential to the validity of such conditions that they should be so framed as to render it capable of ascertainment at any given moment of time whether the condition has or has not taken effect: see Re Viscount Exmouth, Viscount Exmouth *v.* Praed, 23 Ch. D. 158. Where a testator gave an annuity to his wife "yearly during her life" so long as she and his son should live together, Bacon, V.-C., held that the annuity did not cease by the death of the son, Sutcliffe *v.* Richardson, L. R., 13 Eq. 606. See also post, p. 901.

(*m*) Doe d. Kenrick *v.* Lord Beauclerk, 11 East, 667.

(*n*) Doe d. Taylor *v.* Crisp, 8 Ad & El. 778.

(*o*) Lady Fry's case, 1 Vent. 199: Burgess *v.* Robinson, 3 Mer. 7; Carter *v.* Carter, 3 K. & J. 618; Re Hodges' Legacy, L. R., 16 Eq. 92; Powell *v.* Rawle, L. R., 18 Eq. 243; Astley *v.* E. of Essex, id. 290. It has been decided, that where there is a testamentary gift to such members of a class as shall claim within a specified time, a general decree for the administration of the estate before the time specified is equivalent to a claim by the legatees, though they may not be parties to the suit, Franco *v.* Alvares, 3 Atk. 342, Tollner *v.* Marriott, 4 Sim. 19. But it has been held by North, J., that this rule does not apply to an order for limited administration made on summons, Re Hartley, Steeman *v.* Dunster, 34 Ch. D. 742.

[1] Duddy *v.* Gresham, 2 L. R., Ir. 442, 471; Clavering *v.* Ellison, 3 Drew. 451; Egerton *v.* Brownlow, 7 H. L. Cas. 721. The condition must be such that the courts can see from the beginning, precisely and distinctly, upon the happening of what event it is that the vested estate is to determine. Lord Cranworth in Egerton *v.* Brownlow, supra. So, also, when a prior estate is vested by a devise, but subject to be divested on the happening of a contingency, the event must take place literally or the prior estate will not be divested. Illinois Land Co. *v.* Bonner, 75 Ill. 315.

[2] Friedman *v.* Steiner, 107 Ill. 125; Birmingham *v.* Lesan, 76 Maine, 482; *s. c.* 77 Maine, 494; Moore *v.* Sanders, 15 S. C. 440; See the notes of the American editor in chap. 12, Vol. I. pp. 326, 378. See also chap. 15. But while special provisions or conditions will not in ordinary cases avail to take away from an estate qualities which the law attaches to it, still provisions may be operative to carry out a similar purpose when they are framed as limitations to the estate; thus serving to show that what without them might be a larger estate was intended to be a smaller interest. Sheet's Estate, 52 Penn. St. 257; Urich *v.* Merkel, 81 Penn. St. 332. Thus a condition against alienating an estate clearly and fully given is, as will be seen on the next page, repugnant to the estate; but an estate may be given (*i. e.* limited) until an attempt shall be made to alien it, and then over. Lear *v.* Leggett, 1 Russ. & M. 690; Ex parte Eyston, 7 Ch. D. 145; Pace *v.* Pace, 63 N. Car. 119; Dick *v.* Pitchford, 1 Dev. & B. Eq. 480; Mebane *v.* Mebane, 4 Ired. Eq. 131. See Sparhawk *v.* Cloon, 125 Mass. 263, 266; post, p. 866.

giving an estate in fee, proceeds to qualify the devise by a proviso or condition,[1] which is of such a nature as to be incomparable with the absolute dominion and ownership, the condition is nugatory, and the estate absolute.[2] Such would, it is clear, be the fate of any clause providing that the land should forever thereafter be let at a definite rent (*p*), or be cultivated in a certain manner, or be kept vacant and unoccupied (*q*); this being an attempt to control and abridge the exercise of those rights of enjoyment which are inseparably incident to the absolute ownership. But, of course, a direction that the rents of the *existing* tenants should not be raised, or * that [*855] certain persons should be continued in the occupation (*r*), would be valid; as this merely creates a reservation or exception out of the devise in favor of those individuals. So, if there be a devise in fee upon condition that the wife shall not be endowed, or the husband be tenant by the curtesy, the condition is void, because repugnant to the estate devised (*s*). And it was said by Lord Hardwicke, that a gift over in case devisee in fee or in tail should commit treason within a given number of years, would be void as abrogating the law (*t*).

(*p*) Att.-Gen. *v.* Catherine Hall, Jac. 395; Att.-Gen. *v.* Greenhill, 33 Beav. 193. To this principle, it is conceived, may be referred the case of Inskip *v.* Lade, in Chancery, 16th June, 1741, 1 W. Bl. 428, Amb. 479, Butler's n. to Fearne, C. R. 530, where Sir John Lade, by will dated the 17th August, 1739, devised all his real estate to trustees, their heirs and assigns, to the use of his cousin John Inskip for life, with remainder to the use of the trustees for the life of John Inskip to preserve contingent remainders, with remainder to the use of the first and other sons of John Inskip in tail male, with remainder to the use of several other persons and their issue, in strict settlement, in like manner; and the testator directed, that while John Inskip should be under the age of twenty-six, *and so often and during such time as the person for the time being, in case he had not otherwise directed, would, by virtue of his will, have been entitled to the said devised premises, or the trust thereof, as tenant for life in his own right, or tenant in tail male, should be severally under the age of twenty-six years*, his said trustees should enter upon the same premises, and receive the rents and profits thereof, and should thereout maintain the person under age, and accumulate the residue, and invest the accumulations in purchasing other land to be settled to the same uses. On the 14th of November, 1760, Lord Northington sent a case to the Court of K. B., with the question, whether upon the death of John Inskip the cousin, leaving his eldest son under the age of twenty-six, the trustees took any and what estate under the proviso. The answer of the judges was in the negative; and their certificate was confirmed by the L. C.

It does not appear what was the precise ground of the decision — whether the proviso was adjudged to be invalid, as being repugnant to the several estates conferred by the devise, or as being obnoxious to the rule against perpetuities: on either ground, it seems open to exception: but the latter appears to be the true ground, see Butler's n. cited above.

(*q*) Brown *v.* Burdett, 21 Ch. D. 667.

(*r*) Tibbetts *v.* Tibbetts, 19 Ves. 656.

(*s*) Portington's case, 10 Rep. 36; Mildmay's case, 6 id. 40 a.

(*t*) Carte *v.* Carte, 3 Atk. 180. As to forfeiture for treason, see Vol. I., p. 45.

[1] So of a gift in remainder after an estate in fee. Ramsdell *v.* Ramsdell, 21 Maine, 288; Rona *v.* Meier, 47 Iowa, 607; McRae *v.* Means, 34 Ala. 349; Jackson *v.* Robins, 16 Johns. 537; Ide *v.* Ide, 5 Mass. 500; Pickering *v.* Langdon, 22 Maine, 413; McKenzie's Appeal, 41 Conn. 607; Harris *v.* Knapp, 21 Pick. 412; Homer *v.* Shelton, 2 Met. 194; Lynde *v.* Esterbrook, 7 Allen, 68; Fiske *v.* Cobb, 6 Gray, 144; Burbank *v.* Whitney, 24 Pick. 146.

[2] A gift expressed to be for the common good, as to a town for educational purposes, may be attended by a repugnant condition in that the testator has attempted to exclude certain designated persons and their descendants from participation in the advantages of the bounty. Nourse *v.* Merriam, 8 Cush. 11. Such a condition would be void not merely on the ground of the practical difficulty in the way of carrying it out, but also and chiefly, it is said, because it strikes at the equality upon which citizenship rests and upon which the gift itself is made. Id. (The condition in the particular case cited seems to have been void on grounds of public policy, rather than of repugnancy.)

Where a testator devised real estate to his son and his heirs and then declared that, in case his son should die without leaving lawful issue, then the estate should go over to the son's heir-at-law to whom he gave and devised the same accordingly: it was held by the Court of Appeal that the contingency referred to death at any time, and that the son took an absolute estate in fee simple (*u*). In another case, a devise over on a similar contingency, with a prohibition against alienation, was rejected, as being an attempt to abridge the estate in fee simple by altering the course of its devolution (*x*).

Devise in fee with gift over on death without issue.

So, where a testator bequeathed the residue of his personal estate absolutely, with a direction that it should not be delivered to him till the completion of his twenty-fifth year, it was held that the son was entitled to payment on attaining twenty-one, the direction being rejected as repugnant to the enjoyment of a vested interest (*y*).

Condition postponing enjoyment of vested interest beyond twenty-one.

V. — Conditions restrictive of Alienation. — A power of alienation is necessarily and inseparably incidental to an estate in fee. If, therefore, lands be devised to A. and his heirs, upon condition that he shall not alien (*z*),[1] or charge them with any annuity (*a*), the condition is void. And a condition restraining the devisee from aliening by any particular mode of assurance is bad. Thus, where (*b*) a [*856] testator devised lands to A and his heirs forever, *and in case he offered to mortgage or suffer a fine or recovery of the whole or any part, then to B. and his heirs: it was held, that A. took an absolute estate in fee, without being liable to be affected by his mortgaging, levying a fine, or suffering a recovery. And a condition

General restraint on alienation by devisee in fee is void.

So of alienation in specified mode.

(*u*) Re Parry and Daggs, 31 Ch. D. 130.
(*x*) Corbett *v.* Corbett, 13 P. D. 136, 140; *s. c.* aff. 14 P. D. 7.
(*y*) Rocke *v.* Rocke, 9 Beav. 66; see Re Young's Settlement, 18 Beav. 499; Re Jacob's Wills, 29 Beav. 402; Gosling *v.* Gosling, Johns. 265. See post, pp. 1017, 1018.
(*z*) Co. Lit. 206 b, 223 a. The rule applies equally to legal and equitable estates, see Corbett *v.* Corbett, 14 P. D. 7. See also Re Dugdale, Dugdale *v.* Dugdale, 38 Ch. D. 176, in which case Kay, J., discussed the authorities on the question of conditional limitations in restraint of alienation.
(*a*) Willis *v.* Hiscox, 4 My. & C. 201.
(*b*) Ware *v.* Cann, 10 B. & Cr. 433.

1 Conger *v.* Lowe, 124 Ind. 368 (citing Allen *v.* Craft, 109 Ind. 476; McCleary *v.* Ellis, 54 Iowa, 311); Bennett *v.* Chapin, 77 Mich. 527; Mandlebaum *v.* McDonell, 29 Mich. 78; Oxley *v.* Lane, 35 N. Y. 345; Norris *v.* Beyea, 3 Kern. 273; Relfsnyder *v.* Hunter, 19 Penn. St. 41; Walker *v.* Vincent id. 369; Yard's Appeal, 64 Penn. St. 95; Karken's Appeal, 60 Penn. St. 141; Sheets's Estate, 52 Penn. St. 257; Gleason *v.* Fayerweather, 4 Gray, 348; Blackstone Bank *v.* Davis, 21 Pick. 42; Lane *v.* Lane, 8 Allen, 350; Jones *v.* Bacon, 68 Maine, 34; Williams *v.* Williams, 73 Cal. 99; Norris *v.* Hensley, 27 Cal., 439; Pace *v.* Pace, 73 N. Car. 119. See also Claflin *v.* Claflin, 149 Mass. 19; Hageman *v.* Hageman, 129 Ill. 164. A restriction against a division of property between co-devisees is a restriction upon alienation, and therefore is invalid. Lovett *v.* Gillender, 35 N. Y. 617; Oxley *v.* Lane, id. 340, 346. See Lane *v.* Lane, 8 Allen, 350. When the restriction is personal, it has no force as against subsequent holders, though it should be deemed valid as to the first taker. McKinster *v.* Smith, 27 Conn. 628.

not to alien except by way of exchange or for reinvesting in other land is equally bad (*c*).

So, if lands be devised to A. and his heirs, with a gift over if he die intestate, or shall not part with the property in his lifetime, the gift over is repugnant and void; since, in the first case, it would not only defeat the rule of law which says, that upon the death intestate of an owner in fee simple his property shall go to his heir-at-law, but also deprive him of the power of alienation by act inter vivos; and, in the second case, it would take away the testamentary power from an owner in fee (*d*).[1] And if the devised interest is transmissible, it is immaterial that it is contingent: the gift over on death intestate is still void (*e*).

Gift over if devisee dies intestate or without selling is void.

If, in the case put, A. dies in the testator's lifetime, so that the devise to him lapses, the land is undisposed of (*f*). This position has, indeed, been questioned by a learned judge (*g*), on the ground that there can be no repugnance where the original gift never took effect at all. It is submitted, however, that the position is defensible in law. It is difficult indeed to apply such a gift over to the period antecedent to the testator's death, or to suppose that he intended it to be so applied; since until after the testator's death, A. can neither devise the land, nor, in any proper sense of the condition, die intestate of it: compliance and non-compliance are both equally out of his reach (*h*). But assuming that the gift over is applicable to the period before as well as to the period after the testator's death, the limitation * must, to support the learned judge's view, be split up and [*857] remodelled so as to introduce, first, an alternative gift to take

Whether the rule holds where the devisee dies before testator.

(*c*) Hood *v.* Oglander, 34 Beav. 513.

(*d*) Holmes *v.* Godson, 8 D. M. & G. 152; Gulliver *v.* Vaux, Serj. Hill's MSS. in Linc. Inn Library, lib. x., fo. 282, to the same effect, cited in Holmes *v.* Godson; Barton *v.* Barton, 3 K & J. 512; Shaw *v.* Ford, 7 Ch. D. 669. Real and personal estate are for this purpose classed together, Co. Lit. 223 a; Metcalfe *v.* Metcalfe, 43 Ch. D. 633, 639. Doe d. Stevenson *v.* Glover, 1 C. B. 448, must be treated as overruled.

(*e*) Barton *v.* Barton, 3 K. & J. 516, per Wood, V.-C.

(*f*) Hughes *v.* Ellis, 20 Beav. 193 (personalty); Greated *v.* Greated, 26 Beav. 621.

(*g*) James, L. J., Re Stringer's Estate, 6 Ch. D. 15. Baggallay and Bramwell, L. JJ., were silent on this point. Jessel, M. R., had followed Hughes *v.* Ellis, without full argument, but without any inclination to differ from it, 6 Ch. D. 7. On appeal, it became unnecessary to decide the point, because the court spelt out of the context an alternative gift, by implication, in the event of the devisee dying before the testator, as well as a gift over in the event of his surviving him, but not disposing of the devised estate.

(*h*) If the original donee is the testator's wife (as in Hughes *v.* Ellis) who, if she dies before him, necessarily dies altogether intestate — this is an additional and distinct, but (it is submitted) not an essential, reason, against such an application of the gift over.

[1] Sir George Jessel, M. R., has said that while a man could direct his property to go according to any series of limitations, he could not create a new mode of devolution by operation of law. Thus, in the case of a gift in fee, the donor could not say that in the event of the donee dying intestate, the estate should descend not to his eldest but to his youngest son. In re Wilcock's Settlement, 1 Ch. D. 229. See to the same effect Ross *v.* Ross, 1 Jac. & W. 154; Holmes *v.* Gibson, 8 De G. M. & G. 152, 165; Hill *v.* Downes, 125 Mass. 509, 512. But it may appear, upon a proper construction of the will, that the testator has by sufficiently appropriate language so limited the estate in question that the clause, though inconsistent with expressions literally interpreted concerning the estate, is not out of harmony with it; in which case the clause is of course good, upon the principle that the testator's intention must prevail when not contrary to law. See Hill *v.* Downes, supra.

effect if the original gift never vests, *i. e.* if A. dies before the testators; and, secondly, an executory gift to take effect in defeasance of the original gift after the latter has vested. To such a process the case of Andrew *v.* Andrew (*i*) seems in principle to be strongly opposed. In that case a testator bequeathed consumable articles to his sister for her life, or so long as she should remain unmarried, "in either events then to go over to" A. The sister married in the testator's lifetime. It was held by Sir J. K. Bruce, V.-C., that the gift over was void. There was no express reference, he observed, to the happening of any event in the testator's lifetime: the testator meant death or marriage whensoever happening, not death or marriage happening only in his lifetime. "The words were intended to operate by way of remainder. It is a gift to her so long as she shall be living unmarried, and then over. Now the gift of consumable articles to a woman so long as she shall be living unmarried is the gift of an absolute interest (*j*). The gift over, therefore, is void, nor rendered valid by the circumstance of the legatee having survived the testator and married in his lifetime."

Similarly, a condition that a devisee in fee if he desires to sell shall offer the estate to a particular person at a fixed price below its full value is wholly void as being repugnant to the devise. So, where (*k*) a testator devised his real estates to his son in fee, provided always, that if his said son, his heirs, or devisees, or any person claiming through or under him or them, should desire to sell the estates or any parts thereof in the lifetime of the testator's wife, she should have the option to purchase the same at the price of 3,000*l.* for the whole, and a proportionate price for any part or parts thereof, and the same should accordingly be first offered to her at such price or proportionate price or prices: it was admitted in the special case that the value of the estates was at the date of the will, and the time of the testator's death, 15,000*l.* and upwards: it was held by Sir J. Pearson, J., that the condition was in effect an absolute restraint on sale during the life of the widow; that, notwithstanding the limitation in point of time, the restraint was repugnant to the devise, and void accordingly; and that the son was entitled to sell the estates as he pleased without first offering them to the widow at the price named in the will.

Condition to offer estate to a particular person at a fixed price.

[*858] *But such a partial restraint on the disposing power of a tenant in fee may be imposed, as that he shall not alien to such a one, or to the heirs of such a one,[1] or that he shall not alien in mortmain (*l*).

Restraints on alienation by devisees in fee, how far valid.

It appears too that a condition imposed on a devisee in

(*i*) 1 Coll. 690.
(*j*) Vide Ch. XXVI. ad fin.
(*k*) Re Rosher, Rosher *v.* Rosher, 26 Ch. D. 801.
(*l*) Co. Lit. 223 a. As to Ludlow *v.* Bunbury, 35 Beav. 36, qu.

[1] Crawford *v.* Thompson, 91 Ind. 266; Langdon *v.* Ingram, 28 Ind. 360; McWilliams *v.* Nisly, 2 Serg. & R. 507, 513.

fee not to alien except to particular persons is good. Thus, where (*m*) a testator devised to his two daughters A. and H. his lands in the county of Y. (subject to some legacies), to hold to them, their heirs and assigns, as tenants in common, "upon this special proviso and condition," that in case his said daughters, or either of them, should have no lawful issue, that then, and in such case, they or she, having no lawful issue as aforesaid, should have no power to dispose of her share in the said estates so above given to them, *except to her sister or sisters, or to their children;* and the testator devised the residue of his real estate to his said two daughters in fee. A. married W., and levied a fine of her moiety, declaring the uses in trust for W. in fee, and died without having had any issue. It was held, that this occasioned a forfeiture entitling the heir to enter. Lord Ellenborough — "We think that the condition is good; for, according to the case of Daniel *v.* Ubley (*n*), though the judges did not agree as to the effect of a devise 'to a wife, to dispose at her will and pleasure, and to give to which of her sons she pleased;' Jones, J., thinking it gave an estate for life, with a *power* to dispose of the reversion among the sons; the other Judges, according to his report, thinking it gave her a fee simple in trust to convey to any of her sons; yet, in that case, it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and, if she did not, that the heir might enter for the condition broken; which estate Jones thought the devise gave, if it did not give a life estate with a power of disposing of the reversion among the sons. And Dodderidge said (*o*), 'he conceived she had the fee, with condition, that if she did alien, that then she should alien to one of her children;' and concluded his argument on this point, by saying, that 'her estate was a fee, with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons.' And there is a case (*p*) to this effect: 'A devise to a *wife to dispose and [*859] employ the land on herself and her sons at her will and pleasure:' and Dier and Walsh held she had a fee simple, but that it was conditional, and that she could not give it to a stranger; but that she might hold it herself, or give to one of her sons."

Condition not to alien *but* to a particular class held good.

But the limit within which a restraint of this nature is good, is shown by Muschamp *v.* Bluet (*q*), where it was held, that a condition not to alienate to any but J. S., imposed on a devisee in fee simple, was void:[1] "for," it was said, "to restrain generally, and that he shall alien to none but J. S., is all one; for then feoffor may restrain from aliening to

Condition to alien to none but A., bad; Muschamp *v.* Bluet.

(*m*) Doe d. Gill *v.* Pearson, 6 East, 173.
(*n*) Sir W. Jones, 137, Latch, 9, 39, 134.
(*o*) Latch, 37.
(*p*) Dalison, 58.
(*q*) J. Bridgm. 132, 137.

[1] Schermerlorn *v.* Negus, 1 Denio, 448.

any but himself, or such other person *by name* whom he *may* well know cannot nor never will purchase. . . . Neither is there any authority to warrant this restraint, for Littleton leaves the feoffee at liberty to alien to any but J. S."

Attwater *v.* Attwater.

In Attwater *v.* Attwater (*r*), Sir J. Romilly held that this principle was applicable to a devise of land to A. in fee subject to "an injunction never to sell it out of the family, but if sold at all it must be to one of A.'s brothers *hereafter named*," and that "notwithstanding Doe *v.* Pearson," the condition was void.

Attwater *v.* Attwater questioned.

There is certainly a distinction between a case like Doe *v.* Pearson, where alienation is restricted to an unascertained class, and one like Attwater *v.* Attwater, where it is restricted to named or ascertained persons; for in the latter case all might be selected paupers. But though the condition in Daniel *v.* Ubley was of the latter kind ("to dispose of to such of *my* sons as she thinks best"), the judges took no objection to it, as a condition, on that ground; and in Re Macleay (*s*), Sir G. Jessel, M. R., while apparently approving of the principle of Muschamp *v.* Bluet (since you might not do that indirectly which you might not do directly), dissented from his predecessor's application of it. According to the old books, he said, the test was whether the condition took away the *whole* power of alienation *substantially*. The condition before him (viz. "not to sell out of the family") did not do so; for it permitted of a sale (*t*), not to one person only, [*860] but to a class, many of whom were named in the will; it *was probably a large class, and was certainly not small: the restriction was therefore limited, and consequently valid.

Re Macleay.

Restraint on alienation limited to a stated period, whether valid.

On the principle that a restraint is good which does not substantially take away all power of alienation, it has been thought on the authority of some early decisions that a condition might be supported which prohibits alienation until after a defined and not too remote period of time (*u*),[1] that is to say, a reasonable time, not trenching on the law of perpetuities (*x*).

(*r*) 18 Beav. 330.
(*s*) L. R., 20 Eq. 189.
(*t*) The M. R. observed it was a limited restriction in this also, that a sale only and not any other mode of alienation was prohibited. But see Ware *v.* Cann, 10 B. & Cr. 433, cited above. See also the observations of Pearson, J., in Re Rosher, Rosher *v.* Rosher, 26 Ch. D. 801, 811 et seq., where the authorities on the point as to limited conditions in restraint of alienation are fully considered.
(*u*) Large's case, 2 Leon. 82, 3 Leon. 182; Burnett *v.* Blake, 2 Dr. & Sm. 117.
(*x*) See Mr. Preston's note to Shep. Touchst, 7th Ed., p. 130.

[1] Blackstone Bank *v.* Davis, 21 Pick. 42; Simonds *v.* Simonds, 3 Met. 562; Jackson *v.* Shutz, 18 Johns. 184 (but see as to this case De Peyster *v.* Michael, 6 N. Y. 467); Langdon *v.* Ingram, 28 Ind. 360; McWilliams *v.* Nisly, 2 Serg. & R. 507, 513; Stewart *v.* Brady, 2 Bush, 623; Stewart *v.* Barrow, 7 Bush, 368. But see Hall *v.* Tufts, 18 Pick. 455, in which it was held that a restraint imposed upon remainder-men after a life-estate against alienation during the life-estate was void. And in Mandlebaum *v.* McDonell, 29 Mich. 78, the whole doctrine of the right to restrict the power of alienation, even for a day, is

It would, however, seem clear that a condition limited in point of time in restraint of alienation of real estate would not be upheld at the present day (*y*). The point has more frequently occurred with regard to personal estate (*z*); but in no case where the condition has been held good did it aim at restraining alienation of the property after the period of payment or distribution.

Condition requiring alienation within a given time.

On the principles already stated, a condition *requiring* alienation within a given time is void; *e. g.*, a condition that A. and B., tenants in common in fee, shall make partition during their joint lives; for it is a right incident to their estate to enjoy in undivided shares (*a*).

Restraints on alienation by tenant in tail invalid.

Conditions restraining alienation by a tenant in tail are also void, as repugnant to his estate (*b*), to which a right to bar the entail by means of a fine with proclamations, and the entail and the remainders by suffering a common recovery, was, before the abolition of these assurances, inseparably incident (*c*). And the right of a tenant in tail to enlarge his estate into a fee by means of a disentailing assurance enrolled under the Fines and Recoveries Act (*d*), cannot be restricted by any condition or gift over (*e*). *So a restraint [*861] or alienation does not prevent a married woman from enlarging her estate tail into a fee with her husband's concurrence under

(*y*) It is said in Churchill *v.* Marks, 1 Coll. 445, that an eminent conveyancer, in answer to a question put to him by the Court, stated his opinion to be that a gift to A. in fee, with a proviso that if A. aliens in B.'s lifetime, the estate shall shift to B., is valid. But this doctrine has been much questioned, see Davidson's Conveyancing, 3rd Ed. Vol. iii., Pt. 1, p. 111, n.; and the contrary has now been expressly decided in Re Rosher, Rosher *v.* Rosher, 26 Ch. D. 801, cited ante, p. 857. See Renand *v.* Tourangeau, L. R., 2 P. C. 4, 18; Re Dugdale, Dugdale *v.* Dugdale, 38 Ch. D. 176; Corbett *v.* Corbett, 14 P. D. 7. See also Powall *v.* Boggis, 35 Beav. 535.

(*z*) See Churchill *v.* Marks, 1 Coll. 441 ; Re Payne, 25 Beav. 556 (in both of which the bequeathed interest was during the specified period contingent as well as reversionary); Kiallmark *v.* Kiallmark, 26 L. J. Ch. 1; Pearson *v.* Dolman, L. R., 3 Eq. 320 See also Samuel *v.* Samuel, 12 Ch. D. 152; Graham *v.* Lee, 23 Beav. 388 (in both of which the validity of such a condition was unquestioned). But see Re Spencer, Thomas *v.* Spencer, 30 Ch. D. 183 (as regards the shares of the unmarried daughters).

(*a*) Shaw *v.* Ford, 7 Ch. D. 669.

(*b*) Pierce *v.* Win, 1 Vent. 321, Pollex. 435.

(*c*) 10 Rep. 36; Fea. C. R. 260.

(*d*) 3 & 4 Will. 4, c. 74.

(*e*) Dawkins *v.* Lord Penrhyn, 4 App. Ca. 51.

denied in an exhaustive opinion by Mr. Justice Christiancy; who there reviews all the authorities from Large's Case, 2 Leon, 82, and 3 Leon. 182, down, including the cases above cited. The conclusion reached was, that the rule was not to be sustained in principle and rested upon but a slender basis of authority. See also Oxley *v.* Lane, 35 N. Y. 340, 347; Roosevelt *v.* Thurman, 7 Johns. Ch. 220.

But a power of sale in a trustee may sometimes be restricted for a definite term without infringing the rule as to repugnancy. Such a restriction does not necessarily cut off the power of alienation; since the beneficiary himself may be able in many cases to make a good conveyance. Hetzel *v.* Barber, 69 N. Y. 1. Thus, if land should be vested by descent or by devise in A., subject to a power of sale in B., to be exercised after a definite time for the benefit of C., the beneficiary C. could unite with A. in a warranty deed to D., before the arrival of the time for the execution of the power by B., and make a good title. The power could not afterwards be executed, because the person entitled to the benefits of the sale had anticipated the result and deprived himself of the right to claim the proceeds. Garvey *v.* McDevitt, 72 N. Y. 556, 563, Earl, J. Or C. could release his right to A. Id.; Hetzel *v.* Barber, supra.

that Act (*f*). It was indeed, held, that a tenant in tail might be restrained from making a feoffment or levying a fine at common law, *i. e.* without proclamations, or any other tortious alienation; and also, it seems, from granting leases under the stat. 32 Hen. 8, c. 28, or a lease for his own life (*g*). The invalidity of any restraint on the power of a tenant in tail to enlarge his estate into a fee simple, however, being once established, it is of little avail to fetter him even with such conditions as are consistent with his estate, since he may at any time, by barring the entail, emancipate himself from all restrictions annexed to it. At one period, the attempts to restrain the aliening power of a tenant in tail were numerous; and as it was apparent that it was too late to defeat the estate tail on the suffering of the recovery, since by that act the condition itself was defeated, the next contrivance was to declare the estate to be determined, on the tenant in tail taking any preparatory steps for the purpose, as agreeing or assenting to, or going about, any act, &c. (*h*), but which, of course, was equally void on the principle already stated.

An attempt to interfere indirectly with the power of alienation incidental to an estate tail, occurs in Mainwaring *v.* Baxter (*i*), where lands were limited by deed to A. for life, remainder to trustees for 1000 years, remainder to B. for 99 years, if he should so long live, remainder to trustees during his life, to preserve, &c., remainder to his first and other sons in tail male, with remainders over; and the trusts of the term of 1000 years were declared to be, to the intent that it should not be in the power of any person to destroy or prevent the estate or benefit of him or them appointed to succeed; and that the trustees, after any contract touching the alienation of the premises, should raise 5000*l.* for the benefit of the person whose estate was so defeated. It was held by Sir R. P. Arden, M. R., that the trusts of the term were void, as being inconsistent with the rights of the tenants in tail.

Trust to charge lands on alienation by tenant in tail, void.

And an attempt to secure the same object, by imposing on [*862] *the tenant in tail himself a "trust" to preserve the remainders, is equally ineffectual. As, where a testator devised land to A. in tail, on special trust and confidence that, if A. should have no issue lawfully begotten, he would do nothing to prevent the remainders from taking effect; and then limited the remainders in default of issue of A. It was held, that the "trust" was void. It was not properly a trust (for A. was beneficial as well as legal owner in tail), but a clause intended to defeat the estate of the tenant in tail if he barred the

Devise in tail on trust not to prevent the remainders, void.

(*f*) Cooper *v.* Macdonald, 7 Ch. D. 289.
(*g*) Co. Lit. 223 b.
(*h*) Mary Portington's case, 10 Rep. 36; Corbet's case, 1 Rep. 83 b; Jermyn *v.* Arscot, cit. 1 Rep. 85 a; Mildmay's case, 6 Rep. 40; Foy *v.* Hynde, Cro. Jac. 696; all stated Fea. C. R. 253, et seq.
(*i*) 5 Ves. 458. The same principle applies to wills.

remainders; and by no form of words could such a restriction be effectually imposed (*k*).

Here it may be noticed, that an objection is advanced in some of the early cases, and has been adopted by text writers of high reputation (*l*), to conditions or provisos which are intended to defeat an estate tail, on the ground that the estate is declared to cease, as if the tenant in tail were dead, not as if he were dead *without issue;* or, as we are told, would be most correct (*m*), as if the tenant in tail were dead, and there was a general failure of issue inheritable under the entail. A limitation over in the terms first mentioned is, it is said, contrariant, and on that account void, inasmuch as it amounts to saying, that the estate shall be determined as it would be in an event which *might* not determine it. But it seems questionable, whether much reliance can at the present day be placed on the objection. The Courts would, it is conceived, supply the words "without issue," as in an early case (*n*) (the principle of which seems not very dissimilar), where a devise to a person in tail, with a limitation over "if he die," was read if he die *without issue.* It is to be observed, too, that in the cases in which the doctrine in question was advanced (*o*), the proviso was void on the ground of repugnancy; and it is remarkable, that even Mr. Fearne, its strenuous advocate, completely disregarded the point in the opinion given by him on Mr. Heneage's will (*p*); the proviso in which, so far as it respected the sons of the tenant for life, was obnoxious to this objection.

Limitation over as if tenant in tail were *dead* (not dead *without issue*).

However, in Bird *v.* Johnson (*q*), Sir W. P. Wood, V.-C., treated the objection as valid, and as being applicable to that *case, which was as follows: A testator gave personal property in trust for his daughter for life, and after her death for her children, payable at the age of twenty-one, or at the decease of the daughter, which should last happen, with a proviso, that if any of the legatees should become bankrupt before his share was payable, his interest should "cease and determine as if he were then dead;" it was held that a child who became bankrupt in the lifetime of his mother did not thereby forfeit his interest, the terms of the condition not fitting to the previous gift. "If," the V.-C. said, "the interest given had been an annuity, which would naturally be at an end on the death of the annuitant, such a clause would be operative; but [*863]

(*k*) Dawkins *v.* Lord Penrhyn, 6 Ch. D. 318, 4 App. Ca. 51. See also Hood *v.* Oglander, 34 Beav. 513, 522.
(*l*) Fea. C. R. 253, Harg. & Butl. Co. Lit. 223 b, n. 132, Sand. Uses, ch. 2, s. iv., 4. See also Vaizey on Settlements, Vol. ii. p. 1289.
(*m*) Mr. Butler's n., Fea. C. R. 254.
(*n*) Anon., 1 And. 33, pl. 84.
(*o*) Corbet's case, 1 Rep. 83 b; Jermyn *v.* Arscot, cit. ib. 85 a; Mildmay's case, 6 Rep. 40; Foy *v.* Hynde, Cro. Jac. 696.
(*p*) Butl. Fea. 616, App.
(*q*) 18 Jur. 976. See also Re Catt's Trusts, 2 H. & M. 46.

here it is an absolute interest which is given, and if the donee were dead, the only effect would be to give the fund to his executors or administrators. . . . As to real estate, the old cases have quite settled the law upon this point. With regard to estates tail, it has been decided that it is a condition repugnant, and therefore void if it does not state that the interest is to cease as if the donee were deceased without issue, or without issue heritable under the entail, as the case may be; for that such a condition would not determine the estate tail."

There is, however, an obvious difference between the case of an estate tail where the words "as if," &c., may reasonably be understood as pointing to the regular determination of the estate, and where there is no doubt what words are wanting to express that meaning (*r*), and the case of a fee simple, or perpetual interest in personalty, of which there is no regular determination, and where it is uncertain what other mode of determination is contemplated. In Astley *v.* Earl of Essex (*s*), where the devise was to A. in tail, with a proviso that in a given event his estate should cease and the [*864] property devolve as if he were naturally * dead, the words "without issue" were (in effect) supplied by Sir G. Jessel, M. R., in order to effect the declared intention that in the case contemplated the estate of A. should cease.

As to restraining alienation by legatee of personalty.

The principle which precludes the imposition of restrictions on the aliening powers of persons entitled to the inheritance of lands, applies to the entire or absolute interest in personalty (*t*). It is clear, therefore, that if a legacy were given to a person, his executors, administrators, or assigns, with an injunction not to dispose of it, the restriction would be void; and a gift over, in case of the legatee dying without making any disposition (*u*), or of what he should not spend (*x*), would also

(*r*) This construction would of course be excluded if a clear intention were expressed that the interest of the defaulting tenant in tail alone should cease, and not that of the heirs of his body. But the intention would fail of effect, since *such* a partial defeasance of the estate is not permitted by the law, Seymour *v.* Vernon, 33 L. J., Ch. 690, 10 Jur. N. S. 487. See Vol. I., p. 824, n. (*l*).

(*s*) L. R., 18 Eq. 290, 296. See also Bund *v.* Green, 12 Ch. D. 819. In Jellicoe *v.* Gardiner, 11 H. L. Ca. 323, estate X. stood settled in remainder on testator's sons in tail male: the testator devised his own estates to his sons in tail *male*, remainders to their children in tail *general;* and provided that, if any of his sons, &c. should become entitled to the X. estate, the testator's own estate should shift to the person next in remainder, as if the son, &c. so becoming entitled were dead *without issue*. This was read "dead without issue male," so as not to exclude issue female, who were next in remainder, and to whom the X. estate could never devolve.

(*t*) Co. Lit. 223 a. Metcalfe *v.* Metcalfe, 43 Ch. D. 633.

(*u*) Bradley *v* Peixoto, 3 Ves, 324, Rishton *v.* Cobb, 5 My. & C. 153; Ross *v.* Ross, 1 J. & W. 154; Green *v.* Harvey, 1 Hare, 428; Watkins *v.* Williams, 3 Mac. & G. 622; Re Yalden, 1 D. M. & G. 53; Hughes *v.* Ellis, 20 Beav. 193 (as to which vide ante, p. 856); Re Mortlock's Trust, 3 K. & J. 456; Bowes *v.* Goslett, 27 L. J. Ch. 249; Re Wilcock's Estate, 1 Ch. D. 229; see Re Newton's Trusts, 23 Ch. D. 181. The cases show that repugnancy is the true ground of the decision, and not, as suggested by Lord Truro in Watkins *v.* Williams, the difficulty or impossibility of ascertaining whether any, or what part, of the fund remained undisposed of.

(*x*) Henderson *v.* Cross, 29 Beav. 216. A condition in a policy of life assurance that the

be rejected as a qualification repugnant to the preceding absolute gift (*y*). But, as already noticed (*z*), a prohibition against alienation at any time before the property falls into possession has frequently been upheld.

And the law of England does not (like that of Scotland) admit of the creation of personal inalienable trusts for the purpose of maintenance, or otherwise, except in the case of a woman under coverture. So, where a life annuity was given payable by trustees half-yearly, with a gift over on the death of the annuitant of so much "as should remain unapplied as aforesaid," the gift over was held void on the same principle as a gift over, after an absolute bequest, in case the legatee has not disposed of the legacy (*a*).

VI. — Conditions to Defeat Estate on Bankruptcy, Insolvency, &c. — Upon the principle which forbids the disposition of property divested of its legal incidents, it is clear that no exemption can be created by the author of the gift from its liability to the debts of the donee:[1] and property cannot be so settled as to be unaffected by bankruptcy or insolvency, which is a transfer by * operation of [*865] law of the whole estate; and it is immaterial for this purpose what is the extent of interest conferred by the gift, the principle being no less applicable to a life interest than to an absolute or transmissible property (*b*). Whatever remains in the bankrupt or insolvent debtor at the time of his bankruptcy or insolvency, becomes vested in the person or persons on whom the law, in such event, has cast the property.

Property cannot be given to a man exempt from the operation of bankruptcy.

Thus, in Brandon *v.* Robinson (*c*), where a testator, after devising his real and personal property to trustees, upon trust to sell and divide the produce among his children, directed that the share of his son should be invested at interest in the names of the trustees during his life, and that the dividends and interest thereof, as the same be-

assured shall not assign, has been held valid as merely to prohibiting assignment at law under the stat. 30 & 31 Vict. c. 144, but not as precluding the assured from dealing with his beneficial interest, Re Turcan, 40 Ch. D. 5.

(*y*) See note (*u*).

(*z*) Ante, p. 860.

(*a*) Re Sanderson, 3 Jur. N. S. 809.

(*b*) Brandon *v.* Robinson, 18 Ves. 429, 1 Rose, 197; Graves *v.* Dolphin, 1 Sim. 66; Rochford *v.* Hackman, 9 Hare, 475; all referred to post.

(*c*) 18 Ves. 429, 1 Rose, 197.

[1] Blackstone Bank *v.* Davis, 21 Pick. 42; Keyser's Appeal, 57 Penn. St. 236; Huber's Appeal, 80 Penn. St. 348. But both in Massachusetts and Pennsylvania, and in some other States, gifts upon what are called "spendthrift trusts" may provide against alienation. Broadway Bank *v.* Adams, 133 Mass. 170; Foster *v.* Foster, id. 179; Pacific Bank *v.* Windram, id. 175; Baker *v.* Brown, 146 Mass. 369; Slattery *v.* Wason, 151 Mass. 266; Lampert *v.* Haydel, 96 Mo. 439; Partridge *v.* Cavender, id. 452; Rife *v.* Geyer, 59 Penn. St. 393; Shankland's Appeal, 47 Penn. St. 113; Holdship *v.* Patterson, 7 Watts. 547; Barnes *v.* Dow, 10 Atl. Rep. 258 (Vt.); White *v.* White, 30 Vt. 338: Pope *v.* Elliott, 8 B. Mon. 56; Garland *v.* Garland, 87 Va. 758; Nichols *v.* Eaton, 91 U. S. 716; Hyde *v.* Woods, 94 U. S. 523. See 2 Bigelow, Fraud, 222–224, where the cases contra, which it is conceived are the better, are cited. As to the law of New York, see 2 Bigelow, Fraud, 222, note.

came payable, should be paid by them from time to time into his own proper hands, or on his order and receipt, subscribed with his own proper hand, to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and upon his decease, the principal, together with the interest thereof, to be paid and applied to such persons as would be entitled to any personal estate of A.'s said son, if he had died intestate. The legatee became bankrupt.

On a bill filed by the assignees against the trustees of the will, to have the benefit of the bequest, the latter demurred. It was argued for the defendants that it could not be disputed that a testator might limit a personal benefit strictly, excluding any assignee either by actual assignment or operation of law. He might limit the enjoyment up to a particular period or event, and then to be forfeited or transferred to some other person. If the testator has a right so to limit, he may direct the trustees, who are to take the absolute legal interest, to dispose of it from time to time in a particular manner, to pay into the hands of the legatee personally from time to time, and to no other. Such a disposition, it was contended, is not opposed by any principle of law or public policy. The son acquires nothing until each payment becomes due. When he actually receives, and then only, the trust is executed; and the effect of a decision that the payment is to be made, not to him personally, but to others who by repre-
[*866] sentation are become at law entitled to his rights, would * be making another will for the testator. It was contended for the assignees that this case was not to be distinguished from the case of a lease with a proviso not to assign without license, which would pass by the assignment under a commission of bankruptcy or might be sold under an execution. The voluntary act is restrained, but not the act of law in invitum. Lord Eldon, C., "There is no doubt that property may be given to a man until he shall become bankrupt (*d*);[1] it is equally

Life-interest may be made to cease on bankruptcy.

(*d*) Though his Lordship's dictum on this point is expressed in general terms, it must apparently be taken as intended to apply to cases similar to that then before him, which was that of a life interest, see post, p. 869.

[1] This of course proceeds upon the distinction between a condition and a limitation. Ante, p. 845, note. An estate may be limited to A. until his bankruptcy, and then over to some one else; but it cannot be given to A. absolutely or for a term, without being liable for his debts. Ante, p. 854, note. In ordinary cases of the kind referred to in the text, the purpose of the testator being to have the benefit enure to the donee, the courts will not, merely as against him, decree a forfeiture if the terms of the will in that respect be ambiguous and consistent with a different result. Samuel *v.* Samuel, 12 Ch. D. 125. See White *v.* Chitty, L. R., 1 Eq. 372, for an illustration.

As to what will come within the terms of a limitation over upon bankruptcy or insolvency, so as to cause a forfeiture, it has recently been held that the execution by the donee of a composition deed containing a recital that he was unable to pay his debts in full was sufficient, and that the donee could not afterwards dispute the recital. Hillson *v.* Crofts, L. R., 15 Eq. 314. See also Aylwin's Trusts, L. R., 16 Eq. 585; Ex parte Eyston, 7 Ch. D. 145, where failure to answer a debtor's summons, which was followed by

clear, generally speaking, that if property be given to a man for his life, the donor cannot take away the incidents to a life estate; and a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give it to him for his life, with a proviso that he shall not *sell* or *alien* it. If that condition is so expressed as to amount to a limitation reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited. In the case of Foley *v.* Burnell (*e*), this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley, with a view of depriving the creditors of his sons of any resort to their property. But it was argued here, and, as I thought, admitted, that if the property were given by Lord Foley to his sons, *it must remain subject to the incidents of property*, and it could not be preserved from the creditors, unless given to some one else." And his Lordship further remarked: "This is a singular trust. If upon these words it can be established that he had no interest until he tenders himself personally to the trustees to give a receipt, then it was not his property till then; but if personal receipt is in the construction of this Court a necessary act, it is very difficult to maintain that if the bankrupt would not give a receipt during his life, and an arrear of interest accrued during his whole life, it would not be assets for his debts. It clearly would be so. Next, is there in this will evidence to show that as the interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the commission of bankruptcy? *To prevent that it must be given to some one else* (*f*); and unless it can be established that this by implication amounts to a limitation, giving this interest to the residuary legatee, it is an equitable * interest capable of being [*867] parted with. The principal at the death of the bankrupt will be under very different circumstances. The testator had a right to limit his interest to his life, giving the principal to such person as may be his next of kin at his death, to take it as the personal estate, not of the son, but of him the testator; not as if it was the son's personal estate, but as the gift of the testator. The demurrer must, upon the whole, be overruled."

In Graves *v.* Dolphin (*g*), where a testator directed trustees to pay an annuity of 500*l.* to his son I. for his life, and declared that it was

(*e*) 1 B. C. C. 274.
(*g*) 1 Sim. 66.
(*f*) As to this, vide post, p. 877.

an adjudication of bankruptcy, was held as coming within a proviso of the will that if the donee should "at any time do or permit any act, deed, matter, or thing whatsoever whereby the same shall be aliened, charged, or incumbered in any manner," the gift (an annuity) should be forfeited. The question in that case, however, turned largely on the meaning of the word "permit;" the judge in the lower court thinking that a hostile bankruptcy could not have been intended. See Lear *v.* Leggett, 1 Russ. & M. 690. The term "bankruptcy" was, in Robins *v.* Rose, 43 L. J. Ch. 334, deemed to have been cut down by a particular intention of the testator.

Assignees in bankruptcy entitled to benefit of trust for maintenance.

intended for his personal maintenance and support; and should not, on any account or pretence whatsoever, be subject or liable to the debts, engagements, charges, or incumbrances of his said son, but that the same should, as it became payable, be paid over into the proper hands of him, the testator's said son, and not to any other person or persons whomsoever; and the receipts of the son only were to be sufficient discharges. The son became bankrupt, and it was held by Sir J. Leach, V.-C., that the annuity belonged to his assignees.

In Re Machu (*h*), certain freehold, copyhold, and leasehold houses and lands were devised and bequeathed to the use of A., her heirs, executors, administrators, and assigns, for her separate use, "subject nevertheless to the proviso hereinafter contained for determining her estate and interest in the event hereinafter mentioned." In a subsequent part of the will was contained a proviso that in case A. should at any time be declared a bankrupt, then and henceforth the devise thereinbefore made to her should be void, and the premises should thenceforth go, remain, and be to the use of her children. Part of the property having been taken by a railway company, the purchase-money was ascertained under the Lands Clauses Act, and paid into Court; and A. presented a petition for payment out of the fund to her as being absolutely entitled thereto. It was argued on behalf of the children that the proviso was made by reference a part of the gift itself, and that therefore the gift and the proviso must be read together, so that the proviso would act as a conditional limitation, and would be good. But Sir J. Chitty, J., was of opinion the reference in the gift did not make any difference in the construction, [*868] but that the condition contained in the latter *part of the will was a condition pure and simple, and consequently repugnant and void.

Reference in gift will not render valid a subsequent proviso determining estate in fee on bankruptcy.

And the vesting in trustees of a discretion as to the mode in which income is to be applied for the benefit of a cestui que trust, does not take it out of the operation of bankruptcy or insolvency; to effect which the discretion of the trustees must extend, not merely to the manner of applying the income for the benefit of the cestui que trust, but also to the enabling of them to apply it either for his benefit, or for some other purpose.

Notwithstanding trustees have a discretion as to mode of application.

Thus, in Green *v.* Spicer (*i*), where a testator devised certain estates to trustees, upon trust to pay and apply the rents and profits to or for the board, lodging, maintenance, and support and benefit of his son R., at such times and in such manner as they should think proper, for his life; it being the testator's wish, that the application of the rents

(*h*) 21 Ch. D. 838; see also Re Dugdale, Dugdale *v.* Dugdale, 38 Ch. D. 176.
(*i*) 1 R. & My. 395, Taml. 396.

and profits for the benefit of his said son, might be at the entire discretion of the said trustees; and that his son should not have any power to sell or mortgage or anticipate in any way the same rents and profits. R. took the benefit of an insolvent act, whereupon his interest was claimed by the assignee. Sir J. Leach, M. R., held the assignee to be entitled, on the ground that the insolvent was the sole and exclusive object of the trust. The trustees were bound, he said, to apply the rents for the benefit of R., and their discretion applied only to the manner of their application.

So in Snowden *v.* Dales (*k*), where A. vested a money fund in trustees, in trust during the life of B., or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, or at such other time or times and in such sum or sums as they should judge proper, to allow and pay the interest into the proper hands of B., or otherwise, if they should think fit, in procuring for him diet, lodging, wearing apparel, and other necessaries; but so that he should not have any right, title, claim, or demand in or to such interest, other than the trustees should, in their or his absolute and uncontrolled power, discretion, and inclination, think proper or expedient; and so as no creditor of his should or might have any lien or claim thereon, or the same be in any way subject or liable to his debts, dispositions, or engagements; with a direction that a proportionate part of the interest should be paid up to the decease of B.; and after his decease the fund, and all savings and accumulations, * should be in trust for his chil- [*869] dren, &c. B. became bankrupt. Sir L. Shadwell, V.-C., held, that the assignees were entitled to the life interest; for he thought there was no discretion to withhold and accumulate any portion of the interest during the life.[1]

Title of assignees in bankruptcy not excluded by discretion seemingly given to trustees.

But in Twopeny *v.* Peyton (*l*), where the trustees had a discretion to apply *the whole or such part* of the income as they should think fit, for the maintenance and support of the cestui que trust, who (the testatrix recited) had become a bankrupt and insane, and for no other purpose whatsoever; Sir L. Shadwell, V.-C., held, that the assignees took no interest.[2]

Exception upon special terms of the trust.

(*k*) 6 Sim. 524. See also Piercy *v.* Roberts, 1 My. & K. 4; Younghusband *v.* Gisborne, 1 Coll. 400.

(*l*) 10 Sim. 487. The bankrupt was uncertificated, so that this property was liable. See Yarnold *v.* Moorhouse, 1 R. & My. 364, stated post; also The Queen *v.* The Judge of the County Court of Lincolnshire, 20 Q. B. D. 167, where the trustees of a will similarly worded obtained a prohibition against the judge who had ordered them to pay part of the income to a receiver until judgment in an action was satisfied.

[1] See Easterly *v.* Keney, 36 Conn. 18; Johnson *v.* Connecticut Bank, 21 Conn. 148.

[2] See ante, p. 864, note; Huber's Appeal, 80 Penn. St. 348, 357, Rife *v.* Geyer, 59 Penn. St. 393; Vaux *v.* Parke, 7 Watts & S. 19; Nichols *v.* Eaton, 91 U. S. 716; Nichols *v.* Levy, 5 Wall. 433; Campbell *v.* Foster, 35 N. Y. 361; Williams *v.* Thorn, 70 N. Y. 270. The New York cases, it should be noticed, proceed upon statutory law. It is there held under statutes that the income set apart for the beneficiary, above what is necessary for

If the trusts of the property be declared in favor of several, as a man, his wife, and children, to be applied for their benefit, at the discretion of the trustees, the man's assignees, in case of his bankruptcy, are entitled to as much of the fund as he would himself have been separately entitled to, after providing for the maintenance of the wife and children (*m*). But if he was entitled to nothing separately, but only to an enjoyment of the property jointly with his wife and children, then his assignees have no claim (*n*). And where the trustees of a settlement had a discretionary power of excluding any of the objects of the trust, their power was held to continue after the insolvency of one of such objects (*o*). It was said, however, that any benefit which the insolvent might take would belong to his assignees (*p*). And if the trustees decline (as by paying the fund into Court) to exercise their power of exclusion, the power is gone, and the assignees are entitled to the whole or an aliquot portion of the fund, according as the bankrupt was the only cestui que trust or not (*q*).

Assignees entitled to bankrupt's undivided share.

—— except in special cases.

Assignees may be excluded where the trustees have a discretion to exclude the bankrupt.

But though a testator is not allowed to vest in the object of his bounty an inalienable interest exempt from the operation of bankruptcy-yet there is no principle of law which forbids his giving a life [*870] interest in real or personal property, with a proviso, * making it to cease on such event: for whatever objection there may be to allowing a person to modify his own property, in such man-

(*m*) Page *v.* Way, 3 Beav. 20; Kearsley *v.* Woodcock, 3 Hare, 185; Rippon *v.* Norton, 2 Beav. 63; Lord *v.* Bunn, 2 Y. & C. C. C. 98; Wallace *v.* Anderson, 16 Beav, 533. Some of these cases arose on deeds, but the same principles seem to apply to wills.

(*n*) Godden *v.* Crowhurst, 10 Sim. 642. The principle for which this case is cited is recognized in Kearsley *v.* Woodcock, 3 Hare, 185; and by the Court of Appeal in Re Coleman, Henry *v.* Strong, 39 Ch. D. 443; but the decision itself in Kearsley *v.* Woodcock has been questioned; see Younghusband *v.* Gisborne, 1 Coll. 400.

(*o*) Lord *v.* Bunn, 2 Y. & C. C. C. 98.

(*p*) Per Sir K. Bruce, V.-C., id. See Re Coleman, supra; Re Neil, Hemming *v.* Neil, W. N. 1890, p. 92.

(*q*) Re Coe's Trust, 4 K. & J. 199.

a suitable support and maintenance, may be reached in equity by creditors. Williams *v.* Thorn, supra (denying the individual opinion of Wright, J., in Campbell *v.* Foster, supra). See also Hallett *v.* Thompson, 5 Paige, 586; Rider *v.* Mason, 4 Sandf. Ch. 351; Sillick *v.* Mason, 2 Barb. Ch. 79; Bramhall *v.* Ferris, 14 N. Y. 41; Scott *v.* Nevins, 6 Duer, 672; Graff *v.* Bonnett, 31 N. Y. 9; Nickell *v.* Handly, 10 Gratt. 336; Johnston *v.* Zane, 11 Gratt. 552. This doctrine prevails where no discretion is given the trustee concerning the sum to be paid to the beneficiary. Williams *v.* Thorn, supra.

But apart from statute, where the trustee is clothed with a discretion as to making payments to the beneficiary, the trust estate devised cannot be reached by creditors: they can only reach what has been paid over to the cestui que trust. Keyser *v.* Mitchell, 67 Penn. St. 473; Nichols *v.* Eaton, supra; Easterly *v.* Keney, supra. Nor is the case of Williams *v.* Thorn opposed to this proposition. A different rule would virtually require the courts to exercise the discretion which the testator has properly confided to the trustee; compelling the trustee to set apart from an estate upon which they have no just claim a sum to be availed of by creditors. Of course a gift of the *income* of property, to cease upon the insolvency or bankruptcy of the donee, will take effect according to such limitation as well as though it were a gift of the body of the property. Nichols *v.* Eaton, 91 U. S. 716, 722; Demmill *v.* Bedford, 3 Ves. Jr. 149; Brandon *v.* Robinson, 18 Ves. 427; Rockford *v.* Hackmen, 9 Hare, 475; Tillinghast *v.* Bradford, 5 R. I 205.

ner as to be divested on bankruptcy or insolvency (*r*), it seems impossible, on any sound principle, to deny to a third person the power of shifting the subject of his bounty to another, when it can no longer be enjoyed by its intended object. The validity of such provisions was established in the early case of Lockyer *v.* Savage (*s*), where 4,000*l.* was settled by the father of a feme coverte, for the use of the husband for life, with a direction that *if he failed in the world*, the trustees should pay the produce to the separate maintenance of his wife and children; and the latter trust was held to be good (*t*).

Life interest may be made to cease on bankruptcy.

Indeed, this principle is now so well settled, that the only point on which any doubt can arise is, whether the clause is so framed as to apply to bankruptcy, which we shall see has often been a subject of controversy.

It appears that bankruptcy is a forfeiture, under a proviso prohibiting alienation, if the terms of such proviso extend to alienations by operation of law, as well as those produced by the act of the devisee; bankruptcy being regarded as an alienation of the former kind.

Thus, in Dommett *v.* Bedford (*u*), where a testator, after giving an annuity, charged on real estate, to A. for life, directed that it should from time to time be paid *to himself only*, and that a receipt under his own hand, and no other, should be a sufficient discharge for the payment thereof; the testator's intent being that the said annuity, or any part thereof, should *not on any account be alienated* for the whole term of his life, or for any * part of said term; and, [*871] *if so alienated, the said annuity should cease.* A. having become bankrupt, it was held that the annuity had determined.

Where bankruptcy is a forfeiture under a clause restraining alienation.

So in Cooper *v.* Wyatt (*x*), where the overplus of the rents of a moiety of the testator's real estate was directed to be paid into the hands of S., *but not to his assigns*, for the term of his natural life, for his *own sole* use and benefit, with a limitation over if the devisee should, by any ways or means whatsoever, *sell, dispose of, or incumber*

(*r*) As to this, see Wilson *v.* Greenwood, 1 Sw. 481; Ex parte Mackay, L. R., 8 Ch. 643; Ex parte Williams, 7 Ch. D. 138.

(*s*) 2 Stra. 947. This case (among many others) shows that there is not (as sometimes contended) any real distinction between a trust for A. until bankruptcy and a trust for A. for life, with a proviso determining the life interest on bankruptcy; each is equally valid. Of course clauses of this nature do not affect arrears of income, Re Stulz's Trusts, 4 D. M. & G. 404. See also South Wales Loan Company *v.* Robertson, 7 Q. B. D. 17, where a charging order under a judgment was held effectual against arrears of income in the hands of trustees. It would seem clear on general principles (see ante, p. 855) that a limitation of a fee simple to A. until bankruptcy would be no more valid than a devise of the fee to him subject to a condition purporting to determine his estate on bankruptcy; as to which see ante, p. 864.

(*t*) Where property is given in trust for a person until bankruptcy, and in case of his bankruptcy a discretionary trust is vested in trustees to apply for his benefit the whole or any part of the income, with a gift over, the Court will not interfere with an honest exercise of that discretion, and if the trustees do not apply the whole of the income, the unapplied surplus goes to those entitled under the gift over, Re Bullock, Good *v.* Lickorish, W N. 1891, p. 62. See Re Coleman, Henry *v.* Strong, 39 Ch. D. 443.

(*u*) 3 Ves. 149, 6 T. R. 684.

(*x*) 5 Mad. 482.

the right, benefit, or advantage, he might have for life, or any part thereof: Sir J. Leach, V. C., held that bankruptcy was a forfeiture; considering that the expressions of the testator denoted that the devisee's interest was to cease when the property could be no longer personally enjoyed by him.

On the other hand, in Wilkinson *v.* Wilkinson (*y*), where a testator, after giving certain annuities and other life interests to several persons, provided that in case they should "respectively *assign or dispose of or otherwise charge or incumber* the life estates, the annuities, and provisions so made to and for them during their respective lives as aforesaid, *so as not to be entitled to the personal receipt, use, and enjoyment thereof;* then the annuity, life estate, or interest, of him, her, or their heirs respectively (*z*), so doing, or attempting so to do," should cease, and should immediately thereupon devolve upon the persons who should be next entitled thereto. Sir W. Grant, M. R., was of opinion, that the testator had not with sufficient clearness expressed an intention that the life estate, which he had given to his son, should cease upon bankruptcy.

Bankruptcy held *not* to be a forfeiture.

So in Lear *v.* Leggett (*a*), where a testator after bequeathing to his son and daughters the dividends of certain stock for their respective lives, declared, that their provisions should not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever, or by anticipation of the receipt. And in case they, or any or either of them, should charge or attempt to charge, affect, or incumber the same, or any part or parts thereof respectively, then such mortgage, sale, or other disposition, or incumbrance so to be made by them, or any or either of them, on his, her, or their [*872] interest, should operate as * a complete forfeiture thereof, and the same should devolve as if he, she, or they were then dead. The son became bankrupt, and Sir L. Shadwell, V.-C., decided that the bankruptcy was not a forfeiture. He observed, that the words declaring that the gift should not be subject to any alienation or disposition, did not create any forfeiture. And the subsequent words referred to a voluntary alienation only, and bankruptcy was not such. He commented on the difference of the language of the clause here, and in Cooper *v.* Wyatt (*b*), the authority of which had been much pressed on the Court. Lord Lyndhurst, C., affirmed the decree of the V.-C., observing, that the prohibition in Dommett *v.* Bedford (*c*) was expressed in much more general and comprehensive terms than in the case before him, and might well be construed to extend to alienations by act of law.

Where the language of a clause restrictive of alienation does not

(*y*) Coop. 259, 3 Sw. 515, see 528.
(*z*) Sic orig. as reported.
(*a*) 2 Sim. 479, 1 R. & My. 690. See also Whitfield *v.* Prickett, 2 Kee. 608; Graham *v.* Lee, 23 Beav. 391; Re Pixley, Ex parte Harvey, 60 L. T. 710; 37 W. R. 620.
(*b*) Ante, p. 871.
(*c*) 6 T. R. 684, ante, p. 870.

extend to an alienation in invitum, it seems that the seizure of the property under a judicial process sued out against the devisee or legatee does not occasion a forfeiture.

Thus in Rex *v.* Robinson (*d*), where an annuity of 400*l.* was bequeathed to W. as an unalienable provision for his personal use and benefit, for his life, and not otherwise; and so that the same annuity, or any part thereof, should not be subject or liable to be alienated, or be or become in any manner liable to his debts, control, or engagements; and the annuity was made to cease in case W. should "at any time sell, assign, transfer, or make over, demise, mortgage, charge, or otherwise attempt to alienate," the annuity or any part thereof, or should "make, do, execute, or cause or procure to be made, done, and executed, any act, deed, matter, or thing whatsoever, to charge, alienate, or affect, the said annuity," or any part thereof. A creditor of the legatee sued him to outlawry. Macdonald, C. B., held, on the authority of Dommett *v.* Bedford (*e*), and Doe d. Mitchinson *v.* Carter (*e*), that the seizure of the annuity under the outlawry, * at the suit of the Crown, arising merely from the negative, [*873] and not the positive acts of the party, was *not* a forfeiture on the words of the bequest, which required a positive act. He considered the words, in the present case, were not so large as in Dommett *v.* Bedford, but were more conformable to those in Doe *v.* Carter.

Sale under process of outlawry held no forfeiture, clause requiring positive act.

These cases show that when it is intended to take away a benefit as soon as it cannot be personally enjoyed by the devisee, it should be made to cease on alienation, not only by his own acts, but by operation of law (*f*). To "do or suffer" (*g*), or to "do or permit" (*h*), any act causing alienation has been held to include an act done in invitum.

Clause restraining should extend to involuntary alienation.

It seems that formerly taking the benefit of an insolvent act might be an alienation, when bankruptcy would not, as it required certain

(*c*) Supra.

(*d*) Wightw. 386.

(*e*) 8 T. R. 57. A lessee having covenanted not to let, set, assign, transfer, or make over, &c. the indenture of lease, a warrant of attorney to confess judgment, given without any special intent to evade the restriction on alienation, was held not to create a forfeiture under a proviso for re-entry on breach of any covenant. It afterwards appeared that the warrant of attorney was given for the express purpose of enabling the creditor to take the lease in execution, and this was held (8 T. R. 300) to be a fraud on the covenant, and to enable the landlord to recover in ejectment. Lord Kenyon said, "If the lease had been taken by the creditor under an adverse judgment, the tenant not consenting, it would not have been a forfeiture; but here the tenant concurred throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor." This distinction was recognized in Doe *v.* Hawkes, 2 East, 481; and Avison *v.* Holmes, 1 J. & H. 530. See also Seymour *v.* Lucas, 1 Dr. & Sm. 177. And as to contrivances to evade such a clause, see Oldham *v.* Oldham, L. R., 3 Eq. 404.

(*f*) Since the stat. 33 & 34 Vict. c. 23, whereby forfeitures for treason and felony were abolished, a conviction for felony does not now deprive a person of the enjoyment of his property by operation of law, Re Dash, Darley *v.* King, W. N., 1887, p. 142.

(*g*) Roffey *v.* Bent, L. R., 3 Eq. 759. See also Montefiore *v.* Behrens, 35 Beav. 95; Dixon *v.* Rowe, W. N. 1876, p. 266 (sequestration).

(*h*) *Ex parte* Eyston, 7 Ch. D. 145.

Taking benefit of Insolvent Debtors' Act a voluntary alienation.

acts on the part of the insolvent (viz., the filing of a petition, schedule, &c.), constituting it a voluntary alienation, as distinguished from a bankruptcy, which partook more of the nature of a compulsory measure (*i*).

So, bankruptcy on debtor's own petition.

And a petition by the debtor himself for adjudication under the Bankruptcy Act, 1861 (*k*), or for liquidation under the Bankruptcy Act, 1869 (*l*), were voluntary acts, no less than taking the benefit of an insolvent act formerly was, and equally productive of forfeiture under clauses prohibiting such acts.

[*874] * Sometimes the question arises, whether a proviso of this nature extends to bankruptcy or insolvency occurring in the lifetime of the testator. If such event has left the after-acquired property of the bankrupt or insolvent exposed to the claims of his creditors, then a forfeiture would take place under words sufficiently strong to determine the interest of the devisee or legatee, when the property becomes applicable to any other purpose than the benefit of the cestui que trust.

Effect of bankruptcy in lifetime of testator.

As in Yarnold *v.* Moorhouse (*m*), where a testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and family, declaring that such dividends should not be capable of being charged with his debts or engagements; and that he should have no power to charge, assign, anticipate, or incumber them; but that if he should attempt so to do, or if the dividends by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, *or be, or become, applicable to or for any other purpose than for the maintenance of the nephew and his family,* his interest therein should cease, and the stock be held upon trust for his children. Subsequently to the execution of the will, and prior to a codicil confirming it, the nephew took the benefit of the Insolvent Act (1 Geo. 4, c. 119) in the usual way: afterwards the

(*i*) See this distinction recognized, 2 Sim 479; 9 Hare, 484. In the following cases a forfeiture was held to have been incurred by taking the benefit of an insolvent act:—where the gift was of an annuity for life but to cease if he should sign or execute any instrument "whereby he should authorize or intend to authorize any person or persons to receive the same," Sbee *v.* Hale, 13 Ves. 404; the insolvent was not at that time as in bankruptcy compellable to part with the annuity (but see 1 & 2 Vict. c. 110, s. 36, and Pym *v.* Lockyer, 12 Sim. 394), but the signing of the petition and schedule was a clear act. So, where the gift was to cease if the donee should "incumber or anticipate an annuity," Brandon *v.* Aston, 2 Y. & C. C. C. 24. So also where the gift was subject to a proviso that the donee should not "sell or part with" it till it should be divided, with a gift over in case of non-compliance, Churchill *v.* Marks, 1 Coll. 441. In each of the two last cases, the insolvent stated in his schedule that he had no power to assign the property in question. But the V.-C. held this to be immaterial. See also Martin *v.* Margham, 14 Sim. 230; Rochford *v.* Hackman, 9 Hare, 475; Townsend *v.* Early, 34 Beav. 23.

(*k*) Lloyd *v.* Lloyd, L. R., 2 Eq. 722.

(*l*) Re Amherst's Trusts, L. R., 12 Eq. 464 ("part from"). But a mere declaration of insolvency, though voluntary, is no more a forfeiture than any other act of bankruptcy, Graham *v.* Lee, 23 Beav. 388.

(*m*) 1 R. & My. 364. So in Seymour *v.* Lucas, 1 Dr. & Sm. 177, though the words were "thereafter become bankrupt;" Trappes *v.* Meredith, L. R., 7 Ch. 248, reversing 10 Eq. 604. In Metcalfe *v.* Metcalfe, (1891) 3 Ch. 1, the L. JJ. felt themselves bound with regret to follow these decisions, as establishing the position that the common forfeiture clause applies to a bankruptcy existing at the testator's death.

testator died. As it appeared that the act gave to the Insolvent Debtors' Court a control over stock in the public funds, and the future property generally of a discharged prisoner (*n*), the V.-C. held that the insolvency operated as a forfeiture of the legatee's life interest in the stock; and his decree was affirmed by Lord Lyndhurst, who thought that, as the dividends were subject, at the discretion of the creditors, to be charged with the payment of their debts, the interest was forfeited under the words carrying over the bequest in the event of its being or becoming in any manner applicable to or for any other purpose than for the maintenance of the legatee.

* So, in Manning *v.* Chambers (*o*), where the income of [*875] property was given to one for life or "until he *shall* become bankrupt" or assign his interest, and after his death or upon his becoming bankrupt or assigning, over, and the legatee was already a bankrupt at the date of the instrument, the gift over took effect immediately.

The words of futurity, in these cases, are not permitted to operate so as to defeat what upon the will itself appears to be the manifest intention, namely, that the gift shall be a personal benefit to the legatee, and shall not become payable (through him) to any other person (*p*).

Conversely if the status or act of the legatee still leaves him in the personal enjoyment of the gift, there is no forfeiture. Therefore if, after having become bankrupt, the legatee, before the first payment of income falls due, procures an annulment of his bankruptcy, forfeiture is avoided (*q*). So, where a fund was given to one for life, and afterwards to A., with a clause of forfeiture in case A. should in the lifetime of the tenant for life become bankrupt, or do anything which

No forfeiture if, before any payment is due, the bankruptcy is annulled; or the incumbrance is paid off.

(*n*) The insolvent had also executed to the provisional assignee a warrant of attorney, as required by the act; but this fact, though very prominently set forth in the Master's report, seems not to have been material, since property of this nature could not, in the then state of the law, be seized under any execution which could have been obtained by virtue of such warrant of attorney.

(*o*) 1 De G. & S. 282. See an analogous case, Re Williams, 12 Beav. 317.

(*p*) See per Lord Hatherley, L. R., 7 Ch. 252; per Jessel, M. R., 12 Ch. D. 159.

(*q*) White *v.* Chitty, L. R., 1 Eq. 372; Lloyd *v.* Lloyd, L. R., 2 Eq. 722; Trappes *v.* Meredith, L. R., 9 Eq. 229; Re Parnham's Trusts, 46 L. J. Ch. 80; Ancona *v.* Waddell, 10 Ch. D. 157 (though the annulment was not formally completed till long after). It is otherwise if any payment has fallen due: Re Parnham's Trusts, L. R., 13 Eq. 413; Robertson *v.* Richardson, 30 Ch. D. 623; Re Broughton, Peat *v.* Broughton, W. N., 1887, p. 109. So in Hurst *v.* Hurst, 21 Ch. D. 278, Fry, J., said (at p. 288), "If a charge or a bankruptcy, or any other impediment to the personal reception of the income has been created, but has been validly extinguished before the period of distribution or the period at which the right to receive any portion of the money has accrued, there is no forfeiture." In that case it was held by the Court of Appeal (affirming the decision of Fry, J.) that a forfeiture was incurred by a charge of a defeasible life estate, notwithstanding that the chargee immediately on hearing of the forfeiture clause disclaimed the charge and took other security. So where a testator bequeathed certain reversionary interests in personalty in trust for his children, subject to a proviso for forfeiture if by act or operation of law the interests should be aliened whereby the same should vest in any other person; one of the children was a bankrupt at the time of the testator's death, but within a year afterwards and before the interests fell into possession she became entitled to other property by the sale of which she paid off all her debts and costs, but the bankruptcy was not annulled till two years after such payment: it was held by Kekewich, J., that as the personal enjoyment by the legatee as regards the reversions had not been interfered with, there was no forfeiture, Metcalfe *v.* Metcalfe, 43 Ch. D. 363, affirmed on another point (1891) 3 Ch. 1, see ante, p. 874, note (*m*).

would vest the fund in any other person; A. mortgaged his reversion, but having paid off the mortgage before the death of the tenant for life, he was held not to have forfeited his interest (*r*).

But in Cox *v.* Fonblanque (*s*), it was held that this principle was not applicable where the condition of solvency was precedent.

[*876] * In that case, a testator directed his executors to invest so much of his residuary estate as would produce 100*l.* a year, and to pay the same to A. (if not at the testator's death an uncertificated bankrupt or otherwise disentitled to receive and enjoy the same) during his life, or until he should become bankrupt or assign the annuity, or do or suffer something whereby the same would become payable to some other person; and after the determination of that trust, or in the event of its failure, then, after the testator's death, to sink into the residue. A. was an uncertificated bankrupt at the testator's death; but within six months afterwards the bankruptcy was annulled. It was held by Lord Romilly, M. R., that the gift nevertheless failed. "The gift was only made (he said) provided the donee was not a bankrupt; that was a condition precedent annexed to the gift; he was a bankrupt, he did not fulfil the condition, consequently there was no gift. The cases cited (*t*) do not appear to me to have any application to this case; those were cases of conditions subsequent, in which the annulment of the bankruptcy prevented the effect of the condition, but here no subsequent annulment could prevent him from having been a bankrupt at the testator's death."

Distinction where solvency is a condition precedent, qu.;

But was not the true question here precisely the same as in the previous cases, viz. was the donee bankrupt within the meaning of the condition? and must not the meaning be the same whether the condition is precedent or subsequent? The case is different where the prohibited act is not in its nature such as to deprive the legatee of the personal enjoyment of the legacy, *e. g.* a composition with creditors. Here personal enjoyment is not made the criterion. If, therefore, the legatee compounds, though without touching the bequeathed interest, the forfeiture takes effect (*u*).

—where the prohibited act would not denude the legatee.

(*r*) Samuel *v.* Samuel, 12 Ch. D. 152.
(*s*) L. R., 6 Eq. 482.
(*t*) White *v.* Chitty, Lloyd *v.* Lloyd, sup.
(*u*) Sharp *v.* Cosserat, 20 Beav. 470. See Nixon *v.* Verry, 29 Ch. D. 196, where a composition under the Bankruptcy Act, 1869, was held a cause of forfeiture under a limitation until "insolvent under some Act for the relief of insolvents." A colonial bankruptcy is within the term "bankruptcy," Townsend *v.* Early, 34 Beav. 23; Re Aylwin's Trusts, L. R., 16 Eq. 590. As to insolvency in the colony of Victoria, Australia, see Waite *v.* Bingley, 21 Ch. D. 674; Re Levy's Trusts, 30 Ch. D. 119. But in Montefiore *v.* Enthoven, L. R., 5 Eq. 35, it was held by Malins, V.-C., upon the context, that executing an inspection deed under the Bankruptcy Act, 1861, not assigning any property, was not within a clause prohibiting "taking the benefit of an act for the relief of insolvent debtors." Cf. Billson *v.* Crofts, L. R., 15 Eq. 314. So the filing of a petition under the Bankruptcy Act. 1883, by a debtor, and the execution by him of a compositiun deed were held not to work a forfeiture of a life interest determinable if he should assign, charge, or otherwise dispose of the income, "or do or suffer anything whereby the income should become vested in any other person," Ex parte Dawes, 17 Q.

* Where "insolvency" is made a cause of forfeiture, it is [*877] not generally necessary that the legatee should have taken the benefit of any act for the relief of insolvent debtors. It is enough that he is unable to pay his debts in full (*x*).

"Insolvency" means inability to pay in full.

Lord Eldon is sometimes supposed to have intended in Brandon *v.* Robinson (*y*), to lay it down that a limitation over to some third person is in all cases essential to the validity of a condition making a life interest to cease on bankruptcy. His remarks, however, are not to be taken as going to that extent (*z*); and Dommett *v.* Bedford (*a*), and Joel *v.* Mills (*b*), in which the life interest was held to cease upon the proviso for cesser without any gift over, are direct authorities to the contrary.

As to validity of condition determining legatee's interest where there is no gift over.

VII. — Conditions avoiding Life Interest on Voluntary Alienation. — But although a life interest cannot be made to adhere to any person (except a married woman (*c*)) in spite of his or her own voluntary acts of alienation, yet as it may be made to cease on bankruptcy or insolvency (*d*), so it may be determined on voluntary alienation (*e*).

Life estate may be made to cease on voluntary alienation.

B. D. 275. So also, where a Scotch sequestration was issued but recalled before a trustee had been appointed, as by the law of Scotland the property is not divested from the debtor until the appointment of a trustee, Clutterbuck *v.* James, W. N., 1890, p. 66, 62 L. T. 454. But where the gift was to cease on the donee suffering anything whereby the income should cease to be "payable to him," it was held that a receiving order, on which no further proceedings had been taken, caused a forfeiture, Re Sartoris' Estate, Sartoris *v.* Sartoris, W. N., 1891, p. 112.

(*x*) De l'astet *v.* Tavernier, 1 Kee. 161; Re Muggeridge's Trusts, Joh. 625; Freeman *v.* Bowen, 35 Beav. 17. The legatee is estopped by a recital of such inability contained in a composition deed executed by him, Billson *v.* Crofts, L. R., 15 Eq 314.

(*y*) 18 Ves., see p. 435; and see per Wood, V.-C., Stroud *v.* Norman, Kay, 330.

(*z*) See per Turner, V.-C., Rochford *v.* Hackman, 9 Hare, 481, 482.

(*a*) 6 T. R. 684.

(*b*) 3 K. & J. 458.

(*c*) See post, Sect. viii.

(*d*) See ante, Sect. vi.

(*e*) Lewes *v.* Lewes, 6 Sim. 304; Carter *v.* Carter, 3 K. & J. 618: Hurst *v.* Hurst, 21 Ch. D. 278, where a prohibition of charge was said by Lindley, L. J., to include any attempt to charge. Questions frequently arise as to the effect of particular acts in occasioning forfeiture under clauses of this description. Where an annuity was to cease if the annuitant should do any act with a view to assign, charge, incumber, or anticipate, it was held to be forfeited by his giving an unstamped memorandum charging the annuity with an annuity which he had contracted to grant, Stephens *v.* James, 4 Sim. 499.

But mere negotiation for an assignment is no breach, Jones *v.* Wyse, 2 Kee. 285; and an attempt to alien (where "attempts" are prohibited) must be such an act as but for the prohibition would be an alienation, Graham *v.* Lee, 23 Beav. 391. A power of attorney given to a creditor to receive dividends is irrevocable, and is therefore a clear violation of a clause against incumbering them, Wilkinson *v.* Wilkinson, 3 Sw. 515; unless arrears then due cover the debt, Cox *v.* Bockett, 35 Beav. 48. As to which see South Wales Loan Company *v.* Robertson, 8 Q. B. D 17. So is an authority by agreement with the creditor given to trustees to pay dividends to the creditor, Oldham *v.* Oldham, L. R., 3 Eq. 404; and so held notwithstanding an arrangement between debtor and creditor that the authority should be binding in honor only, this being considered a mere contrivance to evade the condition, id. In Craven *v.* Brady, L. R., 4 Eq. 209, 4 Ch. 296, marriage was held an act whereby a woman was deprived of "the right to receive or the control over" rents of real estate. But in Bonfield *v.* Hassell, 32 Beav. 217, a personal annuity to a woman with a clause prohibiting any act whereby it might "vest or become liable to vest" in any other person, was held not forfeited by marriage. Of course this question cannot now arise in cases within the Married Women's Property Act, 1882, ss. 2 & 5.

[*878] *But where a sum of money is given to be invested in the purchase, in the names of trustees, of an annuity for the life, and for the benefit, of A., it has been doubted whether a gift over on alienation or bankruptcy is valid; on the ground that, apart from the gift over, it is an absolute interest in A., and that the gift over is consequently repugnant. Now, in form, and so far as the testator's intention is concerned, the gift of a sum to purchase an annuity for A. is not an absolute gift to him of the sum; but the conclusion that A. is absolutely entitled to the sum is arrived at in this way. The trust to purchase is first taken to have been actually executed (for it is a perfectly lawful trust), and seeing from that point of view that A. may immediately sell the annuity, the Court dispenses with the actual purchase, and holds that A. is entitled to immediate payment of the sum. But where the annuity when purchased is to be subject to a gift over, the same point of view does not necessarily present the same conclusion. The case would then seem to be the same as if the testator, being possessed of an annuity pur autre vie, had bequeathed it in trust for the cestui que vie, with a gift over in case of alienation.

May a life annuity, to be purchased with gross sum, be so determined?

The question was raised in Hatton *v.* May (*f*), and it was held by Sir R. Malins, V.-C., that the gift over on alienation was good. And Sir R. Kindersley, V.-C., appears to have been of the same opinion: for in Day *v.* Day (*g*) where, after a life estate in the whole, the trust of one share of residue was to purchase a government annuity for the life of C., and to pay the same to him as it became due and not by anticipation; but if C. should either before or after the testator's death become bankrupt or incumber the annuity, then over; C. died in the lifetime of the tenant for life without having incumbered or become bankrupt, so that the exact point did not arise; but in dealing with the question [*879] *whether or not C.'s representatives were entitled to the share, the V.-C. had to consider the effect, as a matter of construction, of the gift over; and he distinguished between the restraint on anticipation, which (he said) apart from the gift over, would have been void in law, and the gift over, which he treated as an effectual provision, without a hint that he thought it open to any objection in point of law.

Hatton *v.* May.

Day *v.* Day.

But if the testator directs the annuity to be purchased in the name

By deed one may settle even his own property on himself for life, with an effectual proviso for cesser on *voluntary* alienation, Brooke *v.* Pearson, 27 Beav. 181; Knight *v.* Browne, 30 L. J. Ch. 619; or on *involuntary* alienation by process of law in favor of a particular creditor, Re Detmold, Detmold *v.* Detmold, 40 Ch. D. 585; but not on involuntary alienation in favor of creditors generally resulting from bankruptcy, Ex parte Stephens, 3 Ch. D. 807.

(*f*) 3 Ch. D. 148. See also Power *v.* Hayne, L. R., 8 Eq. 262, the conflict between which and Day *v.* Day, inf., is upon another point (vide ante, Vol. I., p. 368) and not, it is submitted, on the point here dealt with.

(*g*) 22 L. J. Ch. 878, 17 Jur. 586; also, but too shortly reported, 1 Drew. 569.

of the annuitant, the purchase would no sooner be made, than all control over the annuity would be gone, as completely as if the will had contained no gift over: the annuitant therefore is entitled to immediate payment of the value (*h*).

VIII. — Restraint on Anticipation by Married Women. — The general rule which renders nugatory and unavailing an attempt to vest in a person an interest which shall adhere to him, in spite of his own voluntary acts of alienation, is subject to an important exception in the case of women under coverture, who it is well known may be restrained from anticipation.

Unalienable trusts not permitted except in case of a married woman;

And a restriction on the aliening power of an unmarried woman is no less inoperative than a similar restraint on the jus disponendi of a man. This was distinctly admitted in Barton *v.* Briscoe (*i*), where a sum of money was vested in trustees, upon trust to pay the annual produce to such persons as A. (a feme coverte) should, notwithstanding her coverture, appoint, but not so as to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise, in the way of anticipation; and in default of such direction, into her own proper hands, for her separate use, exclusively of B. her husband; and after her decease, upon trust to transfer the fund as A. by will should appoint, and in default of such appointment to M., the only child of A. A. survived her husband, and now with M. filed a bill to obtain a transfer of the fund, which Sir T. Plumer, M. R., decreed, on the grouud that the restriction was confined to coverture, and that when a married woman becomes discoverte, she has the same power of disposition over her property as other persons.

but not excepting the case of an unmarried woman.

As the restriction was evidently confined to the existing coverture, the case cannot be considered as an authority on the general question, concerning which, however, there is no doubt either upon authority or principle.

Remark on Barton *v.* Briscoe.

* Thus, in Jones *v.* Salter (*k*), where the income of a money [*880] fund was bequeathed in trust for A., the wife of B., for her life, for her separate use (*l*), so that the same should not be subject to

(*h*) Hunt-Foulston *v.* Furber, 3 Ch. D. 285.
(*i*) Jac. 603.
(*k*) 2 R. & My. 208.
(*l*) What words create a trust for separate use, has often been a subject of dispute. The principle of construction, in cases not within the Married Women's Property Act, 1882, is stated to be that the marital right is not to be excluded, except by expressions which leave no doubt of the intention; 5 Ves. 521; 9 id. 377; 1 Mad. 207; 2 R. & My. 188; 2 My. & K. 181, 188. But in Willis *v.* Kymer, 7 Ch. D. 181, a precatory trust for children, simpliciter, was held by Jessel, M. R., to authorize the trustee to add a trust for separate use; as if the trust had been executory.

In Kirk *v.* Paulin, at the Rolls (1737), 7 Vin. Abr. 95, pl. 43, A. bequeathed household goods, &c., to his daughter B., then the wife of C., *to be at her own disposal*, and to do therewith as she should think fit: the bequest was held to be for her separate use. See also Prichard *v.* Ames, T. & R. 222; Bland *v.* Dawes, 17 Ch. D. 794 ("sole use and disposal.")

[*881] * the debts, dues, or demands, and should be free from the control or interference of B., or of any other husband or husbands, with

In Darley *v.* Darley, 3 Atk. 399, Lord Hardwicke ruled that an estate given to the husband *for the livelihood* of the wife created a trust for her separate use. But assuming the report to be correct, this may have depended on the husband being *sole* trustee (as to which vid. inf.): in the case itself a leasehold estate was conveyed to the wife direct, and the decision was the reverse of the dictum, see n. by Sanders, 3 Atk. 399, and per Arden, M. R., 3 B. C. C. 383. In Packwood *v.* Maddison, 1 S. & St. 232, Leach, V.-C., said, that by a gift "for the support" of a feme coverte a trust for her separate use was not created. And see Gilchrist *v.* Cator, 1 De G. & S. 188; and per Hall, V.-C., Austin *v.* Austin, 4 Ch. D. 236. In Cape *v.* Cape, 2 Y. & C. 543, a gift by codicil for the support and maintenance of the wife of A. was held to be for her separate use, probably because the will had contained a bequest of the same fund to A. himself, which was expressly revoked by the codicil.

In Lee *v.* Priaux, 3 B. C. C. 381, the trust, in a will, was to pay certain dividends to A., but the trustee was not to "be troubled to see to the application of any sum or sums paid to the said A., *but her receipt in writing should be a sufficient discharge*" to the trustee for the sums so paid. Arden, M. R., was of opinion, that the words were sufficient to give an absolute power to the wife independently of her husband. See also Re Lorimer, 12 Beav. 521, where a legacy was directed to be paid "into the proper hands of A., and upon her single receipt for the same."

In Dixon *v.* Olmius, 2 Cox, 414, a bequest to the testator's niece, Lady W., of certain securities owing from Lord W., with a direction that they should be delivered up to her whenever she should demand or require the same, was held, by Lord Loughborough, to be a gift to her separate use; because Lord W. could not have obtained them from the executors without a demand made by Lady W. The same principle evidently applies to a direction that a feme legatee shall not sell without her husband's consent, Johnes *v.* Lockhart, 3 B. C. C. 383, n., Belt's ed.

In Hartley *v.* Hurle, 5 Ves. 540, Arden, M. R., held that a trust to pay income *into the proper hands* of A. was a trust for separate use. But in Tyler *v.* Lake, 4 Sim. 144, Shadwell, V.-C., made a contrary decision on the same words. There was a similar gift to a male legatee in the same will; but his Honor seems not to have wholly relied on this circumstance: and the decision was affirmed by Lord Brougham, 2 R. & My. 183, and reluctantly followed by Wigram, V.-C., in Blacklow *v.* Laws, 2 Hare, 49 (where the trust was "to pay an annuity into the proper hands of A. for her own proper use and benefit"). See also Rycroft *v.* Christy, 3 Beav. 238. But a gift in trust for a woman, she "to receive the rents herself while she lives, *whether married or single*," with a clause forbidding a sale or mortgage during her life, was in Goulder *v.* Camm, 1 D. F. & J. 146, held to create a trust for her separate use.

Of course, a trust or direction to pay the rents or income of property, real or personal, simply to a married woman for life creates no trust for her separate use, Brown *v.* Clark, 3 Ves. 166; Lumb *v.* Milnes, 5 Ves. 517; Jacobs *v.* Amyatt, 1 Mad. 376, n.; and the addition of the words "for her *own* use and benefit" has been repeatedly held not to vary the construction, Wills *v.* Sayer, 4 Mad. 409; Roberts *v.* Spicer, 5 Mad. 491; Beales *v.* Spencer, 2 Y. & C. C. C. 651; and in Taylor *v.* Stainton, 2 Jur. N. S. 634, it was admitted that a residuary bequest to a married woman "for her own proper use and benefit," did not create a separate trust.

"Separate" is the proper technical word for excluding the marital right: "sole" is not equivalent; and prima facie a devise or bequest direct to a *single* woman (including the testator's widow) for her *sole* use will not create a separate use, Gilbert *v.* Lewis, 1 D. J. & S. 38; Lewis *v.* Mathews, L. R., 2 Eq. 177. Nor will the mere circumstance that the property is vested in trustees, as where all the testator's estate is given to trustees for the general purposes of the will, affect the result, Massy *v.* Rowen, L. R., 4 H. L. 288. It is a question of construction on the whole will in each case: and where the machinery of a trust was created for the special benefit of a *married* woman (Green *v.* Britten, 1 D. J. & S. 649; Re Amies' Estate, W. N., 1880, p. 16), and of a single woman for whose possible marriage the testator was providing (Re Tarsey's Trusts, L. R., 1 Eq. 561). a trust for the *sole* use was held to exclude the husband. In Re Tarsey's Trusts the allusion to marriage was not in connection with the very legacy upon which the question arose, but with another given by the same will distinctly for the same legatee's separate use; and the exclusion of the husband from one fund by clear words was considered to increase the probability that by the use of the word "sole" it was intended to exclude him from the other (see also L. R., 4 H. L. 302): a fortiori, where one bequest was to be enjoyed together with the other, as a house with its furniture, Ex parte Killick, 3 M. D. & D. 480.

Income being more commonly devoted to separate use than corpus (and in Troutbeck *v.* Boughey, L. R., 2 Eq. 534, the separate use was held upon the construction of the will to attach on the income only, although the woman was devisee in fee), "sole" may more readily be understood as intended to annex such a use to income than to corpus, per Lord Cairns, L. R., 4 H. L. 301; and see Adamson *v.* Armitage, Coop. 283, 19 Ves. 416 (where there was also a special trust created); Inglefield *v.* Coghlan, 2 Coll. 247. But if a testator

* whom she might at any time thereafter intermarry, *and* [*882] *without any power to charge, incumber, anticipate, or assign*

after directing that the income bequeathed to females shall be "under their sole control" (words which standing alone would clearly exclude the marital right), show by the context that the expression has reference to the possible control of some person other than the husband, the words will be inoperative to modify the interest. Massey *v.* Parker, 2 My. & K. 174. Ex parte Ray, 1 Mad. 199, where, in default of children, the trust of corpus was for the sole use, benefit, and disposition of a woman, arose on her marriage settlement; so that an intention to exclude the husband might be readily inferred from the nature of the instrument. But some dicta in this and other cases previous to Gilbert *v.* Lewis, especially in Ex parte Killick, ascribe greater force to the word "sole" than is consistent with late cases; with which also Cox *v.* Lyne, Young, 562, and Lindsell *v.* Thacker, 12 Sim. 178, are difficult to reconcile.

The construction is wholly uninfluenced by any extrinsic circumstances in the situation of the cestui que trust, which might seem to render a trust of this nature reasonable or convenient, as that of her being indigent, or living separately from her husband, or both, Palmer *v.* Trevor, 1 Vern. 261, Raithby's ed., unless the circumstances are expressly referred to in the will, as where "in case husband and wife should not at testator's death be living together," the bequest was to the wife "absolutely," Shewell *v.* Dwarris, Joh. 172. But the fact of the husband being *one* of the trustees, Kensington *v.* Dollond, 2 My. & K. 184, or even that of the prior trust being for him determinable on bankruptcy, &c., the trust in that event being simply to pay "unto" the wife, Stanton *v.* Hall, 2 R & My. 175, does not afford ground for inferring a separate trust. If the husband be made sole trustee the inference might be stronger, per Leach, V.-C., Ex parte Beilby, 1 Gl. & J. 167.

Where the gift was to A. and B. (one a married woman, and the other her infant daughter), to be equally divided between them, "for their own use and benefit, *independent of any other person;*" it was held, that these words meant "*independent of*" *all mankind*, and, therefore, included the husband, Margetts *v* Barringer, 7 Sim. 482. But a general exclusion of all, was by Lord Hatherley, L. R., 4 H. L. 298, distinguished from the particular exclusion of a husband.

In Wardle *v.* Claxton, 9 Sim. 524, a direction to trustees to pay the interest to the testator's wife, to be by her applied for the maintenance of herself *and her children*, was held not to create a trust for separate use; the words "to be applied," &c., referring not only to the widow, but to all the children. But this circumstance will not control the force of a clear trust for separate use, Bain *v.* Lescher, 11 Sim. 397, for, as K. Bruce, V.-C., said (2 Coll. 421), "a case might arise in which the words 'sole use' applied to a class of men and women, might not be held indiscriminately applicable to each." See also Froggatt *v.* Wardell, 3 De G. & S. 685.

Where a trust for separate use is created, but no trustee is appointed, the husband becomes a trustee for his wife, Bennett *v.* Davis, 2 P. W. 316; see also 9 Ves. 375, 583. The point had been doubted by Lord Cowper in Harvey *v.* Harvey, 1 P. W. 125.

The several questions above noticed will gradually lose their former importance as the operation of recent legislation comes more fully into force.

Under the Married Women's Property Act, 1882 (44 & 45 Vict. c. 75), s. 2. Every woman married after the commencement of this Act (1st of January, 1883), may hold as her separate property and dispose of as if she were a feme sole, all real and personal property belonging to her at the time of marriage or acquired by or devolving upon her after marriage. And by s. 5 of the same Act, every woman married before the commencement of the Act may hold and dispose of in manner aforesaid as her separate property all real and personal property her title to which accrues after the commencement of the Act. The title is deemed to accrue at the date when such title, whether vested or contingent, was originally acquired, not the date at which the property falls into possession: see Reid *v.* Reid, 31 Ch. D. 402, overruling Baynton *v.* Collins, 27 Ch. D. 604; Re Thompson and Curzon. 29 Ch. D. 177; and Re Hughes, W. N., 1885, p 62; and affirming Re Adame's Trusts, 33 W. R. 834, W. N. 1885, p. 153; Re Tucker, Emmanuel *v.* Parfitt, 33 W. R., 932, W. N., 1885, p. 148; and Re Hobson, Webster *v.* Rickards, 34 W. R., 195, W. N., 1885, p. 218.

To the complete efficiency of a trust for the separate use, a restraint on the anticipation of future income is essential as a protection against marital influence. Hence, to ascertain by what terms a restrictive provision of this nature may be created is a point of much importance. The intention must be clear: and therefore a direction to pay the income *from time to time*, or as it shall become due, or into the *proper hands* of the feme coverte, Pybus *v.* Smith, 3 B. C. C. 340, 1 Ves. Jr. 189; Parkes *v.* White, 11 Ves. 222; Acton *v.* White, 1 S. & St. 429; Glyn *v.* Baster, 1 Y. & J. 329; nr even upon her personal appearance and receipt, Ross's Trust, 1 Sim. N. S. 196; cf. Arden *v.* Goodacre, 11 C. B. 883; will not take away the power of anticipation. In Alexander *v.* Young, 6 Hare, 393, the principle was carried to its full extent, Wigram, V.-C., holding that a trust for the separate use of a married woman for her life; and after her death, as she should appoint, *but no appointment by deed to come into operation until after her death*, did not forbid anticipation.

But no technical form of words is necessary. In Field *v.* Evans, 15 Sim. 375, Shadwell, V.-C., decided, that, under a trust for the separate use of a married woman, and a declaration

[*883] *the growing *payments thereof;* and after her decease, in trust for other persons. B., the husband, died, and A., the widow, and the ulterior cestuis que trust, petitioned for a transfer of the fund. Sir W. Grant, M. R., after some consideration, made the order.

Inalienable trust for unmarried woman not admissible.

So in Woodmeston *v.* Walker (*m*), part of a residue was to be laid out in the purchase of a life annuity for A., for her separate use, and independent of any husband she might happen to marry, with a direction that her receipts, notwithstanding her coverture, should be good and sufficient discharges for the same, and to be for her personal benefit and maintenance, *and without power for her to assign or sell the same by way of anticipation, or otherwise.* A. was a widow at the date of the will, and not having married again, applied for payment of the fund. Sir J. Leach, M. R., held that A. was not entitled to the absolute interest, inasmuch as the gift was subject to the contingency of a future mar-

What words create a trust for separate use.

that the receipts of herself or the persons to whom she should appoint the income, *after the same should become due*, should be effectual, she was restrained from anticipating. See also Baker *v.* Bradley, 7 D. M. & G. 597; Re Smith, Chapman *v.* Wood, W. N., 1884, p. 181. In Steedman *v.* Poole, 6 Hare, 193, a gift of property for the separate use of a feme coverte, "and not to be sold nor mortgaged," was similarly construed; and under a bequest to children, "the girls' shares to be settled on themselves strictly," it was held, that an executory trust for separate use without power of anticipation was created, Loch *v.* Bagley, L. R., 4 Eq. 122. In Brown *v.* Bamford, 1 Phill. 260, it was decided by Lord Lyndhurst (reversing 11 Sim. 127), that a bequest in trust to pay the income to such persons as a married woman should appoint, but not by way of anticipation, and in default of appointment, into her proper hands for her separate use, created a valid restraint against anticipation, extending not only to the express power but to the trust in default of appointment. So, Moore *v.* Moore, 1 Coll. 54; Harnett *v.* M'Dougall, 8 Beav. 187; Spring *v.* Pride, 4 D. J. & S. 395. And in Re Lawrenson, Payne-Collier *v.* Vyse, W. N., 1891, p. 28, a restraint on anticipation attached to an annuity was held to extend to a share of the testator's residue given to the annuitant. But in Marshall *v.* Aiglewood, W. N., 1881, p. 3, where residue was given on certain trusts for testator's *children* and their issue, the shares of *daughters* and *female* issue to be for their separate use, a valid restraint on anticipation was held not to be annexed to the shares of daughters by a superadded clause prohibiting alienation by any of the *children* during their lives.

It was formerly considered that the restraint was inapplicable to a fund which was not producing income, and that in such a case the corpus was payable to the feme coverte during coverture, Re Croughton's Trusts, 8 Ch. 460, and see Armitage *v.* Coates, 35 Beav. 1. Secus, as to the inheritance of land, or the corpus of an income-bearing fund. Baggett *v.* Meux, 1 Coll. 138, 1 Phill. 627; Re Ellis' Trusts, L. R., 17 Eq. 409; at least, not without a reservation of the income during coverture, see per Jessel, M. R., Cooper *v* Macdonald, 7 Ch. D. 288, 298. But the Court of Appeal have laid down that under a bequest to a married woman for her separate use, followed by a clause restraining anticipation, the efficacy of the restraint depends not on whether the gift is of an income-bearing fund or of cash, but on whether the testator has or has not shown an intention that the trustees of his will shall keep the fund and only pay the income, if any, to the married woman; Re Boun, O'Halloran *v.* King, 27 Ch. D. 411. See further as to the nature and scope of clauses in restraint on anticipation, Re Spencer, Thomas *v.* Spencer, 30 Ch. D. 183, Re Currey, Gibson *v.* Way, 32 Ch. D. 361; Re Grey's Settlements, Acasen *v.* Greenwood, 34 Ch. D. 85, Re Tippett's and Newbould's Contract, 37 Ch. D. 444.

For the purposes of a clause of this nature there is no distinction between a restraint on anticipation and a restraint on alienation; 8 Ch. D. 463; 27 Ch. D. 414; 32 Ch. D. 365.

With the ordinary proviso against anticipation, income accruing de die in diem, but not yet actually payable, cannot be dealt with, Re Brettle, 1 D. J. & S. 79; but overdue arrears are not protected, Pemberton *v.* M'Gill, 1 Dr. & Sm. 266. A feme coverte may bar an entail in land notwithstanding a restraint on anticipation, Cooper *v.* Macdonald, supra. A restraint on anticipation does not create a separate use by implication, Stogdon *v.* Lee, W. N., 1891, p. 47.

(*m*) 2 R. & My. 197.

riage, when the restriction would be operative. The decree was reversed by Lord Brougham, C., on the authority of Barton *v.* Briscoe. After laying down the doctrine, that equity allows a restriction to be imposed on the dominion over separate estate, as a thing of its own creation, the better to secure it for the benefit of the object, he observed, that the operation of the clause against anticipation, where there was no limitation over, rested entirely on its connection with the coverture, and on its being applied to a species of interest which was itself the creature of equity; that * the present [*884] was not a case where there was a coverture, but a possibility only of coverture; and it would be going farther than the authorities warranted, and be violating legal principle, to give effect to an intention of creating an inalienable estate in a chattel interest, conveyed to the separate use of a feme sole (which estate, till her marriage, or after the husband's decease, she might otherwise deal with at discretion), simply because, at some after period, she might possibly contract a marriage.

The next point is of great and general importance, namely, whether a restriction or alienation, extending generally to future coverture, is valid. Formerly the validity of such restrictions was not supposed to admit of doubt. To the surprise of the profession, however, a restriction or alienation applied to future coverture, was pronounced by Sir L. Shadwell to be invalid in Newton *v.* Reid (*n*), and Brown *v.* Pocock (*o*), though without much consideration. Lord Brougham, too, in Woodmeston *v.* Walker (*p*), expressed his strong doubt of the capacity of a testator or settlor to create a fetter on alienation which should attach during future coverture, and from time to time fall off, when such coverture determines.

Controversy as to trust for separate inalienable use during future coverture.

Happily, the subsequent cases of Tullett *v.* Armstrong (*q*), and Scarborough *v.* Borman (*r*), have established beyond dispute the validity of a trust for the separate unalienable use of woman during *future* coverture. In each of those cases Lord Langdale, M. R., and on appeal, Lord Cottenham, held a trust of this nature to be valid. "After the most anxious consideration," said the L. C., in concluding an elaborate judgment in the former case, "I have come to the conclusion that the jurisdiction which this Court has assumed in similar cases, justifies it in extending it to the protection of the separate estate, with its qualification and restrictions attached to it throughout a *subsequent* coverture; and resting such jurisdiction upon the broadest foundation, and that the interests of society re-

Validity of trust for separate and unalienable use during future coverture finally established.

(*n*) 4 Sim. 160.
(*o*) 5 Sim. 663.
(*p*) 2 R. & My., at p. 206.
(*q*) 1 Beav. 1, 4 My. & Cr. 390, and Sweet's Cases on Separate Estate, 28.
(*r*) 1 Beav. 34, 4 My. & Cr. 378.

quire that this should be done. When this Court first established the separate estate it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed (*s*). [*885] It * being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation (*t*)."

Forfeiture not effected by ineffectual attempt to anticipate.

Where there is a gift of a life interest to a married woman without power of anticipation, with a gift over on her death or "on her anticipating" her interest, any attempted assignment of her life interest is simply inoperative, and accordingly does not effect a forfeiture (*u*).

IX. — Conditions in Restraint of Marriage. — The numerous and refined distinctions on the subject of conditions in restraint of marriage do not apply to devises of, or pecuniary charges upon, real estate (*x*), but are confined exclusively to personal legacies and money arising from the sale of lands (*y*); and with regard to the latter, they owe their introduction to the ecclesiastical courts, who, in the exercise of the jurisdiction they once possessed over personal legacies, it is well known, borrowed many of their rules from the civil law.

Distinction in regard to real and personal estate.

By this law, all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift over or not, and however qualified, were absolutely void (*z*); and marriage simply was a sufficient compliance with a condition requiring marriage with consent, or with a particular individual, or under any other restrictive circumstances (*a*); but this doctrine did not apply to widows.

Rule of the civil law.

Our Courts, however, while they equally deny validity to con-

(*s*) Even trusts for separate use during future coverture seemed exposed at one time to some peril by the often cited doctrine in Massey *v.* Parker, 2 My. & K. 274; but the apprehensions on this subject had considerably abated, even before the cases of Tullett *v.* Armstrong, and Scarborough *v.* Borman, post, had established beyond controversy the validity of restrictions on alienation extending to futura coverture; Davies *v.* Thornycroft, 6 Sim. 420; Johnson *v.* Johnson, 1 Kee. 648.

(*t*) As to whether a trust for separate use is intended to apply to all future covertures, or only to an existing or contemplated coverture, see Beable *v.* Dodd, 1 T. R. 193; Re Gaffee, 1 Mac. & G. 541; and the cases there cited; Hawkes *v.* Hubback, L. R., 11 Eq. 5; King *v.* Lucas, 23 Ch. D. 712 (settlement).

(*u*) Re Wormald, Frank *v.* Muzeen, 43 Ch. D. 630.

(*x*) Reves *v.* Herne, 5 Vin. Ab. 343, pl. 41; Hervey *v.* Aston, 1 Atk. 361; Regnish *v.* Martin, 3 Atk. 330.

(*y*) Bellairs *v.* Bellairs, L. R., 18 Eq. 510, 516, per Jessel, M. R. The case was one of a mixed fund, and was held governed by the rule respecting personalty.

(*z*) Godolph. Orph. Leg. p. 1, c. 15.

(*a*) Id. p. 3, c. 17.

What are valid restraints on marriage by the law of England.

ditions in general restraint of marriage, though accompanied by a gift over (*b*), yet have not adopted the rule of the civil law in its unqualified extent, but have subjected it to various modifications. "By the law of England," says an eminent Judge, * "an injunction to ask [*886] consent is lawful, as not restraining marriage generally (*c*).[1] A condition that a widow shall not marry, is *not* unlawful (*d*). An annuity during widowhood (*e*), a condition to marry or not to marry T., is good (*f*). A condition prescribing due ceremonies and place of marriage is good (*g*); still more is the condition good which only limits the time to twenty-one (*h*), or any other reasonable age (*i*),[2] provided it be not used as a cover to restrain marriage generally" (*k*).[3] Conditions not to marry a Papist (*l*), or a Scotchman (*m*); not to marry any but a Jew (*n*), and that a *man* shall not marry again (*o*), have also been held good.[4]

(*b*) Morley *v.* Rennoldson, 2 Hare, 570; Lloyd *v.* Lloyd, 2 Sim. N. S. 255; Bellairs *v.* Bellairs, L. R., 18 Eq. 510.

(*c*) Sutton *v.* Jewks, 2 Ch. Rep. 95; Creagh *v.* Wilson, 2 Vern. 573; Ashton *v.* Ashton, Pre. Ch. 226; Chauncey *v.* Graydon, 2 Atk. 616; Hemmings *v.* Munckley, 1 B. C. C. 303; Dashwood *v.* Bulkeley, 10 Ves. 230.

(*d*) Barton *v.* Barton, 2 Vern. 308; Lloyd *v.* Lloyd, 2 Sim. N. S. 255; whether the bequest be by the husband or another, Newton *v.* Marsden, 2 J. & H. 356. Where a testator devised his real estate to his wife "during her life, provided she shall so long remain my widow," and he directed his trustees after the decease or re-marriage of his wife to sell the real estate, and declared that the trustees shall out of the proceeds of sale "from and immediately after the decease" of his wife raise and pay certain legacies: it was held by North J., that the legacies were payable on the re-marriage of the wife, Re Tredwell, Jaffray *v.* Tredwell, W. N., 1891, p. 35.

(*e*) Jordan *v.* Holkham, Amb. 209.

(*f*) Jervoise *v.* Duke, 1 Vern. 19. See also Randall *v.* Payne, 1 B. C. C. 55, ante, p. 843; Davis *v.* Angel, 4 D. F. & J. 524.

(*g*) In Haughton *v.* Haughton, 1 Moll. 611 (a case of real estate), a condition requiring marriage to be according to the rites of the Quakers was held valid.

(*h*) Stackpole *v.* Beaumont, 3 Ves. 89.

(*i*) Yonge *v.* Furse, 8 D. M. & G. 756 (twenty-eight).

(*k*) Per Lord Thurlow, in Scott *v.* Tyler, 2 B. C. C. 488.

(*l*) Duggan *v.* Kelly, 10 Ir. Eq. Rep. 295.

(*m*) Perrio *v.* Lyon, 9 East, 170 (real estate).

(*n*) Hodgson *v.* Halford, 11 Ch. D 959. See also Re Knox, 23 L. R. Ir. 542.

(o) Allen *v.* Jackson, 1 Ch. D. 399.

[1] Collier *v.* Slaughter, 20 Ala. 263; Hogan *v.* Curtin, 88 N. Y. 163 (condition against marriage under twenty-one without consent held good).

[2] See Reuff *v.* Coleman and Hogan *v.* Curtin, supra.

[3] See Phillips *v.* Ferguson, 85 Va. 509; Renff *v.* Coleman, 30 W. Va. 171.

[4] Upon the general subject see a note by the present writer in 1 Story, Eq. pp. 276–280, 13th ed. Conditions imposed by a testator in a gift of realty in restraint of marriage on the part of his widow are, by the general current of authority, valid. Duddy *v.* Gresham, 2 L. R. Ir. 442, 464; Commonwealth *v.* Stauffer, 10 Barr, 350; Cornell *v.* Lovett, 35 Penn. St. 100; Knight *v.* Mahoney, 152 Mass. 523 (overruling Parsons *v.* Winslow, 6 Mass. 169); Gaven *v.* Allen, 100 Mo. 293; Boyer *v.* Allen, 76 Mo. 498; Little *v.* Giles, 25 Neb. 313 (see Giles *v.* Little, 104 U. S. 291); McCloskey *v.* Gleason, 56 Vt. 264. See Luigart *v.* Ripley, 19 Ohio St. 24; Clark *v.* Tennison, 33 Md. 85; Duncan *v.* Philips, 3 Head, 415; Hughes *v.* Boyd, 2 Sneed, 512; Vaughan *v.* Lovejoy, 34 Ala. 437; Snider *v.* Newson, 24 Ga. 139; Chapin *v.* Marvin, 12 Wend. 538; Scott *v.* Tyler, 2 Brown, Ch. 487; Phillips *v.* Medbury, 7 Conn. 568; Pringle *v.* Dunkley, 14 Smedes & M. 16; Dumey *v.* Schoeffler, 24 Mo. 170, 177; Allen *v.* Jackson, 1 Ch. D. 399. Contra, Levengood *v.* Hoople, 124 Ind. 27 (citing Coon *v.* Bean, 69 Ind. 474; Stilwell *v.* Knapper, id. 558). See Phillips *v.* Ferguson, 85 Va. 509. And the same rule applies to the second marriage of a man as to that of a woman. Allen *v.* Jackson, supra. The condition in such case is probably good, though there be no limitation over. Cornell *v.* Lovett, 35 Penn. St. 100, 104; Commonwealth *v.* Stauffer, 10 Barr, 350. In gifts of legacies, however, the condition

On the other hand, a condition not to marry a man of a particular profession (*p*), or a man who is not seised of an estate in fee, or of

(*p*) 1 Eq. Ca. Ab. 110, pl. 1, n. in marg. But in Jenner *v.* Turner, 16 Ch. D. 188. Bacon, V.-C., upheld a condition subsequent in restraint of marriage with any person who was or had been a domestic servant.

would be held void by those courts which have followed the doctrines of the English Ecclesiastical Court. Id. See Jones *v.* Jones, infra; Marples *v.* Bainbridge, 1 Madd. 590; Duddy *v.* Gresham, 2 L. R. Ir. 442, 465; Bannerman *v.* Weaver, 8 Md. 517; Gough *v.* Manning, 26 Md. 347, 362; Waters *v.* Tazewell, 9 Md. 292.

This is the *in terrorem* doctrine of the judges who "have never felt very sure of the ground upon which they were treading." Dickson's Trust, 1 Sim. N. S. 37, Lord Cranworth; Selden *v.* Keen, 27 Gratt. 576, 581. In such cases a gift during widowhood becomes a gift for life. Bannerman *v.* Weaver, supra. The better opinion appears to be that in those states in which the ecclesiastical law has not been adopted, the condition even in a gift of personalty would be valid. See McKrow *v.* Painter, 89 N. C. 437 (where, however, the condition is spoken of as a limitation), and the reasoning in Commonwealth *v.* Stauffer, supra. In many of the cases, however, the condition has been followed by a gift over upon breach; and this has always been held to make the condition good; a distinction which is criticised infra. As to the law of Indiana, see Harmon *v.* Brown, 53 Ind. 207; Mack *v.* Mulcahy, 47 Ind. 68.

In regard to the marriage of others than the testator's widow, a condition, without a gift over, should, it is held, be limited to the forbidding of marriage with a particular person, or under a certain age, or without the consent of certain persons. Duddy *v.* Gresham, supra; Maddox *v.* Maddox, 11 Gratt. 804; Williams *v.* Cowden, 11 Mo. 211; Cornell *v.* Lovett, supra. If, however, the gift be made in the form of a limitation of the estate, as where land is devised to A. "until marriage," or to A., "and in the event of marriage," then over, the gift over is by the general current of authority deemed good. Giles *v.* Little, 104 U. S. 291; Kaufman *v.* Breckenridge, 117 Ill. 305; Green *v.* Hewitt, 97 Ill. 113; Levengood *v.* Hoople, 124 Ind. 27 (citing Harmon *v.* Brown, 53 Ind. 207; Tate *v.* McLain, 74 Ind. 493; Wood *v.* Beasley, 107 Ind. 37); Summit *v.* Young, 109 Ind. 506; Hibbits *v.* Jack, 97 Ind. 570; Nash *v.* Simpson, 78 Maine, 142 (citing Dole *v.* Johnson, 3 Allen, 364); Knight *v.* Mahoney, 152 Mass. 523; Otis *v.* Prince, 10 Gray, 581; Bodwell *v.* Nutter, 63 N. H. 446; Morgan *v.* Morgan, 41 N. J. Eq. 235; Selden *v.* Keen, 27 Gratt. 576; Lloyd *v.* Branton, 3 Meriv. 108; Morley *v.* Rennoldson, 2 Hare, 570; Harmon *v.* Brown, 53 Ind. 207 (overruling, on statutory law, Spurgeon *v.* Scheible, 43 Ind. 216); Randall *v.* Marble, 69 Maine, 310 (case of a deed); Maddox *v.* Maddox, 11 Gratt. 804; Dawson *v.* Oliver-Massey, 2 Ch. D. 753. A testator may give another as small an estate as he will, and clearly the donee cannot take a larger interest, to the detriment of the later donee, in the absence of evidence in the will of any purpose in the testator to enlarge the first gift in any case. The courts cannot give a devisee or legatee an estate which the testator did not express an intention to give; and the rights of the later donee in such a case are to be respected as much as those of the earlier.

But the limitation over must be valid, or the prior taker will hold the estate free from it. Otis *v.* Prince, supra; Randall *v.* Marble, supra. And inasmuch as there cannot be an heir of a living person, it was held in Otis *v.* Prince that a limitation over to the "heirs" of the donee upon his marriage, in the absence of evidence in the will to show that the term was not used in its technical sense, was void; and an attempt to forfeit the donee's interest in his lifetime in favor of his "heirs" failed. In Randall *v.* Marble, which arose under a grant, a broader ground was taken; the court declaring that a limitation over to one's heirs was of no effect, because the estate would descend to the heirs in case of forfeiture whether there was a limitation or not. Hence, forfeiture to the donor's heirs was no forfeiture. The gift over must be to a stranger. Compare Williams *v.* Cowden, 11 Mo. 211. And see ante, p. 845 n., as to the distinction between a condition and a limitation in the matter of forfeiture.

The question may sometimes be difficult to decide whether the testator intended to impose a general (and, therefore, unlawful) restraint upon marriage, or merely to provide for the donee while unmarried, a provision to the latter effect being, of course, a mere limit fixed upon the estate given. See Jones *v.* Jones, 1 Q. B. D. 279, a case in which the court considered that the testator did not intend to impose a restraint upon marriage. It was also affirmed in that case that there is no authority for holding that the validity of a gift of land may turn upon the question whether the disposition amounts to a (conditional) limitation or not, though the validity of a gift of personalty might, perhaps, turn upon such a question. And it was said that the general doctrine concerning gifts in restraint of marriage had been borrowed from the ecclesiastical law (Commonwealth *v.* Stauffer, 10 Barr, 350, 354; Cornell *v.* Lovett, 35 Penn. St. 100, 101, 103), and that the consequences had sometimes been so inconvenient that the courts had resorted to many nice distinctions between conditions and limitations to escape the rule. Commonwealth *v.* Stauffer, supra; Cornell *v.* Lovett, supra. See also Parsons *v.* Winslow, 6 Mass.

perpetual freehold of the annual value of 500*l.* (*q*), is said to be too general, and therefore void.

But a bequest during celibacy is good; "for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage" (*r*). "This is not a subtlety of our law only: the civil law made the same distinction" (*s*). *And no gift over is required to make the restriction in this form effectual (*t*). [*887]

Limitation *until* marriage.

Generally in the law of personalty (*u*) to make effectual a condition to ask consent there must be a bequest over in default, otherwise the condition will be regarded as in terrorem only (*v*). "Different

(*q*) Keily *v.* Monck, 3 Ridg. P. C. 205.

(*r*) Scott *v.* Tyler, Dick. 722; Heath *v.* Lewis, 3 D. M. & G. 954; Potter *v.* Richards, 24 L. J. Ch. 488, 1 Jur. N. S. 462; Evans *v.* Rosser, 2 H. & M. 190. And see Bullock *v.* Bennett, 7 D. M. & G 283; Webb *v.* Grace, 2 Phill. 701; Re Paine, W. N., 1882, p. 77.

(*s*) Per Wilmot, C. J., Wilm. Op. 373. But the distinction does not hold in gifts of real estate, Jones *v.* Jones, 1 Q. B. D. 274, stated infra.

(*t*) Heath *v.* Lewis, 3 D. M. & G. 954.

(*u*) In the case of real estate a gift over is not essential to the validity of conditions in partial restraint of marriage, Haughton *v.* Haughton, 1 Moll. 611. As to whether the rule applies where real and personal estates are given together, see Duddy *v.* Gresham, 2 L. R., Ir. 443.

(*v*) 2 Ch. Rep. 95; 2 Freem. 41; 2 Eq. Ca. Ab. 212, 1 Ch. Cas. 22; 2 Freem. 171; 2 Vern. 357; 2 Vern. 452; Pre. Ch. 562; 2 Eq. Ca. Ab. 213; Sel. Cas. in Ch. 26; 1 Atk. 361; Willes, 83; 2 Atk. 616; 3 id. 330; 1 Wils. 130; 3 Atk. 364; 19 Ves. 14. Two cases, indeed, may be cited which may seem to militate against the rule ascribing this effect to a bequest over — Underwood *v.* Morris, 2 Atk. 184; and Jones *v.* Suffolk, 1 B. C. C. 528; but the authority of the former was doubted by Lord Loughborough, in Hemmings *v.* Munckley, 1 B. C. C. 303, 1 Cox, 39; and denied by Lord Thurlow, in Scott *v.* Tyler, 2 B. C. C. 488; and in the other (Jones *v.* Suffolk) it is to be inferred from the judgment, though the fact is not distinctly stated, that one of the persons whose consent was required was dead, and consequently the gift over on marriage without consent failed; and even if the general rule were not (as, however, it seems that it is) that where the act or event which is to give effect to the gift over and defeat the prior defeasible gift becomes impossible, the former is defeated, and the latter is rendered absolute (ante, p. 851), yet where the effect of a contrary construction would be, as in the present case, to impose a general restraint on the marriage of the first devisee or legatee, after the death of the person whose consent is required, the case seems to fall within the principle on which conditions restraining marriage generally have been considered as void; the necessary consequence of which would be, that the first legacy is absolute, and the substituted gift fails. The same observations apply to Peyton *v.* Bury, 2 P. W. 626.

169, 181; 4 Kent, Com. 127, doubting the soundness of a distinction based upon a mere gift over in such cases.

It will be observed that cases of this kind differ widely from cases of restrictions upon alienation and the like. In those cases the rights of creditors are concerned, and the distinction between a bare, repugnant condition and a limitation of the estate becomes most important; in the case under consideration, however, the real question, supposing, with the authorities, that an attempt to impose a general restraint upon marriage is void, should be whether a purpose to impose such a restraint is apparent from the will. If that purpose is apparent, then in principle it should be immaterial in what form, whether by a simple condition or by a limitation, the purpose is expressed. Thus, in case of a gift of Blackacre to A. in fee, but upon A.'s marriage, then over to B., the question, notwithstanding the existence of a limitation, should be whether the testator intended by the gift over to restrain A. from marrying; as to which it seems there should be some clear evidence — something beyond the mere form of a gift in language — like that of the examples, except perhaps in the case of a gift to the testator's widow. If such evidence appear, then A. should take in fee in disregard of the limitation.

However, it may be too late in America to make this suggestion even on the authority of Jones *v.* Jones, supra, although in all the distinctions taken, and in the actual conflict of authority, there has never, it is apprehended, been any doubt that if the provision as to marriage could be construed as not *designed* (even though tending) to impose restraint upon marrying, it must be sustained. And if the question were open, there might be ground to inquire whether conditions in restraint of marriage generally were contrary to public policy. See Commonwealth *v.* Stauffer, supra; Allen *v.* Jackson, 1 Ch. D. 399, 405; Jones *v.* Jones, supra.

Gift over is necessary, to make effectual condition to ask consent.

reasons have been assigned for allowing this operation to a bequest over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely in terrorem, which might otherwise have been presumed. Others have said that it was the interest of the legatee over which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect. Whatever might be the real ground of the doctrine, it was held that where the testator only declared, that in case of marriage without consent, the legatee should forfeit what was before given, but did not say what should become of the legacy, in such case the declaration was wholly inoperative" (*x*).[1]

In terrorem doctrine as to conditions subsequent; and precedent.

This observation, it will be seen, refers to conditions subsequent, and certainly it is in regard to them only that it can be made with confidence; for though in many of the cases already cited the condition was precedent, yet there are, on the other hand, not a few such cases [*888] in which a compliance with a condition *to marry with consent, though unaccompanied by a bequest over, has been enforced.

On examining these cases, however, it seems that in each of them there was some circumstance which afforded a distinction; and though some of these distinctions may appear to savor of excessive refinement, and were not recognized by the Judges who decided the cases. yet in no other manner than by their adoption can many of the modern cases be reconciled with the stream of general authorities. But it is impossible that the reader should receive without some degree of jealousy a plan for reconciling these cases, when an eminent Judge (*y*) expressed an opinion that they were so contradictory as to justify the Court in coming to any decision it might think proper. With diffidence, therefore, the writer submits that, according to the authorities, conditions *precedent* to marry with consent, unaccompanied by a bequest over in default, will be held to be in terrorem, unless in the following cases.

Conditions precedent when not in terrorem.

First, Where the legatee takes a provision or legacy in the alternative of marrying without the consent, Creagh *v.* Wilson (*z*), Gillet *v.* Wray (*a*). In Creagh *v.* Wilson this principle is not expressly stated to have governed the decision, but it can be accounted for only on this ground. The smallness of the alternative legacy could make no difference, if the

Where the legatee takes an alternative provision.

(*x*) Per Sir W. Grant, in Lloyd *v.* Branton, 3 Mer. 108.
(*y*) See Lord Loughborough's judgment in Stackpole *v.* Beaumont, 3 Ves. 98.
(*z*) 2 Vern. 573, 1 Eq. Ca. Ab. 111, pl. 5.
(*a*) 1 P. W. 284.

[1] See Hogan *v.* Curtin, 88 N. Y. 163.

principle be, as apparently it is, that the testator, by providing for the event of the condition being broken, shows that he did not intend it to be in terrorem only. In Gillet *v.* Wray, the alternative provision was an annuity of 10*l.*; and Lord Cowper held, that as the legatee was provided for, equity could not relieve (*b*).

Where legacy is given upon an alternative event.

Secondly, Where marriage with consent is only one of two events, on either of which the legatee will be entitled to the legacy; as where it is given on marriage with consent, or attaining a particular age, Hemmings *v.* Munckley (*c*), Scott *v.* Tyler (*d*). In these cases *neither* of the events happened. In Hemmings *v.* * Munckley, the legatee married without consent, and died before attaining the required age. In Scott *v.* Tyler the alternative event was reaching a particular age unmarried, and the legatee defeated the gift quâunque viâ by marrying without consent before that age. [*889]

Where marriage with consent is restricted to minority.

Thirdly, Where marriage with consent is confined to minority, Stackpole *v.* Beaumont (*e*). Lord Loughborough, in his judgment in this case, observed, that it was perfectly impossible to hold that restraints on marriage under twenty-one could be dispensed with, now (*i. e.*, since the Marriage Act of 26 Geo. 2, c. 33) that such marriage was contrary to the political law of the country, unless (if by license) with the consent of parents: and the testator merely places trustees in the room of parents (*f*).

Observations.

In all such cases, therefore, the legatee must comply with the condition imposed on him by the will, although there is no bequest over. They certainly show the anxiety of the Judges of later times to limit as much as possible the rule adopted from the civil law, which regards such restraining conditions as being in terrorem only; and suggest the necessity of great caution in its application to all other cases of conditions precedent, since it is not easy to calculate whether future Judges will adopt the distinctions which modern cases present, or treat them as getting rid altogether of the

(*b*) Hicks *v.* Pendarvis, 2 Freem. 41, 2 Eq. Ca. Ab. 212 pl. 1, in which this principle is denied, is of no authority. In Holmes *v.* Lysaght, 2 B. P. C. Toml. 261, the circumstance of another legacy being given free from any such condition of marrying with consent was not regarded as an alternative provision so as to bring it within this exception. Against this decision, however (of the Irish Court of Exchequer), there was an appeal to D. P., which was compromised. But Reynish *v.* Martin, 3 Atk. 330, seems to go to the same point.

(*c*) 1 B. C. C. 303, 1 Cox, 39. See also Re Brown's Will, 18 Ch. D. 61.

(*d*) 2 B. C. C. 431. And see Gardiner *v.* Slater, 25 Beav. 509, where, however, there was also a gift over.

(*e*) 3 Ves. 89. See also Hemmings *v.* Munckley, 1 B. C. C. 303, referred to supra, where the age on which the legatee was to become entitled, independently of the condition of marrying with consent, was eighteen; and Scott *v.* Tyler, 2 B. C. C. 431, where it was, as to one moiety twenty-one, and the other twenty-five.

(*f*) The Courts seem to have inclined greatly to confine marriage conditions to marriage during minority or within the period fixed for the payment of the legacy, Knapp *v.* Noyes, Amb. 662; Osborn *v.* Brown, 5 Ves. 527; King *v.* Withers, Cas. t. Talb. 117, 1 Eq. Ca. Ab. 112, pl. 10; Duggan *v.* Kelly, 10 Ir. Eq. Rep. 473; West *v.* West, 4 Gif. 198.

in terrorem doctrine, as applicable to conditions precedent (*g*). Such, indeed, we may collect was the intention of Lord Loughborough, who in Stackpole *v.* Beaumont made a general and indiscriminate attack on the qualified adoption of the rule of the civil law, as applicable either to personal legacies or legacies charged on real estates, conditions precedent or subsequent. His decision may, and it is conceived does, rest on solid grounds; but his observations do not evince that respect for authority and established principles which has characterised his successors. However, in Yonge *v.* Furse (*h*), a condition precedent not to marry under twenty-eight was held effectual,

[*890] * though there was no gift over, and no other circumstance to bring it within either of the three categories mentioned above.

But it should be remembered that no question exists as to the applicability of the in terrorem doctrine to conditions *subsequent* (*i*). And here it may be observed, that, admitting it to the fullest extent in regard to conditions precedent; yet, in such a case a legacy given on marriage with consent cannot be claimed by the legatee while *unmarried*, as the doctrine dispenses only with the consent, not with the marriage itself (*k*).

Marriage necessary, when.

It has been decided that where a condition of this nature is annexed to a specific or pecuniary bequest, a residuary clause in the same will is not equivalent to a positive bequest over, in rendering the condition effectual (*l*), unless there is an express direction that the forfeited legacy shall fall into the residue (*m*). And it was held in Keily *v.* Monck (*n*), that a direction that a forfeited legacy should fall into a fund created for payment of debts and legacies, there being no deficiency in the general personalty to occasion a resort to that fund, was not equivalent to a gift over: and a dictum to the same effect of Lord Keeper Har-

Residuary bequest does not amount to a gift over.

Neither does a direction that legacy shall fall into fund for paying debts, if there are no debts.

(*g*) Such a conclusion would overturn Reynish *v.* Martin, 3 Atk. 330, and many other cases decided upon great deliberation.

(*h*) 8 D. M. & G. 756.

(*i*) See Marples *v.* Bainbridge, 1 Mad. 590 (second marriage of widow); Wheeler *v.* Bingham, 3 Atk. 368 (marriage with consent). W.—— *v.* B.——, 11 Beav. 621, where the condition was not to marry any daughter of A., seems also referable to this ground; for "and" could not (as appears to have been argued) be changed into "or" so as to understand a gift over, on breach of one alternative during the life of T., to T.'s *widow;* while, without the change, there was no gift over corresponding accurately with the condition.

(*k*) Garbut *v.* Hilton, 1 Atk. 381. See also Gray *v.* Gray, 23 L. R. Ir. 399.

(*l*) Semphill *v.* Bayly, Pre. Ch. 562; Paget *v.* Heywood, cit. 1 Atk. 378; Scott *v.* Tyler, as reported Dick. 723; which overrule Amos *v.* Horner, 1 Eq. Ca. Ab. 112, pl. 9.

(*m*) Wheeler *v.* Bingham, 3 Atk. 364; Lloyd *v.* Branton, 3 Mer. 108, overruling the dictum in Reves *v.* Herne, 5 Vin. Ab. 343, pl. 41, and Mr. Roper's suggestion, 1 Rop. Leg. 327. See also Ellis *v.* Ellis, 1 Sch. & Lef. 1; Stevenson *v.* Abington, 11 W. R. 935.

(*n*) 3 Ridg. P. C. 205. Legacies, charged on real in aid of the personal estate, were there given to the testator's daughters, payable on the respective days of marriage, subject to a proviso, that if either married without consent, or a man not seised of an estate in fee or of perpetual freehold of the annual value of 500*l.*, she should forfeit her legacy, which was then to sink as in the text; one daughter married with consent, but her husband had not the requisite estate. Lord Clare was of opinion that she was nevertheless entitled to her legacy on either of two grounds; first, that the legacy was pecuniary and there was no gift over; or secondly, that even if it were held that the legacy was a charge on the realty, the condition was illegal at common law, being too generally in restraint of marriage.

court (*o*), was cited in support of that opinion. The ground of this opinion was, that in order to constitute such a gift over, there must appear a clear distinct right vested in a third person; but as there was no necessity to resort to the fund, there was no person who had such a right; there was therefore no gift over.

* It is conceived, however, that this reasoning could not be [*891] applied to a case where a clear undoubted gift over lapses.

As the rule which denies effect to a condition restraining marriage, unless accompanied by a bequest over, is (we have seen), confined to bequests of personal estate and money arising from the sale of land, it follows that where a condition of this nature is annexed to a legacy which is charged on real estate, in aid of the personalty, the condition will, so far as the latter (which is the primary fund) is capable of satisfying the legacy, be invalid; while, to the extent that it becomes an actual charge on the real estate, it will be binding and effectual (*p*).

Effect where legacy is chargeable on real and personal estate.

It is remarkable, that in the early cases of conditions to marry with consent annexed to devises of land, no attempt was made to argue that the coudition was not broken or rendered impossible by marriage without consent, as the devisee might survive his wife or her husband, and then be in a situation to comply with the condition. Upon this principle Lord Thurlow, in Randall *v.* Payne (*q*) held that a gift in case J. and M. did not marry into certain families did not arise on their marrying into other families, as they had their whole life to perform the condition; but in a modern case (*r*), a devise subject to a condition of this nature was held to be forfeited by marriage into another family. There were circumstances distinguishing it from Randall *v.* Payne, particularly a legacy payable at twenty-one or marriage, by the way of alternative provision, which showed that the testator had a *first* marriage in contemplation.

Whether condition requiring marriage with consent is broken by a *first* marriage without consent.

The same argument might arise with regard to a bequest of personal estate if the case were one of those in which a condition precedent may be enforced without a gift over (*s*). Thus in Clifford *v.* Beaumont (*t*), where a legacy was given by the testator to his daughter L., payable upon her marriage "with such consent and approbation as aforesaid," (the reference being to a clause requiring marriage "if before twenty-one, with the consent of trustees"): the legatee married under twenty-one and without consent, and Lord Loughborough decided that the legacy was not then payable (*u*). After-

(*o*) Pre. Ch. 350.
(*p*) Reynish *v.* Martin, 3 Atk. 330.
(*q*) 1 B. C. C. 55, ante, p. 843. See also Page *v.* Heywood, 2 Salk. 570.
(*r*) Lowe *v.* Manners, 5 B. & Ald. 917.
(*s*) Vid. ante, p. 887.
(*t*) 4 Russ. 325.
(*u*) Stackpole *v.* Beaumont, 3 Ves. 89.

wards, having attained twenty-one, she married a second husband, and claimed the legacy; but Sir J. Leach, M. R., thought himself precluded from allowing the claim by the previous decision. [*892] That decision, however, appears * in fact to have left the point untouched; and Sir J. Leach's judgment has consequently been questioned (*x*).

General restrictions on marriage, as to real estate.

But, even in regard to devises of real estate, it seems to be generally admitted (though the point rests rather on principle than decision), that unqualified restrictions on marriage are void, on grounds of public policy. Though (*y*), where lands were devised to A. in fee, with an executory limitation over if she married with any person born in Scotland, or of Scottish parents, the devise over was held to be valid, as not falling within this principle; it is evident, from Lord Ellenborough's few remarks, that he would have considered a devise over, defeating the estate of the prior devisee on marriage generally, to be void.

In Jones *v.* Jones (*z*), too, it was said by Blackburn, J., that there was strong authority that where the object of the will was to restrain marriage and to promote celibacy, the Court would hold such a condition to be contrary to public policy and void. In that case a testator devised land to three women, A., B., and C., to possess and enjoy the same jointly during their lifetime, and when any or some of them should die he gave their shares to be possessed and enjoyed by D. and her daughter E., during their lifetime, provided that E. continued single; otherwise if she should marry her share was to go to the others, share and share alike. E. married; and it was held that her estate thereupon ceased; for that there appeared to be no intention to promote celibacy, but only that if E. married she should be maintained by her husband. Blackburn, J., said, the will "comes to this, 'I have left to three women enough to live upon, and if one of them dies I bring in D. and E.; but if E. (I *suppose* as the youngest she was most likely to change her state) happens to marry, her husband must maintain her, and her share shall pass to the rest.' . . . Looking at the object of this will and the *fact* that the testator *probably* thought that his property was not more than enough for these women to live upon together, his direction that the one who married should lose her share cannot be said to be contrary to public policy."

It was argued that the distinction between a limitation and a condition was established by authority and was fatal to the condition in this case; but it was held that those authorities were inapplicable to devises of real estate, and that as this will showed the testa- [*893] tor's object not to be restraint of marriage it was * immaterial

(*x*) See Beaumont *v.* Squire, 17 Q. B. 905.
(*y*) Perrin *v.* Lyon, 9 East, 170.
(*z*) 1 Q. B. D. 279.

that the disposition was in form a condition: what he intended was a limitation during celibacy.

Public policy is equally violated by a condition the natural effect of which is to promote celibacy, whether the testator intended it so to operate or not; but if it is a question of intention, it is certainly more agreeable to general rules to collect that intention from the whole context than to insist on its being manifested by a particular form of words (*a*).

It has been decided, that a requisition to marry with consent, imposed by a testator on his daughters, then spinsters, did not apply to a daughter who afterwards married in the testator's lifetime, and was a widow at his death (*b*). The contrary construction would have produced the absurdity of obliging the legatee to marry again, in order to provide for her children, if any, by her first husband. And in such a case, it seems, if the legatee marry with her father's consent, or even his subsequent approbation (*c*), she will be entitled to all the benefit attached by him to marrying with the consent required; as it is impossible to suppose that a testator could intend to place a daughter, marrying with his own consent, in a worse situation than if she had married with that of his trustees (*d*). The substance of the condition is to guard against an improvident marriage, and to this end the control of the testator himself is equivalent to that of his deputies: the condition is substantially performed. But a condition not to marry before a given age (*e*), or requiring marriage with A. (*f*), or not to marry again (*g*), is in no sense performed by the testator giving his consent to a marriage before the prescribed age, or to a marriage with some one else than A., or to a second marriage (as the case may be). Possibly he intended the legacy to stand freed from the condition; but he could only effect that object (at least since the stat. 1 Vict. c. 26) by some means authorized by that statute (*h*).

Legatee marrying in testator's lifetime.

*It seems that the assent of trustees will sometimes be [*894] presumed from the non-expression of their dissent, according

(*a*) In Right *v.* Compton, 9 East, 267, stated ante, Vol. I., p. 461, a limitation until marriage was assumed to be valid.

(*b*) Crommelin *v.* Crommelin, 3 Ves. 227.

(*c*) Wheeler *v.* Warner, 1 S. & St. 304.

(*d*) Clarke *v.* Berkeley, 2 Vern. 720; Parnell *v.* Lyon, 1 V. & B. 479; Coventry *v.* Higgins, 14 Sim. 30; Tweedale *v.* Tweedale, 7 Ch. D. 633.

(*e*) Yonge *v.* Furse, 8 D. M. & G. 756.

(*f*) Davis *v.* Angel, 4 D. F. & J. 524.

(*g*) Bullock *v.* Bennett, 7 D. M. & G. 283; West *v.* Kerr, 6 Ir. Jur. 141. The circumstance that the restriction was in the form of a limitation during widowhood appears not to have been essential to these decisions.

(*h*) In Smith *v.* Cowdery, 2 S. & St. 358, before the act, a condition not to marry A. was held dispensed with by testator consenting to marriage with A. This case was relied on by Wood, V.-C., in Violett *v.* Brookman, 26 L. J. Ch. 308, as authority for holding, upon a will dated 1850, that forfeiture for breach of a condition, not to dispute another document, had been waived by the testator's acts. Sed qu. The V.-C. also held that simple confirmation of the will by codicil subsequently executed set up the gift free from the condition. Sed qu.

Assent to marriage, when presumed.

to the maxim, qui tacet consentire videtur, especially if the express assent were withheld with a fraudulent intent (*i*); and, in the absence of direct evidence, assent will be presumed, where no objection to the legatee's title is taken for a long period of time after the alleged forfeiture has taken place (*k*). But where the consent is required to be *in writing*, it is not clear that any misconduct on the part of the trustees would be a ground for dispensing with it. Thus in Mesgrett *v.* Mesgrett (*l*), though the trustee was actuated by the motive of inveigling the legatee into a match without his consent, in order to transfer the portion to one of his own children, yet the Lord Keeper laid some stress on the circumstance that a consent in writing was not required; and Lord Eldon, in Clarke *v.* Parker (*m*), observed that it would be difficult to support the decision if it had been. On the other hand, Lord Hardwicke, in Strange *v.* Smith (*n*), held that the mother, whose consent *in writing* was required, had, by making the offer to, and permitting the addresses of the intended husband, given consent to her daughter's marriage, which she could not retract, though there appears to have been no written consent; a circumstance to which his lordship does not once advert, nor, which is still more singular, does Lord Eldon, in his comments on this and the other cases, in Clarke *v.* Parker, notice it. Sir J. Leach (*o*), thought that the accidental omission of a trustee, who approved the marriage, to give a consent *in writing*, would not have invalidated it; but in the case before his Honor, the requisite consent was held to have been contained in a letter written by the trustee before the marriage, though a more formal writing was in his contemplation (*p*).

Consent *in writing*.

The Courts are disposed to construe liberally the expressions of persons whose consent is required (*q*), especially if they have sanctioned, by their acquiescence, the growth of an attachment [*895] *between the parties (*r*). In Pollock *v.* Croft (*s*), where, under the circumstances, consent was not required to be in writing, a general permission to the legatee to marry according to her discretion, appears to have been deemed sufficient, without any further consent.

Expressions of consent, how construed.

A consent to a marriage with A., of course, is no consent to a marriage with B., though B. should, for the purpose of the marriage,

(*i*) Mesgrett *v.* Mesgrett, 2 Vern. 580; Berkley *v.* Rider, 2 Ves. 533.
(*k*) Re Birch, 17 Beav. 358.
(*l*) 2 Vern. 580.
(*m*) 19 Ves. 12.
(*n*) Amb. 263.
(*o*) Worthington *v.* Evans, 1 S. & St. 165.
(*p*) See also Le Jeune *v.* Budd, 6 Sim. 441.
(*q*) Daley *v.* Desbouverie, 2 Atk. 261; but as to which, see Clarke *v.* Parker, 19 Ves. 12; D'Aguilar *v.* Drinkwater, 2 V. & B. 225; Re Smith, Keeling *v.* Smith, 44 Ch. D. 654.
(*r*) D'Aguilar *v.* Drinkwater, 2 V. & B. 225.
(*s*) 1 Mer. 181; see also Mercer *v.* Hall, 4 B. C. C. 326.

and with the fraudulent design of deceiving the trustees as to his identity, assume the name of A. (*t*) (supposing the marriage, under such circumstances, to be lawful) (*u*). As to marriage in wrong name.

* It seems, that if trustees withhold their consent from a vicious, corrupt, or unreasonable cause, the Court will interfere (*x*); but in such a case the onus of proof would lie on the complaining party, and it would not be incumbent on the trustee to assign any reason for his dissent, even although the person whose consent is required be the devisee over (*y*), notwithstanding the doubt thrown out by Lord Hardwicke, in Harvey *v.* Aston (*z*), and by Lord Mansfield, in Long *v.* Dennis (*a*); but of course the refusal of such a person would be viewed with particular jealousy. And where a trustee refuses either [*896] Trustees withholding consent.

(*t*) Where (as sometimes occurs) a person drops his real name and assumes another, without any authority, a marriage by the adopted name (being the name by which he is generally known) is clearly valid. And even the adoption of a false name, pro hac vice, will not, under the statute of 3 Geo. 4, c. 75, invalidate a marriage, *unless the misnomer is known to both parties.*

And here it may be observed that a gift by will to a person described as the husband or wife or widow of another is not in general affected by the fact of the devisee or legatee not actually answering the description, by reason of the invalidity of the supposed marriage, or by reason of the second marriage, of the supposed widow or otherwise: Giles *v.* Giles, 1 Kee. 685; Doe d. Gains *v.* Rouse, 5 C. B. 422; Rishton *v.* Cobb, 5 My. & C. 145; Re Petts, 27 Beav. 576; Lepine *v.* Bean, L. R., 10 Eq. 160; In the goods of Howe, 33 W. R. 48. See Re Boddington, Boddington *v.* Clairat, 25 Ch. D. 685, where the Court of Appeal (affirming the decision of Fry, J.) held that a lady whose marriage with the testator had been annulled was entitled to a legacy given to her by his will under the description of his *wife*, but not to an annuity given to her so long as she should continue his *widow*. As regards the effect of a dissolution of the marriage, Fry, J., held in Bullmore *v.* Wynter, 22 Ch. D., 619, that a husband who had obtained a divorce was entitled to property devised after the death of the wife in trust for any husband with whom she might intermarry, if he should survive her, for his life. But Kay, J., in Re Morrison, Hitchins *v.* Morrison, 40 Ch. D. 30, expressed his dissent from this decision, and held that a divorced wife was not entitled to a life interest in property bequeathed in trust for "any wife" of the testator's son. As to the effect of a divorce upon a bequest of an annuity to A. and his wife B. jointly, and if A. should predecease B. to B., see Knox *v.* Walls, 48 L. T. 655, 31 W. R. 559; W. N. 1883, p. 59. And, on the same principle, a legacy to a person described as the testator's intended wife has been held to be payable, although the testator did not eventually marry her; Schloss *v.* Stiebel, 6 Sim. 1.* A different rule prevailed, however, where a fraud had been practised on a testatrix, the discovery of which, there was reason to suppose, would have destroyed the motive for the gift. As, in Kennell *v.* Abbott, 4 Ves. 804, where the testatrix, under a power, bequeathed a legacy to a man whom she described and with whom she lived as her husband: the marriage was invalid, on account of his having a wife at the time, but the fact was never known to the testatrix. Under these circumstances, the legacy was held to be void. See also Wilkinson *v.* Joughin, L. R., 2 Eq. 319, where the gift to the fraudulent "wife" failed, but that to the innocent "step-daughter" was upheld. But these cases are properly within the exclusive jurisdiction of the Probate Court, ante, Vol. I., p. 27.

(*u*) Dillon *v.* Harris, 4 Bli. N. S. 329. In this case, the marriage was had with a person whom the testator had prohibited the legatee from associating with or having any further knowledge of: expressions which Lord Brougham appeared to think did not necessarily extend to marriage; but Lord Tenterden (whom Lord Brougham consulted) seems to have inclined to a contrary opinion. However, this point did not arise, according to the adjudged construction.

(*x*) See judgments in Clarke *v.* Parker, 19 Ves. 18; Dashwood *v.* Lord Bulkeley, 10 Ves. 245; Peyton *v.* Bury, 2 P. W. 628.

(*y*) 19 Ves. 22.

(*z*) 1 Atk. 380.

(*a*) 4 Burr. 2052.

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* This was before the act 1 Vict. c. 26, under which the marriage would, if it had taken place, have been a revocation of the bequest, ante, Vol. I., p. 112.

to assent or dissent, the Court will itself exercise his authority, and refer it to the Master to ascertain the propriety of the proposed marriage (*b*).

Retracting consent.

It seems that consent once given, with a knowledge of the circumstances, and where there is no fraud, cannot be retracted (*c*), without an adequate reason, unless it be given upon a condition (as that of the intended husband making a settlement (*d*)), which is not performed; but actual withdrawal in such a case must be unnecessary, since a conditional consent is no consent until the performance of the condition.

Consent of all.

Where the consent of several persons is required, all must concur; and the consent of two out of three, the third not expressly dissenting, is insufficient (*e*). But the weight of authority inclines, after some fluctuation, towards dispensing with the concurrence of a renouncing executor or trustee.

Renouncing executor and trustee; his consent not necessary.

Lord Hardwicke, in Graydon *v.* Hicks (*f*), held that a consent, which was to be obtained of the testator's "executor," was not rendered unnecessary by his renunciation. On the other hand, Sir J. Leach, V.-C., (before whom Lord Hardwicke's decision was not cited,) held (*g*), in accordance with an intimation of Lord Eldon's opinion in Clarke *v.* Parker, that where the marriage was to be with the consent of "trustees," the concurrence of one who had not acted, and had renounced the executorship (he being also executor), was not necessary. And this was [*897] followed by Lord * Plunket, C. Ir., in Boyce *v.* Corbally (*h*) where, though Graydon *v.* Hicks was cited, he held that a legacy with a gift over in case of marriage without the consent of the executors "after named," was not forfeited by marriage without the consent of one of the persons named who had declined to act.

Whether survivors can give consent.

A consent, required to be given by several persons nominatim, of course, cannot be exercised by survivors; and in Peyton *v.* Bury (*i*), it was so decided, though the persons were also appointed executors, whose office survives; in which, however, Lord Thurlow seems not to have fully concurred (*k*); his opinion being, that the required consent of "guardians," might be given by a survivor, though he admitted that it was collateral to the office (*l*).

(*b*) Goldsmid *v.* Goldsmid, Coop. 225, 19 Ves. 368.
(*c*) Lord Strange *v.* Smith, Amb. 263; Merry *v.* Ryves, 1 Ed. 1; Le Jeune *v.* Budd, 6 Sim. 441.
(*d*) Dashwood *v.* Lord Bulkeley, 10 Ves. 230. It seems that a settlement after marriage is sufficient to satisfy such a conditional consent, id. 244; Daley *v.* Desbouverie, 2 Atk. 261.
(*e*) See Clarke *v.* Parker, 19 Ves. 1.
(*f*) 2 Atk. 16.
(*g*) Worthington *v.* Evans, 1 S. & St. 165.
(*h*) 2 Ll. & Go. 102. See also Ewens *v.* Addison, 4 Jur. N. S. 1034.
(*i*) 2 P. W. 626.
(*k*) See Jones *v.* Earl of Suffolk, 1 B. C. C. 528.
(*l*) See this point, in regard to powers generally, 1 Powell Dev., Jarm. 239.

And with this agrees the decision in Dawson *v.* Oliver-Massey (*m*), where it was held that a condition precedent to marry with consent of "parents," was well performed after the death of the father by marrying with the consent of the mother. The Court read the will as requiring marriage to be "substantially with proper parental consent, — with the consent of the parents or parent, *if any*." On this principle it has been held that a condition not to marry A. without the written consent of the testator applies only to marriage during the testator's lifetime; and that marriage with A. after the testator's death, and without any written consent being left by him, was no breach (*n*). Where, however, the consent of guardians is required to marriage, then, if there are no guardians, an application must be made to the Court for the appointment of guardians, and the consent of the guardians so appointed must be obtained to satisfy the condition. The consent of a guardian appointed by the infant would not be sufficient (*o*).

Subsequent approbation.

It seems to be clear, that approbation subsequent to a marriage is not in general a sufficient (*p*) compliance with a condition requiring consent; but Lord Hardwicke, in Burleton *v.* Humfrey (*q*), took a distinction between the words "consent" and * "approbation," holding the latter to admit subsequent [*898] approval, where coupled with the former disjunctively; but he decided the case principally on another ground, and in regard to the admission of subsequent consent the authority of the case has been questioned (*r*).

Instance of equitable relief.

Where a term was limited to trustees, upon trust to raise portions for daughters upon marriage with consent, and upon condition that the husband should settle property of a certain value; and the marriage was had with the requisite consent, but the settlement was omitted by the neglect of the trustee; the Court relieved against a forfeiture, upon a settlement being ultimately made (*s*).

"Against" consent, construed *without*.

It remains only to be observed, that in a case (*t*) in which the devise was on marrying *with* consent, and the limitation over on marrying *against* consent, the word "against" was construed *without*, to make it alternative to the other gift.

(*m*) 2 Ch. D. 753. See also per Lord Eldon, Grant *v.* Dyer, 2 Dow. 84. In Peyton *v.* Bury, sup., the condition was subsequent: so that the effect of the decision was to make the legacy absolute. The power of giving or withholding consent does not generally pass to the representative of a last-surviving executor or trustee, per Lord Eldon, sup.

(*n*) Booth *v.* Meyer, W. N. 1877, p. 224.

(*o*) Re Brown's Will, 18 Ch. D. 61. See as to the appointment of guardians generally Byth. & Jarm. Conv. (4th Ed. by Robbins), Vol. I., pp. 796, et seq.

(*p*) Fry *v.* Porter, 1 Ch. Cas. 138; Reynish *v.* Martin, 3 Atk. 330.

(*q*) Amb. 256.

(*r*) See Clarke *v.* Parker, 19 Ves. 21.

(*s*) O'Callaghan *v.* Cooper, 5 Ves. 117.

(*t*) Long *v.* Ricketts, 2 S. & St. 179. See also Creagh *v.* Wilson, 2 Vern. 573, 1 Eq. Ca. Ab. 111, pl. 5.

X. — **Condition to assume a Name.** — An obligation is frequently imposed on a devisee or legatee to assume the testator's name; and in such case the question arises, whether the condition is satisfied by the voluntary assumption of the name, or requires that the devisee or legatee should obtain a license or authority from the Crown, or the still more solemn sanction of the legislature, unless (as commonly happens) the instrument imposing the condition prescribes one of those modes of procedure.

Whether satisfied by voluntary assumption.

In Lowndes *v.* Davies (*u*), where a testator constituted A. his lawful heir, on condition he changed his name to G., it was held that A.'s unauthorized assumption of the name was sufficient. So, in Doe d. Luscombe *v.* Yates (*x*), where a condition was imposed upon devisees *not bearing the name of Luscombe*, that they, within three years after being in possession, should procure their names to be altered to Luscombe by act of Parliament; it was held that this requisition did not apply to an individual who, before he came into possession (*y*), had voluntarily [*899] and without *any special authority assumed the name of Luscombe; he being, it was considered, a person "bearing the name" within the meaning of the will (*z*).

But in Barlow *v.* Bateman (*a*), a testator gave a legacy of 1,000*l.* to his daughter, upon condition that she married a man *of the surname of Barlow*, to be paid her on the day of such her marriage with a Barlow aforesaid; but if she died unmarried, or married a person not bearing the surname of Barlow, he gave the legacy to another. The daughter married a person whose name was Bateman, but who, at the time of the marriage, assumed the name of Barlow, and this was held to be a compliance with the condition by Sir J. Jekyll, M. R., who said, that the usage of passing acts of Parliament for the taking upon one a surname was but modern, and that any one might take upon him what surname, and as many surnames as he pleased, without an act of Parliament. It was suggested that the husband might, after receiving the legacy, resume his old name, and the Court was requested to make an order that he should retain it, but this was refused. The

(*u*) 2 Scott, 71, 1 Bing. N. C. 597.

(*x*) 1 D. & Ry. 187, 5 B. & Ald. 543. See also Hawkins *v.* Luscombe, 2 Sw. 375. And as to a direction to quarter the testator's arms, see Austen *v.* Collins, W. N., 1886, p. 91.

(*y*) He was under age at the time, and this perhaps is not an immaterial circumstance, as Abbott, C. J., observed that "a name assumed by the voluntary act of a young man *at his outset into life*, adopted by all who know him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually his name as if he had obtained an act of Parliament to confer it upon him." But see 3 Dav. Conv. 360, n., 3rd ed.

(*z*) As to gifts to persons of a prescribed name, vide Jobson's case, Cro. El. 576, and other cases cited, Ch. XXIX. ad fin. And as to the period at which the conditions for the assumption of a name are to be performed, see Gulliver *v.* Ashby, 1 W. Bl. 607, 4 Bur. 1940, ante, p. 848; Lowndes *v.* Davies, 2 Scott, 74; Pyot *v.* Pyot, 1 Ves 335, post; Cro. El. 532, 576; Langdale *v.* Briggs, 8 D. M. & G. 391 (construction of "in possession or receipt of the rents" where the devised estate was reversionary).

Whether the assumed name is to stand last, or alone, as surname, see D'Eyncourt *v.* Gregory, 1 Ch. D. 441; Bennett *v.* Bennett, 2 Dr. & Sm. 276.

(*a*) 3 P. W. 65.

decision of the M. R. was, however, reversed in the House of Lords, probably on the ground urged in argument that the testator intended a person of his own family, and originally bearing the name of Barlow (*b*).

A condition imposing an obligation to take and use a particular name cannot be attached to a devise of an estate in fee simple. So where (*c*) a testatrix settled her freehold property in such a manner that, in the events which happened, a share of it became vested in L., in fee; and the will contained a proviso that any person becoming entitled in possession to the property should within one year thereafter take and use the name of J., and that in case any such person should refuse or neglect or discontinue to use the name of J., then from and after the expiration of the year, the estate limited to him or her should be void and should first go to C. (since deceased) for her life, and afterwards to the person or persons next in remainder under the *trusts of the will as if the person refusing or [*900] neglecting were dead: it was held that the gift being in fee simple there could be no person entitled in remainder, and that, consequently, the name clause was absolutely void, and that the property belonged to L. free from any condition.

It follows that a tenant in tail may, by barring the entail and thereby enlarging his estate into a fee simple, defeat a condition for taking and using a testator's name and arms. But where (*d*) personal estate was settled by will upon trusts intended to correspond with the limitations of real estate thereby devised in strict settlement so far as the nature of the personal estate and the rules of law and equity permit, with a separate name-and-arms clause, whereby on discontinuance of user of the prescribed name and arms within the period of twenty-one years by any person entitled under the will to an absolute beneficial interest in possession by purchase in the personal estate, his interest should cease, and the personal estate should go over to the person or persons who would have been entitled to the real estate under the will in case the person whose estate should cease being tenant for life of the real estate were dead or being tenant in tail were dead without issue: it was held by Sir J. Pearson, J., that the forfeiture clause was valid as to the personalty, notwithstanding that the real estate had been disentailed.

XI. — Condition requiring "Residence." — Another condition frequently imposed on a devisee is that he shall "reside" in a particular house. The terms of the will are generally such as to leave no doubt that personal residence to some extent is required (*e*); but where no

(*b*) 2 B P. C. Toml. 272.
(*c*) Musgrave *v.* Brooke, 26 Ch. D. 792.
(*d*) Re Cornwallis, Cornwallis *v.* Wykeham Martin, 32 Ch. D. 388.
(*e*) See cases, ante, Vol. I., p. 741. A direction that a testator's widow may reside rent free in his residence does not entitle her to let the house and retain the rents for her own

period is fixed for the duration of the residence, it is almost impossible to enforce the condition; for on the one hand it may be contended that the devisee must live in the house always; and, on the other, that if he constantly keeps up an establishment there it will be sufficient if he goes there only once in his life (*f*). In [*901] Fillingham *v.* Bromley (*g*), this *difficulty was held insurmountable, and a purchaser was compelled by Lord Eldon to take a title depending on the invalidity of the condition. "Suppose [said the L. C.] the devisee had been a member of Parliament, and had had a house in London, would you say he did not live and reside at J.?" Even should the devisee be required to reside in the house during a defined period (*h*), or to make it his principal or usual place of abode (*i*), the condition may still be frustrated, for personal presence in the specified place for any part of a day is sufficient residence for that day; and it is not necessary to pass the night of that day there (*k*). It will depend on the particular terms of the will whether a forced absence or departure from the house, as where the devisee becomes bankrupt and the assignees sell to a purchaser who turns the devisee out (*l*), is a breach of the condition. In a case where a life estate was given to a married woman on condition that she should within eighteen months cease to reside at S., a place where her husband carried on a business which required his residence there, the condition was held void, as obliging her to neglect the performance of a duty, sc. living with her husband (*m*). And of course a life annuity given to A., to cease when A. and B. should cease to reside together, was held not to be determined by the death of B. (*n*).

In this connection, regard must be paid to sects. 51 & 52 of the Settled Land Act, 1882 (*o*), the effect of which is that a clause requiring residence and forfeiting the estate in the event of non-residence when annexed to the estate of a tenant for life or person having the powers of a tenant for life, is regarded as a provision which puts him into a position inconsistent with the exercise of his statutory powers; a tenant for

Effect of the Settled Land Act, 1882, on conditions as to residence.

benefit, May *v.* May, 44 L. T. 412. As to the construction of a bequest to a class of persons "residing in this country," see Dale *v.* Atkinson, 3 Jur. N. S. 41; Woods *v.* Townley, 11 Hare, 314.

(*f*) Per Wood, V.-C., Kay, 545. See, however, Stone *v.* Parker, 29 L. J. Ch. 874, where this difficulty was not alluded to. As to what length of residence is required by a condition to "return to England," see Re Arbib and Class and Pennrick's Contract, W. N., 1891, p. 22.

(*g*) T. & R. 530. See also 7 Beav. 443; 24 L. J. Ch. 488.

(*h*) Walcot *v.* Botfield, Kay, 534; Re Moir, Warner *v.* Moir, 25 Ch. D. 605.

(*i*) Wynne *v.* Fletcher, 24 Beav. 430; Dunne *v.* Dunne, 3 Sm. & Gif. 22, 7 D. M. & G. 207.

(*k*) Per Wood, V.-C., Walcot *v.* Botfield, Kay, 550; per Jessel, M. R., Astley *v.* Earl of Essex, L. R., 18 Eq. 295. In Re Moir, Warner *v.* Moir, 25 Ch. D. 605; Bacon, V.-C., held that a condition to reside in a house "for at least six months (but not necessarily consecutively) in every year" was satisfied by keeping up an establishment and occasionally visiting the house.

(*l*) Doe *v.* Hawke, 2 East, 481; Doe d. Shaw *v.* Steward, 1 Ad. & Ell. 300.

(*m*) Wilkinson *v.* Wilkinson, L. R., 12 Eq. 604, citing Mitchel *v.* Reynolds, 1 P. W. 181.

(*n*) Sutcliffe *v.* Richardson, L. R., 13 Eq. 606.

(o) 45 & 46 Vict. c. 38.

life may therefore sell or demise a property, including (provided he obtains the consent of the trustees or an order of the Court) the mansion house, &c., notwithstanding a clause of forfeiture on non-residence, and, he will be entitled for his life to the income arising * from the proceeds of such sale, or to the rents aris- [*902] ing under such demise (*p*). But in Re Haynes, Kemp *v.* Haynes (*q*), Sir F. North, J., held that such a restriction, although inoperative to prevent the exercise of any of the statutory powers by a tenant for life, had the effect of determining the interest of a tenant for life where the non-observance of the restriction preceded any attempted exercise of any statutory power.

XII. — Conditions as to Disputing Wills, &c. — Sometimes a testator imposes on a devisee or legatee a condition that he shall not dispute the will. Such a condition is regarded as in terrorem only, at least, where the subject of disposition is personal estate; and, therefore, a legatee will not, by having contested the validity or effect of the will, forfeit his legacy, where there was probabilis causa litagandi (*r*), unless, it seems, the legacy be given over upon breach of the condition (*s*).

Condition that a legatee shall not dispute the will, as to personal estate, ineffectual without a gift over.

But this doctrine has never been applied to devises of real estate; on the contrary, in Cooke *v.* Turner (*t*), it was expressly decided that such a condition annexed to a devise of land was valid and effectual without a gift over on breach.[1] It was argued that the condition was void as being contrary to the liberty of the law (*u*); but it was answered by the Court, that it was no more so than a condition not to dispute a person's legitimacy, which was good (*v*): that, in truth, there was not any policy of the law on the one side or the other: that conditions said to be void as trenching on the liberty of the law were such as restrained acts which it was the interest of the state should be performed, as marriage, trade, agriculture, and the like; but it was immaterial to the state whether land was enjoyed by the heir or the devisee, and, therefore, the condition was good, and the devisee had, by disputing the will, forfeited the devise in her favor.

Secus, as to real estate.

(*p*) Re Paget's Will, 30 Ch. D. 161.
(*q*) 37 Ch. D. 306.
(*r*) Powell *v.* Morgan, 2 Vern. 90; Lloyd *v.* Spillett, 3 P. W. 344; Morris *v.* Burroughs, 1 Atk. 404.
(*s*) Cleaver *v.* Spurling, 2 P. W. 528; 1 Rep. 304; Stevenson *v.* Abington, 11 W. R. 935. A gift to the executors of the first legatee will not suffice, Cage *v.* Russell, 2 Vent. 352.
(*t*) 15 M. & Wel. 727, 14 Sim. 493.
(*u*) Citing Shep. Touchst. 132; which, however, says only that conditions which are against the liberty of the law are invalid, not that a condition not to dispute a will is against the liberty of the law. And see Anon., 2 Mod. 7.
(*v*) Stapilton *v.* Stapilton, 1 Atk. 2.

[1] Hoit *v.* Hoit, 42 N. J. Eq. 388 (citing Powell *v.* Morgan, 2 Vern. 90; Bradford *v.* Bradford, 19 Ohio St. 546; Chew's Appeal, 45 Penn. St. 228); *s. c.* 40 N. J. Eq. 478; Thompson *v.* Gaut, 14 Lea, 310. Further, see Donegan *v.* Wade, 70 Ala. 501.

The argument and judgment both turned on the legality of the condition, and no doubt seems to have been entertained that if it was legal it must also be effectual. That this ought to be [*903] * the sole criterion in all cases where the effect of a condition is brought in question, can scarcely be doubted; and that as no gift over will give effect to a condition in itself illegal (as a condition in total restraint of marriage (*w*)), so a legal condition should never be rendered ineffectual by the absence of such a gift. The validity of a condition that the devisee shall not dispute another testator's will was assumed in Violett *v.* Brookman (*x*), although there was no gift over on breach: the only question was whether the testator had by concurring in the acts alleged as a breach waived the condition; and it was held, that he had (*y*); and further, that he had not re-imposed it by subsequent codicils, which simply confirmed the will.

In Adams *v.* Adams (*z*), a testator devised his real estate to trustees in trust to pay certain annuities to his only son with a condition of forfeiture on interference with the management of the testator's real or personal estate, and after the son's death in trust for his unborn sons in fee. Fry, L. J., held that the annuitant had incurred a forfeiture by bringing frivolous and groundless actions against the trustees, alleging non-payment of the annuities, and that the trustees had wasted the estate. His lordship considered that if the actions had been bona fide in defence of the annuity no forfeiture would have been incurred.

Frivolous actions against trustees.

And even with regard to personal estate, the in terrorem doctrine is not admitted in cases arising on other conditions than those relating to marriage and disputing a will. Thus, in Re Dickson's Trusts (*a*), where a testator bequeathed to his daughter a life interest in 10,000*l.*, and by a codicil, provided that if she should become a nun she should forfeit the legacy: there was no gift over; but Lord Cranworth, V.-C., held that the condition being legal was effectual, [*904] and that the daughter having become a * nun had forfeited the legacy. So, in the earlier case of Colston *v.* Morris (*b*),

As to other cases of personal estate.

Re Dickson's Trust.

(*w*) Morley *v.* Rennoldson, 2 Hare. 570; Lloyd *v.* Lloyd, 2 Sim. N. S. 255.
(*x*) 26 L. J. Ch. 308. Evanturel *v.* Evanturel, L. R., 6 P. C. 1 (Canadian appeal) may be usefully perused with reference to such conditions, and with reference to the question whether legal proceedings are a breach if abandoned before judgment. A devise on condition not to take any proceedings at law or in equity relating to the testator's estate is too wide: it would prevent the devisee from asserting or defending his right to the devised estate against a wrongdoer, and is absurd and repugnant, Rhodes *v.* Muswell Hill Land Company, 29 Beav. 560. A condition not to make any claim against a testator's estate was held not to prohibit the legatee from continuing a litigation pending between them at the testator's death, Warbrick *v.* Varley, 30 Beav. 347. A breach must of course be proved by the person alleging it, Wilkinson *v.* Dyson, 10 W. R. 681 (condition not to interfere in administration).
(*y*) But as to this, see above, p. 843.
(*z*) 45 Ch. D. 426.
(*a*) 1 Sim. N. S. 37. And see per Wood, V.-C, Re Catt's Trusts, 2 H. & M. 52.
(*b*) Jac. 257, n.

where a testator gave a legacy, and declared that if the legatee should ever interfere with the management of trustees appointed for the education of the legatee's daughter, then he revoked the legacy: there was no gift over, and it was argued that the declaration or condition was therefore in terrorem only; but it was held by Sir J. Leach, V.-C., that the legatee was not entitled to the legacy unless he undertook to comply with the condition. Colston *v.* Morris.

Where the legatee has taken his legacy with a legal condition of any kind annexed, he is, of course, estopped by his own act from afterwards insisting on rights, which by the terms of the condition he is bound to release (*c*), or from declining a duty which he is thereby required to perform. This principle was applied in Att.-Gen. *v.* Christ's Hospital (*d*), where a testator bequeathed to the governors of the hospital (who had power to accept such gifts) an annuity of 400*l.* forever, upon condition that his trustees should be at liberty to send a certain number of children to be educated at the school; and in case and as often as the governors should refuse to admit the children, the trustees were empowered to apply the annuity towards the education of the children elsewhere. For some years the governors of the hospital received the annuity and admitted the children, but afterwards resolved to do so no longer. Sir J. Leach, M. R., said, the question was whether this was a gift of the annual sum so long as they should receive the children, or a gift upon condition that they should receive them? He thought it clear the latter was the true construction, and that having accepted it they were bound by the condition. The proviso gave an authority to the trustees, without releasing the governors from their engagement. Acceptance of legacy makes the annexed condition binding.

(*c*) Egg *v.* Devey, 10 Beav. 444.
(*d*) Taml. 393. And see Gregg *v.* Coates, 23 Beav. 33.

* CHAPTER XXVIII.

GIFTS TO THE HEIR AS PURCHASER (WITHOUT ANY ESTATE IN THE ANCESTOR).

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I. — General Principles of Construction of Gifts to the Heir. — Gifts to the heir, whether of the testator himself, or of another, are so frequently found in wills, and where these instruments are the production of persons unskilled in technical language, the term *heir* is so often used in a vague and inaccurate sense, that to ascertain and fix its signification in regard to real and personal estate respectively, whether alone or in conjunction with other phrases which most usually accompany it, is a point of no inconsiderable importance. Like all other legal terms, the word *heir*, when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import; in which sense it obviously designates the person or persons appointed by law to succeed to the real estate[1] in case of intestacy.[2] It is clear, therefore,

Gifts to "heir," how construed.

[1] Though personal estate is included, the rule is the same, unless a different intention appears. Lincoln *v.* Perry, 149 Mass. 368 (citing Fabens *v.* Fabens, 141 Mass. 395, 399); White *v.* Stanfield, 146 Mass. 424, 434; Merrill *v.* Preston, 135 Mass. 451; Lombard *v.* Boyden, 5 Allen, 249; Clarke *v.* Cordis, 4 Allen, 466.

But used as to personalty alone, "heirs" means next of kin. White *v.* Stanfield, supra (citing Houghton *v.* Kendall, 7 Allen, 72; Sweet *v.* Dutton, 109 Mass. 589).

[2] Three cardinal rules exist, the application of one or other of which will be necessary to the solution of ordinary questions concerning the meaning of the word "heirs," or indeed of any other technical term of double import. 1. An intention actually expressed, or to be gathered from the language used, will prevail over any technical meaning attached to the word, unless that intention be opposed to some absolute rule of law, such as the rule in Shelly's Case. See Sears *v.* Russell, 8 Gray, 86, 94; Knowlton *v.* Sanderson, 141 Mass. 323; Gifford *v.* Choate, 100 Mass. 343; Ide *v.* Ide, 5 Mass. 500; Bowers *v.* Porter, 4 Pick. 198; Morton *v.* Barrett, 22 Maine, 257; Bennett *v.* Evans, 26 Ohio St. 409; Fulton *v.* Harman, 45 Md. 251; Smith *v.* Schultz, 68 N. Y. 41; Thurber *v.* Chambers, 66 N. Y. 42; Scott *v.* Guernsey, 48 N. Y. 106; Cushman *v.* Horton, 59 N. Y. 149; Heard *v.* Horton, 1 Denio, 168; Carne *v.* Roche, 7 Bing. 226; Vannorsdall *v.* Van Deventer, 51 Barb. 137; Bond's Appeal, 31 Conn. 183; Roberts *v.* Ogbourne, 37 Ala. 174; Reck's Appeal, 78 Penn. St. 432; Swann

that where a testator devises real estate simply to his heir, or to his heir-at-law, or his right heirs, the devise will apply to the person or

v. Poag, 4 S. Car. 16. 2. Where an intention appears to make a gift such as the law permits, and a technical term is used the intended meaning of which is not explained by any language of the will, the technical meaning of the term will be applied, whether the result be to annul the gift, or to enlarge or cut it down as contrasted with the effect of attaching some secondary meaning to the word. Rand *v.* Butler, 48 Conn. 293; Heard *v.* Harton, 1 Denio, 165; Thurber *v.* Chambers, 66 N. Y. 42; Campbell *v.* Rawdon, 18 N. Y. 412; Cushman *v.* Horton, 59 N. Y. 149, 154; Simms *v.* Garrot, 1 Dev. & B. Eq. 393; Sears *v.* Russell, 8 Gray, 86, 94; Clarke *v.* Cordis, 4 Allen, 466; Abbott *v.* Bradstreet, 3 Allen, 587; Rand *v.* Sanger, 115 Mass. 124; Bassett *v.* Granger, 100 Mass. 348; Richardson *v.* Martin, 55 N. H. 45; Reinders *v.* Koppelman, 68 Mo. 482; Duncan *v.* Harper, 4 S. Car. 76; Clark *v.* Moseley, 1 Rich. Eq. 396. 3. As a corollary to these two rules, it is held that when a word is used more than once, it is to receive the same construction in each case; with this exception, that a word having a technical legal meaning, when accompanied in one clause by a context which shows an intention that it should be understood in a different sense, and used in another distinct clause, in reference to a different subject, without such explanatory context, must receive in the latter clause its technical meaning. Lloyd *v.* Rambo, 35 Ala. 709; Carter *v.* Bentall, 2 Beav. 522; Doe d. Cadogan *v.* Ewart, 7 Ad. & E. 636; State Bank *v.* Ewing, 17 Ind. 68.

Difficulty, however, is not removed in all cases, if in most of them, by the statement of the chief rules that are to govern; the question oftener is, how to apply a rule to the particular case, or which of the several rules the case falls within. When, for instance, to refer to the first of the foregoing propositions, has the testator, by the context of the will, attached to the word "heirs" a meaning at variance with its technical signification? No rule can be laid down for the answer of this question for all cases. One or two rules, however, relating to the effect of the language of the context, have been found possible and serviceable. Thus, when the word "heirs," as used by the testator, is used in *evident* reference to a set of children elsewhere mentioned as a whole, or elsewhere described individually, the word is to be treated as used merely for convenience, or to avoid repetition, and to be understood in the sense of that for which it stands. Ex parte Artz, 9 Md. 65. Again, technical words in the explanatory context are doubtless to be treated there, in the interpretation of the main term in question, just as they would be treated if they were the main subject of examination.

But there are many cases of language in the context which fall without the limits of such rules; cases, indeed, which cannot be embraced within any rule whatever, save the general one that, as to non-technical language, good sense and the natural and obvious meaning should be observed. Each case of this kind must, of course, be considered by itself, and the interpretation of the technical term in question, unassisted by special rules as to the application of the particular context, governed accordingly. The following cases, among many others, may be referred to as illustrating this observation; in most of which it is held that the accompanying language of the testator did not modify the technical meaning of the word "heirs." Porter's Appeal, 45 Penn. St. 201 ("the whole of heirs named," some being named who were not heirs, means only those who would take in case of intestacy); Eby's Appeal, 50 Penn. St. 311 ("heirs and distributees according to the law of the land"); Clark *v.* Scott, 67 Penn. St. 446 ("the heirs, executors, or administrators of said legatees or devisees"); Keeler *v.* Keeler, 39 Vt. 550 ("male heirs at law who may then live in S. H."); Gibbon *v.* Gibbon, 40 Ga. 562 ("heirs of the full blood"); Feltman *v.* Butts, 8 Bush, 115 ("to his heirs" construed to his children living). See further Quick *v.* Quick, 21 N. J. Eq. 13; Kiser *v.* Kiser, 2 Jones Eq. 28; Baskin's Appeal, 3 Barr, 304; Rand *v.* Sanger, 115 Mass. 124; Dove *v.* Torr, 128 Mass. 38; Vinson *v.* Vinson, 33 Ga. 454. In Lord *v.* Bourne, 63 Maine, 368, it is held that "all the residue . . . I give to my legal heirs" does not include the testator's widow, overruling Mace *v.* Cushman, 45 Maine, 250. With Lord *v.* Bourne agree Richardson *v.* Martin, 55 N. H. 45; Rusing *v.* Rusing, 25 Ind. 63; Holt *v.* Wall, 3 Ves. 247; Bailey *v.* Bailey, 25 Mich. 185; and, it is apprehended, all the common-law authorities, in cases in which there is no indication that the word "heir" is not used in its technical sense. Contra by statute, Gibbon *v.* Gibbon, 40 Ga. 562; Furguson *v.* Stuart, 14 Ohio, 140; Rawson *v.* Rawson, 52 Ill. 62. And the widow is treated as an heir under the statute of Indiana defining competent witnesses. Peacock *v.* Albin, 39 Ind. 25.

The second rule, which permits a lawful gift to be annulled or modified, by reason of the failure of the testator to provide some legal means for interpreting the word "heirs" in a secondary sense, is illustrated by a gift to the "heirs" of a living person, but not indicated in the will to be living. Now "viventis nemo est hæres," and for this technical reason the gift is void. Heard *v.* Horton, 1 Denio, 168; Goodright *v.* White, 2 W. Black. 1010; Carne *v.* Roche, 7 Bing. 226; Campbell *v.* Rawdon, 18 N. Y. 412, 417; Simms *v.* Garrot, 1 Dev. & B. Eq. 393.

This, it seems, proceeds upon the ground of the inadmissibility of parol evidence in aid of the gift attempted. There is no latent ambiguity in the will to justify the introduction of evidence to explain that the ancestor of the "heirs" was living, and that the testator therefore contemplated a gift to the heirs as

persons answering this description at his death,[1] and who, [*906] under the statute regulating the law of inheritance (*a*) * will

(*a*) 3 & 4 Will. 4, c 106, s. 3. It has been held by North, J., that there is nothing repugnant to law in a gift of real or personal property to A. for his own life and the life of his heir; on the death of A., his heir would be an ascertained person ; and on the death of the heir of

children. But the rule results, no doubt, in annulling the intention (a perfectly legal intention, too) of the testator; and hence, when anything can be discovered in the will which indicates that he contemplated a gift to the persons called heirs, in the lifetime of their ancestor, that will be laid hold of. How far, indeed, the courts will go to uphold the gift may be seen in Carne *v.* Roche, 7 Bing. 226, where the fact that the will described the ancestor of the "heir" as "of Butterhill" was considered to imply that the person was contemplated as living at the testator's death.

The same conclusion was necessarily reached in Goodright *v.* White, 2 W. Black. 1010, from the fact that the testator left a term and a subsequent annuity to the ancestor. To the same effect, Simms *v.* Garrot, 1 Dev. & B. Eq. 393. And, of course, there is an end of question when the testator in terms describes the ancestor as living. Heard *v.* Horton, 1 Denio, 168. But in the absence of expressed intention, the rule that a gift to the "heirs" of a person described or indicated to be living, is meant to be a gift to the children or other persons intended of the living donee, rather than to those who may be his heirs in the legal sense (that is, at his death), applies only when those heirs are to take presently upon the testator's death, and not where the gift to them follows a gift to some one else. Campbell *v.* Rawdon, 18 N. Y. 412.

The second rule finds further illustration in the case so often cited in the present note, Campbell *v.* Rawdon. In that case those who had been described as "heirs" would have taken only a life-estate had the term been construed to mean children. As it was, construing the word, in the absence of explanatory context, in its primary sense, they took an estate in fee simple. It may be added that, under the law which has prevailed in New York since 1830, the same designation under either interpretation would give the donees a fee. 18 N. Y. 416.

The primary, *i. e.* technical, sense of the word "heirs," as may be inferred from an observation already made concerning the first rule (that a contingent estate may be given by the context or by express terms), signifies not merely those who are or would be heirs, at the time of the ancestor's death, as contrasted with persons in being in his lifetime, but also those who would be heirs at the death of the ancestor, in contrast with those who would be his heirs at a later period. Minot *v.* Tappan, 122 Mass. 535 ; Dove *v.* Torr, 128 Mass. 38. This, indeed, is only a more specific way of saying that vested are preferred over contingent interests. Vol. I., p. 756. If, however, a different intention appear in the will, that must prevail, if lawful. Id. ; Sears *v.* Russell, 8 Gray, 86, 94; Donohue *v.* McNichol, 61 Penn. St. 73. Still, if the testator's intention should be obnoxious to some prohibition of law, such as the rule against perpetuities, the purpose would fail altogether. The courts could not fall back upon the technical meaning of the word to uphold the gift. Sears *v.* Russell, supra ; Donohue *v.* McNichol, supra.

The term "heir" has no technical sense as applied to gifts of personalty. Kiser *v.* Kiser, 2 Jones Eq. 28; Sweet *v.* Dutton, 109 Mass. 589. It should naturally be construed to mean those who would be entitled to take under the statutes of distribution, unless a different intention appear. Id. ; Houghton *v.* Kendall, 7 Allen, 72; Nelson *v.* Blue, 63 N. Car. 659. But in some cases it is held that the construction of the term is to be governed by the nature of the property. Sweet *v.* Dutton, supra; Gittings *v.* McDermott, 2 My. & K. 69. But the testator's intention is to govern if it can be ascertained. Id.; De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524; Clark *v.* Cordis, 4 Allen, 466, 480; Collier *v.* Collier, 3 Ohio St. 369; Walker *v.* Dunshee, 38 Penn. St. 430. See post, p. 930. It may be added that the primary sense of untechnical terms generally, such as the words "husband," "wife," and "relations" (post, p. 972) is the ordinary popular sense; and this is to be applied in the absence of evidence showing that the testator used it in some other sense. The first rule is also exemplified in the large class of cases dwelt upon in Chap. XXV. (Vol. I., p. 756), in which, by force of express terms, or of the context, an estate to "heirs" has been held contingent until the happening of a particular event, rather than vested at the death of the ancestor.

In some states the word "heirs," "heirs of the body," "lineal heirs," &c., have a statutory meaning. Craig *v.* Ambrose, 80 Ga. 134. See Ford *v.* Cook, 73 Ga. 215; Guerard *v.* Guerard, id. 505.

[1] Wood *v.* Bullard, 151 Mass. 324 ; Fargo *v.* Miller, 150 Mass. 225 ; Whall *v.* Converse, 146 Mass. 345 ; Dove *v.* Torr, 128 Mass. 38 ; Minot *v.* Tappan, 122 Mass. 535; Abbot *v.* Bradstreet, 3 Allen, 587. In the last cited case it is said to have been held sometimes that if there is a gift to one for life, remainder to testator's next of kin, and the life tenant is sole next of kin at testator's death, the remainder will be considered given to the person answering the description at the termination of the life estate, but that such cases were exceptional. See Fargo *v.* Miller, supra.

A devise to heirs designates not only the persons who are to take, but the manner and proportions in which they are to take. Cummings *v.* Cummings, 146 Mass. 501 (citing Rand *v.* Sanger, 115 Mass. 124); Kelley *v.* Vigas, 112 Ill. 242.

take the property in the character of devisee, and not, as formerly, by descent. And if the heirship resides in, and is divided among, several individuals as co-heirs or co-heiresses, the circumstance that the expression is *heir* (in the singular) creates no difficulty in the application of this rule of construction; the word "heir" being in such cases used in a collective sense, as comprehending any number of persons who may happen to answer the description (*b*),[1] and which persons, if there are no words to sever the tenancy, will be entitled as joint tenants (*c*).

Devise to heir or heirs passes fee simple.

As regards all wills made or republished since 1838, a devise to the *heir*, in the singular, or to the *heirs*, in the plural, will equally confer on the person or persons answering the description an estate in fee simple (*d*).

Heirs of the body as purchasers.

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

the devisee or legatee, the property would go over to the heir or next of kin of the testator, or to his residuary devisee or legatee, as the case may be, Re Amos, Carrier *v.* Price (1891), 3 Ch. 159.

(*b*) Mounsey *v.* Blamire, 4 Russ. 384.

(*c*) Lit. s. 254.

(*d*) 1 Vict. c. 26, s. 28. A devise to *heirs* in the plural, had the same effect under the old law, Co. Lit. 10 a. See also per Pollexfen, arguendo in Burchett *v.* Durdant, Skinn. 206; Marshall *v.* Peascod, 2 J. & H. 73 (deed). Semble, the same rule applied to a devise, by will made before 1838, to the *heir* in the singular, notwithstanding Coke's reasoning (Co. Lit. 8 b.), see Beviston *v.* Hussey, Skin. 385, 563; Marshall *v.* Peascod, 2 J. & H. 75. Distinguish between such a devise and a will thus, "I make A. heir of my land": which gives A. the fee simple, "for such estate as the ancestor hath such is A. to inherit," Spark *v.* Purnell, Hob. 75; Jenkins *v.* Lord Clinton, 26 Beav. 108, 8 H. L. Ca. 571 (Jenkins *v.* Hughes); ante, Vol. I., p. 327, n. (*d*).

(e) The cases cited in support of this proposition (see next note) are all cases either of deeds or of wills made before 1838. There appears to be no reported decision affirming this rule as still in force as regards wills coming under the present law. The generally received opinion of the profession appears to be that the rule is still applicable to such cases so as not to bring them within s. 28 of the Wills Act. See *e. g.*, the unqualified statement of the rule in the text, and by Mr. Theobald (Law of Wills, p. 255). The ground for this opinion seems to be that it is considered that though a devise in the terms stated in the text has no "words of limitation" superadded to it, yet that the expression "heirs of the body" must be regarded as of itself necessarily importing words of limitation, creating an estate tail which (unless barred) will be carried on to successive generations, so as to except the devise from the operation of s. 28. Otherwise, it may be asked, how could such a devise have carried an estate of inheritance before the Wills Act? The argument is analogous to that used for a somewhat different purpose by Taunton, J., in Doe d. Winter *v.* Perrott, post, p. 908. On the other hand, if the point should arise in practice, it might, perhaps not altogether unreasonably, be urged that the grounds of the decision in Mandeville's case are not very fully recorded, and that the estate held to have been created in that case seems somewhat anomalous (see 2 Drew. 455; 31 Ch. D. 99); that the adoption of the rule by judges before the Wills Act, may probably be attributed to their anxiety as far as established rules would permit, to construe expressions liberally, so as to give estates of inheritance in accordance with the pre-

[1] When the word "heirs" is taken as a word of limitation, it is collective, and signifies all the descendants in all generations; but when it is taken as a word of purchase, it may denote particular persons answering the description at a particular time, and in a special sense, according to circumstances. Fulton *v.* Harman, 45 Md. 251. For example, where in the case of a gift to A. for life, remainder to his "lawful heirs," the words quoted are followed by words of partition and distribution inconsistent with the devolution of the estate by inheritance, the estate for life cannot be enlarged to a fee simple by the term "lawful heirs." Id.

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

Mandeville's case.

Whether a devise to the heir of the body in the singular ought to be held to confer an estate tail by purchase on the person or persons first answering the description of heir of the body, is a question which does not appear to be precisely covered by judicial decision. In Chambers *v.* Taylor (*g*), Lord Cottenham, though he treated the decisions upon gifts to A. and the heir of his body as authorities applicable to the question what estate was conferred by a devise to the heir of the body of A. by purchase, drew from those decisions the conclusion that a devise to heir of the body in the singular by purchase would not confer an estate tail.

"Heir of the body" (in the singular).

After noticing the decisions upon devises to A. and the [*908] *heir of his body in the singular, the L. C. said, "These cases prove that the word heir in the singular number has sometimes the same effect as the word heirs in the plural; but if

sumed intentions of testators, and that all reason for such anxiety has now been done away with; that the language of s. 28 is explicit and general, and makes no exception in favor of the well-known rule in Mandeville's case; and that the effect of maintaining the exception as regards wills under the present law, would be not to enlarge, but to cut down the estate contrary to the spirit as well as the letter of the enactment.

(*f*) Co. Lit. 26 b. See also Southcote *v.* Stowell, 1 Mod. 226, 237, 2 Mod. 207-211, Freem. 216, 225; Wills *v.* Palmer, 5 Burr. 2615, 2 W. Bl. 687; Wright *v.* Vernon, 2 Drew. 439, 7 H. L. Ca. 35, 4 Jur. N. S. 1113. The entail must be traced as if limited originally to the testator or other person so as to be descendible from him to the claimant. It may of course be general or special, but must not be eccentric or invented to suit the occasion, Allgood *v.* Blake, L. R., 7 Ex. 363; per Bosanquet, J., 9 Cl. & Fin. 625. See Moore *v.* Simkins, 31 Ch. D. 95 (deed of settlement, see post, p. 923), where Mandeville's case was cited and observed on by Pearson, J.

(*g*) 2 My. & C. 376. In that case land was settled by *deed* to the use of the settlor and his wife successively for life, remainder to the use of the heir female of the body of the settlor on the body of his said wife already begotten and then living or which might be begotten thereafter, and in default of such issue to the use of the heir male of the body of the settlor on the body of his said wife to be begotten, and in default of such issue to the right heirs of the settlor. At the date of the deed the settlor and his wife had four daughters living, but no issue male: at his death the four daughters and several sons of the marriage survived.

words of limitation are superadded to the word heir, it is considered as conclusively showing that the word is used as a word of purchase. When that is not the case, it is considered in construing wills as nomen collectivum for the purpose of creating an estate tail in the first taker, and not as creating an estate tail in the person answering the description of heir. If the word heir would per se give an estate of inheritance to the party answering the description, there would be no reason for any distinction whether words of limitation or inheritance were or were not superadded. These cases therefore prove that the daughters would not have taken estates of inheritance as purchasers under a will; and it is not pretended that their parents took more than estates for life" (*h*).

But assuming that a devise to the heir of the body in the singular would confer an estate tail by purchase on the person or persons first answering the description of heir of the body it would still remain undecided whether the property would devolve successively to every individual who should answer the description of heir of the body, in like manner as under a devise to heirs of the body in the plural, or whether the estate would vest in and be confined to the individual who should first answer the description of heir of the body, and who would take an estate tail by purchase. The latter was evidently the opinion of Taunton, J., in Doe d. Winter *v.* Perratt (*i*), who, after citing Mandeville's case (*k*), and Southcote *v.* Stowell (*l*), said: "In these instances the estate tail arises out of proper words of limitation *in the plural number* denoting a certain continuous line of posterity 'heirs of the body.' But no such effect can be given to the word 'heir,' 'heir of the body,' 'right heir,' or 'next,' or 'first heir,' where they constitute only a mere designatio personæ" (*m*). The case, however, did not raise this precise point, * as the words [*909] "first male heir" occurring in the will then before the Court were held to mean first male *descendant*, in which sense they could not operate to confer an estate tail by force of the doctrine under consideration any more than those words themselves would if employed by the testator. It seems difficult, however, to reconcile with this doctrine the case of Whitelock *v.* Heddon. Whitelock *v.* Heddon.

(*h*) Lord Cottenham's reasoning would seem to suggest that, under the present law, a devise to the heir (in the singular) of the body of A., would vest in the person answering that description, an estate in fee simple under 1 Vict. c. 26, s. 28.

(*i*) 9 Cl. & Fin. 616.

(*k*) Ante, p. 907.

(*l*) 1 Mod. 226, 237; 2 Mod. 207, 211.

(*m*) May not this mean that where (*i. e.* assuming that) the expressions in question, in the singular, constitute *only* designatio personæ, they not only do not confer such an estate as was exemplified in Mandeville's case, but no estate of inheritance whatever? The tenor of the learned judge's remarks seems to be rather to the effect that the words in question regularly confer a life estate only; but it was not necessary for him to go further than to say that such was their effect when (as in the case he was considering) they amounted only to designatio personæ. In Doe d. Sams *v.* Garlick, 14 M. & W. 698, a devise to "the person or persons as at my death shall be the heir or heirs-at-law of A.," was held a mere designatio personæ, and to confer a life estate only.

Heddon (*n*), where A. devised to his grandson C. all his estates, to him, his heirs, and assigns, except as thereinafter mentioned; that is to say, provided that in case his (testator's) son B. should have any son or sons begotten or born in lawful matrimony, then he devised the said estates *to such* (*o*) *male issue as his son B. should or might have at the time of C.'s attaining the age of twenty-one years;* but in case his said son B. should have any male issue, then he directed that C. should receive the rents, until twenty-one, as above mentioned: it was held, that a son of B., in ventre matris on C.'s attaining his majority (and who was the eldest son in esse at that period, the first being dead), *took an estate tail* by force of the word "issues," and not a fee simple by the effect of the word "estates." Eyre, C. J., said, as the objects were the sons of the testator's son, who, it appeared, were to have his bounty in preference to the son of his daughter (for such C. was), and *as "issue" was a collective term,* capable of being descriptive of either person or interest, or both, he thought it reasonable to understand the word "issue" in its largest sense, so as to deem it descriptive of an estate tail male to the sons of B., as many as there should be, in order of succession.

Devise to male issue.

It is evident that the Court did not construe the words "male issue" as altogether synonymous with heirs male of the body (*p*), inasmuch as the devise was to take effect in favor of the son of B. in the lifetime of his father, so that the words were read as importing heirs *apparent* of the body, a mode of construction which seems to bring the case into direct collision with Doe *v.* Perratt in regard to the nature of the estate conferred by the devise, this point Whitelock *v.* Heddon (but which, unfortunately, was not cited in Doe *v.* Perratt) must be considered as overruled.[1]

Remarks upon Whitelock *v.* Heddon.

[*910] * **II. — Gift to the Heir with Superadded Qualification.** — Where a testator has thrown into the description of heir an additional ingredient or qualification, the devisee must answer the description in both particulars. Thus a devise to the right heirs *male* of the testator, or to the right heirs *of his name,* is, according to the early cases, to be read as a devise to the heir, provided he be a male, or provided he be of the tes-

"Heir" with superadded qualification.

(*n*) 1 B. & P. 243.

(*o*) Eyre, C. J., reasoned upon the word "such," as if it meant such sons before mentioned; but the expression was "such male issue as my said son shall or may have." The word, therefore, evidently had reference to the succeeding words of the context.

(*p*) For an instance of the words being so construed, see Allgood *v.* Blake, L. R., 7 Ex. 339, 8 Ex. 160.

[1] The following is held to create an estate tail in the first taker: "I give my house in P. to my daughter L. during her life, and at her decease I bequeath it to her oldest male heir." Brownell *v.* Brownell, 10 R. I. 509. See Cuffee *v.* Milk, 10 Met. 366; Canedy *v.* Haskins, 13 Met. 389.

tator's name (as the case may be); and, consequently, on the principle just stated, if the character of heir should happen to devolve to a person not answering to the prescribed sex or name, the devise would fail.

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

"Right heirs male," how construed.

So, in Counden *v.* Clerke (*r*), where a testator, having issue a son and daughters, and two grand-daughters the issue of his daughter, devised an annuity out of certain lands to his grand-children, and a legacy to his brother; and then declared that the land should descend unto his son, and if he died without issue of his body, then to go unto his (the testator's) *right heirs of his name and posterity*, equally to be divided, part and part alike; and then to his grand-daughters he devised another annuity out of the land. The question was, whether the devise to the right heirs of his name and posterity was a good devise to the testator's brother, who was of his name, but was not his heir. It was held, that the brother was not entitled, and that the devise was void (*s*). And the principle of these decisions was *adopted [*911] in Wrightson *v.* Macaulay (*t*), where it was held, that under a devise to the testator's "right heirs being of the name of H.," the person who was his nearest relation of that name, but not his heir, had no claim.

"Right heirs of my name and posterity."

It remains to be considered how far the doctrine of the preceding cases is applicable to limitations to heirs *of the body*. Sir Edward

(*q*) Cited Hob. 34.

(*r*) Moore, 860, pl. 1181, Hob. 29. See also Starling *v.* Ettrick, Pre. Ch. 54; Lord Ossulston's case, 3 Salk. 336, 11 Mod. 189, Co. Lit. 25 a; Dawes *v.* Ferrers, 2 P. W. 1, 8 Vin. Ab. 317, pl. 13, Pre. Ch. 589.

(*s*) But is there not ground to contend that a devise to the heirs male of the testator operates as a devise to the heirs male *of his body*, seeing that it has been long settled that a devise to A and his heirs male, or to A. and his heirs female, confers an estate tail special (Baker *v.* Wall, 1 Ld. Raym. 185); and such is likewise the effect of a devise to A. for life, and after his death to his right heirs male forever (Doe d. Lindsey *v.* Colyear, 11 East, 548); the word "heirs" being in these several cases construed to mean heirs *of the body*. Indeed, the opinion of the Court seems to have been in favor of such a construction in Lord Ossulston's case, 3 Salk. 336, Co. Lit. 25 a, where one Ford, having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male forever; and the three sons being dead without issue, the whole Court held that the brother could not take as male heir — first, *because a devise to heirs male operates as a limitation to heirs male of the body*, and the brother could not be heir male of the devisor's body; secondly, because the remainder to the heirs male were words of purchase, and by purchase the brother could not take as heir male, his niece being the heir at common law. As the case on the latter ground accords with the antecedent authorities above stated, it would not be safe or correct to treat it as an adjudication on the first point; though if the Court had been called upon to decide the case, it is pretty evident what the decision would have been. The doctrine of these cases was recognized in Doe d. Winter *v.* Perratt, 5 B. & Cr. 65, 3 M. & Sc. 605, 9 Cl. & Fin. 606, where, however, the question before the Court was (as we shall presently see) different. See also Doe d. Angell *v.* Angell, 9 Q. B. 328.

(*t*) 14 M. & Wel. 214. And see Thorpe *v.* Thorpe, 1 H. & C. 326.

Whether devise to heirs of the body, male or female, applies to a person not heir general.

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

The latter branch of this proposition has been the subject of much controversy. Lord Cowper, in the well-known case of Brown *v.* Barkham (*x*), denied it to be law, and so decided; and though the propriety of his determination was questioned by Lord Hardwicke, before whom the case was brought by a bill of review (*y*), and though Mr. Hargrave has defended the position of his author with his usual acuteness and learning (*z*), yet subsequent cases appear to have established, in opposition to Coke's doctrine, that a limitation, either in a will or deed, to the heirs special of the body by purchase, will take effect in favor of the designated heir of the body (if any) *though he or she be not the heir general of the body.* Thus in Wills *v.* Palmer (*a*), it was held, that, under a devise in remainder to the heirs male of the body of A. (a person who had no estate of freehold under the will), the second son of A. was entitled as heir *male* of the body, [*912] though *he was not heir general of the body, which character belonged to a grand-daughter, the child of a deceased elder son.

Heir male of body as purchaser held entitled, though not heir general.

This case was followed by Evans d. Weston *v.* Burtenshaw (*b*), in which the same construction was applied to the limitations of a marriage settlement. In this state of the authorities, it seems unnecessary to encumber the present work with a statement of the numerous early cases on the subject (*c*), which (conflicting as they are) cannot exert much influence on a question which has been the subject of three distinct adjudications of a comparatively recent date, all concurring to support the more convenient and liberal construction. It

(*u*) Co. Lit. 24 b.
(*x*) Pre. Ch. 442, 461. 1 Stra. 35, 2 Vern. 729, and see per Hale, C. J., Pybus *v.* Mitford, 1 Freem. 369.
(*y*) Amb. 8.
(*z*) Co. Lit. 24 b, n. (3).
(*a*) 5 Burr. 2617.
(*b*) Co. Lit. 164 a, n. (2).
(*c*) The reader who wishes to examine these cases will find the authorities on one side fully stated in Mr. Hargrave's note above referred to, and those on the other in Mr. Powell's Treatise on Devises, vol. i., p. 319, 3d ed.; these authors having both displayed much industry in the search for cases to support their respective views. It should be observed that Mr. Hargrave's strictures were written before the cases of Wills *v.* Palmer and Evans *v.* Burtenshaw, and that in many of the cases cited by him the devise was to the heirs general; as to which it is not attempted to impugn the doctrine for which he contends.

is probable, indeed, that a Judge less abhorrent of technical and rigid rules of construction than Lord Mansfield, would have hesitated to decide, as he did in Wills *v.* Palmer, and Evans *v.* Burtenshaw, in the teeth of the high authority of Lord Coke; but it is still more probable that the Courts, at the present day, would refuse to set the question again afloat, by attempting to overrule those cases, even if they disapproved of the principle on which they were decided (*d*).

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

Heir male of the body claiming by descent, must claim through heirs male.

It is otherwise, however, in the case of gifts to the heir male or female by *purchase;* for, if lands be devised to A. for life, and, after his decease, to the heirs male of the body of B., and
* B. have a daughter who dies in his lifetime, leaving a son, [*913]
who survives B. (all this happening in the lifetime of A., the tenant for life), such grandson is entitled, under the devise, as a person answering the description of heir male of the body of B., he being not only the immediate heir of B. (though the heirship is derived through his deceased mother (*f*)), but being also of the prescribed sex (*g*).

Aliter as to heirs taking by purchase.

It should be observed, however, that, in Oddie *v.* Woodford (*h*), which arose on the will of Mr. Thellusson, and also in Bernal *v.* Bernal (*i*), a devise to male descendants was held to be confined to males claiming through males, and not to comprise descendants of the male sex claiming through females; but in neither of these cases does the

(*d*) In Wrightson *v.* Macaulay, 14 M. & W. 231, the Court treated Coke's rule on this point as no longer law.

(*e*) Sect. 24.

(*f*) Hob. 31; Co. Lit. 25 b.

(*g*) This distinction, however, seems to have been lost sight of by Taunton, J., in Doe d. Winter *v.* Perratt, 3 M. & Sc. 594, who on the authority of the above-cited passage in Littleton seems to have considered, that even under a devise to the heir male of the body *by purchase*, the heir must derive his title entirely through males, and that the male issue of a deceased daughter could not under any circumstances support a claim. The case, however, did not raise the point; and others of the learned Judges in the same case expressly recognized the distinction stated in the text. But in Lywood *v.* Kimber, 29 Beav 38, Romilly, M. R., rejected the distinction. And see 3 Dav. Conv. 347, n. (3d ed.), on the difficulties involved in the distinction if the devisee takes an estate tail.

(*h*) 3 My. & Cr. 584.

(*i*) 3 My. & Cr. 559. This is rather a decision who shall *inherit*, than who can claim as *purchaser* a legacy given to male children (construed descendants); in which view it agrees with the general rule, that the descent is to be traced wholly through males.

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

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

Devise to heir male may apply to several grandsons.

"Next heir male," how construed as between sons of several daughters.

A question of this nature was elaborately discussed in Doe d. Winter *v.* Peratt (*n*), where a devise in remainder was "to the first male heir of the branch of my uncle Richard Chilcott's family;" the facts being that, at the date of the will in 1786, and the death of the testator in 1787, the uncle was dead,

"First male heir" in similar case.

(*k*) "Eldest" was afterwards held to mean prior in line, not senior by birth, Thellusson *v.* Rendlesham, 7 H. L. Ca. 429 (same will).
(*l*) See also Doe d. Angell *v.* Angell, 9 Q. B. 328.
(*m*) Co. Lit. 25 b.
(*n*) 5 B. & Cr. 48; in D. P. 3 M. & Sc. 586, 10 Bing. 198, 9 Cl. & Fin. 606, 6 M. & Gr. 314.

leaving five daughters, of whom the eldest died before the remainder fell into possession (which happened in July, 1820), leaving several daughters, one of whom (who was living) had a son born in 1795; the uncle's second daughter (who was also living) had a son born in 1763; and the fourth (who was dead) a son born in 1768. It was agreed, both in the Court of King's Bench and in the House of Lords, that the devisee must be a single individual; but as to the meaning of the word "first," the only point decided was that the second daughter's son, though first in priority of birth, was not the first male heir within the meaning of the will (*o*). * That construction was upheld indeed by two of the Judges, but opposed by nine others; of whom two favored the claim of the eldest daughter's grandson as being first in priority of line; five, with Lord Brougham, were of opinion (diss. Lord Cottenham and six Judges) that the son of the fourth daughter was entitled, because, by the decease of his mother, he had first acquired the character of male *heir*, in the strict sense of the word (*p*), while the remaining two held the will void for uncertainty (*q*). [*915]

III. — Word "Heir" when construed "Heir Apparent." — It is clear, that no person can sustain the character of heir, properly so called, in the lifetime of the ancestor, according to the familiar maxim, nemo est hæres viventis. Therefore, where (*r*) a man having two sons, devised lands to the younger son and the heirs of his body, and, for want of such issue, to the heirs of the body of his elder son, and the younger died without issue in the lifetime of the elder; it was held, that the son of the elder could not take under the devise (*s*). Nemo est hæres viventis.

The great struggle, however, in cases of this nature, has generally

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

(*p*) As to this, see next paragraph.

(*q*) "Heir of a family" was said to be an expression not known to the law; but in Horsefield *v.* Ashton, 1 W. R. 259, Lord Cranworth was of opinion that a devise in remainder to the "heir of the testator's family" was not void for uncertainty. See also Tetlow *v.* Ashton, 20 L. J. Ch. 53, 15 Jur. 213.

(*r*) Challoner *v.* Bowyer, 2 Leon, 70. See also Archer's case, 1 Co. 66; Anon., Dyer, 99 b. pl. 64; Frogmorton d. Robinson *v.* Wharrey, 2 W. Bl. 728, 3 Wils. 125, 144. And the same principle holds good as to personalty, so that no person can sustain the character of next of kin of a living person, per Kay, J., Re Parsons, Stockley *v.* Parsons, 45 Ch. D. 51, 63.

(*s*) It will be observed that the failure of the devise in this case was a consequence of the rule which required that a contingent remainder should vest at the instant of the determination of the preceding estate. But see now 40 & 41 Vict. c. 33, ante, Vol. I. p. 832.

been to determine whether the testator uses the word "heir" according to its strict and proper acceptation or in the sense of heir apparent, or in some inaccurate sense.

Sometimes the context of the will shows that he intends the person described as heir to become entitled under the gift in his ancestor's lifetime; the term being used to designate the * heir apparent, or heir presumptive (*t*).[1] As, in James *v.* Richardson (*u*), where a man devised lands to A. and his heirs during the life of B., in trust for B., and, after the decease of B., to the heirs male of the body of B. *now living*, and to such other heirs male or female as B. should have of his body, the words "heirs male of the body now living" were held to be a good description of the son and heir apparent, living at the time of the making of the will, to which period the word "now" was considered to point (*x*).

[*916]

Heir when construed to mean heir apparent or heir presumptive.

Heirs male "now living."

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

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

"Heir at law," held to mean eldest son by force of context.

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

(*t*) The reader scarcely need be reminded of the difference between an heir apparent and an heir presumptive. An heir apparent is the person who will *inevitably* become heir in case he survives the ancestor. The heir presumptive is a person who will become heir in the same event, provided his or her claim is not superseded by the birth of a more favored object. Thus, if a man has an eldest or only son, such son is his heir apparent. If he has no child, but has a brother or sister, or any other collateral relation, such relation is his heir presumptive, because liable to be postponed by the birth of a child; so, if his only issue be a daughter, such daughter, being liable to be superseded by an after-born son, is heir presumptive. If the ancestor dies intestate leaving a daughter, and his wife enceinte, who is afterwards delivered of a son, the daughter takes the rents accrued due in the mean time, Richards *v.* Richards, Joh. 754.

(*u*) T. Jon. 99, 1 Vent. 334, 2 Lev. 232, 3 Keb. 832, Pollex. 457, Raym. 330; Burchett *v.* Burdant, on same will, Skin. 205, 2 Vent. 311, Carth. 154. See also Rittson *v.* Stordy, 3 Sm. & Gif. 230. Where the person was otherwise clearly designated, his being an alien, and consequently (before 33 Vict. c. 14, s. 2) incapable of holding land, did not alter the construction, *s.* c.

(*x*) Ante, Vol. I. p. 288.

(*y*) Amb. 533.

(*z*) 4 M. & Pay. 862, 7 Bing. 226.

[1] Morton *v.* Barrett, 22 Maine, 257; Stuart *v.* Stuart, 18 W. Va. 675.

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

As, in Darbison d. Long *v.* Beaumont (*a*), where the testator *after creating various limitations for life and in tail, [*917] devised his estates to the *heirs male of the body of his aunt E. L. lawfully begotten*, remainder to the testator's own right heirs; *he also gave* 100*l. to his said aunt E. L.*, and 500*l.* to her children; he likewise gave to D. (who was his heir-at-law) an annuity out of the said hereditaments, and a legacy to her children. The prior limitations determined in the lifetime of E. L., upon which the question arose, whether A., the eldest son of E. L., could take; to whose claim it was objected, that, his mother being living, he was not heir. But it was adjudged in the Court of Exchequer, which judgment (after being reversed in the Exchequer Chamber) was ultimately affirmed in the House of Lords, that A. was entitled under this devise; it being evident from the whole will, that the eldest son was the person designed to take by the appellation of the heir male of the body of the testator's aunt E. L.; and that although the word "heir," in the strictest sense, signified one who had succeeded to a dead ancestor, yet, in a more general sense, it signified an heir apparent, which supposed the ancestor to be living; that the testator took notice that the sons of E. L. were living at that time, by giving them legacies, and also that E. L. was likewise living, by giving her a legacy (*b*); and, therefore, he could not intend that the first son should take strictly as heir, that being impossible in the lifetime of the ancestor; but, as heir apparent, he might and was clearly intended to take. "Heir" held to mean heir *apparent*.

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

(*a*) 1 P. W. 229, 3 B. P. C. Toml. 60, et vid. James *v.* Richardson, supra.

(*b*) But might not the testator have calculated on E. L. surviving him, and afterwards dying before the remainder to her heir took effect in possession? This and the next case were disapproved by Lord Brougham, 9 Cl. & Fin. 693.

(*c*) 2 W. Bl. 1010.

to the heirs and assigns of M. forever. R. the son, had, [*918] *at the date of the will, a son and two daughters; and M., the testator's daughter, then had one son. R. died in the lifetime of M. It was contended, that the devise to the heir of M. was void, his mother being alive at the expiration of the preceding estates; but the Court held, that her son was entitled. De Grey, C. J., said, that the testator took notice that M. was living, *by leaving her a term and a subsequent annuity*, and meant a present interest should vest in her heir, that was, her heir apparent during her life. Blackstone, J., thought that, as the testator had varied the tenure of M.'s annuity from that of the other sisters, *theirs* depending on their own single lives, and *hers* on the joint lives of herself and her brother R., it was plain the testator had in his contemplation that *she might survive R.*, as in fact, she did; and therefore, the word "heir" must be construed as equivalent to *issue*, in order to make him take in her lifetime, agreeably to the intent of the testator.

In Doe d. Winter *v.* Perratt (*d*), a testator devised lands to his kinsman, John Chilcott, or his male heir, and, in default of male heir by him, directed the lands to fall *to the first male heir* of the branch of his (the testator's) uncle, Richard Chilcott's family, paying unto such of the daughters of the said R. Chilcott, as should be then living, the sum of 100*l.* each, at the time of taking possession of the said estates. John Chilcott died without issue. R. Chilcott was dead when the testator made his will, having left five daughters, several of whom (including the eldest) died before the remainder fell into possession. The eldest daughter left several daughters, one of whom had a son, who was the only male descendant of the eldest daughter. Each of the other deceased daughters left sons, and each of the living daughters had also sons, some of whom were born before the grandson of the eldest daughter. The question between these several stocks was which of them was entitled under the denomination of "first male heir." Holroyd and Littledale, JJ., held that the son of the daughter *who first died* leaving male issue was entitled; dissentiente Bayley, J., who was of opinion that the son of the *eldest of the daughters*, who had a son, was entitled, whether such daughter were living or dead, and without regard to the relative ages of the sons of the several daughters; thinking that "heir" here meant heir apparent of the eldest daugh- [*919] ter. The case was brought by writ of error into the *House of Lords; and the House submitted to the Judges the question (among others), whether the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living. Four out of the ten Judges (namely, Littledale, Maule,

"To first male heir of the branch of R. C.'s family."

"First male heir" held to mean *male descendant.*

(*d*) 5 B. & Cr. 48; in D. P. 3 M. & Sc. 586, 10 Bing. 198, 9 Cl. & Fin. 606, 6 M. & Gr. 314.

and Coltman, JJ., and Parke, B.) answered this question in the negative, thereby supporting the judgment of K. B., and with them agreed Lord Brougham. The opinion of the other six Judges (Taunton, Bosanquet, Bayley, Patteson, Williams, JJ., and Tindal, C. J.), with whom Lord Cottenham concurred, was in the affirmative; and this opinion was founded on the circumstances of the testator's knowledge of the state of his uncle Richard's family; that his uncle was then dead; that he had left no heir male, but only daughters; that legacies were given to such of the daughters as should be living when the remainder vested, to be paid by the person who was to take under the description of "first male heir," not "of my daughters," or "of daughters," or of any one daughter specifically, but "of the branch of my uncle Richard Chilcott's family;" all of which it was considered amounted to a demonstration that the testator used the word "heir" to denote a person of whom the ancestor might be living. It ultimately appeared that the precise point was not before the House, and it was therefore not decided.

On the other hand, in Collingwood *v.* Pace (*e*), where lands were devised to the heir of A. and to the heirs of the said heir, and an annuity was bequeathed to A. for the bringing up A.'s eldest son; it was held that, A. being alive at the testator's death, the devise to his heir failed; for, though it was strongly argued for the eldest son of A. that by giving A. an annuity the testator showed that he expected him to survive, and therefore, the devise being immediate, could not have used the word "heir" in its technical sense; yet (it was answered) there was nothing to show, in case A.'s eldest son died in the testator's lifetime, whether a second son was to take; and that, if the eldest was intended, it might have been so expressed, as it was in another part of the will.

"Heir" held not to mean heir apparent.

And in Doe d. Knight *v.* Chaffey (*f*), a devise to husband and wife for their lives, remainder to their son A. in fee; but in case * he should die without issue in their lifetime, then to "their next heir" in fee, was held to give the estate to the true heir of the husband and wife, and not to the child born next after A.

[*920]

IV. — The word "Heir" explained by the Context of the Will to denote a Person who is not the Heir-general. — Where a testator shows by the context of his will that he intends by the term "heir" to denote an individual who is not heir-general, such intention, of course, must prevail, and the devise will take effect in favor of the person described, Thus, if a testator says, "I make A. B. my sole heir," or, "I

"Heir" explained by context to denote a person not heir-general.

(*e*) Bridg. by Ban. 410. Assuming "heir" to have its proper sense, this devise would at the present day be construed as an executory devise to the person who should be the heir of A. at his death, and the testator's heir would be entitled during A.'s life, the old distinction between gifts per verba de præsenti and per verba de futuro being now exploded, Fea. C. R. 535; Harris *v.* Barnes, 4 Burr. 2157.

(*f*) 16 M. & Wel. 656.

give Blackacre to my heir male, *which is my brother, A. B.;*" this is, it seems, a good devise to A. B., although he is not heir-general (*g*) [1]

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

So, in the case cited by Lord Hale in Pybus *v.* Mitford (*k*), where a man, having three daughters and a nephew, gave his daughters 2,000*l.*, and gave the land to his nephew by the name of his *heir* male, provided that, if his daughters "troubled *the heir,*" the devise of the 2,000*l.* should be void; it was adjudged that the devise to the nephew was good, although he was not heir-general (because the devisor expressly took notice that his three daughters were his heirs); and that the limitation to the brother's son by the name of heir male was a good name of purchase.

Term "heir" applied by a testator to a devisee.

Again, in Baker *v.* Wall (*l*), where the testator, having issue [*921] * two sons, devised to A., his eldest son, his farm called Dumsey, to him and his heirs male forever; adding, "if a female, my next heir shall allow and pay to her 200*l.* in money, or 12*l.* a-year out of the rents and profits of Dumsey, and shall have all the rest to himself, I mean my next heir, to him and his heirs male forever." A. died leaving issue a daughter only; and the question now was, whether in event C., the youngest son of the testator, was entitled. And the Court held that he was: first, because it was manifest that the devise to A. was an estate tail male; secondly, that it was apparent that the devisor had a design, that if A. had a daughter, she should not have the lands; for the words, "if a female, then my next heir," &c., must be

"Next heir" held to denote a person not heir-general.

(*g*) Hob. 33. See also Dormer *v.* Phillips, 3 Drew. 39; Parker *v.* Nickson, 1 D. J. & S. 177.
(*h*) Hob. 34. But a devise of customary lands to the *heir* simpliciter gives them to the common-law heir, Co. Lit. 10 a; post, p. 922.
(*i*) Pre. Ch. 464, per Lord Cowper.
(*k*) 1 Vent. 381.
(*l*) 1 Ld. Raym. 185, Pre. Ch. 468, 1 Eq. Ca. Abr. 214, pl. 12. See also Rose *v.* Rose, 17 Ves. 347, where the phrase "my heir under this will" was held, in reference to certain pecuniary legacies, to point to the testator's residuary legatee. See Thomason *v.* Moses, 5 Beav. 77, ante Vol. I. p. 345.

[1] See the following cases for illustration: Bradlee *v.* Andrews, 137 Mass. 50; Minot *v.* Harris, 132 Mass. 528; and cases cited at the end of this chapter, of wife or husband taking as "heir."

intended as if he had said, "But if my son A. shall have only issue a female, *then* that person who would be my next heir, if such issue female of A. was out of the way, shall have the land;" and, to make his intent more manifest, the testator gave a rent to such female out of the lands; for she could not have both the land and a rent issuing out of it. By the words, "to *him*," it was apparent that he intended the *male* heir; so that it was the same thing as if he had said, "I mean my next heir male." And as to the objection, that C. was male, but not heir (for J. D., a female, was right heir to the devisor), the Court said, that if the party take notice that he has a right heir, and specially exclude him, and then devise to another by the name of heir, this shall be a special heir to take.

But in Goodtitle d. Bailey *v.* Pugh (*m*), where the devise was to the eldest son of the testator's only son, begotten or to be begotten, for his life; and the testator added, "and so on, in the same manner, to all the sons my son may have; if but one son, then all the real estate to him for his life, and for want of heirs in him, *to the right heirs of me* (*the testator*) *forever, my son excepted, it being my will he shall have no part of my estates, either real or personal.*" The testator left his son and three daughters. The son died without issue, having enjoyed the lands for his life. The daughters contended, that they were the personæ designatæ under the devise *to the testator's own right heirs, his son excepted;* for that the son, who was the proper heir, was plainly and manifestly excluded by the express words. And of this opinion were Lord Mansfield and the rest of the Court of King's Bench, who held, that the words were to be interpreted as if the testator *had said, "Those who would be my right heirs, if my son [*922] were dead." This judgment, however, was reversed in the House of Lords, with the concurrence of the Judges present, who were unanimously of opinion that no person took any estate under the will by way of devise or purchase.

"To the right heirs of me, my son excepted."

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

Remarks upon Goodtitle *v.* Pugh.

But if a person truly answers the special description contained in the will, the fact that he is also heir-general affords no pretext for

(*m*) 3 B. P. C. Toml. 454, Butl. Fea. 573, cit. 2 Mer. 348.

Capacity of special heir not affected by his being general heir also.

his exclusion; and therefore where a testator devised the ultimate interest in his property to his right heirs on the part of his mother, his co-heirs at law, who were also his heirs ex parte maternâ, were held entitled under the devise (*n*). It scarcely requires notice that wherever the heir-general is a descendant, or the brother or sister, or descendant of a brother or sister of the testator, he will be heir ex parte maternâ as well as ex parte paternâ.

V. — Construction of the Word "Heir" varied by the Nature of the Property. — It is next to be considered how far the construction of the word "heir" is dependent upon, or liable to be varied by, the nature of the property to which it is applied.

If the subject of disposition be real estate of the tenure of gavelkind, or borough English, or copyhold lands held of a manor in which

"Heir" in reference to gavelkind or borough English lands;

a course of descent different from that of the common law prevails, it becomes a question, whether, under a disposition to the testator's heir as a purchaser, the intended object of gift is the heir-general at common law, or his heir quoad the particular property which is the subject of the devise; and the authorities, at a very early period, established the claim of the common-law heir (*o*); supposing, of course, that there is nothing in the context to oppose the construction.

[*923] * If a testator seised of lands by descent from his mother devises them to his heir, and die leaving different persons his heir ex parte maternâ and his heir ex parte paternâ (who both claim at common law), the question, which is entitled, will depend on whether the devise is sufficient according to the principles of the old law to break the descent. Thus, in Davis *v.* Kirk (*p*), a testator devised all his real estate (part of which had descended to him ex parte maternâ) to a trustee, his heirs and assigns, upon trust to sell part, and to pay the income of the residue to the testator's widow for life, and after her death "upon trust to convey the said residue unto such person as should answer the description of the testator's heir-at-law." It was held by Sir W. P. Wood, V.-C., that the descent was broken by the devise, and that the

— as between pars paterna and pars materna:

(*n*) Foster *v.* Sierra, 4 Ves. 766; Rawlinson *v.* Wass, 9 Hare, 673. See Gundry *v.* Pinniger, 14 Beav. 94, 1 D. M. & G. 502.

(*o*) Co. Lit. 10 (a devise to heir of stranger); Rob. Gavelk. 117, 118; Garland *v.* Beverley, 9 Ch. D. 213; Thorp *v.* Owen, 2 Sm. & Gif. 90 (devise in 1841 to heir male of testator); per Romilly, M. R., Polley *v.* Polley, 31 Beav. 363 (gift to heir of stranger of money to arise by sale of borough English lands). In Sladen *v.* Sladen, 2 J. & H. 369, the claim of the common-law heir was fortified by the circumstance that leaseholds were mixed with the gavelkind land in the same set of limitations.

(*p*) 2 K. & J. 391. The will was dated in 1845, and was therefore subject to stat. 3 & 4 Will. 4, c. 106, s. 3 — a circumstance noted by the V.-C. on a subsequent occasion, 1 J. & H. 674. But that statute appears to give no help in determining who is the person to take, but only, if the heir ex parte maternâ is found to be the person intended, to direct how he takes it.

heir ex parte paternâ was therefore entitled. In Moore *v.* Simkin (*q*), by a marriage settlement executed in 1810, real estate of the wife was settled to certain uses which determined or failed, with an ultimate limitation to the use of the right heirs of the wife's mother then deceased forever; at the date of the settlement the wife was entitled to the estate settled, as to part as heiress-at-law of her deceased mother, and as to the remainder as one of the coheiresses of a deceased maternal great-uncle: it was held by Sir J. Pearson, J., that the descent was not broken by the settlement, and that under the ulterior limitation the wife took the estate as part of her old estate which she had before the settlement.

With respect to the personalty, too, it is often doubtful whether the testator employs the term "heir" in its strict and proper acceptation, or in a more lax sense, as descriptive of the person or persons appointed by law to succeed to property of this description (*r*). Where the gift to the heirs is by way of substitution, the latter construction generally prevails. Thus, in Vaux *v.* Henderson (*s*), where a testator bequeathed to A. *200*l.*, "and, failing him by decease before me, *to his heirs;*" [*924] the legacy was held to belong to the next of kin of A. living at the death of the testator. And a similar decision was made in Gittings *v.* M'Dermott (*t*). Of this case Lord St. Leonards observed (*u*) that the gift over was "to prevent a lapse. The argument was a very fair one, that as the property in one case would have gone to the party absolutely, and from him to his personal representatives, so when the testator spoke there by way of substitution, of the heir of the body, it was understood that he meant the same person who would have taken after him in case there had (qu. not) been a lapse." This principle has since been followed in other cases (*x*), including one where real estate was combined with personalty in a gift to the testatrix's sisters as tenants in common for life, or until marriage, with survivorship, and upon the death or marriage of all "to be divided in equal shares between my brothers and sisters then living or their heirs;" it was held by Sir C. Hall, V.-C., that this limitation to heirs, by way of substitution, contained within itself that which required that the property should go to heirs upon whom the property would devolve by law, that is to say, as to the real estate the heir-at-law, and as to

— in reference to personal estate, how construed.

"To A. or his heirs" (by substitution).

(*q*) 31 Ch. D. 95.

(*r*) *I. e.* under the Statute of Distribution; including the widow, Doody *v.* Higgins, 2 K. & J. 729, and cases there cited; but not the husband, Re Walton's Trusts, cor. V.-C. Kindersley, 8 D. M. & G. 174, and cited in Doody *v.* Higgins. As to this see Ch. XXIX.

(*s*) 1 J. & W. 388, n.

(*t*) 2 My. & K. 69.

(*u*) De Beauvoir *v.* De Beauvoir, 3 H. L. Ca. 557.

(*x*) Doody *v.* Higgins, 9 Hare, App. 32. 2 K. & J. 729: Jacobs *v.* Jacobs, 16 Beav. 557; Re Porter's Trusts, 4 K. & J. 188; Re Philp's Will, L. R., 7 Eq. 151; Finlayson *v.* Tatlock, L. R., 9 Eq. 258; Parsons *v.* Parsons, L. R., 8 Eq. 260 (perpetual personal annuity).

the personalty the statutory next of kin according to the Statute of Distribution (*y*).

So in Re Newton Trusts (*z*), where a testator bequeathed one-seventh of his personal estate "to my brother A., his heirs and assigns forever," another seventh "to my brother B., his heirs and assigns forever," and so on, and the remaining seventh "to the heirs and assigns forever of my late sister C. *now deceased:*" it was held by Sir W. P. Wood, V.-C., that this last was quasi substitutional and went to the next of kin; that by the previous gift the testator showed how he supposed personal estate would devolve, and wished to put the representatives of C. in the same position as if C. had been alive, and her share had thus devolved from her.

[*925] * Where the substituted gift is to heirs of the body such of the next of kin will be entitled as are descended from the propositus, *i. e.*, issue (*a*).

"Heirs of the body" construed next of kin being issue.

Again, a direction to divide a legacy amongst the heirs of the testator or another person indicates an intention to give concurrent interests to several; which can seldom be satisfied by understanding "heirs" in its primary sense (under which one person will, with rare exceptions, be entitled to the whole); but which will generally be satisfied by construing "heirs" to mean next of kin. Thus in Re Steevens' Trusts (*b*), where a testator directed his trustees *to divide* a sum of money "*amongst* the heirs of my *late* brother J. S." (J. S. being dead leaving one person his heir and the same person and others his next of kin), it was held by Sir J. Bacon, V.-C., that "heirs" meant next of kin. And in Low *v.* Smith (*c*), where a testator gave all his real and personal estates upon trusts which implied conversion (*d*), and to be divided among his nephews, grand-nephews, and nieces, the several shares to be invested and the income applied for their maintenance until the age of twenty-one, "except my grand-nephew A., and he only to receive the interest of his portion until the age of thirty. Afterwards if my executors think him capable of using one-half in his business, let it be done, the remaining half to be continued in the stocks the income of which he is to receive during his life, and at his death to be *equally divided* among his legal heirs."

"To be divided among the heirs of A."

(*y*) Wingfield *v.* Wingfield, 9 Ch. D. 658. See also Keay *v.* Boulton, 25 Ch. D. 212. See post, p. 930, n. (*b*).

(*z*) L. R., 4 Eq. 171. A gift to the heirs *and assigns* of A. has been held to give A. a general power of disposition, Quested *v.* Michell, 24 L. J. Ch. 722: (see also per Shadwell, V.-C., Waite *v.* Templer, 2 Sim. 542; and cf. Brookman *v.* Smith, L. R., 6 Ex. 291, 305, 7 Ex. 271); and will sometimes be words of limitation where "heirs" alone would have described a legatee by substitution, Re Walton's Estate, 8 D. M. & G. 173.

(*a*) Pattenden *v.* Hobson, 22 L. J. Ch. 697, 17 Jur. 406; Price *v.* Lockley, 6 Beav. 180 (children held entitled as "heirs lawfully begotten," but whether as children or next of kin does not appear). See also Re Jeaffreson's Trusts, L. R., 2 Eq. 276, stated below.

(*b*) L. R., 15 Eq. 110.

(*c*) 25 L. J. Ch. 503, 2 Jur. N. S. 344.

(*d*) By the trust to invest all the shares, see Affleck *v.* James, 17 Sim. 121.

It was held by Sir R. T. Kindersley, V.-C., that at the death of A. his share went to his next of kin.

In the former of these two cases the decision has the additional support of the circumstance that A. was, to the testator's knowledge, actually dead at the date of the will, leaving one person his heir and several his next of kin. It must, however, be admitted that in neither case were the grounds to which they are here referred distinctly alluded to by the Court. In Re Steevens' Trusts the V.-C. treated the authorities as hopelessly confused; while in Low *v.* Smith the Court relied on the cases of substitution already noticed, and adverted particularly to the *form of the gift, [*926] which was in the first place to the grand-nephew, as one of the class absolutely, and was then restricted for the sole apparent purpose of better securing the benefit of it to the legatee himself (*e*).

The effect of words of distribution is more clearly exemplified in Re Jeaffreson's Trusts (*f*), where personalty was bequeathed to trustees in trust for A. for life, and after her death "for the benefit of the heirs of the body of A., first to educate at their discretion the said heirs, and lastly to pay to the said heirs the said residue at their respective ages of twenty-one in such proportions as A. might by deed or will" appoint. Sir W. P. Wood, V.-C., held that the words "heirs of the body" were not used in the technical sense of all descendants ad infinitum and did not operate as words of limitation so as to give an absolute interest to A. (*g*), but indicated the interests of a set of persons co-existing, and that the next of kin of A. descended from her and living at her death were entitled (*h*).

In Re Gamboa's Trusts (*i*), where a testator bequeathed a legacy "to the heirs of his late partner for losses sustained during the time that the business of the house was under my sole control," Sir W. P. Wood, V.-C., held that the next of kin according to the statute were entitled, founding his decision on the expressed reason of the bequest, which would be unmeaning if the testator intended to benefit the heir strictly so called. "Had it been 'to the heirs of my late partner' simply," added the V.-C., "I should not have felt so clear upon the point."

"Heirs" explained by reason given for making the bequest.

And here may be noticed a case where a bequest of personalty to "the heirs or next of kin of A. deceased" was held to be a gift to the

(*e*) See White *v.* Briggs, 2 Phil. 583. In Powell *v.* Boggis, 35 Beav. 535, the word "heirs" was construed legal personal representatives.

(*f*) L. R., 2 Eq. 276.

(*g*) See Ch. XLIV.

(*h*) See also Bull *v.* Comberbach, 25 Beav. 540, stated below. In Ware *v.* Rowland, 15 Sim. 587, 2 Phil. 635, Shadwell, V.-C., expressed an opinion that under a gift at the death of A. to "my heirs-at-law share and share alike" the heir proper was entitled. But as A. was both heir-at-law and sole next of kin the point did not arise. The words "share and share alike" were referred to in argument for the purpose only of showing that A., a known individual, could not have been intended to take either as heir-at-law or next of kin, and that the words imported a class to be ascertained at the death of A.; as to which vide post.

(*i*) 4 K. & J. 756.

"Heirs or next of kin of A. deceased."

next of kin of A. according to the Statute of Distribution: "or" not signifying an alternative between two classes (which would have made the gift void for uncertainty), but the one description being explanatory of the other (*j*).

It need not be pointed out that in all the foregoing cases [*927] special * grounds were assigned for departing from the proper sense of the word "heirs;" and they will not be understood to warrant the general position that the word "heirs" in relation to personal estate imports next of kin, especially if real estate be combined with personalty in the same gift; which circumstance though not conclusive (*k*), yet according to the principle laid down by Lord Eldon in Wright *v.* Atkyns (*l*) affords a ground for giving to the word in reference to both species of property the construction which it would receive as to the real estate if that were the sole subject of disposition.

"Heirs," unexplained, strictly construed in bequests of personalty.

A fortiori where realty and personalty combined.

Thus in Gwynne *v.* Muddock (*m*), where a testator gave all his real and personal estate to A. for life, adding, after her death "my nighest heir-at-law to enjoy the same;" Sir W. Grant, M. R., held that the heir-at-law took both the real and personal estate, not the realty only, the testator having blended them in the gift. Here it will be observed the word used was "heir" in the singular. So in Tetlow *v.* Ashton (*n*), where a testator devised and bequeathed his real and personal estate, upon failure of certain previous limitations, to the heir-at-law of his family whosoever the same might be; Sir J. K. Bruce, V.-C., said "The testator has used words which no person, professional or unprofessional, can misunderstand. . . . If there were any correcting or explanatory context the case might be different. I give no opinion how the case would have stood if the word 'heirs' had been used instead of 'heir.'" And he held that the next of kin had no color of title.

"To my nighest heir-at-law."

——"heir at law of my family."

In De Beauvoir *v.* De Beauvoir (*o*), the word used was "heirs" in the plural. A testator devised his estates in the funds of England, and his freehold, copyhold, and leasehold property to several persons and their sons in strict settlement, remainder to his own right heirs; and empowered his trus-

Ultimate remainder to "my own right heirs."

(*j*) Re Thompson's Trusts, 9 Ch. D. 607.

(*k*) See Wingfield *v.* Wingfield, 9 Ch. D. 658, stated sup.; and per Lord Cottenham, White *v.* Briggs, 2 Phil. 590.

(*l*) Coop. 111, 123. See also Pyot *v.* Pyot, 1 Ves. 335, where, however, the words of the will being applicable rather to personalty, the construction which obtains in regard to this species of property predominated as to both real and personal estate.

(*m*) 14 Ves. 488.

(*n*) 20 L. J. Ch. 53, 15 Jur. 213.

(*o*) 15 Sim. 163, 3 H. L. Ca. 524. See also Boydell *v.* Golightly, 14 Sim. 327. In Macpherson *v.* Stewart, 28 L. J. Ch. 177, a direction to trustees to invest the testator's property for the benefit of his *heirs* was held to mean persons entitled under the will.

tees to invest the residue of his personal estate in the purchase of freehold land, to be settled to the same uses. It was held by Sir L. Shadwell, V.-C., and on appeal by the House of Lords, that the intention to be collected from the whole will, especially from the power to invest, was * to give both realty and personalty, as a [*928] blended property, to the same set of persons throughout, and that the whole property therefore went ultimately to the heir-at-law. Lord St. Leonards, after stating the general rule as to personal estate (*p*), said (*q*), "Then we come to the mixed cases. I quite agree that as to them the argument is still stronger against the appellant (the next of kin), for if the law is settled when you can collect the intention, as regards personal estate, the argument that it is so must, à fortiori, have more operation when you come to blended property, consisting of real and personal estate; for as to so much of the property which consists of real estate, there can be no doubt but the person who is described as 'heir' is intended to take in that character. You, therefore, at once in speaking of heir impress upon the gift, or upon him who is to take it, his own proper character,—that of heir. When you are dealing, therefore, with the same disposition, though of another part of the property, you are relieved from the difficulty which you labor under in the more naked case of personal property, and having found that the testator meant what he has expressed as regards that portion which is real property, you may more readily infer the same intention as regards the other portion of the same gift depending upon the same words, and you, therefore, allow the whole disposition the same operation as you would give to it if it had been confined to real estate alone."

So in Henderson *v.* Green (*r*), where a testator devised and bequeathed to his daughter a house and the interest of 800*l.* for her life, and if she died leaving issue he directed 500*l.* to be paid to them, and that the remainder, that is 300*l.*, and the house, should revert to his next lawful heirs; it was held by Sir J. Romilly, M. R., that the case was within De Beauvoir *v.* De Beauvoir, and that the heir, and not the next of kin, was entitled to the house and the 300*l.*

"To my next lawful heirs."

And even where the entire subject of gift is personal, the word "heir," unexplained by the context, must be taken to be used in its proper sense. Thus it is laid down (*s*), that if one devise a term of years to J. S., and after his death that the heir of J. S. shall have it; J. S. shall have so many years of the term as he shall live, and the heir of J. S. and the executor of * that heir shall have the remainder of the term. So, in Danvers *v.* Lord Clarendon (*t*), [*929]

"Heir" unexplained strictly construed in bequests of personal estate.

(*p*) Vide infra.
(*q*) 3 H. L. Ca. 557.
(*r*) 28 Beav. 1. See also Re Dixon, 4 P. D. 81.
(*s*) Shep. Touch. 446.
(*t*) 1 Vern. 35. See also Southgate *v.* Clinch, 27 L. J. Ch. 651, 4 Jur. N. S. 428; Re Rootes, 1 Dr. & Sm. 228.

where a testator bequeathed all his goods in C. house to A. for life, and after her death to the heir of Sir J. D.; the only question raised was whether he that was heir of Sir J. D. at the time of his death or at the time of A.'s death was entitled.

Nor will the construction be varied by the circumstance, that the gift is to the heir in the singular, and there is a plurality of persons conjointly answering to the description of heir (*u*). Thus, under the words "to my heir 4,000*l.*," three co-heiresses of the testator were held to be entitled; Sir J. Leach, M. R., observing, "Where the word is used not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word 'heir'" (*v*).

"Heirs," in the plural similarly construed.

And although the word used, in a gift of personal estate only, is "heirs" (*x*), in the plural, it will, unless explained by the context retain its proper sense, Sir R. P. Arden, in Holloway *v.* Holloway (*y*), was strongly disposed to construe it next of kin; though his opinion on another question rendered the point immaterial.[1] But in De Beauvoir *v.* De Beauvoir (*z*), Lord St. Leonards did not approve of this construction. He reviewed the authorities, and without distinguishing between those where the word used was "heir," and others where it was "heirs," said, "As far as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to me to be uniform,—to give to the words the sense which the testator himself has impressed upon them,—that if he has given to the heir, though the heir would not by law be the person to take that property, he is the person who takes as persona designata. It is impossible to lay down any other rule of construction."[2]

[*930] * One of the authorities noticed by Lord St. Leonards was Pleydell *v.* Pleydell (*a*), where a testator, after making several contingent dispositions of a sum of money, gave the ultimate interest to his own right heirs (in the plural); and it was held that the testator's heir was entitled, not his executor.

(*u*) See 2 Ld. Lavm. 829.
(*v*) Mounsey *v.* Blamire, 4 Russ. 384. Jessel, M. R., is reported, 10 Ch. D. 114, to have disapproved of this case; but the context would seem to indicate that what he disapproved of was the half-admission, made arg. gr. by Sir J. Leach, that in cases of succession "heir" meant next of kin.
(*x*) "Heirs-at-law" has been thought less flexible than "heirs," L. R., 15 Eq. 113; but see 15 Sim. 593.
(*y*) 5 Ves. 403.
(*z*) 3 H. L. Ca. 524, 557, disapproving of Evans *v.* Salt, 6 Beav. 266, which nevertheless has since been sometimes cited as law, 25 L. J. Ch. 504; L. R., 15 Eq. 114; sed qu., see 29 Beav. 198.
(*a*) 1 P. W. 748.

1 See 4 Kent. 537, note.
2 But see White *v.* Stanfield, 146 Mass. 424 (explaining Fabens *v.* Fabens, 141 Mass. 395), and other cases ante, p. 905.

And in Smith *v.* Butcher (*b*), where personalty was given in trust to be equally divided amongst "the children of A. during their lives, and on the decease of either of them his or her share of the principal to go to his or her lawful heir or heirs;" it was held by Sir G. Jessel, M. R., that the words were not, by analogy to the rule in Shelley's case, to be read as words of limitation, and that neither the next of kin, nor the legal personal representatives, of a deceased child were entitled to his share, but his heir-at-law.

To several for life, "and on the death of either to his lawful heir or heirs."

VI. — Words "Heirs," &c., construed "Children." — The words "heirs" and "heirs of the body," applied to personal estate, have been sometimes held to be used synonymously with "children" — a construction which of course, requires an explanatory context.[1]

"Heirs" held to mean *children* in regard to personalty.

As, in Loveday *v.* Hopkins (*c*), where the words: "Item I give to my sister Loveday's *heirs* 6,000*l.*" — "I gave to my sister Brady's children equally 1,000*l.* At the date of the will, Mrs. Loveday had two children, one of whom was a married daughter, who afterwards died in the lifetime of the testatrix, leaving three children. Mrs. Loveday was still alive, and her surviving child claimed the legacy. Sir Thomas Clarke, M. R., was clearly of opinion, that the testatrix intended to give the 6,000*l* to the children of Mrs. Loveday, the same as in the subsequent clause to Brady's children, and had not their descendants in view; or if she had, yet as she had not expressed herself sufficiently, the Court could not construe the will so as to let them in to take. He therefore, held the surviving child to be entitled to the legacy.[2]

(*b*) 10 Ch. D. 113. See also Hamilton *v.* Mills, 29 Beav. 193 (deed). It will be observed that in Smith *v.* Butcher, the "heir or heirs" took by way of remainder, which appears to distinguish that case from Wingfield *v.* Wingfield (ante, p 924), and Keay *v.* Boulton, 25 Ch. D. 212, where there was an independent gift by way of substitution to the heirs of deceased children.

(*c*) Amb. 273.

[1] In the following recent cases "heirs" has been construed, or shown capable of being construed, to mean children: Summers *v.* Smith, 127 Ill. 645; Bland *v.* Bland, 103 Ill. 11; Levengood *v.* Hoople, 124 Ind. 27 (citing Underwood *v.* Robbins, 117 Ind. 308); Conger *v.* Lowe, 124 Ind. 368; Pate *v.* French, 122 Ind. 10; Underwood *v.* Robbins, 117 Ind. 308; Allen *v.* Craft, 109 Ind. 476 (citing Ridgeway *v.* Lanphear, 99 Ind. 251; Shimer *v.* Mann, id. 190; Hadlock *v.* Gray, 104 Ind. 596); Hochstedler *v.* Hochstedler, 108 Ind. 506, Brumfield *v.* Drook, 101 Ind. 190; Chew *v.* Keller, 100 Mo. 362 (citing Landon *v.* Moore, 45 Conn. 422; Thurber *v.* Chambers, 66 N. Y. 42; Linton *v.* Laycock, 33 Ohio St. 136; Haverstick's Appeal, 103 Penn. St. 394); Eldridge *v.* Eldridge, 41 N. J. Eq. 89; Davis *v.* Davis, 39 N. J. Eq. 13; McKelvey *v.* McKelvey, 43 Ohio St. 213; Oyster *v.* Knull, 137 Penn. St. 448; Stambaugh's Estate, 135 Penn. St. 585.

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

And in Bull *v.* Comberbach (*d*), where a testator devised
[*931] lands *to trustees in trust for six persons equally for their lives, and after the death of all, in trust to sell the land and divide the money equally "amongst their several heirs," Sir J. Romilly, M. R., held that heirs meant children. He said, "I am at a loss to conceive why he should direct the property to be sold, except for the purpose of division amongst a larger class than the tenants for life; he does not think that six persons are too many to hold and enjoy it in common, but he does think it necessary to direct that after their deaths it shall be sold for the purpose of division." And added, "Where there is a gift of personalty to one for life, and after his death *amongst* his 'heirs,' I should have no doubt that the expression 'heirs' would apply to children."

This construction is equally applicable to a devise of real estate. Thus, in Milroy *v.* Milroy (*e*), where a testator, after giving a life interest to his daughter, and directing that after her death the proceeds of his real and personal estate should be applied for the benefit of her children during their minority, and that afterwards the personalty should be assigned to them, ordered his trustees to convey his freehold and leasehold estates to "the heir or heirs who should be legally entitled to the same;" but, in case his daughter left no children, he gave all the property over; Sir L. Shadwell, V.-C., thought the words "heir or heirs" evidently meant the children of the daughter.

Same construction applied in the case of real estate.

VII. — Period when the object of a Devise to the Heir is to be ascertained — What is the period at which the object of a devise to the heir is to be ascertained, is a question of frequent occurrence, in the determination of which, the rule that estates shall be construed to vest at the earliest possible period consistent with the will, bears a principal part. An immediate devise to the testator's own heir vests, of course, at his death, and the interposition of a previous limited estate to a third person does not alter the case. Thus, in Doe d. Pilkington *v.* Spratt (*f*), where a testator devised to his son A. and M. his wife, and B. and N. his wife, or the survivor of them, for their lives, with remainder to the male heir of him the said testator, his heirs and assigns
[*932] forever, *the remainder was held to vest at the testator's

At what period the heir is to be ascertained.

At the ancestor's death, both in the case of a gift to testator's heir.

(*d*) 25 Beav. 540. No claim was made for next of kin other than children. See also Roberts *v.* Edwards, 33 Beav. 259. So, "heirs of the body," Symers *v.* Jobson, 16 Sim. 267; Gummoe *v.* Howes, 23 Beav. 184. In Fowler *v.* Cohn, 21 Beav. 360, "heirs" was construed issue in a power to appoint among "the children of A. and their heirs for such estates," &c. See also Speakman *v.* Speakman, 8 Hare, 180.

(*e*) 14 Sim. 48. See also Micklethwait *v.* Micklethwait, 4 C. B. N. S. 790. And compare Spence *v.* Handford, 27 L. J. Ch. 767, 4 Jur. N. S. 987.

(*f*) 5 B. & Ad. 731. See also per Bayley, J., Doe *v.* Martyn, 8 B. & Cr. 511.

death in his eldest son C., who was his male heir-at-law at that time.

On the same principle an executory gift to the heir of another person vests as soon as there is a person who answers that description, namely, at the death of the person named; and if the gift is postponed till the determination of a limited interest given to a third person, still the death of the propositus is the time for ascertaining the person of the devisee. Thus, in Danvers *v.* Earl of Clarendon (*g*), where goods were bequeathed to A. for life, remainder to the heir of B., B. having died in A.'s lifetime, the question was, whether the person to take the remainder was he who was B.'s heir at his death or at the death of A., and judgment was given in favor of the former.

— and of a gift to the heir of a stranger.

This case also shows, that though the rule which requires the earliest possible vesting of an interest so given in remainder is, in a great measure, founded on a reason applicable only to legal estates in real property; namely, that it is (or was) in the power of the owner of the prior particular estate to defeat a contingent remainder (*h*); yet that the rule also holds good generally with regard to personal property for the purposes of the present question.

Same rule as to real and personal estate.

And since a departure from the rule leads to frequent inconveniences, slight circumstances or conjectural probability will not prevent an adherence to it. Thus it is not enough that the heir has an express estate in the same property limited to him in a previous part of the will. In Rawlinson *v.* Wass (*i*), under a devise in trust for the testator's daughter (who was his heir-at-law) for life, remainder as she should appoint, and, in default of appointment, for the testator's heirs and assigns, as if he had died intestate, the daughter was held entitled to an immediate conveyance of the estate from the trustees. It is true the words "as if he had died intestate" point expressly to the period of the testator's death, and in an even balance of arguments must weigh in favor of the general rule (*k*). But this ground was wanting in other cases, in which, nevertheless, the express provision for the heir, though aided by other circumstances, was held insufficient to exclude the general rule. Thus, in Boydell *v.* Golightly (*l*), where a testator devised real estates in trust

Previous devise to the heir out of same property no cause for an exception.

* for the maintenance of his son J. (who was his heir apparent during his life, remainder to his sons successively in tail, with remainders over in strict settlement to other persons and their [*933]

(*g*) 1 Vern. 35.
(*h*) Vide ante, Vol. 1., p. 831.
(*i*) 9 Hare, 673.
(*k*) Doe *v.* Lawson, 3 East, 278; Jenkins *v.* Gower, 2 Coll. 537; Smith *v.* Smith, 12 Sim. 317; Southgate *v.* Clinch, 27 L. J., Ch. 651, 4 Jur. N. S. 428.
(*l*) 14 Sim. 327.

issue with an ultimate remainder to the testator's right heirs; and power was given to the trustees to limit a jointure to any wife of J., and to raise portions for his children; the intermediate remainders having failed, it was argued, that the testator had clearly shown an intention that his son J. should not take the fee, not only by the express provision for him, but by the subsequent clauses in the will; but Sir L. Shadwell, V.-C., held, that there was no such indication of intention as he could act upon, to prevent the estate vesting in the testator's heir at his death.

Again, in Wrightson *v.* Macaulay (*m*), where a testator devised an estate to his son R. (who was his heir apparent) for life, and after several intermediate limitations, remainder in default of issue of the last devisee "to the male heir who should be in possession of and lawfully entitled for the time being to the estate at M. for his life, remainder to his issue, and for default of a male heir being in possession and entitled to the M. estate at the time thereinbefore for that purpose mentioned, or in default of issue male of such heir male, then to his own right heirs, and *his, her, and their* heirs and assigns forever." It was contended, upon the determination of all the estates preceding the ultimate remainder, that the express provision for R., the words of contingency introducing the ultimate devise, and the words "his, her, or their" applied to the testator's heir, — terms which he could not mean to apply to his own son and heir, — showed that the testator referred to some future period for the ascertainment of the heir entitled under the will; but it was held that the evidence of such an intention was not clear enough to control the rule of law, and that the remainder vested in R. immediately on the testator's decease.

What is sufficient to cause a departure from the rule.

But in Doe d. King *v.* Frost (*n*), where a testator devised lands to his son W. (who was his heir apparent) in fee, and if he should have no children, child, or issue, "the said estate is, on his decease, to become the property of the heir-at-law, subject to such legacies as W. may leave by will to [*934] the younger branches * of the family;" and it appeared that at the date of the will the testator had a daughter who had five children; it was held that the person who at the time of the decease of W., without issue, should then be the heir-at-law of the testator, was the person entitled under the executory devise. This decision was based on the state of the family to which the testator was thought to be specifically referring, and on the consideration that W. himself could not have been meant, since that would make

(*m*) 14 M. & Wel. 214.

(*n*) 3 B. & Ald. 546. (The gift over was held to be an executory devise in the event of the son dying without leaving issue *at his death*, post, Chap. XLI.) See also Locke *v.* Southwood, 1 My. & C. 411; Cain *v.* Teare, 7 Jur. 567; and the analogous cases on devises and bequests to next of kin in the next chapter.

the executory devise nugatory, and the power to give legacies unnecessary.

Devise to the person who shall be heir at a future time.

Of course, if the contingency of the devise consists in the uncertainty of the object, as if lands be devised to the person who shall, at a specified time, be the testator's heir of the name of H., no person will be duly qualified to take under the will unless he bears the name at that time (*o*).[1]

(*o*) Wrightson *v.* Macaulay, 14 M. & Wel. 214 (answer to second question); Thorpe *v.* Thorpe, 1 H. & C. 326.

[1] The following recent cases treat of the word "heirs": Anthony *v.* Anthony, 55 Conn. 256; Turrill *v.* Northrop, 51 Conn. 33; Ryan *v.* Allen, 120 Ill. 648; Waters *v.* Bishop, 122 Ind. 516 ("heirs of the body"); Kelley *v.* Vigas, 112 Ill. 242; Brown *v.* Harmon, 73 Ind. 412; *s. c.* 58 Ind. 207 (widow may be heir under statute); Buck *v.* Paine, 75 Maine, 582 (husband not a "legal heir," citing Lord *v.* Bourne, 63 Maine, 368); Albert *v.* Albert, 68 Md. 352; Gambrill *v.* Forest Grove Lodge, 66 Md. 17; Hardy *v.* Wilcox, 58 Md. 180; Kendall *v.* Gleason, 152 Mass. 457 ("legal heirs" = distributees, citing White *v.* Stanfield, 146 Mass. 424. But see Tillman *v.* Davis, infra); Wood *v.* Ballard, 151 Mass. 324; Wyeth *v.* Stone, 144 Mass. 441 (adopted child not an "heir." See Jenkins *v.* Jenkins, 64 N. H. 407, adopted illegitimate child of testator not "issue"); Lavery *v.* Egan, 143 Mass. 389; Morrison *v.* Sessions, 70 Mich. 297 (adopted child not a "lawful heir," citing Reinders *v.* Koppelman, 94 Mo. 344); Hascall *v.* Cox, 49 Mich. 435; Greenwood *v.* Murray, 28 Minn. 120; Irvine *v.* Newlin, 63 Miss. 192; Wilkins *v.* Ordway, 59 N. H. 378 (widow not "heir," citing Richardson *v.* Martin, 55 N. H. 45); Chadwick *v.* Chadwick, 37 N. J. Eq. 71; In re Bartles, 33 N. J. Eq. 46; Woodward *v.* James, 115 N. Y. 346; Tillman *v.* Davis, 95 N. Y. 17 (husband or wife not "heir," citing Dodge's Appeal, 106 Penn. St. 216; Murdock *v.* Ward, 67 N. Y. 387; Luce *v.* Dunham, 69 N. Y. 36; Keteltas *v.* Keteltas, 72 N. Y. 312. and declining to follow McGill's Appeal, 61 Penn. St. 46; Eby's Appeal, 84 Penn. St. 241; Sweet *v.* Dutton, 109 Mass. 589; Welsh *v.* Crater, 32 N. J. Eq. 177; Freeman *v.* Knight, 2 Ired. Eq. 72; Croom *v.* Herring, 4 Hawks, 393; Corbitt *v.* Corbitt, 1 Jones, Eq. 114; Henderson *v.* Henderson, 1 Jones, 221; Alexander *v.* Wallace, 8 Lea, 569; Collier *v.* Collier, 3 Ohio St. 369); Lawton *v.* Corlies, 127 N. Y. 100; Woodward *v.* James, 115 N. Y. 346; Leathers *v.* Gray, 101 N. C. 162 (overruling *s. c.* 96 N. C. 548); King *v.* Utley, 85 N. C. 59; Weston *v.* Weston, 38 Ohio St. 473 (widow an "heir," citing Rawson *v.* Rawson, 52 Ill. 62; Richards *v.* Miller, 62 Ill. 417; Brower *v.* Hunt, 18 Ohio St. 311); Comly's Estate, 136 Penn. St. 153 ("by weight of authority" word "heirs" means "those entitled under the statutes of distribution," citing Morton *v.* Barrett, 22 Maine, 264; Mace *v.* Cushman, 45 Maine, 250, 261; Houghton *v.* Kendall, 7 Allen, 72, 77; Sweet *v.* Dutton, 109 Mass. 589; Finlason *v.* Tatlock, L. R., 9 Eq. 258. But see Tillman *v.* Davis, supra); Ashton's Estate, 134 Penn. St. 390 (same point as in Comly's Estate, supra); Cochran *v.* Cochran, 127 Penn. St. 486; Bassett *v.* Hawk, 118 Penn. St. 94; Reed's Appeal, id. 215; Little's Appeal, 117 Penn. St. 14; Cockins's Appeal, 111 Penn. St. 26; Ivins's Appeal, 106 Penn. St. 176; McKee's Appeal, 104 Penn. St. 571; (same point as in Comly's Estate, supra); Barnett's Appeal, 104 Penn. St. 342; Muhlenberg's Appeal, 103 Penn. St. 507; Pierce *v.* Pierce, 14 R. I. 514; Alverson *v.* Randall, 13 R. I. 71; Wallace *v.* Minor, 86 Va. 550; Webster *v.* Morris, 66 Wis. 366.

* CHAPTER XXIX.

GIFTS TO FAMILY, DESCENDANTS, ISSUE, ETC.

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I. — Gifts to Family. — The word "family" has been variously construed according to the subject-matter of the gift and the context of the will.[1] Sometimes the gift has been held to be void for uncertainty.[2]

Construction of the word "family."

As, in Harland *v.* Trigg (*a*), where a testator after devising certain leaseholds to the same uses as certain freholds devised by his father's will to his brother, J. H., with remainder to his issue in strict settlement, so far as by law he could, gave certain other leaseholds to "J. H. forever, hoping he will continue them in the family," Lord Thurlow thought it too indefinite to create a trust, as the words did not clearly demonstrate an object.

Devises to "family" when void for uncertainty.

So, in Doe d. Hayter *v.* Joinville (*b*), where a testator devised and bequeathed residuary real and personal estate to his wife for life, and, after her decease, one half to his wife's "family," and the

(*a*) 1 B. C. C. 142. His lordship also considered that the expression "hoping" was precatory not imperative. See ante, Vol. I., p. 358.
(*b*) 3 East, 172.

[1] The acceptation of the word "family" may be narrowed or enlarged by the context of the will, so as in some instances to mean children, or in others, heirs, or it may even include relations by marriage. See Phelps *v.* Phelps, 143 Mass. 570; Bradlee *v.* Andrews, 137 Mass. 50; Bates *v.* Dewson, 128 Mass. 334; Bowditch *v.* Andrew, 8 Allen, 339, 342; Langmaid *v.* Hurd, 64 N. H. 526; Stuart *v.* Stuart, 18 W. Va. 675; Whelan *v.* Reilly, 3 W. Va. 507; Heck *v.* Cleppenger, 5 Barr, 385; Blackwell *v.* Ball, 1 Keen, 176; Woods *v.* Woods, 1 Mylne & C. 401; Grant *v.* Lyman, 4 Russ. 292; Doe *v.* Flemming, 2 Cr. M. & R. 638; 2 Story, Eq. § 1065, b., § 1071; Harland *v.* Trigg, 1 Bro. C. C. (Perkin's ed.) 142-144, and notes; MacLeroth *v.* Bacon, 5 Ves. (Sumner's ed.) 168, and note (*a*); Walker *v.* Griffin, 11 Wheat. 375. In Lambe *v.* Eames, L. R., 6 Ch. 597, the word "family" was held to include an illegitimate child.

[2] See Tolson *v.* Tolson, 10 Gill & J. 159; Harper *v.* Phelps, 21 Conn. 259; Yeap Cheah Neo *v.* Ong Cheng Neo, L. R., 6 P. C. 381. "The members of my family" held sufficiently certain. Hill *v.* Bowman, 7 Leigh, 650.

other half to his "brother and sister's family," share and share alike; and it appeared that, at the date of the will, the testator's wife had one brother who had two children, and the testator had one brother and one sister, each of whom had children, and there were also children of another sister, who was dead. Upon these facts, it was held, that both the devises * were void, [*936] from the uncertainty in each case as to who was meant by the word "family;" and in the latter case, also, from the uncertainty whether it applied to the family as well of the deceased, as of the surviving sister; and also whether it referred to the brother's family; which, however, the Court thought it did not.

Gifts to family held void for uncertainty.

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

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

"Family" synonymous with *heir.*

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

So, in Chapman's case (*f*), where C., seised in fee of three houses, devised that which N. dwelt in to his three brothers amongst them, and N. to dwell still in it, and they to raise no * ferme; [*937] and willed his house that T., his brother, dwelt in, to him,

(*c*) 8 Sim. 134. "I cannot say that that case is quite satisfactory to my mind," per Lord Cranworth, V.-C., 1 Sim. N. S. 246. See also Stubbs *v.* Sargon, 2 Kee. 253.

(*d*) No doubt the testator's real intention was to assimilate the residuary bequest to the legacies, so far as the children are concerned; but the V.-C., seems to have considered that this hypothesis savored too much of mere conjecture.

(*e*) Hob. 29.

(*f*) Dyer, 333 b.

and he to pay C. 3*l.* 6*s.* to find him to school with, and else to remain to the house: the words "and else to remain to the house" were construed to mean the chief, most worthy, and eldest person of the family (*g*).

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

Where "family" means *heir*.

On appeal, Lord Eldon admitted the general rule, that, if a man devises lands to A. B., with remainder to his *family*, inasmuch as the Court will never hold a devise to be too uncertain, unless no fair construction can be put upon it, the heir-at-law, as the worthiest of the family, is the person taken to be described by that word. But several circumstances embarrassed the question in this case; one was, that leaseholds were included, *which was not noticed at the Rolls;* another was, that it was not a trust simply, but a power which might be exercised at any time during the life of the donee, before which period the object [*938] might * be dead; and the remaining circumstance was founded on the objection, why should the testator have given this lady a power of devising, if by the words "his family," he only meant his heir-at-law? As to the first of these circumstances, his Lordship was of opinion that the word *family*, as had been decided with regard to relations (*i*), used in a devise of both real and per-

Lord Eldon's judgment in Wright *v.* Atkyns.

(*g*) But was not the word "house" used in the same sense as in the former part of the will, the effect of the clause being merely to declare that the charge should merge or sink in the property which was the subject of the devise? 17 Ves. 257, n.; 19 Ves. 300.

(*h*) 17 Ves. 255.

(*i*) Coop. 111, 19 Ves. 299. See also T. & R. 143.

sonal estate, must receive the same construction as to both; and he denied the authority of the case, cited 1 Taunt. 266, in which, under a limitation to the family of J. S., the real estate was held to go to the heir-at-law, and the personalty to the next of kin. In regard to the two other circumstances, he thought they could not vary the construction (*j*); for it was merely what might happen in the case of a similar power to appoint among relations, where all the relations might die before the exercise of the power, or there might originally be but one relation; and it could not be contended, that these circumstances would make any difference in the construction; and, therefore, not in the present case (*k*). Lord Eldon, accordingly, affirmed the decree at the Rolls.

"Family" in gift of real and personal estate similarly construed as to both.

In the next case (*l*), the word *family*, applied to real estate, was construed to mean heir *apparent*. A very illiterate testator devised lands "into my sister C.'s family, to go in heirship forever;" and it was held, that the eldest son and heir apparent of C. was entitled, though it was admitted that the word "family," in *another* part of the will, and applied to personal property, meant children; the Court thinking it no objection, that the same word, when elsewhere applied to a different subject, would receive a different construction.

"Family" held to mean heir apparent.

In Griffiths *v.* Evan (*j*), where a testator devised to his daughter in tail, with power to her, in default of issue, to appoint to the testator's "nearest family;" it was held, that this was a power to appoint to the heir.

"Nearest family" held to mean heir.

In Lucas *v.* Goldsmid (*m*), where a testator devised real estate, "to be equally divided between my two sons, who shall enjoy the interest thereof, and then go to their respective families according to seniority;" the questions were whether each of the testator's sons took as tenant in common in tail, or for life only, with remainder by purchase; and, if the latter, whether the remainder was to the eldest child in tail, or to all the children; * and it was held by Sir J. Romilly, [*939] M. R., that the testator's sons were entitled as tenants in common in tail. He said there was no case relating to real estate simpliciter in which the word "family" had not been held to imply inheritance, or that species of succession which belongs to inheritance, or in which "family" had been held to mean "children," as distinguished from children who took by inheritance: the property was to go in the same way that the law would direct (*n*), except that it was to go by seniority, that is to say, in tail.

"Family according to seniority" construed heirs of the body.

(*j*) 5 Beav. 241.
(*k*) This is a very brief summary of the judgment, which deserves perusal.
(*l*) Doe d. Chattaway *v.* Smith, 5 M. Sel. 126.
(*m*) 29 Beav. 657.
(*n*) Note that the words of division did not (as in the next case) point directly to a separation between the families.

The declaration that the estate should go according to seniority, distinguishes this case from Burt *v.* Hellyar (*o*), where a testator devised his real and personal estate to his wife for life, and after her death "to his son C. and to his heirs; in case C. should die leaving no issue, then my freehold estate shall be equally divided among my surviving children or their families." Sir J. Wickens, V.-C., held, that "families" meant "children." He thought the nature of the gift made it almost impossible to construe it as meaning anything but descendants, or some class of descendants. The words of division imported a separation between the families, which excluded any such construction as that of heirs general or blood relations generally. It might have meant "heirs of the body," if the testator's object had been to keep an estate together in a particular line; but this was an unnatural construction of the word as there used. If it meant descendants generally, a descendant would take with its parent if alive; which was an improbable intention. His conclusion was that it meant "children," which was in accordance with common usage.

"Family" construed "children" on the context.

It is evident that the construction, which reads the word "family" as synonymous with *heir*, only obtains where real estate is included in the disposition; it certainly never would be applied to a bequest of personalty only: and with regard to a gift comprehending both real and personal estate, the point is far from being clear; for though Lord Eldon appears, by Sir Geo. Cooper's report of Wright *v.* Atkyns, to have argued (and most convincingly) that the gift was to be construed as if it had actually embraced in its operation both species of property; yet as this is at variance with Mr. Vesey's report of the same case, and as the learned Judge, who originally decided it, treated the gift as comprising real estate exclusively, and it was [*940] cited as a *case of that kind by Lord Ellenborough in Doe d. Chattaway *v.* Smith (*p*), it cannot confidently be regarded as an authority for applying the construction in question to a gift comprising both real and personal estate. Moreover, the doctrine ascribed to Lord Eldon, that the word family used in a devise of both species of property must receive the same construction as to both, was denied by Lord Cottenham in White *v.* Briggs (*q*), where a testator gave his real and personal property to his wife for life, and after her death, his nephew to be heir to all his property; but, apprehending his nephew might require control, he directed it to be secured for the benefit of the nephew's *family:* the L. C. was of opinion, that the testator's object was simply to secure, against the supposed

Influence which the nature of the property has upon the construction.

(*o*) L. R., 14 Eq. 160 (will dated 1854).

(*p*) 5 M. & Sel. 129. The case of Wright *v.* Atkyns appears to *decide* that where the principal subject is realty, the construction as to that will not be varied by the presence of personalty: it leaves undecided what will become of the latter.

(*q*) 15 Sim. 17, 2 Phill. 583. See also Wingfield *v.* Wingfield, 9 Ch. D. 658, ante, p. 924.

improvidence of his nephew, the succession to each species of property in the course prescribed by law; and that by the word "family" he intended to designate the heir as to real estate and the next of kin as to personal.

Where word "family" used to designate *children*.

Sometimes "family" has been construed *children* with little aid from the context. As, where (*r*) a testator devised the remainder of his estate to be equally divided between "brother L.'s and sister E.'s family," it was held, by Sir W. Grant, M. R., that the children of L. and E. took as well the real as the personal estate, per capita. In this case, the only questions in regard to the objects of the gift were, whether the children took per stirpes, and whether L. and E. were included; both which were decided in the negative.

Where "family" construed *relations*.

The word "family" has also been construed as synonymous with *relations*. Thus, in Cruwys *v.* Colman (*s*), where a testatrix, after bequeathing her property to her sister, a spinster, for life, whom she made executrix, declared it to be her desire, that she (the sister) should bequeath "at her own death, to those of her own family, what she has in her own power to dispose of that was mine." Sir W. Grant, M. R., held, that the expression "of her own family," was equivalent to *of her own kindred*, or *her * own relations*; and she, not having [*941] exercised the power, it was, therefore, a trust for her next of kin excluding all beyond the statutory limit.

It is observable with respect to the two sets of cases last referred to that where the word "family" was construed to mean children, no one was interested in insisting on its receiving the more enlarged signification of relations; and on the other hand that where it was construed to mean next of kin, there were no children (*t*), and the situation of the parties made it improbable that there should be any, or that the birth of any was contemplated. But later authorities have decided that, in a gift of personal estate to the "family," either of the testator (*u*) or some other person (*v*), the primary meaning of the word "family" is "children;" and that there must be some peculiar circumstance, arising either on the will itself or from the situation of the parties, to give it to another (*x*): so that generally children will be entitled

Primary sense of "family" in gift of personalty is children.

(*r*) Barnes *v* Patch, 8 Ves. 604. See also M'Leroth *v.* Bacon, 5 Ves. 159; and Doe d. Chattaway *v.* Smith, 5 M. & Sel. 126; Woods *v.* Woods, 1 My. & Cr. 401.

(*s*) 9 Ves. 319. See also Grant *v.* Lynam, 4 Russ. 292; Re Maxton, 4 Jur. N. S. 407. But a trust "for such of her own family" as A. (a spinster) should appoint does not confine the *selection* to statutory next of kin. Cruwys *v.* Colman, 9 Ves. 324; Grant *v.* Lynam, 4 Russ. 292; Snow *v.* Teed, L. R., 9 Eq. 622.

(*t*) See this circumstance mentioned as making "children" an improbable construction, by Romilly, M. R., 19 Beav. 581.

(*u*) Pigg *v.* Clarke, 3 Ch. D. 672.

(*v*) Wood *v.* Wood, 3 Hare, 65.

(*x*) See the other cases cited on this page; and Re Terry's Will, 19 Beav. 580; Reay *v.* Rawlinson, 29 Beav. 88; Owen *v.* Penny, 14 Jur. 359; Morton *v.* Tewart, 2 Y. & C. C. C. 67, 81. Sir W. M. James, L. J., would appear disposed to comprehend in the *ordinary* meaning

to the exclusion of a husband (*y*), of a wife (*z*), of parents (*a*), of collateral relations (*b*), and of remoter descendants; and as to these last whether, as representing their deceased parents, they would (*c*), or by reason of their parents being alive, they would not (*d*), have participated if "family" had meant relations.

Every case however must depend upon its particular circumstances. "Family" is not a technical word, and is of flexible meaning (*e*). It may mean ancestors (*f*). "In one sense it means the whole household, including servants and perhaps lodgers (*g*). In another [*942] it means everybody descended from a * common stock, *i. e.*, all blood relations; and it may perhaps include the husbands and wives of such persons (*h*). In the sense I have just mentioned the family of A. includes A. himself; A. must be a member of his own family (*i*). In a third sense the word includes children only; thus when a man speaks of his wife and family he means his wife and children. Now every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another. What then is the primary meaning of 'family'? It is 'children': that is clear upon the authorities which have been cited; and independently of them I should have come to the same conclusion" (*k*).

"Family" construed "descendants."

In Williams *v.* Williams (*l*) the context was such as to give to the word "family" a meaning wider even than relations. The testator by his will bequeathed personal property to his wife absolutely. By a codicil addressed to her he added "using your judgment where to dispose of it amongst your *children* when you can no longer enjoy it; but I should be unhappy if I thought any one of your *family* should be the better for what I feel confident you will so well direct the disposal of." At the date of his death, which followed soon after the date of his codicil, the testator had two sons and two daughters. The younger daughter was married. His wife was of advanced years and had no children but by her marriage with the testator. In this state of things, Lord Cranworth, V.-C., held that the words "of your family" as used in the

of the word persons beyond the limits of the Statutes of Distribution, Snow *v.* Teed, L. R., 9 Eq. 622; Lamb *v.* Eames, L. R., 6 Ch. 597, 600, including in the latter case even an illegitimate child; but the weight of opinion seems to justify the position in the text.

(*y*) Per Arden, M. R., M'Leroth *v.* Bacon, 5 Ves. 159.

(*z*) Re Hutchinson and Tenant, 8 Ch. D. 540.

(*a*) Re Mulqueen's Trusts, 7 L. R. Ir. 127.

(*b*) Wood *v.* Wood, 3 Hare, 65.

(*c*) Pigg *v.* Clarke, 3 Ch. D. 672.

(*d*) Gregory *v.* Smith, 9 Hare, 708; Burt *v.* Hellyar, L. R., 14 Eq. 160, ante, p. 939.

(*e*) Per Kindersley, V.-C., Green *v.* Maraden, 1 Drew. 651.

(*f*) Per Romilly, M. R., Lucas *v.* Goldsmid, 29 Beav. 660. And see James *v.* Lord Wynford, 3 Sm. & G. 350, where upon a devise of lands "except such as I may derive from A. or from any of her family," A.'s father was held included in her "family."

(*g*) But a very improbable sense in a bequest to a man's "family."

(*h*) See acc. M'Leroth *v.* Bacon, 5 Ves. 159; Blackwell *v.* Bull, 1 Kee. 176.

(*i*) But this is not the general rule in a gift to A. and his family, Barnes *v.* Patch, 8 Ves. 604, stated sup.; Gregory *v.* Smith, 9 Hare, 708.

(*k*) Per Jessel, M. R., Pigg *v.* Clarke, 3 Ch. D. 674.

(*l*) 1 Sim. N. S. 358.

codicil were not confined to children, but were equivalent to "of your blood," that is "your posterity, your descendants;" so that if there was a trust for the "family," issue of every degree would be included, and parents and children would take together. The improbability that this was intended, coupled with the precatory language of the codicil, led the Court to conclude that no trust was intended.

General remark on preceding cases.

It should seem, then, that a gift to the *family* either of the testator himself, or of another person, will not be held to be void for uncertainty, unless there is something special creating that uncertainty. The subject matter and the context of the will are to be taken into consideration, and generally where personal * estate is given to A. and his [*943] family, the word "family" will not be rejected as surplusage, or (which amounts to the same thing) treated as a word of limitation, but will give a substantive interest to the children (*m*) or other persons indicated.

"To A. and his family."

Gift to the "younger branches" of a "family."

Whether effect can be given to a devise to the "younger branches of a family" must of course chiefly depend on the state of the family at the date of the will. In Doe d. Smith *v.* Fleming (*n*), where a testator disposed of the ultimate remainder of his estates to the *younger branches of the family of* A. and their heirs as tenants in common, and in default of such issue to the elder branches of the same family and their heirs as tenants in common. There were living at the date of the will, and of the testator's death, two daughters of A., four children of one of those daughters and children of two deceased sons of A., and the devise being thus ambiguous was held void. But in Doe d. King *v.* Frost (*o*), where a testator devised his real estates to his son W. in fee; but if he should die without issue living at his decease (which happened), to I. S., "subject to such legacies as W. might leave to any of the younger branches of the family:" and it appeared that besides his only son W. the testator had issue one daughter, who at the date of the will had five children; Abbott, C. J., and Bayley, J., agreed that by the term "the younger branches of the family," the testator meant his daughter's younger children: the daughter herself and her eldest son being in the event contemplated successive heirs apparent to W., and therefore excluded from any claim to the legacies.

Word "descendants," how construed.

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

(*m*) Parkinson's Trusts, 1 Sim. N. S. 242; Beales *v.* Crisford, 13 Sim. 592. On the question whether children take concurrently with their parent, or in remainder, vide post, Ch. XXXVIII. s. i.

(*n*) 2 C. M. & R. 638.

(*o*) 3 B. & Ald. 546.

[1] See Houghton *v.* Kendall, 7 Allen, 72; Bates *v.* Gillett, 132 Ill. 287; West *v.* West, 89 Ind. 529 (husband not a "descendant" of his wife, citing Prather *v.* Prather, 58 Ind.

In Crossley *v.* Clare (*p*), a devise of real estate "to the descendants of A. now living in or about B., or hereafter living anywhere else," and a bequest of personalty in the same words, were held to apply to all who proceeded from A.'s body, so that grandchildren and great-grandchildren were entitled, and a great-great-grandchild was not included, only because born after the date of the will, the words [*944] "*now* living" excluding him. * In Legard *v.* Haworth (*q*), the word "descendants" was held to refer to children and grandchildren who were objects of an antecedent gift.

In Craik *v.* Lamb (*r*), where a testator gave the residue of his real and personal property "unto and equally amongst all his relations who might prove their relationship to him by lineal descent;" it appeared that the testator was a widower, and had no issue, but several first cousins, his next of kin, and it was held by Sir J. K. Bruce, V.-C., that, as the testator had not required his devisees to prove their descent from him, he might be understood to mean lineal descent from a common progenitor, and therefore that his cousins were entitled to the residue.

"Relations by lineal descent."

But if the person to whose descendants the gift is made is specified, it would seem to require a strong case to enable collateral relations to participate. In Best *v.* Stonehewer (*s*), where a testator devised real estate to his sister B. and two other persons successively for life, and afterwards to be sold, and directed the proceeds to be paid "to such person or persons as shall at the death of the survivor of them be the nearest in blood to me as descendants from my great-grandfather J. S. and whose kindred with me originates from him;" and at the date of the will the only lineal descendants of J. S. were the testator and his sister B., who were both so advanced in years as to make it highly improbable that either of them would have issue; it was held by Sir J. Romilly, M. R., that the testator meant collateral descendants (children and grandchildren of a brother) of J. S., and that this was warranted by legal and popular usage, and by the definition of "descendant" given by Coke and Blackstone. The "definition" referred to however is of "descent," quoad real estate, not of "descendant" (*t*); and, it is submitted, affords no ground for concluding that, because an

Whether collaterals may be included.

(*p*) Amb. 397, 3 Sw. 320, n. See Re Flower, Matheson *v.* Goodwyn, 62 L. T. 216.
(*q*) 1 East, 120.
(*r*) 1 Coll. 489.
(*s*) 34 Beav. 66, 2 D. J. & S. 537.
(*t*) Co. Lit. 10 b, 13 b, 237 a; 2 Bl. Com. Ch. xiv. If the meaning of a gift to "descendants" is to be determined by the meaning of "descent," it might, since the Inheritance Act, 1834, include not only collaterals, but father, grandfather, &c.

141; Gray *v.* Bailey, 42 Ind. 349; Holbrook *v.* McCleary, 79 Ind. 167); Morse *v.* Hayden, 82 Maine, 227. The word does not include, prima facie, collateral relations. Van Beuren *v.* Dash, 30 N. Y. 393; Baker *v.* Baker, 8 Gray, 101; West *v.* West, supra. In Georgia, "descendants" is held to mean next of kin under the Statute of Distributions. Walker *v.* Walker, 25 Ga. 420. Comp. cases in note, ante, p. 934.

estate is properly said to "descend" to a collateral heir, it is proper or customary to speak of a *person* being descended, or being a descendant, from his uncle, his nephew, or his brother. Sir J. K. Bruce, L. J., dissented from the construction put on the will by the M. R.; and it was not approved by Sir G. Turner, L. J., though he upheld the decision on distinct grounds (*u*).

* Under a gift to descendants *equally*, it is clear that the [*945] issue of every degree are entitled per capita, *i. e.* each individual of the stock takes an equal share concurrently with, not in the place of, his or her parent (*x*). And even where the gift is to descendants simply, it seems that the same mode of distribution prevails; unless the context indicates that the testator had a distribution per stirpes in his view, as in Rowland *v.* Gorsuch (*y*), where the testator, as to the residue of his fortune, willed that the descendants *or representatives* of each of his first cousins deceased should partake in equal shares with his first cousins then alive; Sir Ll. Kenyon, M. R., considered that the gift applied to first cousins, and all persons who were descendants of first cousins, and who, in quality of descendants, would be entitled, under the Statutes of Distribution, to represent them. He had some doubt whether they were to take per capita, or per stirpes; but upon the whole, he thought that no person taking as representative could take otherwise than as the statute gives it to representatives, *i. e.* per stirpes. So if descendants are expressly desired to take in the proportions directed by those statutes, they cannot take concurrently with, but only in the place of, their parents (*z*). And in one case (*a*), where a testator gave the residue of his real and personal property to his wife for life, and after her death to the brothers and sisters of himself and his said wife and to their descendants in such proportions as she should by will appoint, an intention was held to be implied that no descendants should take but by substitution for a parent (brother or sister) who died before the wife.

Gift to descendants *equally*; they take per capita,

unless they are to take as "representatives,"

or in the statutory proportions.

Where the distribution is to be per stirpes the principle of representation will be applied through all degrees, children never taking concurrently with their parents (*b*). In a case (*c*) where the gift was "to the descendants of A. and B. per stirpes," Sir J. Romilly, M. R., thought A. and B. were the stirpes in the first instance to be considered, so that the primary

Mode of division per stirpes.

(*u*) He read the will (diss. K. Bruce, L. J.) as describing not one set of persons, but two; first, descendants of J. S.; secondly, those whose kindred with the testator originated from J. S.

(*x*) Bufler *v.* Stratton, 3 B. C. C. 367.

(*y*) 2 Cox, 187.

(*z*) Smith *v.* Pepper, 27 Beav. 86, marg. note.

(*a*) Tucker *v.* Billing, 2 Jur. N. S. 483.

(*b*) Ralph *v.* Carrick, 11 Ch. D. 873, stated below.

(*c*) Robinson *v.* Shepherd, 32 Beav. 665, on app. 10 Jur. N. S. 53; 4 D. J. & S. 129.

division should be into two parts. But Lord Westbury held that you must look to the number of families or stirpes descended either from A. or B. and existing at the testator's death, and divide the [*946] fund primarily * into a corresponding number of parts. However in a subsequent case the M. R. acted on his own opinion, which appears to have been acquiesced in (*d*). If the gift were to the descendants of one person, per stirpes, it must necessarily be dealt with on Lord Westbury's principle.

The mode of division according to Lord Westbury's decision was adopted by Sir F. North, J., in Re Wilson, Parker *v.* Winder (*e*). In that case a testator gave a fund, subject to a life interest therein of his wife, in trust for his cousins (the children of the testator's deceased aunts and uncles named in the will) living at the determination of the life interest and such issue then living, if any, of his said cousins then dead according to the stocks. It was held that the "stocks" were the cousins, living and deceased, themselves, and not the aunts and uncles.

III. — Gifts to Issue. — 1. *"Issue" generally means Descendants of every Degree; Mode of Division.* — The word *issue*, though its popular sense is said to be children (*f*), is technically, and when not restrained by the context, co-extensive and synonymous with descendants, comprehending objects of every degree (*g*).[1] And here the distribution is per capita, not per stirpes. Davenport *v.* Hanbury (*h*) presents a simple example. The bequest was to M., or her issue. M. died in the lifetime of the testator, leaving one son living, and two children of a deceased

Bequest to "issue," how construed.

(*d*) Gibson *v.* Fisher, L. R., 5 Eq. 51. See also Booth *v.* Vicars, 1 Coll. 6.
(*e*) 24 Ch. D. 664.
(*f*) 11 Ch. D. 882, 885.
(*g*) Haydon *v.* Wilshere, 3 T. R. 372; Hockley *v.* Mawbey, 1 Ves. Jr., 150, 1 R. R. 93; Wythe *v.* Thurlston, Amb. 555, 1 Ves. 195, more correctly 3 Ves. 258; Horsepool *v.* Watson, 3 Ves. 383; Bernard *v.* Montague, 1 Mer. 434; Hall *v.* Nalder, 22 L. J., Ch. 242, 17 Jur. 224; South *v.* Searle, 2 Jur. N. S. 390; Re Jones' Trusts, 23 Beav. 242; Maddock *v.* Legg, 25 Beav. 531; Hohgen *v.* Neale, L. R., 11 Eq. 48; Re Corlass, 1 Ch. D. 460. "Offspring" is synonymous with "issue," see Thompson *v.* Beasley, 3 Drew. 7; read as a word of limitation in a gift to "A, and her offspring," Young *v.* Davies, 2 Dr. & Sm. 167; confined to children in an executory trust to settle, Lister *v.* Tidd, 29 Beav. 618. In a bequest to the issue male of A., it was held that the claim must be wholly through males, Lywood *v.* Kimber, 29 Beav. 38, vide ante, p. 913, n. (*g*).
(*h*) 3 Ves. 257, 3 R. R. 91.

[1] On the word "issue" see Jackson *v.* Jackson, 153 Mass. 374; Hills *v.* Barnard, 152 Mass. 67; Dexter *v.* Inches, 147 Mass. 324; Hall *v.* Hall, 140 Mass. 267; Gabouey *v.* McGovern, 74 Ga. 133; Henderson *v.* Henderson, 64 Md. 185; Dickson *v.* Satterfield, 53 Md. 317; Kimball *v.* Penhallow, 60 N. H. 448; Palmer *v.* Dunham, 125 N. Y. 68; Palmer *v.* Horn, 84 N. Y. 516; Parkhurst *v.* Harrower, 142 Penn. St. 432; Shalters *v.* Ladd, 141 Penn. St. 349; Hackney *v.* Tracy, 137 Penn. St. 53; Manerback's Estate, 133 Penn. St. 342; Carroll *v.* Burns, 108 Penn. St. 386; Wistar *v.* Scott, 105 Penn. St. 200; Hill *v.* Hill, 74 Penn. St. 173; Taylor *v.* Taylor, 63 Penn. St. 481; Miller's Appeal, 52 Penn. St. 113. See Chelton *v.* Henderson, 9 Gill, 432, as casting doubt upon the soundness of the general interpretation of the term. The word "offspring" is held to be a word of limitation, prima facie, and not of purchase. Allen *v.* Markle, 36 Penn. St. 117.

daughter. Sir R. P. Arden, M. R., held, that these three objects were entitled per capita; and, there being no words of severance, they took as joint-tenants.

Words "lawful issue" held to comprise children and grandchildren.

In Leigh *v.* Norbury (*i*), the same mode of construction was applied to a deed. In consideration of an intended marriage, A. assigned to trustees all his personal estate, upon trust to permit him to enjoy the same during his life, and after his decease, * in trust for such persons as he [*947] should appoint, and in default of appointment, for the lawful *issue* of A. A. made no appointment, and died leaving several children, some of whom had children. Sir W. Grant, M. R., held that the property was divisible among all the children and grandchildren per capita. He said, it was clearly settled, that the word "issue," unconfined by any indication of intention, includes all descendants. Intention, he said, was required for the purpose of limiting the sense of that word to children.

Distribution per capita.

In Freeman *v.* Parsley (*k*), a testator devised and bequeathed a moiety of his personal estate, and of the proceeds of his real estate (which he directed to be sold), to T., his heirs, &c., to be divided among A., B., C., and D.: "but in case of their decease, or of any of them, such deceased's share to be divided among the *lawful issue* of such deceased, and, in default of such issue, such share to be equally divided among the survivors." B., C., and D. died in the testator's lifetime, leaving children and grandchildren. Lord Loughborough held, that all were entitled, though he expected that it was contrary to the intention. He regretted that there was no medium between the total exclusion of the grandchildren and admitting them to share with their parents.

Gift to *issue* extended to children and grandchildren.

It will be perceived that in all the preceding cases the subject of disposition was personal estate, or (which is identical for this purpose) the produce of realty. Probably, however, the construction of the word "issue" would not be varied when applied to real estate. It is true, indeed, that the word "issue," when preceded by an estate for life in the ancestor, is frequently construed (as we shall hereafter see) as synonymous with heirs of the body, and as such conferring an estate tail, on the ground that this is the only mode in which the testator's bounty can be made to reach the whole class of descendants born and unborn; and it must be confessed, that the same reasoning applies, to a certain extent, in the case now under consideration; for to adopt any other interpretation narrows the range of objects, by confining the devise to issue living at a given period, and thereby excluding, it may be, an unlimited succession of unborn descendants, on whom an estate tail would, if

Devise of real estate to issue.

(*i*) 13 Ves. 340. (*k*) 3 Ves. 421.

not barred, devolve (as in Mandeville's case (*l*)). But whatever may be plausibility of force of such analogical reasoning, it has received but little [*948] * countenance from the cases; there being, it is believed, no direct adjudication in favor of such a construction, while positive authority may be cited against it: as in Cook *v.* Cook (*m*), where it was held, that, under a devise to the issue of J. S., the children and grandchildren took concurrently an estate for life.

"To the issue of J. S."

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

Remark on Cook *v.* Cook.

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

Effect where the devise is to the issue as tenants in common in fee.

Thus, in Mogg *v.* Mogg (*n*), where, under a devise to trustees, to pay profits to the children begotten and to be begotten of M. for their lives (which vested the legal estate pro tanto in the trustees), and after the decease of such children, the testator devised the estate to the lawful issue of such children, *to hold unto such issue, his, her, and their heirs, as tenants in common*, without survivorship (and which was held to execute the use *in the issue*), the court of K. B., on a case from Chancery, certified (*o*) that the issue of such of M.'s children as were *living at the testator's decease took the remainder in fee, expectant on the estate pur autre vie of the trustees, as tenants in common;* and this certificate was confirmed by Sir W. Grant, M. R.

It is equally clear, on the other hand, that if the context manifests an intention to keep the devised estate together in a single owner, the issue will take successively in tail, as in Mandeville's case. Thus, where by will, dated 1780, a testator devised his "estates" in formerly strict settlement to several of his sons and daughters in tail male, "and in default of such issue to all and every other the issue of my body, and for default of such issue to my own right heirs," his desire being "to prevent the dispersion of his estates, and to keep up his name and family [*949] in * one person;" the devise to issue was read as a devise to the heirs of the body (*p*).

Effect of express desire to keep estate together.

(*l*) Ante, p. 907.
(*m*) 2 Vern. 545.
(*n*) 1 Mer. 654.
(*o*) See answer to the query, 1 Mer. 689.
(*p*) Allgood *v.* Blake, L. R., 7 Ex. 339, 8 Ex. 160. See also Whitelock *v.* Heddon, 1 B. & P. 243, ante, p. 909.

III. — 2. *"Issue" construed "Children."* — The word "issue," however, may be, and frequently is, explained by the context to bear the restricted sense of *children*.[1]

"Issue" explained to mean *children*.

Where a will declares that in the event of the deaths of original devisees or legatees before a specified time, their issue shall take the shares which the *father* or *mother* of such issue would have taken if then living, it is obvious that issue must be construed to mean children (*q*). And a clause substituting issue for their *parents*, it seems, has such effect, the word "parent" so used being considered to import, according to its ordinary meaning, *father* or *mother*, as distinguished from, and in exclusion of, a more remote ancestor.

Thus in Sibley *v.* Perry (*r*), where a testator gave a sum of 1,000*l*. Stock to each of several persons, if living at his decease, and if not, he directed that their lawful *issue* should take that 1,000*l*. Stock which their respective *parents*, if living, would have taken; and he made other bequests to the lawful issue, living at certain periods, of other persons; Lord Eldon thought it was clear, as to the former class, that children were intended, and that this was a ground for giving to the word "issue" the same construction as the other bequests (*s*).

Sibley *v.* Perry.

But if in such a case there follows a gift over on a general failure of "issue" of the original legatee, this construction is excluded. Thus, in Ross *v.* Ross (*t*), where a testator bequeathed a share of a money fund to his niece C. for life, and after her *death [*950] to her children living at her death, and the issue then living of children then dead, each surviving child to take an equal share, "and the issue, if more than one," of deceased children "to take equally amongst them the share which their parent would have been entitled to if he or she had survived C., and if but one, then to

Distinction where there is an ultimate gift over on failure of issue.

(*q*) Buckle *v.* Fawcett, 4 Hare, 536, 544; Martin *v.* Holgate, L. R., 1 H. L. 175.

(*r*) 7 Ves. 522; Prnen *v.* Osborne, 11 Sim. 132; Bradshaw *v.* Melling, 19 Beav. 417 (real estate); Smith *v.* Horsfall, 25 id. 628; Maynard *v.* Wright, 26 id. 285 (real estate); Stephenson *v.* Abingdon, 31 Beav. 305; Lanphier *v.* Buck, 2 Dr. & Sm. 484; Heasman *v.* Pearse, L. R., 7 Ch. 275; Re Smith, 58 L. J. Ch. 661. But see Birdsall *v.* York, 5 Jur. N. S. 1237. In Crozier *v.* Crozier, 3 D. & War. 386, where a testator devised lands to the "issue male and female of J. C., now begotten or to be begotten on the body of his present wife," issue was held to mean children.

(*s*) See also Ridgway *v.* Munkittrick, 1 D. & War. 84; Edwards *v.* Edwards, 12 Beav. 97; Rhodes *v.* Rhodes, 27 Beav. 413. It is not, however, a necessary result of the word "issue" being used in the sense of *children* in one clause, that it is to be similarly construed in another clause, where it is surrounded by a different context, Carter *v.* Bentall, 2 Beav. 551; Head *v.* Randall, 2 Y. & C. C. C. 231; Hodges *v.* Harpur, 9 Beav. 479; Caulfield *v.* Maguire, 2 Jo. & Lat. 176; Williams *v.* Teale, 6 Hare, 239. Still less can "issue" be restricted to "children" merely to make two different bequests correspond, Waldron *v.* Boulter, 22 Beav. 284.

(*t*) 20 Beav. 645.

[1] McPherson *v.* Snowdon, 19 Md. 197; Hall *v.* Hall, 140 Mass. 267; King *v.* Savage, 121 Mass. 303; Ballentine *v.* De Camp, 39 N. J. Eq. 87; Parkhurst *v.* Harrower, 142 Penn. St. 432; Hill *v.* Hill, 74 Penn. St. 173; Taylor *v.* Taylor, 63 Penn. St. 481; Kleppner *v.* Laverty, 70 Penn. St. 70; Edwards *v.* Bibb, 43 Ala. 666; Merrymans *v.* Merrymans, 5 Munf. 440; McGregor *v.* McGregor, 1 De G. F. & J. 63. See Clifford *v.* Koe, 5 App. Cas. 447, 458; Daniel *v.* Whartenby, 17 Wall. 639. Under Pennsylvania statutes "lawful issue" will embrace illegitimate children who have been legitimated. Miller's Appeal, 52 Penn. St. 113.

take the child's share;" the other parts of the fund were then given in similar terms to other nieces and their respective children and issue; "and in case all my said nieces should die without leaving a child or issue of a child living at their respective deaths, then" to sink into the residue. Sir J. Romilly, M. R., recognized the rule deduced from Sibley *v.* Perry, but held that it was inapplicable to the case; for although issue if more than one were to take their *parent's* share, yet if there was but one, that one took, not a parent's, but a *child's* share. The collocation of the word "parent" with the word "issue," which was the foundation of the rule, was wanting in this branch of the clause, so that up to this point it was uncertain in what sense the word "issue" had been used. Then came the gift over on general failure of issue, in which per se there was nothing to restrict the meaning of the word to children, and which put a construction on what was ambiguous in the previous part of the will. Suppose none but children were entitled under the original gift; then, if you restricted the meaning in the same manner in the gift over, that gift would take effect, and disappoint remoter issue, if any; or if you retained the wider meaning in the gift over, that gift would fail, and there would be an intestacy. It was impossible to suppose the testator had meant that. The M. R. therefore held that "issue" retained its primary meaning in the original gift. As between a parent and his issue, "issue" meant "children"; but "parent" meant "child" or "grandchild" according to circumstances; so that on the death of a parent of any degree, his children (whether children, grandchildren, or remoter issue of C.) took his share, but not letting in issue of a remoter degree to share with issue less remote (*u*). In other words, the substitution would take place according to circumstances through all the degrees of issue.

So in Ralph *v.* Carrick (*x*), where a testator bequeathed a [*951] portion * of his residuary personal estate, after the death of his wife, to the children of his late aunt W. equally, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received if alive; and gave the other portions to other aunts and their descendants in like manner; "and should there be no children or lawful descendants of any of my said aunts at the time these bequests should become payable, then the portion destined for such to be placed in the general residuary fund, and bestowed as part thereof as above pointed out" (*y*): Sir C. Hall, V.-C., held, that descendants were confined

(*u*) That, where "issue" is unrestricted, issue of several degrees taking by substitution will not take concurrently, see also Robinson *v.* Sykes, 23 Beav. 40; Amson *v.* Harris, 19 Beav. 210; Re Orton's Trusts, L. R., 3 Eq. 375; Gibson *v.* Fisher, L. R., 5 Eq. 51. But see Birdsall *v.* York, 5 Jur. N. S. 1237.

(*x*) 5 Ch. D. 984, 11 Ch. D. 873.

(*y*) This appears to be an effectual disposition of any portion of which the primary trusts failed, see Atkinson *v.* Jones, Joh. 246; and cf. Lightfoot *v.* Burstall, 1 H. & M. 546.

to children by force of the word "parents"; observing that Ross *v.* Ross must be considered an exceptional case, and as depending altogether on the peculiar wording of the passage relating to "a child's share." But this decision was reversed by the L. JJ. They thought, indeed, that "descendants" could not be so easily controlled by the context as "issue." But if the word used had been "issue," Sir W. James thought it would have been impossible to distinguish the case from Ross *v.* Ross. "Here (he said) we have a gift over of all the funds provided for the aunts and their descendants, which gift over is not to take effect except on failure of all the descendants of the aunts; and this appears to me to exclude the limited construction which it is sought to give to the original gift. *That* was decided in Ross *v.* Ross, and it seems to me rightly decided." And Sir H. Cotton observed, that in the gift over "descendants" could not be restricted to children, for it was expressly distinguished from the latter word; and he added, "it is a sound principle, that when there are ambiguous words in the original gift, you should not construe the gift over in a restrictive sense which it does not otherwise bear, but should construe the ambiguous words in the previous gift so as to agree with the unambiguous words contained in the gift over."

Where the gift is to issue, and the testator proceeds to speak of "issue" of that issue, it is clear that he did not, in the first instance, use the word "issue" in its most comprehensive sense; and if he has further called the first "parents" of the second, the sense to which the word is limited must be that of "children" (*z*). Even without the latter circumstance it is difficult to see how, if * restricted at all, the term can mean anything but chil- [*952] dren (*a*), unless it means issue living at a particular period.

Again, in Hampson *v.* Brandwood (*b*), it was considered that a limitation in a deed to the first male issue, *lawfully begotten by A.*, was restricted to *sons;* but the construction seems to have been aided by the context, the next limitation being expressly to *daughters*, and the father having a power, in case there were any such male issue to inherit, to charge the property in favor of his *other children.* It has been frequently decided, that the words "lawfully begotten by A." are not per se enough to limit a bequest "to the issue of A." to his children (*c*). But in a case upon articles for a settlement on husband and wife successively for life, with remainder to their issue as they should appoint, and in default of appointment, then in equal shares, if there were more than one of such issue, born in the husband's lifetime or *in a reasonable time after his*

"Issue begotten by A."

(*z*) Pope *v.* Pope, 14 Beav. 593; Williams *v.* Teale, 6 Hare, 239; Fairfield *v.* Bushell, 32 Beav. 158.
(*a*) See per Maule, J., 8 C. B. 880.
(*b*) 1 Madd. 381; Gordon *v.* Hope, 3 De G. & S. 351.
(*c*) Caulfield *v.* Maguire, 2 Jo. & Lat. 176; Evans *v.* Jones, 2 Coll. 516; Haydon *v.* Wilshere, 3 T. R. 372. And see King *v.* Melling, 1 Vent. 230.

death, it was held by Sir E. Sugden that the word "issue" meant *children* (*d*).

Gift to issue referred to as gift to children.

A gift to issue may also be restricted to children by a codicil (*e*),[1] or another clause of the will (*f*) referring to it as a gift to "children," or by declaring the trusts by reference to trusts for children (*g*).

Effect where words "issue" and "children" are used indifferently.

Difficulty, however, often arises from the testator having used the words "issue" and "children" synonymously, rendering it necessary, therefore, in order to avoid the failure of the gift for uncertainty, that the prevalency of one of these terms should be established. Lord Hardwicke thought that, where the gift was to several, or the respective *issues* of their bodies, in case any of them should be dead at the time of distribution; viz., to each, or their respective *children* one-fourth, followed by a gift to survivors, in case any of them should be dead without issue, the word "children" was not restrictive of "issue" previously mentioned, the videlicet being merely explanatory of the shares to be taken, and not of the objects to take. The word "children," therefore, was to be construed as meaning *issue*, and not "issue" abridged to *children* (*h*).[2]

[*953] ***IV. — Gifts to Next of Kin.** — A devise or bequest to *next of kin* creates a joint tenancy (*i*) in the nearest blood-relations in equal degree of the propositus; such objects being determined without regard to the Statutes of Distribution.[3] This rule, however, more

(*d*) Thompson *v.* Simpson, 1 D. & War. 459, 480.
(*e*) Macgregor *v.* Macgregor, 1 D. F. & J. 63.
(*f*) Baker *v.* Bayldon, 31 Beav. 209.
(*g*) Marshall *v.* Baker, id. 608 (deed).
(*h*) Wyth *v.* Blackman, 1 Ves. 198, Amb. 555 (deed). See also Horsepool *v.* Watson, 3 Ves. 383; Royle *v.* Hamilton, 4 Ves. 437; Dalzell *v.* Welch; 2 Sim. 319, stated post; Doe d. Simpson *v.* Simpson, 5 Scott, 770, 4 Bing. N. C. 333, 3 M. & G. 929, stated post; Harley *v.* Mitford, 21 Beav. 280. In Cancellor *v.* Cancellor, 2 Dr. & Sim. 194, the testator sometimes used both words together, "children and issue," sometimes "children" only, and all degrees were held entitled. In Cursham *v.* Newland, 2 Scott, 105, 2 Bing. N. C. 58, 4 M. & Wel. 104, both words being used indifferently, and "issue" was restrained to *children*. See also Jennings *v.* Newman, 10 Sim. 219; Goldie *v.* Greaves, 14 id. 348; Benn *v.* Dixon, 16 id. 21; Earl of Oxford *v.* Churchill, 3 V. & B. 67; Bryan *v.* Maosion, 5 De G. & S. 737; Farrant *v.* Nichols, 9 Beav. 327; Edwards *v.* Edwards, 12 id. 97; Re Heath's Settlement, 23 Beav. 193; Bryden *v.* Willett, L. R., 7 Eq. 472; Re Hopkins' Trusts, 9 Ch. D. 131; Re Warren's Trusts, 26 Ch. D. 208, and other cases, post, Ch. XXXIX., s. ii., sub-s. 4.
(*i*) Withy *v.* Mangles, 4 Beav. 358, 10 Cl. & Fin. 215, 8 Jur. 69; Baker *v.* Gibson, 12 Beav. 101; Lucas *v.* Brandreth, 28 Beav. 274 (deed). In Dugdale *v.* Dugdale, 11 Beav. 402, a bequest, equally among next of kin, both maternal and paternal, was distributed per capita, not in moieties between the next of kin ex parte maternâ and ex parte paternâ. So a gift to next of kin of testator and his wife, Rook *v.* Att.-Gen., 31 Beav. 313.

[1] So of the word "issue" *in* a codicil. King *v.* Savage, 121 Mass. 303; Edwards *v.* Edwards, 12 Beav. 97.

[2] To effect the manifest intention of the testator, the word "children" may be taken as synonymous with *issue*. Merrymans *v.* Merrymans, 5 Munf. 440. See Bates *v.* Gillett, 132 Ill. 287, on "children and descendants."

[3] The English courts have, in later times, departed from the old rule of interpretation which considered "next of kin" to mean those who would take under the statute; and they now hold that, in the absence of the manifestation of any different purpose in the will, the term means *nearest* of kin, though such person would be postponed to another under the statute. By this rule a brother or

Gift to next of kin, how construed.

particularly as it affects the rights of persons who claim by representation under the express clause of the statute (*k*), entitling the children of the brothers and sisters of an intestate to stand in the place of their deceased parents, was the subject of many conflicting dicta and determinations. In favor of the claim of these representatives were the dictum of Lord Kenyon (*l*), and the decisions of Buller, J. (*m*), and Sir J. Leach (*n*). On the other side were ranged the strongly expressed opinions of Lord Thurlow (*o*), Lord Eldon (*p*), and Sir W. Grant (*q*), and a decision of Sir T. Plumer (*r*).

Next of kin confined to persons strictly answering to this character.

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

*applied to the next of kin in the strictest sense of the term, [*954] excluding persons entitled by representation under the statute, and consequently, that A.'s surviving brother was entitled to the whole fund (*t*).

(*k*) 22 & 23 Car. 2, c. 10, explained by 29 Car. 2, c. 30.
(*l*) Stamp *v.* Cooke, 1 Cox, 234.
(*m*) Phillips *v.* Garth, 3 B. C. C. 64.
(*n*) Hinckley *v.* Maclarens, 1 My. & K. 27.
(o) Phillips *v.* Garth, 3 B. C. C. 64.
(*p*) Garrick *v.* Lord Camden, 14 Ves. 372.
(*q*) Smith *v.* Campbell, Coop. 275.
(*r*) Brandon *v.* Brandon, 3 Sw. 312.
(*s*) 2 My. & K. 82.
(*t*) 2 My. & K. 780. See also Avison *v.* Simpson, Joh. 43; Halton *v.* Foster, L. R., 3 Ch. 505. A gift to "next of kin *in equal degree*" had been twice held to exclude representatives, Wimbles *v.* Pitcher, 12 Ves. 433; Anon., 1 Mad. 36.

sister would take in preference to a nephew or niece. Harris *v.* Newton, 36 L. T. N. S. 173; *s. c.* 46 L. J. Ch. 268; Withy *v.* Mangles, 4 Beav. 358; *s. c.* 10 Clark & F. 215; Elmesley *v.* Young, 2 Mylne & K. 780, reversing id. 82. See also, to the same effect, Harrison *v.* Ward, 5 Jones, Eq. 236; Jones *v.* Oliver, 3 Ired. Eq. 369; Simmons *v.* Gooding, 5 Ired. Eq. 382; Redmond *v.* Burroughs, 63 N. Car. 242; Rook *v.* Att.-Gen., 31 Beav. 313; 4 Kent, 537, note; Wright *v.* Methodist Epis. Church, Hoff. 202, 213. And see Wilson *v.* Atkinson, 4 De G. J. & S. 455, where, by force of the will, an illegitimate child took estate as next of kin. Under this interpretation of "next of kin," the father would be entitled to share equally with the son. Houghton *v.* Kendall, 7 Allen, 72, 77. But where the question arises solely under the Statute of Distributions, the statute, it seems, should be regarded concerning the persons who are to take and what they are to take. Houghton *v.* Kendall, supra: Horn *v.* Coleman, 1 Small & G. 169; Hinckley *v.* McLarens, 1 Mylne & K. 27; Anonymous, 1 Madd. 36; Booth *v.* Vickars, 1 Colly. 6. Further, see Swasey *v.* Jaques, 144 Mass. 135; Wilkins *v.* Ordway, 59 N. H. 378; Pinkham *v.* Blair, 57 N. H. 226.

So all who are of equal degree will be included in such a gift, though some of them may be beyond the statutory limit. Thus in Withy *v.* Mangles (*u*), where the question was who was entitled under the ultimate limitation in a marriage settlement in favor of "such persons or person as shall be the next of kin of E. M. at the time of her decease;" E. M. died, leaving a child, and also her father and mother, who claimed each an equal share of the property with the child; Lord Langdale, M. R., decided that the parents, though postponed to children by the Statutes, were here entitled concurrently with the child, as being of equal degree. "All writers on the law of England (he said) appear to concur in stating, that, in an ascending and descending line, the parents and children are in an equal degree of kindred to the proposed person (*x*); and I think that, except for the purposes of administration and distribution in cases of intestacy, and except in cases where the simple expression may be controlled by the context, the law of England does consider them to be in an equal degree of consanguinity. The law of England gives a preference to the child over the parent in distribution; but I think we cannot, therefore, conclude with respect to every distribution of property, made in words to give the same to persons equally next of kin, the parents are to be held more remote than the child." The House of Lords affirmed the decision, and thus finally settled this long-agitated question (*y*).

Parents and children, being of kin in equal degree, take together as "next of kin."

But a reference to the statute, whether express (*z*), or implied from a mention of intestacy (*a*), will admit all kindred who are within the statutory limit (*b*). And if a testator describes the objects of gift by express reference to the statute, as next of kin under or according to the [*955] statute, and does not expressly state * how they are to take, they take according to the mode and in the shares directed by the statute, sc. per stirpes and as tenants in common (*c*). This mode of distribution would be excluded by an express direction to divide in equal shares (*d*), but not by a mere direction to take as tenants in common, without specifying the shares (*e*), nor by the cir-

Secus, where statute of distribution is referred to.

(*u*) 4 Beav. 358, 10 Cl. & Fin. 215, 8 Jur. 69.

(*x*) 2 Bl. Com. 504. The degrees are to be reckoned according to the civil law, Cooper *v.* Denison, 13 Sim. 290; by which law the half-blood stands on equal ground with the whole-blood, Cotton *v.* Scarancke, 1 Mad. 45; Grieves *v.* Rawley, 10 Hare, 63.

(*y*) And see Cooper *v.* Denison, 13 Sim. 290 (brothers and sisters admitted with grandchildren).

(*z*) Nichols *v.* Haviland, 1 K. & J. 504. See also 4 Beav. 368.

(*a*) Garrick *v.* Lord Camden, 14 Ves. 372, 385, 386.

(*b*) Exclusive of husband or wife, vide post, s. vi.

(*c*) Bullock *v.* Downes, 9 H. L. Ca. 1; Re Ranking's Settlement, L. R., 6 Eq. 601; contra, Re Greenwood's Will, 3 Gif. 390; 31 L. J. Ch. 119, sed qu.

(*d*) Per Lord Langdale, 3 Beav. 132, and per Wood, V.-C., Joh. 47. And see corresponding cases on gifts to "relatives," post, s. vi.

(*e*) Mattison *v.* Tanfield, 3 Beav. 131; Lewis *v.* Morris, 19 Beav. 34. Contra Richardson *v.* Richardson, 14 Sim. 526, and Godkin *v.* Murphy, 2 Y. & C. C. C. 351 ("persons entitled

cumstance that the description excludes a person (viz. the widow) who would have taken a share in case of actual intestacy, the whole fund being divided among the others as if they alone had been entitled under the statute (*f*). A gift to the "next of kin" of a married woman "as if she had died unmarried" has been held too doubtful a reference to the statute to let in any but the nearest relations (*g*).

Upon a bequest to the next of kin ex parte maternâ, a person who happens to be next of kin on the father's as well as the mother's side will be entitled (*h*), unless the testator has expressly excluded the former (*i*). Where a bequest was to the persons *exclusive of* A., who under the statute would, at the death of X., have been entitled to the testator's personal estate, if he had died at that time intestate; A. was in fact his sole next of kin at that time, and it was argued that this was a gift to a class "except" to the sole member of it, and therefore void; but it was held to be a valid bequest to the artificial class of persons who, if A. were out of the way, would have been the testator's next of kin had he died immediately after X. (*k*).

Construction of gift to next of kin ex parte paternâ, or maternâ, to next of kin, exclusive of A.

It seems never to have been decided whether in case an additional term of description be annexed to a gift to next of kin, as if property be given to next of kin of a particular name, and the true next of kin do not bear that name, the nearest relations who do bear it can take under the will (*l*). The question was discussed, * but a [*956] decision expressly avoided, in Doe d. Wright *v.* Plumptre (*m*).

Gift to next of kin of a particular name.

In Boys *v.* Bradley (*n*), a testator, who died a bachelor, leaving several brothers and sisters his nearest relations, gave personal estate to be accumulated for the term of twenty-one years, and then to go to "his then nearest of kin in the male line in preference to the female line." At the end of the term the property was claimed by a sister, the sole survivor at that time of the nearest relations; by his nephews, the sons of sisters, claiming simply as male representatives of the family;

"Next of kin in the male line, in preference to the female line."

under the statute"); but both cases were plainly disapproved, 9 H. L. Ca. 28, 29, and the former was questioned by the judge who decided it, 8 Hare, 307.

(*f*) Bullock *v.* Downes, dub. Lord Wensleydale, 9 H. L. Ca. 1, 22, 26.

(*g*) Halton *v.* Foster, L. R., 3 Ch. 505. See also Lucas *v.* Brandreth, 28 Beav. 274; Re Webber, 17 Sim. 221, but qu. as to the ratio decidendi.

(*h*) Gundry *v.* Pinniger, 14 Beav. 94, 1 D. M. & G. 502.

(*i*) See Say *v.* Creed, 5 Hare, 580. A bequest to "next of kin in the male line *in preference to* the female line," does not exclude but only postpones the latter, semb. Boys *v.* Bradley, 10 Hare, 399, 4 D. M. & G. 58; 5 H. L. Ca. 892, 900.

(*k*) White *v.* Springett, L. R., 4 Ch. 300.

(*l*) See the corresponding cases on gifts to the heir, p. 910.

(*m*) 3 B. & Ald. 474 (deed). The decision was that plaintiff's wife answered neither branch of the description. If "name" was to be literally understood (as to which, post, s. viii.) she did not bear it at the prescribed time: if "name" meant "family," there was another of that family more nearly related. Shadwell, V.-C., is reported to have taken a different view of the decision, Carpenter *v.* Bott, 15 Sim. 609; but see *s. c.* 16 L. J. Ch. 433.

(*n*) 10 Hare, 389, 4 D. M. & G. 58, 5 H. L. Ca. 873, 25 L. J. Ch. 593 (Sayers *v.* Bradley).

and by a more remote male relation claiming wholly through males. It was held by Sir W. P. Wood, V.-C., that the will was not void for uncertainty, but meant nearest relations ex parte paternâ, and did not require the legatee to be a male or to claim wholly through males. The sister, therefore, answered all parts of the description. An appeal by the remote relation was dismissed first by the L. JJ. K. Bruce and Turner, and afterwards by the House of Lords, it being considered clear that he was not the person designated. Lord Cranworth, C., gave more weight than Lord St. Leonards appears to have done to the mere fact that the appellant was not the nearest nor one of the nearest of kin. But he and the Judges (who were consulted) agreed that it was much easier to say of any particular person that he was not the person designated, than to say who was. Sir J. K. Bruce, L. J., had no doubt that the sister was related to the testator "in the male line," but was not satisfied that this expression, though used in contradistinction to "female line," was equivalent to the phrase "ex parte paternâ;" since one might be allowed to speak of all his maternal kindred as his relatives in the female line, whether related to his mother on his father's side or otherwise; but it would be incorrect to speak of being related in the male line to all his father's relations.

"Next male kin."

In Re Chapman, Ellick *v.* Cox (*o*), a testator devised freeholds in certain proportions to two persons, "and in the event of either dying, the deceased's share to revert to the [*957] next male kin." It *was held by Sir F. North, J., that all the nearest of kin of the testator, being males, living at his death, took as joint tenants in fee simple in reversion expectant on the death of the tenants for life.

In Williams *v.* Ashton (*p*), a testator devised *land* to her "nearest of kin by way of heirship," and the heir not being one of the nearest of kin, it was argued that he was not entitled; but Sir W. P. Wood, V.-C., decided that he was, that the word heirship must be referred to the subject of gift, which was realty, and that the testatrix meant the nearest in the line through which real estate would descend; in short (though it was a circuitous way of expressing it) the heir.[1] And on the other hand, a gift of personalty to "the heirs or next of kin of A. deceased" was held a bequest to the persons who would by law succeed to property of that description, viz., the statutory next of kin (*q*).

"Nearest of kin by way of heirship."

"Heir or next of kin."

(*o*) W. N., 1883, p. 232, 32 W. R. 424; 49 L. T. 673.
(*p*) 1 J. & H. 115.
(*q*) Re Thompson's Trusts, 9 Ch. D. 607, following Lowndes *v.* Stone, 4 Ves. 649, as explained by Lord Cottenham, 10 Cl. & Fin. 253. See ante, p. 926.

[1] In determining who is the next of kin of the intestate "of the blood of the person from whom the estate came or descended," the persons entitled are the next of kin of the blood of the person from whom the estate came by *immediate* descent. Morris *v.* Potter, 10 R. I. 58; Gardner *v.* Collins, 2 Peters, 58.

V. — Gifts to Legal or Personal Representatives, Executors, or Administrators: — 1. *How construed generally.* — The construction of the words "legal representatives" (*r*), or "personal representatives," has presented another perplexing and fruitful topic of controversy.[1] Each of these terms, in its strict and literal acceptation, evidently means "executors," or "administrators," who are, properly speaking, the "personal representatives" of their deceased testator or intestate;[2] but as these persons sustain a fiduciary character, it is improbable that the testator should intend to make them beneficial objects of gift; and almost equally so, in some cases, that he should mean them to take the property as part of the general personal estate of their testator or intestate, which is, in effect, to make *him* the legatee. Accordingly, in numerous cases, the term "legal representative," or "personal representative," has been construed as synonymous with *next of kin*, or rather as descriptive of the person or persons taking the personal estate under the Statutes of Distribution, who may be said, in a loose and popular sense, to "represent" the deceased.[3]

"Legal representatives" or "personal representatives," how construed.

Thus, in Bridge *v.* Abbot (*s*), (which is a leading authority for this construction), a testatrix made a bequest to certain [*958] persons, and, in case of the death of any of them before her (the testatrix), to his or her *legal representatives;* and Sir R. P. Arden, M. R., held the next of kin to be entitled. This construction has also been adopted in several recent cases. As in Cotton *v.* Cotton (*t*), where a testator bequeathed the residue of his property to his executors, to be divided between the gentlemen thereafter named, *or the legal representatives* of the said gentlemen, in the proportion that the sums set against their names bore to each other. The testator wrote the names of twelve persons, opposite to which he placed different figures. One of these persons was dead at the date of the will, having left a will. Lord

"Legal representatives" held to denote next of kin.

(*r*) This term was thought by K. Bruce, V.-C., less precise than "personal" or "legal personal representatives." Topping *v.* Howard, 4 De G. & S. 268; Smith *v.* Barneby, 2 Coll. 736. But see 2 Hare, 523, 524; 2 Drew. 235; 4 De G. & J. 484.

(*s*) 3 B. C. C. 224. See also Long *v.* Blackall, 3 Ves. 486; Jacob *v.* Catling, W. N., 1881, p. 105; Re Thompson, W. N., 1886, p. 130. See Hewitson *v.* Todhunter, 22 L. J. Ch. 76, where, however, the universal legatee, not the next of kin, of the original legatee, was held entitled, sed qu. See also Re Horner, Eagleton *v.* Horner, 37 Ch. D. 695, 712. If next of kin take, they take per stirpes, Rowland *v.* Gorsuch, 2 Cox, 187; Booth *v.* Vicars, 1 Coll. 6.

(*t*) 2 Beav. 67.

[1] See Davies *v.* Davies, 55 Conn. 319 (citing Palin *v.* Hills, 1 Mylne & K. 470; Cotton *v.* Cotton, 2 Beav. 67; Walter *v.* Makin, 6 Sim. 148; Tillman *v.* Davis, 95 N. Y. 17; Brokaw *v.* Hudson, 27 N. J. Eq. 135); Rivenett *v.* Bourquin, 53 Mich. 10; Halsey *v.* Paterson, 37 N. J. Eq. 445; Greenwood *v.* Holbrook, 111 N. Y. 465, reversing 42 Hun, 623.

[2] Cox *v.* Curwen, 118 Mass. 198. See Gourdin *v.* Shrewsbury, 12 S. Car. 1, 27.

[3] See Brokaw *v.* Hudson, 27 N. J. Eq. 135; Drake *v.* Pell, 3 Edw. 270; Thompson *v.* Young, 25 Md. 450; Gibbons *v.* Fairlamb, 16 Penn. St. 217; Ware *v.* Fisher, 2 Yeates, 578; Stook's Appeal, 20 Penn. St. 349.

Langdale, M. R., held that the next of kin of the deceased person named by the testator, not the residuary legatee, were entitled.

In these two cases the gift to the person named was immediate; a circumstance which will be observed upon in the sequel (*u*).

Again, in Baines *v.* Ottey (*x*), where a testator gave certain real and personal estate to trustees, in trust for such persons as A. (a married woman) should appoint, and in default of appointment, for her separate use, and, at her decease, to convey the real estate to such person or persons as would be the heir-at-law of the said A., and to assign the personal estate *to or amongst* such person or persons as would be the personal representatives of the said A.; Sir J. Leach, M. R., held the next of kin to be entitled.

"Personal" or "legal representatives" held to mean *next of kin.*

And in Smith *v.* Palmer (*y*), where a testator, after the death of his wife, gave his property to A. "if he should be then living, but if he should be then dead, to his legal representative or representatives, if more than one, *share and share alike;*" Sir J. Wigram, V.-C., held these words to mean next of kin according to the Statute of Distribution.

So, in Atherton *v.* Crowther (*z*), where there was a residuary bequest to the testator's wife for life, remainder to the children of A. living at A.'s death, "but if any of the said children should [*959] * die in A.'s lifetime, then for the personal representatives of such child or children *to take per stirpes and not per capita;*" and in another clause there was a gift "in case there should be no such children nor any representatives of such children living at A.'s death, then to the persons who should be the testator's next of kin;" it was held by Sir J. Romilly, M. R., that the words "personal representatives" meant descendants (*a*).

"Personal representatives" held to mean *descendants.*

Again, in Jennings *v.* Gallimore (*b*), where, by deed, a fund was vested in trustees, in trust to pay it to such persons as A. should by

(*u*) At pp. 962, 963.

(*x*) 1 My. & K. 465, 2 Coll. 733 n.

(*y*) 7 Hare, 225; see also Wilson *v.* Pilkington, 11 Jur. 537; King *v.* Cleaveland, 26 Beav. 26, 4 De G. & J. 477; Holloway *v.* Ratcliffe, 23 Beav. 163.

(*z*) 19 Beav. 448.

(*a*) The sense of next of kin was held to be excluded by the context, because the provision that the legatees should take per stirpes was less applicable to next of kin than to descendants, and in the subsequent clause the words "personal representatives" and "next of kin" were contrasted, where the former could not be held to mean executors or administrators without leading to the absurdity that that gift was to depend on whether administration was taken out in the lifetime of A. It may be added that the children, being legitimate, could scarcely die "without any representatives" in the sense of next of kin. See also Styth *v.* Monro, 6 Sim. 49; Re Knowles, Rainford *v.* Knowles, 59 L. T. 359. In Horsepool *v.* Watson, 3 Ves. 383, "representatives" was construed "issue." In Re Booth's Estates, W. N. 1877, p. 129, "legal representatives of children," who were to take "their parents' shares," was construed "grandchildren."

(*b*) 3 Ves. 146, 3 R. R. 77. See also Briggs *v.* Upton, L. R., 7 Ch. 376; Re Grylls' Trusts, L. R., 6 Eq. 589, where, however, a trust by will for a married daughter's relations as she should appoint, and in default for "the persons who would be her personal representatives *in case she had died unmarried*," was referred to by codicil as a trust for the daughter's "relations and next of kin." Moreover, her executor or administrator was not before the Court.

deed or will appoint, and, in default of appointment, then to "the legal representatives of A., according to the course of administration." A. by his will appointed the fund "to be paid by the said trustees unto my legal representatives according to the course of administration," and gave all the rest of his property to B., and appointed B. and C. executors; it was held by Sir R. P. Arden, M. R., that the next of kin of A. were entitled under the appointment. "The testators (he said) would never have made such a will if he had thought all the words he had used came to nothing more than executing the power by giving the fund to B.," — *i. e.*, by giving it to the executors for them to administer by paying it, as in due course they would have been bound to do, to B.

"Legal representatives according to the course of administration."

In the four last cases the direction as to the mode in which the trust fund was to be paid, shared, or enjoyed, was held to be sufficient evidence that the testator did not use the words "personal representatives" in their strict sense.

And as a testator is supposed to have a different meaning whenever he uses a different expression, it is always a circumstance favorable to the construction which reads the words "legal" or "personal representatives" as denoting *next of* * *kin*, that there [*960] is elsewhere in the same will, and in reference to another subject of disposition, a gift to the executors or administrators of the same individual.

Effect of limitation to executors or administrators in same will.

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

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

"Personal representatives" construed *next of kin.*

(*c*) 6 Sim. 148. The opposite inference is obviously deducible from the circumstance of "personal representatives" being elsewhere used in the sense of "executors," Dixon *v.* Dixon, 24 Beav. 129.

(*d*) 6 Sim 47. See also Nicholson *v.* Wilson, 14 Sim. 549; Walker *v.* Marquis of Camden, 16 Sim. 329; Booth *v.* Vicars, 1 Coll. 1011; per Wickens. V.-C., L. R., 7 Ch. 378 n. But see Saberton *v.* Skeels, 1 R. & My. 587; Hinchlifte *v.* Westward, 2 De G. & S. 216; and per Kindersley, V.-C., Re Crawford, 2 Drew. 240. In Philps *v.* Evans, 4 De G. & S. 188. "personal representatives" were interpreted by the words "or next of kin" subjoined. See also Baker *v.* Gibson, 12 Beav. 101.

of kin of the wife were beneficially entitled: the husband was the trustee, and was to pay the fund.

Effect of the word "next" prefixed to "legal representatives."

And a still stronger argument for the same construction is derived from the word "next" being prefixed to "legal representatives," that being a word which has no connection with the character of executor or administrator (*e*).

Indeed, so strong has been the leaning sometimes in favor of the construction which gives to words pointing at succession or representation the sense of next of kin that even a gift to *executors* or *administrators* has been thus construed (*f*). But it is clear that at the present day such a gift would be construed as a gift to the executors or administrators of the deceased legatee to be held by them as part of his estate (*g*).

"Executors or administrators" held to mean *next of kin.*

[*961] * From cases of this description, however, we must carefully distinguish those in which the words "executors and administrators," or "legal representatives," are used as mere words of limitation. As in the common case of a gift to A. and his executors or administrators, or to A. and his legal representatives, which will, beyond all question, vest the absolute interest in A. (*h*).

"Executors or administrators" used as words of limitation.

The same construction, too, in some instances, has been applied in cases of a more doubtful complexion; as where the bequest was to A. for life, and, after his decease, to his executors or administrators (*i*) or personal representatives (*k*). So, in numerous instances, where a testator has given a fund in trust for A. for life (frequently a married woman), with power to appoint it after her death, and, in default of appointment, to the "executors and administrators," or to the "personal representatives" of A., the words have received this their proper interpretation. A. was considered to be the only object of bounty, and the words were held to be in effect mere words of limitation (*l*). And a trust for children which fails (*m*), or a clause of for-

(*e*) Booth *v.* Vicars, 1 Coll. 6; Stockdale *v.* Nicholson, L. R., 4 Eq. 359.

(*f*) Palin *v.* Hills, 1 My. & K. 470; and see Bulmer *v.* Jay, 4 Sim. 48, 3 My. & K. 197.

(*g*) Re Clay, Clay *v.* Clay, W. N. 1885, p. 22, 32 W. R. 516, 52 L. T. 641. See also Wallis *v.* Taylor, 8 Sim. 241, stated post, p. 965; Long *v.* Watkinson, 17 Beav. 471, post, p. 963; Webb *v.* Sadler, L. R., 8 Ch. 419, 429 (settlement). Palin *v.* Hills must be regarded as overruled.

(*h*) Lugar *v.* Harman, 1 Cox, 250; Taylor *v.* Beverley, 1 Coll. 108; Appleton *v.* Rowley, L. R., 8 Eq. 139.

(*i*) Co. Lit. 54 b; Socket *v.* Wray, 4 B. C. C, 483. See other cases, post, Chap. XXXVI. Nurse *v.* Oldmeadow, 5 L. J. Ch. 300, cor. Shadwell, V.-C., is contra, unless distinguishable on the ground that the limitation was to the executor, in the singular. Sed qu.

(*k*) Alger *v.* Parrott, L. R., 3 Eq. 329.

(*l*) Saberton *v.* Skeels, 1 R. & My. 587. Att.-Gen. *v.* Malkin, 2 Phill. 64; Devall *v.* Dickens, 9 Jur. 550; Page *v.* Soper, 11 Hare, 321 (settlement). If A. becomes bankrupt the trustee is entitled to the fund as part of A.'s estate, Re Seymour's Trusts, Joh. 472; and see Webb *v.* Sadler, L. R., 8 Ch. 419; Mackenzie *v.* Mackenzie, 3 Mac. & G. 559 (appointment of policy on appointor's life to his own executors); Re Onslow, Plowden *v.* Gayford, W. N. 1888, p. 167 (settlement, f. c. since M. W. P. Act, 1882).

(*m*) Allen *v.* Thorp, 7 Beav. 72 (settlement); Re Wyndham's Trusts, L. R., 1 Eq. 290; Re Best's Trusts, L. R., 18 Eq. 686 (settlement).

feiture on alienation or bankruptcy which is not called into action (*n*), interposed between the life estate and the ultimate trust, will not affect the construction.

And it should seem that where the word "assigns" is subjoined to "executors and administrators," they are always read as words of limitation, and not as designating next of kin. Thus, in Grafftey *v.* Humpage (*o*), where a sum of 4,000*l.* was bequeathed by A. to trustees, in trust for his wife and daughter and the survivor for life, for their separate use, and after the decease of the * survivor, in trust for the daughter's children, if any, and if none, then the testator gave one moiety of the 4,000*l.* to his brother I., and the other moiety to such persons as the daughters should by deed or will appoint, and in default, to the *executors, administrators, or assigns* of the daughter. The daughter died in the lifetime of her husband, childless, and without having made any appointment: and the husband was, on the ground above mentioned, held to be entitled as her administrator.

Limitation to executors, administrators, *and assigns.*

[*962]

But the strict or literal construction of the words "executors" or "representatives" is not confined to cases where they are thus in form mere words of limitation. It will also generally obtain where there is a prior gift to A., and the gift to his executors or representatives is in the form of a substitution for him in case of his death. Thus, in Price *v.* Strange (*p*), a testator devised real estate to his wife during widowhood, and at her death or marriage, to trustees upon trust for sale, and directed that, in case the death or second marriage of his wife should not happen until his youngest child, being a son, should have attained twenty-three, or, being a daughter, should have attained that age, or be married with consent, his trustees should, immediately after the receipt of the money arising from the said real estates, pay and divide the same among such of his children as should be then living, *and the legal representative or representatives of him, her, or them, as should be then dead;* and in case such death or marriage of his said wife should happen during the minority of any of his said children, then the testator directed the trustees to pay an equal proportion of the said money to such of his children as should, at that time, be entitled to receive their shares, in case he, she, or they had been then living, *and if dead, then to his, her, or their legal representatives:* Sir J. Leach, V.-C., held, that legal representatives must be understood in their ordinary sense of "executors or administrators," and that this

Gifts to "representatives" by substitution.

(*n*) Webb *v.* Sadler, L. R., 8 Ch. 419.

(*o*) 1 Beav. 46. See also Hames *v.* Hames, 2 Kee. 646; Howell *v.* Gayler, 5 Beav. 157; Holloway *v.* Clarkson, 2 Hare, 521; Spence *v.* Handford, 27 L. J. Ch. 767, 4 Jur. N. S. 987; cf. Re Newton's Trusts, L. R., 4 Eq. 171, stated ante, p. 924.

(*p*) 6 Madd. 159. See also Corbyn *v.* French, 5 Ves. 418; Hinchliffe *v.* Westwood, 2 De G. & S. 216; Taylor *v.* Beverley, 1 Coll. 108; Re Crawford, 2 Drew. 230; Re Henderson, 28 Beav. 656; Chapman *v.* Chapman, 33 Beav. 556; Re Turner, 2 Dr. & Sm. 501; Re Ware, Cumberlege *v.* Cumberlege-Ware, 45 Ch. D. 269.

made it equivalent to a direction to pay at the death of the widow to the children, their executors or administrators; or, in other words, gave a vested interest to the children.

It will be observed, that in this case, and in the others cited with it, the gift to the legatees or their representatives was to take effect after a previous life estate, *i. e.* the event contemplated [*963] * was the legatee surviving the testator, but dying before the tenant for life (*q*). A distinction was drawn by Sir R. Kindersley, V.-C. (*r*), between such a case and that of an immediate gift to A. or his representatives without a previous life estate. In the former case, he thought there was no improbability in supposing the testator to have intended that the legacy should go to the legatee's executors or administrators as part of his personal estate; for then the legatee got the benefit of the bequest as a reversionary legacy, though he might not live to receive it. But, in the latter case, the testator was providing for the event of the intended legatee dying in his (the testator's) lifetime. In such event the intended legatee could not under any construction which could be put on the words "legal representatives" derive any advantage from the bequest; indeed, he would never even know of it. The V.-C. thought it highly improbable that the testator should intend the legacy to go to the executors or administrators as part of the legatee's general assets, perhaps to benefit no one but the legatee's creditors. He therefore held that in such a case the term "representatives" was properly construed next of kin, and that Bridge *v.* Abbot (*s*) and Cotton *v.* Cotton (*t*) were thus consistent with the other authorities.

Distinction in regard to substitution between immediate and future gift.

But, although the gift is immediate, the context may, of course, show that the words have been used in their proper sense. Thus, in Long *v.* Watkinson (*u*), where a testator bequeathed the residue of his estate to A., but in case of her death then "to the executors or executrixes whom A. may appoint;" A. died in the testator's lifetime, and Sir J. Romilly, M. R., said he could not reconcile Palin *v.* Hills with the later authorities, and decided that neither the residuary legatee nor the next of kin of A. took the residue as personæ designatæ, but that it went to her executrix as part of her personal estate. Besides that "executors" is a less ambiguous term than "personal representatives" (*v*), it may be noted that the words "whom A. may appoint" were very inappropriate to describe her

(*q*) If, in such case, the legatee died in the testator's lifetime, the legacy would lapse, Corbyn *v.* French, 4 Ves. 418. See post, Ch. XLIX.
(*r*) Re Crawford, 2 Drew. 242.
(*s*) 3 B. C. C. 224, ante, p 957.
(*t*) 2 Beav. 67, ante, p. 958.
(*u*) 17 Beav. 471. See Re Clay, Clay *v.* Clay (C.A.), W. N., 1885, p. 22, 32 W. R. 516, 52 L. T. 641.
(*v*) See per Lord Cottenham, Daniel *v.* Dudley, 1 Phil. 6; and per Sir J. Romilly, M. R., Atherton *v.* Crowther, 19 Beav. 450, 451. And see ante, p. 960.

next of kin; for of course A. could not appoint who they should be.

So in Re Valdez's Trusts (*x*), where a testator gave his * residuary real and personal property to M. and J., and in case of their decease bequeathed what he had bequeathed to them to their executors or administrators. Both M. and J. died in the lifetime of the testator. J., by her will, after making certain specific bequests, gave the residue of her property to the testator. It was held that the effect of the will was to give to the executors or administrators of each of them, M. and J., as part of her personal estate, one-half of the testator's property; and further that the moiety of J. was held by her executors in trust for the testator himself as residuary legatee under her will; and that such moiety had by the death of J. in the testator's lifetime lapsed, and accordingly was undisposed of, and went to the testator's next of kin. [*964]

Gift to "executors" or "representatives" of A., simpliciter, strictly construed.

Again, a gift to such of a class as shall be living at a time stated, and "the executors or administrators of such of them as shall be then dead," will, prima facie, go to the legal personal representatives, and not to the next of kin (*y*). This, perhaps, might be considered to be quasi substitutional. But a gift to the "executors" or "representatives" of A., simpliciter, without any previous gift or suggestion of gift to A., and whether A. is dead at the date of the will (*z*), or whether (as it should seem) he survives the testator (*a*), will generally receive the same construction.

Whether executors or administrators are entitled for their own benefit;

Supposing the words "executors" or "administrators" not to be used as words of limitation, nor as descriptive of next of kin, the question arises (which has been in some measure anticipated), whether the property so given vests in the persons answering such description for their own benefit, or is to be administered as part of the personal estate of the testator or intestate.

The former result, indeed, is so manifestly contrary to probable intention, that the case of Evans *v.* Charles (*b*), in which this construction prevailed, has been generally condemned; and the Judge, whose solitary approbation the decision has elicited, did not choose to follow its authority (*c*); and such a construction would be the more palpably absurd, now that, by express enactment (*d*), executors are excluded from taking beneficially, by * virtue of their office, [*965]

(*x*) 40 Ch. D. 159.
(*y*) Re Seymour's Trusts, Joh. 472.
(*z*) Trethewy *v.* Helyar, 4 Ch. D. 53; Leak *v* Macdowall, 33 Beav. 238, where the declared motive for the bequest was that A. and B (partners in trade) had lost a like amount by the testator, and it was held not a bequest to the firm so as to pass to the successors in business. As to this, see Kerrison *v.* Reddington, 11 Ir. Eq Rep. 451.
(*a*) Morris *v.* Howes, 4 Hare, 599 (limitation in a settlement to the executors, administrators, *and assigns* of A.).
(*b*) 1 Anstr. 128. See also Churchill *v.* Dibben, Sugd. Pow. 8th ed. 313.
(c) See Long *v.* Blackall, 3 Ves. 483.
(*d*) 1 Wm. 4, c. 40.

even the undisposed-of personal estate of their testator. Accordingly, it is established, that, unless a contrary intention appears by the context, whatever is bequeathed to the executors or administrators of a person vests in them as part of the personal estate of the testator or intestate.

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

And, notwithstanding the case last mentioned, the same rule prevails though the original gift is immediate, and the legatee dies in the testator's lifetime (*f*), or is dead at the date of the will (*g*).

— in case of real estate.

It has also been held applicable to the case of real estate, the gift in that case being held equivalent to a declaration that the estate shall be held by the executors as part of the personal estate of the person named (*h*).

Construction of gift to the executors of testator himself.

On the same principle property given to the executors or administrators (*i*) or to the personal representative (*k*) of the testator himself forms part of his general personal estate in the hands of his legal personal representatives; Sir J. K. Bruce, V.-C., holding that it was not enough to exclude the rule that by declaring them to be trustees the bequest to them was mere surplusage (*l*).

Gifts to executors "for their own use."

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

As, in Wallis *v.* Taylor (*m*), where a testatrix bequeathed a fund to trustees in trust to pay the interest for the separate use

(*e*) Stocks *v.* Dodsley, 1 Kee. 325; see Collier *v.* Squire, 3 Russ. 467; Morris *v.* Howes, 4 Hare, 599 (deeds).

(*f*) Long *v.* Watkinson, 17 Beav. 471; ante, p. 963. See also Re Clay, W. N., 1885, p. 22, 32 W. R. 516, 52 L. T. 641.

(*g*) Re Valdez's Trusts, 40 Ch. D. 159; Leak *v.* Macdowall, 33 Beav. 238; Trethewy *v.* Helyar, 4 Ch. D. 53.

(*h*) Per Romilly, M. R., Dixon *v.* Dixon, 24 Beav. 135; Wellman *v.* Bowring, 2 Russ. 374, 3 Sim. 328.

(*i*) Andrew *v.* Andrew, 1 Coll. 686. And see Mackenzie *v.* Mackenzie, 3 Mac. & G. 559.

(*k*) Smith *v.* Barneby, 2 Coll. 728.

(*l*) See Hinchliffe *v.* Westwood, 2 De G. & S. 216.

(*m*) 8 Sim. 241. See also Sanders *v.* Franks, 2 Mad. 147. But see as to marriage settlements, Hames *v.* Hames, 2 Kee. 646; Marshall *v.* Collett, 1 Y. & C. 232; Meryon *v.* Collett, 9 Beav. 386; Johnson *v.* Routh, 27 L. J. Ch. 305. In Smith *v.* Dudley, 9 Sim. 125, an ultimate limitation in a settlement of the wife's property to "the executors and administrators of her own family" was held to carry it to her next of kin as personæ designatæ, although the ultimate limitation of the husband's property to the executors and administrators of his own family was held to give the husband the absolute interest.

* of her daughter for life, and, after her decease, upon trust [*966] to transfer the principal to her executors or administrators, *to and for his, her, or their use and benefit absolutely forever;* Sir L. Shadwell, V.-C., held that the husband of the daughter, on his taking out administration, was absolutely entitled for his own benefit.

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

Remark on Wallis *v.* Taylor.

The conclusion is that under a gift simply to "representatives," "legal representatives," "personal representatives," and to "executors and administrators," the hand to receive the property is that of the person constituted representative by the proper Court, and that it lies on those maintaining a different construction to show that the testator's intention is clearly so; but that the person so constituted will in the absence of a clear intention to the contrary take the property as part of the estate of the person whose representative he is, and not beneficially (*n*).

General conclusion.

V. — 2. *Gifts to Executors, when annexed to the office.* — When a testator gives to his executors, describing them as such, a specific or pecuniary legacy, which is clearly beneficial, the general rule, in the absence of indication of intention to the contrary, is to regard the legacy as given to the persons so described in their character of executors. And accordingly no such person will be entitled to claim the legacy unless he undertakes the duties of the office to which he has been appointed. "Nothing is so clear as that if a legacy is given to a man as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor" (*o*).

Beneficial legacy to executor generally presumed to be given to him in that character.

So if a testator says "I give 50*l.* to A. as my executor" (*p*), * or "I appoint A. my executor desiring him to accept 100*l.* (*q*), [*967]

(*n*) Per Wigram, V.-C., Holloway *v.* Clarkson, 2 Hare, 523.
(*o*) Per Lord Alvanley, M. R., in Harrison *v.* Rowley, 4 Ves., at p. 216. See also Freeman *v.* Fairlie, 3 Mer. 31.
(*p*) Abbot *v.* Massie, 3 Ves. 148, 3 R. R. 79.
(*q*) Reed *v.* Devaynes, 2 Cox, 285, 3 B. C. C. 95, 2 R. R. 48; but see the remarks on this decision, post, p. 968, note (*c*).

or if he appoints A. his executor and in a subsequent part of the will gives a legacy to "the said A." (*r*), or if he gives a legacy to A. and B. "my executors hereinafter named," and in a subsequent part of the will appoints A. and B. executors of his will (*s*), in all such cases the legacy is regarded as annexed to the executorship.

So if a testator by will or codicil appoints a person as executor and gives him a legacy, and, by a subsequent codicil revokes the appointment, the legacy is deemed to be revoked by virtue of the revocation of the appointment; and if several legacies are given by the will or by a codicil thereto to a person named executor whose appointment is revoked by a subsequent codicil, all such legacies will be deemed to be revoked, though such codicil expressly revokes only one of the legacies (*t*).

Revocation of appointment as executor revokes legacy.

But the presumption that a legacy to a person appointed executor is given to him in that character may be rebutted, if the legatee can satisfy the Court that it was the intention of the testator that he should take the legacy independently of the executorship. If he should succeed in doing so, he will be entitled to receive his legacy, though he refuse to undertake the office. So in Stackpoole *v.* Howell (*u*), Sir W. Grant, M. R., said, "The question is whether you must not find circumstances to show that the legacy was intended for the executor in a distinct character; otherwise, the presumption is prima facie that it is given to him as executor."

The presumption may be rebutted by indication of contrary intention.

A renouncing executor will be entitled to claim his legacy, if he can show that the testator intended him to take independently of his office by the context of the bequest, or by indications of such intention appearing in other parts of the will, or even, as has been said (*x*), by adducing parol evidence of such intention.

What will be sufficient to indicate contrary intention.

The presumption may, accordingly, be rebutted, if the bequest itself contains expressions indicating that the testator's motive in giving the legacy was that of personal regard and affection, and not to provide a remuneration for trouble in administering the estate.

So in Cockerell *v.* Barber (*y*), a testator, after giving a [*968] *legacy to his "friend and partner P.," appointed him one of the executors of the will, and made other devises and bequests in his favor, so that P. was entitled under the will to much greater benefits than any of the other executors (*z*). By a codicil, in which P. was referred to as

Words expressive of regard and affection.

(*r*) Calvert *v.* Sibbon, 4 Beav. 222; Hanbury *v.* Spooner, 5 Beav. 630.
(*s*) Slaney *v.* Watney, L. R., 2 Eq. 418.
(*t*) Walne *v.* Hill, W. N., 1883, p. 171. But see Burgess *v.* Burgess, 1 Coll. 367, post, p. 968.
(*u*) 13 Ves. 417.
(*x*) Per Sir. H. Cotton, L. J., in Re Appleton, Barber *v.* Tebbit, 29 Ch. D. 895, dubitante Sir E. Fry, L. J., at p. 898.
(*y*) 2 Russ. 585.
(*z*) See, however, on this point, post, p. 970.

one of the executors, a further legacy was given to him. It was held by Lord Eldon, C., that all the legacies were given to P. independently of his character of executor.

So also in Bubb *v.* Yelverton (*a*), where a testator appointed his "friend" P. his executor, and gave him a legacy "as a remembrance," it was held by Lord Romilly, M. R., that P. was entitled to the legacy, though he did not prove the will nor act as executor. In the earlier case of Re Denby (*b*) before the Lords Justices of Appeal it was held that a legacy "to my friend A., one of the executors of my will," was not conditional on the acceptance of the office of executor, though there were no other indications in the bequest or will of such intention.

Again, in Burgess *v.* Burgess (*c*), a legacy was given to each of the testator's trustees, naming them, as a mark of his respect for them, and the testator appointed his wife and the legatees executors of his will. Sir J. L. Knight Bruce, V.-C., held that the legacies were not revoked by a codicil appointing other trustees and executors in the room of those originally appointed, and giving legacies of equal amount to the newly appointed trustees and executors in similar language.

Similarly, the description of a legatee named as executor by his degree of relationship to the testator has been held sufficient to rebut the presumption that the legacy is annexed to the office. Thus in Dix *v.* Reed (*d*) a testator named two persons to be his executors, and bequeathed to them 50*l.* each upon condition of their taking upon themselves certain trusts, and in a subsequent part of the will was contained a bequest in these words: "I give to my cousin T. K. 50*l.*, whom I appoint joint executor." It was held by Sir J. Leach, M. R., that the legacy to T. K. was intended to be in respect rather of the legatee's relationship than of his office, and that he was entitled thereto, although he had *declined to act in the trusts of the will. So also [*969] where (*e*) a testator gave several legacies to C. his executor, describing him in some places as "my brother C. my executor," and elsewhere merely as "my brother C." it was held by the same learned judge that C. was entitled to all the legacies though he did not prove, nor act under the will.

Mention of testator's relationship to the legatee-executor.

Next, as to indications of intention arising on other parts of the will.

(*a*) L. R., 13 Eq. 131.
(*b*) 3 De G. F. & J. 350.
(*c*) 1 Coll. 367. On the other hand, in Reed *v.* Devaynes, 2 Cox, 285, 3 B. C. C. 95, where a testator appointed A. and B. his executors "desiring them to accept 100*l.* each, as a mark of my gratitude for the friendship they have shown me," Lord Alvanley, M. R., seems to have paid no attention to these expressions of personal regard, but to have told B. that he would not have the legacy unless he proved. But this may be regarded as inconsistent with the more recent authorities.
(*d*) 1 Sim. & St. 237.
(*e*) Compton *v.* Bloxham, 2 Coll. 201.

Legacy to be paid immediately.

It would seem that if a legacy given to a person named executor is intended to be paid immediately on the testator's decease, or without waiting for the expiration of twelve months thereafter, the legatee will be entitled though he does not prove, nor act under the will (*f*).

Legacy subject to prior life-interest.

The presumption has in several cases been held to be rebutted where a legacy to a person named executor was given in remainder expectant on the determination of a life-interest. Thus (*g*), where a testator, by a codicil, gave to M. a legacy of 200*l.* and appointed him an executor, and in case the testator's son should die a lunatic, then he gave 200*l.* to the said M., Sir J. Stuart, V.-C., held that the latter gift was at any rate not annexed to the office, and that M. took it though he had not proved the will; and his Honor thought that, whatever might have been the case as to the first legacy if it had stood by itself, putting the two passages together, M. was entitled to both (*h*).

So where (*i*) a testatrix gave the residue of her personal estate upon trust to pay the income to M. for her life, and after her decease upon trust to pay thereout a legacy of 100*l.* to P., and, subject thereto upon certain further trusts, and she appointed P. one of her executors; it was held by Sir G. Jessel, M. R., that the fact of the legacy having been given to P. after the death of M., rebutted the presumption that it was given to him in his character of executor.

It has been held in an Irish case (*k*) that a direction that in the event of the executor-legatee's death before the testator, the legacy shall go to his next of kin, will rebut the presumption that the legacy is given to him in his character of executor.

[*970] * Sir L. Shadwell, V.-C., held in two cases (*l*) that the presumption that a gift to a person named executor is attached to the office does not arise where the gift is of residue, or of a share of residue. And the Vice-Chancellor said that there was no case which decided that an executor should be deprived of his right to a residue or a share of a residue given to him, because he did not prove the will (*m*).

Gift of residue.

(*f*) Humberston *v.* Humberston, 1 P. Wms. 332; Brydges *v.* Wotton, 1 V. & B. 134.
(*g*) Wildes *v.* Davies, 1 Sm. & G. 575, 22 L. J. Ch. 497.
(*h*) The same learned V.-C. decided differently in Slaney *v.* Watney, L. R., 2 Eq. 418; but in that case further legacies were given in a subsequent part of the will to the persons named executors "as an *additional* acknowledgment" for their trouble.
(*i*) Re Reeves' Trust, 4 Ch. D. 841.
(*k*) Re Bunbury, I. R., 10 Eq. 408.
(*l*) Griffiths *v.* Pruen, 11 Sim. 202; Christian *v.* Devereux, 12 Sim. 264. See also Parsons *v.* Saffery, 9 Pri. 578.
(*m*) 12 Sim. at p. 269. But only a few years previously, in Barber *v.* Barber, 3 My. & Cr. 688, a case where a residue, consisting of proceeds of a mixed fund, was in the events which happened, given equally among four persons who were appointed executors, Lord Langdale, M. R., had held that one fourth share, in consequence of one of such persons having renounced probate, devolved upon the three other legatees as tenants in common. On appeal before Lord Cottenham, C., the question of the right of the renouncing executor to his share was not raised, but his Lordship reversed the decision of the M. R. as to the devolution of the share, holding that it lapsed and went to the next of kin. See as to this, ante, Vol. I., p. 312, note (*d*).

The presumption that a legacy given to a person who is appointed executor is annexed to the office will not be rebutted by the mere fact that the legacy is given to him by name without describing him as executor, and that his appointment as executor occurs in a subsequent part of the will (*n*), or that the appointment is made by the will and the legacy is given by a codicil to the person so appointed, merely naming him (*o*).

Legacy to executor by name.

Nor will the fact that the legacies to several persons appointed executors differ in amount or subject-matter be enough of itself to rebut the presumption. The decision in Cockerell *v.* Barber (*p*) seems to have been partly influenced by this consideration. But in Re Appleton, Barber *v.* Tebbit, it was laid down by Sir H. Cotton, L. J. (*q*), that it must not be taken as a general rule "that a difference either in the nature or the amount of the legacies given to the persons named as executors is of itself sufficient to show that the gift is not attached to the office."

Difference between amounts of legacies to executors.

Where a testator confers on his executors a power in the nature of a trust, the exercise of which is not part of the duty of executors as such, the question, whether an executor, who renounces probate, will nevertheless continue a trustee for the purpose of exercising the power, will depend on whether, on the construction of the particular will, it appears that the power was * intended to be exercised [*971] by the executors as individuals, or whether it is annexed to their office (*r*).

Where a renouncing executor may exercise a power conferred by the will.

The next question with regard to legacies to persons appointed executors is as to what will amount to a sufficient assumption of the character of an executor to entitle them to claim their legacies.

What is sufficient assumption of executorship to support claim to legacy.

It is clear that if the legatee proves the will with a bona fide intention to act as executor, that will be sufficient to entitle him to his legacy, even though he should die before the business of administering the estate is completed (*s*). And he may prove at any time before the estate is fully administered (*t*). Proving the will is prima facie regarded as an acceptance of the trust (*u*).

It will also be a sufficient assumption of office if the legatee, though he does not prove the will, unequivocally shows by his con-

(*n*) Piggott *v.* Green, 6 Sim. 72; Re Appleton, Barber *v.* Tebbit, 29 Ch. D. 893.
(*o*) Stackpoole *v.* Howell, 13 Ves. 417.
(*p*) 2 Russ. 585; stated ante, p. 967.
(*q*) 29 Ch. D. at p. 896. The decision of Sir W. M. James, V.-C., in Jewis *v.* Lawrence, L. R., 8 Eq 345, must be regarded as overruled.
(*r*) Crawford *v.* Forshaw (1891), 2 Ch. 261 (C. A.), reversing the decision of Kekewich, J., 43 Ch. D. 643.
(*s*) Hollingsworth *v.* Grasett, 15 Sim. 52; Angermann *v.* Ford, 29 Beav. 349.
(*t*) Reed *v.* Devaynes, 2 Cox, 385, 2 R. R. 48.
(*u*) Mucklow *v.* Fuller, Jac. 198.

Acting as executor.

duct that he intends to perform his duty as executor. Thus, in Harrison *v.* Rowley (*x*), an executor, who died before probate, was held entitled to a legacy given to him as executor for his care and loss of time in the execution of the trusts reposed in him, by having concurred with the other executors in directions for the funeral and in paying certain expenses for that occasion. So also in Lewis *v.* Mathews (*y*), an executor to whom a legacy was left for his trouble, being in Australia at the death of the testator, sent home a power of attorney under which another person administered the personal estate and received the rents of the real estate. The executor died without proving the will. It was held by Sir R. Malins, V.-C., that the executor had sufficiently shown his intention to act as such so as to entitle his representatives to the legacy.

Incapacity to act.

But in order to entitle an executor-legatee to his legacy he must either prove or act under the will. He will not be entitled to the legacy, by its being shown that he was incapacitated from undertaking the office by age and infirmity (*z*), or illness (*a*), or by death before he had time to prove the will (*b*).

But the mere fact of proving a will will not support an executor's claim to his legacy if it appears that he procured probate merely in order to claim the legacy and without any bona fide [*972] * intention to act in the trusts of the will; à fortiori if in consequence of misconduct as executor he is restrained from interfering in the administration of the estate (*c*).

Probate fraudulently obtained.

Sometimes a testator gives an annuity to his executors for their trouble in administering his estate, and events may occur raising the question as to whether the annuity should cease to be payable. Thus in Baker *v.* Martin (*d*), a testator dictated that 100*l.* should be annually paid to one of his executors, for his trouble in superintending his concerns, until a final settlement of his affairs should take place. The executor proved and acted. Some time after the testator's death a suit was instituted for the administration of his estate, but no receiver was appointed, and some of the assets were still outstanding, Sir L. Shadwell, V.-C., held that the annuity did not cease on account of the institution of the suit.

Cesser of annuity given to executor for his trouble.

VI. — Gifts to "Relations." — The word "relations" taken in its widest extent embraces an almost illimitable range of objects; for it comprehends persons of every degree of consanguinity, however remote, and hence, unless some line were drawn, the effect would be, that every such gift would be

Gifts to relations, how construed.

(*x*) 4 Ves. 212.
(*z*) Hanbury *v.* Spooner, 5 Beav. 630.
(*b*) Griffiths *v.* Pruen, 11 Sim. 202.
(*d*) 8 Sim 25.
(*y*) L. R., 8 Eq. 277.
(*a*) Re Hawkins' Trusts, 33 Beav. 570.
(*c*) Harford *v.* Browning, 1 Cox, 302.

void for uncertainty. In order to avoid this consequence, recourse is had to the Statutes of Distribution; and it has been long settled, that a bequest to relations applies to the person or persons who would, by virtue of those statutes, take the personal estate under an intestacy, either as next of kin, or by representation of next of kin (*e*).[1]

Objects of a gift to relations determined by Statutes of Distribution.

It was formerly doubted whether this construction extended to devises comprising real estate only, but the affirmative was decided in Doe d. Thwaites *v.* Over (*f*), where a testator devised all his freehold estates to his wife for life, and, at her decease, to be equally divided *among the relations on his side;* and it was held, that the three first cousins of the testator, who were his next of kin at his death, were entitled. A counter claim was made by the heir-at-law, who was the child of a deceased first * cousin, and who contended that the devise was void [*973] for uncertainty. One of the first cousins, who was the nearest paternal relation, also claimed the whole, as being designated by the words "on my side;" but the Court was of opinion that those words did not exclude the maternal relations, they being as nearly related to the testator as the relations ex parte paterna.

As to real estate.

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

(*e*) 2 Ch. Rep. 77; Pre. Ch. 401; Gilb. Eq. Ca. 92; 1 Atk. 469; Ca. t. Talb. 251; 2 Eq. Ab. 368, pl. 13; Dick. 50, 380; Amb 70; 1 T. R. 435, n., 437, n.; 1 B. C. C. 31; 3 id. 234; 4 id. 207; 8 Ves. 38; 9 id. 319; 16 id. 27; 19 id. 423; 3 Mer. 437, 689; overruling Jones *v.* Beale, 2 Vern. 381. So "friends and relations," 2 Ves. 87, 110; 2 Dr. & Sm. 527. But as to *powers of selection* in favor of relations, vide ante, p. 940, n. (*s*). The exclusion of "relatives" from all benefits under a will does not prevent relatives from taking undisposed of property of the testator as his statutory next of kin, Re Holmes, Holmes *v.* Holmes, 62 L. T. 383.

(*f*) 1 Taunt. 263.

(*g*) Rayner *v.* Mowbray, 3 B. C. C. 234.

1 Varrell *v.* Wendell, 20 N. H. 431; Drew *v.* Wakefield, 54 Maine, 291; Green *v.* Howard, 1 Bro. C. C. (Perkins' ed.) 33, note (a); Lees *v.* Massey, 3 De G. F. & J. 113; McNeilledge *v.* Galbraith, 8 Serg. & R. 43; McNeilledge *v.* Barclay, 11 Serg. & R. 103; Rayner *v.* Mowbray, 3 Bro. C. C. (Perkins' ed.) 235, note (1); 2 Williams, Ex. (6th Am. ed.) 1208. See Grant *v.* Lynam, 4 Russ. 92; 4 Kent, 537, note; Wright *v.* Methodist Epis. Church, 1 Hoff. Ch. 213; M'Cullough *v.* Lee, 7 Ohio, 15; Devisme *v.* Mellish, 5 Ves. (Sumner's ed.) 529, note (a).

The term "relations" in the Statutes of Distribution of some, if not all, of the states, means relations by blood. Elliot *v.* Fessenden, 83 Maine, 197 (citing Keniston *v.* Adams, 80 Maine, 290); Cleaver *v.* Cleaver, 39 Wis. 96; Esty *v.* Clark, 101 Mass. 36; Kimball *v.* Story, 108 Mass. 382. If there be two equally appropriate interpretations of a will, so far as mere language is concerned, in the case of a contest between one of kin with the testator and a stranger, that one will be adopted which prefers the kin, especially where the kin is heir-at-law. Quinn *v.* Hardenbrook, 54 N. Y. 83. As to "nearest relations" see Lock *v.* Lock, 45 N. J. Eq. 97.

On the other hand, in Greenwood *v.* Greenwood (*h*), where a testatrix gave the residue "to be divided between her relations, that is, the Greenwoods, the Everits, and the Dows:" the testatrix had herself explained her meaning, and, therefore, the Everits, although not within the degree of relationship limited by the statute, were held to take jointly with the Greenwoods and Dows, who were.

To "relation" in the singular.

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

Distribution among "heirs" or "representatives" is under the statute.

In a gift to next of kin expressly according to the Statutes of Distribution, the statutes, as already noticed, not only determine the objects of gift, but also regulate the manner and proportions in which they take (*k*). And a gift to "heirs" (*l*) or "legal representatives" (*m*), where either [*974] expression is construed * statutory next of kin, is brought by the implied reference to the statute under the same rule.[1]

But among "relations" is per capita.

A gift to "relations," though not so plainly pointing to succession ab intestato, might perhaps have been thought to fall within the reason of the rule (*n*). By construction such a gift is limited to those entitled as next of kin under the statute (*o*); and though this is founded on the inconvenience of a wider interpretation (*p*), still it is a rule of construction, and as such supposes the testator to have the statute in his contemplation. But authority, though not perfectly distinct, inclines to an opposite view. Thus in Tiffin *v.* Longman (*q*), where a testator gave personalty to his daughter for life, and if she died

Tiffin *v.* Longman.

(*h*) 1 B. C. C. 32, *n.* See Stamp *v.* Cooke, 1 Cox, 234, stated post; Griffith *v.* Jones, 2 Freem. 96.

(*i*) Pyot *v.* Pyot, 1 Ves. 337; and see per Lord Loughborough, Marsh *v.* Marsh, 1 B. C. C. 294. So of the words "inheritor," "party," &c., Boys *v.* Bradley, 10 Hare, 389, 4 D. M. & G. 58.

(*k*) Ante, p. 955.

(*l*) Jacobs *v.* Jacobs, 16 Beav. 557. And see Doody *v.* Higgins, 2 K. & J. 729; Re Porter's Trust, 4 K. & J. 188; Re Thompson's Trusts, 9 Ch. D. 607.

(*m*) See Booth *v.* Vicars, 1 Coll. 6; Rowland *v.* Gorsuch, 2 Cox, 187, ante, p. 945; Alker *v.* Barton, 12 L. J. Ch. 16. Walker *v.* Marquis of Camden, 16 Sim. 329, is contra, sed qu.; and in Stockdale *v.* Nicholson, L. R., 4 Eq. 359, a gift to "next personal representatives" was treated as a gift to "next of kin" (totidem verbis), and as creating a joint tenancy; sed qu., see Booth *v.* Vicars, sup.

(*n*) See the Author's note to 1 Pow. Dev. 290, maintaining this view, chiefly on the authority of Pope *v.* Whitcombe, 3 Mer. 689: it afterwards appeared that the report of that case was inaccurate, and that the facts of it did not raise the question, Sug. Pow. 8th ed. 660. However, the Author re-stated his former view, though without reference to any authority, 1st ed. of this work, Vol. II. p. 46. And see per Kindersley, V.-C., 2 Sim. N. S. 111, 112.

(*o*) Gilb. Eq. Ca. 92.

(*p*) 1 B. C. C. 33.

(*q*) 15 Beav. 275.

[1] Tillinghast *v.* Cook, 9 Met. 143, 147; Daggett *v.* Stack, 8 Met. 450. See Kean *v.* Roe, 2 Harring. 103.

without issue (which happened) he directed that advertisements should be published for the information of his relations, and gave the property to such of them as should make their claim within two months after such advertisements, to be divided among them according to the discretion of his executors (who died without exercising it); it was held by Sir J. Romilly, M. R., that the class was to be ascertained at the death of the daughter, that it consisted of those who would have been the testator's statutory next of kin if he had then died intestate, and that the property must be divided between the class equally, per capita.

From the express direction to divide per capita it is to be inferred that the facts of the case (which in this respect are not given) actually called for a decision of the material question whether distribution should or should not be according to the statute, *i. e.*, per stirpes. It is observable, however, that the objects of gift were what has been called an artificial class created by the testator and to be ascertained at a time other than the death of the propositus — a circumstance which, even where the gift is to "next of kin" with an express reference to the statute, is considered to deprive the reference of much of its force beyond ascertaining the persons who are to take (*r*).

Again in Eagles *v.* Le Breton (*s*), where a testatrix gave all her * property to her sisters A. and B., and by codicil [*975] directed that at their death it should "pass to her relations in America." Her relations in America at her death consisted of thirteen persons, all being her first cousins. One of them died before B. (who survived the testatrix). It was held by the same judge that the thirteen cousins were entitled, and that they took, not as tenants in common, as they would have taken under the statute, but as joint tenants. He said it was settled that under a gift of this description the class was to be ascertained at the testator's death (*t*); also that "relations" meant the persons who would take under the statute; that it was true that where there was an express reference to the statute they would take as tenants in common in the shares in which they would have taken on an intestacy. But that when there was no express reference to the statute the case was different. There was nothing then to prevent the ordinary rule from applying, that under a gift to a class without words of severance all the members of the class took as joint tenants. Eagles *v.* Le Breton.

Here again the class was an artificial one, being limited to those in America, and excluding the surviving sister (*u*). This limit happened

(*r*) See per Selwyn, L. J, L. R., 4 Ch. 303; per Lord Cairns, 4 App. Ca. 451.

(*s*) 42 L. J. Ch. 362; also reported, but less fully and with some variations, L. R., 15 Eq. 148 (where "tenant for life" in the judgment is an erratum for "testatrix").

(*t*) As to this see below.

(*u*) The cousins not being properly next of kin, they would have been entitled if the gift had been to "*next of kin* in America." See Doe *v.* Plumptre, ante, p. 956. In Smith *v.* Campbell, 19 Ves. 400, upon a gift to "*nearest* relations in Ireland," Grant, M. R., held the words "in Ireland" to be demonstratio merely, not limitatio.

to be the same as (putting the sister aside) was imposed by the statute. But the statute was not thereby prevented from applying; for the circumstances might have been different at the death of the testatrix, and a gift to relations in a particular country might often be as indefinite as a gift to relations simpliciter. In denying to any but an express reference to the statute the effect of importing the statutory mode of distribution, the M. R. probably intended to speak only of a case where (as here) the term used was "relations," and not to deny the sufficiency of an implied reference in case where the terms used were "next of kin" or "heirs," which would have been to contradict a previously expressed opinion (*x*) and a previous decision (*a*) of his own.

If the testator has introduced into the gift expressions pointing at equality of participation, of course the statutory mode of distribution is excluded, and all the objects of every degree are [*976] *entitled in equal shares (*b*), whether the gift be to "relations" or (where either of these terms is construed statutory next of kin) to "legal representatives" (*c*), or, it may be presumed, to "heirs" (*d*).

A fortiori where there are words directing equal distribution.

The objects of a gift to "relations" are not varied by its being associated with the word "near" (*e*). But where the gift is to the "nearest relations," the next of kin will take, to the exclusion of those who, under the statute, would have been entitled by representation. Thus, surviving brothers and sisters would exclude the children of deceased brothers and sisters (*f*), or a living child or grandchild, the issue of a deceased child or grandchild. And on the other hand, all who stand in the same degree must take under the will, though only some of them would have been entitled under the statute (*g*). Where, however, the testator added to a devise to nearest relations, the words "as sisters, nephews, and nieces," Sir Ll. Cenyon, M. R., directed a distribution according to the statute; and they were held to take per stirpes, though it was contended,

"Near" and "nearest" relations.

Nearest relations, "as sisters, nephews, and nieces."

(*x*) In Lucas *v.* Brandreth, 28 Beav. 278.
(*a*) Jacobs *v.* Jacobs, 16 Beav. 557, ante, p. 973.
(*b*) Thomas *v.* Hole, Cas. t. Talb. 251; Green *v.* Howard, 1 B. C. C. 31; Rayner *v.* Mowbray, 3 id. 234; Butler *v.* Stratton, id. 369.
(*c*) Smith *v.* Palmer, 7 Hare, 225. In Holloway *v.* Radcliffe, 23 Beav. 163, "equally" was neutralized by "in like manner as under the statute;" so, Fielden *v.* Ashworth, L. R., 20 Eq. 410. In Booth *v.* Vicars, 1 Coll. 6, where the gift was to "next legal representatives of A. & B. share and share alike," the words "share and share alike" were held to refer to A. and B. only, so as to make equal division between the stocks.
(*d*) Low *v.* Smith, 25 L. J. Ch. 503, 2 Jur. N. S. 344, ante, p. 925. The difficulty (there mentioned) "that in that sense the property would not go equally," was apparently put by the Court as suggesting that reference to the statute, which directs that objects shall take per stirpes, could not have been intended, and, consequently, as an objection (which yet it overcame) to construing "heirs" in the sense of statutory next of kin, not as intimating that, if it was so construed, the objects would not take in equal shares.
(*e*) Whithorne *v.* Harris, 2 Ves. 527. See also 19 Ves. 403.
(*f*) Pyot *v.* Pyot, 1 Ves. 335; Marsh *v.* Marsh, 1 B. C. C. 293; Smith *v.* Campbell, 19 Ves. 400, Coop. 275. But see Edge *v.* Salisbury, Amb. 70
(*g*) See Withy *v.* Mangles, 4 Beav. 358, 10 Cl. & Fin. 215, ante, 954.

that all the relations specified should take per capita, including the children of a living sister. He thought, however, that the testator had a distribution according to the statute in his view; at all events, that the contrary was not sufficiently clear to induce him to depart from the common rule. The children of the living sister, therefore, were excluded (*h*).

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

* A gift to next of kin or relations, of course, does not extend to relations by affinity (*k*), unless the testator has subjoined to the gift expressions declaratory of an intention to include them.[1] Such, obviously, is the effect of a bequest expressly to relations "by blood or marriage" (*l*), or of a gift by a married man "to nephews and nieces on both sides" (*m*). [*977] Relations by affinity.

It is clear that a gift to next of kin or relations does not include a husband (*n*)[2] or wife (*o*),[3] nor is a wife included in a bequest to "my next of kin, *as if I had died intestate*" (*p*); the latter words being considered not to indicate an intention to Husband or wife.

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

(*i*) Cotton *v.* Scarancke, 1 Mad. 45. The presumption may be rebutted by the context of the will, Re Reed, 36 W. R. 682.

(*k*) Maitland *v.* Adair, 3 Ves. 231; Harvey *v.* Harvey, 5 Beav. 134. See Craik *v.* Lamb, 1 Coll. 489, 494.

(*l*) Devisme *v.* Mellish, 5 Ves. 529.

(*m*) Frogley *v.* Phillips, 30 Beav. 168, 3 D. F. & J. 466. As to what will or will not suffice to include particular relations by affinity, see post, Ch. XXX. s. ii., and Hibbert *v.* Hibbert, L. R., 15 Eq. 372.

(*n*) Watt *v.* Watt, 3 Ves. 244; Anderson *v.* Dawson, 15 id. 537; Bailey *v.* Wright, 18 id. 49, 1 Sw. 39.

(*o*) Nicolls *v.* Savage, cit. 18 Ves. 53; Re Parry, Scott *v.* Leak, W. N. 1888 p. 179.

(*p*) Garrick *v.* Lord Camden, 14 Ves. 372. See also Davies *v.* Bailey, 1 Ves. 84; Worsely *v.* Johnson, 3 Atk. 758, Cholmondeley *v.* Lord Ashburton, 6 Beav. 86; Kilner *v.* Leech, 10 Beav. 362; Lee *v.* Lee, 29 L. J. Ch. 788. In Re Collins' Trusts, W. N. 1877, p. 87, the widow was upon the context held entitled to share, sed qu. In Ash *v.* Ash, 10 Jur. N. S. 142, the widow was admitted to a share because the will was thought to amount to a declaration of intention to die intestate. In Hawkins *v.* Hawkins, 7 Sim. 173, a fund belonging to the wife (who was illegitimate) was settled in default of issue in trust for her next of kin; she died without issue in her husband's lifetime, and it was held against the Crown that the settlement was exhausted, and that the husband administrator was entitled for his own benefit.

[1] A step-son of the testator is not a relation of his under the Massachusetts Gen. Stat. c. 92, § 28. Kimball *v.* Story, 108 Mass. 382.

[2] A man may take as "husband" though his marriage was unlawful, and though a lawful husband be living. Hardy *v.* Smith, 136 Mass. 328.

[3] 3 Kent, 136; Clark *v.* Esty, 101 Mass. 36; Harraden *v.* Larrabee, 113 Mass. 430; Wetter *v.* Walker, 62 Ga. 142, 145; Withy *v.* Mangles, 4 Beav. 358; *s. c* 10 Clark & F. 215; Keteltas *v.* Keteltas, 72 N. Y. 312; Murdock *v.* Ward, 67 N. Y. 387; Luce *v.* Dunham, 69 N. Y. 36; Townsend *v.* Radcliffe, 44 Ill. 446; Jones *v.* Oliver, 3 Ired. Eq. 369; Watt *v.* Watt, 3 Ves. Jr. (Sumner's ed.) 244, note (*a*): Whitaker *v.* Whitaker, 6 Johns. 112; Hoskins *v.* Miller, 2 Dev. 360; Dennington *v.* Mitchell, 1 Green, Ch. 243; Byrne *v.* Stewart, 3 Desaus. 135; Storer *v.* Wheatley, 1 Penn. St. 506. See Cleaver *v.* Cleaver, 39 Wis. 96; Kimball *v.* Story, 108 Mass. 382, as to relations under the Statutes of Distribution; and compare ante, p. 934, note, as to whether the wife can take as "heir" of the husband.

give to the persons entitled under the statute at all events; *i. e.*, whether next of kin or not. But under a bequest to the persons who under the statute would be entitled as on an intestacy (*q*), or to "legal" or "personal representatives" (where those words are held to mean persons entitled as upon an intestacy (*r*)), in either of these cases a wife is entitled to a share, for these terms do not imply consanguinity. In neither case would a husband be entitled. The reference, whether express or implied, to the statute excludes [*978] him (*t*); for he is not of kin and does not take * his wife's estate under the Statutes of Distribution (*u*), but by a right paramount (*x*).

Gifts "to poor relations," how construed.

A difficulty in construing the word "relations" sometimes arises from the testator having superadded a qualification of an indefinite nature; as where the gift is to the *most deserving* of his relations; or to his *poor or necessitous* relations. In the former case, the addition is disregarded, as being too uncertain (*y*); and the better opinion, according to the authorities is, that the word "poor" also is inoperative to admit relations beyond the limits of the statute. Thus in Widmore *v.* Woodroffe (*z*), a testator bequeathed one-third of his property *to the most necessitous of his relations* by his father's and mother's side. He left a niece his sole next of kin according to the statute, and more remote relations; and it was argued for the latter that in consequence of the use of the word "necessitous" the gift ought not to be confined to those who were within the statute; but Lord Camden said "several cases have been cited, all making the statute the rule, to prevent an inquiry which would be infinite. Thus it would clearly stand upon the word 'relations' only, *the word 'poor' being added makes no difference.* There is no distinguishing between the degrees of poverty." That is to say, unless limited by the statute, an inquiry who are poor

(*q*) Martin *v.* Glover, 1 Coll. 269; Jenkins *v.* Gower, 2 Coll. 537; Starr *v.* Newberry, 23 Beav. 436.

(*r*) Cotton *v* Cotton, 2 Beav. 67, 10 Beav. 365 n; Smith *v.* Palmer, 7 Hare, 225; Holloway *v.* Radcliffe, 23 Beav. 163. Although in Booth *v.* Vicars, 1 Coll. 6, K. Bruce, V.-C., used the word "consanguinity," he expressly guarded himself on a subsequent occasion, Wilson *v* Pilkington, 11 Jur. 537, against the supposition that he intended thereby to exclude the widow. Robinson *v.* Smith, 6 Sim. 49, proceeded on special grounds, as did Bulmer *v.* Jay, 4 Sim. 48, 3 My. & K. 197.

(*t*) King *v.* Cleaveland, 26 Beav. 166, 4 De G. & J. 477; and see Re Walton's Estate, 25 L. J. Ch. 569. But why should a reference to the statute be implied? Why should not the words be construed those who are entitled to the personal estate in case of intestacy? Generally those persone must be ascertained by reference to the statute; but is not that accidental? There is nothing importing consanguinity. If a woman dies leaving a husband, why should his beneficial title be worse because he is also the legal personal representative in the strict legal sense? However, the point is settled.

(*u*) Milne *v.* Gilbart, 2 D. M. & G. 715, 5 D. M. & G. 510. And see Watt *v.* Watt, 3 Ves. 244.

(*x*) Per Lord Cranworth, L. J., Milne *v.* Gilbart, 2 D. M. & G. 722. "It may be that he is entitled to administer under the statute of 31 Edw. 3, c. 11, but this is a different right," id.

(*y*) Doyley *v.* Att.-Gen., 4 Vin. Abr. 485, pl. 16, 2 Eq. Ca. Abr. 194, pl. 15.

(*z*) Amb. 636, citing Carr *v.* Bedford, 2 Ch. Rep. 146; Griffith *v.* Jones, id. 394; and Isaac *v.* Defriez, and Brunsden *v.* Woolredge, both stated below. A fortiori, if the term be "nearest relations," Goodinge *v.* Goodinge, 1 Ves. 231.

relations would be as "infinite" as the inquiry who are relations. This decision may be considered to have overruled the earlier case of Att.-Gen. *v.* Buckland (*a*), in which a gift to *poor relations* was extended to necessitous relations *beyond* the Statutes of Distribution.

In Widmore *v.* Woodroffe, as there was only one relation within the statute, the question whether the word "poor" had any operation in still further qualifying the word "relations" did not arise (*b*). But authority is not wanting to show that as between those who are within the statute the qualification is not to be disregarded. The inquiry is then not who are poor or poorest of an infinite number (which Lord Camden said there * was no distinguishing), [*979] but who are comparatively so among a limited number.

In an early case (*c*) it was said that the word "poor" was frequently used as a term of endearment and compassion, as one often says, "my poor father," &c.; and accordingly a countess, who was "a relation as near as any to the testator," but it seems had not an estate equal to her rank, was held to be entitled to a share under a bequest to "poor relations." This, however, is no authority upon the question what is the effect of the word "poor" when it imports poverty.

In Brunsden *v.* Woolredge (*d*), where, by will dated 1734, B. bequeathed 500*l.* on a certain event, to be distributed among his mother's poor relations. Also W. (the brother of B.) by will dated 1757, devised real estates to A. and his heirs, in trust to sell to pay debts, and pay the overplus to such of his mother's *poor relations*, as A., his heirs, &c., should think objects of charity; Sir T. Sewell, M. R., held that the gift was confined to those who were within the statute; and that the true construction of both wills was, "such of my mother's relations as are poor and proper objects." He said the difference was, that the latter gave a discretionary power to the executor, and the former did not.

In several cases gifts to poor relations seem to have been regarded as charitable (*e*). But in most of them the intention was to create a perpetual fund. Thus, in Isaac *v.* Defriez (*f*), where a testator bequeathed an annuity to his sister for life, and after her death to his own and his wife's poorest relations, to be distributed proportionably share and share

Gifts to poor relations when regarded as charity.

(*a*) Cited 1 Ves. 231, Amb. 71, n., Blunt's ed.

(*b*) The Author (Vol. II. 51, 1st ed.) thought the decision regarding the will of B. in Brunsden *v.* Woolredge irreconcilable with Widmore *v.* Woodroffe. But see a valuable note, Lewin, Trusts, p. 836, 8th ed.

(*c*) Anon, 1 P. W. 327.

(*d*) Amb. 507, Dick. 380, R L. 1764 A., fo. 536. See also Carr *v.* Bedford, Griffith *v.* Jones, both sup.; Gower *v.* Mainwaring, 2 Ves. 87, 110, as to which see Lewin, Trusts, p 836, n., 8th ed.

(*e*) When this is the case "poor" bears the specific meaning attached to it in charity cases, see Vol. I. p 172. That charity was not the ground of Sir T. Sewell's judgment in Brunsden *v.* Woolredge is clear; for the subject of gift under the will of William (dated 1757) was land, or money to arise by sale of land, a gift of which to charitable uses would have been void by 9 Geo. 2, c. 36 (1736).

(*f*) Amb. 595, more correctly in n. by Blunt, and 17 Ves. 373 n.

alike at the discretion of his executors; he further gave the interest of his stock to his wife for life, and after her death directed all money then on any securities should *so continue*, and one half-year's interest he gave to one poor relation of his own, the management thereof to be at the discretion of his executors, and the other one-half to one poor relation of his wife in like manner; it was treated as a charity, and appears not to have been restricted to relations
[*980] * within the statute (*g*); an impracticable restriction, indeed, where the trust, as here, was to have perpetual continuance.

Again, in White *v.* White (*h*), a legacy of 3,000*l.* "for the purpose of putting out our poor relations" apprentices, was supported as a charity. The decree directed objects who were ready to be put out, and the fund to be laid out from time to time. And in Att.-Gen. *v.* Price (*i*), where a testator by his will, dated 1581, devised land to A. and his heirs in trust that he and they should forever distribute according to his and their discretion amongst the testator's poor kinsmen and kinswomen and their issue, 20*l.* by the year, Sir W. Grant held it to be a charity. "It is to have perpetual continuance in favor of a particular description of poor, and is not like an immediate bequest of a sum to be distributed among poor relations."

These authorities were followed by Sir J. Wickens, V.-C., in Gillam *v.* Taylor (*k*), where the trust was to invest in the names of the trustees, the interest to be from time to time given to such of the lineal descendants of testator's uncle R. as they may severally need, and the trustees were directed to make such provision as would insure the continuance of the trust at their decease.

But although the gift is of a sum in gross, the context may show that charity is intended. Thus, in Mahon *v.* Savage (*l*), a testator bequeathed to his executor 1,000*l.*, to be distributed among his (the testator's) *poor relations*, or such *other* objects of charity as should be mentioned in his private instructions. He left no instructions; and it was held by Lord Redesdale that the testator's design was to give to them as objects of charity, and not merely as relations, that a relation within the statute who had become rich before distribution was not entitled to a share, and that a share was not transmissible to representatives (*i. e.*, of an object who died before distribution). He also thought that the executors had a discretionary power of distribution, and need not include *all* the testator's poor relations, and that poor relations beyond the statute might be admitted.

Remark on Mahon *v.* Savage.

(*g*) Amb. 596, n. (2).
(*h*) 7 Ves. 423.
(*i*) 17 Ves. 371. So in Hall *v.* Att.-Gen., Rolls, 28 July, 1829, Leach, M. R., held that a devise of real estate to trustees "in trust to pay the rents to such of my poor relations as my trustees shall think most deserving" was a charitable trust, and therefore void as a gift of an interest in land.
(*k*) L. R., 16 Eq. 581; but as to the *meaning* of 'poor" in charity cases, see Att.-Gen. *v* Duke of Northumberland, 7 Ch. D. 745.
(*l*) 1 Sch. & Lef. 111.

This case is clearly distinguishable from a simple gift to poor * relations; for the additional words denoted that char- [*981] ity was the main object of the testator.

VII. — At what Period Relations, Next of Kin, &c., are to be ascertained. — This question, however, which more than any other has been the subject of controversy in gifts to next of kin and relations, refers to the period at which the objects are to be ascertained; in other words, whether the person or persons who happen to answer the description at the testator's death, or those to whom it applies at a future period, are intended.[1] Where a devise or bequest is simply to the testator's own next of kin, it necessarily applies to those who sustain the character at his death. It is equally clear that where a testator gives real or personal estate to A. (a stranger) during his life, or for any other limited interest, and afterwards to his own next of kin, those who stand in that relation at the death of the testator will be entitled, whether living or not at the period of distribution (*m*), there being nothing in the mere circumstance of the gift to the next of kin being preceded by a life or other limited interest to vary the construction; the result in fact being the same as if the gift had been "to my next of kin, *subject to a life interest in A.*" The death of A. is the period, not when the objects are to be ascertained, but when the gift takes effect in possession.[2]

Next of kin *simpliciter* means those living at testator's death.

In Wharton *v.* Barker (*n*) the gift (after a previous life estate and failure of children) was of one half to the persons "who shall then be considered as my next of kin" according to the statute, and of the other half to the persons "who shall then be considered as the next of kin (by statute) of my deceased wife." Sir W. P. Wood, V.-C.,

(*m*) Harrington *v.* Harte, 1 Cox, 131. See also 3 B. C. C. 234; 4 id. 207; 3 East, 278; Taml. 346; 4 Jur. N. S. 407.

(*n*) 4 K. & J. 483. The decision on the former half was influenced by the construction made as to the latter; without this some of the V.-C.'s remarks would seem to show more reliance on existing circumstances than is perhaps quite consistent with modern authority. See also Philps *v.* Evans, 4 De G. & Sm. 188. In Re Rees, Williams *v.* Davies, 44 Ch. D. 488, the gift was to the persons who would have become entitled to the estate of the husband of the testatrix if he had died intestate, and "*without leaving any widow him surviving:*" Stirling, J., considered that the concluding words of the gift took the case out of the rule in Wharton *v.* Barker.

[1] Prima facie the next of kin at the death of the testator are meant; and the indication should be clear to overcome the presumption. Moss *v.* Dunlop, Johns. 490; Wharton *v.* Barker, 4 Kay & J. 483 (where the presumption was overcome by the words "shall then be considered"); Long *v.* Blackall, 3 Ves. 486 (presumption overcome); Harrison *v.* Harrison, 28 Beav. 21; Pinder *v.* Pinder, id. 44 (presumption overcome by limitation to next of kin of wife after death of surviving husband and failure of children); Chalmers *v.* North, 28 Beav. 175; Downes *v.* Bullock, 25 Beav. 54; *s. c.* 9 H. L. Cas. 1; Lees *v.* Massey, 3 De G. F. & J. 113; Martin *v.* Holgate, L. R., 1 H. L. 175; Heaseman *v.* Pearse, L. R., 7 Ch. 660 ("then living"); In re Ridge's Trusts, id. 665; Penny *v.* Clarke, 1 De G. F. & J. 425; Dove *v.* Torr, 128 Mass. 38 ("then entitled" as heirs of the testator); Thompson *v.* Ludington, 104 Mass. 193 ("then living," importing contingency).

[2] Jones *v.* Oliver, 3 Ired. Eq. 369; Wharton *v.* Barker, 4 Kay & J. 483; Rayner *v.* Mowbray, 3 Brown, Ch. 234.

thus stated the rule applicable in such cases: "According to Philips *v.* Evans a bequest to the next of kin of a person who is dead at the date of the will must, under ordinary circumstances, receive an interpretation analogous to that adopted in the case of a bequest to the testator's own next of kin as regards the period for ascer-
[*982] taining who are the * persons intended; and if there be nothing in the context to make the words applicable to a class to be ascertained at any other time than that of the testator's death, those who at the testator's death are the next of kin of the deceased person named in the will would naturally be the persons to take."

Next of kin of deceased person.

Where the gift is to "the next of kin" of a person then actually dead, or who happens to die before the testator, the entire property (at least, if there be no words severing the joint-tenancy) vests in such of the objects as survive the testator (*o*). But where (*p*) a testator directed a sum of money to be "divided between and amongst the relations of his late wife in such manner, shares, and proportions as would have been the case if she had died possessed of the said sum, a spinster and intestate;" the wife had left sixteen nephews and nieces, her statutory next of kin, five of whom died before the testator; and it was argued that this was a gift to a class, and that the whole vested in those who survived the testator. Sir R. Kindersley, V.-C., agreed that it would have been so, if the gift had been simply to the wife's relations (*q*); but there was also a direction that they were to take in the manner, shares, and proportions prescribed by the statute: this they could only do by reading the will as a gift to all the relations of the wife living at her death as tenants in common; for if the survivors took the whole they would take in different shares from those prescribed by the statute (*r*). The shares of those who died before the testator therefore lapsed.

It will be remembered, however, that in Bullock *v.* Downes the exclusion of the widow was held not to prevent the statute from governing the distribution of the whole fund among the others, as if they had been the only persons who would have been entitled in case of intestacy. And in Re Philps' Will (*s*), where the gift was to the testator's childreu living at the death of his wife, "or their
[*983] heirs" (which is a gift to the persons entitled * under the

(*o*) Vaux *v.* Henderson, 1 J. & W. 388, n. There being no words of severance, the question, whether it was a gift to such of the next of kin as survived the testator, did not arise, as they were entitled quâcunque viâ; see, however, infra, n. (*s*). See further Philps *v.* Evans, 4 De G. & S. 188; where, however, the only question was between the next of kin at the testator's death and those at the death of the tenant for life. And see Wharton *v.* Barker, 4 K. & J. 502.

(*p*) Ham's Trust, 2 Sim. N. S. 106.

(*q*) See Lee *v.* Pain, 4 Hare, 250, and other cases cited post, Ch. XXX. s. iii.

(*r*) See per Hall, V.-C., Sturge *v.* Great Western Rail. Co., 19 Ch. D. 449.

(*s*) L. R., 7 Eq. 151. The gift in Vaux *v.* Henderson, also was to "heirs"; but the effect of a reference to the statute had not then been decided. Neither that case nor Ham's Trust was cited in Re Philps' will.

statute in the statutory proportions) (*t*), it was held by Sir J. Romilly, M. R., that the next of kin of children who were dead at the date of the will must be ascertained, not at the death of the children, but at the death of the testator, because the will did not take effect until then.

If the gift be to the next of kin or relations of a person who outlives the testator, of course the description cannot apply to any individual or individuals at his (the testator's) decease, or at any other period during the life of the person whose next of kin are the objects of gift (*u*) "There is no such character in law as the heir of a living person, or as his statutory next of kin" (*v*). The vesting must await his death, and will apply to those who first answer the description, without regard to the fact whether by the terms of the will the distribution is to take place then or at a subsequent period (*w*).

— of person who survives testator.

The rule of construction which makes the death of the testator the period of ascertaining the next of kin is adhered to notwithstanding the terms of the will confine the gift to such of the next of kin as shall be *living* at the period of distribution; for this merely adds another ingredient to the qualification of the objects, and makes no further change in the construction. Indeed, it rather affords an argument the other way. Thus, where (*x*) a testator directed personal estate, and the produce of real estate, to be laid out for accumulation for ten years, and then a certain part thereof divided among such of the testator's next of kin and personal representatives *as should be then living*, Lord Thurlow held, that the next of kin at the testator's death, *surviving the specified period*, were entitled; *for it was plain that the testator meant some class of persons, of whom it was doubtful whether they would live ten years.*

Next of kin living at a future period.

The same construction prevails, though the tenant for life, at whose death the distribution is to be made, is himself one of the next of kin. As where (*y*) a testator bequeathed 5,000*l.* in trust * for [*984] his daughter for life, and after her decease for her children

(*t*) Ante, pp. 924, 973.
(*u*) Danvers *v.* Earl of Clarendon, 1 Vern. 35.
(*v*) Per Kay, J., Re Parsons, Stockley *v.* Parsons, 45 Ch. D. 51, 63.
(*w*) Cruwys *v.* Colman, 9 Ves. 319; Smith *v.* Palmer, 7 Hare, 225; Gundry *v.* Pinniger, 14 Beav. 94, 1 D. M. & G. 502; Walker *v.* Marquis of Camden, 16 Sim. 329. As to Booth *v.* Vicars, 1 Coll. 6, and Godkin *v.* Murphy, 2 Y. & C. C. C. 351, see 1 D. M. & G. 504; 8 Hare, 307.
(*x*) Spink *v.* Lewis, 3 B. C. C. 355; Bishop *v.* Cappel, 1 De G. & S. 411. The contrary construction appears to have been assumed in Destouches *v.* Walker, 2 Ed. 261, where however, the gift was to such of testatrix's *relations*, &c. — as to which vide inf. p. 986, n. (*d*).
(*y*) Holloway *v.* Holloway, 5 Ves. 399; Harrington *v.* Harte, 1 Cox, 131; Masters *v.* Hooper, 4 B. C. C. 207; Doe d. Garner *v.* Lawson, 3 East, 278; Lasbury *v.* Newport, 9 Beav. 376; Jenkins *v.* Gower, 2 Coll. 537; Wilkinson *v.* Garrett, id. 643; Wilson *v.* Pilkington, 11 Jur. 537 (settlement); Holloway *v.* Radcliffe, 23 Beav. 163; Starr *v.* Newberry, id. 436; Re Greenwood's will, 31 L. J. Ch. 119, the report of which 3 Gif. 390 is wrong, see R. L., A. 1861, fo. 2402.

Prior legatee for life, himself one of the next of kin.

living at her decease, in such shares as she should appoint; and in case she should leave no child, then as to 1,000*l.*, part thereof, in trust for the executors, administrators, and assigns of the daughter; and as to 4,000*l.*, the remainder, in trust for the person or persons who should be his heir or heirs-at-law. The daughter died without leaving children. She and two other daughters were the testator's heirs-at-law. Sir R. P. Arden, M. R., held the heirs *at the time of the testator's death* to be entitled, from the absence of expression showing that these words were necessarily confined to another period, which, he said, required something very special. He thought the word "heirs" was to be construed as next of kin, but this it was unnecessary to determine, the daughters being entitled quâcunque viâ.

So far the law has long been clearly settled. But notwithstanding the generality of the principle asserted by Sir R. P. Arden, it was made a question whether, if the person taking the life interest was the *sole* next of kin at the death of the testator, an intention was not ipso facto shown that the gift should vest in the person answering the description at the death of the tenant for life. And several authorities are to be found favoring this distinction, of which one of the first in time and importance was Jones *v.* Colbeck (*z*), where a testator devised the residue of his estate to the children of his daughter M., and until she should have children, or if she should survive them, then to the separate use of M. during her life; and after the decease of his said daughter and her children, in case they should all die under twenty-one, that the residuum should go and be distributed *among his relations* in a due course of administration. The daughter was the only next of kin at the testator's death. Sir W. Grant, M. R., thought it was clear that the testator intended to speak of relations not at the time of his own death, but at that of his daughter or her issue under twenty-one. He deemed it impossible that the testator could mean that the relations who were to take in that event were the daughter herself, who the testator evidently thought would survive him, and to [*985] whom the * expression "my relations" was in the opinion of the M. R., quite inappropriate.

Effect where legatee for life is sole next of kin.

Again, in Briden *v.* Hewlett (*a*), where a testator bequeathed all his personalty in trust for his mother for life, and after her decease, unto such persons as she by will should appoint; and in case his mother should die without a will, then *to such person or persons as would be entitled to the same by virtue of the Statute of Distributions.* The mother was the testator's sole next of kin at his death; and Sir J. Leach, M. R., held

Effect where prior legatee for life was sole next of kin.

(*z*) 8 Ves. 38. "That case has the singular property of being often cited as an authority, always considered as open to observation, and never followed," per Stuart, V.-C., 1 Sm. & Gif. 122.

(*a*) 2 My. & K. 90. But see Harvey *v.* Harvey, 3 Jur. 949, post.

that she was not entitled absolutely in this character, and that the property devolved to the testator's next of kin at the time of the decease of the mother. "It is impossible," said his Honor, "to contend that this testator meant to give the property in question absolutely and entirely to his mother, because he gives it to her for life, with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons as would be entitled to it by virtue of the Statute of Distributions. Entitled at what time? The word 'would' imports that the testator intended his next of kin at the death of his mother."

So where property was given to a testator's next of kin in defeasance of a prior gift in favor of persons, who, if they survived him, would be his next of kin at his death, the gift was considered as pointing to next of kin at a future period. As where (*b*) a testator bequeathed the residue of his personal estate, upon trust (among other things) to raise the sum of 200*l.*, and pay the same to his son J., and he gave the interest of the residue of the personalty to his (testator's) widow for life; and, after her decease, one moiety to his son C., and the other moiety to J. By a codicil he declared, that in case his son C. should die in the lifetime of the testator's widow, and his son J. should be living, he gave to J. the share of C.; but, in case C. and J. should both die in the lifetime of the testator's wife, he directed that, after her decease, the whole of the residue of his personal estate, after securing a certain annuity, should go to and be divided among *all and every his* (*the testator's*) *next of kin in equal shares.* C. and J. survived the testator, and died in the lifetime of the widow. Sir W. Grant, M. R., held that, as the testator had given by express bequest to his sons, who were his next of kin living at his death, he must, when he used the term "next of kin," have meant his next of kin at some other period than at his decease, * and, therefore, that the next of kin *at the death of the* [*986] *widow*, and not at the death of the testator, were entitled. It is to be observed, however, that the sons, even if they survived the testator, were not *necessarily* his *sole* next of kin at his death, as he might have had other children.

Bequest in defeasance of a prior gift to the persons who are presumptive next of kin.

Remark on Miller *v.* Eaton.

And the circumstance, that the prior legatee, whose interest on his death without issue, or other such contingency, is divested in favor of the ulterior gift to the testator's next of kin, was *one* of such next of kin at the time of his (the testator's) death, has been deemed a strong ground for construing the words to import next of kin at the happening of the contingency.

Effect where such person was *one* of next of kin.

Thus, in Butler *v.* Bushnell (*c*), where a testator bequeathed certain

(*b*) Miller *v.* Eaton, Coop. 272. (*c*) 3 My. & K. 232.

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

Remark on the preceding cases.

In none of the cases, indeed, except Miller *v.* Eaton, was the fact of the prior legatee being the sole next of kin at the testator's death the only ground relied upon. In Jones *v.* Colbeck, the M. R. remarked on the inapplicability of the term "my relations" (*d*) to an only daughter; and in Briden *v.* Hewlett, Sir J. Leach laid much stress on the words "would be," as importing a future contingency upon which the next of kin were to be ascertained. In Butler *v.* Bushnell, too, which, from his own point of view, is a weaker case than the others (since the tenant for [*987] life was only one of the next of kin) he laid similar stress * on the words "should happen to be." But the effect given to those additional grounds of argument is scarcely to be reconciled with the principle which may be considered to be now established, that, as infinite variations may take place in the expectant next of kin, either by deaths, or births, or both, in the interval between the making of the will and the death of the testator, it is not to be assumed, in the absence of a clear context, that the testator lost sight of the probability of such variation; and without that assumption the testator's supposed intention in favor of or against particular persons as his next of kin can possess little or no weight. The argument drawn from the inapplicability of the description used to the person eventually answering to it thus falls to the ground; since the testator may have chosen to give to that person by a description which, if he died in his lifetime, would carry his bounty to other objects. Again, words which are expressive of futurity without pointing to any definite period are satisfied when referred to the time of the testator's death; and, being themselves ambiguous, ought not to be allowed to

(*d*) It was held by Romilly, M. R., in Tiffin *v.* Longman, 15 Beav. 275, ante, p. 974, that "relations" had not such necessary reference to the time of the death of the propositus as "next of kin;" and the like of "legal personal representatives," in Holloway *v.* Radcliffe, 23 Beav. 163.

control the known legal meaning of such words as "next of kin." At the present day it is not probable that such decisions would be made as those in Briden *v.* Hewlett and Butler *v.* Bushnell (*e*).

One of the earliest cases in which these principles were practically enforced was Pearce *v.* Vincent (*f*), where a testator devised lands to his cousin, T. Pearce, *for life*, and, after his decease, to such of the testator's relations of the name of Pearce (being a male) as his cousin T. Pearce should by deed appoint, and, in default of appointment, to such of the testator's relations of the name of Pearce (being a male) as T. Pearce should adopt, if he should be living at the time of the decease of T. Pearce; and, in case T. Pearce should not have adopted any such male relation of the testator, or, in case he should have done so, and there should not be any such male relation living at the decease of T. Pearce, then the testator devised the property to *the next or nearest relation or nearest of kin of himself of the name of Pearce* (*being a male*), *or the elder of such male relations, in case there should be more than one* of equal degree, who should be living *at the testator's decease*, his heirs, executors, administrators, and assigns, forever. The will also contained a power to T. Pearce to lease for any term not exceeding seven *years. T. Pearce, the tenant for life, died without issue, [*988] and without having executed the powers of appointment or adoption given by the will. The nearest of kin of the testator living at the time of his decease (which occurred in 1814) were — first, his cousin T. Pearce (the devisee for life) aged sixty-seven; secondly, his cousin Richard Pearce, the son of another uncle, and who was aged sixty-six; and thirdly, William Pearce, a younger brother of Richard. The testator had a brother named Zachary, who, if living at his death, would have been his nearest of kin; but it appeared that he went to sea, and had not been heard of since 1795. The question was, what estate, assuming Zachary to have died without issue in the lifetime of the testator, Thomas or Richard took under the ultimate limitation? On a case from Chancery the Court of Exchequer certified that Thomas took an estate in fee in the real estate, and the absolute interest in the personalty. Sir J. Leach, M. R., being dissatisfied with this, sent a case to the Court of Common Pleas, the Judges of which were of the same opinion; and these certificates, after some argument, were confirmed by Lord Langdale (who had in the mean time succeeded Sir J. Leach at the Rolls), and whose judgment contains a very clear statement of the principle of the decision. He said, "The question is, whether Thomas Pearce, being

Tenant for life being sole next of kin, held not sufficient to exclude him from a devise to "next of kin."

(*e*) See Holloway *v.* Holloway, 5 Ves. 399; Doe d. Garner *v.* Lawson, 3 East, 278; Stert *v.* Platel, 5 Bing. N. C. 434; Re Greenwood's will, 31 L. J. Ch. 119.
(*f*) 1 Cr. & M. 598, 2 My. & K. 800, 2 Scott, 347, 2 Bing. N. C. 328, 2 Kee. 230.

devisee for life, and filling the character of the person to whom the testator has given his estates in certain events, is, because he is tenant for life, to be excluded from taking under the description in the ultimate limitation, which he afterwards filled? It is tolerably clear, that a vested interest was given to the person who should, at the time of the testator's death, answer the description in the ultimate limitation, which vested interest might have been divested by the appointment of Thomas Pearce or by his adoption of a male relation of the name of Pearce, but was, in default of such appointment or direction, to take effect. If it should so happen that Thomas Pearce, the devisee for life, should also at the death of the testator answer the description of the person who is to take under the ultimate limitation, ought he, because he fills the two characters, to be excluded from taking under that limitation? It is argued that he ought, because the gift to Thomas Pearce for life and the restrictions put upon him in his character of tenant for life are wholly inconsistent with an intention on the part of the testator to give him the absolute power over the estate. But the testator could not have had in his [*989] view and knowledge that the ultimate gift, which is * limited to a person unascertained at the date of his will, would go to Thomas Pearce. The argument derived from intention does not apply to this case; and I am of opinion that upon the true construction of the will, Thomas Pearce took under the ultimate limitation, not because he was the individual person intended by the testator to take, but because he answers the description of the person to whom the estates are ultimately given."

That bequests of personalty are subject to the same rule of construction is also clearly decided. Thus in Urquhart *v.* Urquhart (*g*), where a testator bequeathed his personal estate to his daughter if she survived her mother and had issue, but if she died before her mother, then on the wife's death one moiety to belong to his own nearest of kin, and the other moiety to his wife's nearest of kin; at the date of the will and of the testator's death the daughter was his sole next of kin, she never had issue, and died before the wife, and her representative was held entitled under the ultimate bequest of the first moiety. The V.-C. said, "The rule is that the persons who are designated by any description, must be the persons who answer that description according to the legal sense of those words, unless on the face of the instrument you find that the testator himself has put a construction on those words, and shown that he does not mean to use them in their natural ordinary and legal sense:" and he thought there was nothing to control that sense except the mere *surmise* arising out of the previous bequest to the daughter.

Same construction with regard to bequest of personalty.

So, in Seifferth *v.* Badham (*h*), where a testator gave personal prop-

(*g*) 13 Sim. 613. (*h*) 9 Beav. 370.

erty in trust, after the decease of his wife, for his children (who were then and at his death his sole next of kin), but if they should die without leaving issue, to assign the property "unto and equally between his next of kin according to the statute," it was held by Lord Langdale, M. R., that the children were entitled under the ultimate gift.

Again, in Nicholson *v.* Wilson (*i*), where the bequest was in trust for the testator's daughter A. for life, remainder to such of his children B., C., and D. as should be living at the death of A., and if only one *then* living, to that one; but if all his children were *then* dead, *then* to his personal representatives: it was contended that as "then" was here clearly used as an adverb of time, the representatives must be such as answered the description when the specified contingency happened; but Sir L. Shadwell, V.-C., * thought [*990] the argument was founded entirely upon conjecture, and that conjecture did not authorize the Court to depart from the plain meaning of the words which were found in the will, and which meant next of kin at the testator's death.

These and other similar cases (*j*) have settled the law on this much disputed point.

In all the foregoing cases the bequests were to the testator's own next of kin. A similar rule prevails where the gift is to the next of kin of a third person preceded by an express devise to the individual who is such person's expectant next of kin. Thus, in Stert *v.* Platel (*k*), where lands were devised to R. H. for life, remainder to his sons successively in tail, remainder to A. D. H. for life, remainder to his sons in like manner, remainder to "such person bearing the name of H. as *shall* be the male relation nearest in blood to R. H." (*l*): it was held by the Court of Common Pleas, that A. D. H. being the nearest relation of R. H. at the time of the testator's death, had an immediately vested remainder under the ultimate limitation in the will. It will be observed that the same individual being the nearest relation of R. H. at his death and at the death of the testator, no person was concerned to raise the question at which of those two periods the remainder should be held to vest (*m*).

Where the devise is to the next of kin of a third person.

It remains to consider those cases in which, independently of the circumstance that the gift to next of kin is preceded by a gift to the

(*i*) 14 Sim. 549.

(*j*) Ware *v.* Rowland, 15 Sim. 587, 2 Phill. 635; Baker *v.* Gibson, 12 Beav. 101; Murphy *v.* Donegan, 3 Jo. & Lat. 534; Bird *v.* Luckie, 8 Hare, 301; Jennings *v.* Newman, 10 Sim. 219; Re Barber's Will, 1 Sm. & Gif. 118; Gorbell *v.* Davison, 18 Beav. 556; Markham *v.* Ivatt, 20 id. 579; Harrison *v.* Harrison, 28 id. 21; Re Lang's Will, 9 W. R. 589; Mortimore *v.* Mortimore, 4 App. Ca. 448. And in the case of settlements, Elmsley *v.* Young, 2 My. & K. 82, 780; Smith *v.* Smith. 12 Sim. 317; Allen *v.* Thorp, 7 Beav. 72.

(*k*) 5 Bing. N. C. 434.

(*l*) These terms were considered equivalent to a bequest to next of kin, see per Bosanquet, J., 5 Bing. N. C. 441.

(*m*) Ante, p. 983.

What expressions authorize a departure from the rule.

individual who happens to answer that description at the death of the testator or other ancestor, the context has been held to show an intention to refer to some other persons than those who answer the description at that time. Bird *v.* Wood (*n*) is generally cited on this point, but it appears to be an instance rather of the exclusion by force of the context of the true next of kin in favor of more remote relations than of the postponement of the period at which the legatees should be ascertained. The bequest was to the testatrix's daughter for life, and after her death, as she should appoint, and in default of appoint-
[*991] ment, to her (the * testatrix's) next of kin, *to be considered as a vested interest from the testatrix's death*, except as to any child afterwards born of her daughter. The daughter having died childless and without making any appointment, Sir J. Leach, V.-C., held that by the exception the testatrix had shown what class she meant to designate as her next of kin, namely, her grandchildren; *and they were to take vested interests at her* (the testatrix's) *death:* the daughter was therefore excluded (*o*).

But the mere exception from a gift to the next of kin of persons who if the tenant for life were out of the way would, as matters stand at the date of the will, be included among the next of kin, is not sufficient reason for departing from the general rule: for this would be to assume that the testator expected the state of his family to remain the same at his death as at the date of the will, an assumption which we have already seen ought not to be made. It may very well be that the testator introduced the exception with this view, that if the tenant for life should die in his lifetime and his next of kin should consist of the class to which the excepted person belonged, those persons should be excluded from the bequest, and if the matter is thus left in doubt the general rule prevails (*p*).

In Cooper *v.* Denison (*q*), where a residue was bequeathed in trust, in case the testator's daughter survived her mother, for her at her mother's death; and in case the mother survived the daughter (which event happened) then in trust for the mother for life, and at her decease, a third part to be paid and applied according to her will, and the other two-thirds to his *other* the next of kin of his paternal line. The daughter was sole next of kin ex parte paterna at the death, and the V.-C. held, first, that she was excluded by force of the word "other;" and, secondly, that as it was clear that all the persons who were to take at the mother's death were meant to be ascertained

(*n*) 2 S. & St. 400, corrected 2 My. & K. 86, 89.
(*o*) See also Eagles *v.* Le Breton, L. R., 15 Eq. 148, ante, p. 974.
(*p*) Lee *v.* Lee, 1 Dr. & Sm. 85. Although the facts were found not to raise the point, Kindersley, V.-C., expressed a clear opinion upon it. Cf. Re Crawhall's Trust, 8 D. M. & G. 480 (gift to "children, except issue of A," who was a deceased child).
(*q*) 13 Sim. 290. In Minter *v.* Wraith, id. 52, the next of kin were ascertained at the period of distribution, for reasons similar to those which were rejected in Urquhart *v.* Urquhart, sup. See 4 K. & J. 500.

simultaneously, while those who were to take *her* one-third *could* not (owing to the power) be ascertained until her death, it followed that the persons to take the other two-thirds were also to be ascertained at the mother's death.

Clapton *v.* Bulmer (*r*) involved the construction of a peculiarly * worded instrument. The testator bequeathed his resi- [*992] due to trustees in trust for his daughter for life, and after her death for her children; but if she died without leaving any children, he directed his trustees *upon her decease to raise and pay* 3,000*l.* as she should by will appoint, and if his wife survived his daughter and his daughter died childless, *then* his trustees were to raise and pay the further sum of 2,000*l.* to his wife, and "assign and transfer the residue to the nearest of kin of his own family forever." Sir L. Shadwell, V.-C., understanding "family" to mean *children*, held the bequest to be to the next of kin *of the daughter*. Upon appeal, Lord Cottenham thought this might have been the testator's meaning, but if not, it meant his own next of kin at his daughter's death, for in no case was there such strong demonstration to be found that the legatee was to be ascertained at a future period. Between these two constructions it was unnecessary to decide, since the same individual answered both descriptions.

Where there is an *express* gift in remainder to next of kin, subject to a power of appointment in the legatee for life, the objects of the gift are of course to be ascertained without regard to the existence of the power, which, unless exercised, has no operation on the question. But where such a gift is implied from a power to appoint by will, then the death of the donee is the period to be regarded, whether the power be one of selection (*s*), or only of distribution (*t*).

Rule where gift to next of kin is implied from a power.

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

Gift expressly to next of kin at a future period.

(*r*) 10 Sim. 426, 5 My. & C. 108.

(*s*) Att.-Gen. *v.* Doyley, 4 Vin. Abr. 485; Harding *v.* Glyn, 1 Atk. 469, cit. 5 Ves. 501; Cooper *v.* Denison, 13 Sim. 290.

(*t*) Pope *v.* Whitcombe, 3 Mer. 689, corrected Sug. Pow. 953, 8th ed., ante, Vol. I., p. 520.

(*u*) Long *v.* Blockall, 3 Ves. 486; Horn *v.* Coleman, 1 Sm. & Gif. 169. See Sturge *v.* The Great Western Rail. Co., 19 Ch. D. 444. In Wharton *v.* Barker, 4 K. & J. 483, ante, p. 981, the decision on the former half of the gift was apparently influenced by the construction made as to the latter. In Wheeler *v.* Addams, 17 Beav. 417, "then" was construed "in that case," not "at that time." It should be observed that Jones *v.* Colbeck and Miller *v.* Eaton have been cited by a respectable text writer, as authorities for the position that a bequest to the next of kin, after a life interest, *refers to those who answer the character at that time*, 1 Rob. on Wills, 3rd ed. 432. This is not only directly opposed to the general principles which govern the vesting of estates (ante, Vol. I., p. 756), but also to the strong line of authorities before cited in support of the contrary general rule; to which may be added Holloway *v.* Holloway, and other cases of the same class before mentioned. It is, moreover, inconsistent with the principle on which Sir W. Grant rested his decision in each of the first-mentioned cases themselves, as will be seen by a perusal of his judgments.

(*x*) Boys *v.* Bradley, 10 Hare, 389, 4 D. M. & G. 58.

[*993] gift, entitled. But if the * gift is, not to those who will then be, but to those who will (or would) then be *entitled* as, next of kin by statute, the word "then" will be understood as referring to the period when they will be entitled in possession. The persons to take will be, not those who would have been entitled if the testator had *then* died (*y*), but those who would *then* be entitled if the testator, when he died, had died intestate (*z*). Moreover, "then" has more meanings than one, each equally common:[1] it may mean "at that time" or "in that case" (*a*); and unless the latter meaning be excluded by the context, it will be adopted rather than construe "next of kin according to the statute" (the statute being expressly referred to), as meaning something different from what the statute says it means. Thus, in Cable *v.* Cable (*b*), where a testator bequeathed a fund in trust for his wife for life, and at her death to be paid to his children; but if he left no children at his decease, then to become the property of the person or persons who would *then* become entitled to take out administration as his personal representative or representatives, under the statute of distribution, as if he had died intestate and "*unmarried*." The testator left no children, and Sir J. Romilly, M. R., held that, as the word "unmarried" showed that the testator was contemplating a period before his wife's death, the word "then" should be construed as "thereupon," in order to make the whole consistent (*c*).

"Then" not always an adverb of time.

VIII. — Gifts to Persons of Testator's Blood or Name. — Sometimes it is made part of the description or qualification of a devisee or legatee, that he be of the testator's name. The word "name," so used, admits of either of the following interpretations: — First, as designating one whose name answers to that of the testator (which seems to be the more obvious sense); and, secondly, as denoting a person of the testator's family; the word "name" being, in this case, synonymous with "family" or * "blood." The former, as being the more natural construction, prevails in the absence of an explanatory con-

Gifts to persons of testator's name.

(*y*) If the case is expressly put of the propositus dying at some time other than that at which he actually died, all doubt would seem to be removed, Pinder *v.* Pinder, 28 Beav. 44; Chalmers *v.* North, id. 175; Bessant *v.* Noble, 26 L. J. Ch. 236, 2 Jur. N. S. 461, Clarke *v.* Hayne, 42 Ch. D. 529. But see Druitt *v.* Leaward, 31 Ch. D. 234, and Re Bradley, W. N. 1888, p. 83, 58 L. T. 63.

(*z*) Bullock *v.* Downes, 9 H. L. Ca. 1, 19; Mortimore *v.* Mortimore, 4 App. Ca. 448, affirming Mortimer *v.* Slater, 7 Ch. D. 322; Mitchell *v.* Bridges, 13 W. R. 200; Re Morley's Trusts, 25 W. R. 825, W. N. 1877, p. 159, is contra, sed qu.

(*a*) See 7 H. L. Ca. 119.

(*b*) 16 Beav. 507; see also Wheeler *v.* Addams, 17 Beav. 417; Lees *v.* Massey, 3 D. F. & J. 113; Moss *v.* Dunlop, Joh. 490 ("next of kin for the time being").

(c) But did not "then" refer to the period last mentioned, namely, the testator's own death without leaving children? Archer *v.* Jegon, 8 Sim. 446.

[1] As to the word "then," see Dove *v.* Torr, 128 Mass. 38; Thomson *v.* Ludington, 104 Mass. 193; Sears *v.* Russell, 8 Gray, 86; Long *v.* Blackall, 3 Ves. 486, Heasman *v.* Pearse, L. R., 7 Ch. 660; Pinder *v.* Pinder, 28 Beav. 44; Chalmers *v.* North, id. 175.

text; and such is most indisputably its meaning, when found in company with some other term or expression, which would be synonymous with the word "name," if otherwise construed; for no rule of construction is better established, or obtains a more unhesitating assent, than that where words are susceptible of several interpretations, we are to adopt that which will give effect to every expression in the context, in preference to one that would reduce some of those expressions to silence.

Thus, where a testator gives to the next *of his kin* or *descendants* of his name (*d*), or to the next of his name *and blood* (*e*), it is evident that he does not use the word "name" as descriptive of his relations or family only, because that would be the effect if the mention of the name were wholly omitted and the gift had been simply to his next of kin or the next of his blood; and hence, according to the principle of construction just adverted to, it is held that the testator means additionally to require that the devisee or legatee shall bear his name. Where, on the other hand, the testator gives to the next of his name (*f*), there is ground to presume that he intends merely to point out the persons belonging to his family or stock, without regard to the surname they actually bear. Such was the construction which prevailed in Pyot *v.* Pyot (*g*), where a point of this nature underwent much discussion. A testatrix devised her estate, real and personal, to trustees, and their heirs, executors, administrators, and assigns in trust, first for her daughter Mary, and her heirs, executors, administrators, and assigns forever; provided that, if she (Mary) died before twenty-one or marriage, then in trust to convey and assign all the residue of her estate to her *nearest relation of the name of the Pyots*, and to his or her heirs, executors, administrators, and assigns. Mary died under twenty-one, and unmarried. At the death of the testatrix there were three persons then actually of the name of Pyot, namely, the plaintiff, * and also his two sisters who were then unmarried, but who [*995] married before the happening of the contingency. There was also a sister, who, prior to the making of the will, was married, and, consequently, at the death of the testatrix was not of that name.

To next of testator's name, or next of kin of his name.

To the "nearest relation of the name of the Pyots."

(*d*) Jobson's case, Cro. Eliz. 576. See Re Roberts, Repington *v.* Roberts-Gawen, 19 Ch. D. 520, post, p. 997.

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

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

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

An elder brother of these persons had died before the testatrix, leaving a son also of the name of Pyot, who was her heir-at-law, but who, of course, was one degree more remote than the others. On behalf of the heir-at-law, it was insisted,— First, that this devise to the "nearest relation" was void for uncertainty, because the word "relation" was not nomen collectivum; for no words were of that description, except such as had no plurals: Secondly, that if it was not void, then the heir-at-law was the person meant by "nearest relation;" for the testatrix had in view a single person, and could not intend to give it to all her relations. But Lord Hardwicke said, that a devise was never to be construed absolutely void for uncertainty, unless from necessity; and if this necessarily related to a single person, it would be so, as there were several in equal degree of the name of Pyot. But he did not take it so: the term "relation" was nomen collectivum as much as heir or kindred. "Then," continued he, "taking this to be nomen collectivum, as I do, there is no ground in reason or law to say, the plaintiff should be the only person to take; because there is no ground to construe this description to refer to the actual bearing the name at that time, but to refer to the stock 'of the Pyots.' If it refers to the name, suppose a person of nearer relation than any of those now before the Court, but originally of another name, changing it to Pyot by Act of Parliament, that would not come within the description of nearest relation of the name of Pyot; for that would be contrary to the intention of the testatrix; and yet that description is answered, being of the name of Pyot, and, perhaps, nearer in blood than the rest. Then suppose a woman nearer in blood than the rest, and marrying a stranger in blood of the name of Pyot; that would not do; and yet, at the time of the contingency, she would be of the name. In Jobson's Case, and in Bon *v.* Smith (which was a case put at the bar by Serjeant Glanville, which was often done in those times, but cannot be any authority), *it is next of kin of my name* (*h*), which is a mere designation of the name, and is expressed differently here.

[*996] It may be a little nice; but, I think, '*the Pyots*' describe * a particular stock, and the name stands for the stock; but yet it does not go to the heir-at-law, as in the case of Dyer (*i*), because it must be *nearest relation*, taking it out of the stock; from which case it also differs, as the personal is involved with real; and it was meant that both should go in the same manner; and shall the personal go to the heir-at-law? Then this plainly takes in the plaintiff and his two sisters unmarried at the time of making the will, although married before the contingency; and I think the other sister, not before the Court, is equally entitled to take with them; the change of name by marriage not being material, nor the continuance of the name regarded by the testatrix."

(*h*) This is not accurate; vide ante, p. 994, n. (*f*).
(*i*) Chapman's case, Dyer, 333 b, ants, p. 936.

So, in Mortimer *v.* Hartley (*k*), where a testator devised lands to his son J., on condition that neither he nor his heirs should sell the same, "it being the testator's desire that they should be kept *in the Westerman's name;*" and if J. died without leaving lawful issue, then the testator's *daughter* A. to have her brother's share *subject to the same restrictions,* it was held that the word "name" must be construed to mean "family" or "right line," for the son J. was held to take an estate tail, and the daughter was to take subject to the same restrictions, that is, an estate tail also, in which case the lands would devolve upon persons not bearing the name of Westerman.

To be kept in the W.'s *name.* "Name" held to mean family.

It seems to have been thought in Carpenter *v.* Bott (*l*), that the word "surname" was more easily convertible with "family" or "stock" than the word "name." T. Crump, the testator in that case, bequeathed a fund, in the event (which happened) of his niece dying without leaving issue, "amongst his *next of kin of the surname of Crump,* who should be living at the decease of his niece, in like manner as if his said next of kin had become entitled thereto under the Statute of Distributions." At the death of the testator, his sole next of kin bearing the name of Crump, was a lady who afterwards married the plaintiff during the life of the niece, and Sir L. Shadwell, V.-C., thought the expression "of the surname" was to be taken in the sense attributed by Lord Hardwicke to the words "of the (name of the) Pyots," namely, "of the stock:" and therefore that Mrs. Carpenter was entitled (*m*).

To the next of kin of the surname of C.

* Where a gift to persons of the testator's name is held, ac- [*997] cording to the more obvious sense, to point to persons whose names answer to that of the testator, of course it does not apply to a female who was originally of that name, but has lost it by marriage. As in Jobson's case (*n*), often before cited, which was a devise of lands in tail, the remainder to the next of kin of the testator's name. The next of kin, at the date of the will, and also at the death of the testator, was his brother's daughter, who was then married to J. S.; and, on the death of the tenant in tail, without issue, the question was, whether she should have the land? and it was held, that she should not, because she was not then of the name of the devisor. But if a person has acquired a new name by royal license or by Act of Parliament, he has not therefore lost his original name, for the license or statute is simply permissive, and leaves the person at liberty to resume his original name: so that a new name so acquired

As to females losing name by marriage.

Name assumed by license or Act of Parliament may be laid aside.

(*k*) 6 Exch. 47.
(*l*) 15 Sim. 606.
(*m*) The question whether it would have been necessary that the surname (if literally construed) should be borne at the niece's death was not decided. As to this question, see end of this Chapter.
(*n*) Cro. El. 576. See also Bon *v.* Smith, id. 332; Doe d. Wright *v.* Plumptre, 3 B. & Ald. 474.

would probably be held no obstacle to his taking by a description of which the old name was a part (*o*).

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

In the absence of any express or implied indication to the contrary appearing in the will, a gift to such of the testator's next of kin or descendants who shall bear a particular name will not be confined to persons entitled by birth to that name, but will include a person who has assumed or obtained authority to use the name (*q*).

To persons of testator's name and blood.

In Leigh *v.* Leigh (*r*), the testator, after limiting estates to his two sisters and their issue in strict settlement, devised the property, on failure of those estates, to the first and nearest of his kindred, being male *and of his name and blood*, that should be living at the determination of the estates before devised, and to the heirs of his body; Lord Eldon, with Thompson, B., and Lawrence, J., held, that a person, who answered the other parts of the description, but of another name, was not qualified, in [*998] *respect of the name, by his having, before the determination of the preceding estates, obtained a royal license that he and his issue might use the surname of Leigh instead of his own name, and having since assumed it. That the design of the testator, in this case, was the exclusion of the female line, and that he was not influenced solely by attachment to the name (one of which objects he must have had in view), appeared from his not having imposed the obligation of assuming his name upon the issue of his sisters taking under the prior limitations.

At what period legatee must answer prescribed description.

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

If the devise confers an estate in possession at the testator's decease, that obviously is the point of time to which the will refers; and even where the devisee might, in other respects, take at the testator's decease an absolutely vested estate in remainder, it should seem that the same construction prevails. Such was the unanimous opinion of the Court in the two early cases of Bon *v.* Smith (*s*), and Jobson's case (*t*), where lands were devised to A. in tail, with remain-

(*o*) See per Lord Eldon, Leigh *v.* Leigh, 15 Ves 100.
(*p*) As to the voluntary assumption of a name, ante, p. 898.
(*q*) Re Roberts, Repington *v.* Roberts-Gawen, 19 Ch. D. 520.
(*r*) 15 Ves. 92.
(*s*) Cro. El. 532.
(*t*) Cro. El. 576.

der to the next of the testator's name, or the next of kin of his name; and it was admitted, in both cases, that the testator's daughter, if she had answered the description *at the death of the testator*, would have been entitled.

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

If such a construction can be sustained, it must embrace all * executory gifts to persons answering a prescribed character, as, to next of kin, heir, and other such persons; for it is difficult to perceive any valid reason for making the gifts under consideration the subject of any peculiar rule in this respect; and, as general doctrine, his Lordship's proposition would have to contend with a large amount of authority, including those cases in which (as we have seen) the words "next of kin" have been held to designate the next of kin at the time of distribution, on other special grounds (*y*), for it would have been idle to discuss the question, whether an executory gift to the next of kin applied to the person answering the description of next of kin when such gift took effect in possession, on the special ground that the prior legatee was sole next of kin, or one of the next of kin at the death of testator, if, by the general rule, an executory bequest to next of kin applied to the persons answering the description when the bequest took effect in possession. [*999]

Remarks upon Lord Hardwicke's doctrine in Pyot *v.* Pyot.

(*u*) 1 Ves. 335, Belt's ed.; ante, p. 994.
(*x*) See further, on this point, Gulliver *v.* Ashby, 4 Burr. 1940; Lowndes *v.* Davies, 2 Scott, 74; ante, p. 898.
(*y*) Ante, p. 983.

*CHAPTER XXX.

DEVISES AND BEQUESTS TO CHILDREN.

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I. — Who are included in the Expressions "Children," "Grandchildren," &c.—The legal construction of the word "children" accords with its popular signification (*a*); namely, as designating the immediate offspring; for, in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as issue (*b*). It seems, however, that a gift to children extends to grandchildren, where there is no child (*c*).[1] Thus, in

Children, how construed.

Whether it extends to grandchildren, and when.

(*a*) The French word "enfans" received the same construction in Duhamel *v.* Ardouin, 2 Ves. 162. But see Martin *v.* Lee, 9 W. R. 522.

(*b*) Wythe *v.* Blackman, Amb. 555, 1 Ves. 196; Gale *v.* Bennett, Amb. 681; Chandless *v.* Price, 3 Ves. 99; Royle *v.* Hamilton, 4 Ves. 437; and other cases, ante, p. 952, n. (*h*).

(*c*) Per Kay, J., in Re Smith, Lord *v.* Hayward, 35 Ch. D. 558, stated infra.

[1] "Children" presumptively is to be taken in its strict sense. Pugh *v.* Pugh, 105 Ind. 552; Palmer *v.* Horn, 84 N. Y. 516. The word does not embrace grandchildren, prima facie. In re Schedel, 73 Cal. 594; Pugh *v.* Pugh, supra (citing Cummings *v.* Plummer, 94 Ind. 403); Osgood *v.* Lovering, 33 Maine, 464; Thomson *v.* Ludington, 104 Mass. 193; Tillinghast *v.* De Wolf, 8 R. I. 69; Low *v.* Harmony, 72 N. Y. 408; Gable's Appeal, 40 Penn. St. 231; Castner's Appeal, 88 Penn. St. 478; Feit *v.* Vanatta, 21 N. J. Eq. 84; Turner *v.* Withers, 23 Md. 18; Taylor *v.* Watson, 35 Md. 519; Moors *v.* Stone, 19 Gratt. 130; Denny *v.* Closse, 4 Ired. Eq. 102; Ward *v.* Sutton, 5 Ired. Eq. 421: Willis *v.* Jenkins, 30 Ga. 167; Walker *v.* Williamson, 25 Ga. 549; Hopson *v.* Skipp, 7 Bush, 644; Churchill *v.* Churchill, 2 Met. (Ky.) 466; Turner *v.* Ivie, 5 Heisk. 252; Morton *v.* Morton, 2 Swan, 318. Nor step-children. Cromer *v.* Pinckney, 3 Barb. Ch. 466, 475; Barnes *v.*

Crooke *v.* Brooking (*d*), though the claim of grandchildren to be entitled in conjunction with a surviving child under a bequest to "children," was rejected, yet the Lords Commissioners considered, that, if there had been no child, they might *have [*1001] taken. Lord Alvanley, too, in Reeves *v.* Brymer (*e*), laid it down, that "children may mean grandchildren, where there can be no other construction, but not otherwise." Sir W. Grant, also, seems rather to have assented to than denied the doctrine, though he refused to apply it to a case (*f*) in which there was a gift to the children of several persons deceased equally per stirpes, and one of the persons was, at the making of the will, dead, leaving grandchildren, but no child; his Honor being of opinion, that, as there were children living of the other persons, as to whom, therefore, the gift was clearly confined to those objects, he was precluded from giving the word a different signification in the other instance. The same Judge, on another occasion (*g*), refused to let in a great-grandchild under the description of "grandchildren," there being grandchildren; though he admitted, that "where there is a total want of children, grandchildren have been let in, under a liberal construction of 'children'" (*h*).

(*d*) 2 Vern. 106.
(*e*) 4 Ves. 698. See also his judgment in Royle *v.* Hamilton, 4 Ves. 439.
(*f*) Radcliffe *v.* Buckley, 10 Ves. 198; Moor *v.* Raisbeck, 12 Sim. 123.
(*g*) Earl of Orford *v.* Churchill, 3 V. & B. 59.
(*h*) No previous decision on the point, however, it is conceived, can be found; and the doctrine appears to have, at that time, rested on the dicta of the Lords Commissioners who decided Crooke *v.* Brooking, Lord Alvanley, and Sir W. Grant.

Greenzebach, 1 Edw. 41; Sydnor *v.* Palmer, 29 Wis. 226; Cutter *v.* Doughty, 23 Wend. 513; In re Hallett, 8 Paige, 375. (See Kimball *v.* Story, 108 Mass. 382, that a step-son is not a "relative.") Nor adopted children. Schafer *v.* Eneu, 54 Penn. St. 304; Russell *v.* Russell, 84 Ala. 48. See Commonwealth *v.* Nancrede, 32 Penn. St. 389. Compare Johnson's Appeal, 88 Penn. St. 346.

When grandchildren are included in the term, see In re Schedel, 73 Cal. 594; Bowker *v.* Bowker, 148 Mass. 198; Minot *v.* Harris, 132 Mass. 528; Houghton *v.* Kendall, 7 Allen, 72 (gift to children "who may be surviving heirs"); In re Paton, 111 N. Y. 480; Hunt's Estate, 133 Penn. St. 260; Sorver *v.* Berndt, 10 Barr, 213 (children "or legal heirs"); Neave *v.* Jenkins, 2 Yeates, 414; Long *v.* Labor, 8 Barr, 229; Whitehead *v.* Lassiter, 4 Jones, Eq. 79; Hughes *v.* Hughes, 12 B. Mon. 115, 121; Ewing *v.* Handley, 4 Litt. 349; Drayton *v.* Drayton, 1 Desaus. 327; Devaux *v.* Barnwell, id. 499; Smith *v.* Cose, 2 Desaus. 123, n. See also Mowatt *v.* Carow, 7 Paige, 328; Izard *v.* Izard, 2 Desaus. 308; Tier *v.* Pennell, 1 Edw. 354; Marsh *v.* Hague, id. 174; Hone *v.* Van Shaick, 3 Edw. 474; Hallowell *v.* Phipps, 2 Whart. 376; Dickinson *v.* Lee, 4 Watts, 82; Phillips *v.* Beall, 9 Dana, 1; Robinson *v.* Hardcastle, 2 Brown, Ch. 344; Clifford *v.* Koe, L. R., 5 App. Cas. 447.

"Children," though presumptively a word of purchase, may be a word of limitation, so as to mean descendants. Prowitt *v.* Rodman, 37 N. Y. 42; Meson *v.* Ammon, 117 Penn. St. 127; Tyrone *v.* Waterford, 1 De G. F. & J. 637; Robinson *v.* Robinson, 1 Burr. 38; Hodges *v.* Middleton, 2 Doug. 431; Doe *v.* Webber, 1 B. & Ald. 713; Doe *v.* Simpson, 3 Man. & G. 929; Parkman *v.* Bowdoin, 1 Sumn. 359, 368; Haldeman *v.* Haldeman, 40 Penn. St. 29; Guthrie's Appeal, 37 Penn. St. 9. But primarily it is, of course, a word of purchase. Hill *v.* Thomas, 11 S. Car. 346, 357; Hannan *v.* Osborn, 4 Paige, 336; Sisson *v.* Seabury, 1 Sumn. 235.

Further, Butler *v.* Ralston, 69 Ga. 485; White *v.* Rowland, 67 Ga. 546; Lewis *v.* Lewis, 62 Ga. 265; Elliott *v.* Elliott, 117 Ind. 380 ("children" construed illegitimate in preference to legitimate children); Chenault *v.* Chenault, 88 Ky. 83; Heald *v.* Heald, 56 Md. 301; Stump *v.* Jordan, 54 Md. 619; Stonebraker *v.* Zollicoffer, 52 Md. 154; White's Estate, 135 Penn. St. 341; McCulloch's Appeal, 113 Penn. St. 247; Affolter *v.* May, 115 Penn. St. 54; Jones *v.* Cable, 114 Penn. St. 586; Webb *v.* Hitchins, 105 Penn. St. 91; Oyster *v.* Oyster, 100 Penn. 538; Smith *v.* Fox, 82 Va. 763.

In Re Smith, Lord *v.* Hayward (*i*), a testator gave his residuary real and personal estate upon trust for sale and *to divide the proceeds of sale into six shares, and to pay one of such shares* "equally between all the children" of his "late sister B." who should be living at his death, and he gave the other five-sixths in similar terms to the children of five other deceased persons. At the date of the will, as was well known to the testator, there were no children of B. living, but there were two grandchildren of B. who survived the testator. It was held by Sir E. Kay, J., that the two grandchildren took the one-sixth given to the "children" of the deceased sister. He thus stated the law on the point under discussion: "The law seems to stand thus. If the testator on the face of the will gives a legacy to the children of a deceased person, mentioning that person as being dead, and at the date of the will there are no children of that person, but there are grandchildren, then the Court, on the principle ut res magis valeat, holds that the gift takes effect in favor of the grandchildren. On the other hand, if the testator mentions the children of the late A. B., the late C. D., and the late E. F., and some of these have left children, and one has left grandchildren only, then the Court considers there is a difficulty in holding that the word [*1002] *'children' only once used can have a different meaning where there are in one case children and another case grandchildren. Again, if on the face of the will the testator shows an intention to use the word 'children' in its normal and ordinary meaning, by himself having mentioned 'grandchildren,' as well as 'children,' there, again, the Court feels itself obliged to read the word 'children' in its ordinary sense" (*k*). His Lordship laid stress on the point that, in the case before him, the testator, instead of giving his residue in the mass to the children of the late A. B., and C., as in Radcliffe *v.* Buckley, divided it into six shares, and gave one-sixth to the children of the late A., and another sixth to the children of the late B., and so on, describing in each case the class who were to take.

"Children" held to mean "grandchildren" where no children living at date of will.

The extension of gifts to children to more remote descendants is, as it would seem, confined to cases in which, but for this construction, the gift, *according to the state of events at the time of its inception* (*i. e.*, of the making of the will), never could have had an object, as in the case of a gift to the children of A., a person then being, to the testator's knowledge (*l*), dead, leaving grandchildren only (*m*). It is evident,

Where the gift otherwise *never* could have had an object.

(*i*) 35 Ch. D. 558.
(*k*) See Loring *v.* Thomas, infra, p. 1004.
(*l*) This knowledge must be proved; it cannot be presumed, per Lord Cranworth, Crook *v.* Whitley, 7 D. M. & G. 496.
(*m*) Which, as before suggested, occurred in respect of one class of children, in Radcliffe *v.* Buckley. The case of Lord Woodhouselee *v.* Dalrymple, 2 Mer. 419, stated next Chapter,

that a strong argument in favor of this doctrine as so limited, is to be drawn from cases in which words have been carried beyond their ordinary signification, from the want of other persons or things more nearly answering to the terms of description used (*n*), in order to avoid the evident absurdity of supposing the testator to have made a gift without an actual or possible object. Such were the circumstances and such the decision in Fenn *v.* Death (*o*). But this reasoning does not apply to a case in which the gift, being to the children of a person *living*, might in event include objects subsequently coming in esse; so that no inference, that the testator does not mean children properly so called, arises from the fact of there being no child when he makes the gift. To apply the doctrine * in question to such a case, [*1003] is to allow the construction to be influenced by subsequent circumstances, in opposition to a well-known rule. Besides, it denies to a testator the power of giving to children, to the exclusion of descendants of another generation (which is certainly a possible intention), without using words of exclusion, though he might reasonably suppose the intention to exclude them was sufficiently apparent by the mention of another class of objects, and not of them. In the case of a gift to A., and after his death, to his children living at his decease, and if he dies without leaving children, to B. and his children; the testator may choose to prefer A. and his children to B. and his children; but it does not follow that he intends the same preference to extend to the *grandchildren* of A. (*p*).

Extended construction is confined to such cases;

In Pride *v.* Fooks (*q*), where a testator bequeathed his residuary estate in trust for "such child or children as his niece and two nephews, A., B. and C. should leave at their respective deceases," one-third to the "child or children" of A., and the two other thirds to the "child or children" of B. and C. in like manner; with cross executory limitations in case the niece or either of the nephews should die without leaving any "children or child," to the "children or child" of the other or others "leaving children or a child;" and in case all of them, his said nephews and niece, should die without leaving "any issue" lawfully begotten, the testator directed the whole of the resi-

would probably be considered as aiding the argument for an extension of the bequest to grandchildren *in such a case*.

(*n*) Day *v.* Trig, 1 P. W. 286, ante, Vol I. p. 358; Doe d. Humpbreys *v.* Roberts, 5 B. & Ald. 407, ante, Vol. I. p. 752; Gill *v.* Shelley, 2 R. & My. 336.

(*o*) 23 Beav. 73. See also Berry *v.* Berry, 3 Gif. 134. In general, if the word "children" extends beyond its primary meaning, it will include issue of every degree. See per Turner, L. J., Pride *v.* Fooks, 3 De G. & J. 275, and per Lord Cranworth, Crook *v.* Whitley, 7 D. M. & G. 496. In Fenn *v.* Death, great-grandchildren appear to have been excluded; sed qu.

(*p*) In Loveday *v.* Hopkins, Amb. 273, Sir T. Clarke, M. R., held that grandchildren were not entitled under a bequest to "heirs," because the term appeared by the context of the will to be used in the sense of children. Sir E. Sugden, has shown, (Pow. 8th ed. 664), that a power to appoint among children cannot be exercised in favor of grandchildren. He does not advert to any distinction in the case of there being no children. According to the doctrine which the present writer has endeavored to refute, such a power would *in that event* extend to grandchildren.

(*q*) 3 De G. & J. 252.

due to be divided between the three "children" of X. equally, or in case of either of them being then dead, to the survivors or survivor and the "issue" of such as might be dead, such "issue" taking per stirpes and not per capita. The nephews and niece survived the testator, and died without leaving any children living at their respective deceases, but the niece left several grandchildren and one great-grandchild, and it was contended, that, there being in event no children, the bequest to "children" must be extended to remoter issue: but it was held by K. Bruce and Turner, L. JJ., that the construction of the will could not thus be made dependent on subsequent events. This [*1004] being so, * and the case not being one in which the gift over without issue could be read "without such issue" (*r*), the residue was undisposed of.

And even where, according to the state of facts at the date of the will, the gift could never have taken effect in favor of children, the context may be such as to exclude remoter issue. Thus, in Loring *v.* Thomas (*s*), where a testatrix bequeathed one part of her residue to the *children* of her deceased aunt A., and another part to the *grandchildren* of her deceased aunt B., and added a proviso giving certain directions in case the *children* of A. or the *grandchildren* of B. should die in her lifetime: there was no child of A. living at the date of the will, but there were grandchildren, who claimed the part given to the children of A. Sir R. Kindersley, V.-C., held that they were not entitled. He observed that it was said the testatrix must have used the word "children" inadvertently, and meant grandchildren. That must mean either that she intended to have written grandchildren, or that she used the word "children" as co-extensive with it. But this could not be maintained, since not only there, but in the proviso, he found that she clearly knew the distinction between children and grandchildren: she made the very distinction (*t*).

—— may be excluded even from such cases, by context.

The word "grandchildren" must, on the same principle, be confined to the single line or generation of issue, which it naturally imports. Lord Northington, indeed, in Hussey *v.* Berkeley (*u*), expressed an opinion that the word "grandchildren" would, without further explanation, comprehend great-grandchildren,[1] the term being, he thought, in common par-

Whether "grandchildren" includes great grandchildren.

(*r*) As to this, vide post, Ch. XL.

(*s*) 1 Dr. & Sm. 497, 508. See also Stephenson *v.* Abingdon, 31 Beav. 305, stated post, p. 1008.

(*t*) The V.-C. added, "A third alternative construction would be that she thought the grandchildren really were children; but that would be inconsistent with the evidence which proved that she was acquainted with the state of the family."

(*u*) 2 Ed. 194, Amb. 603 (Hussey *v.* Dillon).

[1] See Royle *v.* Hamilton, 4 Ves. (Sumner's ed.) 437. Great-grandchildren do not take under the designation of grandchildren, unless it plainly appears that such was the intention. Hone *v.* Van Shaick, 3 Edw. 474; Yeates *v.* Gill, 9 B. Mon. 204; Dooling *v.*

lance used rather in opposition to children, than as confined to the next generation. But, in the case before his Lordship, the testator had explained this to be his construction, by applying in another part of his will the term "grandchild" to a great-grandchild (*x*). And the contrary of Lord Northington's doctrine was determined by Sir W. Grant, in Earl of Orford *v.* Churchill (*y*), in which, however, it is remarkable, that neither his Lordship's dictum nor decision was noticed.

It should be observed, however, that, in a considerable class of * cases (*z*), the word "child" or "children" has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring, and been considered to have been employed as nomen collectivum, or as synonymous with *issue* or *descendants*;[1] in which general sense it has often the effect, when applied to real estate, of creating an estate tail. Where this construction prevailed, however, it has generally been aided by the context. But even if the fact were otherwise, those cases would afford no authority for extending the word "children" to grandchildren in the cases under consideration. *There* it was synonymous with issue in *all* events; *here* it is to be so construed only in *certain* events, leaving the signification of the word, therefore, dependent on circumstances arising subsequently to the making of the will, or, it may be, to the death of the testator. The cases, therefore, are not analogous. [*1005]

"Children" when synonymous with *issue*.

Under a gift to the children of a person, his children by different marriages will generally be entitled;[2] and it is not necessary to show that the testator had in view a future marriage, but only that the terms of the will are not so wholly inconsistent with such a notion as necessarily to limit the generality of the word "children" (*a*), in which latter case effect will of course be given to the testator's language (*b*). In a case of Stavers *v.* Barnard (*c*), where a testator bequeathed his personal estate to trustees, in trust to apply the interest thereof "in the maintenance

"Children" includes children of different marriages.

(*x*) But as to this, see pp. 1005, 1006.

(*y*) 3 V. & B. 59.

(*z*) Vide post, Ch. XXXVIII.; and Re Crawhall's Trusts, 8 D. M. & G. 480 (gift "to the children of my sister A. (except the issue of her daughter X.) and of my sister B.," held to include grandchildren of B.).

(*a*) Barrington *v.* Tristram, 6 Ves. 345; Critchett *v.* Taynton, 1 R. & My. 541; Peppin *v.* Bickford, 3 Ves. 570; Ex parte Ilchester, 7 Ves. 368; Re Pickup's Trusts, 1 J. & H. 389; Isaac *v.* Hughes, L. R., 9 Eq. 191. See also Nash *v.* Allen, 42 Ch. D. 54, where it appearing from the terms of the gift over that children of a future marriage were intended to participate, it was held that an after-taken husband was also intended to be benefited.

(*b*) Stopford *v.* Chaworth, 8 Beav. 331.

(*c*) 2 Y. & C. C. C. 539; and see Lovejoy *v.* Crafter, 35 Beav. 149; Re Parrott, Walter *v.* Parrott, 33 Ch. D. 274.

Hobbs, 5 Harr. (Del.) 405; Heyward *v.* Hasell, 2 S. Car. 509; Pemberton *v.* Parke, 5 Binn. 601.

[1] See Dunlap *v.* Shreve, 2 Duval, 335; Prowitt *v.* Rodman, 37 N. Y. 42; Haldeman *v.* Haldeman, 40 Penn. St. 29; Guthrie's Appeal, 37 Penn. St. 9; Parkman *v.* Bowdoin, 1 Sumn. 359.

[2] See Carroll *v.* Carroll, 20 Texas, 731.

of his children until the youngest attained twenty-one, and then to divide the same equally between A., B., C., and D., children by his former wife, and E. and F., children by his then present wife, *and such other child or children* as might be living, or as his said wife might be enceinte with at his decease." Sir J. K. Bruce, V.-C., held that two children by the first marriage, not named in the will, but living at the date of the will and of the testator's death, were not entitled under the latter words of the bequest.

[*1006] *It remains to be observed that a gift to children does not extend to children by affinity; consequently a grandson's widow has been held not to be entitled under a devise to grandchildren (*d*).

Children by affinity not included.

II. — Gifts to Classes of Nephews, Nieces, Cousins, &c. — Gifts to other classes of relations, as nephews, nieces, cousins, are subject to like rules.[1] Thus great-nephews and great-nieces are not included in a gift to "nephews and nieces" (*e*),[2] nor a great grand-nephew in a gift to "grand-nephews" (*f*). So descendants of first cousins will not take under a gift to "first cousins or cousins german" (*g*); nor a first cousin once removed under a gift to second cousins (*h*). And "cousins" prima facie means first cousins (*i*). Again, relations by affinity do not, without the aid of a context (*k*), take under a gift to "relations" generally (*l*), or to relations of a particular denomination, as, nephews and nieces (*m*).[3] And a gift to nephews or nieces will not include all great-nephews or great-

"Nephews," "first cousins," &c., do not include great nephews or second cousins.

"Cousins" means first cousins.

(*d*) Hussey *v.* Berkeley, 2 Ed. 194.
(*e*) Shelley *v.* Bryer, Jac. 207; Falkner *v.* Butler, Amb. 514.
(*f*) Waring *v.* Lee, 8 Beav. 247.
(*g*) Sanderson *v.* Bayley, 4 My. & C. 56.
(*h*) Corporation of Bridgnorth *v.* Collins, 15 Sim. 541; Re Parker, Bentham *v.* Wilson, 15 Ch. D. 528, 17 Ch. D. 262.
(*i*) Stoddart *v.* Nelson, 6 D. M. & G. 68; Stephenson *v.* Abingdon, 31 Beav. 305; overruling contrary dictum of Shadwell, V.-C., Caldecott *v.* Harrison, 9 Sim. 457.
(*k*) Vide ante, p. 977; see also Cloak *v.* Hammond, 34 Ch. D. 255.
(*l*) Hibbert *v.* Hibbert, L. R., 15 Eq. 372.
(*m*) Wells *v.* Wells, L. R., 18 Eq. 504; Grant *v.* Grant, L. R., 5 C. P. 380, 727, 2 P. & D. 8, contra, is opposed to the general current of authority.

1 "To each of my nephews, one and all," includes those to whom legacies have already been given by the will. Bartlett *v.* Houdlette, 147 Mass. 25 (citing Cushing *v.* Burrell, 137 Mass. 21).

2 Goddard *v.* Amory, 147 Mass. 71; In re Woodward, 117 N. Y. 522 (citing Low *v.* Harmony, 72 N. Y. 408); Shull *v.* Johnson, 2 Jones, Eq. 202; Cromer *v.* Pinckney, 3 Barb. Ch. 466. Nephews and nieces "on both sides" will include those such by marriage. Frogley *v.* Phillips, 3 De G. F. & J. 466. And in Hogg *v.* Clark, 32 Beav. 641, and Sherratt *v.* Mountford, L. R., 8 Ch. 928, *s. c.* L. R., 15 Eq. 305, where the testator had no nephews or nieces of his own blood, those of his wife were held entitled. See also Adney *v.* Greatrex, 38 L. J. Ch. 414, distinguishing Smith *v.* Lidiard, 3 K. & J. 252. On the admissibility of declarations of the testator as to the person intended, see id.; Grant *v.* Grant, L. R., 5 C. P. 380, 727, criticised in note *m.* supra. See further Morrison's Estate, 139 Penn. St. 306; Appel *v.* Byers, 98 Penn. St. 479; Sherratt *v.* Mountford, supra; Gill *v.* Shelley, 2 Russ. & M. 336; Leigh *v.* Byron, 1 Sm. & G. 486; Thompson *v.* Robinson, 27 Beav 486; Crook *v.* Whitley, 7 De G. M. & G. 490.

3 Green's Appeal, 42 Penn. St. 25.

nieces (*n*), or all nephews or nieces by marriage (*o*), merely because in another part of the will the testator has misdescribed one or more of them as a nephew or niece. Generally, indeed, it will not include even the individuals thus misdescribed (*p*).

But the intention of a testator to use any of these appellations in a less accurate sense will of course prevail, if clearly indicated by the context.[1] Thus, in James *v.* Smith (*q*), where a testator, after describing a great-niece as his "niece A., daughter of his nephew B." bequeathed his residue to his nephews and nieces, Sir L. Shadwell, V.-C., held that the testator had unequivocally shown that he meant the child of a nephew or niece * to take, as well as a nephew or a niece, and that not only A. but all others in the same degree were entitled to share. He distinguished Shelley *v.* Bryer: "There the testator spoke of a person as his niece who in fact was great-niece, but he did not show that he knew her to be the child of a nephew or niece; he spoke at random." It may be doubted, however, whether the judges who decided Smith *v.* Lidiard and Thompson *v.* Robinson would accept inadvertence as a sufficient distinction between those cases and James *v.* Smith. Again, in Weeds *v.* Bristow (*r*), where by his will a testator bequeathed his residue equally amongst his nephews and nieces; and by codicil he gave to his "nephew A." (who was in fact a great-nephew), 100*l.*, which he declared was to be in addition to the share of residue given to him by the will — (thus far like Shelley *v.* Bryer) — and that he was to receive first the 100*l.*, and afterwards, in addition thereto, the said share of residue; it was held by Sir J. Stuart, V.-C., that the testator had put his own construction on his language, and that not only A., but all other great-nephews and great-nieces were let in. As to A., the concluding passage of the codicil constituted of itself a gift to A.; for of course a gift to an individual otherwise sufficiently described is not invalidated by a misstatement of his relationship (*s*); but as to the others, the case goes beyond James *v.* Smith; for there the testator used the word "niece" of "the daughter of a nephew;" here he used it only of "A."

Unless the context proves a different intention;

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So if at the date of the will there is not, and it is impossible there ever should be, a nephew or niece, properly so called, and the

(*n*) Shelley *v.* Bryer, Jac. 207; Thompson *v.* Robinson, 27 Beav. 486. See also Re Blower's Trusts, L. R., 6 Ch. 351, reversing *s. c.* L. R., 11 Eq. 97; Re Standley's Estate, L. R., 5 Eq. 303.
(*o*) Smith *v.* Lidiard, 3 K. & J. 252; Wells *v.* Wells, L. R., 18 Eq. 504.
(*p*) See cases in last two notes, and Hibbert *v.* Hibbert, L. R., 15 Eq. 372. See also Merrill *v* Morton, 17 Ch. D. 382.
(*q*) 14 Sim. 214.
(*r*) L. R., 2 Eq. 333.
(*s*) Stringer *v.* Gardiner, 4 De G. & J. 468.

[1] Shepard *v.* Shepard, 57 Conn. 24; Goddard *v.* Amory, 147 Mass. 71.

—or the gift strictly construed *never* could have had an object.

testator knows the fact, the nephew or niece of a husband (*t*) or wife (*u*) may be entitled. So if the gift be to "nephews and nieces" (in the plural), and there is not and cannot be more than one nephew and one niece, nephews and nieces by marriage may take (*x*). And under corresponding circumstances first cousins once removed may take under a gift to "second cousins" (*y*). * But in these cases it must be proved that the testator knew the facts (*z*).

[*1008]

And the larger construction may after all be excluded by the context; as in Stephenson *v.* Abingdon (*a*), where by will the bequest was to "my cousins living at my death and the children of my cousins then dead," and by codicil the testator excluded from the bequest the only four persons who then were or could ever become his "cousins," it was nevertheless held that the children of those cousins, *i. e.*, first cousins once removed, could not take, for the testator had by expressly mentioning children of deceased cousins provided for such first cousins once removed as he meant to include.

Conversely, the full force of any term of relationship may be so limited by the context as to exclude some of those who would naturally be included in the class (*b*). And it is to be observed that a bequest to "first and second cousins" has been decided to comprehend all who are within the same degree (the sixth) as second cousins; and therefore to admit great-nieces and first cousins once (*c*), or twice (*d*) removed.

Full meaning curtailed.

Gift to "first and second cousins."

(*t*) Sherratt *v.* Mountford, L. R., 8 Ch. 928.

(*u*) Hogg *v.* Clark, 32 Beav. 641; Sherratt *v.* Mountford, L. R., 8 Ch. 928.

(*x*) Adney *v.* Greatrex, 38 L. J., Ch. 414. It was assumed that a woman aged 60 was past child-bearing.

(*y*) Slade *v.* Fooks, 9 Sim. 386. It is presumed that the state of facts found was that which existed at the date of the will. See also Re Bonner, Tucker *v.* Good, 19 Ch. D. 201; Wilks *v.* Bannister, 30 Ch. D. 512. If, however, there are persons who strictly answer the description of second cousins, evidence is not admissible that the testator was accustomed to call his first cousins once removed "second cousins," per Cotton, L. J., in Re Parker, Bentham *v.* Wilson, 17 Ch. D. at p. 265.

(*z*) Crook *v.* Whitley, 7 D. M. & G. 490.

(*a*) 31 Beav. 305.

(*b*) Caldecott *v.* Harrison, 9 Sim. 457, where the V.-C. held that "cousins" was restricted by the context to first cousins. The principle is of course clear, though the V.-C.'s constructions of "cousins" has not been followed, sup.

(*c*) Mayott *v.* Mayott, 2 B. C. C. 125. But in Re Parker, Bentham *v.* Wilson, 15 Ch. D. 528, this laxity of construction was disapproved of by Jessel, M. R., who said that Mayott *v.* Mayott had been mistaken in the subsequent cases; that by "first and second cousins" the testator, in Mayott *v.* Mayott, referred to some living persons whom he knew (as "anybody reading the will could see"), and that, as there were no second cousins then living, he must have meant somebody else. The M. R. drew no distinction between one gift to "first and second cousins," and distinct gifts (as in the case before him), one to first cousins, and the other to second cousins. The decision of the M. R., was affirmed by the Court of Appeal, 17 Ch. D. 262, see ante, p. 1006, n. (*h*).

(*d*) Silcox *v.* Bell, 1 S. & St. 301; Charge *v.* Goodyer, 3 Russ. 140. But see contra, Slade *v.* Fooks, 9 Sim. 386.

Again, a gift to brothers and sisters extends to half brothers and sisters (*e*),[1] and a gift to nephews and nieces to the children of half brothers and sisters (*f*): and so with regard to every other degree of relationship.

A gift to a class of relations includes those of the half-blood.

III. — What Class of Objects, as to Period of Birth, "Children" comprehend, generally. — But the question which has been chiefly agitated in devises and bequests to children is, as to the point of time at which the class is to be ascertained, or in other words, as * to the period within [*1009] which the objects must be born and existent;[2] supposing

As to class of children entitled.

(*e*) The point was adverted to, arguendo, in Leake *v.* Robinson, 2 Mer. 363, which did not require its determination.

(*f*) Grieves *v.* Rawley, 10 Hare, 63; Re Hammersley, Kitchin *v.* Myers, W. N. 1886, p. 64.

[1] But see Wood *v.* Mitcham, 92 N. Y. 375, contra.

[2] A devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, unless a contrary intention can be inferred from some particular language of the will, or from some such extrinsic facts as may be entitled to consideration in construing its provisions. Russell *v.* Russell, 84 Ala. 48 (citing Hollingsworth *v.* Hollingsworth, 65 Ala. 321); Campbell *v.* Rawdon, 18 N. Y, 412; Jenkins *v.* Freyer, 4 Paige, 47; Lorillard *v.* Coster, 5 Paige, 172; Chasmar *v.* Bucken, 37 N J. Eq. 415; Lombard *v.* Willis, 147 Mass. 13; Minot *v.* Taylor, 129 Mass. 160; Upham *v.* Emerson, 119 Mass. 509; Worcester *v.* Worcester, 101 Mass. 128; Lombard *v.* Boyden, 5 Allen, 249, Whitney *v.* Whitney, 45 N. H. 311; Gross's Estate, 10 Barr, 360; Chase *v.* Lockerman, 11 Gill & J. 185; Young *v.* Robinson, id. 329, Shotts *v.* Poe, 47 Md. 513, Shinn *v.* Motley, 3 Jones, Eq. 490; Britton *v* Miller, 63 N. Car 268; Gillespie *v.* Schuman, 62 Ga. 252; Springer *v.* Congleton, 30 Ga. 977; Goodwin *v.* Goodwin, 48 Ind. 584, Wren *v.* Hynes, 2 Dnv. 129; McClung *v.* McMillan, 1 Heisk. 655; In re Coleman, L. R, 4 Ch. D. 165. See Lewis *v.* Lewis, 62 Ga. 265. And in the case of a gift to tenants in common, the survivors at the time of the testator's death, some of the number having previously deceased, gain, prima facie, no benefit from the diminution of donees. Upham *v.* Emerson, 119 Mass. 509, Lombard *v.* Boyden, 5 Allen, 249. (It would be otherwise if the donees were to take jointly. Holbrook *v.* Harrington, 16 Gray, 102. See post, Ch. XXXII.)

Thus it is a general rule that when an aggregate fund is given to several, to be divided among them nominatim, in equal shares, if one of them dies before the testator his share, if not otherwise disposed of, will lapse. Workman *v.* Workman, 2 Allen, 472, Jackson *v.* Roberts, 14 Gray, 546; Stedman *v.* Priest, 103 Mass. 293. See Kelly *v.* Kelly, 61 N. Y. 47; Haward *v.* Peavey, 128 Ill. 430, Thompson *v.* Ludington, 104 Mass. 193, Blanchard *v.* Blanchard, 1 Allen, 223. Still, the mere fact that the testator mentions by name the individuals who make up the class is not conclusive, and if an intention to give a right of survivorship may be collected from the remaining provisions, applied to the existing facts, such intention must prevail. Stedman *v.* Priest, 103 Mass. 293; Hood *v.* Boardman, 148 Mass. 330 (citing Wright *v.* White, 136 Mass. 170; Dove *v.* Johnson, 141 Mass. 287); Towne *v.* Weston, 132 Mass. 513. So, too, where the question of right by survivorship arises upon the termination of a prior estate given by the testator, if there be words which show an intention that those living at that time shall take the whole estate, then, though the interest of each was vested when the testator died, such interest would not be transmitted by the death of a child during the existence of the prior estate, but would go by survivorship to the others. McClung *v.* McMillan, 1 Heisk. 655; Bridgewater *v.* Gordon, 2 Sneed, 5.

On the other hand, where a gift to a class is to take effect after the testator's death, the estate given will be cut down by the birth of others who come within the description before the period or event upon which the gift is to take effect or the distribution is to be made; such will be included as within the probable intention of the testator. Thus, in the case of a gift to grandchildren, any grandchild of the testator who might be born after his death would be entitled to a share of the fund. McArthur *v.* Scott, 113 U. S. 340, Doe *v.* Considine, 6 Wall 458, Webster *v.* Welton, 53 Conn. 183; Hall *v.* Hall, 123 Mass. 120; Fosdick *v.* Fosdick, 6 Allen, 41; Worcester *v.* Worcester, 101 Mass. 128; Hatfield *v.* Sohier, 114 Mass. 48, Nichols *v.* Denny, 37 Miss. 59; Yeaton *v.* Roberts, 28 N. H. 459; Haskins *v.* Tate, 25 Penn. St. 249; Teed *v.* Morton, 60 N. Y. 502, Sinton *v.* Boyd, 19 Ohio St. 30; Myers *v* Myers, 2 McCord, Ch. 256.

But if the period is left indefinite, or if the gift is per verba in præsenti, none but those born before the death of the testator can take. Myers *v.* Myers, supra; Jenkins *v.* Freyer, 4 Paige, 47, Van Hook *v.* Rogers, 3 Murph.

the testator himself not to have expressly fixed the period of ascertaining the objects, which, of course, takes the case out of the general rule; for example, a gift to children "now living" applies to such as are in existence at the date of the will (*g*), and those only; and a gift to children living at the decease of A. will extend to children existing at the prescribed period, whether the event happens in the testator's lifetime (supposing that they survive him), or after his decease (*h*). These, however, are still gifts to classes, and if any of the children "now living," or "living at the death of A." (supposing A. to die before the testator) should die in the testator's lifetime, the share which such child would have taken will not lapse, but the surviving children will take the whole. Classes fluctuate both by diminution and by increase: here it would be by diminution only (*i*).[1]

(*g*) James *v.* Richardson, 1 Vent. 334, 2 Vent. 311; Burchet *v.* Durdant, T. Raym. 330. See also Att.-Gen. *v.* Bury, 1 Eq. Ca. Ab. 201; Crosley *v.* Clare, 3 Sw. 320 n.; Abney *v.* Miller, 2 Atk. 593; Blundell *v.* Dunn, 1 Mad. 433.

(*h*) Allen *v.* Callow, 3 Ves. 289; Turner *v.* Hudson, 10 Beav. 222. Where a testator gave a legacy to A. his daughter for life, and after her death to his grandson B., and if he should die in the lifetime of A., then to the children of C. who should be then living; it was held that the bequest was confined to the children of C. living at the death of A., and that the point was so clear, that the costs of the suit occasioned by the refusal of the executor to pay the legacy without the opinion of the Court, must fall on himself, Harvey *v.* Harvey, 3 Jur. 949. See also Sturge *v.* Great Western Rail. Co., 19 Ch. D. 444; Re Milne, Grant *v.* Heysham, 57 L. T. 828. See further as to "then living," ante, Vol. I., p. 809, n. And here it may not be amiss to observe, that a child who is made a legatee for life is not thereby incapacitated from claiming under a bequest of the ulterior interest to the testator's children living at his (the testator's) decease, Jennings *v.* Newman, 10 Sim. 219. See also Almack *v.* Horn, 1 H. & M. 630; and see Woods *v.* Townley, 11 Hare, 314; Carver *v.* Burgess, 18 Beav. 541, 7 D. M. & G. 97; Reay *v.* Rawlinson, 29 Beav. 88.

(*i*) Lee *v.* Pain, 4 Hare, 250; Leigh *v.* Leigh, 17 Beav. 605; Cruse *v.* Howell, 4 Drew. 215. See also Viner *v.* Francis, 2 Cox, 190; Dimond *v.* Bostock, L. R., 10 Ch. 358. See further as to gifts to a class, Vol. I., pp. 232, 310 et seq. The head-note to Spencer *v.* Wilson, L. R., 16 Eq. 501, erroneously states that in that case Leigh *v.* Leigh was "not followed." The two cases were very different, as pointed out in the latter by Malins, V.-C., who in Re Smith's Trusts, 9 Ch. D. 119, cited Leigh *v.* Leigh as an authority.

178. See Hansford *v.* Elliott, 9 Leigh, 79; Meares *v.* Meares, 4 Ired. 192. To let in children born after the death of the testator, some subsequent period of distribution must be fixed, or the result must depend on some contingency, and not be left indefinite. Swinton *v.* Legare, 2 McCord, Ch. 440; Jenkins *v.* Freyer, 4 Paige, 47; Battel *v.* Ommaney, 4 Russ. 70. See Turner *v.* Patterson, 5 Dana, 292. A testator devised all the remainder of his estate, both real and personal, to his daughter S. A. and the children born of her body, including all estate his wife had the improvement of during her life, after the decease of his said wife. S. A. had three children when the will was made, and a fourth was born afterwards in the testator's lifetime, all of whom survived the testator, and two more were born after his decease. It was held that "the children of her body" meant all the children she might have. Mr. Justice Wilde said this was not a strained construction of the words when it is observed that, as to part of the property, the devise was prospective, it being a remainder after a life-estate to the widow. If the devisor had intended to limit his bounty to the children living when he made his will, the learned judge thought that he would have named them, or used words to show that he meant so to limit it. Annable *v.* Patch, 3 Pick. 363. In this case S. A. and her four children, living at the time of the testator's death, took an estate together in fee-simple in the real property, — in the part in which the widow had a life-estate, a vested remainder, which opened to let in the two after-born children, and in the rest a qualified fee so limited as to admit their claims by way of executory devise. See Dole *v.* Keyes, 143 Mass. 237 (citing Weston *v.* Foster, 7 Met. 297; Hatfield *v.* Sohier, 114 Mass. 48; Gibbens *v.* Gibbens, 140 Mass. 102); Bruce *v.* Bissell, 119 Ind. 525. And it seems that the after-born children were entitled to share in the personal property by way of executory devise. See Dingley *v.* Dingley, 5 Mass. 535, 537; Ballard *v.* Ballard, 18 Pick. 41; Parkman *v.* Bowdoin, 1 Sum. 366; Weston *v* Foster, 7 Met. 300; Yeaton *v.* Roberts, 28 N. H. 459; Phillips *v.* Johnson, 14 B. Mon. 172; Ward *v.* Saunders, 3 Sneed, 387; Gardner *v.* James, 6 Beav. 170.

[1] It is laid down that, by the weight of authority, when an estate is given to a class

But if the testator after a gift to "children" proceeds to name them (*k*), or if he specifies their number, as by giving "to the five children of A." (*l*), this is a designatio personarum, and is a bequest to those who are named, or to the five in existence at the date of the will, and the shares of any who die before the *testator lapse. So where the bequest was to the testator's brothers and sister and his wife's brothers and sister, the testator and his wife each having one sister at the date of the will (*m*), and in another case even where the bequest was to E., the eldest son of J. S. and the other children of J. S., he having three other children at the date of the will, it was held that the terms "children," "brothers," &c., were to be understood as confined to those living at the date of the will (*n*). [*1010]

The following are the rules of construction regulating the class of objects entitled in respect of period of birth under general gifts to children.

IV. — What Class of Objects comprehended where the Gift is immediate. — An *immediate* gift to children (*i.e.*, a gift to take effect in possession immediately on the testator's decease), whether it be to the children of a living (*o*) or a deceased person (*p*), and whether to children simply or to all the children (*q*), and whether there be a gift over in case of the decease of any of the children under age or not (*r*), comprehends *the children living at the testator's death* (*if any*), and those only; Immediate gifts confined to children living at death of testator.

(*k*) Bain *v.* Lescher, 11 Sim. 397. And see Burrell *v.* Baskerfield, 11 Beav. 525; Re Hull's Estate, 21 Beav. 314; Spencer *v.* Wilson, L. R., 16 Eq. 501. But a gift to several children, nominatim in one part of the will, does not confine the generality of a bequest to "children," in another part, Moffat *v.* Burnie, 18 Beav. 211. See also Fullford *v.* Fullford, 16 Beav. 565; Fitzroy *v.* Duke of Richmond, 27 id. 186. Cf. White *v.* Wakley, 26 id. 23.

(*l*) Re Smith's Trusts, 9 Ch. D. 117; Jacob *v.* Cattling, W. N. 1881, p. 105.

(*m*) Havergal *v.* Harrison, 7 Beav. 49. And see Hall *v.* Robertson, 4 D. M. & G. 781.

(*n*) Leach *v.* Leach, 2 Y. & C. C. C. 495. See also Ramsey *v.* Shelmerdine, L. R., 1 Eq. 129, and qu. Cf. Goodfellow *v.* Goodfellow, 18 Beav. 356; Re Stanhope's Trusts, 27 id. 201; Re Jackson, Shiers *v.* Ashworth, 25 Ch. D. 162. In Re Stansfield, 15 Ch. D. 84, a testator gave certain property to his wife for life, remainder "to his nine children," and gave the residue to "all his children" equally, except that the eldest, by reason of his taking some realty as heir to his mother, was to have 30*l.* less than each of the others. It was held by Bacon, V.-C., that the residuary gift was given to the same children as were objects of the previous gift, as designated persons.

(*o*) 2 Vern. 105; 1 Eq. Ca. Ab. 202, pl. 20; Pre. Ch. 470; 2 Vern. 545; 1 Ves. 209; 2 Ves. 83; Amb. 273; id. 348; 1 B. C. C. 532, n.; id. 529; 1 Cox, 68; 2 Cox, 190; 2 B. C. C. 658; 3 B. C. C. 352; id. 391; 14 Ves. 576.

(*p*) Viner *v.* Francis, 2 Cox, 190, 2 R. R. 29.

(*q*) Heathe *v.* Heathe. 2 Atk. 121; Singleton *v.* Gilbert, 1 B. C. C. 542, n., 1 Cox, 68; Scott *v.* Harwood, 5 Mad. 332.

(*r*) Davidson *v.* Dallas, 14 Ves. 576; Scott *v.* Harwood, 5 Mad. 332. But as the gift over necessarily suspends the distribution as to all until the eldest attains twenty-one, as to which, however, see Fawkes *v.* Grey, 18 Ves. 131, ought not the children born in the interval to have been let in, seeing that these rules always aim at including as many objects as possible?

described as survivors such estate does not vest until the time designated for beginning of enjoyment by that class, and the word "survivor" has reference to that period unless a different intention appears. Cheney *v.* Teese, 108 Ill. 473.

notwithstanding some of the early cases, which make the date of the will the period of ascertaining the objects (*s*).[1]

It is scarcely necessary to observe, that this and the succeeding rules apply to issue of every degree, as grandchildren, great-grandchildren, &c., though cases to the contrary are to be found, especially [*1011] at an early period. As in Cook *v.* Cook (*t*), where, * under an immediate devise (*i. e.*, a devise in possession) to the *issue* of J. S. (which was held to apply to the children and grandchildren), a son born after the death of the testator was allowed to participate.

V. — What Class of Objects is comprehended where there is an anterior Gift. — Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, *but all who may subsequently come into existence before the period of distribution* (*u*).[2] Thus in the case of a devise or bequest to A. for life, and after his decease to his children, or (which is a better illustration of the limits of the rule, since, in the case suggested, the parent being the legatee for life, all the children who can ever be born necessarily come in esse during the pre-

In future gifts, children born before period of distribution let in.

(*s*) See Northey *v.* Strange, 1 P. W. 341; *s. c.* nom. Northey *v.* Burbage, Gilb. Rep. Eq. 136, Pre. Ch. 470.

(*t*) 2 Vern. 545. See Weld *v.* Bradbury, 2 Vern. 705, and the notes to that case.

(*u*) 9 Mod. 104; 1 Atk. 509; 2 Atk. 329; Amb. 334; 1 Ves. 111; 1 Cox, 327; Cowp. 309, 1 B. C. C. 537, 542; 3 B. C. C. 352, 434; 5 Ves. 136; 8 Ves. 375; 15 Ves. 122; 10 East, 503; 1 Mer. 654; 2 Mer. 363; 1 Ba. & Be. 449; 3 Dow, 61; 5 Beav. 45.

[1] Biggs *v.* McCarty, 86 Ind. 352; Merriam *v.* Simonds, 121 Mass. 198; Gardiner *v.* Guiler, 106 Mass. 25; Yeaton *v.* Roberts, 28 N. H. 459; Post *v.* Herbert, 12 C. E. Green, 540; Downing *v.* Marshall, 23 N. Y. 373; Tucker *v.* Bishop, 16 N. Y. 402; Mowat *v.* Carow, 7 Paige, 339; Gross's Estate, 10 Barr. 361. See also Springer *v.* Congleton, 30 Ga. 977; Cessna *v.* Cessna, 4 Bush, 516. Of course the date of the will *may* be made the time for ascertaining the objects, whether by specific language or by reasonable interpretation, the presumption that the will speaks from the death of the testator being prima facie only. Dingley *v.* Dingley, 5 Mass. 535; Morse *v.* Morse, 11 Allen, 36; Britton *v.* Miller, 63 N. C. 270; Whitehead *v.* Lassiter, 4 Jones, Eq. 79; Shinn *v.* Motley, 3 Jones, Eq. 499; Henderson *v.* Womack, 6 Ired. Eq. 441; Ballard *v.* Conners, 10 Rich. Eq. 389; Harris *v.* Alderson, 4 Sneed, 254; Unsworth *v.* Speakman, 4 Ch. D. 620 (denying Stewart *v.* Jones, 3 De G. & J. 532, in which, however, the principle was not disputed); In re Potter's Trusts, L. R., 8 Eq. 52, 60; Habergham *v.* Ridehalgh, L. R., 9 Eq. 395.

In general, legacies to a class go to those and those only who compose the class at the time the legacies take effect. But where a legacy takes effect, in point of right at one time and in point of enjoyment at a later time, all who are embraced in the class at the time of distribution, or when the legacy takes effect in enjoyment, will take. Jones's Appeal, 48 Conn. 60.

[2] Ridgeway *v.* Underwood, 67 Ill. 419; Biggs *v.* McCarty, 86 Ind. 352 (citing Jones' Appeal, 48 Conn. 60); Hall *v.* Hall, 123 Mass. 120; Worcester *v.* Worcester, 101 Mass. 132; Pike *v.* Stephenson, 99 Mass. 188; Bowditch *v.* Andrews, 8 Allen, 342; Moore *v.* Weaver, 16 Gray, 305; Parker *v.* Converse, 5 Gray, 336; Winslow *v.* Goodwin, 7 Met. 381; Harris *v.* Alderson, 4 Sneed, 250; Nichols *v.* Denny, 37 Miss. 59; Hill *v.* Rockingham Bank, 15 N. H. 270; Carroll *v.* Hancock, 3 Jones, 471; Simms *v.* Garrot, 1 Dev. & B. Eq. 393. It may be remarked that the question who are eventually to take in cases of this kind is not to be confounded with the question when the estate given vests in the donees. It is of course perfectly consistent with the vesting of an estate at the death of the testator that that estate should afterwards open to receive after-born objects, and that it should not receive its final character until the happening of some event to transpire after the testator's death; at least in the case of a gift of realty.

ceding interest) to A. for life, and after his decease to the children of B., the children (if any) of B. living at the death of the testator, together with those who happen to be born during the life of A., the tenant for life, are entitled, but not those who may come into existence after the death of A. (*x*). And a gift over in case of the decease of any of the children under age will not affect the construction (*y*). The rule is the same where the life interest is not of the testator's own creation, but is anterior to his title (*z*). Where the prior estate determines by bankruptcy or some other event, the class must as a general rule be ascertained at the time of the determination of the estate (*a*). But the rule will not apply if there are expressions in the context of the will indicating * that the [*1012] class should not be so restricted. So where a testator gave a fund upon trust for his son for life, and after his death to be divided among "all the children which such son might have," and in a subsequent part of the will was contained a proviso that as and when they should respectively attain twenty-one years, if the son should, inter alia, be adjudicated a bankrupt, the fund should henceforth immediately go and be payable and applicable for the benefit of the child or children "of the son, in the same manner as if he was naturally dead;" the son was adjudicated bankrupt; it was held by the Court of Appeal (*b*) that the testator did not mean by the proviso to disturb the previous gift; and, accordingly, that children born after the adjudication were entitled to share in the fund.

In cases falling within the rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares, subject to the diminution of those shares (*i. e.*, to their being divested pro tanto), as the number of objects is augmented by future births, during the life of the tenant for life; and, consequently, on the death of any of the children during the life of the tenant for life, their shares (if their interest therein is transmissible) devolve to their respective

Children take vested shares, liable to be divested pro tanto.

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

(*y*) Berkeley *v.* Swinburne, 16 Sim. 275, corresponding with Davidson *v.* Dallas, sup.; the gift over was treated as *confirming* the rule. But see per Cur. in Re Emmet's Estate, 13 Ch. D. 489, 491, 492. See also the *order* in Re Smith, 2 J. & H. 601, which favors a different rule, since in terms it admits all children born before the gift over operated. The only point decided, however, was that no child born after its father's bankruptcy (upon which the prior estate ceased) was entitled; and as, in fact, no child was born between that event (1841) and the eldest son's majority (1848), the other point did not arise.

(*z*) Walker *v.* Shore, 15 Ves. 122. The same rules are applicable to an appointment under a power; and though the power authorizes an appointment to children living at the donee's death only, the Court will not on that account, and to make the appointment fit on to the power, restrain the generality of the expressions used, Harvey *v.* Stracey, 1 Drew. 73, 122. That appointments by will are generally to be construed in the same way as simple bequests, see Oke *v.* Heath, 1 Ves. 135; Easum *v.* Appleford, 5 My. & C. 56; Freme *v.* Clement, 18 Ch. D. 499.

(*a*) Re Smith, 2 J. & H. 594; Re Aylwin's Trusts, L. R., 16 Eq. 590.

(*b*) Re Bedson's Trusts, 28 Ch. D. 523, affirming the decision of Pearson, J., 25 Ch. D. 458. In the Court of Appeal Lord Esher, M. R., expressed an opinion that the rule could be less strictly applied in the case of personalty than in the case of realty, but Sir H. Cotton, L. J., expressly dissented from this view. See also Brandon *v.* Aston, post, p. 1016.

representatives (*c*); though the rule is sometimes inaccurately stated, as if existence at the period of distribution was essential (*d*).

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

Construction applicable to *executory* gifts.

[*1013]

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

Thus, in Singleton *v.* Gilbert (*g*), where A. devised her real estate to trustees for 500 years, to raise 200*l.*, and then to other trustees for 1000 years, out of the rents to pay the interest thereof, and certain life annuities; and, subject to the said terms, she gave the estate to all and every the child and children of her brother T. in tail, as tenants in common. One question was, whether a child born after the death of A., but in the lifetime of the annuitants, could take jointly with two others born before A.'s death. It was insisted, on behalf of such child, that the devise was to be considered as vesting at the time when the trusts of the term were satisfied, and, consequently, that it let in all such children of T. as were then alive. Lord Thurlow admitted that where the legacy is given with any suspension of the time, so as to make the gift take place either by a fair or even by a strained construction (for so, he said, some of the cases go), at a future period, then such children shall take as are living at that period. But this was an estate given directly, although given charged with the terms, and therefore he could not consider the after-born children as entitled.

Mere charging of lands does not let in future children.

(*c*) Att.-Gen. *v.* Crispin, 1 B. C. C. 386; Devisme *v.* Mello, Id. 537; Middleton *v.* Messenger 5 Ves. 136; Cooke *v.* Bowen, 4 Y. & C. 244; Watson *v.* Watson, 11 Sim. 73; Locker *v.* Bradley, 5 Beav. 593; Salmon *v.* Green, 13 Jur. 272; Evans *v.* Jones, 2 Coll. 516, 524; Pattison *v.* Pattison, 19 Beav. 638.

(*d*) See judgment in Matthews *v.* Paul, 3 Sw 339; Houghton *v.* Whitegreave, 1 J. & W. 150. See also Crooke *v.* Brookeing, 2 Vern. 106; Baldwin *v.* Karver, Cowp. 309.

(*e*) Haughton *v.* Harrison, 2 Atk. 329; Ellison *v.* Airey, 1 Ves. 111; Stanley *v.* Wise, 1 Cox, 432; Baldwin *v.* Rogers, 3 D M. & G. 649.

(*f*) Oppenheim *v.* Henry, 10 Hare, 441.

(*g*) 1 Cox, 68, 1 B. C. C. 542, n.

The same rule is applicable to personal estate; so that where a testator directs that a particular sum shall be set apart for a temporary purpose (as a life-annuity), and that it shall afterwards fall into the residue, and the residue is bequeathed to the children of A., those children who are in existence at the time of the testator's death are alone entitled to the particular sum (subject to the temporary purpose), as well as the residue (*h*).

Same construction as to charge on personal estate.

The rule was applied in Coventry *v.* Coventry (*i*), where the *general estate was devised subject to a life estate in [*1014] part. A testator devised certain freehold and other estates in trust out of one moiety of the annual proceeds to pay one-half of his debts, &c., and the remainder of that moiety he gave to his wife for life, and at her death directed that the said moiety should go into and form part of his residuary estate, and be held upon the same trusts; and out of the other moiety to pay the other half part of his debts, &c., and accumulate the remainder until 1875 (twenty-one years from his death), when the second moiety was to fall into and become part of, and be disposed of in like manner as, his residuary estate: he also gave his wife a life interest in certain specific portions of his personalty, which at her death were also to fall into his residuary estate: and he gave the residue of his real and personal estate to his son A., his daughter-in-law B., his widow, and all his grandchildren, share and share alike. Sir R. Kindersley, V.-C., held that the same class of grandchildren were entitled to the property in which the wife had a life interest as to the general residue, viz. those living at the testator's death.

The result might be different if the context showed an intention to treat the funds separately. As an example of such treatment, though not involving the exact point in question, reference may be made to King *v.* Cullen (*k*), where a testator directed a fund to be set apart to answer an annuity for his wife, for her life; at her death to sink into the residue; and bequeathed the residue to his children as tenants in common; provided that in case any of them should die either in his lifetime or after his decease, before their shares should become vested interests leaving issue, such issue should have their parents' share. One of the children who survived the testator died in the widow's lifetime, leaving a daughter; and Sir J. K. Bruce, V.-C., held, that although the deceased child took absolutely such part of the residue as was not set apart for the annuity, yet her share in the fund that was so set apart went to her daughter. The ground of this decision would

Whether the construction applies where funds are treated as distinct.

(*h*) Hill *v.* Chapman, 3 B. C. C. 391, 1 Ves. Jr. 405; see Cort *v.* Winder, 1 Coll. 320.

(*i*) 2 Dr. & Sm. 470. See also Lill *v.* Lill, 23 Beav. 446; Hagger *v.* Payne, id. 474; Bortoft *v.* Wadsworth, 12 W. R. 523. On a somewhat similar principle the same class of children as take the original share of a fund given to their parent for life have sometimes been held to take accruing shares coming by failure of another stirps; as to which see further Ch. XLVII.; Re Ridge's Trusts, L. R., 7 Ch. 665; Heasman *v.* Pearse, id. 660.

(*k*) 2 De G. & S. 252. See also Gardner *v.* James, 6 Beav. 170, where distribution was by the will expressly postponed.

seem to have been that by no other construction could the gift over have any operation, since no child could die *after the testator's decease* without attaining a vested (*l*) interest in the general residue.

[*1015] *The rule which makes a gift to children comprehend all who come into existence before the time of distribution is not peculiar to that class of relations; for, that which is held a wise rule with regard to one grade of relationship must also be so held with regard to another (*m*). Thus a gift to A. for life and after his death to his brothers, will include the brothers born during the life of A. (*n*); and the same has been held with regard to nephews and nieces (*o*), and cousins (*p*); but with regard to other classes of objects the gift would clearly apply and be confined to those who were living at the death of the testator (*q*).

Gifts to other classes of relations governed by same rule.

VI. — What Class of Objects is comprehended where Possession is Postponed till a given Age. — It has been also established, that where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply to those who are living at the death of the testator, and who come into existence before the first child attains that age, *i. e.* the period when the fund becomes distributable in respect of *any* one object, or member of the class (*r*) [1] And the result is the same where the expression is "*all* the children" (*s*).

Rule where distribution is postponed to a given age.

This rule of construction must be taken in connection with, and not as in any measure intrenching upon the two preceding rules. Thus, where a legacy is given to the children, or to all the children, of A., *to be payable at the age of twenty-one*, or to Z. for life, and after his decease to the children of

Does not clash with the preceding rules.

(*l*) The word "vested" was held to mean *vested in possession*, on the same ground.

(*m*) See per Turner, L. J., 3 D. M. & G. 656.

(*n*) Devisme *v.* Mello, 1 B. C. C. 537; Doe d. Stewart *v.* Sheffield, 13 East, 526. See also Leake *v.* Robinson, 2 Mer. 363

(*o*) Balm *v.* Balm, 3 Sim. 492. See also Shuttleworth *v.* Greaves, 4 My. & C. 35; Cort *v.* Winder, 1 Coll. 320; Re Partington's Trusts, 3 Gif. 378.

(*p*) Baldwin *v.* Rogers, 3 D M & G. 649.

(*q*) As to gifts to next of kin, depending as they do on peculiar considerations, see ante, p. 981. Many cases might be suggested in which a gift to objects in esse would open and let in future objects; as to A. and the heirs of the body of B., a person living, or to A. and any wife whom he shall marry. See Mutton's case, Dy. 274 b.

(*r*) 1 Ves. 111; 1 B. C. C. 530; id. 582; 3 B. C. C. 401; id. 416; 2 Ves. Jr. 690; 3 Ves. 730; 6 Ves. 345; 8 Ves. 380; 10 Ves. 152. 11 Ves. 238; 3 Sim. 417, 492; 2 Beav. 221; 1 Beav. 352; 12 id. 104; 7 Hare, 473, 477. But see 5 Sim. 174; 2 Ves. 83. And see as to *income*, post, p. 1023.

(*s*) Whitbread *v.* Lord St John, 10 Ves. 152.

[1] In Hubbard *v.* Lloyd, 6 Cush. 522, it was held that a bequest of a residue "unto all the children of B equally, when they shall severally attain the age of twenty-five years," included all the children born before one attained that age, though born after the death of the testator, but did not include those born after one attained that age. See Curtis *v.* Curtis, 6 Madd. 14; Gilbert *v.* Boorman, 11 Ves. 238; Andrews *v.* Partington, 3 Brown, Ch. 401; Leake *v.* Robinson, 2 Meriv 393; Defflis *v.* Goldschmidt, 1 Meriv. 417; Handbury *v.* Doolittle, 38 Ill. 206; Hempstead *v.* Dickson, 20 Ill. 193; Winslow *v.* Goodwin, 7 Met. 375; Emerson *v.* Cutler, 14 Pick 108; Collin *v* Collin, 1 Barb Ch. 636; Doubleday *v.* Newton, 27 Barb. 431; Simpson *v.* Spence, 5 Jones, Eq. 208; Buckley *v.* Read, 15 Penn. St. 83; Heisse *v.* Markland, 2 Rawle, 274.

A., *to be payable at twenty-one*, and it happens that any child in the former case at the death of the testator, and in the latter at the death of Z., have attained twenty-one, so that his or her share would be immediately payable, no subsequently born child will take; but if at the period of such death no child should have attained twenty-one, then all the children of A. who may subsequently come into existence before one shall have attained that [*1016] age will be also included (*t*): in short, whichever event happens last marks the period of distribution and for ascertaining the class. So in Brandon *v.* Aston (*u*), where a fund was given in trust for A. for life or until alienation, and in either event, for such of A.'s children as should attain twenty-one, to be paid to them on attaining that age, if the same should happen after the death of A., and if he should be then living, to be paid on his death. A.'s interest having ceased by his alienation, two of his children who were adult claimed immediate payment of their shares; but this was refused by Sir J. K. Bruce, V.-C., since that would prejudice any claim which after-born children of the father might have.

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

Ascertainment of class not accelerated by advancement out of children's shares.

The rule in question, as it respects the exclusion of children born after the vesting in possession of *any* of the shares, has been viewed with much disapprobation; and Lord Thurlow, in Andrews *v.* Partington (*z*), said he had often wondered how it came to be so decided; there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children. In marriage settle-

Judicial opinions upon rule which excludes children born after eldest attains twenty-one.

(*t*) Clarke *v.* Clarke, 8 Sim. 59. See also Matthews *v.* Paul, 3 Sw. 328; Robley *v.* Ridings, 11 Jur 813; Gillman *v.* Daunt, 3 K. & J. 48; Re Emmet's Estate, 13 Ch. D. 484.

(*u*) 2 Y. & C. C. C. 24, 30, see minute of decree. Cf. Re Bedson's Trusts, ante, p. 1012.

(*x*) Titcomb *v.* Butler, 3 Sim. 417 As to the effect of such a clause to postpone the ascertainment of the class, see below, p. 1020

(*y*) Balm *v.* Balm, 3 Sim. 492; cf. Matchwick *v.* Cock, 3 Ves 611; Freemantle *v.* Taylor, 15 id. 363.

(*z*) 3 B. C. C. 401. See also per Lord Rosslyn, Hoste *v.* Pratt, 3 Ves. 732; per K. Bruce, V.-C., Brandon *v.* Aston, 2 Y. & C. C. C. 30; Darker *v.* Darker, 1 Cr. & M. 850.

ments, however, one at least of the parents generally takes
[*1017] a life interest, so that the shares do *not vest in possession until the number of objects is fixed. The rule has gone, Lord Eldon remarked (*a*), upon an anxiety to provide for as many children as possible with convenience. Undoubtedly it would be very inconvenient, especially in the case of legacies payable instanter, if the shares of the children were, by reason of the possible accession to the number of objects by future births, unascertainable during the whole life of their parent; and though this inconvenience is actually incurred, as we shall presently see, in some cases (*b*), in which the gift runs through the whole line of objects, born and unborn, even after vesting in possession in the existing children, yet it will be found in such cases either that the construction was adopted ex necessitate rei (there being no alternative but either to admit *all* the children, or hold the gift to fail in toto for want of objects), or, that the admission of all the children was compelled by some expressions of the testator.

The principle of the rule under consideration seems to apply to all cases in which the shares of the children are made to vest *in possession* on a given event, as on marriage; in which case the marriage of the child who happens to marry first, is the period for ascertaining the entire class (*c*).

When the legacy is not to vest until the period of distribution, all children, born before the eldest acquires a vested interest, — which he does upon the happening of the contingency as to him individually, — may by possibility be participators in the fund (*d*). Younger children as to whom the contingency has not happened are, of course, not entitled to anything while the contingency is in suspense: it is uncertain, therefore, by how many the class ultimately entitled may fall short of the number of children living when the contingency happens as to the eldest; but as the class cannot, in consequence of the application of the rule, be enlarged, the minimum of each share is immediately fixed.

Construction where period of vesting is period of distribution.

Construction not varied though it leads to remoteness.

The foregoing rules, which admit all children coming in esse before the period of vesting or of possession, will (like other rules of construction) be generally adhered to, although the gift may in consequence fail for remoteness, as, where the gift is to the children of a living person
[*1018] to vest at the age of *twenty-two (*e*). But if a distinct

(*a*) In Barrington *v.* Tristram, 6 Ves. 348.
(*b*) See post, pp. 1021, 1022.
(*c*) Dawson *v.* Oliver-Massey, 2 Ch. D. 753, acc.
(*d*) Clarke *v.* Clarke, 8 Sim. 59; Gillman *v.* Daunt, 3 K. & J. 48; Locke *v.* Lambe, L. R., 4 Eq. 372.
(*e*) Leake *v.* Robinson, 2 Mer. 363, 383; Arnold *v.* Congreve, 1 R. & My. 209; Comport *v.* Austen, 12 Sim. 218; Boughton *v.* James, 1 Coll. 43, 1 H. L. Ca. 406. See Pearks *v.* Moseley, 5 App. Ca. 714, 719; Re Mervin, Mervin *v.* Crossman (1891), 3 Ch. 197. If any one of the

vested gift be followed by a direction postponing distribution beyond the legal period, the direction will be rejected as void, and the gift left intact, as in Kevern *v.* Williams (*f*), where a testator bequeathed the residue of his personal estate in trust for A. for life, with remainder to the grandchildren of B., "to be by them received in equal proportions when they should severally attain the age of twenty-five years." On the question of remoteness being raised, it was held by Sir L. Shadwell, V.-C., that the grandchildren who had come in esse before A.'s death were alone entitled. He distinguished Leake *v.* Robinson because there the time of gift was not distinct from the time of enjoyment.

Gift to A. for life, remainder to children of B., *payable* at twenty-five; class held ascertainable at death of A.

Again, in the case of Elliot *v.* Elliot (*g*), where there was a residuary bequest to the children of A., "as and when they should attain their respective ages of twenty-two years," and the testator directed the interest on their respective shares to be accumulated and to be paid to them as and when the principal should be payable; it was argued that the gift being contingent was void for remoteness; but the same learned Judge saw no objection in principle to holding that by this description the testator meant those children who were then living, or might be living, at his death; and then there was no objection to the gift. But though this case is an authority that, where the terms are thus general, the Court may, of two possible constructions of a will, choose that which renders it valid, that course is denied if the testator has, in express terms, denoted an intention to comprehend after-born children in the description (*h*).

Gift to children of A. at twenty-two, held to include children living at testator's death only.

But an important exception obtains in the case of legacies which are to come out of the general personal estate, and are made payable at a given age (say twenty-one); in which case it seems that the bequest is confined to children in existence at the death of the testator, on account of the inconvenience of * postponing the distribution of the general [*1019] personal estate until the majority of the eldest legatee, which would be the inevitable effect of keeping open the number of pecuniary legatees (*i*); and if there is no child in existence at the testator's death, the legacies fail altogether (*k*). But this argument of incon-

Exception as to general legacies.

class has attained the age in the testator's lifetime, the gift is good, because no after-born child is admissible, Picken *v.* Matthews, 10 Ch. D. 264.

(*f*) 5 Sim. 171, cited 16 Sim. 285.

(*g*) 12 Sim. 276; followed by Stirling, J., in Re Coppard's Estate, Howlett *v.* Hodson, 35 Ch. D. 350. The direction as to interest in Elliot *v.* Elliot, was apparently regarded as vesting the shares of the children of A. as from the testator's death (as to which see ante, Vol. I., p. 800), so as to bring the case within Kevern *v.* Williams, per Stirling, J., Re Mervin, Mervin *v.* Crossman (1891), 3 Ch. 197, 204.

(*h*) Boughton *v.* James, 1 Coll. 43, 1 H. L. Ca. 406.

(*i*) Ringrose *v.* Bramham, 2 Cox, 384, 2 R. R. 84; Peyton *v.* Hughes, 7 Jur. 311; Mann *v.* Thompson, Kay, 638. And see Storrs *v.* Benbow, 2 My. & K. 46.

(*k*) Rogers *v.* Mutch, 10 Ch. D. 25.

venience, it is obvious, does not apply where the number of objects affects the *relative* shares only, and not the aggregate amount (*l*), nor where a definite sum is directed to be set apart to answer the legacies, and the legacies are to come only out of that sum (*m*).

Other cases in which the rule has been departed from.

The rule in question, so far as regards the exclusion of children born after the vesting in possession of any one of the distributive shares, has been sometimes departed from upon grounds which can scarcely be considered as warranting that departure. Thus, where (*n*) a testator bequeathed 300*l.* to the children of his sister S., to be equally divided *at their respective ages of twenty-one or marriage*, with interest, and failing the share of any, to the survivors, and failing the share of *all*, then to G. One of the questions was, whether the legacy belonged to a child of S., born, at the making of the will, to the exclusion of those since born, or to be born? Lord Hardwicke thought it was meant for the benefit of *all the children S. should have;* for the testator, knowing she had but one then, had yet given it to *children*, had pointed out survivors, and given it over to another branch of the family, which he could not mean, till all failed.

Remark on Maddison *v.* Andrew.

It is clear that none of these circumstances would now be held to take the bequest out of the ordinary rule. Its being to children in the plural, with a provision for survivorship, was consistent with that construction; as was the word "all," which was satisfied by referring it to the children of any class who took shares.

Gift over in case parent die *without issue.*

Lord Loughborough seems to have thought that where a devise or bequest of the nature of those under consideration is followed by a gift over in case the parent die without issue, all children, without reference to the period of vesting in possession, are eutitled. Thus, where (*o*) a testator devised, on a certain event, the produce of the sale of certain freehold estates to be divided between the children of his daughters E. and R., such [*1020] of the * children as should be sons *to be paid at their respective ages of twenty-one*, and such as should be daughters at their respective ages of twenty-one, or days of marriage respectively; and he bequeathed the residue of his personal estate to be equally divided between *the child and children* of his said two daughters, *in like manner as the money to arise from his real estate;* and, in case any child of his said daughters should marry and die in the lifetime of their respective mothers, then he directed that the issue of such child should stand in the place of their parent; *and, in case his said*

(*l*) Gilmore *v.* Severn, 1 B. C. C. 582.
(*m*) Evans *v.* Harris, 5 Beav. 45. But until the number of legatees is finally ascertained, there is always a possibility of the fund proving deficient. As to abatement in such a case vide id. and 19 Ves. 570.
(*n*) Maddison *v.* Andrew, 1 Ves. 58.
(*o*) Mills *v.* Norris, 5 Ves. 335.

daughters should die without issue, or such issue should die without issue in the lifetime of his said daughters, then over. It appeared, in the consideration of another question, that Lord Loughborough had previously decided, that the latter disposition extended to all the children of testator's daughters without reference to the age of twenty-one, by force of the clause limiting it over in case of the failure of issue of the daughters.

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

Remark on Mills *v.* Norris.

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

If, however, the shares are directed to vest at twenty-one, and maintenance and advancement are expressly authorized out of vested as well as out of presumptive shares, children born after the eldest has attained twenty-one will be admitted; for it is clear that the trustees were to retain the fund after some had attained a vested interest (*s*). But a power of maintenance out *of the interest of pre- [*1021] sumptive shares of course has no such effect (*t*).

Power of advancement out of *vested* shares.

Again, the rule is not applicable where the vesting in possession is postponed until the youngest child attains a prescribed age. Where distribution is directed generally at twenty-one, there is no doubt about the time of payment; it is certain that as soon as any child attains the age, the testator intended him to have his share, and after-born children are unavoidably excluded. But it is very doubtful whether by youngest child (in the case supposed) the testator means anything but youngest whenever born: in the absence of an explanatory context, it is mere conjecture that the youngest for the time being in esse, or the young-

Gift to children when the youngest attains twenty-one.

(*p*) See Vandergucht *v.* Blake, 2 Ves. Jr. 534, and other cases treated of in Ch. XL.
(*q*) 6 Ves. 50.
(*r*) See cases referred to, ante, p. 1015.
(*s*) Iredell *v.* Iredell, 25 Beav. 485; Bateman *v.* Gray, L. R., 6 Eq. 315. See also Berry *v.* Briant, 2 Dr. & Sm. 1, where distribution was postponed after the age of vesting by reason of the whole income being given for the common maintenance of the legatees (named) during the life of their parent. So also, where distribution is postponed by a trust for accumulation, Watson *v.* Young, 28 Ch. D. 436.
(*t*) Gimblett *v.* Purton, L. R., 12 Eq. 427.

est living at the death of the testator, was meant, admitting those born before, but excluding all born after, such youngest has attained the age.

Thus, in Mainwaring *v.* Beevor (*u*), where a testator bequeathed the residue of his stock to trustees in trust thereout to maintain his "grandchildren, the children of his sons A. and B., until they should severally attain twenty-one," and accumulate the surplus dividends, "and when and so soon as all and every his said grandchildren should have attained twenty-one," in trust to pay and divide the fund among them, Sir J. Wigram, V.-C., refused to decree an immediate division of the fund, merely because the youngest grandchild for the time being had attained the age of twenty-one. He adverted to the inconvenience which arose as soon as the elder children attained twenty-one, viz. that the provision for the maintenance of those children ceased, though, as it could not be certainly said that the youngest child had attained twenty-one, they could not claim a distribution of the fund; and continued, "The question is, how long is the eldest child or the other children to wait? If the objects of the testator's bounty can be confined to children of his sons living at his death,—which, independently of the fact that one son had no children at that time, I am clear cannot be done in this case,—it might be possible to get at the conclusion that, the moment the eldest attained twenty-one, the period pointed out for division arrived. If it be once admitted that a child born after the death of the testator may take, all the inconvenience is let in, and the eldest * child may have to wait an indefinite time, so long as children may continue to be born. How in that case is it possible to limit the class entitled in the way suggested, which is, the moment the youngest child in esse attains twenty-one, there is to be a division, although there may be an unlimited number of children born afterwards? I do not see how the inconvenience can be avoided. The words of the will do not require an immediate distribution."

Gift to grandchildren when all have attained twenty-one.

[*1022]

In Hughes *v.* Hughes (*x*), a testator gave real and personal estate in trust to pay the income for the maintenance of all the children of his three daughters A., B., and C., share and share alike, until the youngest of his said grandchildren should attain twenty-one; and in case of the death of any of them before the youngest of those *living* should attain twenty-one, leaving children, then to such children, and when the youngest grandchild *living* should have attained twenty-one, then he gave one full proportionable share to such of his said grandchildren as should be then living, and the children of such as should be then dead. A question arose on the claim of the subsequently-born grandchildren

Gift to grandchildren when youngest attains twenty-one.

(*u*) 8 Hare, 44. See also Bateman *v.* Foster, 1 Coll. 118, 126.
(*x*) 3 B. C. C. 352, 434.

to be admitted to a participation with those living at the testator's death. Lord Thurlow, during the argument, said, when the gift is general, it is always confined to the death of the testator. Where there is a gift for life, or the distribution is postponed to a future time, then children born during the life or before that time are let in. On a subsequent day he decided in favor of the after-born grandchildren, the gift being to *all the grandchildren*. He distinguished the cases where the time for vesting the property in possession was perfectly marked out by the testator, and the distribution consequently was confined to those who had come in esse at that time: whereas here was a general gift not narrowed or controlled by any words the testator had used. By the decree it was declared that the residue should be divisible among the grandchildren of the testator who were living at his death, and that had been born since and that should be born, until the youngest of such grandchildren should attain the age of twenty-one (*y*).

* The expression "*all the children*," noticed by Lord Thur- [*1023]
low, has been held, we have seen, to be inadequate to enlarge the construction (*z*). The case subsequently came on a petition for rehearing before Lord Eldon (*a*), who varied the decree by declaring that the residue was divisible "among such of the testator's grandchildren (except T. C. H.), whether living at the testator's death or born afterwards, as were living at the time the youngest of such grandchildren shall appear to have attained the age of twenty-one years" (*b*).

Lastly, this rule being one "of convenience," applies only to distribution of corpus where the aliquot share of each member of a class cannot be ascertained until the class is closed, and has no bearing on a gift of income, which is payable periodically. In the case of a gift of income, members of

The rule does not apply to gifts of income.

(*y*) This apparently confined the class to those who had come in esse when the youngest for the time being attained twenty-one; and the word "living," as used in the trusts of the income, seems to require that construction; but the facts, so far as they can be collected, did not require a decision between that and letting in every child whenever born. The testator died 3d June, 1782, R. L. 1791, A. fo. 215. Wigram, V.-C., thought (8 Hare, 50) the decree might mean every grandchild whenever born. But that is inconsistent with the clause "that should be born until the youngest of such grandchildren should attain twenty-one," for none could be born after the birth of the absolute youngest. Mr. Jarman thought "such" referred to the grandchildren living at the testator's death, and that thus "the seeming inaccuracy of the case was corrected." But that is not the grammatical sense. Moreover it appears (14 Ves. 258) to have been assumed that John Erasmus Adlam, a grandchild born after the testator's death, who attained twenty-one in 1806, and was the youngest for the time being, was the youngest "living" within the meaning of the will.

(*z*) Whithread *v.* St. John, 10 Ves. 152, see ante, p. 1015; see also Heathe *v.* Heathe, 2 Atk. 121; Singleton *v.* Gilbert, 1 Cox, 68, 1 B. C. C. 542, n.; Scott *v.* Harwood, 5 Mad. 332.

(*a*) 14 Ves. 258.

(*b*) R. L. 1807, A. fol. 1091. It is remarkable that nothing is said in Lord Eldon's declaration as to shares of grandchildren who might die leaving issue. Probably the point had become immaterial, the youngest grandchild having attained twenty-one years, and those who had died would appear from the recitals in the order of 1807 to have died without issue.

the class coming into esse after the first member has attained the given age will be admitted to share in the distribution (*c*).

VII. — Effect where no Object exists when Gift falls into Possession. — 1. *Where the Gift is Immediate.* — We are now to consider the effect upon *immediate* and *future* gifts to children of a failure of objects at the period when such gift would have vested in possession. With regard to immediate gifts (*d*), it is well settled that if there is no object in esse at the death of the testator, the gift will embrace *all* the children who may subsequently come into existence, by way of executory gift.

Rule where no object exists at period of distribution.

Where the gift is immediate, all afterwards born entitled.

Thus, in Weld *v.* Bradbury (*e*), a testator bequeathed certain moneys to be put out at interest; one moiety to be paid to the younger children of M. living at his (the tes- [*1024] tator's) death, and * the other moiety *to the children of S. and N.* Neither S. nor N. had any child living at the date of the will (*f*), or at the death of the testator. It was held to be an executory devise (qu. bequest?), to such children as they or either of them should *at any time* have.

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

In these cases there was nothing to show that less than all must be admitted, if any. But if the shares are directed to vest, or to be paid, when the children respectively attain twenty-one, it would seem to agree best with the principle of the preceding rules, and still more closely with the rule presently mentioned, of which Whitbread *v.* Lord St. John (*h*), is the leading example, that only those children should be admitted who have come into existence before the eldest attains the prescribed age. In Armitage *v.* Williams (*i*) the income of certain securities was directed "to be applied to the education of the children of A. and B. in equal shares, and on their attaining the age of twenty-one years the whole to be sold and divided equally among them. Should the said A. and B. die without issue the fund was given on the same conditions to the children of C. and D. It

But if distribution postponed till twenty-one, none let in after eldest attains twenty-one.

(*c*) Re Wenmoth's Estate, Wenmoth *v.* Wenmoth, 37 Ch. D. 266.
(*d*) Where a person taking a preceding life interest dies in the testator's lifetime, the gift is of course treated as immediate.
(*e*) 2 Vern. 705. See also Haughton *v.* Harrison, 2 Atk. 329.
(*f*) This was immaterial.
(*g*) Amb. 448.
(*h*) 10 Ves. 152, post, p. 1037.
(*i*) 27 Beav. 346. No reasons are reported. The judgment is more fully reported, 7 W. R. 650, but with a statement of the "rule of the Court for ascertaining the period of distribution," which must not be taken as the general rule.

was held by Sir J. Romilly, M. R., that all the children whenever born were entitled: but this was apparently because the will was considered to direct a division when *all* the children had attained the age, and thus to bring the case within Mainwaring *v.* Beevor.

Devises and bequests of this nature have given rise to two questions: First, as to the destination of the income between the period of the testator's death and the birth of a child; secondly, as to the appropriation of the income between the birth of the first and the birth of the last child.

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

[*1025]

Destination of income until birth of child.

Immediate income was held to accumulate.

(*k*) Harris *v.* Lloyd, T. & R. 310. See Bullock *v.* Stones, 2 Ves. 521.
(*l*) Harris *v.* Lloyd, T. & R. 310, and Hopkins *v.* Hopkins, Cas. t. Talb. 44.
(*m*) Bullock *v.* Stones, 2 Ves. 521.
(*n*) 1 Ves. 485.

disposed of. Lord Hardwicke, after a long argument on the terms of the will, and, after admitting that the heir was entitled to what was not given away by express words or necessary implication, held that the intermediate profits passed to the trustees for the benefit of the devisees; thinking, upon the whole, that there was an intention to accumulate; for which he relied partly on the fact of the real and personal estate being comprised in one clause (*o*), and on the expression in the will and codicil respecting the annuities.

The other question arising on these gifts to children is, as [*1026] to * the destination of the income accruing in the interval between the births of the eldest and the youngest child, with respect to which it is settled (nor could it have been doubted upon principle), that the children for the time being take the whole.

Children for the time being take the whole income.

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

So, in a subsequent case (*r*), it was held by Lord Loughborough that a child subsequently born was not entitled to a share in the by-gone income, in equal participation with children antecedently in existence; the special terms of the gift, which expressly comprised the "interest and produce," being considered insufficient to control the general rule, which was also followed by Lord Langdale (*s*) and Sir J. Wigram (*t*).

If the bequest be contingent, a child only presumptively or contingently entitled is, for the purpose of answering either of the above

(*o*) On this point, vide Genery *v.* Fitzgerald, Jac. 468, and other cases commented on Vol. I. p. 615.
(*p*) Amb. 448, ante, p. 1024.
(*q*) The word in the report is "daughters;" but this was evidently used in mistake for children.
(*r*) Mills *v.* Norris, 5 Ves. 335.
(*s*) Scott *v.* Earl of Scarborough, 1 Beav. 154.
(*t*) Mainwaring *v.* Beevor, 8 Hare, 44, see minute of decree, p. 51; Ellis *v.* Maxwell, 12 Beav. 104.

questions, to be considered as not in existence; so that in the first case the intermediate profits will go to the next of kin or heir-at-law, or to the residuary legatee or devisee (*u*), and in the second, to the children who have attained a vested interest, notwithstanding the existence of children who have not yet but may hereafter become entitled to a share (*x*).

Disposition of income before contingent legacy vests.

* 2. *Where the Gift is in Remainder.* — The next inquiry is [*1027] as to the rule of construction which obtains, where the gift to the children is preceded by an anterior interest, and no object comes into existence before its determination; as in the case of a gift to A. for life, and after his decease, to the children of B.; and B. has no child until after the death of A. It is clear that in such a case, if the limitation to the children of B. were a legal remainder of freehold lands, it would unless saved by stat. 40 & 41 Vict. c. 33, fail by the determination of the preceding particular estate before the objects of the remainder came in esse (*y*). This rule, however, originating in feudal principles, is not applicable to equitable limitations of freehold estate, and accordingly it has been held, that in a similar devise by way of trust, the ulterior limitation does not fail by the non-existence of objects during the life of A., the tenant for life, but takes effect in favor of such objects whenever they come into existence. Thus in Chapman *v.* Blisset (*z*), where lands were devised to trustees upon certain trusts during the life of A., and at his decease as to one moiety in trust for such child or children of A. as he should leave, and as to the other moiety in trust for the children of B., not repeating the words "as he shall leave." B. had no child born until after the decease of A.; and it was held that such after-born child was entitled to the latter moiety; Lord Talbot observing, that, "in regard to trusts, the rules are not so strict as at law; for the whole legal estate being in the trustees, the inconvenience of the freehold being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented." The same doctrine would seem to hold in regard to bequests of personal estate; to which it is obvious none of the rules governing contingent remainders are applicable. As some of the positions, however, advanced by a very learned Judge in Godfrey *v.* Davis (*a*), may seem to be inimical to such a conclusion, it will be necessary to examine that case.

Effect where there is no object at or before time of distribution.

(*u*) Haughton *v.* Harrison, 3 Atk. 329; Shaw *v.* Cunliffe, 4 B. C. C. 144.

(*x*) This seems a necessary conclusion, see Furneaux *v.* Rucker, W. N. 1879, p. 135, See also Stone *v.* Harrison, 2 Coll. 715; and Re Jeffery, Burt *v.* Arnold (1891), 1 Ch. 671, in which case the principle stated in the text was applied, so as to hold that the statutory provisions as to maintenance contained in sect. 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), do not apply to a gift to members of a class contingently on attaining twenty-one years.

(*y*) See per Jessel, M. R., Re Roberts, Repington *v.* Roberts-Gawen, 19 Ch. D. at p. 530. And see ante, Vol. I., pp. 226, 831.

(*z*) Cas. t. Talb. 145.

(*a*) 6 Ves. 43.

Godfrey v. Davis, considered.

A. bequeathed annuities to several persons for life, and directed that the first annuity that dropped in *should devolve upon the eldest child* male or female for life of H.; and he directed that as the annuities dropped in, they should go to increase the annuities of the survivors, and so to the [*1028] last survivor, except * as to two individuals named; and when the said annuitants were all dead, the whole property to devolve upon the heirs male of P. *At the death of the first annuitant, H. had no legitimate child* (the claim of a natural child was disallowed (*b*)); but he afterwards married, and had a child, who claimed the annuity. Sir R. P. Arden, M. R., said, "It is clearly established by Devisme *v.* Mello (*c*), and many other cases, that where a testator gives any legacy or benefit to any person, not as persona designata, but under a qualification and description at any particular time, the person answering the description at that time is the person to claim; and, if there are any persons answering the description, they are not to wait to see whether any other persons shall come in esse, but it is to be divided among those capable of taking, when by the tenor of the will he intended the property to vest in possession (*d*). That case was much considered by Lord Thurlow, and seems to have settled the law upon the subject. The first question is, whether it is clear the testator meant any given set of persons should take at any given time: if so, it is clear that all persons answering that description, whether born before *or afterwards* (*e*), shall take; but if there are no such persons, it shall not suspend the right of others, but they shall take as if no such persons were substituted. Before that case, this point was not quite so clear (*f*). Where the gift is to all the children of A. at twenty-one, if there is no estate for life, it will vest in all the children coming into existence until one attains the age of twenty-one (*g*). Then that one has a right to claim a share, admitting into participation all the children then existing. So if it is to a person for life, and, after the death of that person, then to the children of A., the intention is marked, that until the death of the person entitled for life no interest vests (qu. in possession?). When that person dies, the question arises whether there are then any persons answering that description; if so they take, without waiting to see whether any others will come in esse answering the description. *If it is given over in the event that there are no children, and there are no children at that period, the person to whom it is given over takes.* It is clear this testator meant these annuities to commence at his death, and that each annuitant should receive a pro-

(*b*) See next chapter.
(*c*) 1 B. C. C. 537.
(*d*) This is indisputable, see ante, p. 1010.
(*e*) The words "or afterwards" are not consistent with the preceding position or with the general rule.
(*f*) Singleton *v.* Singleton, Ayton *v.* Ayton, 1 B. C. C. 542, n.
(*g*) See ante, p. 1015.

portionable share of his fortune, with benefit of survivorship and right of accruer, subject upon the * death of the [*1029] first annuitant to the substitution of the eldest child of H. Upon the death, therefore, of the first annuitant, unless there was some person who had a right of substitution in the room of that person, and there was no such person, it was to go among the survivors. *The person substituted, namely, the first child of H., cannot now claim.* That construction is much fortified by the manner in which it is given over, for it is perfectly clear that he meant the persons to whom it was given over, under the description of the heirs of P., to take upon the death of the persons to whom it was first given over. If the first construction contended for is to prevail, those persons, supposing all the other annuitants claiming by survivorship were dead, must wait not only the death of the survivor, but also the death of H., for during his life there would be a possibility that a child might be born who upon that construction might say he was the survivor."

It is evident, therefore, that the judgment of the M. R. was partly founded upon the particular circumstances of the case; and yet no one can read that judgment without seeing that in his opinion the rule was universal, that a bequest to children as a class, to fall into possession on the determination of an anterior interest, failed, *if there was no object at that period:* and he seems to have considered this as a necessary consequence of holding that such objects (if any) would have taken to the exclusion of subsequently born children. That the one proposition is not invariably a corollary of the other, is established, we have seen, by the cases respecting *immediate* gifts to children, which although they extend only to such children (if any) as are in existence at the death of the testator, yet, in case of there being at that period no child, will embrace the *whole* range of unborn children (*h*). Upon what principle a different construction could be supported in the case of an executory bequest preceded by a bequest for life, it is difficult to discover, unless it were for the sake of assimilating the construction to that of a legal remainder, but which is decisively negatived by the construction that has been applied to equitable limitations, as to which we have seen the rule is different; and the inevitable conclusion, it is conceived, is that, by analogy to the latter class of devises, *a bequest to A. for life, and after his death to the children of B., is not defeated by the non-existence of an object at the death of A., but will take * effect in favor of* ALL *the subsequently born children as* [*1030] *they arise;* assuming, of course, that the terms of the bequest do not bring it within the restrictive rule stated in the third division of the present section.

Suggested result of the cases.

The doctrine above suggested is tacitly recognized in Wyndham *v.*

(*h*) Ante, p. 1024.

Wyndham (*i*), where a testator bequeathed the residue of his estate to A. for life, but if she shall die leaving any child or children, then the trustees were to pay the principal to them; but if A. should die without any child or children, then he left the residue *to the younger children of B.*, if he should have any, and if not, he left it to C. A. died without children before B. had any, and B. afterwards died without having had a child; and the question in this case was, as to what became of the income in the interval between the deaths of A. and B.; which question of course assumes, that the property did not go over to C. immediately on the death of A. without a child, but remained in expectancy during the whole life of B., to await the event of his having children.

Executory gift not defeated by failure of objects until after the time of vesting in possession.

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

In the case (*k*) alluded to a testator devised the reversion in a moiety of certain real estate to his sister A., subject to a charge in the following terms: "The sum of 500*l.* I also deduct out of the said part of my estate to my niece M., daughter of my brother R., to be paid when most convenient to my sister A., bearing interest three months after my decease. Whenever this 500*l.* shall be paid by my sister A., I do require that it be put into government or any other security by her trustee P., whom I appoint to act as such, as he shall think most to her advantage; and that the said M. shall receive the said 500*l.*, with the accumulated interest, either *on the day of marriage or at the age of twenty-one* as shall be thought best. [*1031] *Should the said M. not * survive either of those periods, and there be no child or children of the said R., then I would have the said sum of* 500*l. revert to my sister A.; but, in case of other children of R., I would have the said sum equally divided, share and share alike.*" M. died under age, and unmarried. R. had no other children at that time, but other children were born afterwards; and the question was, whether such subsequently-born children were entitled. Sir T. Plumer, V.-C., adverted to Godfrey *v.* Davis as having been decided upon the principle, that a period being distinctly fixed when the distribution was to take place, the children born after that period were not entitled. "Are there (he said) any words in this will fixing the time when a share is to vest, so as to exclude after-

(*i*) 3 B. C. C. 58. See Shawe *v.* Cunliffe, 4 B. C. C. 144, where a gift to the children of A. after the death (without children) of B., and in default of children of A. to fall into the residue, was construed a gift to the children who survived A., by the controlling force of a prior gift, made expressly to such last-mentioned children. B. having died in the lifetime of A., the same question, and consequent recognition of the doctrine advocated in the text, occurred here as in Wyndham *v.* Wyndham. See also Conduitt *v.* Soane, 4 Jur. N. S. 502.

(*k*) Hutcheson *v.* Jones, 2 Mad. 124; Haughton *v.* Harrison, 2 Atk. 329.

born children? The property is not given on the children attaining twenty-one, or marriage; it is a reversionary fund, which is a strong circumstance, and the gift to A. is expressed in unambiguous terms. If the after-born children are excluded, it must be in the teeth of the words of the will, which only give it to A. 'if there be no child or children of the said R. (*l*).'" He accordingly decided in favor of the children of R.

This case shows that an executory bequest, in derogation of a preceding gift, does not fail for want of objects at the period of taking effect (though, if there had been any such, it would have been confined to them (*m*)); and that, in the opinion of the learned Judge who decided it, the case of Godfrey *v.* Davis sustains no general doctrine to the contrary, but is referable to its special circumstances.

Remark on Hutcheson *v.* Jones.

In another case (*n*), where lands were by settlement limited to A. for life, remainder to B. for life, remainder to trustees for 500 years, in trust to raise 1000*l.* for such persons as B. should appoint, and, in default of appointment, *to the executors, administrators, and assigns of C.;* and A. and B. died in the lifetime of C., without any appointment by B., it was argued that there was at the determination of their estates no object of the trust of the term, since C. could have no executor or administrator in her lifetime, and, therefore, that the limitation failed, as in the case of a devise of real estate to the heirs of a person living at the determination of the prior estates; but Sir T. Plumer, M. R., said, *he did not see that the analogy could be applied.* The case, however, was not distinctly decided upon this point.

* So, in the earlier case of Lord Beaulieu *v.* Lord Cardi- [*1032]
gan (*o*), where the testator bequeathed an Exchequer annuity, which was granted for a term of years, to his grandson, Lord Montague, for so many years as he should live, and after his death for such person as, "*at the time of Lord Montague's death,* should be heir male of Lord Montague's body, to take lands of inheritance from him by course of descent, for the residue of the term; *and in case there should be no such heir male, then in trust for such person as should be heir male of the body of Duke John,* to take lands by course of descent, for the residue of the term; and in case there should be no such person as should be such heir male, then in trust for Duke John for life, with remainder to such person and persons as should be entitled by virtue of his said will to the rents of the real estate thereby devised." Lord Montague died without issue before Duke John had a son; and it was held by Lord Northington, that the gift in question took effect in favor of a son who was born six years

(*l*) As to this, see post, p. 1033.
(*m*) Ellison *v.* Airey, 1 Ves. 111, and other cases cited ante, p. 1012, n. (*e*).
(*n*) Horseman *v.* Abbey, 1 J. & W. 381.
(*o*) Amb. 533.

after this event; observing, that if the limitation to the son of Duke John was to depend on the words "*living at the time of the death of Lord Montague,*" it would defeat the intention of the testator; for he meant that the sons of Duke John should take after (qu. in substitution for ?) the sons of Lord Montague.

The weight of authority, therefore, is decidedly in favor of the position, that all gifts to children, preceded by an anterior interest, will embrace the objects existing at the death of the testator, and those who may come in esse before the determination of such interest; *and that in all such cases, except in the instance of a legal remainder of real estate* (*p*), *if there be no object at the time of the vesting in possession, all the children subsequently born will be let in,* unless the terms of the gift restrict it to a *narrower* class of objects.

General conclusion from the cases.

The doctrine, however, of the preceding cases may seem to be encountered by some remarks occurring in Bartleman *v.* Murchison (*q*), where an annuity was bequeathed to A. for life, and, after her decease, to B., "*if a widow,* but not otherwise, but to revert back to any child or children after her death;" and it was held, that B., who was married at the death of A., and afterwards became a widow, [*1033] was not entitled on such subsequent * widowhood; Lord Brougham, observing: "Although, in construing bequests of personal, the same technical strictness does not prevail as in devises of real estate, the same rules are to a great extent applicable;" and then, after adverting to the construction of *bequests* to children, as comprehending the same persons as devises to these objects, he remarked: "It is only following out the same principles, to hold, *that a person,* to whom a legacy is given in a particular character, and by a particular description, shall not be entitled to it, unless he be clothed with that character and answer that description at the moment when the legacy might vest in possession."

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

Remark on Bartleman *v.* Murchison.

And here the student should be reminded, that where, in the preceding observations, mention is made of the *objects at the period of distribution,* this is not intended to designate children *existing* at that period; for it has been already shown, that all who have existed in the interval between the death of the testator and the period of distribution, whether living or dead at the latter period, are objects of the gift,

Existence up to time of distribution not necessary.

(*p*) *I.* e., a legal remainder not protected by stat. 40 & 41 Vict. c. 33, ante, Vol. I. p. 832. Unless the rule is as stated in the text, this statute gives effect to certain legal remainders of real estate, which, if limited with regard to personal estate, would fail.

(*q*) 2 R. & My. 136.

and may therefore not improperly be termed objects *at that period*; their decease before the period of distribution having no other effect than to substitute their respective representatives, supposing, of course, the interest to be transmissible.

It is to be observed, that the rules fixing the class of objects entitled under gifts to children are not in general varied by a limitation over, in case the parent should die without children, or in case *all* the children die, &c., as these words are construed merely to refer to the objects of the preceding gift. It is true, indeed, that in Hutcheson *v.* Jones some stress was laid by Sir T. Plumer, V.-C., on the words giving the property over in default of child or children, as importing that the ulterior gift was not to take effect unless in the event of the failure of *all* the children; but in Andrews *v.* Partington (*r*) a pecuniary legacy to *all* the children of A., payable at twenty-one or marriage, with a bequest over in case *all* the children died before their shares became payable, was confined to children who were in esse when the first share became payable. So, in Scott *v.* * Harwood (*s*), where the devise was to the use and behoof [*1034] of all and every the child and children of A. lawfully begotten, and their heirs forever; and in case the said children of A. should all die before they attained the age of twenty-one years, then over; Sir J. Leach, V.-C., held, that the children of A. living at the testator's death were exclusively entitled, and that *in the devise over "the testator must, by necessary inference, be considered as speaking of the children to whom the estate is given."* If it be objected that in this case the expression "the said children" required such a construction, the answer is, that the preceding gift being to *all* the children, the referential expression had the same force as if the same terms were repeated, and consequently the effect of the whole would be, according to Sir T. Plumer's doctrine in Hutcheson *v.* Jones, that the estate was not to go over until the failure of *all* the children.

Whether gift over in default of children enlarges class of objects entitled.

Remark on Scott *v.* Harwood.

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

Gift to children *to be born* or *to be begotten.*

Where they extend the class.

(*r*) 3 B. C. C. 401. (*s*) 5 Mad. 332.

Thus, in Mogg *v.* Mogg (*t*), where a testator devised the Mark Estate to trustees, in trust to pay the rents toward the support and maintenance of the child and children begotten *and to be begotten*, of his daughter, Sarah Mogg: it was contended that, notwithstanding the words "to be begotten," the devise could apply only to the children born before the testator's death, as those words might be satisfied by letting in the children born after the date of the will before the death of the testator; but the Court of K. B. (on a case from Chancery) certified that all the nine children of Sarah Mogg, including five who were born after the death of the testator, took under the devise; and Sir W. Grant, M. R., expressed his concurrence in the certificate.

[*1035] * And in Gooch *v.* Gooch (*u*), where a testator devised lands to trustees in trust "during the lives and life of the survivor or longest liver of all the children which his daughter A. hath or shall have," to apply the rents for the support of A. and "of all her children which she shall from time to time have living;" and when his grandchildren, the children of his said daughter, should have attained the age of twenty-one, the testator directed the rents to be paid among the said children, and the issue of such as should die leaving issue, and the survivors and survivor of them, during the life of the longest liver of the said children; Sir J. Romilly, M. R., on the authority of Mogg *v.* Mogg (in which he expressed his concurrence), held that children born after the death of the testator were entitled under the trust for children during the minority of the youngest. He also held, however, that the time up to which such after-born children were admissible was, not the death of A., but the period when the youngest child for the time being attained the age of twenty-one years; upon the special ground (besides a variety of expressions tending to the same conclusion) that the will had provided for the event of the youngest child attaining that age in the lifetime of A., and that it was inconsistent with the provision that it should in all events remain a matter of uncertainty until the death of A., which was or might be her youngest child. This decision was affirmed on both points by Lord Cranworth.

Distinction in regard to general pecuniary legatees;

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

(*t*) Mogg *v.* Mogg, 1 Mer. 654, 658. In the marginal note of the report, these words are omitted. The case is deserving of attentive perusal, as it illustrates almost every rule regulating the class of children entitled under immediate and future devises.

(*u*) 14 Beav. 565, 3 D. M. & G. 366. As to the meaning in a gift of this nature, of the words "born in due time after" the testator's death, see Re Wass, Marshall *v.* Mason, W. N., 1882, p. 158.

Thus, in Storrs *v.* Benbow (*x*), where a testator bequeathed * 500*l.* "to each child *that may be born* to either of the chil- [*1036] dren of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship; Sir J. Leach, M. R., held, that the gift was confined to children living at the testator's death. He thought that the words "may be born," provided for the birth of children between the making of the will and the death of the testator; and observed, that to give a different meaning to the words would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until the deaths of his brothers' children (*y*).

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

— and cases where distribution is otherwise postponed.

(*x*) 2 My. & K. 46, affirmed 3 D. M. & G. 390, and Townsend *v* Early, 28 Beav. 429, 3 D. F. & J. 1 (same will). See also Butler *v.* Lowe, 10 Sim. 317. In Deffis *v.* Goldschmidt, 19 Ves 566, 1 Mer. 417, it was admitted (improperly as it now appears) that legacies to each of the children of the testator's sister "whether born or hereafter to be born," would include every child whenever born unless the will showed a contrary intention, and proceeding on that admission, Sir W. Grant held that this contrary intention had not been shown; and he relied on the provision that if the sister should die before all her children had attained twenty-one, the interest of the legacies provided for such children as should be under age, or a competent part thereof, should be applied in their maintenance; whereby he considered that the testator had shown that in his view she could not die leaving any child who would not be entitled to maintenance, and consequently to a legacy. But in Butler *v* Lowe, 10 Sim. 317, a similar provision was disregarded.

(*y*) The reason last assigned by the M. R. is the only one which characterizes this class of excepted cases. The former argument would apply equally to cases within the general rule stated ante, p. 1034. It has indeed been suggested that these excepted cases furnish the general rule, from which Mogg *v.* Mogg, and Gooch *v.* Gooch, as relating only to real estate, are themselves the exception, Dias *v* De Livera, 5 App. Ca. 134, 135. No reason is given why there should be any such distinction between real and personal estate, unless a vague allusion to the feudal system was so intended. A distinction derived from this source would, however, tell the other way, since feudal law accelerates the vesting of estates and (by consequence) the ascertainment of classes.

Sprackling *v.* Ranier, 1 Dick. 344, was also cited (5 App. Ca. 133) as a "direct authority" that the words in question do not enlarge the class. But in that case the gift was to G. for life, and afterwards to his sons and daughters, and their children, if any then dead, equally, per stirpes; and if G. should die without issue, then to the sons and daughters of M., lawfully begotten or to be begotten, and their children, in case any of them should be *then* dead leaving issue, equally, per stirpes. G. died without issue in the testator's lifetime. At the death of G., M. had three children, and after the testator's death gave birth to a fourth. It was held by Sir T. Clarke, M. R., that only such of the children of M. as were living at the death of G. were entitled. "The Court (he said) will sometimes extend the words 'then living' to those living at the time of the will, but never further than the death of the testator." It is plain, therefore, that the decision turned on the word "then" tying down the class to the death of G., and that the case has no bearing upon the question under consideration.

It is true that Butler *v.* Lowe was treated by Sir L Shadwell as a case within "the general rule;" but, having regard to the argument in that case, this must have meant "the general rule respecting distinct legacies."

It may be added that Dias *v.* De Livera did not, and could not, raise the precise point. That case turned on the construction of a mutual will, executed by husband and wife according to the Roman-Dutch law of Ceylon, and operating at different times on the different moieties of the joint property; a very different instrument from an English will.

Thus, in Paul *v.* Compton (*z*), where a testator bequeathed
[*1037] the * residue of his personal estate in trust for his wife for life, and after her decease unto such of his daughters and such of their children as she should by will appoint, recommending her "to provide for such child or children as may *hereafter be born* of my said two daughters;" and in default of such disposition, then in trust for the children of the daughters; Lord Eldon held that this power to the wife did not authorize her to appoint to children *not born in her lifetime.*

Construction of a *future* gift not varied by words "to be born;"

So, in Whitbread *v.* Lord St. John (*a*), he decided that a bequest unto and among the child and children of A. born *and to be born*, as many as there might be, *when and as they should attain their age of twenty-one years or be married* with consent, was confined to his children living at the death of the testator and those who afterwards came in esse before the first share vested in possession, according to the rule before adverted to (*b*).

So in Parsons *v.* Justice (*c*), where the gift was to A. for life, and after her death to all the children of B. who should be living at the testator's death or be born afterwards who should attain twenty-one; it was held by Sir J. Romilly, M. R., that the class was to be ascertained on the happening of the latter of the two events, viz. the eldest child attaining twenty-one and the death of A., and that no child born after the death of A., which happened last, could participate. This decision is the more emphatic because the will contained a provision that "no child attaining twenty-one should be excluded from his share in consequence of any other child or children having previously attained a vested interest in his share or shares, but that each child attaining in B.'s lifetime a vested interest in his share should thenceforth *during B.'s life* be entitled to receive the whole income of his vested share for the time being, subject to the contingent right of any after-born child to such vested share."

—nor by the words "to be born after my death."

But if the bequest is to "such children as shall hereafter be born during the lives of their respective parents," of course this construction is excluded by the express terms of the will, and all the after-born children will be let in, whether born before the period of distribution (*d*) or not.

It has been decided, too, that the words "which shall be begotten" or "to be begotten," annexed to the description of
[*1038] * children or issue, do not *confine* the devise to future chil-

(*z*) 8 Ves. 375.
(*a*) 10 Ves. 152.
(*b*) See ante, p. 1015. In Eddowes *v.* Eddowes, 30 Beav. 603, the bequest was not so confined; Whitbread *v.* St. John, however, was not cited.
(*c*) 34 Beav. 598.
(*d*) Scott *v.* Earl of Scarborough, 1 Beav. 156.

dren; but that the description will, notwithstanding these words, include the children or issue in existence before the making of the will (*e*).

Do not confine devise to *future* children.

This doctrine is as old as the time of Lord Coke, who says (*f*), that as procreatis shall extend to the issues begotten *afterwards*, so procreandis shall extend to the issues begotten *before*. And in Almack *v.* Horn (*g*), where a testator devised real estate to his daughter A., a widow, and his granddaughter B., and the survivor for life, remainder to all the children of A. and B. lawfully to be begotten as tenants in common in tail; B. was the only child of A.; but notwithstanding this (*h*), and the apparently future import of the expression "to be begotten," it was held by Sir W. P. Wood, V.-C., that she was entitled with her own children to share in the remainder; the correct view in his opinion being that the expression had no reference at all to time, but merely pointed out the stirps.

And it seems that even the words "*hereafter* to be born" will not exclude previously-born issue (*i*), a construction first applied to cases (though not now confined to them) where the word "heirs" or "issue," to which the phrase in question was added, was a word of limitation, not giving an estate by purchase to any other person than to him whose heirs were mentioned; and this Lord Talbot said was to prevent the great confusion which would arise in descents by letting in the younger before the elder. But, as a rule of construction, it must be founded on presumed intention; it supposes that the testator, by mentioning future children, and them only, does not thereby indicate an intention to exclude other objects, and in this view is certainly an exception to the maxim, expressio unius est exclusio alterius.

"Hereafter to be born" does *not* exclude existing children.

In a case (*j*) where by a codicil a testatrix revoked a legacy given by her will to her sister A., and gave a like sum in trust for her during her life, and after her death for "the child or, if more than one, for all and every the children of A., whether by her *present or any future* husband," it was held by Sir W. P. Wood * that [*1039] a child, who was the only child of A. by a former husband (who was dead at the date of the will) was entitled. "Neither internally nor externally," said the V.-C., "was there any evidence of an intention to exclude this child by a former husband. The testatrix, who had by her will given the legacy to her sister absolutely, revoked by codicil the absolute gift, and after giving her a life interest,

(*e*) Doe d. James *v.* Hallett, 1 M. & Sel. 124. See the same principle applied to a deed, Hewet *v.* Ireland, 1 P. W. 426, 2 Coll. 344, n.

(*f*) Co. Lit. 20 b.

(*g*) 1 H. & M. 630.

(*h*) See analogous cases upon gifts to next of kin, ante, pp. 983, 984.

(*i*) Hebblethwaite *v.* Cartwright, Cas. t. Talb. 31; which seems to overrule the position of Lord Hale, that the words "in posterum procreandis" exclude sons born before, on account of the peculiar force of "in posterum:" Hal. MSS. cit. Co. Lit. 20 b, n. 3; 3 Leon. 87.

(*j*) Re Pickup's Will, 1 J. & H. 389.

introduced the provision for the children. She knew that her sister had one child living. There might be more, and it was immaterial to her whether those others should be by the present or any future husband of her sister" (*k*).

"*Shall* happen to die."

Sir W. Grant thought (*l*) that a gift over, in case certain persons "*shall* happen to die in my lifetime," though strictly importing futurity, might be understood as speaking of the event at whatever time it may happen, whether before or after the will; applying the rule that the prior limitation being, by what means soever, out of the case, the subsequent limitation takes place.

Unless the will show an intention to exclude them.

But the context may require expressions of this kind to be construed strictly as importing time future. Thus, in Early *v.* Benbow (*m*), where a testator gave legacies of 500*l.* each to A., B., C., and D., four of the grandchildren of his brother Henry, and by a codicil bequeathed 500*l.* "to each child *that may be born* to either of the children of either of my brothers lawfully begotten;" it appeared that at the date of the codicil and of the testator's death, there were living, to his knowledge, several grandchildren of his brothers besides A., B., C., and D. (and for whom no provision was made except by the codicil), and several children of brothers, one at least of which brothers survived the testator. Under these circumstances, Sir J. K. Bruce, V.-C., held that neither of the legatees named in the will was intended to take any benefit by the codicil so as to give double legacies; and appeared to entertain an opinion equally adverse to all grandchildren [*1040] living at the date of the codicil, although not * named. Sir J. Romilly, M. R., before whom the latter point was afterwards argued (*n*), decided it in conformity with that opinion: he thought it was concluded in principle by the previous decision, in which he concurred. And both decisions were upheld by the Court of Appeal (*o*).

The preceding citation from Lord Coke has anticipated the observation (which properly finds a place here), that a gift to children "born" or "begotten" will extend to children coming in esse sub-

(*k*) Compare the principle of these cases with that of Shuldam *v.* Smith, 6 Dow. 22, ante, Vol. I., p. 779. The cases in the text strongly exemplify the anxiety of the Courts to avoid giving devises to children an operation that will restrict them to certain classes of children. See judgment in Matchwick *v.* Cock, 3 Ves. 611, where after-born children were admitted to participate in a provision for maintenance out of income in favor of "children" generally, though the disposition of the property itself, out of which the income was to arise (and the objects of which, it might be presumed, were intended to be the same as those of the maintenance provision), was confined to the existing children. Freemantle *v.* Taylor, 15 Ves. 363.

(*l*) In Christopherson *v.* Naylor, 1 Mer. 326. See also Re Sheppard's Trusts, 1 K. & J. 269.

(*m*) 2 Coll. 342. It will be observed that the gift in this case was not to children as a class. And see Wilkinson *v.* Adam, 1 V. & B. 422, 468; Locke *v.* Dunlop, 39 Ch. D. 387.

(*n*) Early *v.* Middleton, 14 Beav. 453.

(*o*) Townsend *v.* Early, 1 D. F. & J. 1, affirming 28 Beav. 428.

sequently to the making of the will, and even after the death of the testator, where, the time of distribution under the gift being posterior to that event, the gift would by the general rule of construction include such after-born children.

Words "born" and "begotten" do not exclude after-born children.

Thus, where (*p*) a testator bequeathed certain funds to trustees in trust for his wife for life; and, after her decease, in trust to transfer the same unto and among all and every the child and children lawfully *begotten* of the testator's nephews and niece by their then or their late respective wives and husband: Sir J. Leach, V.-C., held that the bequest comprehended children born after the death of the widow, *i. e.*, it is presumed (for she died before the testator so that the gift to the children was, in event, immediate), in the interval between her death and his.

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

Legacy to every child E. *hath* extended to future children.

It is not to be inferred, however, that because the Courts in the preceding cases have refused to allow the claims of after-born * children to be negatived by expressions of a loose [*1041] and equivocal character, they would deny all effect to words studiously inserted with the design of restricting a gift to children to existing objects, though the reason or purpose of the restriction may not be apparent: as in the instance of a gift to children "now living," which we have seen is confined to children in existence at the date of the will (*r*). And effect has sometimes been given to the word "born" or "begotten," by considering it as intended to apply to objects not strictly or prima facie included in the class, where otherwise the word would have been inoperative (*s*).

And here it may be observed that, under a devise to children *born* at a particular time, children take a vested interest immediately on

(*p*) Browne *v.* Groombridge, 4 Mad. 495.

(*q*) 2 Cox, 384, 2 R. R. 84. See also Doe d. Burton *v.* White, 1 Ex. 526, 2 Ex. 797, where, however, the only question was whether an immediate gift to "children who *have* issue," included children who had no issue until after testator's death; and it was held that it did not, but meant "have at testator's death."

(*r*) Vide ante, Ch. X.

(*s*) See next chapter.

Gift to children *born* at a time named; they need not survive.

their birth, not subject to be divested by death before the specified period (*t*). But it is otherwise, of course, if the gift is to children *living* at the time. In Fox *v.* Garrett (*u*), where the gift was to A. for life, and if he should die (as he did) without children, then to the children of B. and C., who should be living at the decease of himself, the testator, and A.; it was held that this meant living at the death of the survivor of the testator and A.

IX. — As to Children "en ventre." — It should be observed, that in the application of the preceding rules, and, indeed, for all purposes of construction, a child en ventre sa mère is considered as a child in esse[1] if it will be for its own benefit to be so considered. This was finally established in Doe *v.* Clarke (*x*), which was an ejectment directed by Lord Thurlow, in consequence of a difference of opinion between himself and Sir Ll. Kenyon, M. R., on the claim of a posthumous child under a gift to all the children of C. who should be *living* at the time of his death; the former maintaining the competency, and the M. R. the incompetency, of the child en ventre sa mère to take as a "living child" (*y*).

Children en ventre, when included.

Held to take as objects *living* at a given period.

The case of Clarke *v.* Blake afterwards came before Lord Loughborough (*z*), on the equity reserved, and, in conformity to [*1042] *the decision of C. P., he held the posthumous child to be entitled. Indeed so completely is the point now set at rest, that the claim of a child en ventre sa mère under a bequest "to the child and children begotten and to be begotten on the body of A., who should be *living* at B.'s decease," was admitted sub silentio in the much-discussed case of Mogg *v.* Mogg (*a*).

(*t*) Paterson *v.* Mills, 18 L. J. Ch. 449, 14 Jur. 126.
(*u*) 28 Beav. 19.
(*x*) 2 H. Bl. 399, 3 R. R. 431.
(*y*) Clarke *v.* Blake, 2 B. C. C. 321 (overruling Pierson *v.* Garnett, 2 B. C. C. 47; Cooper *v.* Forbes, id. 63; Freemantle *v.* Freemantle, 1 Cox, 248). The child en ventre is supposed to be actually born at the period of distribution; if on that supposition he would have been illegitimate, as, if his mother is then unmarried, he will not take, although the mother may be married before his actual birth, Re Corlass, 1 Ch. D. 460.
(*z*) 2 Ves. Jr. 673.
(*a*) 1 Mer. 654. See also Rawlins *v.* Rawlins, 2 Cox, 425. These cases demonstrate that

[1] Hall *v.* Hancock, 15 Pick. 255; Stedfast *v.* Nicoll, 3 Johns. Cas. 18; Marsellis *v.* Thalhimer, 2 Paige, 35; Petway *v.* Powell, 2 Dev. & B. Eq. 312; Swift *v.* Duffield, 5 Serg. & R. 38; Barker *v.* Pearce, 30 Penn. St. 173; Laird's Appeal, 85 Penn. St. 339; Burke *v.* Wilder, 1 McCord, Ch. 551; Pratt *v.* Flamer, 5 Harr. & J. 10; Crook *v.* Hill, 3 Ch. D. 773; *s. c.* L. R., 6 H. L. 265; Occleston *v.* Fullalove, L. R., 9 Ch. 147 (the last three being cases of illegitimate children). Of course the question may be one of interpretation or of construction when particular language is used, and the intention of the testator is to govern. In Re Emery, 3 Ch. D. 300; Starling *v.* Price, 16 Ohio St. 29. The designation of the children to take as "the three children" of A., of course cuts off a posthumous child not specially referred to. In Re Emery, supra. But a posthumous child will be included under the words "children," or "sons" or "daughters" of A., though the language be qualified by such terms as "now living" or "born." Starling *v.* Price, supra.

It being thus settled that children en ventre were entitled under the description of children *living*, the only doubt that remained was whether they would be held to come under the description of children *born;* and that question also has been decided in the affirmative (*b*). The result then is to read the words "living," and "born," as synonymous with *procreated:* and, to support a narrower signification of such terms, words pointedly expressive of an intention to employ them in a special and restricted sense must be used (*c*).

Child en ventre entitled under description of children *born*.

The rule of construction prevails wherever it makes the unborn child an object of gift, or of a power of appointment (*d*), or prevents a gift to it (*e*), or an estate otherwise vested in it, as by descent (*f*), from being divested. But it is limited to cases where the unborn child is benefited by its application. Thus in Blasson *v.* Blasson (*g*), where a testatrix directed a fund to be accumulated, and when the youngest of the children of A., B., and C. who should have been born and should be living at her death should attain twenty-one, to be divided among such of the children of A., B., and C., as should then be living: two children who were en ventre at the death of the testatrix were held by Lord Westbury not to be "born and living" at her death, because, although by holding them to be then born and living, the period of accumulation would have been extended, and the class of children consequently enlarged, that construction was not needed for the purpose of admitting the individuals who were en ventre to share in the fund.

Child en ventre is not considered in esse except for its own benefit.

* It should be observed, that in Bennett *v.* Honeywood (*h*), [*1043] Lord Apsley considered that the admission of children en ventre was confined to devises to children, and refused to let in such a child under a devise to relations. This decision does not appear to have been expressly overruled; but it is conceived that the present doctrine, and the principle upon which the late cases have proceeded, that a child en ventre sa mère is for all purpose a child in existence, and even *born*, conclusively negative any such distinction (*i*).

Whether children en ventre take under a gift to *relations;*

the distinction laid down in Northey *v.* Strange, 1 P. W. 341, between a devise to children generally and to children living at a given period, with reference to the admission of children en ventre, is unfounded; nor would it have been deemed worthy of remark had not the case been cited (1 Belt's Ves. 113, Editor's note) without an explicit denial of its authority.

(*b*) Trower *v.* Butts, 1 S. & St. 181. See also Whitelock *v.* Heddon, 1 B. & P. 243.

(*c*) See as to indications of such intention, Wallis *v.* Wallis, 13 L. R., Ir. 258.

(*d*) Re Farncombe's Trusts, 9 Ch. D. 652.

(*e*) Pearce *v.* Carrington, L. R., 8 Ch. 969.

(*f*) Burdet *v.* Hopegood, 1 P. W. 485, and see other cases cited 1 S. & St. 182, 183.

(*g*) 2 D. J. & S. 665.

(*h*) Amb. 708.

(*i*) See acc. Sugd. Pow. 653, 8th ed. Re Gardiner's Estate, L. R., 20 Eq. 647 (gift to brothers and sisters), is contra. The V. C. (Bacon) would even appear to have denied generally the doctrine that in applying the preceding rules a child en ventre is to be deemed in esse: sed qu.

It has also been suggested (*k*), that a child en ventre is not a child in existence for the purpose of applying the second branch of the rule in Wild's case (*l*), according to which, if one devises land to A. and his children, and A. has children at the time of the devise, they take jointly with A. But the case did not require a decision on this point.

— under a devise to A. and his children.

X. — Clauses substituting Children for Parents. — Sometimes questions arise on the construction of clauses substituting the children of legatees who die before the period of distribution or enjoyment.[1] Most of these questions will be found in other parts of the present work, especially in a subsequent chapter, which treats of the period to which words providing against the death of a prior devisee or legatee, coupled with a contingency, are to be considered as referring (*m*). But there is one point which it is convenient to notice in this place, because at one time the authorities were conflicting, some of them maintaining a construction which seemed to be hardly reconcilable with the principles of analogous cases, and to be peculiar to clauses of substitution in favor of *children*. The point occurs where children are substituted for legatees dying before a given period (usually the period of distribution), without any express requisition that the children thus substituted shall survive such period: and the question is, whether the substituted gift is by necessary intendment to be construed as applying only to such issue as may happen to be living at such period, or whether the issue surviving the parents are absolutely entitled; in other words, * whether the gift to the issue is by implication subject to the same contingency of survivorship as the gift to the parents. The prevalent notion before any adjudication on the subject, seems to have been, that in such cases it was not allowable to engraft on the gift to the issue an implied qualification, in order to assimilate their interest to that of their parents; and this strictness of construction was considered to be warranted by the apparently analogous cases establishing that accruing shares were not, by necessary implication, subject to clauses of accruer which the testator had in terms applied to original shares only; there being, it was thought, no such irresistible inference that the tes-

Clauses of substitution.

Whether shares of children are by necessary implication subject to the same contingency as their parents.

[*1044]

(*k*) By Kelly, C. B., Roper *v.* Roper, L. R., 3 C. P. 32.
(*l*) Post, Ch. XXXVIII.
(*m*) Ch. XLIX.; also Ch. XXXII., s. 1, ad fin.; Ch. XL.

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

tator has the same intention in regard to original and the accruing shares, as to supply the defect of expression. The application of this strict rule was, however, sometimes supposed to defeat the probable intention, and the more liberal construction was accordingly adopted of extending to the children the qualification affecting the shares of the original objects of gift (*n*).

It is probable, however, that the testator does not contemplate the precise event, and "a judge is not justified in departing from the plain meaning of words which admit of a rational interpretation, for the purpose of giving effect to an assumed intention, which appears to him to be more rational, or more consistent with the rest of the will" (*o*). Moreover, even if the testator did contemplate the event, it is not clear that his real intention would be carried into effect by the construction adopted in those cases. "It is said," observed Sir W. P. Wood, V.-C. (*p*), "that there is no satisfactory reason why a condition of survivorship should attach to a parent and not to a child,—a remark with which I cannot altogether agree, for there is very considerable difference in the positions of the parents and their issue. It is intelligible that a gift to children should be limited to those who survive the tenant for life, there being a gift over to their issue; but in the case of issue, why a share should be distributed among surviving issue, giving nothing to the representatives of those who may be dead, is not so clear. If * all are to [*1045] participate, any of them, in making arrangements on marriage, or otherwise, may rely upon this, that should he die before the share falls in, his family will take it. This observation does not apply to the case of children, under a condition that they must survive the tenant for life, with substituted gifts to issue, because, notwithstanding the condition of survivorship, their families are provided for. On the construction that would limit the issue entitled to those who survive the tenant for life, the objects of the testator's bounty are placed in a position which is not such as the testator would desire. To these considerations must be added the inclination of the Court to avoid the suspense of shares, as far as can be done consistently with the expressed intention, and to favor early vesting."

Children not required to survive the period of distribution, though their parents are.

These considerations were, in repeated instances, held to outweigh the authority of the decisions above referred to, and it is now settled that children are not by implication required to survive the period of distribution as expressed with regard to their parents in whose place

(*n*) Bennett *v.* Merriman, 6 Beav. 360; Macgregor *v.* Macgregor, 2 Coll. 192; Penny *v.* Clarke, 1 D. F. & J. 425; Re Corrie's Will, 32 Beav. 426; and other cases to the same effect cited in Martin *v.* Holgate, L. R., 1 H. L. 175. Eyre *v.* Marsden, 2 Kee. 564, may perhaps be supported by the reference ("in the same manner," &c.) to the gift to the parents: see Smith *v.* Palmer, 7 Hare, 229. Turner *v.* Sargent, 17 Beav. 515, was an executory trust.

(*o*) Per Lord Westbury, L. R., 1 H. L. 189.

(*p*) Re Wildman's Trusts, 1 J. & H. 302, approved by Turner, L. J., Re Pell's Trust, 3 D. F. & J 293.

In what cases the children must survive their own parents.

they stand, whether the gift to the issue be original — as where it is to such of a class of legatees as survive the period of distribution, and the issue of such as are then dead (*q*) — or strictly substitutional, *i. e.*, divesting a previous vested gift to the parent (*r*). And though the child dies before its parent, it will still be entitled, if the gift to it be original (*s*); but not, it seems, if the gift be substitutional (*t*). And where [*1046] * the gift to issue is original, it has been held that if it be to the issue of such of the prior legatees as die *leaving* issue, issue who predecease their parent will not be entitled (*u*). But the better opinion appears to be that if *any* issue survive the parent, the interest of all, whether they survive or not, will be preserved (*x*).

XI. — Mis-statement as to Number of Children. — It often happens, that a gift to children describes them as consisting of a specified number, which is less than the number found to exist at the date of the will. In such cases, it is highly probable that the testator has mistaken the actual number of the children; and that his real intention is, that all the children, whatever may be their number, shall be included. Such, accordingly, is the established construction, the numerical restriction being wholly disregarded.[1] Indeed, unless this were done, the gift must be void for uncertainty, on account of the impossibility of distinguishing which of the children were intended to be described by the smaller number specified by the testator.[2]

Rule where number of children is erroneously referred to.

(*q*) Martin *v.* Holgate, L. R., 1 H. L. 175. See also Re Orton's Trusts, L. R., 3 Eq. 375; Re Bratt's Trusts, W. N., 1883, p. 54. The previous decisions were Stanley *v.* Wise, 1 Cox, 432; Lyon *v.* Coward, 15 Sim. 287; Barker *v.* Barker, 5 De G. & S. 753; Bellamy *v.* Hill, 2 Sm. & Gif. 328; Re Bennett's Trusts, 3 K. & J. 280; Crause *v.* Cooper, 1 J. & H. 207, Re Wildman's Trusts, id. 299; Harcourt *v.* Harcourt, 26 L. J. Ch. 536 (deed); Lanphier *v.* Buck, 34 L. J. Ch. 650, also reported 2 Dr. & Sm. 484, where the marginal note mis-states the gift.

(*r*) Re Turner, 2 Dr & Sm 501; Hodgson *v* Smithson, 21 Beav 354. See also Masters *v.* Scales, 13 Beav. 60; Buckle *v* Fawcett, 4 Hare. 536 545; Re Pell's Trust, 3 D. F. & J. 291, in which three cases the gift was to the parents, *or* such of them as survived and the issue of such as were dead, which is a vested gift, subject to be divested in favor of issue if any, and if none in favor of survivors. And see Re Merrick's Trusts, L. R., 1 Eq. 551, which was treated by Wood, V.-C., as a substitutional gift to issue, but see the definition given by Kindersley, V.-C., 2 Dr. & Sm. 494, and by Lord Westbury, L. R., 1 H. L. 181.

Pearson *v.* Stephen, 5 Bli. N. S. 203, 2 D. & Cl. 328, has been cited contra; but though the decree as drawn up appears to support the doctrine that in a case of substitution the issue are impliedly subject to the same conditions as their parent, the only point *argued* in the case was whether, under a gift of personalty to several and their issue per stirpes, "issue" was a word of limitation or purchase, *i.* e., whether the parents took absolutely, or for life only with remainder to their children. See per Kindersley, V.-C., 34 L. J. Ch. 659.

(*s*) Lanphier *v.* Buck, 2 Dr. & Sm. 484; Re Smith's Trusts, 7 Ch. D. 665; notwithstanding Humfrey *v.* Humfrey, 2 Dr. & Sm. 49.

(*t*) Re Turner, 2 Dr. & Sm. 501; Hurry *v.* Hurry, L. R., 10 Eq. 346. And see Re Bennett's Trusts, 3 K. & J. 280; Crause *v* Cooper, 1 J. & H. 207; Re Merrick's Trusts, L. R., 1 Eq. 551, all decided by Wood, V.-C., as cases of substitutional trusts.

(*u*) Thompson *v.* Clive, 23 Beav. 282; per Kindersley, V.-C., Lanphier *v.* Buck, 2 Dr. & Sm. 499.

(*x*) Re Smith's Trusts, 7 Ch. D 665; and see cases Ch. XLIX., ad fin.

1 Kalbfleisch *v.* Kalbfleisch, 67 N. Y. 354; Shepard *v.* Wight, 5 Jones, Eq. 22.

2 Id., Wrightson *v.* Calvert, 1 Johns. & H. 250. See also as to this ground of the rule,

Thus in Tomkins *v.* Tomkins (*y*), where a testator, after bequeathing 20*l.* to his sister, gave to her *three* children 50*l.* each; and the legatee had *four;* Lord Hardwicke held that they were *all* entitled.

Gift to A.'s *three* children, there being four, held to comprehend *all.*

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

Again, in Stebbing *v.* Walkey (*a*), where a testator bequeathed certain stock unto "the *two* daughters of T. in equal shares," *during their lives; and if *either* of them should die, then [*1047] to pay the whole to the survivor during her life, and in case *both* should depart this life, then the whole to fall into the residue. At the date of the will T. had *three* daughters, all of whom were held to be entitled; Sir Ll. Kenyon, M. R., declaring that he yielded to the authority of the cases, and not to the reason of them.

Bequest to the *two* daughters of T., there being three.

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

Pecuniary legacy given to *three*, held that the fourth took one of equal amount.

And in M'Kechnie *v.* Vaughan (*d*), where 500*l.* was bequeathed "to

(*y*) Cit. 2 Ves 564, cit 3 Atk. 257, and stated from the Register's Book, 19 Ves. 126; Morrison *v.* Martin, 5 Hare, 507; Spencer *v.* Ward, L. R., 9 Eq. 507; Re Basset's Estate, L. R., 14 Eq. 54. See the same principle applied to bequests to servants, in Sleech *v.* Thorington, 2 Ves. 561.

(*z*) 1 Cox, 79, cit. 2 B. C. C. 86, where it is erroneously stated to be a bequest to *two* daughters.

(*a*) 2 B. C. C. 85, 1 Cox, 250; Lee *v.* Pain, 4 Hare, 249; Lee *v.* Lee, 10 Jur. N. S. 1041.

(*b*) 19 Ves. 125.

(*c*) Supra, p. 1040.

(*d*) L. R., 15 Eq. 289.

Spencer *v.* Ward, L. R., 9 Eq. 507; Stebbing *v.* Walkey, 2 Brown, Ch. 86. A testator devised his estate to his wife and three children, if his wife should not be enceinte at his death, but, if she should be, then to her and his four children. He lived, had the fourth child, and his wife was enceinte with the fifth. All the children were allowed equal shares of the estate. Adams *v.* Logan, 6 T. B. Mon. 175. Devise of the testator's farm to his two nieces, the daughters of J. V., and his grandson. J. V. had three daughters, nieces of the testator. The three took two-thirds of the farm. Vernor *v.* Henry, 6 Watts, 192.

each of my four nieces the daughters of my late brother A.," and at the date of the will there were five, Sir W. James, V.-C., held that each of the five was entitled to a legacy of 500*l.* It was argued that the blank showed an intention to select particular nieces, and that this not being effectually done, the gift was void for uncertainty; but the V.-C. thought that the blank was much more probably due to the testator being ignorant of the state of the family, and was not enough to take the case out of the general rule.

Gift to *four* with a blank as if for names, there being five.

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

Division into *eight*, there being seven objects only.

In cases the converse of the preceding, *i. e.*, where the number of children mentioned in the will exceeds the actual number, of course there is no hesitation in holding all the children to be entitled; and, in Lord Selsey *v.* Lord Lake (*f*), a trust for the five daughters of the testator's niece, E., and the survivors and survivor of them, was held to apply to [*1048] a daughter of E. (and *who was the only daughter at the date of the will, and not to sons, of whom there were five at the date of the will; it being considered, it should seem, that the mere correspondence of number was not sufficient to indicate that the word "daughters" was written by mistake for *sons*.

"To the *five* daughters of E.," there being one daughter and five sons.

But, in Lane *v.* Green (*g*), under a bequest of 100*l.* each to the four sons of A., A. having, in fact, three sons and a daughter; Sir J. K. Bruce, V.-C., thinking it clear that the testator intended to give four legacies of 100*l.*, held the daughter entitled to a legacy as well as the sons.

To the four sons of A., there being three sons and one daughter.

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

The ground on which the Court has proceeded is that it is a mere slip in expression (*i*), and the circumstance that the testator knows the true number of children is not a sufficient reason for departing from the rule. Thus, where a testatrix bequeathed to the three children of her niece, A., 500*l.* each, knowing that A. had nine children, all the children

Testator's knowledge of the real number does not affect the rule.

(*e*) 1 Russ. 496. (*f*) 1 Beav. 151.
(*g*) 4 De G. & S. 239.
(*h*) 1 R. & My. 72. And see Hare *v.* Cartridge, 13 Sim. 165.
(*i*) Per Grant, M. R., 19 Ves. 126.

were held entitled to a legacy (*k*). Evidence was offered that when A. had only three children, the testatrix being aware of that fact had made a will in the terms stated above, and had, in the intervals after the births (of which she was regularly informed) of a fourth and ninth child, made a second and third will, and finally the will which was in question: and all these wills were in the same words. But Sir J. K. Bruce, V.-C., thought that assuming the admissibility of the evidence (which he purposely avoided deciding), it was not sufficient to exclude the claim of the six younger children.

And in Yeats *v.* Yeats (*l*), where a testator bequeathed 40*l.* a year "to each of the seven children now living of A.:" it was proved that a year before the date of the will the testator had been informed, as the fact was, that A. then had seven children. But in the interval two more were born; and it was held, that the general rule must prevail, and that all nine were entitled to annuities.

*But, as was implied in the very statement of the rule, it [*1049] is not applicable where the context, with such aid if any from extrinsic facts as may be necessary and admissible, points out which of the children the testator intended to describe by the smaller number. There is then no uncertainty, and the presumption of mistake and the consequent rejection of the numerical restriction are inadmissible. Thus a gift equally among "my four nephews and niece, namely, A., B., C. and D.," there being four nephews besides D. the niece, was held to include only those named (*m*). So where the testator gave a legacy to the two grandchildren of A., adding, "they live at X.," and A. had three grandchildren, but only two lived at X., it was held that only these two were entitled (*n*).

Rule inapplicable unless there is uncertainty in the objects.

Again, in Hampshire *v.* Peirce (*o*), where a testatrix gave 100*l.* "to the four children of my late cousin E. B. equally to be divided; if any of them should die under twenty-one or unmarried, their share or shares shall go to the survivors of them;" at the date of the will there were living two children of E. B. by P. a former husband, both then of age, and four children by B., all infants, and it was urged that "four" ought to be rejected. But Sir J. Strange, M. R., said, "I should have had some doubt if it had not so entirely corresponded with the circumstances and situation of the family at that time. Here were not six children by one and the same husband, as it was in Tomkins *v.* Tomkins, but two broods of children by different husbands; therefore it was natural, in pointing out the number, to understand her pointing

Gift to four, there being four of one marriage and two of another.

(*k*) Daniell *v.* Daniell, 3 De G. & S. 337; Scott *v.* Fenoulhett, 1 Cox, 79.
(*l*) 16 Beav. 170.
(*m*) Glanville *v* Glanville, 33 Beav. 302. So a gift "to all the children of A., namely," &c., was confined to those named, in Re Hull's Estate, 21 Beav. 314.
(*n*) Wrightson *v.* Calvert, 1 J. & H. 250.
(*o*) 2 Ves. 216.

out that particular brood of number four; and so there is not that uncertainty as if all the children had been by the same husband." He also adverted to the clause of survivor if any should die under twenty-one, which the P. children could not, being both of age. It must be observed that the M. R. thought there was still some uncertainty left, and that to remove it he admitted evidence of *declarations* by the testatrix that she intended the four B. children only. "It may be well doubted," said Lord Abinger, in Doe *v.* Hiscocks (*p*), "whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family and [*1050] their ages, which no doubt * were admissible, were quite sufficient to have sustained the judgment without the questionable evidence."

So, in Newman *v.* Piercey (*q*), where a testatrix bequeathed "to Mrs. Walden, widow of the late William Walden, 100*l.*, and to each of her three children a like sum of 100*l.*;" at the date of the will there was no person answering the description "Mrs. W.," &c., consequently parol evidence of the circumstances was admissible to explain that. This evidence showed that William Walden, a half brother of the testatrix, had died leaving a widow and three children; and that she had since married P. and (as the testatrix knew) had *some* children by him. It was held by Sir G. Jessel that the P. children did not answer the description in the will, for at no period of their lives could they be described as the children of "Mrs. W., widow of the late W. W.:" they were the children of Mrs. P. and not of the widow of W. Taking the description and the evidence together, he thought it clear that the children of Mrs. W., by W. W., were alone intended to take. One of those three was dead at the date of the will, but it appeared probable, and was assumed, that she did not know it: as far as she knew, there were still three.

Of course, if the number mentioned by the testator agree with the number existing at the date of the will, there is no ground for extending the gift to an after-born child (*r*), although en ventre sa mère at the date of the will (*s*).

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

Gift to testator's *seven* children, naming only *six*, there being in fact eight.

(*p*) 5 M. & W. 371, ante, Vol. I., p. 407.
(*q*) 4 Ch. D. 41. It is singular that Hampshire *v.* Peirce was not cited in this case.
(*r*) Sherer *v.* Bishop, 4 B. C. C. 55.
(*s*) Re Emery's Estate, 3 Ch. D. 300.
(*t*) Humphreys *v.* Humphreys, 2 Cox, 184. See also Garth *v.* Meyrick, 1 B. C. C. 30; Eddels *v.* Johnson, 1 Giff. 22.

XII. — Whether children take per stirpes or per capita. — Where a gift is to the children of several persons, whether it be to the children of A. and B. (*u*), or to the children of A. *and the children of B. (*x*), they take [*1051] per capita, not per stirpes.[1] To the children of A. and B.

The same rule applies, where a devise or bequest is made to a person and the children of another person (*y*);[2] or to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation as to "my son A. and the children of my son B." (*z*);[3] in which case A. takes only a share equal to that of one of the children of B., though it may be conjectured that the testator had a distribution according to the statute in his view.[4] So if the gift be to To A. and the children of B.

(*u*) Weld *v.* Bradbury, 2 Vern. 705; Lugar *v.* Harman, 1 Cox, 250; Pattison *v.* Pattison, 19 Beav. 638; Armitage *v.* Williams, 27 id. 346.

(*x*) Lady Lincoln *v.* Pelham, 10 Ves. 166; see also Barnes *v.* Patch, 8 Ves. 604; Walker *v.* Moore, 1 Beav. 607; Bolger *v.* Mackell, 5 Ves. 509; Eccard *v.* Brooke, 2 Cox, 213; Heron *v.* Stokes, 2 D. & War. 89.

(*y*) Butler *v.* Stratton, 3 B. C. C. 367; Dowding *v.* Smith, 3 Beav. 541; Rickabe *v.* Garwood, 8 id. 579; Paine *v.* Wagner, 12 Sim. 184; Amson *v.* Harris, 19 Beav. 210.

(*z*) Blackler *v.* Webb, 2 P. W. 383; Williams *v.* Yates, 1 C. P. Coop. 177, 1 Jur. 510; Hyde *v.* Cullen, id. 100; Linden *v.* Blackmore, 10 Sim. 626; Tomlin *v.* Hatfield, 12 Sim. 167; Tyndale *v.* Wilkinson, 23 Beav. 74; Payne *v.* Webb, L. R., 19 Eq. 26. In Blackler *v.* Webb, Lord King, C., said that A. and the children of B. "should each of them take per capita, as if all the children had been named by their respective names." This is not to be understood as limiting the class of children capable of taking to those living at the date of the will; on the contrary, the general rule applies by which all children born before the period of distribution are admitted to share, Dowding *v.* Smith, 3 Beav. 541; Linden *v.* Blackmore, 10 Sim. 626; Cooke *v.* Bowen, 4 Y. & C. 244. But see Parkinson's Trust, 1 Sim. N. S. 242; where, however, the point seems not to have been noticed. Scott *v.* Scott, 15 Sim. 47, went apparently upon the rule in Wild's case.

[1] McCartney *v.* Osburn, 118 Ill. 403; Hill *v.* Bowers, 120 Mass. 135; Campbell *v.* Clark, 64 N. H. 328; Hall *v.* Smith, 61 N. H. 144; Farmer *v.* Kimball, 46 N. H. 435; Benedict *v.* Ball, 38 N. J. Eq. 48; In re Verplanck, 91 N. Y. 439; Howell *v.* Tyler, 91 N. C. 207; Ex parte Leith, 1 Hill, Ch. 153; Balcom *v.* Haynes, 14 Allen, 204; Shaffer *v.* Kettell, id. 528; Brittain *v.* Carson, 46 Md 186; Thompson *v.* Young, 25 Md. 461; Brown *v.* Ramsey, 7 Gill, 347; Maddox *v.* State, 4 Har. & J. 539; Hoxton *v.* Griffith, 18 Gratt. 574; Smith *v.* Curtis, 5 Dutch. 345; Post *v.* Herbert, 27 N. J. Eq. 540; Shull *v.* Johnson, 2 Jones, Eq. 202; Young's Appeal, 83 Penn. St. 59; McNeillage *v.* Galbraith, 8 Serg. & R. 42; McNeillage *v.* Barclay, 11 Serg. & R. 103; Risk's Appeal, 52 Penn. St. 269. So where a devise is made to children and grandchildren, or to brothers and sisters, and nephews and nieces, to be equally divided between them, and the devisees are individually named, they take per capita and not per stirpes. Kean *v.* Roe, 2 Harring. 103; Shull *v.* Johnson, 2 Jones, Eq. 202. See Brewer *v.* Opie, 1 Call, 212; Kimbro *v.* Johnson, 15 Lea, 78. Indeed, whenever a testator designates the objects of his bounty by their relationship to a living ancestor, they take equal shares per capita. Young's Appeal, and other cases supra. But this rule readily yields to the manifestation of a different intention, as stated in the text. Young's Appeal, supra. Of course donees by name prima facie take per capita. Crawford *v.* Redus, 54 Miss. 700; Nichols *v.* Denny, 37 Miss. 59.

Gift of real and personal estate to the heirs of A., whose heirs are two children of a deceased sister and three children of a deceased brother. The personalty should be divided per capita and the realty per stirpes. Hayes *v.* King, 37 N. J. Eq. 1. See Mills *v.* Thorne, 95 N. C. 362; Woodward *v.* James, 115 N.Y. 346, referring to the rule which obtains in many states compelling a reference to the statute as a guide to the manner and proportion of division, in the case of a devise to heirs, and citing Richards *v.* Miller, 62 Ill. 417; Bassett *v.* Granger, 100 Mass. 348; Baskin's Appeal, 3 Penn. St. 304; Bailey *v.* Bailey, 25 Mich. 185; Cook *v.* Catlin, 25 Conn. 387.

[2] Pitney *v.* Brown, 44 Ill. 363; Vincent *v.* Newhouse, 83 N. Y. 505.

[3] McCartney *v.* Osburn, 118 Ill. 403; Allender *v.* Keplinger, 62 Md. 7; Campbell *v.* Clark, 64 N. H. 328; Farrer *v.* Pyne, 81 N. Y. 281; Osburn's Appeal, 104 Penn. St. 637.

[4] Henry *v.* Thomas, 118 Ind. 23. The per capita rule, it is rather strongly declared in this case, has been so departed from, that it

A. and B. and their children, or to a class and their children, every individual coming within the terms of the description, as well children as parents, will take an equal proportion of the fund; that is, the distribution will be made per capita (*a*).

But this mode of construction will yield to a very faint glimpse of a different intention in the context.[1] Thus the mere fact, that the

(*a*) Cunningham *v.* Murray, 1 De G. & S. 366; Abbay *v.* Howe, id. 470; Northey *v.* Strange, 1 P. W. 340; Murray *v.* Murray, 3 Ir. Ch. Rep. 120; Law *v.* Thorp, 4 Jur. N. S. 447, 27 L. J. Ch. 649. So where a gift is implied from a power to appoint to children or issue, Re White's Trust, Joh. 656. As to the question whether the parents take an equal share with their children, or a life interest in the whole with remainder amongst the children, see post, Ch. XXXVIII.

has no longer any practical force; the weight of authority being that the beneficiaries take per stirpes unless a contrary intention appears. Id. (citing Minter's Appeal, 40 Penn. St. 111; Fissel's Appeal, 27 Penn. St. 55; Clark *v.* Lynch, 46 Barb. 68; Vincent *v.* Newhouse, 83 N. Y. 505; Bool *v.* Mix, 17 Wend. 119; Alder *v.* Beall, 11 Gill & J. 123). See also Farrer *v.* Pyne, 81 N. Y. 281, referring to the same protest against the per capita rule; Kimbro *v.* Johnson, 15 Lea, 78.

[1] Woodward *v.* James, 115 N.Y. 346 (citing Farrer *v.* Pyne, 81 N. Y. 284); Vincent *v.* Newhouse, 83 N. Y. 505 (citing Lockhart *v.* Lockhart, 3 Jones, Eq. 205; Fisher *v.* Skillman, 3 C. E. Green, 229; Hoppock *v.* Tucker, 59 N. Y. 202); Howell *v.* Tyler, 91 N. C. 207; Balcom *v.* Haynes, 14 Allen, 204; Raymond *v.* Hillhouse, 45 Conn. 467; Hoxton *v.* Griffith, 18 Gratt. 574; Hamlett *v.* Hamlett, 12 Leigh, 350; Gilliam *v.* Underwood, 3 Jones, Eq. 100; Lockhart *v.* Lockhart, id. 205; Alder *v.* Beall, 11 Gill & J. 123; Lackland *v.* Downing, 11 B. Mon. 32; Fissel's Appeal, 27 Penn. St. 55; Young's Appeal, 83 Penn. St. 59.

Thus, in a case where the testator devised the residue of his estate as follows, "to be equally divided between the children of my sister B. and their heirs forever, and the children of my sister C. and their heirs forever," and C. survived the testator, B. being dead, the latter having seven children and the former four, it was held that the residue of the estate should be divided into two equal portions, between the children of B. and C. Alger *v.* Beall, 11 Gill & J. 123. See Bool *v.* Mix, 17 Wend. 119; Walker *v.* Griffin, 11 Wheat. 375; Roome *v.* Counter, 1 Halst. 111. So where the devise was of property to be divided as follows, "between the children of my brother J., deceased, and the children or heirs of my sister C., deceased, and my brother Jacob, or his heirs or legal representatives," it was held, that the children described took per stirpes and not per capita. Fissel's Appeal, 27 Penn. St. 55; Lockwood's Appeal, 55 Conn. 157; Raymond *v.* Hillhouse, 45 Conn. 467; Henry *v.* Thomas, 118 Ind. 23; Wood *v.* Robertson, 113 Ind. 323; Houghton *v.* Kendall, 7 Allen, 72. So a bequest of a certain fund "to the bodily heirs of my three daughters R., C., and K." passes the fund to be shared per stirpes and not per capita. Lowe *v.* Carter, 2 Jones, Eq. 377. So a devise to A. and B. and their heirs and assigns, to share alike between them (A. and B.) and their heirs and assigns, is a gift to take effect per stirpes. Miller's Appeal, 35 Penn. St. 323. Indeed, the word "heirs" prima facie indicates that the gift is to take effect per stirpes. Balcom *v.* Haynes, supra; Houghton *v.* Kendall, 7 Allen, 72; Daggett *v.* Slack, 8 Met. 450; Tillinghast *v.* Cook, 9 Met. 143; Cook *v.* Catlin, 25 Conn. 387.

But this rule, too, readily gives way. Thus, it is held that the words "to be distributed equally between my lawful heirs," or "share and share alike," give to the heirs per capita and not per stirpes. Parrish *v.* Groomes, 1 Tenn. Ch. 581; Puryear *v.* Edmonson, 4 Heisk. 43; Richards *v.* Miller, 62 Ill. 417; Tuttle *v.* Puitt, 68 N. Car. 543; Ward *v.* Stow, 2 Dev. Eq. 509; Freeman *v.* Knight, 2 Ired. Eq. 72. And see Balcom *v.* Haynes, supra; Holbrook *v.* Harrington, 16 Gray, 102; Risk's Appeal, 52 Penn. St. 269; Stevenson *v.* Lesley, 70 N. Y. 512; Purnell *v.* Culbertson, 12 Bush, 369. It matters not whether the donees are relations or strangers in blood to the testator. Purnell *v.* Culbertson, supra.

It is, however, held that where a testator gives to his next of kin in classes, leaving it doubtful in what proportions they are to take, he will be presumed, in the absence of evidence of a different purpose, to have intended the donees to take under the Statute of Distributions, and the classes will take per stirpes and not per capita. Harris's Estate, 74 Penn. St. 452. See Risk's Appeal, 52 Penn. St. 269. But the expressed or implied purpose of the testator must govern. Harris's Estate, supra. In Lyon *v.* Acker, 33 Conn. 222, it was held that the words "share and share alike" referred to a division per stirpes, because the donees were deemed to have been designated as a class. By a devise for the benefit of the four children of the testator's sister S., during their lives, "and upon the decease of either of them, the principal of his or her share shall be equally divided among the heirs-at-law of such deceased person," the heirs take per stirpes according to the Statutes of Distribution. King *v.* Savage, 121 Mass. 303; Daggett *v.* Slack, 8 Met. 450; Tillinghast *v.* Cook, 9 Met. 143.

annual income, until the distribution of the capital, is applicable per stirpes, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital (*b*). And the same effect was held by Sir *J. K. Bruce, V.-C., to be [*1052] produced by the share of one stirps being, in the case of its failure before the period of distribution, given over to the others, per stirpes (*c*). And a residue given to the children of a testator's son and daughters, A., B., C., and D., was held by Sir L. Shadwell, V.-C., to be divisible per stirpes, by reason of a gift over of the shares of any of the son and daughters (who had previous life-interests) dying without leaving issue, to the survivors and their issue (*d*). By this clause the testator showed he did not intend a distribution per capita, since, in that case, the whole residue would, by force of the original gift, have gone among the children of those who had children in equal shares (*e*).

Construction where context indicates different intention.

Children will also generally take per stirpes where the gift to them is substitutional, as in the case of a bequest to several or their children (*f*). So, where a testator bequeathed the residue of his personal estate to A. for life, and after his decease, unto and equally amongst all the children of A., except his eldest son J., and amongst the issue of any children of A. who should be then dead, and also among the issue of the said J., *such issue taking their respective parents' share*, it was held, that the issue of J. took, per stirpes, with the other children of A. (*g*). And where residue was bequeathed "to be equally divided between my sisters J. and M. and the issue of my deceased sisters E. and A. in equal shares if more than one *of such respective issue;*" it was held by Lord Westbury that the word "respective" showed there was to be a subdivision of what was taken by the issue of E. and A.—*i. e.* there must be two subdivisions; consequently two subjects of subdivision: hence the primary division was to be per stirpes (*h*).

To A. and B. for their lives, remainder to their children: whether children take per capita or per stirpes.

This question often arises upon devises or bequests to two or more persons for their lives, with remainder to their children. The conclusion then depends in a great measure upon whether the tenants for life take jointly or as tenants

(*b*) Brett *v.* Horton, 4 Beav. 239; see Crone *v.* Odell, 1 Ba. & Be. 449, 3 Dow. 61; Overton *v.* Bannister, 4 Beav. 205. Otherwise, it seems, where so much only of the income as the trustees may think sufficient is so applicable, Nockolds *v.* Locke, 3 K. & J. 6.

(*c*) Nettleton *v.* Stephenson, 18 L. J. Ch. 191. See also Archer *v.* Legg, 31 Beav. 187.

(*d*) Hawkins *v.* Hamerton, 16 Sim. 410.

(*e*) Smith *v.* Streatfield, 1 Mer. 358; Bolger *v.* Mackell, 5 Ves. 509; Armitage *v.* Ashton, W. N., 1869, p. 64 (combined effect of will and codicil); Re Campbell's Trusts, 33 Ch. D. 98.

(*f*) Price *v.* Lockley, 6 Beav. 180; Armstrong *v.* Stockham, 7 Jur. 230; Shailer *v.* Groves, 6 Hare, 162; Burrell *v.* Baskerfield, 11 Beav. 525; Congreve *v.* Palmer, 16 Beav. 435; Timins *v.* Stackhouse, 27 id. 434. But see Atkinson *v.* Bartrum, 28 Beav. 219.

(*g*) Minchell *v.* Lee, 17 Jur. 726.

(*h*) Davis *v.* Bennet, 31 L. J. Ch. 337, 8 Jur. N. S. 269. See also Hunt *v.* Dorsett, 5 D. M. & G. 570; Shand *v.* Kidd, 19 Beav. 310.

in common. If the latter, then, as the share of any one will, [*1053] on his decease, go over *immediately, without waiting for the other shares,[1] it is probable that the testator intended it to continue separate and distinct from the other shares, and consequently, to devolve on the children per stirpes (*i*).[2] If otherwise, then it would follow that the different shares would go to different classes of children; for, after the death of the tenant for life who first died, another might have more children, who would be entitled to participate in a share of any tenant for life who died afterwards.

First, where A. and B. are tenants in common.

But such an intention, however improbable, must of course prevail if clearly indicated. Thus, in Stephens *v.* Hide (*k*), where a portion of the residue was bequeathed in trust for the testator's two daughters for their lives, as tenants in common, "and afterwards to their or either of their child or children," and for default of such issue, over; one of the daughters died leaving a son, and the other without children; and it was held that the son was entitled to the whole fund, since the testator had used plain words to show his intent, that whether there was one or more children, in either case the child or children should take the whole. So in Abrey *v.* Newman (*l*), where a testator bequeathed property "to be equally divided between A. and B. for the period of their natural lives, after which to be equally divided between their children, *that is to say, the children of A. and B. above named.*" Sir J. Romilly, M. R., held, that on the death of A. one-half of the fund was divisible per capita among the children of both A. and B.: he thought the last words of the bequest prevented him from reading the preceding words as their respective children.

Where the property is given to several for life and afterwards to

(*i*) See accordingly Pery *v.* White, Cowp. 777; Taniere *v.* Pearkes, 2 S. & St. 383; Willes *v.* Douglas, 10 Beav. 47; Flinn *v.* Jenkins, 1 Coll. 365; Arrow *v.* Mellish, 1 De G. & S. 355; Doe d. Patrick *v.* Royle, 13 Q. B. 100; Re Laverick's Estate, 18 Jur. 304; Bradshaw *v.* Melling, 19 Beav. 417; Hunt *v.* Dorsett, 5 D. M. & G. 570; Coles *v.* Witt, 2 Jur. N. S. 1226; Turner *v.* Whittaker, 23 Beav. 196; Archer *v.* Legg, 31 Beav. 187; Milnes *v.* Aked, 6 W. R. 430; Wills *v.* Wills, L. R., 20 Eq. 342; Re Hutchinson's Trusts, 21 Ch. D. 811.

(*k*) Ca. t. Talb. 27. See also Swabey *v.* Goldie, 1 Ch. D. 380. But see Waldron *v.* Boulter, 22 Beav. 284.

(*l*) 16 Beav. 431. See also Peacock *v.* Stockford, 3 D. M. & G. 73.

[1] Woolston *v.* Beck, 34 N. J. Eq. 74. Gift to children as tenants in common shows that it is not to them as a class. Parker *v.* Glover, 42 N. J. Eq. 559 (citing Herbert *v.* Post, 11 C. E. Green, 278; *s.* c. 12 C. E. Green, 540). See also Delafield *v.* Shipman, 103 N. Y. 463. On the other hand a class is not made separable by the fact that the will provides that the members shall take per capita. Coggins's Appeal, 124 Penn. St. 10.

[2] See Dole *v.* Keyes, 143 Mass. 237. "Perhaps this Court has gone further than the English Courts would go, in reading 'at their decease' as meaning 'when all the life tenants shall have died' rather than 'as they respectively die,' Loring *v.* Coolidge, 99 Mass. 191, 192, although in that case the limitation over was not to children of the life tenants. But when this interpretation is adopted, the reason for the English rule ceases, because the whole fund goes over together instead of in separate shares at different times." Dole *v.* Keyes, *supra*, Holmes, J. It was accordingly held in that case that the children of the tenants in common took per capita. See also Weston *v.* Fuller, 7 Met. 297.

Where remainder is given to children of some only of the tenants for life.

the children of some only of the tenants for life, the children are entitled per capita. So, where a testator gave property, the interest to be divided among four named persons for their lives, and the property "to devolve" on the children of three of those persons equally, it was held, that on the death of each of the tenants for life their shares, then set free, went over at once to * the children of the three per capita (*m*). In such a case it is obvious that there may be some additional members of the class at the time each share falls in, but that is an inconvenience (if it be one) which frequently arises on wills of this description (*n*). [*1054]

Secondly, where A. and B. are joint tenants.

On the other hand, if the tenants for life take jointly, or (which is for this purpose equivalent) as tenants in common with express or implied survivorship, the whole subject of the devise remains undivided until the death of the survivor, and then goes over in a mass. In this case there is but one period of distribution, and presumably one class of objects; who therefore prima facie take per capita (*o*). And the same argument is applicable although the life interest does not survive, if the general distribution among the children is postponed until after the death of the last surviving tenant for life (*p*); that is to say, if the property is a money fund, easily divisible at once. But not so, if the property be realty and given in specie until the death of the surviving tenant for life, and then directed to be sold (*q*).

The case of Smith *v.* Streatfield (*r*), may perhaps be referred to a similar principle. A legacy was there given in trust to pay one-half of the income to A. and the other half to B., for their lives, "and as their lives drop and expire, I direct that the principal and interest be reserved, and be equally divided among their children when they shall severally attain the age of twenty-one years;" A. died childless, and it was held by Sir W. Grant, M. R., after some hesitation, that the children of B. (who had all attained twenty-one) were entitled to the whole sum. The reasons of this decision do not appear, but were probably those which were urged in argument, that the direction to *reserve* and divide at twenty-one rendered the limitation over independent of the periods when the previous interests determined.

Where (*s*) a testator bequeathed his "fortune" to be equally

(*m*) Swan *v.* Holmes, 19 Beav. 471.
(*n*) Per Romilly, M. R., ibid., at p. 478.
(*o*) Malcolm *v.* Martin, 3 B. C. C. 50; Pearce *v.* Edmeades, 3 Y. & C. 246; Stevenson *v.* Gullan, 18 Beav. 590; Parker *v.* Clarke, 6 D. M. & G. 110; Parfitt *v.* Hember, L. R., 4 Eq. 443; Taaffe *v.* Conmee, 10 H. L. Ca. 64. Compare Shand *v.* Kidd, 19 Beav. 310; Begley *v.* Cook, 3 Drew. 662.
(*p*) Nockolds *v.* Locke, 3 K. & J. 6.
(*q*) Re Campbell's Trusts, 33 Ch. D. 98.
(*r*) 1 Mer. 358, ex rel.
(*s*) Wicker *v.* Mitford, 3 B. P. C. Toml. 442. And see Malcolm *v.* Martin, 3 B. C. C. 50.

To the younger sons of J. and S., J. having none.

divided between any second or younger sons of his brother J. and his sister S.; and in case his said brother and sister should not leave any second or younger son, the testator gave and bequeathed his said fortune to his [*1055] said brother and sister; it was *held, that there being no son of J., and but one younger son of S., such younger son took the whole.

Here it may be observed, that where the gift is to A. and B.'s children, or to "my brother and sister's children" (the possessive case being confined to B. and the sister), it is read as a gift to A. and the children of B., or to the brother and the children of the sister, as it strictly and properly imports, and not to the respective children of both, as the expression is sometimes inaccurately used to signify (*t*).

Gift to A. and B.'s children.

"To the children of my cousin A. and my cousin B."

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

To make the bequest clearly applicable to the children of B., the word "of" ought to have been repeated before the words "my cousin B." (*x*). But the sentence was not strictly accurate, even as a gift to B., and not to his children. It ought, for that purpose to have run, "to the children of my late cousin A. and *to* my cousin B." An intention that the sentence should be read as a gift to the children of B., has therefore been inferred from slight circumstances, as from a bequest, in another part of the will, of equal legacies to the parents A. and B. (*y*)—a circumstance which was taken to show that they were to be on an equality, and which distinguished the case from Lugar *v.* Harman (*u*), where A. was dead at the date of the will, and was so described.

Whether dying without children means *having* or *leaving* a child.

XIII — Limitation over, as referring to having or leaving Children. — Another subject of inquiry is, whether a gift over, in case of a prior devisee or legatee dying without *children* (*z*); means without *having had* or without *leaving* a child.

(*t*) See Doe d. Hayter *v.* Joinville, 3 East, 172. If, however. A. and B were husband and wife (as if the bequest were to John and Mary Thomas's children), no doubt the construction would be different; it would apply to the children of both.

(*u*) Lugar *v.* Harman, 1 Cox, 250. See also Stummvoll *v.* Hales, 34 Beav. 124; Re Ingle's Trusts, L. R., 11 Eq 578, 590 (where the construction was aided by a reference to "the legacy left to B."); Hawes *v* Hawes, 14 Ch. D. 614; Re Featherstone's Trusts, 22 Ch. D. 111. And see Trail *v.* Kibblewhite, 12 Sim. 5, where a gift to "the aunts of A. and his sister B." was held not to entitle B. to a legacy. But see Re Davies' Will, 29 Beav. 93.

(*x*) Peacock *v.* Stockford, 3 D. M. & G. 73 ("for the benefit of the children of A. and of B.").

(*y*) Mason *v.* Baker, 2 K. & J. 567.

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

In Hughes *v.* Sayer (*a*), a testator bequeathed personalty to * A. and B., and upon either of them dying without chil- [*1056] dren, then to the survivor; and if both should die without children, then over; and it was held to mean children living at the death. The great question in this case was, whether the word "children" was not used as synonymous with *issue* (*b*) indefinitely, in which case the bequest over would have been void; and the M. R. seems to have thought that, whether it meant *issue* or *children*, it referred to the period of the death (*c*).

Upon A. and B. both dying without children.

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

If A. happened to die without any child.

And this construction is more easily adopted when, in another part of the will, the testator has used other words signifying death without having ever had any children (*e*).

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

Without having children, how construed.

Thus, in Weakley d. Knight *v.* Rugg (*f*), where leasehold property was bequeathed to A., "and in case she died without *having* children," over; it was held that the legatee's interest became indefeasible on the birth of a child.

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

So, in Bell *v.* Phyn (*h*), where the bequest was to the testator's

(*a*) 1 P. W. 534.
(*b*) As to which, see Doe d. Smith *v.* Webber, 1 B. & Ald. 713, and ante, p. 946.
(*c*) But see Massey *v.* Hudson, 2 Mer. 135.
(*d*) 3 B. P. C. Toml. 365.
(*e*) Jeffreys *v* Conner, 28 Beav. 328.
(*f*) 7 T. R. 322. See also Stone *v.* Maule, 2 Sim. 490; Findon *v.* Findon, 1 De G. & J. 380; Jeffreys *v.* Conner, sup.
(*g*) 16 Ves. 413.
(*h*) 7 Ves. 453.

three children A., B., and C., but in case of the death of
[*1057] * any of them without being married (*i*) and having children then over, Sir W. Grant, M. R., held that the share of A. was absolutely vested in her upon the birth of a child.

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

Word "leaving" refers to period of death.

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

Sometimes construed "having," so as not to divest previous gift;

— or indefinitely, so as to create an entail.

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

In case of two persons, husband and wife, leaving no children.

As in Doe d. Nesmyth *v.* Knowls (*o*), where the devise was to *William Smyth* and *Mary* his wife, and the survivor of them, during their lives, then to Mary, their daughter, or, if more children by *Mary*, equal between them; and, *in case they leave no children*, to their heirs and assigns forever; it was held that the fee
[*1058] simple became vested under the last devise, when the * survivor of *William* and *Mary* (namely William), died leaving

(*i*) "Without being married" was construed to mean "without having ever been married;" and the word "and" as "or," ante, Vol. I., p. 485.
(*k*) Read *v.* Snell, 2 Atk. 647.
(*l*) Cross *v.* Cross, 7 Sim. 201.
(*m*) Maitland *v.* Chalie, 6 Mad. 243, and other cases, Ch. XLIX., ad fin.
(*n*) See Raggett *v.* Beatty, 5 Bing. 243, and other cases stated post, Ch. XXXVIII. The same may be said of the words "dying without children," Bacon *v.* Cosby, 4 De G. & S. 261, stated post, same chap.
(o) 1 B. & Ad. 324.

no children of their marriage surviving him, though a child was living at the death of Mary; Bayley, J., observing, — "they cannot be said to leave no child till both are gone."

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

Distinction where they are not husband and wife.

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

Where the gift is by a parent, "younger" means "unprovided for."

As where a parent, having a power to dispose of the inheritance to one or more of his children, subject to a term of years for raising portions for *younger children*, appoints the estate to a younger son, the elder will be entitled to a portion under the trusts of the term (*r*); and, by parity of reason, the appointee of the estate, though a younger son, will be excluded.

The principle is that the elder shall be deemed a younger child, and the younger shall be deemed an elder in respect of the interests derived under a particular settlement or will (*s*). So that if father and eldest son, tenant for life and in tail, execute a disentailing deed and acquire the fee simple, a younger son cannot afterwards become an elder within the meaning of the rule; for the settlement is destroyed, and though he becomes

[*1059]

(*p*) Chadwick *v.* Doleman, 2 Vern. 528; Beale *v.* Beale, 1 P. W. 244; Butler *v.* Duncombe, id. 451; Heneage *v.* Hunloke, 2 Atk. 456; Pierson *v.* Garnett, 2 B. C. C. 38.
(*q*) Bretton *v.* Bretton, Freem. Ch. 158, pl. 204, 3 Ch. Rep. 1, 1 Eq. Ca. Ab. 202, pl. 18.
(*r*) Duke *v.* Doidge, 2 Ves. 203.
(*s*) See per Wood, V.-C., Sing *v.* Leslie, 2 H. & M. 87; per Lord Langdale, Peacocke *v.* Pares, 2 Kee. 699.

eldest in fact, it can never give him the estate; and should he afterwards acquire the estate by a new title, as by descent or devise from the elder brother, yet as this will not be under settlement, it will not exclude him from participating in portions provided by the will or settlement for younger children (*t*). But the eldest son, who has concurred with his father in re-settling the property, will be excluded, if by the re-settlement he takes back substantially what the settlement gave him; as a life-estate with remainder to his issue in tail, instead of the estate tail in himself; or the property burdened with a charge of which he has had the benefit (*u*). And the fact that the estate charged proves to be of less value than the portions, or even of no value at all, will not give to the eldest son any right to participate in the portions (*x*).

Rule applies to devise of *lands* to "younger children."

It was formerly doubted whether the rule applied to a legal devise of lands to younger children (*y*). But in Re Bayley's Settlement (*z*), it was applied to a legal limitation of lands by settlement to younger children as tenants in common *in tail*, on the ground that the same construction must be given to the words by Courts of Law as by Courts of Equity.

But it should be observed, that where the portions are to be raised for *children* generally, the child taking the estate is allowed to participate (*a*); and where the will purports to exclude these only [*1060] who come into possession of the estate, a child (or his *executor) will not be excluded if he dies before coming into possession, although the estate devolves on his heir-in-tail (*b*).

Rule confined to parental provisions.

The rule under consideration, however, applies only to gifts by parents or persons standing in loco parentis, and not to dispositions by strangers, in which the words "younger children" receive their ordinary literal interpretation (*c*), unless the context supplies actual evidence of an intention to

(*t*) Spencer *v.* Spencer, 8 Sim. 87; Macoubrey *v.* Jones, 2 K. & J. 684, virtually overruling Peacocke *v.* Pares, 2 Kee. 689. A fortiori where the portions are for "children other than an eldest son entitled under the limitations contained in" the will or settlement. See Sing *v.* Leslie, 2 H. & M. 68. So where A. was eldest son, but, in consequence of forfeiture incurred by his father, was not "entitled under the limitations of the will," he was not excluded from a portion, Johnson *v.* Foulds, L. R., 5 Eq. 268.

(*u*) Collingwood *v.* Stanhope, L. R., 4 H. L. 43. And see per Lord Selborne, Meyrick *v.* Laws, L. R., 9 Ch. 242; and per Kay, J., Domvile *v.* Winnington, 26 Ch. D. 386.

(*x*) Reid *v.* Hoare, 26 Ch. D. 363 (settlement), where an estate charged with 5,000*l.* for portions for children other than an eldest son, was sold for 2,500*l.* before the eldest son came in possession.

(*y*) By Lord Hardwicke, Heneage *v.* Hunloke, 2 Atk. 457.

(*z*) L. R., 9 Eq. 491, 6 Ch. 590. In Hall *v.* Luckup, 4 Sim. 5, this construction was aided by the context. And see now the Judicature Act, 1873, s. 25.

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

(*b*) Wyndham *v.* Fane, 11 Hare, 287. Whether the word "entitled" (alone) means entitled in possession, see Chorley *v.* Loveband, 33 Beav. 189; Re Grylls' Trusts, L. R., 6 Eq. 589; Umbers *v.* Jaggard, L. R., 9 Eq. 200.

(*c*) See Lord Teynham *v.* Webb, 2 Ves. 197; Hall *v.* Hewer, Amb. 203; Lady Lincoln *v.* Pelham, 10 Ves. 166. It is said, Sug. Pow. 680, 681, 8th ed., that this distinction does not appear to be attended to at the present day; but it was recognized in Wilbraham *v.* Scarisbrick, 4 Y. & C. 116, 1 H. L. Ca. 167, and in Sandeman *v.* Mackenzie, 1 J. & H. 628.

adopt the rule. Thus in Livesey *v.* Livesey (*d*), a testatrix bequeathed a nominal legacy to "the eldest son of my daughter E. who shall be living at my decease," declaring that she gave him no more because he would have a handsome provision from the estates of his grandfather and father. She then gave a moiety of the residue of her estate to the children of E. "(except her eldest son, or such of her sons as shall by the death of an elder brother become an eldest, it being my will that the son who is or shall become an eldest son shall not be entitled to take anything under this devise) equally to be divided among them when the youngest shall attain twenty-one." By a subsequent clause, if all the children but one, a daughter, should die under twenty-one, she also excepted that daughter. The eldest son at the decease of the testatrix was provided for as mentioned by her. He died before the second son attained twenty-one; but the latter, although he had thus become the eldest son, did not succeed to the provision made for his elder brother; he therefore contended that he was entitled to a share of the residue, since the declared motive for excluding the eldest was inapplicable to him. But it was held that he was not so entitled: it might be that the motive was as alleged; but if so, the testatrix should have excluded not any son who might at any time have become an eldest son, but (in the terms of the former clause) the eldest son, or such other son as should be eldest at the time of her death: besides, she had excluded the eldest daughter, for whom no provision was made by the grandfather's will: "eldest" must therefore be read in its ordinary sense, and without reference to the succession to property.

*Nor is every gift by a parent a parental provision within the meaning of the rule. The ground of the rule is that an intention is manifested to provide for *all* the children without permitting any one child to take a double provision at the expense of another (*e*). Generally the same instrument settles the estate and provides the portions; or the instrument providing the portions refers on the face of it to the instrument which settles the estate (*f*). If the will of a parent provides only for younger children and no provision appears to have been made for the eldest, the ground of the rule fails, and "younger children" must, it would seem, be literally construed. [*1061]

What parental provisions are not within the rule.

(*d*) 13 Sim. 33, 2 H. L. Ca. 419. See also Lyddon *v.* Ellison, 19 Beav. 565.

(*e*) See per Lords Hatherley and Westbury, Collingwood *v.* Stanhope, L. R., 4 H. L. 52, 55, 57.

(*f*) As in Collingwood *v.* Stanhope, sup.; Re Bayley's Settlement, L. R., 9 Eq. 491, 6 Ch. 590; and (by implication) in Bathurst *v.* Errington, 4 Ch. D. 251, 2 App. Ca. 698. In the last case, a shifting clause was to take effect if A., B., or C., described as second, third, and fourth sons of "Sir T. M. of H. in the county of C., Bart., should become the eldest son of the said Sir T. M.," and this was held (overruling Jessel, M. R.) to imply "eldest son and as such heir apparent to the title and to the family estate." It followed that the event must happen if at all in the lifetime of the father. A distinction was drawn between "eldest son" quoad the father and "eldest son" quoad the brothers. See also Domvile *v.* Winnington, 26 Ch. D. 387, where there was no reference to the settlement of the estate.

In the case of Wilbraham *v.* Scarisbrick (*g*), a father devised his estates A., B., and C., for the benefit of his children, giving to the eldest and his issue estate A., to the second and his issue estate B., and estate C. to the third son and his issue, with remainders in each case to the testator's other sons and daughters, and a clause shifting estate C. away from the third son if he should become entitled to estate B. and any *younger* son should be then living; the second son having died in the testator's lifetime, the third son became entitled to estate B., and it was then contended that estate C. went over to the eldest son, as being younger in regard to the limitations of that estate, though elder by birth. But it was held that the natural sense of "younger" was younger in order of birth; the devise was not a provision by a parent for his family, but an attempt to found three families; and that as there was nothing in the will to show that it was more in accordance with the testator's intention that when that attempt failed the eldest son should have estates A. and C., than that the third should have B. and C., the word could not be understood in the sense contended for.

The rule in question is one not of law but of construction, and it must give way to the meaning of the will, having regard to the language in which it is expressed. So in Re Pryterch, Pryth-
[*1062] erch **v.* Williams (*h*), a testator devised real estate on trust for his four sons A., B., C., and D., and their issue male successively in strict settlement. He bequeathed his personal estate upon trust to pay the income to his wife during her life, and after her death upon trust thereout to pay to his "younger children," *namely*, B., C., D., E., F., G., H., K. and L. (the last six being daughters) "so that the share or interest of each of them, my said younger children, shall be absolutely vested at his or her age of twenty-one years, whether the preceding trust shall be determined or not." A. and B. died in the lifetime of the testator's widow without issue male. C. attained twenty-one years in the lifetime of B., and succeeded to the settled real estate. It was held by Sir F. North, J., that C. was entitled to share in the legacy of 14,000*l.*

The rule will yield to contrary intention indicated by will.

It may be observed, that a bequest to "the youngest child of" A. has been held to apply to an *only* child (*i*). An only son has also been held to be excluded by an exception of "the eldest son" from a devise to "second, third, and other sons" (*k*).

Only child held to take as *youngest* child.

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

As to period of ascertaining who are "younger children."

It is clear that an immediate devise or bequest to

(*g*) 1 H. L. Ca. 167.
(*h*) 42 Ch. D. 590.
(*i*) Emery *v.* England, 3 Ves. 232.
(*k*) Tuite *v.* Bermingham, L. R., 7 H. L. 634.

younger children applies to those who answer the description at the death of the testator, there being no other period to which the words can be referred (*l*). Immediate gifts.

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

In Lady Lincoln *v.* Pelham (*m*), the bequest was to A. for life, and, after her death to her children; and, in case she should have none, or they should all die under twenty-one, then to the *younger children of B.*; and A. having no child, the younger children of B. at the death of the testator were held entitled to a vested interest. Lord Eldon, however, seems to have thought * that this construction was aided by the terms of another bequest; and he laid some stress on the circumstance that the bequest did not proceed from a parent, or one in loco parentis. [*1063]

In regard to parental provisions of this nature, certainly a peculiarity of construction seems to have obtained, the leading authority for which is Chadwick *v.* Doleman (*n*), where a father, having a power to appoint portions among his younger children, to be raised within six months after his death, by deed appointed 2,600*l.*, part of the entire sum, to his son T., describing him as his second son. No power of revocation was reserved. T. afterwards became an elder son, whereupon the father made a new appointment in favor of another son; and the Lord Keeper Wright held that the second was valid, the first appointment being made upon the tacit or implied condition of the appointee not becoming an elder son before the time of payment. Parental provision for younger children. Appointment to younger children held subject to implied condition of their not becoming elder.

It may, then, be regarded as settled (*o*), that a gift by a father or a person assuming the parental office, in favor of younger children, is, without any aid from the context, to be construed as applying to the persons who shall answer the description at the time when the portions became payable. The object of thus keeping open the vesting during the suspension of payment, probably is to prevent a child from taking a portion Objects are ascertained when portions are payable.

(*l*) Coleman *v.* Seymour, 1 Ves. 209. So, a gift to "unmarried" daughters, Jubber *v.* Jubber, 9 Sim. 503.

(*m*) 10 Ves. 166.

(*n*) 2 Vern. 528. See also Loder *v.* Loder, 2 Ves. 531; Broadmead *v.* Wood, 1 B. C. C. 77; Savage *v.* Carroll, 1 Ba. & Be. 265; Macoubrey *v.* Jones, 2 K. & J. 692. It is immaterial that an appointment is made to a child by name, Broadmead *v.* Wood, 1 B. C. C. 77; Savage *v.* Carroll, 1 Ba. & Be. 265. In Jermyn *v.* Fellows, Ca. t. Talb. 93, a child named in the *power* as an object did not lose his share as younger child, though he afterward became eldest; but as to this case, see Sug. Pow. 679, 8th ed.

(*o*) Per Kay, J., Reid *v.* Hoare, 26 Ch. D. 363, 369.

as younger child, who has become, in event, an elder child, and also, perhaps, to prevent the inheritance (which is often charged with portions to younger children) from being burdened with the payment of portions which are not eventually wanted.

Thus, suppose lands to be devised to A. for life with remainder to his first and other sons in tail, charged with portions to his younger children to vest at twenty-one, but not to be paid until the death of A. A. has several sons, who all attain twenty-one in his lifetime. The eldest then dies in A.'s lifetime without issue: the second son, having thus become the eldest, and as such entitled to the [*1064] estate, will not take a share of the portions (*p*), * but the representatives of the deceased eldest son will (*q*). It would be otherwise if the eldest son left issue (*r*), or had joined his father in barring the entail so as substantially to enjoy the estate (*s*); for the second son would not in either case have become eldest within the rule, namely, the son taking the estate.

Rule not excluded by gift over.

In Windham *v.* Graham (*t*), it was held that an express limitation over, in case of a younger son becoming the eldest before the age of twenty-one, prevented his being excluded by becoming the eldest under other circumstances, by force of the often-cited principle, exclusio unius est inclusio alterius. But the Court did not rely solely on this ground, and Re Bayley's Settlement decides that it will not generally authorize a departure from the rule, but may be referred to the event of a younger son who is under age at the period of distribution dying after that period without attaining the age.

(*p*) Ellison *v.* Thomas, 1 D. J. & S. 18 (trust for "children other than an eldest son for the time being entitled in possession"), Swinburne *v.* Swinburne, 17 W. R. 47 (a similar trust); Davies *v.* Huguenin, 1 H. & M. 730 ("children other than an eldest son"); Re Bayley's Settlement, L. R., 9 Eq. 491, 6 Ch. 590 ("all sons except eldest"). In Wood *v.* Wood, L. R., 4 Eq. 48, where personalty was bequeathed in trust for the testator's son A. for life, remainder in strict settlement for "F. the eldest son of A." and the children of F., and in default of children, for F.'s younger brothers and their children; and a share of residue was given to the children of A. "except F." : the case was treated as one of parental provision; but the rule was held not to apply, the exclusion being considered personal and not applicable to a younger brother who by A.'s death had become eldest.

In Leake *v.* Leake, 10 Ves. 477, there was a proviso that if any younger child should be advanced by its parent such advance should go in satisfaction of its portion; a younger child having been advanced was not compelled to refund on becoming eldest. In Glyn *v.* Glyn, 3 Jur. N. S. 179, 26 L. J. Ch. 409, a clause excluding an eldest son from a share of *residue* in case he became entitled to the family estate, was held not to operate *after* the time for distributing the residue had arrived. See also Stares *v.* Penton, L. R., 4 Eq. 40.

(*q*) Ellison *v.* Thomas and Davies *v.* Huguenin, sup.; which appear to overrule Gray *v.* Earl of Limerick, 2 De G. & S. 370, at least as a general authority. In Ellis *v.* Maxwell, 3 Beav. 594, where the estate was entailed first on A. and his issue, and, failing them, on B. and her issue, and B. had children, but A. as yet had none, it was held that B.'s eldest son had not, while he continued first remainderman, an indefeasible right to a younger child's portion; but it was said by Lord Langdale that if A. had a son born, B.'s eldest son would acquire a younger child's rights.

(*r*) See per Wood, V.-C., 2 K. & J. 698. This confirms the Author's opinion expressed 1st ed. ii. 119, n.

(*s*) Collingwood *v.* Stanhope, L. R., 4 H. L. 43. See also Bathurst *v* Errington, 4 Ch. D. 251, 2 App. Ca. 698 (shifting clause).

(*t*) 1 Russ. 331, cited again infra, p. 211. The case arose on the construction of a marriage settlement, but the principle seems not to be different on that account; and see per Romilly, M. R., L. R., 9 Eq. 496 acc.

Shutting out of view these particular cases of parental provision (the propriety of which it is too late to question), and applying to bequests to younger children the principles established by the cases respecting gifts to children in general, it * would seem, [*1065] that, in every case of a future gift to younger children, whether vested or contingent, provided its contingent quality did not arise from its being limited in terms to the persons who should be younger children at the time of distribution (*x*), or any other period, the gift would take effect in favor of those who sustained the character at the death of the testator, and who subsequently came into existence before the contingency happened, as in the case of gifts to children generally; and, consequently, that a child in whom a share vested at the death of the testator, would not be excluded by becoming an elder before the period of distribution. With this conclusion, however, it is not easy to reconcile the two following cases.

Whether objects of non-parental gift must sustain the character at period of distribution.

Thus, in Hall *v.* Hewer (*y*), A., having devised lands to trustees, to raise 6,000*l.*, afterwards wrote a letter (which was proved as a codicil) to J., one of his trustees, which contained the following passage: "I have given you and W. a power to mortgage for payment of 6,000*l.*, and I beg that that sum may be lent to W., and that you will take such securities from him as he can give to indemnify you and your children from payment of it; and in case of your death without children, I desire it may be *secured to the younger children of W.*" Lord Hardwicke held that the 6,000*l.* did not vest until the death of J.; then, and not till then, it became a charge; and vested then in such persons as were at that time younger children of W.; and, consequently, that a younger child who became an elder during the life of J. was excluded. The grounds of this decision are wholly unexplained, and are not apparent.

Hall *v.* Hewer.

In Ellison *v.* Airey (*z*), 300*l.* was bequeathed to E., to be paid at her age of twenty-one or marriage, and interest in the mean time for her maintenance and education; but if she died before twenty-one or marriage, then to the *younger children of testatrix's nephew F.*, equally to be divided to or among them, the eldest son being excluded from any part thereof. Lord Hardwicke was of opinion that it meant such as should be younger children at the death of E. before twenty-one or marriage, *the legacy being contingent until that period.*

Ellison *v.* Airey.

But as the fact of there being younger children at the period * of distribution was no part of their qualification, could [*1066]

(*x*) Livesey *v.* Livesey, 13 Sim. 33, 13 Jur. 371, n., 2 H. L. Ca. 419.
(*y*) Amb. 203.
(*z*) 1 Ves. 111. This case has been frequently cited in the present Chapter as an authority for admitting children born before the time of distribution. As such, it is unquestionable, and has always been regarded as a leading case; but this is quite distinct from the point now under consideration.

it properly form a ground for varying the construction? In the case of a devise to A. in fee, and if he die under twenty-one, to B. it has long been established that B. takes an executory interest, transmissible to his representatives (*a*), and it cannot be material whether the executory devise is in favor of a person nominatim, or as the member of a class upon whom the interest has devolved at the death of the testator, or at any subsequent period before the happening of the contingency (*b*).

Remarks on Hall *v.* Hewer, and Ellison *v.* Airey.

It does not appear that Ellison *v.* Airey involved the application of the peculiar rule respecting parental provisions, or that Lord Hardwicke so regarded it; any more than Hall *v.* Hewer, which he expressly noticed was the case of a stranger, and not between parent and child; nor is it even clear that he considered the construction exclusively applicable to gifts to younger children; for it will be remembered that in Pyot *v.* Pyot (*c*) he laid down the rule generally, that an executory or contingent gift to persons by a certain description applied to such of them only as answered the description at the happening of the contingency. If there is any such rule, of course the cases under consideration do not exist as a distinct class. But there is no such general rule (*d*). We are too much in the dark as to the ground of decision in Hall *v.* Hewer, and Ellison *v.* Airey, to found any general conclusion upon those cases, nor, on the other hand, is it safe wholly to disregard them. It seems probable that the former turned, partly at least, on the rule which then prevailed, that a legacy charged on land was in no case to be raised if the legatee died before the time of payment (*e*). And with regard to the latter, it is worth observing that no child of F. was excluded by the construction adopted; for none died before E., E. herself dying the day after the testatrix. No child was born in that short interval; but there was one born after the death of E., who claimed a share. The only points decided in the case were that the class (younger children) was not confined to those living at the date of the will, so as to exclude one who was born between that date and the death of the testatrix, but that it did not include the child born after the death of E. (*f*).

[*1067] * It is clear, however, that an express exclusion of the son who shall be elder *at the time of the death of the tenant for life*, will have the effect in like manner of restricting a gift to younger children to such as shall *then* sustain the character (*g*).[1]

Exception of elder son at the time of distribution.

(*a*) Goodtitle *v.* Wood, Willes, 21.
(*b*) As to the general distinctions between gifts to classes and individuals, see ante, Ch. XI.
(*c*) Ante, p. 994.
(*d*) Per Turner, L. J., Bolton *v.* Beard, 3 D. M. & G. 612. (*e*) Ante, Vol. I., p. 791.
(*f*) R. L., 1747 A. fo. 700 b. (*g*) Billingsley *v.* Wills, 3 Atk. 219.

[1] A testator bequeathed legacies to the two eldest children of a person, not naming them, and after the death of one of them made a codicil confirming his will so far as not altered

Expression an "elder son" construed to mean elder son at time of distribution.

Matthews v. Paul.

And the same construction was given to the expression "an eldest son," in Matthews *v.* Paul (*h*), which deserves some consideration. A testatrix gave to trustees certain bank stock, upon trust to pay the dividends to her daughter M. for life, and after her decease to P. her husband for his life, and after his decease upon trust to transfer the said stock unto all the children of M., if more than one (*except an eldest son*), share and share alike, *the same to be vested interests*, and transferable *at their, his, or her age or age of twenty-one years*, and in the mean time to invest their respective shares of the dividends for such children's future benefit; and in case any such children or child should die under the said age, leaving any children or child, then the share of every such child to go among their, his, or her children; otherwise to go to the survivors or survivor, and to be transferable in like manner as their original share; and in case M. should leave no children or child at her decease, or, leaving such, they should all die under the age of twenty-one years without children as aforesaid, then over. The testatrix then gave certain terminable imperial annuities and other stock to the same trustees, in trust to receive the dividends, and invest the same in government stock, to accumulate until the expiration of the imperial annuities, and thereupon to transfer all such stock, as well original as accumulated, unto and among all and every the children of her said daughter, if more than one (*except an eldest son*) equally, share and share alike; and if but one, then the whole to such one or only child, the same to be vested interests and transferable at such times and in such manner as the bank stock thereinbefore given. One of the younger children became an elder between the periods of the death of the testatrix and the expiration of the imperial annuities, but before any younger child had attained twenty-one, which raised the question as to the point of time to which the exception of an elder son was referable. Sir T. Plumer, M. R., held, first, that the shares vested when one of the younger children attained twenty-one, and not before. With respect to the period at which the phrase "an eldest son" was to be applied, he considered that three different times might * be proposed: the date of the will, the death of the testatrix, and the time when the fund was directed to be distributed. After showing that neither the first nor the second could be intended, he came to the conclusion, that, in all cases of legacies payable to a class of persons at a future period, the constant rule has been, that all persons coming in esse, and answering the description at the

Time of vesting.

"Eldest son," to what period referable.

[*1068]

(*h*) 3 Sw. 328.

by the codicil, and took no notice of the legacies. It was held that the two oldest children living at the testator's death should take the legacies. Miles *v.* Boyden, 3 Pick. 213.

period of distribution, should take. The same rule must, he thought, be applied to persons excluded. There could not be one time for ascertaining the class of those who are to take, and another to ascertain the character which excludes.

Observations upon Matthews *v.* Paul.

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

Gifts to younger children.

Whether period of vesting is not the time to ascertain who is excluded as an elder child.

It is singular, that though the M. R. took some pains to show that the legacy did not vest until one at least of the younger children attained twenty-one, and he used the fact as an answer to the argument for applying the description to the death of the testator, yet he never once addresses himself to the inquiry, whether *the period of vesting* was not that to which the term "eldest son" was to be referred. It is submitted, upon the general principles which govern these cases, and which were applied by Lord Eldon to a bequest to younger children, in Lady Lincoln *v.* Pelham, that this *was* the period of [*1069] ascertaining * the individual upon whom the character of eldest son had devolved, whether he was marked out as the sole object of the gift, or for the purpose of being excluded from it. If the gift had been to A. for life, and after her decease to an "eldest son" of A. to be vested and transferable when the younger children or child of A. should attain twenty-one, it could not have been doubted for a moment that the person who was eldest son at the period of vesting, whether in the lifetime of A. or not, was absolutely entitled; and yet this is precisely Matthews *v.* Paul, substituting a gift for the exception. Another remark occurs on this judgment: that though at the outset his Honor treats the case as one in which

(*i*) Ante, p. 1015.

(*k*) But if the *youngest* were excepted, it would obviously be necessary to wait until the period of distribution, in order to know who would be the youngest, the exception embracing the last born object of the class. See the observations on the decision in Matthews *v.* Paul, made by Sir E. Kay. J., in Domville *v.* Winnington, 26 Ch D. at p. 388, where his Lordship expressed his concurrence with the criticisms in the text.

the provision proceeded from a stranger (being by a grandmother in the lifetime of a parent, without any indication of an intention to stand in loco parentis), yet he afterwards cites, in support of his decision, Chadwick *v.* Doleman, and other cases of provisions by parents.

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

Effect of gift to the elder son for the time being.

Indeed Lord Gifford, even in a case which was within the rule regarding parental provisions (*m*), was of opinion that a declaration that the children attaining twenty-one, &c., in the lifetime of the parent should take vested interests, was sufficient to entitle a child who was a younger child at this period but subsequently became the eldest. This conclusion, it is conceived, goes far to support the doctrine which has been here contended for in opposition to Matthews *v.* Paul; for as the doubt is not as to the period of vesting, but whether such period is the time of ascertaining the object to be excluded, the declaration in question seems not to be very material. Besides, whatever is its effect, the declaration as to vesting in Matthews *v.* Paul seems to be equivalent in principle. The result of Lord Gifford's determination is, that in the case of gifts to younger children, not involving the peculiar doctrine applicable to parental provisions, the time * of vesting is the period of ascertaining who are to take under the description of younger children, and who is to be excluded as an elder child.

[*1070]

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

Exception of an eldest child referred to time of vesting in devise of real estate;

(*l*) Bowles *v.* Bowles, 10 Ves. 177. See Sansbury *v.* Read, 12 Ves. 175, where younger children were held to be entitled on a very obscure will.
(*m*) Windham *v.* Graham, 1 Russ. 331, ante, p. 1064.
(*n*) 8 Scott, 405, 6 Bing. N. C. 164.

session; but on a case from Chancery the Court certified that C. took, on his father's death, an estate in fee simple in possession defeasible on his dying under the age of twenty-one.

The same principle was applied to the construction of a settlement of personalty, in Re Theed's Settlement (*o*), where the trusts of a sum of money were for H. for life, and if (as happened) he should have no child, then for M. for her life, and after her death to pay it to all the children of M. *except her eldest or only son*, in equal shares, at twenty-one. The eldest-born son died, and the second attained twenty-one, both in the lifetime of H. (who survived M.), and it was argued that the second son, being eldest at the period of distribution (H.'s death), was excluded by the exception; but it was held by Sir W. P. Wood that the interest which vested in him at twenty-one was not divested by his afterwards becoming eldest son.

— in a settlement of personalty.

And where one child has been excluded as being the eldest son at the period of vesting, the clause of exclusion is exhausted, and the next son, when he attains twenty-one, is not excluded by reason of his becoming, in event, the eldest son (*p*).

Exception exhausted on any eldest son being excluded at period of vesting;

These cases, and others to the like effect (*q*), relieve the point of construction which has been the subject of discussion in the preceding remarks from much of the uncertainty which previously existed, and decide that in cases not within the peculiar rule regarding [*1071] parental provisions the time of vesting is the time for * ascertaining the class entitled under devises and bequests to younger children. They do not indeed cover the precise point which appears to have arisen in Hall *v.* Hewer and Ellison *v.* Airey, viz. that of a transmissible contingent interest; but the doubts expressed above, concerning the soundness of those authorities, are strongly confirmed by the decision in Bryan *v.* Collins (*r*), where a testatrix bequeathed a legacy in trust for the eldest daughter of M. D., to be paid when she attained her majority, and if there should be no such daughter, then to the *eldest daughter* of G. B., payable in like manner; G. B. had a daughter A., who was born soon after the death of the testatrix, but died in 1827, and another daughter B., who was still living; and M. D. having died unmarried in 1851, the second daughter claimed to be the eldest within the meaning of the will, but Sir J. Romilly, M. R., decided that the legacy vested in A. at her birth liable only to be divested on the birth of a daughter to M. D.

— in a bequest of a transmissible contingent interest;

The context, however, may show an intention that the class to be

(*o*) 3 K. & J. 375
(*p*) Domvile *v.* Winnington, 26 Ch. D. 382.
(*q*) Adams *v.* Adams, 25 Beav. 652; Sandeman *v.* Mackenzie, 1 J. & H. 613.
(*r*) 16 Beav. 14. See also Lady Lincoln *v* Pelham, sup. p. 1062.

included, or the individual to be excluded, shall be determined at the time of distribution, and not at the time of vesting. Thus, where the gift was to A. for life, with remainder to the two eldest children of B., C., and D. respectively, the two eldest living at the death of A. were held to be entitled by reason of a gift over in case there should be only one child *then* living (*s*).

— not where context shows contrary intention.

XV.—Gifts to eldest, first, or second son.—As in a gift to younger children, or in an exception of the eldest son, so also in a gift to the eldest or to the first or second son of A., the reference is prima facie to the order of birth (*t*). But of course this construction is excluded if at the date of the will the first (or second) born son is to the testator's knowledge dead (*u*), or if he speaks of a son who is not first-born "becoming eldest" (*x*), or of the eldest at a given period (*y*), or for the time being (*z*).

If at the date of the will a son is living who answers the description, he takes as persona designata (*a*); so that if he dies *before the testator the gift lapses (*b*); unless it is within [*1072] the protection given by stat. 1 Vict. c 26, ss. 32, 33 (*c*); or unless the testator has, in the event, disposed of the subject otherwise, as in Thompson *v.* Thompson (*d*), where a testator gave a share in his property to the eldest son of his sister A., and another share to the eldest son of his sister B., and it appeared that each sister had living at the date of the will an eldest son, and other children, but that the eldest son of A. died before the date of a codicil whereby the testator (who knew of A.'s death) bequeathed a legacy to all the children then living of A. and B., except the two provided for in the will. Sir J. K. Bruce, V.-C., without saying what he might have thought right, had the codicil not existed, held that the eldest son of A. who survived the testator became entitled under the bequest.

"First" son living at date of will takes as persona designata.

If the gift be to the "first," or the "second" son, and there is no son who answers the description living at the date of the will, or at the

(*s*) Madden *v.* Ikin, 2 Dr. & Sm. 207. See also Stevens *v.* Pyle, 30 Beav. 284; Harvey *v.* Towell, 7 Hare, 231, better rep. 12 Jur. 242; Livesey *v.* Livesey, 13 Sim. 33, 2 H. L. Ca. 419; and see Cooper *v.* Macdonald, L. R., 16 Eq. 272.
(*t*) 2 Vern. 660; 2 Dr. & Sm. 275; 12 Ch. D. 170.
(*u*) King *v.* Bennett, 4 M. & Wel. 36.
(*x*) Bathurst *v.* Errington, 2 App. Ca. 698, 709 (shifting clause).
(*y*) Livesey *v.* Livesey, 13 Sim. 33, 2 H. L. Ca. 419.
(*z*) Bowles *v.* Bowles, 10 Ves. 177.
(*a*) Meredith *v.* Treffry, 12 Ch. D. 170; Saunders *v.* Richardson, 18 Jur. 714 (settlement).
(*b*) Per Hall, V.-C., Meredith *v.* Treffrey, sup.
(*c*) Id. But as to implying an estate tail from the gift over "in default of issue male" (as was there suggested), vide post, Ch. XLI.
(*d*) 1 Coll. 388. See Perkins *v.* Micklethwaite, ante, Vol. I. p. 159, n.; cf. id. p. 302.

Devise to "second son" where none at date of will or testator's death, held to mean second-born.

time of the testator's death, the first who afterwards comes in esse and answers the description is entitled. Thus, in Trafford *v.* Ashton (*e*), where a testator, about the time of his daughter's marriage, devised his estate in trust for her for life, remainder to the second son of her body in tail male, and so to every younger son; and added, that he did not devise the estate to the eldest son, because he expected his daughter would marry so prudently that the eldest son would be provided for; Lord Cowper said the *second* son was the second in order of birth, and held such son to be entitled, though not born until after the death of the first.

But a son who comes into existence after the date of the will, and dies before the testator, is not reckoned. Thus, in Lomax *v.* Holmden (*f*) a testator devised land to the first son of C. in tail, remainder to his second and other sons (without words of limitation), and in default of such issue, over. At the date of the will C. had no son, but afterwards had one who died before the testator, and then another, A., who was the eldest son living at the testator's death. Lord Hardwicke decided that A. took the estate; because "the [*1073] making and the death only, not the intermediate * time, were to be regarded in construing wills," and the idea that the testator meant a first son in being at the date of his will was excluded by the fact that there was then no son of C.

Son who comes in esse after the will and dies before the testator not reckoned.

So, in King *v.* Bennett (*g*), where, after successive life estates to A. and her husband B., the testator devised lands to their second son in fee, and it appeared that of three sons which A. and B. had had, the third alone survived at the date of the will; that they afterwards had a fourth son, who died in the testator's lifetime; and subsequently a fifth, who survived him; it was held, upon the principle of the last case, that the fifth son, being second at the date of the testator's death, took under the devise. It was thought clear that the testator did not mean the second in order of birth, because at the date of the will that son had died.

In West *v.* Primate of Ireland (*h*), Sir Septimus R. desired that his executor would, at his (the executor's) decease, bequeath 1,000 guineas to Lord C. "for the use of his seventh, or youngest child *in case he should not have a seventh child living.*" At the date of the will Lord C. had six children living; and had had a seventh who had died, but it did not appear that the testator knew of this: at the death of the executor, he had ten. The executor be-

Bequest to "seventh or youngest child;" seventh surviving, but eighth born, held not entitled.

(*e*) 2 Vern. 660. See also Alexander *v.* Alexander, 16 C. B. 59; Bennett *v.* Bennett, 2 Dr. & Sm. 266; Driver *v.* Frank, 3 M. & Sel. 25, 8 Taunt. 468.
(*f*) 1 Ves. 290.
(*g*) 4 M. & Wel. 36.
(*h*) 2 Cox, 258, 3 B. C. C. 148.

queathed the money in the words of the original will, and Lord Thurlow held that the seventh child living at the executor's death, being in fact the eighth born, could not take by the description of seventh child, and decreed in favor of the youngest child then living (*i*).

The present chapter will be concluded with the case of Langston *v.* Langston (*k*), which is remarkable for the great difference of opinion that existed in regard to the true construction of the will. The question was, whether the first son of the testator's son A. was excluded under a clause which directed trustees to convey to him (A.) for life, with remainder to trustees to preserve, with remainder to the *second*, third, fourth, fifth, and all and every *other* son and sons of A. successively, as they should be in seniority of age and priority of birth, in tail male, with remainder to the testator's second and other sons successively in tail male, with numerous remainders over. [*1074] The eldest son of A. claimed an estate tail male expectant on the decease of A. The Court of K. B., on a case from Chancery, certified that he took no estate. Sir J. Leach, M. R. (being, as it should seem, dissatisfied with this opinion), sent a case to the Judges of C. P., who certified that the first son of A. took an estate tail male, and the M. R. decreed accordingly, at the same time recommending that the case should be carried to the House of Lords, which was done; and that House, after much consideration, affirmed the decree of the Court below. Lord Brougham founded his conclusion, that the eldest son took an estate tail male immediately after the death of A. (*l*) partly upon the general context of the will, in which various terms of years and limitations were made dependent on the existence or non-existence of an eldest son, in a manner which rendered them in the highest degree absurd if the eldest son took no estate, and he even considered that the language of the particular devise itself bore out the construction, as the words "other" sons extended to the whole range, including the eldest (*m*). "But it is said," he observed, "that 'other' always means 'younger,' 'posterior,' and I leaned at first towards this view of the subject; it is a very plausible argument, and in ordinary cases it is true in point of fact. If you were to say (in the usual way) first, second, third, fourth, and *other* sons, 'other' must mean the sons after the fourth. But why does it mean those after the fourth? Only because you had before enumerated all that came before the fourth, for you had said first,

Devise to first son supplied by implication from the entire will.

(*i*) But did not the language of the bequest import that the youngest was only to become entitled in case there was no seventh child at the time of ascertaining the object?

(*k*) 8 Bligh, N. S. 16. 2 Cl. & Fin. 194.

(*l*) If he took at all the context showed he took in priority. In Eastwood *v.* Lockwood, L. R., 3 Eq. 495, it was said that without an explanatory context it was doubtful whether "next survivor according to seniority" (among brothers) meant next elder or next younger.

(*m*) See ante, Ch. XVI., s. i.

Devise to second and other sons includes the first, *semble*.

second, third, and fourth. But suppose you had happened to omit the first, and instead of saying first, second, third, fourth, and other sons, you had said second, third, fourth, and other sons, leaving out the first, then it is perfectly clear that 'other' no longer is of necessity confined to the fifth, sixth, and seventh; but rather, ex vi termini, includes the first, because the first is literally the one who answers the description of something other than the second, third, and fourth (*n*). The word 'other' would then just as grammatically, as strictly, and as correctly, describe the first as the fifth, sixth, or seventh son, because the eldest son is a son other than the second, other [*1075] than the third, other than *the fourth. The only reason why 'other' in all ordinary cases, and in the common strain of conveyancing, means a younger son, is, that no one ever thinks of leaving out the elder. If it were the custom to leave out the elder and to begin with the second, then 'other' would of course always suggest to one's mind the idea of the unnamed elder son, as well as the unnamed younger sons."

(*n*) Of course this construction will not be adopted if there are in the context indications of a contrary intention, as if the testator refers to the eldest son as otherwise provided for, see Locke *v.* Dunlap, 39 Ch. D. 387.

DEVISES AND BEQUESTS TO ILLEGITIMATE CHILDREN.

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I. — Illegitimate Children in Existence when the Will is made capable of taking. What is a Sufficient Description of them. — Illegitimate children, born at the time of the making of the will, may be objects of a devise or bequest, by any description which will identify them (*a*). Hence, in the case of a gift to the natural children of a man or of a woman, or of one by the other, it is simply necessary to prove that the objects in question had, at the date of the will, acquired the reputation of being such children. It is not *the fact* (for that the law will not inquire into), *but the reputation of the fact*, which entitles them. The only point, therefore, which can now be raised in relation to such gifts is, whether, according to the true construction of the will, it is clear that illegitimate children were the intended objects of the testator's bounty.

Existing illegitimate children capable of taking.

For, though illegitimate children in esse may take under any disposition by deed or will adequately describing them, yet it has long been an established rule, that a gift to children, sons, daughters, or issue, imports, prima facie, *legitimate* children or issue, excluding those who are illegitimate, agreeably to the rule, "Qui ex damnato coitu nascuntur, inter liberos non computentur" (*b*). * And the same rule applies [*1077]

Gifts to children, prima facie, mean legitimate children.

(*a*) Metham *v.* Duke of Devon, 1 P. W. 529.

(*b*) Hart *v.* Durand, 3 Anst. 684, post, p. 1084. See also Cartwright *v.* Vawdry, 5 Ves. 530. Harris *v.* Stewart, cit. 1 V. & B. 434; Re Ayles' Trusts, 1 Ch. D. 282; Ellis *v.* Houstoun, 10 Ch. D. 236; Re Brown, Penrose *v.* Manning, 63 L. T. 159. A surrender of copyholds to the use of a will was never supplied in equity in favor of illegitimate children, Fursaker *v.* Robinson, Pre. Cha. 475; Tudor *v.* Anson, 2 Ves. 582. As to admission of evidence to rebut the presumption as to legitimacy, see Hawes *v.* Draeger, 23 Ch. D. 173.

In the case of real estate, whether under an intestacy or a devise, the question of legitimacy is determined by the law of England. So a person born in Scotland of parents domiciled there, but not married till after its birth, though legitimate by the law of Scotland, was held not to be capable of taking as heir real estate in England, Doe d. Birtwhistle *v.* Yardhill, 7 Cl. & Fin. 395; 6 Bing. N. S. 385; see also Atkinson *v.* Anderson, 21 Ch. D. 100 (a succession duty case).

With regard to personalty, the question is one of greater complexity. If the testator and the legatees described as children or the next-of-kin are all domiciled in this country, no difficulty arises, as, of course, the question of legitimacy must be determined by English law. In the will of a Jew domiciled in England the expression "children" either of himself or of

where words denoting any degree of kinship are used in a will. The description child, son, issue, every word of that species must be taken prima facie to mean legitimate child, son, or issue" (*c*) Nor will expressions or a mode of disposition affording mere conjecture of intention be a ground for their admission.[1]

another Jew similarly domiciled means legitimate children according to English law, Levy *v.* Solomon, 25 W. R. 842.

So also, on the principle that the devolution of personalty is regulated by the law of the domicile, the children or next-of-kin of a foreign testator or intestate domiciled abroad mean his legal children or next-of-kin according to the law of the foreign domicile; and the same rule would apparently apply to an Englishman who had acquired a foreign domicile at the time when the children or next-of-kin came into existence, see Barlow *v.* Orde, L. R., 3 P. C. 164. In the case of a foreigner domiciled in this country, the legitimacy of his children would, it is conceived, depend upon whether they were legitimate at birth, or by subsequent legitimation, at the time when their father acquired his English domicile. If a domiciled Englishman dies intestate, leaving relatives resident in a foreign country, it has been decided, after much conflict of judicial opinion, by the Court of Appeal Cotton and James, L. JJ., diss. Lush, L. J., that the legitimacy of such relatives, so as to entitle them to share as his next of kin under the Statutes of Distribution, depends on the law of the place where their parents were domiciled at the time of the birth of such children, Re Goodman's Trusts, 17 Ch. D. 266, reversing the decision of Jessel, M. R., 14 Ch. D. 619, and overruling on this point Boyes *v.* Bedale, 1 H. & M. 798; Re Wright's Trusts, 2 K. & J. 595. See also Re Lindo, Forrestier *v.* Buddicom, W. N., 1881, p. 144. If a child claims to have been legitimated by a subsequent marriage the domicile of the parents must have been such at the birth of the child and also at the time of the marriage as to allow of such legitimation, Re Grove, Vaucher *v.* Solicitor to Treasury, 40 Ch. D. 216. And the "children" of a British subject domiciled abroad will include children born before marriage (if he was so domiciled at the time of their birth, but not otherwise, see Udney *v.* Udney, L. R., 1 H. L. Sc. 441), and afterwards legitimated according to the law of the country of domicile; Scottowe *v.* Young, L. R., 11 Eq. 474 (a legacy duty case); Re Andros, Andros *v.* Andros, 24 Ch. D. 637. But a foreign tribunal has no foreign jurisdiction to annul an English marriage, so as to render legitimate the issue of one of the parties by a subsequent marriage, Re Wilson's Trusts, L. R., 1 Eq. 247, 3 H. L. 55 (nom. Shaw *v.* Gould). As to evidence of legitimacy according to the law of a foreign country, see Lyle *v.* Elwood, L. R., 19 Eq. 98. See further on the question of legitimacy as affected by domicile, Story, Conflict of Laws, § 484. As to the law of Trinidad, see Escallier *v.* Escallier, 10 App. Ca. 312.

(*c*) Per Lord Eldon, C., in Wilkinson *v.* Adam, 1 V. & B. 422. See also Re Standley's Estate, L. R., 2 Eq. 303 (next-of-kin); Re Brown, Brown *v.* Brown, 37 W. R., 472 (niece).

[1] Gardner *v.* Heyer, 2 Paige, 11; Kent *v.* Barker, 2 Gray, 535; Heater *v.* Van Auken, 14 N. J. Eq. 159; Kirkpatrick *v.* Rogers, 6 Ired. Eq. 135; Ferguson *v.* Mason, 2 Sneed, 618; Bennett *v.* Cane, 18 La. An. 590; Holt *v.* Sindrey, L. R. 7 Eq. 170. But see Hughes *v.* Knowlton, 37 Conn. 429. Further see Dane *v.* Walker, 109 Mass. 179; Kent *v.* Barker, 2 Gray, 535; Doggett *v.* Moseley, 7 Jones, 587; Lee *v.* Shaukle, 6 Jones. 313; McGunnigle *v.* McKee, 77 Penn. St. 81; Steckel's Appeal, 64 Penn. St. 493; Grubb's Appeal, 58 Penn. St. 55.

The testator devised a part of his estate to his "mother" for life, and, at her death, to her children; and devised another part of his estate to a sister. The testator and the sister were illegitimate children of the mother, who, at her death, left two other legitimate children surviving her. It was decided that, describing the mother and her illegitimate daughter by the terms "mother" and "sister," did not sufficiently manifest the intention of the testator to include the latter in the devise to the children of the former; and that the legitimate children alone were entitled to take. Shearman *v.* Angel, Bail. Eq. 351. But natural children may take under this description of children, if the will itself manifests an intent to include them in the term, either by express designation or by necessary implication. Wilkinson *v.* Adam, 1 Ves. &. B. 422, 462; *s. c.* 12 Price, 470. The proof of the intent to include natural children in the term "children," must, generally speaking, come from the will only; extrinsic evidence being inadmissible to raise a construction by circumstances, except for the purpose of showing that illegitimate children have, at the date of the instrument, acquired the reputation of the children of the testator or the person named in the instrument. Wilkinson *v.* Adam, 1 Ves. & B. 422; Swaine *v.* Kennerley, id. 469; Gardner *v.* Heyer, 2 Paige, 11; Collins *v.* Hoxie, 9 Paige, 88; Shearman *v.* Angel, Bail. Eq. 351: or, to show that there were none but illegitimate children either when the will was made or when the testator died. See Gardner *v.* Heyer, 2 Paige, 11.

Quære, if there were legitimate children when the will was executed, who had deceased without issue at the time of the testator's death, whether an illegitimate child would take? It seems not, unless he had been recognized by the father as his child;

This is well illustrated by Cartwright *v.* Vawdry (*d*), where A. having *four* children, *three legitimate and one illegitimate* (the latter being an ante-nuptial child of himself and his wife), bequeathed to *all and every such child or children*, as he might happen to leave at his death, for maintenance until twenty-one or marriage, and then in trust to pay *such child or children one-fourth* part of the income of his estates; but in case there should be only one such child who should attain that age or marriage as *aforesaid, then to pay the whole [*1078] income to such only child, if the others should have died without issue; and there was a limitation to survivors in case of the death of any of the children under age, unmarried and without issue. It was contended that the distribution into fourths plainly indicated, that the illegitimate daughter was in the testator's contemplation, *there being four children including her* when the will was made, and that all the expressions applied to females, showing that he meant existing daughters, not future issue, which might be male or female. But Lord Loughborough decided against the illegitimate daughter. He said it was impossible that an illegitimate child could take equally with lawful children in a devise to children. This decision has been commended by Lord Eldon, who, in a subsequent case, addressing himself to the argument urged on behalf of the illegitimate daughter (*e*), observed, "That the direction to apply the income in fourths only afforded conjecture; as if between the time of his will and his death one or two of these children had died, the division into fourths would have been just as inapplicable as it was in the case that happened. The question, therefore, only comes to this, whether the single circumstance of his directing the maintenance in fourths compelled the Court to hold, by necessary implication (*f*), that the illegitimate child was to take by implication

Not extended to illegitimate children upon mere conjecture.

Lord Eldon's observations upon Cartwright *v.* Vawdry.

(*d*) 5 Ves. 530.

(*e*) See judgment in Wilkinson *v.* Adam, 1 V. & B. 464, which is replete with learning on this subject.

(*f*) In Crook *v.* Hill, L. R., 6 Ch. 315, James, L. J., explained "necessary implication"

though the fact that the will was not changed might, under some circumstances, tend the other way. Again, though there were none but illegitimate children at the date of the will, if lawful issue were subsequently born, they would be entitled to take under the designation of "children," unexplained. And if the testator can fairly be supposed to refer to the future birth of lawful issue, an illegitimate child in being when the will was made will be excluded, though no other child should afterwards be born. Durrant *v.* Friend, 5 De G. & S. 343. See further Harris *v.* Lloyd, Turn. & R. 310; Mortimer *v.* West, 3 Russ. 370; Cooley *v.* Dewey, 4 Pick. 93; Brewer *v.* Blaugher, 14 Peters, 178; Hughes *v.* Knowlton, 37 Conn. 429; Heath *v.* White, 5 Conn. 228; Ferguson *v.* Mason, 2 Sneed, 618; Doggett *v.* Moseley, 7 Jones, 587; Owen *v.* Bryant, 2 De G. M. & G. 697; Savage *v.* Robertson, L. R., 7 Eq. 176; Godfrey *v.* Davies, 6 Ves. 48.

An illegitimate child, en ventre sa mère, may take by particular description. Dawson *v.* Dawson, Madd. & G. 292; Evans *v.* Massey, 8 Price, 22; Gordon *v.* Gordon, 1 Meriv. 141; Crook *v.* Hill, 3 Ch. D. 773; *s. c.*, L. R., 6 H. L. 265; Occleston *v.* Fullalove, L. R., 9 Ch. 147; Holt *v.* Sindrey, L. R., 7 Eq. 170. But not an illegitimate child "to be begotten." Holt *v.* Sindrey, supra. On the other hand the fact that a donee, as *e. g.* the brother of the testator, is illegitimate, and that the testator was ignorant thereof, will not invalidate the gift. Dane *v.* Walker, 109 Mass. 179.

with the others, as much as if she had been in the plainest and clearest terms persona designata; *and my opinion is that this circumstance is by no means sufficient.* The will would have operated in favor of all his children, however numerous they might have been, and in favor of subsequent legitimate children, even if every legitimate child he had before had died. *It was therefore impossible to say he necessarily means the illegitimate child; as it is not possible to say he meant those legitimate children.* That will would have provided for children living at the time of his death, though not at the date of his will. It could not be taken to describe two classes of children, both legitimate and illegitimate. Without extrinsic evidence, it was impossible to raise the question. The will itself furnished no question whether legitimate or illegitimate children were intended; the question upon which the Court was to decide was furnished by matter arising out of, not in the will."

[*1079] *These observations afford a more satisfactory explanation of the grounds of Lord Loughborough's decision, than is to be found in his own judgment. It will be useful to keep in view the circumstances of the case, and Lord Eldon's comment upon them, when we proceed to examine some later adjudications noticed in the sequel.

Illegitimate children not let in merely from absence of other objects.

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

Thus, in Godfrey *v.* Davis (*g*), where a testator, after giving certain annuities, desired that the first annuity that dropped in might devolve upon the "*eldest child* male or female for life of W." At the time the will was made W. had several illegitimate children, who were known to the testator, but no others; and he had no legitimate child then, or when the first annuitant died (*h*). Sir R. P. Arden, M. R., held that there was not sufficient to entitle any of the illegitimate children; for, whatever the real intention of the testator might be, and though it could hardly be supposed he had not some children then existing in his contemplation, yet as the words were "the eldest *child*," *such persons only could be intended as could entitle themselves as children by the strict rule of law;* and no illegitimate child could claim under such a description, unless particularly pointed out by the testator, and manifestly and incontrovertibly intended though in point of law not standing in that character.[1]

to mean "not natural necessity, but so strong a probability of intention that a contrary intention cannot be supposed." See also Re Browne, Raggett *v.* Browne, 61 L. T. 463.

(*g*) 6 Ves. 43.

(*h*) As to question arising out of this, ante, p. 1027.

[1] See Holt *v.* Sindrey, L. R., 7 Eq. 170, 175; Gardner *v.* Heyer, 2 Paige, 11.

So, in Kenebel *v.* Scrafton (*i*), where a testator being unmarried directed that, *in case he should have any child or children by M.* (a woman with whom he cohabited), a sum of money should be raised *for such child or children;* it was held that he contemplated a marriage with her, and making a provision for the issue of such marriage; and consequently that the will was not revoked by his marriage with M. (*j*), and the birth of a child. Lord Eldon, in reference to this case (*k*), has said, "We may conjecture that he meant illegitimate children if he did not marry, yet notwithstanding that may be conjectured, the opinion of the Court was, as mine is, that *where an unmarried man,* * describing an un- [*1080] married woman as dearly beloved by him, *does no more than make a provision for her and her children, he must be considered as intending legitimate children, as there is not enough upon the will itself to show that he meant illegitimate children;* and my opinion is, that *such intention must appear by necessary implication upon the will itself.*"[1]

Testator's recognition of illegitimate children not sufficient.

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

And in Warner *v.* Warner (*m*), where a testator bequeathed a share of the residue of his personal estate in trust for his son C. for life, "after his death in trust for the maintenance of his wife and the education of his children; at his wife's death the principal to be equally divided among his children then living." At the date of the will C. was living with a woman named M., who was not married to him, and had by her four illegitimate children (who it was proved had always been called and treated by the testator as the children of C.), and no legitimate children; but Sir J. K. Bruce, V.-C., observed that, assuming all those facts and the testator's knowledge of them, the question still was, whether, if the testator had meant that legitimate children only should take, he could have expressed himself more clearly than he had done. He observed that "wife," as here used, was a name rather of the character than of

"Wife."

(*i*) 2 East, 530; see also Dover *v.* Alexander, 2 Hare, 275; Wilkinson *v.* Wilkinson, 1 Y. & C. C. C. 657 (settlements).
(*j*) As to this, ante, Vol. I., p. 111.
(*k*) In Wilkinson *v.* Adam, 1 V. & B. 465. See, however, id. 456, 457.
(*l*) T. & R. 310.
(*m*) 15 Jur. 141. See also Osmond *v.* Tindall, 5 Ves. 534 c, n.; Durrant *v.* Friend, 5 De G. & S. 343; Re Davenport's Trust, 1 Sm. & Gif. 126; Re Overhill's Trust, id. 362; Kelly *v.* Hammond, 26 Beav. 36; Dorin *v.* Dorin, L. R., 7 H. L. 568, stated post; Re Brown, Penrose *v.* Manning, 63 L. T. 159, where the testatrix had always believed that the parents were married. And see post, p. 1095.

[1] Shearman *v.* Angel, Bail. Eq. 351. Parol evidence of intention is not admissible, Id.; Gardner *v.* Heyer, 2 Paige, 11.

the individuality, and decided that the illegitimate children were not entitled (*n*).

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

[*1081]

Recognition of an illegitimate child in a subsequent codicil not sufficient.

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

But, perhaps, the strongest case of this kind is Bagley *v.* Mollard (*q*), where a testator gave the residue of his property equally between the children of his son W. and of two other children; and it was held that an illegitimate child of W. was not entitled to share in the residue; *though the testator, in the same will, had made a specific bequest to her, by the description of the only surviving child of his son.*

Or even in the will itself.

In all the preceding cases, the terms of the gift were perfectly satisfied by referring them to legitimate children only: and this (according to the principles of construction already laid down) was fatal to the claim of the illegitimate children. In none of the wills was there such a manifestation of an intention to use the word "children" in any

Principle not varied by the fact of testator being unmarried.

(*n*) As to the effect upon the meaning of the word "children" of a clear reference to the individual by name as well as by character, as "A. the wife of B.," A. not being the lawful wife of B., see Hill *v.* Crook, L. R., 6 H. L. 265, 285, stated post.

(*o*) 3 Russ. 370.

(*p*) Arnold *v.* Preston, 18 Ves. 288.

(*q*) 1 R. & My. 581. See Megson *v.* Hindle, 15 Ch. D. 198, where Jessel, M. R., in his judgment referred with approval to Bagley *v.* Mollard. See also Re Hall, Branston *v.* Weightman, 35 Ch. D. 551, where a testator appointed two persons to be executors of his will describing them as "my nephews R. W. and H. B.," and gave a part of his residue to the "children" of his sister S. B. in equal shares; R. W. was an illegitimate son of S. B., who had legitimate issue, H. B. and three other children; Kay, J., held that the description of R. W. as "nephew" did not entitle him to participate in the residue. See also Re Goodall, Elsmore *v.* Bradbury, W. N., 1888, p. 69. But in Re Bryon, Drummond *v.* Leigh, 30 Ch. D. 110, Bacon, V.-C., relied on repeated expressions descriptive of kinship to the testator applied, in the will and a codicil thereto, to an illegitimate daughter of his nephew, as indicating an intention that she should participate in the residue given by the will to "all and every the children and child" of the nephew, who was living at the date of the will. See also Owen *v.* Bryant, 2 D. M. & G. 697, post, p. 1090; Smith *v.* Johson, W. N., 1888, p. 184, 59 L. T. 397, post, p. 1091.

other than its ordinary legal signification (namely, legitimate offspring), as could form the ground of a judicial determination; and they show that the circumstances of the testator being a bachelor, and having illegitimate children at the time of the will, and of some of such children being the express objects of his bounty, and described as the "children" *of the person to whose* "other" children the gift in question is made, are not sufficient to divert the word from its established signification. In such cases the conjecture, though highly
* reasonable, that the testator meant by the devise to dis- [*1082]
charge the moral obligation of providing for his illegitimate offspring is sacrificed to the general principle that "children" in its primary and unexplained sense, imports legitimate children only.

Bastards take under description of children, where.

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

Gift to children "now living."

It is equally clear, that where the devise is to the children "*now living*" of a person who has no other than illegitimate children at the date of the will, they are entitled (*s*).[1]

So in Gabb *v.* Prendergast (*t*), where the ultimate limitation in a settlement was "to all the children as well those already born as hereafter to be born of A. and B. his wife," and it appeared that B. had illegitimate children living at the date of the settlement, of whom A. was the reputed father, but no legitimate children by him. Sir W. P. Wood, V.-C., held the illegitimate children to be entitled. "There are numerous authorities (he said) deciding that the word 'procreandis' may be read 'procreatis,' and vice versa (*u*); but there is no authority deciding that when both these words are used either of them has been considered to be ineffective or inoperative." There seems to be no difference in this respect between a deed and a will, since, with reference to the objects of gift, a will, like a deed, speaks from its date, not from the testator's death (*v*).

(*r*) Rivers's case, 1 Atk. 410; Re Browne, Walsh *v.* Browne, 62 L. T., 899.
(*s*) Blundell *v.* Dunn, cit. 1 Mad. 433, though the construction was somewhat aided by the context.
(*t*) 1 K. & J. 439.
(*u*) Ante, pp. 1040, 1041.
(*v*) Ante, Vol. I., p. 302. It is proper to add that a different opinion was expressed by the V.-C. "The difficulty (he said) would be greater in the case of a will than of a settlement. If the description in the will were 'all the children born or to be born,' pointing to a time which would include as a class all those children in esse at the death of the testator, it would occasion some surprise to the testator if he were told that by such a gift he had included all the illegitimate children which the parent referred to might have had." This seems to assume that with reference to the objects of gift a will speaks from the testator's death; and so

[1] Gardner *v.* Heyer, 2 Paige, 11; Beachcroft *v.* Beachcroft, 1 Madd. 430.

And where (*x*) a testator, who at the time he made his will cohabited with a woman named A., and had by her two children
[*1083] * W. and R., gave a sum of money in trust to pay to A. the annual interest "during her life or until she married, for the support of her children W. and R.; and in case of her death or marriage to apply it to the use of *her children;* and, on their coming to the age of twenty-one to divide the same sum between them;" it was held that the only children intended by the testator to take the capital were those named in the provision for support during A.'s lifetime. It could not mean children by marriage, for the right of the children to the present enjoyment of the fund was to depend on the happening of the very event from which the legitimate children were to spring.

Gift to a person till marriage, then to her children.

Upon the same principle, a gift to "the children of *the late* C.," a person who, at the date of the will, was dead, leaving illegitimate, *but no legitimate*, children, has been held to be good as to such illegitimate children (*y*). And a gift to the children of A. by B. (who are within the prohibited degrees) must necessarily mean illegitimate children, since A. and B. cannot contract a lawful marriage (*z*).

Children of a *deceased* person;

—of two persons who cannot lawfully marry.

Whatever the language used, if the intention is manifest to benefit objects existing at the date of the will, and there are no legitimate children then in existence, illegitimate children will be entitled. Some of the cases, as might be expected, run very near each other: thus a gift to "the first-born son of my daughter A." (a spinster) was held not to designate an existing illegitimate son (*a*); but a gift to "my sister A. (who was a spinster) and her two youngest daughters," was held to designate individuals then in existence, and consequently to entitle the two youngest of three existing illegitimate daughters of A. (*b*).

The characteristic feature of these cases, as distingished from those of the former class, is, that, according to the state of facts

indeed the V.-C. had lately decided, 1 K. & J. 315; but this was reversed, 7 D. M. & G. 283. And see further on the words in question, Holt *v.* Sindrey, L. R., 7 Eq. 170; Re Nixon, 2 Jur. N. S. 970; and though James, L. J., spoke slightingly of their efficacy, it was in a case where he did not need their aid to make out the title of the illegitimate child, Crook *v.* Hill, L. R., 6 Ch. 317.

(*x*) In re Connor, 2 Jo. & Lat. 456.

(*y*) Lord Woodhouselee *v.* Dalrymple, 2 Mer. 419. The terms of the bequest show that the fact of C.'s death was known to the testator. Otherwise it should be proved aliunde, see Re Herbert's Trusts, 1 J. & H. 121. How far the testator's knowledge of the material facts may be presumed without actual proof, see id. and Milne *v.* Wood, 42 L. J., Ch. 545. The presumption that a woman of advanced age, who at the date of the will has no legitimate children, is past childbearing, has never been made, so as to let in illegitimate children. In Re Overhill's Trust, 1 Sm. & Gif. 362, the age of 49 was deemed insufficient, and so in Paul *v.* Children, L. R., 12 Eq. 16, was the age of 50. The analogous cases on the rule against perpetuity are against admitting the presumption in any case, ante, Vol. I., p. 241. But see Adney *v.* Greatrex, 38 L. J., Ch., 414, ante, p. 1007.

(*z*) Re Goodwin's Trust, L. R., 17 Eq. 345.

(*a*) Durrant *v.* Friend, 5 DeG. & S. 343.

(*b*) Savage *v.* Robertson, L. R., 7 Eq 176.

* existing when the will was made, legitimate children *never* [*1084] *could have claimed* under the gift.

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

To children (in the plural) of a deceased person, there being only one legitimate child.

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

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

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

Remark upon Hart *v.* Durand, and Swaine *v.* Kennerley.

Thus, in Gill *v.* Shelley (*f*), where A. by a testamentary appointment gave her real and personal estate to her husband M. for his life, and directed that, after his death, such residue should be divided amongst certain classes of persons mentioned in her * will; adding, "amongst whom I include the children of [*1085] the *late* Mary Gladman." Mary Gladman was then dead, having left two children, one legitimate, and the other (being born before her marriage) illegitimate. Sir J. Leach, M. R., said that if

(*c*) 3 Anst. 684.
(*d*) 1 V. & B. 469.
(*e*) Re Yearwood's Trusts, 5 Ch. D. 545.
(*f*) Stated Wigram, Wills, pl. 55.

Swaine *v.* Kennerley and Hart *v.* Durand had not been distingishable from the case before him, he should have felt no hesitation in overruling them; and decreed that the illegitimate child was entitled to share in the residue.

Remarks on Gill *v.* Shelley, Swaine *v.* Kennerley, and Hart *v.* Durand.

Of Swaine *v.* Kennerley the M. R. is reported to have said that the expression there was "the child *or* children, &c.," and that this implied a doubt in the mind of the testator whether his late son had more than one child; and of Hart *v.* Durand, that the expression "to every of the sons and daughters of my late cousin J. D.," manifested that the testator was ignorant of the actual state of J. D.'s family (*g*). But neither distinction appears to have satisfied him; and indeed the former proceeded on a mistake; for the expression in Swaine *v.* Kennerley is "child *and* (not *or*) children;" so that the only apparent distinction between that case and Gill *v.* Shelley, is, that in the former the bequest was to *child* and children, but which, it is conceived, makes no real difference, since the testator evidently uses the singular number, not with a view to the then existing state of the class, but in contemplation of the possible event of its being reduced to a single object in the interval between the making of the will and the death of the testator. In Leigh *v.* Byron (*h*), where a testator made a bequest unto and equally amongst all and every the children of his *late* nephew A. who should be living at the time of the testator's decease, and should attain twenty-one; and if there should be but one such child, then to such one child; and it appeared that A. was dead at the date of the will, having left one legitimate and two illegitimate children: Sir J. Stuart, V.-C., held the two latter entitled to share in the bequest; considering that the words "if there should be but one such child" only cut down the previous words of gift in the event of all the other children afterwards dying under twenty-one.

As to Sir J. Leach's explanation of Hart *v.* Durand, it is to be observed that the testator's knowledge of J. D.'s death, and the absence in fact of legitimate sons, almost necessarily excluded the idea [*1086] that he intended to benefit possible legitimate sons (*i*). *And in Edmunds *v.* Fessey (*j*), where a testator gave a legacy "to each of the sons and daughters of his *late* cousin living at his (the testator's) death," and there were two legitimate and two illegitimate sons, and one illegitimate but no legitimate daughter of the cousin, Sir J. Romilly, M. R., without further evidence of the testator's knowledge of the facts, held that it was impossible to exclude the illegitimate daughter.

(*g*) 2 R. & My. 342.
(*h*) 1 Sm. & Gif. 486, 17 Jur. 822.
(*i*) See judgment of Wood, V.-C., Re Herbert's Trusts, 1 J. & H. 121.
(*j*) 29 Beav. 233. Of course the illegitimate sons were excluded. See also Tugwell *v.* Scott, 24 Beav. 141.

It is submitted, therefore, that the cases of Swaine *v.* Kennerley, and Hart *v.* Durand may be considered as overruled (*k*).

So also in a recent case (*l*) a testatrix bequeathed to A. "the eldest daughter of my deceased daughter S. my gold watch," and she bequeathed other property to trustees "in trust for such of the children of my said deceased daughter S. as shall attain the age of twenty-one years, absolutely, equally share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use." There were two legitimate children of S., a son and a daughter, and one illegitimate daughter, namely A. Sir F. North, J., after observing that the decisions in Bagley *v.* Mollard, and Megson *v.* Hindle (*m*), precluded him from holding that A. was entitled by reason only of her being described as "the eldest daughter" of S., said, "But then come these additional words, 'the shares of such of them as shall be daughters to be for their sole and separate use.' What light does this throw upon the matter? It seems to me to show that the word 'children' was intended to include daughters; it is an adoption of the fact that the word 'children' would include daughters; and it would be impossible that daughters should take unless the illegitimate, for otherwise there would be only one daughter." His Lordship considered that he was not at liberty to reject this clause as common form, especially as in the present case there was the special reason for referring to the clause in the gift which spoke of daughters in that A. had been already described as "the eldest daughter of my deceased daughter S.;" and he held that, looking at the whole will, it was the intention of the testatrix that A. should take under the gift to the children of S.

Where before the stat. 1 Vict. c. 26 a testator, married or unmarried, gave to his children by a woman not then his [*1087] wife, he was presumed (the contrary not appearing) to mean legitimate children, and, by necessary consequence, to contemplate marriage with her. But it was settled, that if a married man, after making a disposition in favor of his children by a particular woman, showed by the context of the will that he expected both his wife and the woman in question to survive him, this, being incompatible with the supposition of his contemplating marriage with her, was considered to indicate that he meant *illegitimate* children only.

What shows that testator does not contemplate marriage.

Thus, in the well-known case of Wilkinson *v.* Adam (*n*), where a testator, being married, but having children by a woman named Ann

(*k*) Yet in Adney *v.* Greatrex, 38 L. J. Ch. 416, the M. R. said Swaine *v.* Kennerley, and Hart *v.* Durand both appeared to him to be "remarkably good law."
(*l*) Re Humphries, Smith *v.* Millidge, 24 Ch. D. 691.
(*m*) Ante, p. 1081.
(*n*) 1 V. & B. 422. Of this case, Sir J. K. Bruce said it had often been considered to go to the extreme verge of the law, Warner *v.* Warner, 15 Jur. 142.

Lewis, devised *to his wife* for life a certain mansion-house, and after her decease, to Ann Lewis (who then lived with him) for life, provided she continued single and unmarried; and, subject thereto, he devised the whole of his estate (after limiting a term of years thereout), *in trust for the children which he might have by the said Ann Lewis and living at his decease, or born within six months after*, share and share alike, and to his, her, and their heirs forever; and, in default of such child or children, over. He also bequeathed to Ann Lewis an annuity for the care, management, and guardianship of each of the children. By a codicil (but which, being unattested, was inoperative to affect the construction of the devise (*o*)), the testator declared that his meaning was to include three children of the said Ann Lewis (naming them). The question was, whether the illegitimate children of the testator by Ann Lewis, living at the time of the making of the will, could take under the devise in the will. It was contended, on the authority of the preceding cases, that the testator must be considered to contemplate the events of his wife dying and his marrying Ann Lewis and having legitimate children by her; that the intention was clear that after-born children should take, and it would be extremely difficult on the words to hold the devise good as to those already born, and not as to those afterwards born. But Lord Eldon, assisted by Thompson, B., and Le Blanc, J., and Gibbs, J., held that the three children were entitled by the effect of the whole will. The judges grounded their opinion on the manner in which the [*1088] testator described the children themselves, and Ann * Lewis, their mother, as living with him whilst his wife was then alive, the mode in which he appointed her guardian of such children, the limiting her annuity, and her compensation for the guardianship, to the time of her continuing single and unmarried (*p*), with many other passages in the will; and they laid particular stress on the devise of the mansion to the testator's wife for life, and after her decease, to Ann Lewis for her life, and then to the children; for, supposing these devises to take place in the order in which they stood, *the wife of the testator must have survived him, and his children by Ann Lewis must consequently have been illegitimate* (*q*). Lord Eldon concurred generally with the Judges as to illegitimate children being intended; and, with regard to the objection that they could not take as a class, though they might by a description amounting to designatio persona-

Where testator provides for his wife and his children by another woman in same will.

(o) See Vol. I., p. 77.

(*p*) These circumstances alone were clearly insufficient to vary the construction. As to the appointment of guardians of illegitimate children by a putative father, see Ward *v.* St. Paul, 2 B. C. C 583; Peckham *v.* Peckham, 2 Cox, 46; Chatteris *v.* Young, 1 J. & W. 106.

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

rum, he considered that, viz. that they might take as a class, as decided by Metham *v.* Duke of Devon (*r*), whatever might have been his opinion if it were res integra. In concluding an elaborate judgment, he expressed his opinion, that *it was impossible* that the testator, a married man, with a wife, who, he thought, would survive him, providing for another woman to take after the death of his wife, and for children by that woman, could mean *anything but* illegitimate children. They took, therefore, by necessary implication, on the face of the will (*s*).

Illegitimate children may take as a class.

Lord Eldon's doctrine, that the intention to give to illegitimate children (as distinguished from legitimate children) must appear by necessary implication on the face of the will, is not to be understood as precluding all inquiry into the state of the testator's family. Thus, in the case of a devise to "my children now living" (*t*), or "to the children of A." a *deceased person* (*u*), it is not known by a mere perusal of the will whether legitimate * or illegitimate children were intended; [*1089] and yet, when it is ascertained that there were no other than the latter objects in existence, the conclusion that he meant illegitimate children is irresistible.

Parol evidence admissible, to what extent

The characteristic of these cases is, that, according to the events existing *at the making of the will*, legitimate children never could have claimed under the bequest, and, therefore, could not have been in the testator's contemplation. But "necessary implication," once allowed, does not stop there. It admits illegitimate children whenever it discovers on the face of the will a clear intention to make them the objects of gift, although legitimate children are also intended to participate. Thus, legitimate and illegitimate children may of course be comprehended in the same devise under a designatio personarum applicable to both; as, where a testator, having four children, two of each kind, gives to his *four* children *then living*. This would be a gift to them, not as a fluctuating class, with a possibility of future accessions, but to four designated individuals; and it being found that, to make up the specified number, it was necessary to include as well those who strictly and properly answered to that character, as those who had obtained a reputation of being such persons, the inevitable conclusion is, that the latter were included in the testator's contemplation. It is equally clear that where a testator includes an illegitimate child, by name amongst "his

Illegitimate may take with legitimate children under designatio personarum applicable to both;

(*r*) 1 P. W. 529. The gift was "to all the natural children of testator's son by Mrs. H." So, Bentley *v.* Blizard, 4 Jur. N. S. 652 ("the natural children of A."). See further instances of illegitimate children taking as a class, Barnett *v.* Tugwell and following cases stated below.

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

(*t*) Blundell *v.* Dunn, cit. 1 Mad. 433, ante, p. 1082.

(*u*) Lord Woodhouselee *v.* Dalrymple, 2 Mer. 419, ante, p. 1083.

children" and then gives property to "his said children," the illegitimate child is entitled to share with the legitimate, it being the same thing as if the testator had repeated the names (*x*).

A similar result has sometimes been attained without the aid of an express term of reference such as the word "said." Thus, in Meredith *v.* Farr (*y*), a testator first bequeathed a sum of 300*l.* in trust for his daughter E. W. for life, and after her death to be equally divided amongst the children of his daughters M. and C., that was to say, one moiety between the children of M., and the other moiety between the children of C. He then gave a second sum of 300*l.* in trust for C. for life, and after her death "in trust for all and every the children and child of C., namely, William, John, Angelina, Sarah." And he gave a third sum of 300*l.* in trust for M. [*1090] for life, and after her death "for all and * every the children and child lawfully to be begotten of M., and *including* her daughter Elizabeth, aged about fourteen." Of the enumerated children of C. William was legitimate, the three others illegitimate. And M., besides Elizabeth (who was illegitimate), had at the date of the will several legitimate children, and another illegitimate child, Keziah. It was held by Sir J. K. Bruce, V.-C., that the three illegitimate children of C. took shares in the *first* bequest of 300*l.* as well as William the legitimate son of C., but that M.'s daughter Elizabeth, named under the word "including" in the third bequest, was not entitled to share in the first bequest (*z*), the V.-C. observing that "it would be too dangerous" to let her in. Keziah, who was not named at all, took nothing under the will; which agrees with another case where it was held that the express exception, from a bequest to children, of one illegitimate child, did not raise a necessary implication that another illegitimate child was intended to take a share (*a*); in other words, by styling *some* illegitimate children of A. his "children," the testator does not necessarily prove that he means *all* illegitimate children of A. to be viewed in the same light (*b*). The distinction made between Elizabeth and the illegitimate children of C., with regard to their admission to the first bequest, corresponds with the difference in grammatical sense, which in strictness exists between the words "namely" and "including." "Namely" imports interpretation, *i. e.*, indicates what is included in the previous term; but "including" imports addition, *i. e.*, indicates something not included. But this is narrow ground.

— under gift to "children," where the word is explained by context.

(*x*) Evans *v.* Davies, 7 Hare, 498. And see Hartley *v.* Tribber, 16 Beav. 510; Re Jodrell, Jodrell *v.* Seale, 44 Ch. D. 590, affirmed in D. P., sub nom. Seale-Hayne *v.* Jodrell (1891), A. C. 304.

(*y*) 2 Y. & C. C. C. 525.

(*z*) See also Hibbert *v.* Hibbert, L. R., 15 Eq. 372.

(*a*) Re Wells' Estate, L. R., 6 Eq. 599.

(*b*) See per Wigram, V.-C., Dover *v.* Alexander, 2 Hare, 281; Edmunds *v.* Fessey, 29 Beav 233 (as to the illegitimate sons).

Again, in Owen *v.* Bryant (*c*), where a testator reciting that he * had nine children by his then present wife, "namely, [*1091] A., B., &c.," and that he had made certain provisions for his four married daughters, and wished to make a similar provision for his unmarried daughters, which he accordingly did in manner appearing by the will, proceeded to give the proceeds of his residuary real estate in trust for his wife for life, remainder between all and every his children by his said present wife who should be living at her decease, and directed his trustees to hold the shares of such of his *said* children as should be daughters upon certain specified trusts. It appeared that the testator was not married to his wife until after the birth of their daughter A.; but it was held by the L. JJ., that she was entitled to share in the residuary bequest. Lord Cranworth said he rejected the notion of there being a rule that illegitimate children cannot, under any circumstances, participate with legitimate children in the benefit of a gift to children generally. But he based his decision on the passage containing the words "*said* children," coupled with the passage which, as he said, preceded it, and in which the testator enumerated his children by name: but for the words specified he would have thought that legitimate children only were intended. However, the last antecedent was, "children of my present wife," in the sentence immediately preceding. Sir J. K. Bruce thought the intention of the testator sufficiently apparent without the aid of the words "said children," and that consistently with the authorities, except, perhaps, Bagley *v.* Mollard, the case might be decided according to the plain intention of the testator.

Owen *v.* Bryant.

In Smith *v.* Jobson (*d*) a testator made two devises in favor of E., who was illegitimate, describing her in each devise as "my eldest daughter," then followed a gift to "my four youngest daughters," naming them, and further dispositions, after which the testator proceeded: "And I particularly direct that should any of my children die without having children lawfully begotten, their share, whether land or money, shall be divided equally among my surviving children." E. survived the testator, but died without issue, leaving

The general rule that "children" means only legitimate children does not apply to a gift over.

(*c*) 2 D. M. & G. 697, 21 L. J. Ch. 860. See also Worts *v.* Cubitt, 19 Beav. 421 (which turned on the words "*all* my daughters," following a gift to "my natural daughter A. and my other daughters"). But cf. Smith *v.* Lidiard, 3 K. & J. 252; Thompson *v.* Robinson, 27 Beav. 486. Allen *v.* Webster, 2 Gif. 177, was "not a case of illegitimate children at all," but a gift to the testator's "grandchildren;" and a bastard son being once recognized, all *his* legitimate children were of course included.

In Re Standley's Estate, L. R., 5 Eq. 303, a testator divided his estate among his illegitimate son and daughters by name, settling the shares of daughters, so that on the death of either without children her share was to go to her statutory next-of-kin, and providing that the share to which any daughter might become entitled *by virtue of the provisions thereinbefore contained as next-of-kin* of the son or other daughters should be settled likewise. One daughter died without children. The question seems to have been whether the testator had made his intention plain, that in ascertaining the next-of-kin (which primâ facie meant legitimate kindred) the brother and sisters were to be deemed legitimate (as in Wilson *v.* Atkinson, 4 D. J. & S. 455). Wood, V.-C., held that he had not.

(*d*) W. N. 1888, p. 184, 59 L. T. 397.

his other children surviving her. Sir E. Kay, J., held that the expression "children" in the will was evidently intended to [*1092] include E., who had twice been called * by name the "daughter" of the testator; and further, that the general rule that a gift to "children" prevents illegitimate children from taking with legitimate, in the absence of expressions to the contrary, does not apply to a gift over on death of children.

Construction of word "children" in a codicil follows that of the will.

In Re Haseldine, Grange *v.* Sturdy (*e*), Sir C. Bowen and Sir E. Fry, L. JJ. (diss. Sir H. Cotton, L. J.), being of opinion that the word "children" was used by the testator in his will so as to include illegitimate persons, held that the word must bear the same interpretation in a codicil to the will.

Although in some of these cases the bequest may have been to a class admitting of increase to its legitimately-born members, in all of them the illegitimate members were included by individual designation. It was considered a doubtful point whether if there were no such designation, legitimate and illegitimate children could, under any circumstances, take together under the general description of children as a class (*f*). But it is now clear, in accordance with Lord Cranworth's observation just cited, that they can; and that in all cases, although there is a very strong presumption that the word "children" means only legitimate children, yet it may denote a class including illegitimate as well as legitimate children, if by necessary implication, or (more intelligibly) upon a just and proper construction of the words, you find in the context an expression of intention that the illegitimate children shall take (*g*).

Illegitimate may, upon the context, take with legitimate children as a class.

Such an intention was shown in the most unmistakable way in Barnett *v.* Tugwell (*h*), where a testator bequeathed one-third of his property to his sister A. and her husband for their lives, and after their death to their surviving children; and if no such children then to be "equally divided amongst the children legitimate or illegitimate of H." At the date of the will H., as the testator knew, had several illegitimate children. There were five of them; and H. had no more afterwards. Of these five three only survived the testator. After the testator's death H. married and had nine legitimate children, three of whom died before A. A. survived her husband and died without [*1093] leaving * children. It was held by Sir J. Romilly that the one-third was divisible equally among the three illegitimate

To "children legitimate or illegitimate of A."

(*e*) 31 Ch. D. 511, stated post, p. 1095.
(*f*) 1 V. & B. 452, 457, 468; 22 Beav. 339.
(*g*) Per Lord Cairns, Hill *v.* Crook, L. R., 6 H. L. 283; per Mellish, L. J., Crook *v.* Hill, L. R., 6 Ch. 318. And see per Stuart, V.-C., Holt *v.* Sindrey, L. R., 7 Eq. 174; per Malins, V.-C., Dorin *v.* Dorin, L. R., 17 Eq. 474; and per Lord Halsbury, C., Re Jodrell, Jodrell *v.* Seale, 44 Ch. D. 607.
(*h*) 31 Beav. 232.

and the nine legitimate children of H. He said "Wilkinson *v.* Adam determines that natural children existing at the date of the will may take as a class, and not only so, but that they may take as a class under words plainly importing the testator's intention that after-born natural children should be included in this class" (an intention which the M. R., held could not be lawfully fulfilled (*i*)): and he added, "If this be so, I am unable to see in what manner I can alter the meaning of these words, as so interpreted by Lord Eldon, because legitimate children are united to take as a class with a class of illegitimate children then in existence. . . . . As therefore the existing natural children of H. take as a class, those only who survived the testator form that class (*k*). As to the legitimate children of H., it became vested in the children as soon as they came in esse, subject to be divested pro tanto for the purpose of admitting any additional child as a member of the class."

On the same principle in Bayley *v.* Snelham (*l*), where a testator, reciting that he had lately married in Scotland Jane W., the sister of his late wife, bequeathed personal estate in trust for his said wife Jane for life, and after her decease to the children begotten and to be begotten by him upon the body of his said wife Jane; and he declared that his said wife Jane and her children should take the provisions thereinbefore made for them in the same manner as if she had been married to him according to the usage of the Church of England and such marriage had been valid according to the English law. It was alleged and was assumed that the marriage was void according to the law of Scotland, and the question was, whether the child born at the date of the will, being illegitimate, could take under the bequest; which Sir J. Leach, V.-C., decided in the affirmative. He observed that he had at first intended to direct an inquiry as to the validity of the marriage, but that it had been argued that this was not necessary, seeing that the gift was conveyed in terms which intended to give the benefit of it to the children of Jane, though she should turn out not to be his lawful wife. The V.-C. added that he was much struck with the language of the * will, [*1094] and was of opinion that no inquiry was necessary, since admitting for the sake of argument that the marriage was not valid, still the testator had made an express gift to children who had acquired the reputation of being his, and their illegitimacy was not made a condition of the gift but was merely a description of the persons.

Children of testator's "wife" to take whether his marriage be valid or not.

(*i*) As to this vide post, s. iii.
(*k*) See some further consequences of the gift being a class-gift, post, s. iii.
(*l*) 5 Ves. 534, n., also shortly reported 1 S. & St. 78, where the decision is made to turn on the words "begotten and to be begotten," as constituting a specific reference to the child already born, although those words are omitted from the statement *of the gift*.

Even though it were clear (and it would certainly be difficult to deny) that had the testator subsequently married Jane W. and had legitimate children by her (*m*), they would have taken under the bequest; the case, it is conceived, forms no exception to or contradiction of the doctrine that "children" prima facie means legitimate children; since it is evident the illegitimate child took, not by virtue of the bequest to children simply as such, but under the clause providing for the event of the marriage proving to be invalid, and which must be considered as extending the bequest to illegitimate as well as legitimate children. In effect, therefore, it was a gift to the children legitimate or illegitimate of A.

So, in Hill *v.* Crook (*n*), John Hill, having a daughter Mary, who (as he knew) had married J. Crook, her deceased sister's husband, and had issue by that connection, made his will, dated 1859, forgiving a debt due to him from "his son-in-law J. Crook," and devising leaseholds in trust "for his daughter Mary, the wife of the said J. Crook," for her separate use, "independent of *her present* or any after-taken husband," and afterwards in trust for "the child, if only one, or all the children if more than one, of his said daughter Mary Crook," with other clauses referring to his daughter as "Mary Crook;" it was held in the House of Lords that, although there was no reason why legitimate children might not take under the bequest, yet that two children of the testator's daughter by J. Crook, who were born before the date of the will, and had acquired the reputation of being the children of J. Crook, were entitled. Lord Chelmsford said: "I know of no objection in law to a gift to childreu, with a clear intention that it shall apply to existing illegiti- [*1095] mate children, being so applied, * although after-born illegitimate children must be excluded, and the gift be extended to future legitimate children." Lord Colonsay said it was clear to him that the testator intended the children of his daughter's union with J. Crook should be dealt with as if they were legitimate. Lord Cairns treated it as clear that a testator might "use the generic term 'children' so as to include illegitimate children along with legitimate children." The only question was, did the will in that case, upon a just and proper construction of its terms, show an intention so to use it. In his opinion it did. He said: "The terms 'husband' and 'wife,' 'father' and 'mother,' and 'children,' are all correlative. If a father knows that his daughter has children by a connection which he calls a 'marriage' with a man whom he calls her 'husband,' terming the

To "the children of my daughter A. wife of B.," testator knowing that the marriage was invalid.

Hill *v.* Crook.

(*m*) Before 5 & 6 Will. 4, c. 54, such marriages were in England voidable only. By that statute they are made absolutely void; therefore now a gift by a woman to her children by A. who was her deceased sister's husband, necessarily means illegitimate children only, Re Goodwin's Trusts, L. R., 17 Eq. 345. Otherwise, if a testator, whose marriage is invalid, refers only to the paternity, as if he gives a legacy to "all and every my child and children," and illegitimate children will not be entitled to take, by reason of his having in the will described their mother as "my wife," Re Bolton, Brown *v.* Bolton, 31 Ch. D. 542.

(*n*) L. R., 6 H. L. 265, affirming 6 Ch. 311.

daughter the 'wife' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person, when he speaks of the 'children' of his daughter, this meaning, that as he has termed his daughter and the man with whom she was living 'wife' and 'husband,' so, also, he means to term the offspring born of that so-called marriage the children according to that nomenclature. If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires." (*o*)

It is to be observed that in this case it appeared, though the decision does not seem to be altogether dependent on the fact, that the testator was aware that a valid marriage could not possibly be contracted between Mary Crook and John Crook. But the mere description of A. as "the wife" of B., will not bring their illegitimate children within the terms of a bequest to "the children of A." where there has been no marriage, valid or invalid, and where it does not appear that the testator knew the actual nature of the connection between A. and B.; for non constat that he used the word "wife" in any but its legal sense, or intended any but legitimate children to take (*p*).

The decision in Re Haseltine, Grange *v.* Sturdy (*q*), seems to * carry still further the principle of admitting not only [*1096] the language of the will itself, but extrinsic evidence of circumstances under which it was made, to show intention that illegitimate children should take under the description of "children." In that case, a testator made his will in October, 1860, whereby he bequeathed "the following legacies to the following persons, that is to say;" then followed legacies to persons named; and he continued, "to each of the children of M. A. L. the sum of 5*l.* for mourning, the same to be paid into the hands and on the receipt of the said M. A. L., their mother, for them, notwithstanding her coverture and their minority." On the 5th of August, 1881, he made a codicil by which he bequeathed 400*l.*, on the death of an annuitant, "unto and equally between all the children who shall then be living of M. A. L., share and share alike," and confirmed his will in all other respects. The testator died two days after execution of the codicil. M. E. L. was sister-in-law to the testator, having been married seven years at the date of the will; she never had any child after her marriage, but she had at that time three

Gift to "the children of A.," testator knowing that her living children were born before marriage.

(*o*) See the observations of Lord Halsbury, C., Re Jodrell, Jodrell *v.* Seale, 44 Ch. D. 605, 606. See also Dilley *v.* Matthews, 11 Jur. N. S. 425; Holt *v.* Sindrey, L. R., 7 Eq. 170; Lepine *v.* Beane, L. R., 10 Eq. 160; Re Brown's Trust, L. R., 16 Eq. 239; Perkins *v.* Goodwin, W. N., 1877, p. 111.

(*p*) Re Ayles' Trusts, 1 Ch. D. 282; and see Warner *v.* Warner, ante, p. 1080. But see Re Horner, Eagleton *v.* Horner, 37 Ch. D. 695, where it was proved that the testator was well aware of the nature of the connection.

(*q*) 31 Ch. D. 511.

children by her husband before marriage, who lived with their parents and were treated as legitimate. At the date of the will M. E. L. was nearly forty-five, and the youngest child was eleven years of age. It further appeared from the evidence that the testator was very intimate with M. E. L. and her husband, that he was seized with a dangerous illness in 1860, while on a visit to them; that he made his will under the advice of his medical attendants, that he was nursed by M. E. L. and her three children during his illness, and that he remained with them till his death. Sir E. Kay, J., thought the case governed by Dorin *v.* Dorin (*r*), and held that the illegitimate children were not entitled to take. On appeal Sir H. Cotten, L. J., was of the same opinion, and held that in the present case no repugnancy or inconsistency in the will would result from giving the word "children" its proper sense of legitimate children. But Sir C. Bowen and Sir E. Fry, L. JJ., came, not without some doubt, to a different conclusion. They considered that the language of the will, as explained by the evidence of surrounding circumstances, was sufficient to show that the testator in the will referred, whether exclusively or not, to the existing children, and that, the codicil having been executed during the same illness, the testator could not be taken to have intended to exclude from it those who were
[*1097] * treated as children by the will. With regard to the will Sir E. Fry, L. J., said, "The language appears to me to be insensible if 'children' be taken in its strict primary sense, but sensible if we understand the word as used in its secondary sense."

The rule then (expressed in accommodation to the cases) may be stated thus: In order to let in illegitimate children under a gift to children, it must be clear upon the terms of the will when applied to the state of facts at the making of it, that legitimate children never could have taken; or that its terms, when so applied, never could have had full effect if confined to legitimate children (*s*). This, it is submitted, forms a test by which the claim of illegitimate children is always to be tried. Unfortunately, however, this principle has not been invariably adhered to.

Rule with suggested qualification.

Thus, in Beachcroft *v.* Beachcroft (*t*), where a testator who resided in the East Indies, and was a bachelor, and had had several children by a native woman, bequeathed as follows:—"*To my children*, the sum of pounds sterling, 5,000 each; *to the*

"To my children;"

(*r*) L R., 7 H. L. 568, post, p. 1099.

(*s*) See per Lords Cairns and Hatherley in Dorin *v.* Dorin, L. R., 7 H. L. 573, 575; per K. Bruce, V.-C., Warner *v.* Warner, 15 Jur. 141; per Stuart, V.-C., Re Overhill's Trust, 1 Sm. & G. 366, 367.

(*t*) 1 Mad. 430. See also Laker *v.* Hordern, 1 Ch. D. 644, where the testator having no legitimate children, a gift to "my daughters" was held to mean existing illegitimate daughters, *upon extrinsic evidence* that he always treated them as his daughters, and so described them in the instructions for his will. It is submitted that the case is undistinguishable from Dorin *v.* Dorin, post, and that the decision cannot be supported. "Daughters" is not more appropriate than "children" to describe illegitimate daughters. Per Wood, V.-C., Re Herbert's Trusts, 1 J. & H. 123.

mother of my children, the sum of sicca rupees, 6,000, which I request my executors will secure to her in the most advantageous way." The question was, whether the illegitimate children were entitled? Sir T. Plumer, V.-C., decided in the affirmative. He referred to Goodinge *v.* Goodinge (*u*), and Crone *v.* Odell (*x*), as authorities that parol evidence was admissible as to the state of the testator's family when he made his will; and observed that, in the case of a latent ambiguity, parol evidence was admissible to prove the identity of the person intended to take, whether an individual or a class. That it had been established by Metham *v.* Duke of Devon, and Wilkinson *v.* Adam, that illegitimate children might take as a class; that if the words had been "my present children," they might have taken as a class, to be ascertained by evidence, and being unmarried (*y*), he must have meant *his illegitimate children. His Honor admitted that the word "present" was not introduced in this will; but he observed that the general presumption is, that a man sitting down to make his will designs a benefit to some existing object, and it was extravagant to suppose that the testator had only future possible children in view, disregarding those whom he was in the habit of denominating and treating as his children. Giving to each a definite portion, 5,000*l.*, and the ultimate residue to his collaterals, showed that he had a definite number in view, and that he recognized his legitimate relatives as having a preferable title to a part of his fortune. That was rational enough if he was providing for illegitimate children, but was very unlikely if he was providing for future legitimate children. "For all these reasons," said his Honor, "I think it is reasonable to interpret the words 'my children' in the same way as if he had said, 'my *present* children.' But this construction of the will does not depend merely upon the first clause of it; for the next clause clearly shows what was meant, 'To the mother of my children the sum of sicca rupees 6,000, which I request,' &c. Was that a provision proper for the intended wife of a man of his fortune? Is it probable that, after giving one whom he thought fit to be his wife so small a sum, he should think it necessary that his executors should secure it for her? (*z*). Did anybody ever describe his wife by the term 'mother of my children?' If she had no children she would not have taken under this bequest. The second clause of the will is explanatory of the first; for, when once it is understood he therein meant to describe some person who had already become the mother

"To the mother of my children;"

— held to extend to illegitimate children.

[*1098]

Judgment in Beachcroft *v.* Beachcroft.

(*u*) 1 Ves. 231.
(*x*) 1 Ba. & B. 481.
(*y*) That this circumstance alone will not let in illegitimate children, see Kenebel *v.* Scrafton, 3 East, 530.
(*z*) Compare the general scope of this reasoning with that of Lord Eldon, in Wilkinson *v.* Adam, 1 V. & B. 460.

of his children he then had, he must, under the term 'children,' have comprehended children already born, and consequently, as he was unmarried, his illegitimate children; and he must be supposed to have used the same word 'children' in the preceding clause in the like sense. I think, therefore, it is clear that existing persons were meant, and that they take, as in the case of Wilkinson *v.* Adam, as designated persons."

Strictures on Beachcroft *v.* Beachcroft.

A case more embarrassing to a Judge could hardly have occurred, for no man, reading this will with the knowledge of the testator's situation, could really entertain a doubt as to illegitimate children being the objects intended; but that [*1099] there was * ground for holding *judicially* that such objects were "*upon the face of the will*" manifestly and incontrovertibly pointed out, is not equally clear. The circumstance of the amount of the bequest to the children and their mother, and the terms in which it was given, as differing from the mode in which a testator would refer to and provide for his future wife and her children, furnished exactly that species of conjecture, which in Cartwright *v.* Vawdry (*a*) was held insufficient to let in the illegitimate child. Indeed the division into fourths in that case supplied a stronger argument than the frame of the will in the case under consideration; and with respect to the argument founded on the bequest to the mother of the children, as showing that the testator referred to existing children, that is, children then having a "mother," it is to be observed that the bequest to the mother is wholly dependent on, and is regulated by, the construction of the gift to the children; for, if the gift to the children standing alone would extend to future legitimate children, then the gift to their mother would be a gift to the mother of the testator's legitimate children, — in other words, to his wife.

Construction not to be made to depend on the fact whether legitimate children come in esse.

In the course of his judgment the V.-C. is made to say, "That no case has been found, where, when the word 'children' has been used in the will of a putative father who has no legitimate children, it has been held that illegitimate children cannot take;" but such a case now exists in Dorin *v.* Dorin (*b*), where a man, having two illegitimate children, afterwards married their mother, and next day made his will, wherein he called her his "wife," giving his property to her for life and afterwards to "his children" by her; he died without lawful issue, and it was held in the House of Lords that the remainder failed. Lord Hatherley said, "It is not because you find in the outward circumstances that there are some children whom you think the testator ought to have provided for, that the will must be taken to mean that they are to be provided for, when the words in the will can

(*a*) Ante, p. 1077.
(*b*) L. R., 7 H. L. 568, reversing L. R., 17 Eq. 463. Godfrey *v.* Davis, 6 Ves. 43, ante, p. 1079, has been cited for the same point; but there the will was not by the putative father.

have full and complete effect given to them if you interpret them in another and a legal sense without altering a single word." And Lord Cairns said: "Supposing it had been in the testator's mind not to take any notice of these children in his will, but to make a provision for them in some other way, and to use his will to designate merely any legitimate children who might be afterwards born, would not every word in the will be satisfied?"

[*1100] *Since the statute 1 Vict. c. 26, a will not operating as an appointment is under all circumstances absolutely revoked by marriage (*c*), and gift by a bachelor to his children can never, therefore, take effect in favor of legitimate children. It seems not unreasonable to impute to a bachelor having illegitimate children a knowledge of this law, and thence to infer an intention in favor of the illegitimate children. And this was so held in Clifton *v.* Goodbun (*d*).

Effect of 1 Vict. c. 26 on construction of gifts by a bachelor to his children.

Another case which is difficult to reconcile with the principles deducible from the general current of the authorities is Fraser *v.* Pigott (*e*), where a testator, after bequeathing certain bank annuities to legitimate and illegitimate children by name of his two sons William and John, gave the residue of his estate to his said sons equally, and directed that if either of them should die in his lifetime the moiety of his deceased son should go to his *children;* but if both his sons should die in his lifetime, he gave the same to and amongst all their *children* equally. Both the sons died in the testator's lifetime, John leaving three legitimate and two illegitimate children, and William leaving three illegitimate but no legitimate children. It was held, that the illegitimate children of John were not entitled to share with the legitimate children in the residue, but that the illegitimate children of William, who left no legitimate child, were to be admitted. Lord Lyndhurst, C. B., said, "It seems to be clear, upon the cases, that where there are any legitimate children to answer this description of children, then, according to the rule of law, the legitimate children only will take. If there be no legitimate children, then extrinsic evidence may be given of the persons who were intended; but where there are legitimate and illegitimate children, legitimate children only will take under the description

Illegitimate children held entitled under gift to children.

(*c*) Ante, Vol. I. p. 112.

(*d*) L. R., 6 Eq. 278. See also Re Hastie's Trusts, 35 Ch. D 728, where a testator gave a fund in trust for "my four natural children by M. M.," naming them, "and all and every other children and child which may be born of the said M. M., previous to and of which she may be pregnant at my death;" it was held by Stirling, J., that illegitimate children born after the date of the will and before the death of the testator were entitled. Apparently this argument would not apply where the testator erroneously supposes his marriage to be valid, per Bowen, L. J., Re Bolton, Brown *v.* Bolton, 31 Ch. D. at p. 553. The point appears to have been overlooked in Pratt *v.* Mathew, 22 Beav. 340; although in a former page (338) it had been referred to as it affected a gift to a "wife." Beachcroft *v.* Beachcroft has even been cited in support of the same general proposition before the statute, Preston on Legacies, 201; but the ratio decidendi in that case was that the special context of the will pointed to *present* children.

(*e*) You. 354, disapproved by Shadwell, V.-C., 14 Sim. 216.

[*1101] of children. In this case the illegitimate children * of William Fraser, and the legitimate children only of John Fraser, appear to me to be entitled."

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

Remarks on Fraser *v.* Pigott.

[*1102] * **II. — Gifts to Illegitimate Children en ventre.** — It is now clear that a gift to a natural child of which a particular woman is enceinte, *without reference to any person as the father*, is good. Thus, in Gordon *v.* Gordon (*h*), where a testator recited that he

(*f*) Mortimer *v.* West, 3 Russ. 370.
(*g*) Ante, Ch. XIII.
(*h*) 1 Mer. 141. See also judgment in Earle *v.* Wilson, 17 Ves. 532; Dawson *v.* Dawson, 6 Mad. 292.

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

Illegitimate children en ventre.

Where described as the children of the mother only, gifts valid.

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

Distinction where described as children by a particular man.

Thus, in Earle *v.* Wilson (*i*), where a testator bequeathed to "such child or children, if more than one, as M. may happen to *be enceinte of *by me*," Sir W. Grant held it to be void. [*1103] There was no gift, he said, to the child of which M. might be enceinte, except as the child of the testator. It was not a matter of indifference to him whether that child should have been begotten by him or another man; therefore he could not do what was required, that is, reject the words "by me" as superfluous. "Suppose," he observed, "the words 'as she may happen to be enceinte of by me,' could be taken to mean, 'as she is now enceinte of by me,' in which there is considerable difficulty; yet if the rule of law does not acknowledge a natural child to have any father before its birth, the change of phrase would not have

Such a gift held invalid, though proceeding from the father.

(*i*) 17 Ves. 528.

the effect of making the bequest good. He means to give to an unborn bastard by a description which the law says such person cannot answer; and if you take away that part of the description, non constat that the gift would ever have been made."

It will be observed that Lord Eldon in Gordon *v.* Gordon (*k*) cautiously abstains from giving an opinion on the point decided by Sir W. Grant in Earle *v.* Wilson, and had, it seems, obtained the concurrence of that learned Judge in the opinion he then pronounced. But the authority of Earle *v.* Wilson has been since questioned in Evans *v.* Massey (*l*), in which a testator, who resided in India, devised as follows: — "Having two natural children, *and the mother supposed to be now carrying a third child,* I bequeath the whole of my property in England at this time, or now on the seas proceeding to England, to be divided equally between them: that is to say, if another child should be born by the mother of the other two, in proper time, that such child is to have one-third of such property." The testator appointed certain persons guardians of *his* children, and in the bequest of the residue expressed himself thus, "after paying *my* natural children as aforesaid." The question was, whether the bequest to the child en ventre sa mère was made to it as the child of the testator, or whether, on the other hand, it was not to the child with which the woman was enceinte, without reference to the father as an essential part of the description. Richards, C. B., was of opinion that the bequest was good. He considered the case to be distinguished from Earle *v.* Wilson, as to which, however, he observed, that he did not understand the grounds upon which it proceeded, and therefore could not entirely accede to it; that the decision excited surprise at the time, [*1104] and that * some of the Judges had intimated upon several occasions dissatisfaction with it. After adverting to what fell from Lord Eldon in Gordon *v.* Gordon, he proceeded: "We have therefore only to inquire, in this case, whether there be in the terms of the present bequest, worded as it is, such a condition precedent annexed to it by the testator as by necessary construction requires, that in order to give effect to the bequest, the child must be shown to be the testator's child, and that he meant to give it only in case the child should be his; and that not only by matter of implication or argument, but of clear illustration. The testator's words are, 'Having two natural children, and the mother supposed to be now carrying a third child.' Now he does not say, 'with which she is pregnant *by me*,' but merely that she is supposed to be pregnant generally, and the time of her delivery would prove that fact; then he bequeaths to such child the legacy in question. It is quite clear that there is

Evans *v.* Massey.

Gift to illegitimate child en ventre held good.

Earle *v.* Wilson questioned by Richards, C. B.

(*k*) 1 Mer. 141, stated ante, p. 1102. (*l*) 8 Pri. 22.

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

It is to be inferred from the observations of the C. B. that the principle upon which he founded his objection to Earle *v.* Wilson is this: that where a testator gives to the child or children * with which a particular woman is enceinte *by him*, although [*1105] he describes the child as his own, yet that he intends to make it the object of his bounty at all events, assuming his parental relation to the child as a fact *not farther to be inquired into*; but, as the learned Judge thought that in the case before him the child was not so described, Earle *v.* Wilson remains uncontradicted by his decision. It is clear, however, that the Court will not act upon the principle of that case, unless the testator's intention to make the fact of his parentage to the unborn infant an essential part of its description be unequivocally demonstrated.

Remarks on Evans *v.* Massey.

It has been said, however, that a child en ventre sa mère is a child in esse, and may have a name by *reputation* (*m*). If so, a reputation regarding its paternity acquired at the date of the will by a child en ventre should be as efficacious as a reputation then acquired by a child previously born, to bring it within the description of a child by a particular father. But all the cases were argued and decided on the opposite assumption, and Lord Eldon laid it down clearly that until born a child has no reputation (*n*). There appears, at least, to be no case

Whether child en ventre may have a name by reputation.

(*m*) By Sir E. Sudgen, 2 Jo. & Lat. 460; also by Romilly, M. R., 22 Beav. 339, 340.
(*n*) 1 Mer. 152, agreeing with Lord Macclesfield, Metham *v.* Duke of Devon, 1 P. W. 529, where dictum as well as decision referred to children by a particular father.

in which reputation acquired before birth has been recognized, and Sir W. James, L. J., has intimated that, in his opinion, there would be great if not insuperable difficulties in the way of proving it (*o*).

The question would seem to have been involved in the facts of Crook *v.* Hill (*p*), where, besides the two children born before the date of the will, the testator's daughter Mary had another child born after the testator's death, which (as the testator is stated to have known) was en ventre sa mère at the date of the will. There was no specific reference to that child; but it was held by Sir C. Hall, V.-C., that it came within the class described as "the children of my daughter Mary Crook." He observed that as a general rule (*i. e.*, in case of a lawful marriage) a child en ventre is included in a trust for children, and continued, "The case, both before the L. JJ. and in the House of Lords, has proceeded on the view that the testator had thought proper to make a will based on the assumption that the union of his daughter with J. Crook was a legal marriage, and all his *dispositions for the objects to take under his will are framed upon this footing. It is clear then that, meaning as he did by the word 'children' the issue *of that union*, he must be taken to have meant to include a child en ventre sa mère."

Crook *v.* Hill, cor. Hall, V.-C.

[*1106]

That is to say, the testator meant this child to be included if it was a child *of* that "union." Now, the marriage being invalid, the only admissible evidence that the child was the issue of that union was reputation; for, of course, the testator could not cause his assumption of the validity of the union to prevail so far as to dispense with this evidence. But no allusion was made to this point, and no such evidence was asked for; and the decision seems to require the further assumption that the testator intended every child of his daughter born *during* that "union" to be taken to be a child *of* that "union:" thereby, in effect, eliminating the question of paternity altogether (*q*). In this respect the decision appears to depart from the ground taken in the House of Lords. The reputed paternity of the two elder children was their proved (*i. e.* admitted on demurrer), and was, it is submitted, essential to their claim; for though the gift was to the children of Mary Crook (without saying "by J. Crook"), yet this would have been completely satisfied by applying it to her legitimate children (who, it will be remembered, were considered to be included), and to them alone, if the Court had not found on the face of the will an intention to include her illegitimate children *by J. Crook*. It is to be observed, however, that the claim of the child en ventre was virtually unopposed.

(*o*) In Occleston *v.* Fullalove, L. R., 9 Ch. 158. And see Re Bolton, Brown *v.* Bolton, 31 Ch. D. 542, 553.
(*p*) 3 Ch. D. 773, will stated ante, p. 1094.
(*q*) See per Bowen, L. J., 31 Ch. D. 550.

But if the child which is en ventre at the date of the will is afterwards born, and before the testator's death acquires the reputation of being child of the person described as father, the difficulty would seem to be removed. Unless the fact of paternity be clearly made a condition of the gift, there appears to be no reason for making a distinction in this respect between a gift specifically to a child en ventre, and a gift to children generally, described as by a particular father; and with regard to the latter, as we shall hereafter see, reputation, acquired at any time before the death of the testator, when the will comes into operation, has been held sufficient (*r*).

Child afterwards born and gaining repute before testator's death.

[*1107] ***III. — Gifts to Illegitimate Children not in esse.** — The preceding sections leave untouched the question respecting the validity of a devise or bequest to the illegitimate children, *not* in esse, of a particular woman, without reference to the father. The state of the law on the subject seems to be this: the early authorities are opposed to gifts to such subjects, on the ground "that the law will not favor such a generation, nor expect that such shall be" (*s*). Dicta, however, have been thrown out by recent Judges which cast a doubt upon the bold opinion. In Wilkinson *v.* Adam (*t*), Lord Eldon observed, that he knew no law against such a devise; but he afterwards said (*u*) that whether the cases in Lord Coke (*x*), which were all cases of deeds, had necessarily established that no future illegitimate child could take under any description in a will, whether that was to be taken as the law it was not

Whether gifts to bastards not in esse good.

(*r*) Occleston *v.* Fullalove, L. R., 9 Ch. 147, 159, 170: Re Goodwin's Trust, L. R., 17 Eq. 345. Perkins *v.* Goodwin, W. N., 1877, p. 111 (testator not the father); Re Hastie's Trusts, 35 Ch. D. 728. See post, pp. 1110, 1111. In Gordon *v.* Gordon, 1 Mer. 150, the question of subsequent recognition of the child was mentioned, but not determined, her claim being upheld on other grounds. In Earle *v.* Wilson and Evans *v.* Massey the child was not born until after testator's death. Lord Selborne is reported (L. R., 9 Ch. 158) to have said, "In Metham *v.* Duke of Devon the child en ventre at the date of the will was born and *in the testator's lifetime acquired the same reputation* (*i. e.* of being the Duke's child by Mrs. H.), but this child as well as all others born still later, was excluded:" which if correct would put that case in opposition to those cited above. The italicized portion of the statement is not contained in 1 P. W. 529, nor in R. L. 1718, B. fo. 215. According to the latter book there were but six children of the Duke (the original defendant) by Mrs. H. The plaintiff alleged that five only, including herself, were born before the date of the deed-pool (will), but that Henrietta, the sixth, claimed a share, though born after the death of the testator. Henrietta answered that all six "were born at the time of the said deed, or at leastwise before the said (testator's) death, and the said Duke owned them all" (not saying in the testator's lifetime). The declaration, extracted 1 P. W. 530, n., is followed by a direction for an inquiry "what children or reputed children of Lord C. (the Duke) by the said Mrs. H. were living at the date of the said deed-pool." No mention is made in R. L. of one of the children being en ventre at the date of the deed. This fact depends on P. W.; and Henrietta, being the only one whose claim was disputed, was doubtless that child; but that she had *in the testator's lifetime* acquired the reputation of being a child of the Duke by Mrs. H. or that there were any "other children born still later" does not appear by either book: nor is the date of the testator's death given. The report does not intimate that the inquiry led to any further hearing.

(*s*) See Blodwell *v.* Edwards, Cro. El. 510.

(*t*) 1 V. & B. 446. But the context shows that he was speaking only of such as were begotten in the testator's lifetime and born "within the longest period allowed for gestation."

(*u*) 1 V. & B. 468.

(*x*) Co. Lit. 3 b.

necessary to decide in that case. He would leave that point where he found it, without any adjudication.

Undoubtedly, if the objection to gifts of this description was referable simply to the ground of uncertainty, there would be no difficulty in saying, in opposition to the early authorities, that such a devise might be sustained, as it is evident that a gift to the future illegitimate children of a *woman* does not involve greater uncertainty than such a devise to legitimate chil-
[*1108] dren. *But it is conceived that there remains a serious objection to the validity of such dispositions, on grounds of public policy.

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

Objection on grounds of public policy;

Lord St. Leonards expressed a clear though extrajudicial opinion that public policy, and not uncertainty, was the ground of objection to gifts to future illegitimate children. Referring to his own argument in Mortimer *v.* West, he said he still retained the same opinion as he had then formed after a careful search into the authorities. According to his impression of the authorities, they authorized the position that it made no difference whether the father was referred to or not. That it was on the ground of public policy that such gifts were held to be void, not because of the difficulty or indelicacy which

might ensue in pursuing an inquiry as to the paternity of the child (*y*).

* As regards provisions for children to be begotten after [*1109] the instrument comes into operation, *i. e.* as to deeds the time of execution, and as to wills the time of testator's death, this doctrine is nowhere denied: such children, whether described as the issue of the woman, or of the woman by a particular man, cannot take (*z*). But as to a will there is yet another period to be considered, viz. that which comes between its execution and the testator's death. Testamentary provisions for children to be begotten during this period also were held void, as being contra bonos mores, by Sir J. Romilly, M. R. (*a*), and Sir W. P. Wood, V.-C. (*b*). Indeed no distinction between the two cases was ever expressly drawn (though it is probably what Lord Eldon hinted at in the passage cited above) until it came to be discussed in Occleston *v.* Fullalove (*c*), where a testator gave real and personal estate in trust for his "sister-in-law" M. L. (with whom he had gone through the form of marriage) for life, and after her death for "his reputed children C. and E., and all other the children he might have, or be reputed to have, by the same M. L. then born or thereafter to be born." A third child of M. L., which was en ventre sa mère *at the date of the will*, was born before the testator's death, and was by him acknowledged and described in the register of births as his. Sir J. Wickens, V.-C., held that this child was not entitled to share. On appeal, the Court was divided; Lord Selborne agreed with the V.-C.; but James and Mellish, L. JJ., differed from him on the technical ground that a will was always revocable during the testator's life, and could therefore be no inducement to himself to continue an immoral life, or at any rate that this was too uncertain to be made a ground of decision. As to the woman, there was no evidence that she knew the will was made, and if she did, she must also have known that it could be revoked at any moment.

— as to children begotten after testator's death;

— but not as to children begotten between the will and testator's death.

Occleston *v.* Fullalove.

Sir W. James gave a new turn to the familiar reflections on the duty of providing for "the unfortunate beings of whose existence one is the author." Those reflections are usually (and particularly by Lord Eldon) (*d*) applied only to children begotten before the date of the will; but the L. J. extended them to * chil- [*1110] dren afterwards to be begotten; he thought it a shocking

(*y*) Re Connor, 2 Jo. & Lat. 459.
(*z*), Per James and Mellish, L. JJ., 9 Ch. D. 160, 166, 167, 171 Crook *v.* Hill, 3 Ch. D. 773 (as to Edward).
(*a*) Medworth *v.* Pope, 27 Beav. 71, and Lepine *v.* Bean, L. R., 10 Eq. 160 (gifts by reputed father). See also Pratt *v.* Mathew, 22 Beav. 334, and per Lord Chelmsford and Colonsay, L. R., 6 H. L. 278, 280.
(*b*) Howarth *v.* Mills, L. R., 2 Eq. 389 (gift by mother).
(*c*) L. R., 9 Ch. 147; followed in Re Hastie's Trusts, 35 Ch. D. 728.
(*d*) 1 Mer. 148, 149.

and perverse thing to deny to a man "living in an unhallowed connection," *which he means to continue*, the right of making a will beforehand in favor of the illegitimate children which "in the course of nature" he expects to beget, and which the L. J. pictured as becoming, in consequence of that denial, "pariah outcasts infesting the public streets" (*e*). But if this denial is of such serious consequence, the deterrent force of it must be admitted; and Lord Selborne said, "In however forcible a light the difference for this purpose between a gift by deed and such a gift by will may be presented, I am not satisfied that the distinction can be practically established without a material encroachment upon the principle which is admitted to stand in the way of a prospective provision by deed for future illegitimate children." But the decision was reversed in obedience to the opinion of the majority of the Court.

As to the sufficiency of the description to identify the objects of gift, reliance was placed by Sir W. James on the gift being to the testator's "reputed" children, as relieving the case from the difficulty which would have existed if the gift had been "to my future children by A. B.," which he thought would have annexed the condition that they shall be really his children. But Lord Selborne considered that this made no difference, the identity of the objects being in both cases equally proved by evidence of reputation; and in Re Goodwin's Trust (*f*), where a testatrix bequeathed personalty in trust for A. (who had been her late sister's husband) for his life, and after his death for "all my children by A.," it was held by Sir G. Jessel, M. R., that an illegitimate child of the testatrix born several years after the date of the will, and registered by A. as the son of himself and the testatrix, was entitled to share. The M. R. said the principle of Occleston *v.* Fullalove was that a gift by a man or woman to one of his or her children by a particular person was good if the child had acquired the reputation of being such child as described in the will before the death of the testator or testatrix.

Distinction between gift to "children" and "to *reputed* children" of a man.

[*1111] *But in Re Bolton, Brown *v.* Bolton (*g*), Sir H. Cotton, L. J., expressly dissented from this view; he said, "I cannot find such a rule laid down in Occleston *v.* Fullalove, and I do not think that this was the ratio decidendi in that case. It only decided that the child came within the description in the will of children whom he might be reputed to have by a particular woman, and that there was no rule of public policy which prevented the child from

(*e*) The L. J. added, "what appeared to him a reductio ad absurdum of this supposed rule of public policy: Take the case of a gift to a concubine of the man's property charged with the maintenance and education of her offspring described as in that will; did morality require that this Court should give her the whole, leaving her if she pleased to throw the offspring on the streets?" Now the law has provided for such a case by rendering a woman so doing punishable as a rogue and a vagabond (7 & 8 Vict. c. 101, s. 6).

(*f*) L. R., 17 Eq. 345. See also Re Hastie's Trusts, 35 Ch. D. 728.

(*g*) 31 Ch. D. 552.

taking." In Re Bolton, by a will made a year and a half before the testator's death, residuary personalty was given to B., a woman with whom the testator had gone through the ceremony of marriage, by the description of his wife, and after her death, to all and every *his* child and children; at the testator's death B. was enceinte of her only child. The Court of Appeal (affirming the decision of Sir E. Kay, J.) held that the child could not take. Sir H. Cotton, L. J., expressed the opinion that the word "child" cannot be treated as denoting a man's reputed child unless a particular child is referred to in the will; otherwise, evidence of paternity would have to be admitted, which the law does not permit. And Sir C. Bowen, L. J., and Sir E. Fry, L. J., concurred in this view. The result of this decision would seem to be to re-affirm the rule that a future illegitimate child described only by reference to paternity cannot take, as the law will not inquire into the fact, and that an illegitimate child en ventre sa mère at the testator's death, and not particularly referred to, being incapable of acquiring the reputation of being his child during his lifetime, cannot take as his reputed child (*h*).

In Occleston *v.* Fullalove (*i*), Lord Selborne, having delivered his opinion that the gift was void as to the general class of children who might be born after the date of the will, held that as a necessary consequence it was void also as regarded the child en ventre at the date of the will, "for the reasons which were well stated by Lord Romilly in Pratt *v.* Mathew (*j*), against separating from the general class of after-born children a child who was en ventre sa mère when the will was made, but to whom there is no gift otherwise than as a member of that general class." Sir G. Mellish, L. J., also with reference (it would seem) to this point, distinguished the case where the will was that of the * putative parent from Metham *v.* Duke of Devon and [*1112] Hill *v.* Crook, where it was the will of a third person, and where therefore the word "children" might (so far as the construction of the will was concerned) have included children begotten after the death of the testator, which children he did not deny would be prevented from taking on grounds of public policy.

Effect, where the class includes future as well as existing children

But in Pratt *v.* Mathew, Lord Romilly was dealing with a different case from Occleston *v.* Fullalove. He rejected the claim of the child en ventre in the case before him, not on account of its supposed inseparability from the general class as a member of which it must (if at all) be admitted, but expressly because in his opinion the class included legitimate children only. He decided against the child en ventre because it was not a member of the class; Lord Selborne be-

(*h*) See per Stirling, J., in Re Hastie's Trusts, 35 Ch. D. at p. 736; see ante, p. 1110, note (*d*).
(*i*) L. R., 9 Ch. 147, 157.
(*j*) 22 Beav. 334, 340.

cause it was. But claiming under a general gift to "after-born children" does not make the child en ventre (who ex hypothesi is sufficiently described by it) less a child in esse, though the rest of the class not being in esse are incapacitated by law. The words are the same for all, but the things signified are different. Why should not the child in esse (provided it acquires the necessary reputation in the testator's lifetime) have the benefit of the general rule which regulates gifts to a class, viz., that those members who at the testator's death, or at any time between that event and the period of distribution, are capable of taking, take the whole, and that those members who are incapable, whether by dying in the testator's lifetime, or by attesting the will, or by some other operation of law, take nothing (*k*).

General rule that capable members of a class take the whole fund.

Lord Selborne's opinion was limited in terms, and it would appear designedly so, to cases where the general class is restricted in point of expression or description, to future-born children (*l*); and in that respect it differs from the opinion suggested in the distinction taken by Sir G. Mellish; for this applies to cases where the class might include, though it is not restricted to, after-born children. But in Crook *v.* Hill (*m*) no objection to the right of the child en ventre at the date of the will was suggested on the ground of its supposed inseparability from those who were begotten after the testator's death; nor, it * is conceived, could any such objection have been maintained consistently with the decision previously made in the House of Lords in favor of the two elder children.

[*1113]

In further illustration of the doctrine that under a gift to illegitimate children as a class, including after-born children who are incapable of taking, those take (*i. e.*, form the class) who are capable, and take the whole, reference may be made to Lepine *v.* Bean (*n*), where a testator, having a wife of advanced age, from whom he lived separate, gave real and personal estate in trust for M., a woman with whom he cohabited and whom he called his wife, for her life or widowhood, and afterwards for his children (which upon the context was held to include his natural children by M.) as tenants in common: at the date of the will he had one illegitimate child by M. living, namely L., and afterwards had another; it was held that the latter could not lawfully take (*o*), and it was contended that there was consequently an intestacy as to a moiety; but Lord Romilly, M. R., observed that although the testator might have

Lepine *v.* Bean.

(*k*) See 4 Ch. D. 173.

(*l*) He remarked (L. R., 9 Ch. 152), that the child en ventre "took if she took at all only as a member of the class of future reputed children," as if these were to be reckoned a distinct class from the other children. It is submitted, however, that there was but one class, and that this class included the two children who were named as well as all the others.

(*m*) 3 Ch. D. 773.

(*n*) L. R., 10 Eq. 160.

(*o*) This was before Occleston *v.* Fullalove, sup.

intended after-born children by this woman to be included, in contemplation of law he had none; and he held that L., as the sole member of the class, took the whole (*p*).

So in Perkins *v.* Goodwin (*q*), where by will dated 1851, a testator gave real and personal estate in trust for his wife for life, "then for his sister Mary, wife of R. P., for her separate use independent of her present or any future husband, for life, and after her death for such children of his (testator's) said sister as should then be living." Mary had gone through the form of marriage with R. P., who was her brother-in-law. By him she had in the testator's lifetime two children, one born before the date of the will, the other several years after, both of whom acquired in the testator's lifetime the reputation of being children of Mary by R. P. These facts were known to the testator. The two children survived their mother, and being sufficiently designated within Hill *v.* Crook (*r*), were held by Sir G. Jessel, M. R., to be entitled in equal shares. Perkins *v.* Goodwin.

* **IV. — General Conclusion from the Cases.** — Upon the [*1114] whole, the general conclusions from the cases seem to be: —

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

2d. They are not objects of a gift to *children*, or *issue* of any other degree, unless a distinct intention to that effect be manifest upon the face of the will (*s*); and if, by possibility, *legitimate* children alone would have satisfied the terms of such gift, illegitimate children *cannot* take; though children, legitimate and illegitimate, may take concurrently under such a gift if the terms of it cannot be satisfied without including the latter.

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

4th. That a gift by a testator to his *own* illegitimate child en ventre sa mère has been decided in one instance (Earle *v.* Wilson) to be void; but the point admits of considerable doubt.

5th. That a gift to the future illegitimate children of a *man*, or of a woman by a particular man, *i. e.*, children not begotten at the testator's death, *is clearly void.*

6th. That a gift to *future* illegitimate children in the same sense

(*p*) Thus the M. R. did not adhere to the suggestion which he threw out in Chapman *v.* Bradley, 33 Beav. 65, 66, viz. that some intended members of the class being disabled from taking, the gift to the class failed altogether, on the principle of Leake *v.* Robinson, 2 Mer. 363. Such cases appear to be distinguishable: in them the intended period of distribution is too remote, and never arrives.

(*q*) W. N. 1877, p. 111.

(*r*) Ante, p. 1094.

(*s*) The cases cited in this Chapter show considerable diversity of judicial opinion as to what will be sufficient to indicate such intention; but, on the whole, the more recent decisions seem to show an inclination to regard as sufficient language in wills which formerly would not have been so accepted for that purpose.

of a particular woman, even irrespective of the father, cannot be sustained, against the objection founded on the immoral tendency of such a disposition.

7th. But it would seem that a gift by a man or woman to the illegitimate children of himself or herself, or of another, by a particular person, is good if they are born, and sufficiently described in the will, and have acquired the reputation of being such children before the death of the testator or testatrix.

JOINT TENANCY AND TENANCY IN COMMON.

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

Joint-tenancy and tenancy in common.

A devise to two or more persons simply, it has been long settled, makes the devisees joint-tenants (*b*),[2] but it should be observed, that

(*a*) Any joint-tenant may, however, by his own conveyance sever the tenancy as to his own share, and consequently destroy the jus accrescendi between himself and his companions. If a woman joint-tenant of freehold or leasehold land (May *v.* Hook, Co. Litt. 246 a, n. (1)) or of reversionary interest in personalty (Re Barton's Will, 10 Hare, 12; Armstrong *v.* Armstrong, L. R., 7 Eq. 518) marries, this is no severance: and the same rule applies to a chose in action (*e. g.*, Bank Stock) not reduced into possession by the husband, Re Butler's Trusts, Hughes *v.* Anderson, 38 Ch. D. 286 (C. A.), disapproving the decision of Malins, V.-C., Baillie *v.* Treharne, 17 Ch. D. 388. See Burnaby *v.* Equitable Reversionary Interest Society, 28 Ch. D. 416, where Pearson, J., held that a settlement on marriage containing a covenant to settle present and after-acquired property of the wife severed the joint-tenancy in a sum of bank annuities to which she was entitled jointly with other persons. Marriage formerly severed a joint-tenancy as to chattels personal in possession (Bracebridge *v.* Cooke, Plowd. 416), as the husband had the right to take them, and so to divest the property out of the wife. But this distinction is apparently done away with by the operation of the Married Women's Property Act, 1882, as regards cases falling within that Act. See Re Butler's Trusts, sup., at p. 291.

(*b*) A limitation to two persons and the survivor of them, and the heirs of such survivor,

[1] Where a devise or bequest is made to a number of persons as tenants in common, if one of them dies in the testator's lifetime his share does not pass, because, having given to each a certain proportion of his property, it would not be consistent with the testator's declared intention to give to the survivors a larger proportion; and where there is a bequest to more persons than one, by words showing that their enjoyment of the same is to be several and not joint, the share of one who dies before the testator does not pass, but remains as undevised estate. Upham *v* Emerson, 119 Mass. 509, Devens, J.; Lombard *v.* Boyden, 5 Allen, 249. See Fussey *v.* White, 113 Ill 637. Secus where the gift is to persons jointly, as in the case of a gift to a class as such. Rockwell *v.* Smith, 59 Conn. 289 (citing Prescott *v.* Prescott, 7 Met. 141; Loring *v.* Coolidge, 99 Mass. 191; Dow *v.* Doyle, 103 Mass. 489; May's Appeal, 41 Penn. St. 512; Martin *v.* Lachasse, 47 Mo. 591); Holbrook *v.* Harrington, 16 Gray, 102; Jackson *v.* Roberts, 14 Gray, 546. See also ante, Vol. I., p. 321, note.

In America, the title by joint-tenancy is much reduced in extent, and the incident of survivorship is still further cut down, and generally limited to cases in which it is proper and necessary; as, to cases of titles held by trustees, and to cases of conveyance or devise to husband and wife. See 4 Kent, 361, 362; Hill *v.* Jones, 65 Ala. 214, Sackett *v.* Mallory, 1 Met. 355; Burghardt *v.* Turner, 12 Pick. 534; Boston Franklinite Co. *v.* Condit, 4 C. E. Green, 394; Hunt *v.* Satterwhite, 85 N. C. 73; Yard's Appeal, 86 Penn. St. 125; Gilman *v.* Morrill, 8 Vt. 77.

[2] See Jacobs *v.* Bradley, 36 Conn. 365; Hannon *v.* Christopher, 23 N. J. Eq. 459;

Devisees joint-tenants, when.

Husband and wife tenants by *entireties*, when;

where the objects of the devise are husband and wife, who are in law regarded for many purposes as one person, they take not as joint-tenants, but *by entireties*;[1] the consequence of which is, that neither can, by his or her own separate conveyance, affect the estate of the other (*c*). The same rules have been held applicable to personalty (*d*).

[*1116] * Another consequence of this unity of person in husband and wife is, that where a gift is made to them concurrently with other persons, they are considered as, and take the share of, *one* only. Thus, if property be given to A., and B. his wife, and C. (a third person), A. and B. will take one moiety, and C. the other, not A. and B. two-thirds, and C. the remaining third (*e*).

— and take the share of *one* only;

It was said by Popham, C. J., that if the gift were to husband and wife and another *as tenants in common*, they would each take a third part (*f*); and so thought Sir J. Romilly, M. R. (*g*), and apparently Sir L. Shadwell also (*h*). But in Warrington *v.* Warrington (*i*), Sir J. Wigram, V.-C., rejected the distinction, thinking that the quantity which the husband and wife took as between them and third parties, was a different question from how they took as between each other. And in Re Wylde (*j*) they were held entitled to a moiety only between them, although in another part of the will an equal legacy was given to each of the three persons, husband, wife, and stranger. Some nice distinctions depending upon the husband and wife being named *after* the other legatee, the omission of the word "and" before the husband's name, and the near relationship to the testator of both hus-

— although the bequest create a tenancy in common.

does not create a joint-tenancy; it gives a contingent remainder to the survivor. Vick *v.* Edwards, 3 P. W. 372; Re Harrison, 3 Anst. 836. But if the gift were to two and the survivor, and *their* heirs, they would probably be held to take jointly, Oakeley *v.* Young, 2 Eq. Ca. Ab. 537, pl. 6; Doe d. Young *v.* Sotheron, 2 B. & Ad. 628.

(*c*) Doe d. Freestone *v.* Parratt, 5 T. R. 652; Back *v.* Andrew, 2 Vern. 120, Pre. Ch. 1.

(*d*) Atcheson *v.* Atcheson, 11 Beav. 485; Moffat *v.* Burnie, 18 Beav. 211; Ward *v.* Ward, 14 Ch. D. 506.

(*e*) See Lewin *v.* Cox, Moore, 558, pl. 759; Anon., Skinn. 182; Co. Lit. 187 a; Bricker *v.* Whatley, 1 Vern. 233. This rule is not altered by the operation of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), see Re March, Mander *v.* Harris, 27 Ch. D. 166 (C. A.), reversing the decision of Chitty, J., *s.* c. 24 Ch. D. 222; see also Re Jupp, Jupp *v.* Buckwall, 39 Ch. D. 148. Would it make any difference, as regards this doctrine, that the wife was described without reference to her conjugal character? It is conceived not. The doctrine is peculiar to English law, Dias *v.* De Livera, 5 App. Ca. 123.

(*f*) Lewin *v.* Cox, Moo. 558.

(*g*) Marchant *v.* Cragg, 31 Beav. 398.

(*h*) Paine *v.* Wagner, 12 Sim. 184.

(*i*) 2 Hare, 54.

(*j*) 2 D. M. & G. 724.

Dana *v.* Murry, 122 N. Y. 604; Purdy *v.* Hayt, 92 N. Y. 446.

[1] Jones *v.* Chandler, 40 Ind. 588; Marburg *v.* Cole, 49 Md. 402; Draper *v.* Jackson, 16 Mass. 480; McDermott *v.* French, 2 McCart. 78; Thomas *v.* DeBaum, 1 McCart. 37; French *v.* Mehan, 56 Penn. St. 286; Criswell's Appeal, 41 Penn. St. 288; Berrigan *v.* Fleming, 2 Lea, 271.

band and wife, and not of one of them only, have been thought sufficient in some cases (*k*) to authorize a departure from this rule, so as to treat the husband and wife as each entitled to share equally with the other legatees. How far such distinctions can be relied upon may be thought doubtful (*l*).

But an exception to the rule, that a devise to two or more creates a joint-tenancy, exists in certain cases where the estate conferred by the devise is an *estate tail;* for where lands are devised to several persons and the heirs of their bodies, who are not husband and wife de facto, or capable of becoming such de jure, either from their being of the same sex, or standing related * within the prohibited degrees, inasmuch [*1117] as the devisees cannot either in fact or in contemplation of law (as the case may be) have common heirs of their bodies, they are "by necessity of reason," as Littleton says, "tenants in common in respect of the estate tail" (*m*). As this reason, however, applies only to the inheritance in tail, and not to the immediate freehold, the devisees are joint-tenants *for life*, with several inheritances in tail, so that on the death of one of them, whether he leave issue or not, the surviving devisee becomes entitled for life to his share under the joint-tenancy (*n*), and the inheritance in tail descends to the issue (if any) subject to such estate for life (*o*).

Devisees in tail tenants in common, when;

— though made joint-tenants of the freehold.

Nor are those cases within the rule where the devise is to the first, second, and other sons of A. in tail, for this form of gift is held to imply succession (*p*).

Devise to "first, second, &c. sons," they take successively.

A bequest of chattels, whether real or personal, to a plurality of persons, unaccompanied by any explanatory words, confers a joint, not a several interest (*q*), and that

Joint-tenancy in chattels;

(*k*) Warrington *v.* Warrington, 2 Hare, 54; Paine *v.* Wagner, 12 Sim. 184. See Bricker *v.* Whatley, 1 Vern. 233; Re Dixon, Byram *v.* Tull, 42 Ch. D. 306.

(*l*) Gordon *v.* Whieldon, 11 Beav. 170; Re Jupp, Jupp *v.* Blackwell, 39 Ch. D. 148; but see the observations of North, J., on this decision in Re Dixon, sup., at p. 309.

(*m*) Co. Lit. 183 a, 184 a. See also Huntley's case, Dyer, 326 a; Cook *v.* Cook, 2 Vern. 545; Pery *v.* White, Cowp. 777; Forrest *v.* Whiteway, 3 Exch. 367; De Windt *v.* De Windt, L. R., 1 H. L. 87.

(*n*) Wilkinson *v.* Spearman, in D. P., cit. Cook *v.* Cook, 2 Vern. 545, and Cray *v.* Willis, 2 P. W. 529. See also Co. Lit. 182 a; Edwards *v.* Champion, 3 D. M. & G. 202; Tufnell *v.* Borrell, L. R., 20 Eq. 194.

(*o*) Sometimes a result of this kind is produced by the terms of the will, of which an example is afforded in Doe d. Littlewood *v.* Green, 4 M. & Wels. 229, where a testator devised his real estates to his nieces E. & J., equally between them, to take as joint-tenants and their several and respective heirs and assigns forever; and it was held they took estates as joint-tenants for life, with remainder, expectant on the decease of the survivor, to them as tenants in common. See also Folkes *v.* Western, 9 Ves. 456; Ex parte Tanner, 20 Beav. 374; Haddelsey *v.* Adams, 22 id. 266.

(*p*) Cradock *v.* Cradock, 4 Jur. N. S. 626, citing Lewis d. Ormond *v.* Waters, 6 East, 336. In the latter case it was said it would be different if the gift were to "all and every the sons;" and see Surtees *v.* Surtees, L. R., 12 Eq. 400, acc. In Allgood *v.* Blake, L. R., 7 Ex. 355, 8 Ex. 166, the words "all and every the *issue*" were construed by the context to be words of limitation equivalent to "heirs of the body."

(*q*) Lit. s. 381; Shore *v.* Billingsley, 1 Vern. 482; Willing *v.* Baine, 3 P. W. 113; Barnes *v.* Allen, 1 B. C. C. 181.

whether the gift be by way of trust or not (*r*); and notwithstanding the disposition of the Courts of late years to favor tenancies in common, the same rule is now established as to money legacies, and residuary bequests (*s*), in opposition to some early authorities (*t*), and the doubts thrown out by Lord Thurlow in Perkins *v.* Baynton (*u*). It is observ- [*1118] able, however, that in another case (*v*) he relied * wholly upon the words of severance, as constituting the legatees of a money legacy tenants in common; from which Lord Alvanley inferred that he had never made the observations imputed to him (*x*); but Lord Eldon has referred to them in a manner which leaves no doubt of the fact, although he has placed the general question beyond controversy, by stating his own opinion generally to be, "that a simple bequest of a legacy or a residue of personal property to A. and B., without more, is a joint-tenancy" (*y*).

— in pecuniary legacies and residues of personalty.

The rule that a gift to two or more simply creates a joint-tenancy, applies indiscriminately to gifts to individuals and gifts to classes (*z*), including, it should seem, dispositions in favor of children, notwithstanding Lord Hardwicke's objection in Rigden *v.* Vallier (*a*) to apply the construction to provisions by a father for his children, on account of its subjecting them to be defeated by survivorship. It also applies to a gift to children in remainder, or quasi remainder, after a prior estate for life (*b*). Such a gift, it has been seen, vests the property in such of the children as are living at the death of the testator, with a liability to be divested pro tanto in favor of objects coming into existence during the prior life estate, each of whom takes a vested interest at his own birth, and consequently, at a different time from the rest. In a conveyance at common law such a limitation, according to Lord Coke, creates a tenancy in common. Thus, "if lands be demised for life,

Rule applies to gifts to children as a class;

— although members of the class may become entitled at different times.

(*r*) Aston *v.* Smallman, 2 Vern. 556; Bustard *v.* Saunders, 7 Beav. 92.

(*s*) 1 Vern. 432; 2 P. W. 347, 529; 3 id. 113; 4 B. C. C. 15; 3 Ves. 629, 632; 6 Ves. 129; 9 Ves. 197; 2 Y. & C. C. C. 372.

(*t*) Cox *v.* Quantoch, 1 Ch. Cas. 238; Sanders *v.* Ballard, 3 Ch. Rep. 214; 2 P. W. 489; Taylor *v.* Shore, T. Jones, 162.

(*u*) 1 B. C. C. 118. Warner *v.* Hone, 1 Eq. Ca. Ab. 292, pl. 10, cited by his Lordship, does not apply, as it was the bequest of a leasehold house, and there were words of severance.

(*v*) Jolliffe *v.* East, 3 B. C C. 25.

(*x*) See Morley *v.* Bird, 3 Ves. 630.

(*y*) Crooke *v.* De Vandes, 9 Ves. 204.

(*z*) "Family," Wood *v.* Wood, 3 Hare, 65; Gregory *v.* Smith, 9 Hare, 708. "Next of kin," Withy *v.* Mangles, 4 Beav. 358; Baker *v.* Gibson, 12 Beav. 191. "Issue," Hill *v.* Nalder, 17 Jur. 224; Williams *v.* Jekyll, 2 Ves. 681; Re Corlass, 45 L. J. Ch. 119, 1 Ch. D. 460.

(*a*) 2 Ves 258.

(*b*) Oates d. Hatterley *v.* Jackson, 2 Str. 1172; Mence *v.* Bagster, 4 De G. & S. 162; Kenworthy *v.* Ward, 11 Hare, 196; Williams *v.* Hensman, 1 J. & H. 546; M'Gregor *v.* M'Gregor, 1 D. F. & J. 63; Ruck *v.* Barwise, 2 Dr. & Sm. 510; Re Corlass, 45 L. J. Ch. 119, 1 Ch. D. 460 (issue); Amies *v.* Skillern, 14 Sim. 428, also is generally cited as in point; but if (as the V.-C. held) the fund there vested in all the children at the same moment, *i. e.*, at the death of the tenant for life, the question did not arise: and so in Bridge *v.* Yates, 12 Sim. 645 and Noble *v.* Stow, 29 Beav. 409.

the remainder to the right heirs of J. S. and J. N., J. S. hath issue, and dieth, and after J. N. hath issue and dieth, the issues are not joint-tenants, because the one moiety vested at one time, and the other moiety vested at another time" (*c*). But his doctrine has been usually considered as not applying to conveyances to uses (*d*) or to wills, *a distinction thus explained by Sir W. P. Wood, [*1119] V.-C.: "Under a limitation in remainder of a use to children, they are not, as they come in esse, let in with other persons who have not the whole interest; but the whole body always hold the whole interest, letting in other members of the body as they come in esse. But at common law, when the interest has once vested in remainder, the interest must vest either wholly or in a moiety; it must be either the one or the other, and there is no mode, as there is in a use, of getting the entirety into the remainderman, and then taking it out of him afterwards by the springing use as soon as the cestui que use comes in esse. Therefore, you have at once and for all to ascertain whether he would take the whole or a moiety: the intent being that he should take a moiety and not the whole; if he took the whole it would be against the intent. The result is, he takes a moiety and holds it in common with the donee of the other moiety. A devise stands on the same footing in this respect as a conveyance to uses; and in the case of a trust a Court of Equity will follow what is said to be the reason of the rule on use and devises, viz. the intent; and the intent, as appearing by the words, is to create a joint-tenancy" (*e*).

Thus, in Oates d. Hatterley *v.* Jackson (*f*), where lands were devised to A. for life, remainder to B. and her children and their heirs; it was held that B. took as joint-tenant with her children, and that it was no objection that the estates might commence at different times. So in M'Gregor *v.* M'Gregor (*g*), where a testator gave his personal, and the money to arise by sale of his real, estate in trust to pay the income to his children living when the youngest of them should attain twenty-one in equal shares for their respective lives, and after the death of any of them, then as to an equal portion of the fund proportionate to the number of children then living, in trust for the issue of the child so dying: it was held that the issue (construed children) took as joint-tenants. And where the gift, after a life interest to A., was to *all and every* her child and children, and his, her, and their executors, &c., the same construction prevailed (*h*).

(*c*) Co. Litt. 188 a.
(*d*) Matthews *v.* Temple, Comb. 467, 1 Ld. Raym. 311, nom. Earl of Sussex *v.* Temple; Stratton *v.* Best, 2 B. C. C. 233; Doe d. Allen *v.* Ironmonger, 3 East, 533; Sugd. Gilb. Uses, 134, 135. and n. (10).
(*e*) 11 Hare, 196. See Samme's case, 13 Rep. 55; Shelley's case, 1 Rep. 101.
(*f*) 2 Str. 1172.
(*g*) 1 D. F. & J. 63.
(*h*) Morgan *v.* Britten, L. R., 13 Eq. 28. See also Surtees *v.* Surtees, L. R., 12 Eq. 400, 406.

But where the remainder is limited to vest in such only of the class as attain twenty-one, then of necessity a tenancy in [*1120] *common is created; for there may be several children, some of age, others not, and those who have contingent interests cannot take as joint-tenants with those who have vested interests since there is no mutuality of survivorship (*i*).

— but not if the gift vests in them at different ages.

But where a fund is given to several or their issue share and share alike, or to be divided among such as may be living at a stated time and the issue of such as may then be dead, the issue (in either case) to take their parents' share, the general rule is to read the words of severance as affecting the interests of the parents only. Thus, in Bridge *v.* Yates (*k*), where a testator gave the produce of his real and personal estate in trust for his wife for life, and after her death "to be equally divided among his children who should be then living, and the issue of such of them as should be then dead, such issue taking only" the deceased parent's share; it was held that the terms of severance referred only to the children, and that the issue of a deceased child, though taking in common with the surviving children, yet inter se were joint-tenants of their parent's share. It is otherwise if the words of severance are repeated and would be tautologous unless applied to the issue (*l*). So, accruing shares will not be held in common merely because that quality is attached to the original shares (*m*). Neither will words importing a tenancy in common in one bequest be extended by implication to another bequest which is connected with the former by the term "also" (*n*).

Tenancy in common not implied in substituted gift;

— nor in gift of accruing shares:

— nor from another gift connected by the word "also."

Whether under gift to A. and his children, they take concurrently.

Reference should here be made to those cases, more fully discussed hereafter (*o*), where a gift to A. and his children has, on slight grounds, been held not to create a joint-tenancy in parent and children, which is its primary effect, but to make A. tenant for life, with remainder to his children. It has been already seen that where one devises [*1121] his lands to A. in fee, and in another *part of his will de-

(*i*) Woodgate *v.* Unwin, 4 Sim. 129, as explained 1 D. F. & J. 74; see also Hand *v.* North, 33 L. J. Ch. 556 (immediate gift to two by name "as they come of age"); Re Jeaffreson's Trusts, L. R., 2 Eq. 282, 283.

(*k*) 12 Sim. 645; see also Amies *v.* Skillern, 14 Sim. 428; Penny *v.* Clarke, 1 D. F. & J 425, per Turner, L. J.; Leak *v.* Macdowall, 32 Beav. 28: Coe *v.* Bigg, 1 N. R. 536; Lanphier *v.* Buck, 2 Dr. & Sm. 499; Heasman *v.* Pearse, L. R., 11 Eq. 522, 7 Ch. 275; Re Yates, Bostock *v.* D'Eyncourt, (1891) 3 Ch. 53. But see Shepherdson *v.* Dale, 12 Jur. N. S. 156; Crosthwaite *v.* Dean, W. N. 1879, p. 93.

(*l*) Lyon *v.* Coward, 15 Sim. 287: and see Att.-Gen. *v.* Fletcher, L. R., 13 Eq. 128; Hodges *v.* Grant, L. R., 4 Eq. 140.

(*m*) Webster's case, 3 Leo. 19, pl. 45; Jones *v.* Hall, 16 Sim. 500; Leigh *v.* Mosley, 14 Beav. 605.

(*n*) Cookson *v.* Bingham, 17 Beav. 262; and see cases cited Vol. I., p. 464.

(*o*) See Newill *v.* Newill, L. R., 7 Ch. 253, and other cases post, Ch. XXXVIII.

vises the same lands to B. in fee, the weight of authority inclines to a joint-tenancy between A. and B. (*p*).

Distinct gifts of same lands to different persons creates a joint-tenancy.

It should be observed, that, in carrying into effect executory trusts, the Courts will not make the objects joint-tenants, without a positive and unequivocal expression of intention to that effect. Thus, where (*q*) trustees were directed, as soon as the testator's three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies and their heirs as joint-tenants, and, for want of such issue, over; Lord Hardwicke decreed that the conveyance should be made to the daughters as tenants in common in tail, with cross-remainders, which he thought was the best mode of giving effect to these words. And in Alloway *v.* Alloway (*r*), where 6,000*l.* having been given to and among such children as A. should appoint, A. made her will thus: "Robert give three of the 6,000*l.* I wish to have given to the two elder girls;" on the ground that this was a direction to Robert to deliver to each of the two appointees her separate share, it was held that they took in common.

Executory trusts.

II. — What Words create Tenancy in Common. — It may be stated generally, that all expressions importing division by equal or unequal (*s*) shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality, will create a tenancy in common. Thus, it has been long settled that the words "equally to be divided" (*t*), or "to be divided" (*u*), will have this effect; and so, of course, will a direction that the subject of gift shall "be distributed in joint and equal proportions" (*x*).[1]

What words create a tenancy in common.

"To be divided."

"In joint and equal proportions."

(*p*) Vol. I., p. 440.

(*q*) Marryat *v.* Townly, 1 Ves. 102. See also Synge *v.* Hales, 2 Ba. & Be. 499; Taggart *v.* Taggart, 1 Sch. & Lef. 84; Owen *v.* Penny, 14 Jur. 359; Head *v.* Randall, 2 Y. & C. C. C. 231; Mayn *v.* Mayn, L. R., 5 Eq. 150. But see White *v.* Briggs, 2 Phill. 585; and a trust to settle or convey (De Havilland *v.* De Sanmarez, 14 W. R. 118; Re Bellasis' Trusts, L. R., 12 Eq. 218) or that property shall "be left" (Mence *v.* Bagster, 4 De G. & S. 162; Noble *v.* Stow, 29 Beav. 409) is not necessarily executory. See further on this subject post, Ch. XXXVI. s. ii.

(*r*) 4 Dr. & War. 380. See Mathews *v.* Bowman, 3 Anst. 727.

(*s*) Gibbon *v.* Warner, 14 Vin. Ab. 484, 485.

(*t*) 3 Rep. 39 b. 1 Salk 226; 1 Vern. 65; 2 Vern. 430; 1 Eq. Ca. Ab. 292, pl. 6; Moore, 594; 1 P. W. 34, 14; 1 Ld. Raym. 622; 12 Mod. 296; 2 P. W. 280; 3 B. P. C. Toml. 104; 1 Wils. 165; 1 Ves. 13, 165; 1 Atk. 493, 494; 3 B. C. C. 25; id. 215; 1 D. & Ryl. 52; 5 B. & Ald. 464, 636.

(*u*) Chapman *v.* Peat, 1 Ves. 542; Ackerman *v.* Burrows, 3 V. & B. 54.

(*x*) Ettricke *v.* Ettricke, Amb. 656. As to whether under a gift to certain persons and their issue or descendants, with words creating a tenancy in common, the issue or descendants will take as tenants in common as between themselves, see Re Quirk, Quirk *v.* Quirk, W. N., 1889, p. 148; Re S. Smith's Trusts, ibid., p. 164; Re Flower, Matheson *v.* Flower, 62 L. T. 216.

[1] See Griswold *v.* Johnson, 5 Conn. 363; Dunn *v.* Bryan, 38 Ga. 154; Whiting *v.* Cook, 8 Allen, 63; Emerson *v.* Cutter, 14 Pick. 108; Parker *v.* Knowlton, id. 244; Reber *v.* Dowling, 65 Miss. 259; Mead *v.* Jennings, 46 Mo. 91; Dickson *v.* Dickson, 70 N. C. 487; Weir *v.* Humphries, 4 Ired. Eq. 264; Stoutenburgh *v.* Moore, 37 N. J. Eq. 63;

[*1122] *A devise or bequest to several persons, "equally amongst them" (*y*), or "equally" (*z*),[1] or "in equal moieties" (*a*), or "share and share alike" (*b*), or "respectively" (*c*), or with a limitation to their heirs "as they shall severally die" (*d*), or "to *each* of their respective heirs" (*e*), or "to their executors and administrators respectively" (*f*), or to several "between" (*g*), or "amongst" them (*h*), or to "each" of several persons (*i*), has been held, in contradiction of some of the very early cases (*k*), to make the objects tenants in common. And a similar construction has been given (*l*) to a devise to several their heirs and assigns, "all to have part alike, and every of them to have as much as the other." So, where (*m*) the devise was to A. and B. of lands, "to be enjoyed alike," Lord Mansfield held that they were tenants in common, considering that word as synonymous with *equally*.

"Equally." "Respectively." "Severally." "Each of their respective heirs." "Between." "Amongst." "Each" of several. "All to have part alike," &c.

Again, where (*n*) A. bequeathed a term of years to her two daughters, they paying yearly to her son 25*l.* by quarterly payments, viz. *each of them* 12*l.* 10*s.* yearly out of the rents of the premises, during his life, if the term so long con-

Charge upon the legatees in moieties.

(*y*) Warner *v.* Hone, 1 Eq. Ca. Ab. 293, pl. 10.
(*z*) Lewen *v.* Dodd, Moore, 558, pl. 759; Cro. El. 443, 695 (Lewen *v.* Cox); Denn *v.* Gaskin, Cowp. 657.
(*a*) Harrison *v.* Foreman, 5 Ves. 206.
(*b*) Rudge *v.* Barker, Ca. t. Talb. 124; Heathe *v.* Heathe, 2 Atk. 122; Perry *v.* Woods, 3 Ves. 204.
(c) Torrett *v.* Frampton, Sty. 434; Stephens *v.* Hide, Ca. t. Talb. 27; Folkes *v.* Western, 9 Ves. 456. See also Marryat *v.* Townly, 1 Ves. 102; Hawes *v.* Hawes, id. 13, 1 Wils. 165; Vanderplank *v.* King, 3 Hare, 1.
(*d*) Sheppard *v.* Gibbons, 2 Atk. 441.
(e) Gordon *v.* Atkinson, 1 De G. & S 478. Compare Ex parte Tanner, 20 Beav. 374.
(*f*) Re Moore's Trusts, 31 L. J. Ch. 368.
(*g*) Lashbrook *v.* Cock, 2 Mer. 70, Att.-Gen. *v.* Fletcher, L. R., 13 Eq. 128.
(*h*) Campbell *v.* Campbell, 4 B. C. C. 15; Richardson *v.* Richardson, 14 Sim. 526.
(*i*) Eales *v.* Cardigan, 9 Sim. 384; Hatton *v.* Finch, 4 Beav. 186.
(*k*) See Lowen *v.* Bedd, 2 And. 17. But from the correspondence in date (Mich. T. 37, 38 Eliz.), this seems to be the same case as Lewen *v.* Dodd, in C. B. Cro. Eliz. 443, in which latter report it appears that Anderson, C. J. (the reporter of Lowen *v.* Bedd), and Walmesley, J., were for the joint-tenancy, against Owen and Beaumont, JJ. In Toth. 143, is cited a case of Lowen *v.* Lowen, also apparently the same case, and held a tenancy in common.
(*l*) Thorowgood *v.* Collins, Cro. Car. 75. See also Page *v.* Page, 2 P. W. 489.
(*m*) Loveacres d. Mudge *v.* Bligh, Cowp. 352.
(*n*) Kew *v.* Rouse, 1 Vern. 353, 1 Eq. Ca. Ab. 292, pl. 7. See also Milward *v.* Milward cited 2 Atk. 309.

Witmer *v.* Ebersole, 5 Barr, 458; Irwin *v.* Dunwoody, 17 Serg. & R. 61; Swinburne, Petitioner, 16 R. I. 208; note 1, p. 1122.

[1] The words, "the same to be equally divided between them, both in quantity and quality," &c. in a devise of real estate, by a father to his sons, creates a tenancy in common. Stoutenburgh *v.* Moore, 37 N. J. Eq. 63; Walker *v.* Dewing, 8 Pick. 520; Burghardt *v.* Turner, 12 Pick. 534; Eliot *v.* Carter, 12 Pick. 436; Emerson *v.* Cutler, 14 Pick. 108; Griswold *v.* Johnson, 5 Conn. 363. A grant of land in fee to two persons "jointly, to be equally divided between them," creates a tenancy in common, by virtue of Mass. Stat. 1785, c. 62, § 4, if not at common law. Burghardt *v.* Turner, 12 Pick. 534. So "jointly and severally," under the same statute. Miller *v.* Miller, 16 Mass. 61. The words "equally to be divided in equal shares," in a will, create a tenancy in common. Drayton *v.* Drayton, 1 Desaus. 329. So the words "share and share alike." Bunch *v.* Hurst, 3 Desaus. 288. See also Woodgate *v.* Unwin, 4 Sim. 129; Westcott *v.* Cady, 5 Johns. Ch. 334.

tinued; Jefferies, L. C., held this to be a tenancy in common, *the 25l. being to be paid by the daughters in moieties.*

In another case (*o*), A. bequeathed his personal estate to his sons R. and J., and provided that if J. should be desirous to be put out apprentice, a competent sum should be raised "in part *of the *share*" to which he would become entitled; and [*1123] Macdonald, C. B., held that the latter words were decisive of the testator's intention to create a tenancy in common. Again, where by will residue was given to A. and B., and by codicil the testator desired that C. should "participate" with them, it was held they were all tenants in common (*p*), and a gift to two, with survivorship as to one moiety, has been held to negative the general right of survivorship characteristic of a joint tenancy, and to create a tenancy in common (*q*).

Direction in respect of one legatee's "share."

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

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

Leaning in favor of tenancy in common.

So where a testator bequeathed a sum to trustees in trust "to pay, assign, and *divide* the same equally between all the children" of his daughter, "if more than one as *joint-tenants*, and if but one then to that one child" (*s*); Sir J. Stuart, V.-C., held that the children took as tenants in common, although the testator had elsewhere bequeathed the residue of his estate unto and equally between two of his grandchildren "as tenants in common."

However, in Barker *v.* Giles (*t*), where a testator devised "to A.

(*o*) Gnat *v.* Lanrence, Wight. 395. See also Ive *v.* King, 16 Beav. 46; Jones *v.* Jones, 29 W. R., 786, 44 L. T. 642.
(*p*) Robertson *v.* Fraser, L. R., 6 Ch. 696.
(*q*) Paterson *v.* Rolland, 28 Beav. 347; Ryves *v.* Ryves, L. R., 11 Eq. 539.
(*r*) Jolliffe *v.* East, 3 B. C. C. 25.
(*s*) Booth *v.* Alington, 27 L. J. Ch. 117, 3 Jur. N. S. 835.
(*t*) 2 P. W. 280, 3 B. P. C. Toml. 104.

and B., and the survivor of them, and their heirs and assigns, to be equally divided between them, share and share alike," it was [*1124] held that the words "equally to be divided" referred * only to the heirs, and, therefore, that A. and B. were joint-tenants for life, with several inheritances to them in common. But the terms of gift are not often capable of being thus split up, and words of survivorship will not generally be held to defeat the tenancy in common, but rather to point out a particular period for ascertaining who are to be the devisees; leaving such devisees, when ascertained, to take as tenants in common (*u*).

To children of several parents "respectively."

In a gift to the children of several persons "respectively," the word may have the effect only of attributing to each parent his own children, and of causing the property to devolve per stirpes; the children taking inter se as joint-tenants (*x*).

Annuity to several in common "for their lives and the life of the survivor."

When annuities are given to two or more persons in terms which constitute a tenancy in common, the interests of the annuitants will not be varied merely by reason of the annuities being given "for their lives and for the life of the survivor;" these words are sufficiently satisfied by their literal interpretation as fixing the duration of the annuities, and, therefore, upon the death of each annuitant his annuity will devolve upon his representative during the life of the survivor (*y*). But where an annuity was given to *each* of two persons "for their lives, or the life of the longest liver of them, for their *or her* own absolute use and benefit," it was held that reddendo singula singulis, the two annuities were to be for the benefit of the annuitants during their joint lives; and after the death of either, then during the life of the other both were to be "for her own use and benefit" (*z*).

Of course expressions which, standing alone, would create a tenancy in common, may be controlled and neutralized by the context: and such, it seems, is the effect of the testator's postponing the enjoyment of an ulterior devisee or legatee until the decease of the *survivor* of the several co-devisees or legatees for life, which, it is [*1125] thought, demonstrates an intention * that the property shall, in the mean time, devolve to the survivors under the jus accrescendi which is incidental to a joint-tenancy.

(*u*) Bindon *v.* Earl of Suffolk, 1 P. W. 96; Perry *v.* Woods, 3 Ves. 204; Russell *v.* Long, 4 Ves. 551; Smith *v.* Horlock, 7 Taunt. 129; Ashford *v.* Haines, 21 L. J. Ch. 496. But see Moore *v.* Cleghorn, 10 Beav. 423, as to which qu. Haddelsey *v.* Adams, 22 id. 266. In Brown *v.* Oakshot, 24 Beav. 254, there was a devise of a term to trustees upon trust to pay certain annuities, and the surplus to A. and B. in equal shares, and subject thereto a devise to A. and B. in fee, and it was held they took the surplus rents during the term as tenants in common, but the fee as joint-tenants.

(*x*) Re Hodgson's Trust, 1 K. & J. 178; Hobgen *v.* Neale, L. R., 11 Eq. 48. And see Davis *v.* Bennet, 31 L. J. Ch. 337 (where further words of severance created a tenancy in common); and cf. Re Moore's Trust, id. 368, ante, p. 1122.

(*y*) Jones *v.* Randall, 1 J. & W. 100; Eales *v.* Cardigan, 9 Sim. 384; Bryan *v.* Twigg, L. R., 3 Ch. 183, stated Vol. I., p. 510.

(*z*) Hatton *v.* Finch, 4 Beav. 186.

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

Words creating a tenancy in common rejected by force of context.

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

Thus, in Tuckerman *v.* Jefferies (*b*), where the testator devised to A. and B., to be equally divided between them during their * natural lives, *and after the decease of A. and B.* to the right [*1126] heirs of A. forever;[1] it was held that they were joint-tenants, notwithstanding the words "equally to be divided;" it being considered that the whole was to go over to the heirs of A. at once on the decease of the survivor, not that they should take by moieties at several times.

So, in Pearce *v.* Edmeades (*c*), where a testator bequeathed the residue of his estate to trustees, in trust to pay the interest dividends

(*a*) 3 B. C. C. 215. See also Doe d. Calkin *v.* Tomkinson, 2 M. & Sel. 165; Cranawick *v.* Pearson, 31 Beav. 624, as to which see per Rolt, L. J., L. R., 3 Ch. 186.

(*b*) 3 Bac. Ab. Joint-Tenants (F), 681, 6th ed., Holt, 370, 11 Mod. 108-9. See also Stephens *v.* Hide, Ca. t. Talb. 27; Malcomb *v.* Martin, 3 B. C. C. 50 (but as to which see cases post, p 1128, n. (*f*)); Townley *v.* Bolton, 1 My. & K. 148; M'Dermott *v.* Wallace, 5 Beav. 142; Alt *v* Gregory, 8 D. M. & G. 221; Begley *v.* Cook, 3 Drew. 662. See and cf. Re Drakeley's Estate, 19 Beav. 395. There will be no implied survivorship where such a gift over is preceded by separate gifts of distinct properties for life, Swan *v.* Holmes 19 Beav. 471; Sarel *v.* Sarel, 23 Beav. 87; Lill *v.* Lill, id. 446; Brown *v.* Jarvis, 2 D, F. & J. 168 (where the gift over was, "after the decease of every of them"); Stevens *v.* Pyle, 28 Beav. 388: nor, if there is no limitation expressly for the lives of the donees, but the gifts are still separate; in such case the interest passes to the respective representatives till the gift over takes effect, Bignold *v.* Giles, 4 Drew. 343. An express gift to the survivors in one event would seem to exclude an implied gift to *them* in the alternative event, Coates *v.* Hart, 32 Beav. 349. But if the share of one co-tenant for life is given (until the final gift over) to his children, if any; this leaves the implication in favor of survivors untouched if there are no children. Walmsley *v.* Foxhall, 1 D. J. & S. 605.

(*c*) 3 Y. & C. 246; Ashley *v.* Ashley, 6 Sim. 358.

[1] See Fussey *v.* White, 113 Ill. 637.

"After decease of E. and G." read after decease of *survivor*.

and produce thereof to his daughter M. for life, and after her decease unto and between her two children E. and G. and G. G., during their *respective* lives *in equal shares; and from and after the decease of the said E. G. and G. G.*, upon further trust to pay or transfer and divide the same unto and between all and every the child or children, if more than one, of the said E. G. and G. G. in equal shares; and if but one then to such only child, and if there should be no child of the said E. G. and G. G. living at the time of their decease, or born in due time after the death of the said G. G., then upon further trust for the testator's legal personal representatives. The testator and E. G. died, the latter leaving children, whereupon the entire income was claimed by G. G. as the only survivor; and Lord Abinger, C. B., held that he was entitled. "It has been settled (he said) by a series of decisions, that the words 'respectively,' and in 'equal shares,' when not controlled by other words in a will, shall be taken to indicate the nature of an estate or interest bequeathed, and shall constitute a tenancy in common. But when these words are combined with or followed by others which would make a tenancy in common inconsistent with the manifest design of the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take. In the present case the bequest to G. G. and E. G. during their lives, is of the interest and dividends only of the residue of the testator's estate. The corpus of the residue is not to be divided or possessed by the legatees till after the decease both of G. G. and E. G.; and then it is to be divided amongst such of their children only as shall be living at the death of the survivor. It is clear, therefore, that the mass of the property is to be divided amongst the children who might survive both the parents, per capita and not per stirpes. This would be quite inconsistent with a [*1127] tenancy in * common of the parents. Again, the testator, by his care in pursuing this property through three generations, and bequeathing it, upon failure of these, to his then personal representatives, shows that he meant to die intestate of no part of it; but as the interest and dividends only are devised to his grandchildren, G. G. and E. G., and nothing is devised to their children till the death of both, it would follow that if G. G. is not entitled to the whole interest and dividends accruing after the death of E. G. during his life, the portions of interest and dividends which she took in her lifetime would be undevised during the remainder of G. G.'s life."

As in the three preceding cases no act had been done to sever the joint tenancy (if any) between the several devisees or legatees, it was not necessary to determine whether the effect of the will was to confer a joint-interest, with its incidental right of survivorship, or to create a tenancy in common with an implied gift to the survivor for life. Indeed, no allusion is made to

Remark on preceding cases.

the latter point, except in Pearce *v.* Edmeades, and even there it does not appear to have formed the prevailing ground of determination, though perhaps less violence is done to the language of the will by implying a positive gift to the survivor than by rejecting the words of severance (*d*).

But the Court will not construe the will as postponing the distribution of every part until the death of the surviving tenant for life, unless an intention so to do is clearly indicated; although the gift in remainder is in terms of the *whole* fund, and appears therefore to have a simultaneous distribution in view, yet, if a tenancy in common is more consistent with the general context, it will be established especially in favor of children, in spite of the apparently antagonistic terms (*e*). And this construction *is readily made where, after the [*1128] gift to several for life, the remainder is not "*after* their death," but "*at* their death;" for the literal meaning, viz. the simultaneous death of all, could not have been contemplated, and "at their respective deaths" is a meaning more likely to suit the intention than "at the death of the survivor" (*f*).[1]

Intention must be clear.

Gift over "at their death."

Where the will creates a tenancy in common with *express* survivorship, there is, of course, no pretence for implying a joint-tenancy (*g*), and each devisee or legatee will have, not a severable interest, but an interest with a contingent gift over to be ascertained only by the event. But in Cookson *v.* Bingham (*h*), where a testator devised his estates to his daughters, A., B., and C., to be jointly and equally enjoyed or divided in the case of the marriage of any of them; and they, or the survivor in case of death, were authorized to dispose of the same by will or assignment as they should think proper: it was held by Sir J. Romilly, M. R., that the three daughters took as joint tenants in

Tenancy in common, with express survivorship, not a joint-tenancy.

(*d*) Hurd *v.* Lenthall, Sty. 211, 14 Vin Ab. 182, pl. 5. Where the objects are more than two, the implication, in order to complete the purpose of filling up a chasm which would otherwise occur between the decease of the first and last of the tenants for life, must either give joint estates carrying the right of survivorship, or, which would seem better, must, on the decease of each tenant for life after the first, deal with the accruing share or shares of such deceased tenant or tenants for life in like manner. For instance, suppose the devise to be to A., B., and C., as tenants in common for life, and after the decease of the survivor, over. A. dies; upon which A.'s share passes to B. and C., it is presumed, as tenants in common. Next B. dies; his original share devolves by implied devise to C., but unless his accruing share (*i. e.* the one half of A.'s share which came to B. on A.'s decease) can pass to C., such share would be undisposed of during the remainder of his (C.'s) life. The implication, therefore, if admissible at all, must, it is presumed, in order to complete its purpose, give B.'s accruing share, as well as the original one, to C. Minton *v.* Cave, 10 Jur. 86. See also Marryat *v.* Townly, 1 Ves. 102.

(*e*) Hawkins *v.* Hamerton, 16 Sim. 410; Ewington *v.* Fenn, 16 Jur. 398: Doe d. Patrick *v.* Royle, 13 Q. B. 106: and see Atkinson *v.* Holtby, 10 H. L. Ca. 313, 325; Re Hutchinson's Trusts, 21 Ch. D. 811.

(*f*) Arrow *v.* Mellish, 1 De G. & S. 355; Willes *v.* Douglas, 10 Beav. 47; Re Laverick's Estate, 18 Jur. 304; Turner *v.* Whittaker, 23 Beav. 195; Archer *v.* Legg, 31 Beav. 187; Wills *v.* Wills, L. R., 20 Eq. 342.

(*g*) Doe d. Borwell *v.* Abey, 1 M. & Sel. 428; Hatton *v.* Finch, 4 Beav. 186; Haddelsey *v.* Adams, 22 Beav. 275; Minton *v.* Minton, 9 W. R. 586; Taaffe *v.* Conmee, 10 H. L. Ca. 64, 78.

(*h*) 17 Beav. 262, 3 D. M. & G. 668.

[1] See Fussey *v.* White, 113 Ill. 637.

fee, and that A. and B. being dead, the whole had survived to C.; and Lord Cranworth inclined to the same opinion; but as he thought that if it were not so the survivor alone had power under the latter clause to dispose of the fee by will, it was unnecessary to decide the point.

III. — Lapse and other Miscellaneous Questions. — It follows as a consequence of the survivorship which is incidental to a joint-tenancy, that if the devise fail as to one of the devisees, from its being originally void (*i*), or subsequently revoked (*k*), or by reason of the decease of the devisee in the testator's lifetime (*l*), the other or others will take the whole.[1] But the rule is different as to tenants in common, whose shares, in case of the failure (*m*) * or revocation of the devise to any of them, descend to the heir-at-law or residuary devisee of the testator (*n*): unless the devise be to the objects as a class, in which case the individuals composing the class at the death of the testator are entitled among them, whatever be their number, to the entirety of the subject of gift (*o*).[2]

Distinction between joint-tenancy and tenancy in common as to lapse, &c.

[*1129]

Here it may be observed, that where, in the absence of an express gift, a trust is raised by implication in default of execution of a power of distribution (*p*), it is now settled that the objects take *as tenants in common* (*q*), and it should seem that under an implied gift resulting from a power of *selection* the same rule prevails (*r*).

Gift implied from power creates a tenancy in common.

(*i*) Dowset *v.* Sweet, Amb. 175 (void for uncertainty); Young *v.* Davies, 2 Dr. & Sm. 167 (devisee attesting witness).

(*k*) Humphrey *v.* Tayleur, Amb. 136; Larkins *v.* Larkins, 3 B. & P. 16; Short *v.* Smith, 4 East, 419; Ramsay *v.* Shelmerdine, L. R., 1 Eq. 129, cited ante, p. 1010; and see Vol. I., p. 309.

(*l*) Davis *v.* Kemp, Cart. 2, 1 Eq. Ca. Ab. 216, pl. 7; Buffar *v.* Bradford, 2 Atk. 220; Morley *v.* Bird, 3 Ves. 628.

(*m*) Owen *v.* Owen, 1 Atk. 494; Norman *v.* Frazer, 3 Hare, 84. It has been held that an appointment void as to an ascertained part (as being to a stranger) follows this rule though in terms which generally create a joint-tenancy, Re Kerr's Trusts, 4 Ch. D. 600.

(*n*) Creswell *v.* Cheslyn, 2 Ed. 123, 3 B. P. C. Toml. 246; Boulcott *v.* Boulcott, 2 Drew. 25.

(*o*) Shaw *v.* M'Mahon, 4 Dr. & War. 431; Clark *v.* Phillips, 17 Jur. 886; Knight *v.* Gould, 2 My. & K. 295; Dimond *v.* Bostock, L. R., 10 Ch. 360; Fell *v.* Biddolph, L. R., 10 C. P. 701; Re Coleman and Jarrom, 4 Ch. D. 165; Lepine *v.* Bean, L. R., 10 Eq. 160. See also Vol. I., pp. 290, 310. But see and consider Re Chaplin's Trusts, 33 L. J. Ch. 183, cited ante, Vol. I., p. 232, n. Re Featherstone's Trusts, 22 Ch. D. 111; and Re Allen, Wilson *v.* Atter, 29 W. R. 430, 44 L. T., 240.

(*p*) See Vol. I., p. 517.

(*q*) Reade *v.* Reade, 5 Ves. 744; Casterton *v.* Southerland, 9 Ves. 445; Re Phene's Trusts, L. R., 5 Eq. 346 (to trustees "for the children of A. to do what the trustees think best"); over-ruling Maddison *v.* Andrew, 1 Ves. 57, and Lord Hardwicke's dictum in Duke of Marlborough *v.* Lord Godolphin, 2 id. 81.

(*r*) Att.-Gen. *v.* Doyley, 4 Vin. Ab. 485, pl. 16; Harding *v.* Glyn, 1 Atk. 469; Re White's Trusts, Joh. 656 ("for such of my children as my trustees may think fit.")

1 Bolles *v.* Smith, 39 Conn. 219; Dow *v.* Doyle, 103 Mass. 489; Jackson *v.* Roberts, 14 Gray, 550; Stephens *v.* Milnor, 9 C. E. Green, 358.

2 See Bolles *v.* Smith, 39 Conn. 219; Springer *v.* Congleton, 30 Ga. 977; Schaffer *v.* Kettell, 14 Allen, 528; Sackett *v.* Mallory, 1 Met. 355; Hoppock *v.* Tucker, 59 N. Y. 202; Magraw *v.* Field, 48 N. Y. 668; Downing *v.* Marshall, 23 N. Y. 366; Todd *v.* Trott, 64 N. C. 280; Provenchere's Appeal, 67 Penn. St. 463.

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

Effect upon power of lapse of some of the shares.

* If, however, under the gift in default of appointment, [*1130] the objects are joint-tenants, or the gift is to a class, of course the decease of any object, even in the testator's lifetime, as it does not occasion any lapse, leaves the power wholly unaffected.

It may be observed, that as an appointment cannot be made in favor of a deceased child whose share under the gift over had vested, the only mode by which the testator's bounty can be made to reach his representatives is to leave a portion of the fund unappointed; in which case the representatives of the deceased child will take his share (but of course *only* his share) in the unappointed portion. Lord Eldon, it is true, expressed his disapproval of this "devise," in Butcher *v.* Butcher (*u*); but he appears to have objected to it as proceeding upon the erroneous notion that it was necessary to enable the donee to appoint the remainder of the fund to the surviving objects: whereas, according to Boyle *v.* Bishop of Peterborough, his power is extended over *the whole* fund. To avoid all such questions, powers have usually been framed so as to authorize an exclusive appointment to one or more of the objects; but this authority is now conferred by statute (*x*) on the donee of every power of distribution (though created before the statute), except so far as the power expressly requires a specific amount or share to be appointed to any of the objects.

(*s*) Boyle *v.* Bishop of Peterborough, 1 Ves. Jr. 299, 2 R. R. 108; Butcher *v.* Butcher, 9 Ves. 382, 1 V. & B. 79; Paske *v.* Haselfoot, 33 Beav. 125; Re Ware, Cumberlege *v.* Cumberlege-Ware, 45 Ch. D. 269.

(*t*) Reade *v.* Reade, 5 Ves. 744; see also Sugd. Pow. 8th ed. 419, where great pains have been taken to establish the position in the text, in opposition to some remarks of the present writer in his volume appended to Powell, Dev. 3d ed. 374, which remarks he has not here repeated; for though he is still unable to discover any solid ground for the alleged difference of effect in regard to the power, where the partial failure of the gift takes place *before* and where it takes place *after* the death of the testator, yet as the cases commented on by the distinguished writer in question seem to favor such a doctrine, and as it is really of more importance that the rules on such points should be certain than that they should be decided in the manner most consistent with principle, he has not felt disposed to revive the discussion.

(*u*) 1 V. & B. 92.

(*x*) 37 & 38 Vict. c. 37. Before this statute a nominal share at least must, notwithstanding 1 Will. 4, c. 46, have been appointed, or left to devolve, to every object.

* CHAPTER XXXIII.

ESTATES IN FEE WITHOUT WORDS OF LIMITATION.

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I. — Enlargement of indefinite Devises under the Old Law by Charges of Debts, &c., Devises over, or Use of particular Words. — The proper and technical mode of limiting an estate in fee simple is to give the property to the devisee and his heirs, or to him his heirs and assigns forever (*a*).

Proper mode of limiting an estate in fee.

Nothing was better settled than that a devise of messuages, lands, tenements, or hereditaments (not estate), without words of limitation, occurring in a will which was not subject to the statute 1 Vict. c. 26, conferred on the devisee an estate for life only.[1] A conviction that the rule was generally

Necessity for words of limitation under the old law.

(*a*) Or by a devise to A. for life, remainder to his heirs, by the operation of the rule in Shelley's case, post, Ch. XXXVI. So where the remainder is to the heir (in the singular), unless formal words of limitation are superadded; see this treated of, Ch. XXXV., with regard to estates tail (Archer's case).

[1] Sargent *v.* Towne, 10 Mass. 303, 307, note (*a*); Farrar *v.* Ayres, 5 Pick. 404, 408; Jackson *v.* Embler, 14 Johns. 198; Jackson *v.* Wells, 9 Johns. 222; Ferris *v.* Smith, 17 Johns. 221; Hall *v.* Goodwin, 2 Nott & McC. 383; Clayton *v.* Clayton, 3 Binn. 476; Steele *v.* Thompson, 14 Serg. & R. 84; Mosberry *v.* Marge, 2 Munf. 453; Parker, C. J., in Cook *v.* Holmes, 11 Mass. 531; Shaw, C. J., in Godfrey *v.* Humphrey, 18 Pick. 539; Kellett *v.* Kellett, 3 Dow, 248; Edelen *v.* Smoot, 2 Har. & G. 285; Owings *v.* Reynolds, 3 Harr. & J. 141; Lyles *v.* Digges, 6 Harr. & J. 364; Smith *v.* Poyas, 1 Desaus. 156.

Introductory words to a will cannot vary the construction, so as to enlarge the estate to a fee, unless there be words in the devise itself sufficient to carry the interest. Such introductory words are like a preamble to a statute, to be used only as a key to disclose the testator's meaning. See Kent, 540, 541. Further see Beall *v.* Holmes, 6 Harr. & J. 205; Finlay *v.* King, 3 Peters, 346; Vanderzee *v.* Vanderzee, 30 Barb. 331, *s. c.* 36 N. Y. 231; Bullard *v* Goffe, 20 Pick. 252, 258; Varney *v.* Stevens, 22 Maine, 331; Davies *v.* Miller, 1 Call, 127; Gernet *v.* Lynn, 31 Penn. St. 94; Goodrich *v.* Harding, 3 Rand. 280; Clark *v.* Mikell, 3 Desaus. 168; Winchester *v.* Tilghman, 1 Harr. & M'H. 452; Harvey *v.* Olmsted, 1 Barb. 105; *s. c.* 1 Comst. 483; Vanderwerker *v.* Vanderwerker, 7 Barb. 221; Weidman *v.* Maish, 16 Penn. St. 504. But the introductory words may often be important in showing the testator's intention. Geyer *v.* Wentzel, 68 Penn. St. 84.

That words of inheritance are unnecessary to carry a fee by will is everywhere held. For illustrations see Whorton *v.* Moragne, 62 Ala. 201; White *v.* White, 52 Conn. 518; Wetter *v.* Walker, 62 Ga. 142; Siddons *v.* Cockrell, 131 Ill. 653; Giles *v.* Anslow, 128 Ill. 137; Walker *v.* Pritchard, 121 Ill. 221; Morgan *v.* McNeeley, 126 Ind. 537; Lennen *v.* Craig, 95 Ind. 167; Bulfer *v.* Willigrod, 71 Iowa, 620; Bromley *v.* Gardner, 79 Maine, 246; Pratt *v.* Leadbetter, 38 Maine, 9; Russell *v.* Elden, 15 Maine, 193; Goodwin *v.* McDonald, 153 Mass. 481; Lincoln *v.* Lincoln, 107 Mass. 590; Tatum *v.* McLellan, 50 Miss. 1; Small *v.* Field, 102 Mo. 104; Lummus *v.* Mitchell, 34 N. H. 39; Hance *v.* West, 32 N. J. Eq. 233; Crain *v.* Wright, 114 N. Y. 307; Radley *v.* Kuhn, 97 N. Y. 26; Flickinger *v.* Saum, 40 Ohio, St. 591; Piatt *v.*

subversive of the actual intention of testators, always induced the Courts to lend a willing ear whenever a plausible pretext for a departure from it could be suggested (*b*).

(*b*) Only the leading principles are here adverted to, which formerly influenced the Courts to imply an enlargement of the devisee's estate, from the general scope of the will, or particular expressions therein, where the proper terms of limitation had not been used by the testator. For a full consideration of this subject, the reader is referred to the 4th Edition of this Work, Vol. II., pp. 267, et seq.

Sinton, 37 Ohio, 353; Drennan's Appeal, 118 Penn. St. 176 (personalty for life, with no limitation over, citing Merkel's Estate, 109 Penn. St. 235; Morris *v.* Potter, 10 R. I. 58; Bell *v.* Alexander, 22 Texas, 350).

If an estate be given to a person generally or indefinitely, with an absolute power of disposition, it carries a fee; but where an estate for life is first created, and then a power of disposition over the remainder is given to the tenant for life, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee, unless there be a general intent to give a fee, inconsistent with such particular intent. Welsch *v.* Belleville Bank, 94 Ill. 191; Funk *v.* Eggleston, 92 Ill. 515, 533; Markillie *v.* Ragland, 77 Ill. 99; Pickering *v.* Langdon, 22 Maine, 413; Ramsdell *v.* Ramsdell, 21 Maine, 293; Swope *v.* Swope, 5 Gill, 225; Spooner *v.* Lovejoy, 108 Mass. 529; Tatum *v.* McLellan, 50 Miss. 1; Cook *v.* Couch, 100 Mo. 29; Burleigh *v.* Clough, 52 N. H. 267; Downey *v.* Borden, 7 Vroom, 460; *s. c.* 6 Vroom, 74; De Peyster *v.* Howland, 8 Cowen, 277; Jackson *v.* Robins, 16 Johns, 587; Jackson *v.* Babcock, 12 Johns. 389; Dillin *v.* Wright, 73 Penn. St. 177; Reformed Church *v.* Disbrow, 52 Penn. St. 219; Cockrill *v.* Maney, 2 Tenn. Ch. 49; McGavock *v.* Pugsley, 1 Tenn. Ch. 410; Downing *v.* Johnson, 5 Coldw. 229. See ante, Vol. I., pp. 326, 378 (where some special phases of the subject are considered).

Thus, a residuary devise and bequest to the testator's wife "to her use, and to be disposed of at her decease according to the terms of any will that she may leave" vests the whole of the residue in her absolutely. Spooner *v.* Lovejoy, 108 Mass. 529.

But the qualifying clause of the foregoing rule, "unless there be a general intent to give a fee," is often applied to enlarge the life-estate accordingly. Dillin *v.* Wright, supra; Reformed Church *v.* Disbrow, supra; Gleason *v.* Fayerweather, 4 Gray, 348; Bell *v.* Alexander, 22 Texas, 350; Bean *v.* Myers, 1 Coldw. 226. Thus, in the last-named case (which, however, appears to have gone to the verge of the authorities, perhaps indicating a tendency, elsewhere observable also, to break away from the older cases, and to seize upon any manifestation of a general intent in addition to the power of disposal) a gift to the testator's wife for life, with power to sell and use the property for payment of debts, for her support, and for all other legal purposes, was held to be a gift of the estate absolutely. So an estate for life is enlarged to a fee when the purpose of the testator as seen in the will cannot be carried out with a less estate. Bell *v.* Alexander, supra.

But, on the other hand, it is held that an estate for life is not enlarged to a fee by a power of disposal of the same as the donee "may find needful for the purpose" of her support during life. Smith *v.* Snow, 123 Mass. 323. So it is declared that the gift of an estate to the testator's widow "for the term of her natural life, to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," carries only a life-estate with full power of enjoyment of the property in specie. It gives her no testamentary power over the estate. In re Thompson's Estate, 15 Ch. D. 263 (Court of App.). So even a gift of land to the testator's wife for life "with power to sell all or any portion thereof, and to reinvest the proceeds in any way that to her seems proper, and generally to act in all things pertaining to said estate as she deems best, without accountability," has recently been held not to give the devisee a fee simple. Cockrill *v.* Maney, 2 Tenn. Ch. 49. So though the power of disposal be contingent, as, for example, upon its being necessary for the convenience and support of the tenant for life, the fact that the decision of the existence of the contingency is left to the tenant for life will not enlarge the life-estate. Cockrill *v.* Maney, supra; Deaderick *v.* Armour, 10 Humph. 588; Pillow *v.* Rye, 1 Swan, 185; Downing *v.* Johnson, 5 Coldw. 229. Indeed, even a gift to the testator's widow "in fee simple absolute, forever," may by explanatory words of the context, when clear and exact, be cut down to a life-estate. Siegwald *v.* Siegwald, 37 Ill. 430. See Vol. I., pp. 326, 378, notes.

See further as to the effect of a power of disposal in such cases, Ackerman *v.* Gorton, 67 N. Y. 63; May *v.* Joynes, 20 Gratt. 692; Bradley *v.* Westcott, 13 Ves. 445; Boyd *v.* Strahan, 36 Ill. 355; Brant *v.* Virginia Coal Co., 93 U. S. 326; Word *v.* Morgan, 5 Coldw. 407; Burleigh *v.* Clough, 52 N. H. 267; Welsch *v.* Belleville Bank, 94 Ill. 191; Weston *v.* Jenkins, 128 Mass. 563. In Burleigh *v.* Clough, supra, it was said that most of the authorities which apparently go to the extent of holding that a power of disposition annexed to an estate for life enlarges the estate to a fee are cases in which the life-estate is not conferred by express terms, but arises from implication; such implication being deemed essential in the particular case in order to give effect to the intention of the

Thus it was settled that where a devisee, whose estate was undefined was directed to pay the testator's debts or legacies, or a specific

testator. Ramsdell *v.* Ramsdell, 21 Maine, 288; Pickering *v.* Langdon, 22 Maine, 213; Burbank *v.* Whitney, 24 Maine, 146; White *v.* White, 21 Vt. 250. The expressions in the following were deemed mere dicta: Harris *v.* Knapp, 21 Pick. 412: Hale *v.* Marsh, 100 Mass. 468; Dodge *v.* Moore, id. 335; Stroud *v.* Morrow, 7 Jones, 463.

But while a life-estate is not enlarged to a fee by a mere power of sale, still, when it is not clear whether the intent was to create a life-estate or a fee, the fact that a power of sale is given is regarded as showing an intention to give the fee. Lewis *v.* Palmer, 46 Conn. 454; Ide *v.* Ide, 5 Mass. 500; Harris *v.* Knapp, 21 Pick. 412; Burbank *v.* Whiting, 24 Pick. 146; Jackson *v.* Coleman, 2 Johns. 391: Helmer *v.* Shoemaker, 22 Wend. 137; McKenzie's Appeal, 41 Conn. 607. See, however, Smith *v.* Bell, 6 Peters, 74; Brant *v.* Virginia Coal Co., 93 U. S. 326; Boyd *v.* Strahan, 36 Ill. 355. So, too, notwithstanding the limit to the estate under the devise, it is held by many authorities that if the power of sale is exercised by the life-tenant, the *purchaser* will take an estate in fee. Lewis *v.* Palmer, 46 Conn. 454, 458; Hull *v.* Culver, 34 Conn. 403; Ramsdell *v.* Ramsdell, 21 Maine, 288; Shaw *v.* Hussey, 41 Maine, 495; Gifford *v.* Choate, 100 Mass. 343, 346; Hale *v.* Marsh, id. 468; Cummings *v.* Shaw, 108 Mass. 159. But see Bradley *v.* Westcott, 13 Ves. 445; Smith *v.* Bell, 6 Peters, 68; Brant *v.* Virginia Coal Co. 93 U. S. 326.

Where a devisee of an estate not defined is required to pay the testator's debts or legacies, or a certain sum in gross, he takes in fee, on the ground that if he took for life only he might be prejudiced by the determination of his interest before reimbursement of his outlay. Robinson *v.* Randolph, 21 Fla. 629; Eastman *v.* Couch, 29 W. Va. 784; Foote *v.* Sanders, 72 Mo. 616; Fahrney *v.* Holsinger, 65 Penn. St. 388; Whorton *v.* Moragne, 62 Ala. 201, 210. But where the charge is on the estate, and there are no words of limitation, the devisee takes an estate for life only; it is where the charge is on the *person* of the devisee in respect to the estate in his hands that he takes a fee. Jackson *v.* Bull, 10 Johns. 148; Jackson *v.* Martin, 18 Johns. 31; Jackson *v.* Merrill, 6 Johns. 185; Spraker *v.* Van Alstyne, 18 Wend. 200; Harris *v.* Fly, 7 Paige, 421; McLellan *v.* Turner, 15 Maine, 436; Gibson *v.* Horton, 5 Harr. & J. 177; Beall *v.* Holmes, 6 Harr. & J. 208; Lithgow *v.* Kavenagh, 9 Mass. 161; Gardner *v.* Gardner, 3 Mason, 309, 312; Cook *v.* Holmes, 11 Mass. 528; Bowers *v.* Porter, 4 Pick. 198. 203; Wait *v.* Belding, 24 Pick. 129; Parker *v.* Parker, 5 Met. 134; Lindsay *v.* M'Cormack, 2 A. K. Marsh. 229; Ferguson *v.* Zepp, 4 Wash. C. C. 645. A gift of a dwelling-house to the testator's widow will not be cut down to a mere right of occupancy by the fact that the testator states in the will that his purpose in giving her the house is to provide her with a suitable residence. Tobias *v.* Cohn, 36 N. Y. 363. Nor is a gift to the testator's widow to be cut down in favor of the heir by the use of terms which are capable, in a strict technical sense, of being construed against her, where the general intention of the testator appears opposed to such a construction. Kelly *v.* Reynolds, 39 Mich. 464. See Stineman's Appeal, 34 Penn. St. 394; Adamson *v.* Ayres, 5 N. J. Eq. 349.

If there be a devise to one generally of freehold and personal estates without any words of limitation, he will take an estate for life only in the freehold, but the personal property absolutely. Newton *v.* Griffith. 1 Harr. & G. 111; Hawley *v.* Northampton, 8 Mass. 3; Bailey *v.* Duncan, 4 T. B. Mon. 257; Jones *v.* Doe, 1 Scam. 276; Jackson *v.* Wells, 9 Johns. 222; Jackson *v.* Embler, 14 Johns. 198; Jackson *v.* Bull, 10 Johns. 148; Conoway *v.* Piper, 3 Harr. 482; Wheaton *v.* Andress, 23 Wend. 452; Hall *v.* Goodwyn, 4 McCord, 442; Scanlan *v.* Porter, 1 Bailey, 427; Wright *v.* Denn, 10 Wheat. 204. Unless, in respect to the real estate, there be a manifest intention to give a fee. Wait *v.* Belding, 24 Pick. 129, 133; Cook *v.* Holmes, 11 Mass. 528, 531; 4 Kent, 5-7; Harris *v.* Harris, 8 Johns. 141; Jackson *v.* Wells, 9 Johns. 222; Jackson *v.* Embler, 14 Johns. 198; Ferris *v.* Smith, 17 Johns. 221; Morrison *v.* Semple, 6 Binn. 94; Steele *v.* Thompson, 14 Serg. & R. 84; Wrigbt *v.* Denn, 10 Wheat. 204; Beall *v.* Holmes, 6 Harr. & J. 209, 210. It should affirmatively appear that a greater than a life estate was intended by the testator to make a fee simple. Cleveland *v.* Spilman, 25 Ind. 95. How ready the courts are to discover such intention may be seen in Johnson *v.* Johnson, 1 Munf. 549; Waring *v.* Middleton, 3 Desaus. 249; Clark *v.* Mikell, 3 Desaus. 168; Whaley *v.* Jenkins, 3 Desaus. 80; Engle *v.* Burns, 5 Call, 463; Brailsford *v.* Heyward, 2 Desaus. 290; Josselyn *v.* Hutchinson, 21 Maine, 340; Godfrey *v.* Humphrey, 18 Pick. 539; Jackson *v.* Babcock, 12 Johns. 389; Fogg *v.* Clark, 1 N. H. 163; Butler *v.* Little, 3 Greenl. 239; Bradstreet *v.* Clark, 12 Wend. 602; Baker *v.* Bridge, 12 Pick. 27; 4 Kent, 5-7; Id. 536, et seq.; Beall *v.* Holmes, 6 Harr. & J. 205; Johnson *v.* Johnson, 1 McMull. 346; Sargent *v.* Towne, 10 Mass. 303; Dunlap *v.* Crawford, 2 McCord, 171; Dice *v.* Sheffer. 3 Watts & S 419; Areson *v.* Areson, 5 Hill 410; Cordry *v.* Adams, 1 Harr. 439; Russell *v.* Elden, 15 Maine, 193; Smith *v.* Berry, 8 Ohio, 365; Parker *v.* Parker, 5 Met. 134; Fox *v.* Phelps, 17 Wend. 593; Den *v.* Bowne, 3 Harrison, 210; Allen *v.* Hoyt, 5 Met. 324; Pattison *v.* Doe, 7 Ind. 282; Pratt *v.* Leadbetter, 38 Maine, 9; Lummus *v.* Mitchell, 34 N. H. 39. The words, "I give my lands;" "all the rest, residue, and remainder of my real estate;" "all my real estate," have been held severally to pass a fee without other words of limitation or inheritance. Lowrie *v.* Ryland, 65 Iowa, 584; Smith *v.* Berry, 8 Ohio, 365;

sum in gross, either personally or out of the lands devised, he took an estate in fee, on the ground that if he took an estate for life only he might be damnified by the determination of his interest before reimbursement of his expenditure; and the fact that actual loss was rendered highly improbable by the *disparity in the amount of the sum [*1132] charged relatively to the value of the land, did not prevent the enlargement of the estate (*c*). And the future or contingent nature of the charge did not prevent it from enlarging the estate (*d*). Secus, where the charge was merely on the land generally (*e*), or where there was in the will another devise without words of limitation, not subject to a charge (*f*).

Charges of a gross sum on the devisee.

The same principle applied to annual sums charged on real estate which, if directed to be paid by the devisee of an undefined estate enlarged that estate to a fee simple, whether the will directed the annual sum to be paid to the devisee, without more, or by the devisee out of the land (*g*); but not so if the annuity was simply imposed on the devised lands (*h*).

As to annual charges.

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

Whether annuity enlarged estate of devisee or ceased at his death.

(*c*) Co. Lit. 9 b; 6 Rep. 16 a; Cro. El. 379; Com. Rep. 323; Willes, 138; 8 T. R. 1; 4 East, 496; 2 K. & J. 400; Lloyd *v.* Jackson, L. R., 1 Q. B. 571, 2 Q. B. 269 (direction to devisee to educate and settle testator's children). For cases where the devisee was also executor, see 6 Mad. 9; 3 B. & Ad. 753; L. R., 7 Ex. 105.

(*d*) 3 Russ. 350; 3 B. & Ad. 753.

(*e*) Denn *v.* Mellor, 5 T. R. 558; *s. c.* in D. P. 2 B. & P. 247; see also Pre. Ch. 67; Mose, 240; 14 M. & Wels. 698; 3 Ell. & Bl. 219; 3 K. & J. 170.

(*f*) 9 East, 267; 33 L. J. Ex. 202.

(*g*) Cro. Jac. 527; Cro. Eliz. 744, 3 Burr. 1533; Willes, 650; W. Bl. 1041; 5 T. R. 13; 9 East, 267, overruling Cro. Car. 157; 3 D. & War. 384; 2 Jones, Ir. Exch. 719. And see Pickwell *v.* Spencer, L. R., 6 Ex. 190, 7 Ex. 105 (direction to pay yearly wages to A).

(*h*) 8 East, 141; 11 Exch. 37.

(*i*) In the case of an express devise for life, of course, the charge of the annuity would not formerly, nor will it now enlarge the devisee's estate, Willis *v.* Lucas, 1 P. Wms. 472; Doe d. Burdett *v.* Wrighte, 2 B. & Ad. 710. See also Bolton *v.* Bolton, L. R., 5 Ex. 145.

Lincoln *v.* Lincoln, 107 Mass. 590 : Parker *v.* Parker, 5 Met. 134 ; Godfrey *v.* Humphrey, 18 Pick. 537. See Josselyn *v.* Hutchinson, 21 Maine, 339. By statute in Virginia, Kentucky, Mississippi, Missouri, Alabama, and New York, and in other states, the word "heirs," or other words of inheritance, are no longer necessary to create or convey an estate in fee; and every grant or devise of real estate, made subsequent to the statute, passes all the interest of the grantor or testator, unless the intent to pass a less estate or interest appears in express terms, or by necessary implication. See 4 Kent, 7, 8; Fuller *v.* Yates, 8 Paige, 325. In New Jersey, Maryland, North Carolina, South Carolina, Tennessee, Massachusetts, and in other states, it has been declared, by statute, that a *devise* of lands shall be construed to convey a fee simple, unless it appears, by express words or manifest intent, that a less estate was intended. 4 Kent, 8; id. 537, 538, and notes; 1 Harr. & G 138, note; Denn *v.* Smilcher, 2 Green, 53, Fay *v.* Fay, 1 Cush. 93; Siddons *v.* Cockrell, 131 Ill. 653.

A fee simple may be cut down to a life estate by accompanying words. Johnson *v.* Johnson, 98 Mass. 564 (citing Bergan *v.* Cahill, 58 Ill. 160).

Devise of income of real estate perpetually carries a fee. Sampson *v.* Randall, 72 Maine, 109. So of personalty. Id.

Enlargement to a fee by effect of devise over.

The fee simple was also held to pass by an indefinite devise where it was succeeded by a gift over in the event of the devisee dying under the age of twenty-one years, or any other specified age;[1] such devise over being considered to denote that the prior devisee was to have the inheritance in the alternative event of his attaining the age in question, since, in any other supposition, the making the ulterior devise dependent on the contingency of the devisee dying under the prescribed age would have been capricious if not absurd (*k*). So, also, where [*1133] *there was a devise over on the prior devisee dying without leaving issue, whether under a specified age (*l*) or not (*m*).

Devise to A. in fee, in trust for B. indefinitely, gave B. a fee.

Where lands were devised to trustees in fee, in trust for a person or a class without any words of limitation, it was settled that unless a contrary intention appeared by the context, the cestui que trust took an equitable interest co-extensive with the legal estate of the trustees, *i. e.*, a fee (*n*).

Conversely, where lands were devised to trustees, without words of inheritance, upon trust for one in fee, the trustees took the fee (*o*).

Even under wills made before 1838, an estate in fee simple might have been created by any expressions, however informal, which denoted the intention. Thus, the inheritance in fee was held to pass by a devise to A. *in fee simple* (*p*), to A. *forever* (*q*), or to him *and his assigns forever* (*r*) (but not to a person and his assigns simply, which gives an estate for life only (*s*)), or to A. *and his successors* (*t*), or to A. *et sanguini suo* (*u*); to A. and *his house*, or A. and *his family* (*x*), or *stock* (*y*), to A. *or* his heirs (*z*), to A. and his execu-

(*k*) 9 East, 400; 2 M. & Sel. 608; 6 Pri. 179, Ha. 232. The rule holds as well where the prior devise is contingent as where it is vested, Re Harrison's Estate, L. R., 5 Ch. 408; and as well where the gift over is implied as where it is express, Andrew *v.* Andrew, 1 Ch. D. 410.

As to the extent of the rule, see 3 Burr. 1618, 1 W. Bl. 535; 6 Pri. 179; 9 East, 400.

(*l*) 10 East, 460.

(*m*) See Moone *v.* Heaseman, Willes, 142; Re Harrison's Estate, L. R., 5 Ch. 408; Holland *v.* Wood, L. R., 11 Eq. 91 (where the gift over was found in the elliptical expression "children or issue"); also Hutchinson *v.* Stephens, 1 Kee. 240; Claridge *v.* Arnold, W. N., 1880, p. 141. But see per Lord Cairns, in Coltsmann *v.* Coltsmann, L. R., 3 H. L. 133, 155.

(*n*) 8 T. R. 597; 3 M. & Gr. 92, 3 Scott. N. R. 409; 12 Jur. 591, 17 L. J. Ch. 400; 14 Sim. 558; 11 C. B. N. S. 121. See Yarrow *v.* Knightly, 8 Ch. D. 736.

(*o*) 2 Str. 798.

(*p*) And. 518, 8 Vin. Ab. 206, pl. 8.

(*q*) Co. Lit. 9 b; 8 Vin. Ab. 206, pl. 6; 2 Ld. Raym. 1152; Cro. Car. 129, Jones, 195; 1 B. C. C. 148.

(*r*) Co. Lit. 9 b.

(*s*) Id.

(*t*) Roll. Rep. 399, pl. 25, 8 Vin. Ab. 209, pl. 1; 3 Bulst. 194; 10 Beav. 517.

(*u*) Co. Lit. 9 b; 8 Vin. Ab. 206, pl. 10.

(*x*) Dy. 333; 17 Ves. 261. See Lucas *v.* Goldsmid, 29 Beav. 657, where "family" was explained to mean heirs of the body.

(*y*) Hob. 33.

(*z*) 2 Atk. 645; and see Plowd. 289.

[1] Devise to A. when he becomes of age, with no contingent limitation over, gives A. a fee simple. Radley *v.* Kuhn, 97 N. Y. 26 (citing Boraston's Case, 2 Coke, 19; Manice *v.* Manice, 43 N. Y. 381).

tors (*a*), to two et heredibus (omitting suis) (*b*); to a man *and his, and to do what he will with it* (*c*), and even to him *and his* simply (*d*); to A. *to give and sell* (*e*); to A. *to give and sell, and do therewith at his will and pleasure* (*f*), or to a person to her own use, *to give away at her death to whom she pleases* (*g*); or *to be at the discretion of* a person (*h*).

* But the words "freely to be possessed and enjoyed" [*1134] have been decided to pass, under the old law, only an estate for life (*i*).

It has been long established that a devise of a testator's "estate" or "estates" included not only the corpus of the property, but the whole of his interest therein (*k*).[1] And the same effect has been given to such words as "property" (*l*),[2] "inheritance" (*m*), "reversion" or "remainder" (*n*),[3] "right and title" (*o*),[4] "all my interest" (*p*), or "real effects" (*q*). And it was ultimately settled that the words "estate," "property," &c., would carry the inheritance, though accompanied by words of locality (*r*), or referring to occupancy (*s*), or other expressions referable exclusively to the corpus of the property (*t*).

Word "estate" carries a fee, when.

(*a*) 3 Burr. 1881; and see 10 Beav. 21.
(*b*) Br. Estates, pl. 4; 8 Vin. Ab. 208, pl. 18.
(*c*) Latch, 36, Benloe, 11, pl. 9.
(*d*) Id. In some manors, copyholds are so limited.
(*e*) Co. Lit. 9 b; 8 Vin. Ab. 206, pl. 7.
(*f*) Br. Dev. pl. 39, 1 Leon. 156, 8 Vin. Ab. 234, pl. 2; id., 1 Leon. 283.
(*g*) 2 Atk. 103. Where such a phrase is added to an *express* estate for life, it confers a power only. See 1 P. W. 149, 1 Salk. 239; 10 East, 438: and as to personalty, 4 Russ. 263; but see 24 Beav. 246; and for cases since 1 Vict. c. 26, see infra.
(*h*) 1 Leon. 156, 8 Vin. Ab. 235, pl. 7. See also 2 Wils. 6.
(*i*) 11 East, 220; 2 C. M. & R. 23; 9 Ha. 378; see also L. R., 2 Q. B. 269.
(*k*) 2 Lev. 91; 3 Keb. 180; 1 Mod. 100; 3 Mod. 45, 228; 3 Keb. 49; 4 Mod. 89; 1 Show. 349; 1 Salk. 236; 1 Com. 337; 2 Vern. 690; Pre. Ch. 264; 2 Vern. 564; 12 Mod. 594; 2 Ld. Raym. 1324; 2 P. W. 524; 1 Eq. Ca. Ab. 178, pl. 18; 3 P. W. 294; Cas. t. Talb. 157; Amb. 181; 2 Atk. 38, 102; 3 Atk. 486; 1 Ves. 10; 2 id. 48; 2 W. Bl. 938; 1 H. Bl. 223; Willes, 296; Lofft, 95, 100; 4 T. R. 89; 1 B. & P. N. R. 335; 11 East. 518; 3 V. & B. 160; 3 Br. & B. 85; 2 Sim. 264; 8 Bing. 323; 1 Moo. & Sc. 466; 9 Ad. & Ell. 719; 1 Per. & D. 472; 15 Q. B. 28; 1 Exch. 414.
As to "estates" (in the plural) see Amb. 181; 2 T. R. 656; 4 M. & Sel. 366; 3 K. & J. 652. See also 1 Cox, 362.
(*l*) 16 East, 221; 18 Ves. 193; 1 J. & W. 189; 11 Ad. & Ell. 1000; 3 Per. & D. 578; 2 Drew. 7; 19 Beav. 225: L. R., 3 H. L. 121.
(*m*) Hob. 2, Godb. 207, Moore, 873, ca. 1218.
(*n*) 1 Lut. 755; 1 Ld. Raym. 187; 2 Ves. 48. Not so if the word "remainder" is used in the sense of residue, Mose. 240; 5 T. R. 558, 2 B. & P. 247.
(*o*) 4 M. & Pay. 445; 6 Bing. 630.
(*p*) 5 T. R. 292.
(*q*) Hogan *v.* Jackson, Cowp. 299, 3 B. P. C. Toml. 388, stated Vol. I., p. 677; Coop. 241; 22 L. J. Ch. 236. See also Grayson *v.* Atkinson, 1 Wils. 333, stated Vol. I., p. 678.
(*r*) Amb. 181; Cas. t. Talb. 157; 2 P. W. 523; 2 Atk. 37, Barn. Ch. Rep. 9; 1 T. R. 411; 4 Taunt. 176, 4 Dow. 92; 4 Taunt. 177; 6 Taunt. 317, 7 East, 259, 2 Ed. 115; 3 Sim. 398; 3 K. & J. 652; 3 D. M. & G. 668.
(*s*) 3 J. B. Moo. 565, 1 Br. & B. 72. See also 5 M. & Sel. 408.
(*t*) 7 Taunt. 35; 2 Ves. 48; 6 Ex. 510.

[1] Evans's Appeal, 51 Conn. 435; Lowrie *v.* Ryland, 65 Iowa, 584; Chapman *v.* Chick, 81 Maine, 109.
[2] White *v.* White, 52 Conn. 518; Robinson *v.* Randolph, 21 Fla. 629; Morgan *v.* McNeeley, 126 Ind. 537; Chapman *v.* Chick, 81 Maine, 109. So "possessions," Chapman *v.* Chick.
[3] Evans's Appeal, 51 Conn. 435. See Chapman *v.* Chick, 81 Maine, 109 ("rest and residue").
[4] Id.

When words "part," "share," "moiety," carried a fee.

It was at one time a question whether under a devise by a testator of "his moiety," "his part," or "his share," of lands the devisee would take an estate in fee, but it seems ultimately to have been settled that he would (*u*); unless a contrary intention appeared by the will, as, where the indefinite gift was one in the midst of a regular series of limitations expressed as remainders one to another (*x*). The words, however, had this force only where the moiety, part, or share belonged as such to the testator himself (*y*).

[*1135] *An estate in fee was sometimes held to be given by virtue of words of exception. So, a devise of an "estate at B." except a particular house, passed the fee in the house (*z*).

Words of exception.

But the word "estate," or other words of similar signification must have been contained in the disposition part of the will. Such words occurring merely in the introductory clause in the will, by which the testator professed in the usual manner his intention to dispose of all his estate, did not have the effect of enlarging the subsequent devises in the will (*a*). And of course such words might be restricted by the context (*b*).

II. — Effect of stat. 1 Vict. c. 26, s. 28. — By s. 28 of the act 1 Vict. c. 26, it is enacted "That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." [1]

A devise without words of limitation, to pass the fee.

Remarks on the rule.

The effect of the enactment, it will be observed, is not wholly to preclude, with respect to wills made or republished since the year 1837, the question whether an estate in fee will pass without words of limitation, but merely to reverse the former rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now, an estate in fee will pass by such a devise, "unless a contrary intention shall appear by the will." The onus probandi (so to speak), under the present law, lies on those who contend for the restricted construction; and is not discharged by showing that another devise in the will contains formal words of

(*u*) 3 C. B. 274; 3 Jo. & Lat. 47; 1 Drew. 646, 653; L. R., 1 Ex. 235.
(*x*) Re Arnold's Estate, 33 Beav. 163.
(*y*) 2 Vern. 388; Cro. Eliz. 52; 19 Beav. 135, 2 D. & Rv. 678, 1 B. & Cr. 688. And in Bentley *v.* Oldfield, 19 Beav. 225, the fee passed by the words "share of *property*."
(*z*) 6 Scott, 303, 4 Bing. N. C. 455. And see 2 Dr. & Sm. 273; 2 J. & H. 634 (annuity, perpetual or for life).
(*a*) 6 Taunt. 317; 8 East, 141; 1 Cr. & Mee. 39.
(*b*) Cowp. 235; 3 B. & Ad. 473; 1 Q. B. 229; 15 Ves. 564; 5 J. B. Moo. 1; 4 D. M & G 73; 1 D. F. & J. 613; 9 App. Ca. 890.

[1] So generally in this country. See note 1, p. 1131, ante.

limitation (*c*), or that a special power of appointment is (in terms) given to the devisee (*d*); though if the same land be given in one part of the will to A., and in another to B., the presence of words of limitation in the latter gift, and their absence from the former, are material to correct the *apparent contradiction, [*1136] and to show that the testator meant a gift to A. for life, with remainder to B. in fee (*e*).

This rule of construction has been held not to apply to interests created de novo; thus a devise of a rent-charge to A. simply, has been held to give him a rent-charge for life only (*f*). And where a testator devised to A. "the house she lives in and grass for a cow in G. field," and gave his D. estate (which included G. field) to X., it was held that A. took the fee simple in the house, but not in the easement; the Court being of opinion that grass for a cow was not necessary for the enjoyment of the house, and that the extent of interest in the one was not governed by the other (*g*).

The rule does not apply to interests created de novo.

A devise of rents and profits or of income of land now carries the fee simple (*h*), under the old law it carried only an estate for life unless words of inheritance were added (*i*).

Devise of income of land.

In conclusion, it may be noticed that where copyholds of a manor, in which there is no custom to entail, are devised in terms which, if applied to freeholds, would create an estate tail, the devisee takes a fee simple conditional, which becomes absolute on the birth of issue under the limitation (*k*), and the same rule applies to a similar gift of a personal inheritance; which cannot be entailed (*l*).

Fee simple conditional in lands not within stat. De Donis.

Or in a personal inheritance.

(*c*) Wisden *v.* Wisden, 2 Sm. & Gif. 396.

(*d*) Brook *v.* Brook, 3 Sm. & Gif. 280. See also Weale *v.* Ollive, 32 Beav. 421; and as to personalty Re Mortlock's Trusts, 3 K. & J. 456. Where the prior devise is expressly for life the question whether the further words give the absolute interest or only a power is the same as before the act, Freeland *v.* Pearson, L. R., 3 Eq. 658; Pennock *v.* Pennock, L. R., 13 Eq. 144.

(*e*) Gravenor *v.* Watkins, L. R., 6 C. P. 500. But for the words of limitation A. and B. would be joint-tenants, Vol. I., p. 440.

(*f*) Nichols *v.* Hawkes, 10 Hare, 342. As to what words are sufficient to create a perpetual rent-charge, see Mansergh *v.* Campbell, 25 Beav. 544, 3 De G. & J. 232.

(*g*) Reay *v.* Rawlinson, 29 Beav. 88. As to the construction where property is devised to one in fee, and there follows an indefinite gift of an easement which is *necessary* to its enjoyment, see Pym *v.* Harrison, 32 L. T. N. S. 817, revd. 33 id. 796 (will before 1838).

(*h*) Plenty *v.* West, 6 C. B. 201; Mannox *v.* Greener, L. R., 14 Eq. 456. See ante, Vol. I., p. 741.

(*i*) 14 Sim. 571.

(*k*) Doe d. Simpson *v.* Simpson, 4 Bing. N. C. 333, 5 Scott, 770; Doe d. Blesard *v.* Simpson. 3 Scott, N. R. 774, 3 M. & Gr. 929; Doe d. Spencer *v.* Clarke, 5 B. & Ald. 458.

(*l*) Stafford *v.* Buckley, 2 Ves. 170; Turner *v.* Turner, 1 B. C. C. 316.

*CHAPTER XXXIV.

ESTATES OF TRUSTEES.

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I.—1. When Trustees take the Legal Estate.— *General Principles.*— The question whether a devise to uses operates by virtue of the Statutes of Wills alone, or by force of those statutes concurrently with the Statute of Uses, has been the subject of much learned controversy (*a*). The prevailing, and, it is conceived, the better opinion is in favor of the latter hypothesis (*b*); the only objection to which seems to be, that, as the Statute of Uses preceded the Statutes of Wills, uses created under the testamentary power conferred by the latter statutes could not, at the time of the passing of the Statute of Uses, have been in the contemplation of the legislature. The futility of this objection has been so often exposed, that it is not intended here to revive the discussion, more especially as the point has not, in general, any practical influence on the construction of wills; for even those who assert that the Statute of Uses does not apply, admit, and the authorities conclusively show (*c*), that a [*1138] * devise to A. and his heirs, simply to the use of B. and his heirs, would vest the fee simple in B., if not by force of the statute, yet in order to give effect to the manifest intention of the testator. Such intention, however, seems to be apparent only when examined through the medium of the Statute of Uses. We must suppose the testator to be acquainted with the effect of that statute, in order to gather from such a devise an intention to confer the legal

Whether devises are within the Statute of Uses.

(*a*) 1 Sand. Uses, 195; 2 Fonbl. Treat. Eq. 24; and Sugd. Pow. 8th ed. 146.
(*b*) But contra per Jessel, M. R, L. R., 20 Eq. 171, 3 Ch. D. 400, 20 Ch. D. 478.
(*c*) Symson *v.* Turner, 1 Eq. Ca. Ab 383, pl. 1, n.: Harris *v.* Pugh, 4 Bing. 335, 12 J. B. Moo. 577. And see Hawkins *v.* Luscombe, 2 Sw. 392; Doe *v.* Field, 2 B. & Ad. 564.

estate on the ulterior devisee. On the other hand, it is clear that a devise to the use of A. and his heirs, in trust for or for the use of B. and his heirs, would vest the legal inheritance in A. in trust for B., and not carry it on to B. Either this must be by the effect of the Statute of Uses forbidding the limitation of a use upon a use, or, supposing that statute not to operate upon wills, it must be (as in the former case) the result of presuming the testator to intend by the devise in question to produce the same effect as such limitation introduced into a deed would have done by force of that statute. It is evident, therefore, that in such cases the question whether the Statute of Uses applies to wills does not arise. And in practice little or no attention seems to have been paid to the difficulty suggested by an eminent writer (*d*), that, under a devise to A. and his heirs, to the use of B. and his heirs, if A. should die in the testator's lifetime, the devise to B. might possibly, under the Statute of Uses, fail at law for want of a seisin to serve the use. Indeed the writer in question himself observes, in solution of his own difficulty, that, as every testator has a power to raise uses either by the joint operation of both statutes, or by force of the Statutes of Wills only, possibly the Courts would, in favor of the intention, construe the devise as a disposition not affected by the Statute of Uses, but as giving the fee to B. immediately. Perhaps, however, there would be some difficulty, in principle, in adopting this construction; for, if, in the event of A. surviving the testator, the use would have been executed by the operation of the Statute of Uses, to hold the result to be different in consequence of the death of A. in the lifetime of the testator would be to make the construction of the devise dependent on events subsequent to its inception. Supposing the devise to be void at law, it is clear that equity * would compel the heir to convey; but probably the Courts would struggle hard against adopting a construction which would invalidate it even at law. The occurrence of the question may of course be easily avoided by devising the estate immediately to uses, and not to a devisee to uses (*e*). [*1139]

Where property, in which a testator has an estate of freehold, is devised to one person in trust for or for the benefit of another, the question necessarily arises whether the legal estate remains in the first-named person, or passes over to, and becomes vested in, the beneficial or ulterior devisee. If the devise is to the use of A., in trust for B., the legal estate (we have seen) is vested in A., even though no duty may have been assigned to him which requires that he should have the estate. Where, however, the property is devised to A. and his heirs, to the use of, or in trust for, B. and his heirs, the question whether A. does

Principle which determines whether persons apparently so, are trustees.

(*d*) Butl. Co. Lit. 272 a, VIII. 1; and 1 Sugd. Pow. 7th ed. 173, but omitted, 8th ed. 148.
(*e*) See further on this subject, Sugd. Pow. 8th ed. 148, where it is shown that an important question on the construction of powers created by will depends upon this point.

or does not take the legal estate depends chiefly on the fact whether the testator has imposed upon him any trust or duty the performance of which requires that the estate should be vested in him.[1] If he

[1] The difficulty arising under the Statute of Uses, by which the legal title is vested in the usee, does not arise in the case of an active or special trust; such being without the purview of the statute. Kirkland *v.* Cox, 94 Ill. 400; Chapin *v.* Universalist Soc., 8 Gray, 580; Striker *v.* Mott, 2 Paige, 387; Wood *v.* Wood, 5 Paige, 596; Perry, Trusts, § 305. That is, as the writer just cited states, if any agency, duty, or power is imposed upon the trustee, such as to pay the rents, or to apply the income of the estate in any particular way, or to raise money, the operation of the statute is excluded, and the equitable estate stands good. See Robinson *v.* Grey, 9 East, 1; Doe *v.* Homfray, 6 Ad. & E. 206; Leggett *v.* Perkins, 2 Comst. 297; Brewster *v.* Striker, id. 19; Moore *v.* Hegeman, 72 N. Y. 376; Garvey *v.* McDevitt, id. 556; Heermans *v.* Robertson, 64 N. Y. 332; Newell *v.* Nichols, 75 N. Y. 78; Fay *v.* Fay, 1 Cush. 93, 105; Shankland's Appeal, 47 Penn. St. 113; Kirkland *v.* Cox, 94 Ill. 400; Morton *v.* Barrett, 22 Maine, 261; Doe *v.* Edlin, 4 Ad. & E. 582; Vail *v.* Vail, 4 Paige, 317; Exeter *v.* Odiorne, 1 N. H. 232; Ashhurst *v.* Given, 5 Watts & S. 323; Vaux *v.* Parke, 7 Watts & S. 19; Nickell *v.* Handly, 10 Gratt. 336. Where, however, the duty is merely passive, as to permit and suffer the usee to occupy the estate or to receive the rents, the statute becomes operative, and defeats the trust. Perry, Trusts, § 306: Verdin *v.* Slocum, 71 N. Y. 345; Parks *v.* Parks, 9 Paige, 107; Jarvis *v.* Babcock, 5 Barb. 139; Beekman *v.* Bonsor, 23 N. Y. 298, 314.

Great difficulty arises sometimes, however, in deciding whether the trust is purely passive, as was the case in Heermans *v.* Robertson, 64 N. Y. 332. But the rule seems to be that if, though apparently passive, it in reality involves the exercise of some active duty, as where the direction is that the trustee shall permit the beneficiary to take the *net* rents or the *clear* rents, the statute is excluded and the trustee takes the legal estate. Perry, § 307; Barker *v.* Greenwood, 4 Mees. & W. 421; Keene *v.* Deardon, 8 East, 248; White *v.* Parker, 1 Bing. N. C. 573. So, too, it is settled in New York that a direction to pay over the rents and profits to the beneficiary is a direction to "apply" them, and is good under the statute of that state. Vernon *v.* Vernon, 53 N. Y. 351, 359; Leggett *v.* Perkins, 2 Comst. 297; Heermans *v.* Robertson, 64 N. Y. 332. The fixing a mere charge, on the other hand, upon the estate, will not prevent the statute from executing the use. Perry, § 308; Doe *v.* Claridge, 6 Com. B. 657, post, p. 1145.

But the courts in recent times have in certain cases, if not generally, felt disposed to look more liberally than formerly towards effectuating the purposes of testators in the matter of the construction of trusts. Thus, in all cases of devises in trust for the separate use of married women, the courts, with less regard than formerly to rigid rules as to what constitutes an active trust, will now construe the trust, if possible, so as to vest the legal estate in the trustee, because this will best promote the testator's purpose. Bowen *v.* Chase, 94 U. S. 812; *s. c.* 98 U. S. 254; Rife *v.* Georges, 59 Penn. St. 393; Ware *v.* Richardson, 3 Md. 505, commenting upon Williams *v.* Waters, 14 Mees. & W. 166, and Douglas *v.* Congreve, 1 Beav. 59, and denying South *v.* Alleine, 1 Salk. 229. With regard to such cases, the true principle was, in Ware *v.* Richardson, supra, declared to be that where lands are devised in trust as to the rents and profits, for the sole and separate use of a married woman, it is immaterial whether the trust is declared to be to *pay* the rents and profits to her, or to *permit* her to receive them; the use is not executed in either case, and the trust is good. See also Harton *v.* Harton, 7 T. R. 652; Hawkins *v.* Luscombe, 2 Swanst. 391; Ayer *v.* Ayer, 16 Pick. 327; Franciscus *v.* Reigert, 4 Watts, 109; Escheator *v.* Smith, 4 McCord, 452. Compare Heermans *v.* Robertson, 64 N. Y. 332; Leggett *v.* Perkins, 2 Comst. 297; Leggett *v.* Hunter, 19 N. Y. 445, 454.

It should further be observed that the courts, especially of England, have generally felt less difficulty in construing wills in aid of the written intention than in so construing deeds. 4 Kent, Com. 216; Whorton *v.* Moragne, 62 Ala. 201, 209. Several of the cases above cited, as Bowen *v.* Chase, Ware *v.* Richardson, Ayer *v.* Ayer, and Escheator *v.* Smith, were cases of deeds. The doctrine of the cases appears to be unaffected by the married women enabling acts; and it probably has a wide significance, one not confined to trusts in favor of married women. In Heermans *v.* Robertson, 64 N. Y. 332, 342, it is laid down that the operation of the New York statute is excluded or not according to the question of the necessity of a legal estate in the trustee; and that when such necessity does not exist, the trust is to be executed as a power.

It may be added that if there be several independent trusts in the will, the invalidity of one or more will not destroy those which are otherwise good. Van Schuyver *v.* Mulford, 59 N. Y. 426; Parks *v.* Parks, 9 Paige, 107; Oxley *v.* Lane, 35 N. Y. 340; Harrison *v.* Harrison, 36 N. Y. 543; Schettler *v.* Smith, 41 N. Y. 328; Manice *v.* Manice, 43 N. Y. 303. All the trusts will, however, be affected by such invalidity when they are so far dependent upon each other or upon the invalid part as not to be separable from that which is void. Van Schuyver *v.* Mulford, supra; Knox *v.* Jones, 47 N. Y. 389. The Statute of Uses does not apply to chattel interests, even in land. Harley *v.* Platts, 6 Rich. 310; Schley *v.* Lyon, 6 Ga. 330; Denton *v.* Denton, 17 Md. 403; Slevin *v.* Brown, 32 Mo. 176. The

has not, the legal ownership passes to the beneficial devisee, and the first-named person is regarded as a mere devisee to uses, filling the same passive office as a releasee to uses in an ordinary conveyance by lease and release. And the fact that the testator, in a series of limitations, employs sometimes the word "use," and sometimes the word "trust" is not considered to indicate that he had a different intention in the respective cases.

Thus, where (*f*) a testator devised lands to A. and his heirs, in trust and for the several uses and purposes after-mentioned, viz. to pay the rents to certain persons for the life of B., and after her decease *to the use* of C. and D. during their lives and the life of the longest liver, remainder to the use of A. and his heirs during the lives of C. and D. and the life of the longest liver, to preserve contingent remainders; and after the several deceases of C. and D., then *in trust* for the heirs male of the bodies of C. and D.; remainder to the use of T. in fee. After B.'s death, C. and D. suffered a recovery, which it was contended was void, on the ground that the limitation to the heirs male of their bodies was equitable, and therefore did not make them *tenants in [*1140] tail (a point which is discussed in a future chapter); but Lord Ellenborough observed, that the testator employed the words "use" and "trust" indifferently, and both were within the operation of the statute (*g*).

Words "use" and "trust" used indifferently.

So, it is clear, that the mere change of language, in a series of limitations, by substituting words of direct gift to the persons taking the beneficial interest, for the phrase "in trust for," will not clothe such persons with the legal estate, if the purposes of the will, in any possible event, require that the legal estate should be in the trustees (*h*).

Effect of changing language of limitations by introducing words of direct gift.

But the Courts are strongly inclined to give the devise such a construction as will confer on the trustees estates co-extensive with those interests which are limited in the terms of trust estates, if the other parts of the will can by any means be made consistent.[1]

(*f*) Doe d. Terry *v.* Collier, 11 East, 377.

(*g*) It is evident, therefore, that his Lordship concurred in the doctrine that uses created by will are within the Statute of Uses.

(*h*) Doe d. Tomkyns *v.* Willan, 2 B. & Ald. 84; Murthwaite *v.* Jenkinson, 3 D. & Ryl. 765, 2 B. & Cr. 357. See also Sandford *v.* Irby, 3 B. & Ald. 654; Blagrave *v.* Blagrave, 4 Ex. 550; Hodson *v.* Ball, 14 Sim. 558; Watson *v.* Pearson, 2 Ex. 581; Smith *v.* Smith, 11 C. B. (N. S.) 121; Collier *v.* Walters, L. R., 17 Eq. 252.

English statute itself has never been in force in some of the states, as in Ohio. Helfenstine *v.* Garrard, 7 Ohio, part 1, 275.

[1] Two fundamental rules, one of extension, the other of restriction, are laid down by the authorities as governing the quantum of estate of the trustee: 1. For every good trust, a legal estate sufficient for the execution thereof shall, if possible, be implied. Young *v.* Bradley, 101 U. S. 782; Doe *v.* Considine, 6 Wall. 458; Neilson *v.* Legrow, 12 How. 98; Webster *v.* Cooper, 14 How. 499; Ward *v.* Amory, 1 Curt. 419; Morton *v.* Barrett, 22 Maine, 257; Cleveland *v.* Hallett, 6 Cush. 403; Welch *v.* Allen, 21 Wend. 147; Williams Presbyterian Soc., 1 Ohio St. 478; Livingston *v.* Murray, 68 N. Y. 485, 495; Kirkland *v.* Cox, 94 Ill. 400; Noble *v.* Andrews, 37

Thus, where (*i*) the testator's real estate was devised to trustees, their survivors or survivor, and their or his heirs, &c., to secure a life annuity (which was to be paid out of the annual income), and then in trust for the testator's children, until they should attain twenty-one, "and then *unto* and among them, share and share alike, as tenants in common, and not as joint-tenants;" and the will contained clauses empowering the trustees to grant leases of the estates, and, if they should think it advisable, to sell any part thereof, *at any time after his* (the testator's) *decease*. It was held, notwithstanding this expression, that the estate of the trustees was confined to the minority of the children, being so restricted by the express devise to them.

Restrictive operation of words of direct gift.

A devise of copyhold lands in trust for a minor, and *to be transferred* to him at twenty-one, has been held to give to the trustees a chattel interest only, determinable at the majority of the cestui que trust; the Court thinking that the words "to be transferred," did not refer to a legal

Devise of copyholds "to be transferred" to A. at majority.

(*i*) Doe d. Budden *v.* Harris, 2 D. & Ryl. 36. See also Goodtitle d. Haward *v.* Whithy 1 Burr. 228; Edwards *v.* Symons, 6 Taunt. 212, Ackland *v.* Lutley, 1 Per. & D. 636, 9 Ad. & Ell. 879; Tucker *v.* Johnson, 16 Sim. 341; Plenty *v.* West, 6 C. B. 201; Doe d. Kimber *v.* Cafe, 7 Ex. 675; Baker *v.* White, L. R., 20 Eq. 176; Richardson *v.* Harrison, 16 Q. B. D. 85, 108. See also Godefroi on Trusts (2d ed.), 11, 12.

Conn. 346. 2. The legal estate in the trustee shall not be carried further than is required for the complete execution of the trust. Lewin, Trusts (6th Eng. ed.), 189; Young *v.* Bradley, supra; Norton *v.* Norton, 2 Sandf. 296; Williman *v.* Holmes, 4 Rich. Eq. 475; Smith *v.* Metcalf, 1 Head, 64; Ellis *v.* Fisher, 3 Sneed, 231; Farrow *v.* Farrow, 12 S. Car. 168. The writer cited gives many illustrations of each of these rules.

As to the first rule, he shows inter alia that the legal estate may be supplied in toto for the sake of an intended trust not fully set out. Thus, in case of a devise to a feme coverte of the issues of certain property, to be paid by the executors, the land itself is deemed to have been given to the executors in trust for effecting the purpose. Bush *v.* Allen, 5 Mod. 63; Doe *v.* Homfray, 6 Ad. & E. 206. Or the legal estate may, if necessary, be enlarged, rather than that the trust should fail. Doe *v.* Simpson, 5 East, 162.

As to the second rule, an illustration is found in the case of a devise to A. and his heirs (the language of a fee simple) in trust to pay the rents to B. for his life, and on his death the estate to C. in fee. Here the legal estate for B.'s life is in the trustee, and the legal estate of the remainder is vested in C. Adams *v.* Adams, 6 Q. B. 860; Cook *v.* Blake, 1 Exch. 220. So, too, though a fee simple be given in appropriate terms to trustees, and though appointees or heirs are to take interests only upon the happening of a contingency, still, when that contingency happens, if the trust has then been fully performed, the appointees or heirs, as the case may be, will at once take a legal estate of the extent given by the will as purchasers. Ward *v.* Amory, 1 Curt. 419, 428. See Pearce *v.* Savage, 45 Maine, 90. On the other hand, the death of the person for whose benefit a trust has been created, does not necessarily terminate the trust in the absence of a specific limitation to that effect. Slevin *v.* Brown, 32 Mo. 176. Compare Scott *v.* Rand, 115 Mass. 104. (But ordinarily it will. Post, p. 1156, note.) Nor where the trust is to terminate upon the performance of some act to be done at a time left to the discretion of the trustee can a third person, against whom the trustee is proceeding to recover trust property, object that the trustee has been negligent in omitting to perform the act, and that therefore his trust is to be deemed as at an end. Cumberland *v.* Graves, 9 Barb. 595. With regard to both of the above-stated rules, the courts will be guided, in determining upon the amount of interest in a trustee when the limits of his estate are not accurately defined by the testator, by the principle that the quantity of estate taken by the trustee is to be governed by the purposes of the trust, ascertainable from the will. Ward *v.* Amory, 1 Curt. 419; Coulter *v.* Robertson, 24 Miss. 278; Norton *v.* Norton, 2 Sandf. 296. Whatever be the general terms of the trust, the nature and duration thereof are, in the absence of clear language defining its limits, determined by its requirements. Young *v.* Bradley, supra; Doe *v.* Considine, supra.

transfer of the estate by surrender (in which case the trustees must have taken the fee to *enable them to make such surrender), but merely to the delivery of possession, and admission on the rolls of the manor (*k*). [*1141]

I. — 2. *Legal Estate by Implication from Direction to apply Rents, &c.* — Where the person to whom the real estate is devised for the benefit of another is intrusted with the application of the rents, he must, according to the principle before laid down, take the legal estate, in order that he may have a command over the possession and income.

Trustee takes legal estate, when directed to apply the rents;

In Shapland *v.* Smith (*l*) the trust was out of the rents, after deducting rates, taxes, repairs, and expenses, to pay such clear sum as remained to S. during his life, and after his death to the use of the heirs male of his body. The question was whether the use for life was executed in S., who, if it were, was tenant in tail male, by force of the rule in Shelley's case (*m*). Eyre, B., sitting for Lord Thurlow, thought there was no difference between a trust to pay the rents to a person, and a trust to permit him to receive them (see contra in the sequel), and, therefore, that the use in this case was vested in S.; but Lord Thurlow, on resuming his seat, determined that as the trustees were to pay taxes and repairs, the legal estate during the life of S. was in them.

— or to pay taxes and repairs;

In Silvester *v.* Wilson (*n*) the testator devised that the trustees should yearly during the life of his son J. W. receive the rents; and he ordered that they should be applied for the maintenance of the said J. W. The Court thought that it was intended that the trustees should have a sort of discretion in the application of the money, and, therefore, that they took the legal estate during the life of J. W.

— or to apply rents for maintenance of cestui que trust;

Indeed, without regard to the exact degree of discretionary power lodged in the trustees, the mere fact that they are made agents in the application of the rents is sufficient to give them the legal estate, as in the case of a simple devise to A. upon trust to pay the rents to B. And it is immaterial in such a *case that there is no direct devise to the trustees, if the intention that they [*1142]

(*k*) Doe d. Player *v.* Nicholls, 1 B. & Cr. 336. Cf. Maden *v.* Taylor, 45 L. J. Ch. 569.

(*l*) 1 B. C. C. 74. See also Browne *v.* Ramsden, 2 J. B. Moo. 612; Tenny d. Gibbs *v.* Moody, 3 Bing. 3, 10 J. B. Moo. 252.

(*m*) The question whether the trustees take any and what estate is often raised in this manner. See Jones *v.* Lord Say and Sele, 8 Vin. Ab. 262, pl. 19, 1 Eq. Ca. Abr. 383, pl. 4, as to which case see per Lawrence, J., 5 East, 167, Fearne, C. R. 54, n. by Butler; Silvester d. Law *v.* Wilson, 2 T. R. 444; Curtis *v.* Price, 12 Ves 89; Wykham *v.* Wykham, 18 Ves. 395; Biscoe *v.* Perkins, 1 V. & B. 485; Adams *v.* Adams, 6 Q. B. 860; Collier *v.* Walters, L. R., 17 Eq. 252.

(*n*) 2 T. R. 444. See also Doe *v.* Ironmonger, 3 East, 533; Reynell *v.* Reynell, 10 Beav. 21; Berry *v.* Berry, 7 Ch. D. 657; and see Plenty *v.* West, 6 C. B. 201.

—or to pay rents to a person.

shall take the estate can be collected from the will. Hence a devise to the intent that A. shall receive the rents and pay them over to B. would clearly vest the legal estate in A. (*o*).

But where real estate is devised to one person upon trust to permit and suffer another to receive the rents, the beneficial devisee takes the legal estate and not the trustee (*p*). The distinction between a direction to pay the rents to a person, and a direction to permit him to receive them, though often condemned, cannot now be questioned. In Doe d. Leicester *v.* Biggs (*q*), Sir James Mansfield said it was miraculous how it came to be established, since good sense requires in each case that it should be equally a trust, and that the estate should be executed in the trustee; for how could a man be said to permit and suffer who has no estate and no power to hinder the cestui que trust from receiving?

To permit receipt of rents, gives trustee no estate.

Where the expressions to "pay unto" and "permit and suffer to receive" are both used, it seems that the construction will (in conformity to a rule discussed in a preceding chapter (*r*)), be governed by the posterior expression. Thus, in Doe d. Leicester *v.* Biggs (*s*), where the trust was "to pay unto or permit and suffer A. to receive the rents," it was held that the words "permit and suffer," coming last, controlled the former trust, "to pay," and consequently that the estate was vested in A. (*t*).

Effect where both expressions are used.

In the proposition that a devise to a person upon trust to permit another to receive the rents, vests the legal estate in the latter, it is assumed that no duty is imposed on the trustee, either expressly or by implication, requiring that he should have the estate, for in such case it is clear the trustees will take the legal estate.

Trust to permit receipt, with other active duties;

Thus, in Biscoe *v.* Perkins (*u*), where a testator devised his real estate to his executors, their heirs, &c., for the life of his [*1143] *son A., to the intent to support the contingent remainders after limited, but in trust, nevertheless, to permit and suffer his said son to receive the rents for his own use during his natural life; and after his decease the testa-

—as to preserve contingent remainders;

(*o*) Doe *v.* Homfray, 6 Ad. & Ell. 206. See also cases cited post, p. 1154.

(*p*) Right d. Phillips *v.* Smith, 12 East, 455; Doe d. Noble *v.* Bolton, 11 Ad. & Ell. 188; but see Gregory *v* Henderson, 4 Taunt. 772, post, p. 1143.

(*q*) 2 Taunt. 109; and see 1 Ed. 36, n., and 1 B. C. C. by Eden, 75, n.

(*r*) Ch. XV.

(*s*) 2 Taunt. 109; so in Baker *v.* White, L. R., 20 Eq. 166. See also Re Allsop and Joy, 61 L. T. 213.

(*t*) But might not the alternative terms of the devise in such a case have been considered as giving the trustees an option? This would have avoided the repugnancy. In Re Tanqueray-Willaume and Landau, 20 Ch. D. at p 478, Jessel, M. R., said that such a case as Doe *v.* Biggs, decided on such narrow grounds, cannot be treated as establishing any principle applicable to other cases.

(*u*) 1 V. & B. 485. See also White *v.* Parker, 1 Bing. N. C. 573, 1 Scott, 542.

tor devised the same to the first son of A. in tail. Lord Eldon held that A. did not take the legal estate, as the purpose of preserving the contingent remainders required that it should be in the trustees.

So in Re Tanqueray-Willaume and Landau (*v*), where there was a devise to the testator's wife and son, their heirs, and assigns, upon trust to pay the rents, &c., or permit the same to be received by the wife during her life, and, after her decease, to raise and pay out of the property certain legacies, and as to the residue to the testator's son in fee. The Court of Appeal held that the wife and son took the legal estate as joint tenants in fee.

— as to raise and pay legacies;

Upon the same principle, it has been often decided that a trust to permit a feme covert to receive the rents for her separate use, vests the estate in the trustees (*x*).

— to secure separate use of f. c.

And where (*y*) a trust to permit and suffer the testator's wife to receive the rents during her widowhood was followed by a direction, that her receipts, *with the approbation of any one of his trustees*, should be good; it was held that the legal estate was vested in the trustees, it being clearly intended that they should exercise a control.

Receipts with the approbation of trustees to be good.

And a similar construction was given to a direction that the trustees should permit the beneficial devisee to receive the *net* rents and profits; this term being used, it was thought, in contradistinction to the *gross* profits, which were intended to be received by the trustees, and the surplus paid over to the person beneficially entitled, both purposes evidently requiring that the trustees should have an estate (*z*).

To permit A. to receive *net* rents.

I.—3. *Legal Estate by Implication from Direction to sell and convey.* — Where the duty imposed on the devisee is to sell or * convey (*a*) the fee simple, he is held to take the inherit- [*1144] ance to enable him to comply with the direction,[1] though in

(*v*) 20 Ch. D. 465.

(*x*) Harton *v.* Harton, 7 T. R. 652; Doe d. Woodcock *v.* Barthrop, 5 Taunt. 382. See also Doe d. Stephens *v.* Scott, 4 Bing. 505, 1 M. & Pay. 317; a fortiori, where the direction is to pay them to her, Nevil *v.* Sanders, 1 Vern. 415, 1 Eq. Ca. Ab. 382, pl. 1; Robinson *v* Grey, 9 East, 1; Hawkins *v.* Luscombe, 2 Sw. 375; and see Toller *v.* Attwood, 15 Q. B. 929; Plenty *v.* West, 6 C. B. 201; but as to a deed, see Williams *v.* Waters, 14 M. & Wels. 166.

(*y*) Gregory *v.* Henderson, 4 Taunt. 772, which compare with Broughton *v.* Langley, Salk. 679, 2 Ld. Raym. 873, 1 Lutw. 823.

(*z*) Barker *v.* Greenwood, 4 M. & Wels. 421.

(*a*) Garth *v.* Baldwin, 2 Ves. 646; Doe d. Booth *v.* Field, 2 B. & Ad. 564; Doe d. Shelley *v.* Edlin, 4 Ad. & Ell. 582. See the rule, as stated in the text, approved of, and commented on by Lord Esher, M. R., in Richardson *v.* Harrison, 16 Q. B. D. at p. 105.

[1] A devise of an estate generally, or indefinitely, with power to convey in fee, carries a fee. Doe *v.* Howland, 8 Cowen, 277; Bell *v.* Humphrey, 8 W. Va. 1; 4 Kent, 319. A fortiori when the trustee is also directed to take possession and manage the estate and pay the taxes thereon until the sale. Duvall *v.* English Church, 53 N. Y. 500; Briggs *v.* Davis, 21 N. Y. 574. It is otherwise, if the power be to devise merely. Id. But where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition, or to appoint the fee by deed or will, be annexed; unless there should be

Direction to sell or convey gives legal estate to devisee.

such a case it is too much to affirm that the testator's intention cannot in any other manner be effected; for, by means of a power, the trustee might be authorized to convey without himself having an estate. It seems to be a more reasonable conclusion, however, that the testator, by devising the property to the person who is directed to make the conveyance or sale, intended not merely to make him the medium or instrument through which to vest the estate in the beneficial devisee, but that he should take an estate commensurate with the duty which was assigned to him; and the ground for this construction is obviously strengthened, when there are other purposes requiring that the trustee should have *some* estate.

In Bagshaw *v.* Spencer (*b*), a devise to trustees and their heirs,

(*b*) 1 Ves. 142, 2 Atk. 570. See also Gibson *v.* Rogers, Amb. 93; Sanford *v.* Irby, 3 B. & Ald. 654; Watson *v.* Pearson, 2 Ex. 581; Blagrave *v.* Blagrave, 4 Ex. 550; Reynell *v.* Reynell, 10 Beav. 21; Rackham *v.* Siddall, 1 M. & Gord. 607, 2 H. & Tw. 44; Doe d. Noble *v.* Bolton, 11 Ad. & Ell. 188; Underhill *v.* Roden, 2 Ch. D. 499; but see Hawker *v.* Hawker,

some manifest general intent of the testator, which would be defeated by adhering to this particular intent. See 4 Kent, 319, 320; Jackson *v.* Robins, 16 Johns. 588; Flintham's Case, 11 Serg. & R. 16.

In cases of devises to executors, the earlier decisions established the distinction that a devise of land to executors to sell passed the interest in it; but a devise that executors shall sell, or that the lands shall be sold by them, gave them but a power. This distinction was taken as early as the time of Henry VI., and it has received the sanction not only of Littleton and Coke, but also of modern judges. Litt. § 169; Co. Litt. 113 a, 181 b; Fay *v.* Fay, 1 Cush. 93, 105; Bergen *v.* Bennett, 1 Caines Cas. 16; Jackson *v.* Scauber, 7 Cowen, 187; Peck *v.* Henderson, 7 Yerg. 18; Bogert *v.* Hertell, 4 Hill, 492; Greenough *v.* Welles, 10 Cush. 571. So it is said that a devise of the land to be sold by the executors confers a power, and does not give any interest. Ferebee *v.* Proctor, 2 Dev. & B. 439; *s. c.* Dev. & B. Eq. 496; Patten *v.* Crow, 26 Ala. 426; 4 Kent, 320, notes. But compare Shippen *v.* Clapp, 29 Penn. St. 265.

Mr. Chancellor Kent has well observed that the distinctions on this subject appear overstrained; 4 Kent, Com. 321, note; and it may be added that the effort of judges and writers has sometimes indicated a stronger desire to lay down an artificial rule of law, however arbitrary, than to carry into effect the testator's intention. When, however, the power to sell is connected with directions to apply the proceeds upon trusts, it is then in the nature of a trust and becomes imperative upon the executors. They must sell and apply the proceeds according to the directions. Greenough *v.* Welles, 10 Cush. 571, 576; Gibbs *v.* Marsh, 2 Met. 243, 251. See Moore *v.* Hegeman, 72 N. Y. 376; Leggett *v.* Perkins, 2 Comst. 297; Mitchell *v.* Spence, 62 Ala. 450; Patten *v.* Crow, 26 Ala. 431. So a devise at common law to executors by name, with directions to sell, intercepted the descent to the heir, coupling an interest with the power. Mitchell *v.* Spence, supra. But if there is only a direction to the executors to sell and apply the proceeds in a particular manner, and there are no duties or trusts devolved upon them which render it necessary to imply a grant of the legal estate, the heirs-at-law will take the legal estate, subject to be divested immediately upon the execution of the power. Greenough *v.* Welles, supra. See also Bruner *v.* Meigs, 64 N. Y. 506; Heermans *v.* Robertson, id. 332.

In regard to the exercise of a power, where a testator directs his estate to be disposed of for certain purposes without declaring by whom the sale is to be made, and the proceeds are to be distributed by the executor, the direction is good, and the power to sell is vested by implication in the executor. Queever *v.* Trew, 6 Heisk. 59. In the case of discretionary powers, it may be observed, the power is not transmitted to an administrator with the will annexed, under the statutes of Alabama. Mitchell *v.* Spence, 62 Ala. 450; Anderson *v.* McGowan, 42 Ala. 285; Tarver *v.* Haines, 55 Ala. 503.

Under the statutes of New York, when an executor takes for administration the growing crops of land well devised, as he may do (Stall *v.* Wilbur, 77 N. Y. 158), and it turns out that there are no creditors of the estate, then, inasmuch as the crops cannot in such cases be sold to pay legacies (Stall *v.* Wilbur, supra), the executor holds them by a mere naked trust: and the whole title to the crops, legal and equitable, vests at once in the devisee. He could, therefore, by an order of the surrogate, or by a suit in equity, compel the executor to deliver them to him. Stall *v.* Wilbur. And if the executor in such a case has sold the crops and converted the avails to his own use, the devisee may at once sue him for the value thereof. Id.

upon trust out of the rents or by sale or mortgage to raise so much as should be sufficient for the payment of debts, legacies, and funeral expenses; and then as to one moiety upon trust for and to the use of B. for life, remainder to trustees to preserve contingent uses, &c., was held by Lord Hardwicke to vest the fee in the trustees, as they were "to sell the lands" by virtue of their estate.

In this case the testator evidently intended the trustees to take the inheritance, as they were to raise the money either out of the rents or by sale or mortgage of the estate, and the former purpose could not be answered by a mere power; though it is observable that the construction adopted by the Court rendered nugatory the remainder in trust for preserving contingent remainders.

Remark on Bagshaw *v.* Spencer.

Even a devise to trustees and their heirs, in trust for several persons as tenants in common for life, and afterwards for their children, and if any tenant for life should die without issue (*i. e.*, such issue, viz. children), then his share to "go to the * survivor or survivors of them and [*1145] their heirs, and to be conveyed and assured to them and their heirs accordingly," was held to give them the fee simple to enable them to *convey* in the event mentioned (*c*).

"In trust and to be conveyed accordingly."

But a formal devise to trustees in fee to successive uses in settlement (with a limitation to the trustees after each life estate to preserve contingent remainders) will not give the legal fee to the trustees (thereby converting all the uses into equitable interests) merely because the will contains a power authorizing them to "*convey* in exchange or on partition," although there are contingent remainders which in the result are not effectually preserved (*d*).

In Richardson *v.* Harrison (*e*) a testatrix devised freeholds to trustees, their heirs and assigns, upon trust for her daughter during her life, and after her decease for her children as she should by deed or will appoint, and in default of such appointment, in trust for the daughter's right heirs. The testatrix directed that the daughter's receipt should be a sufficient discharge to the trustees, and that the property should be enjoyed by her free from the debts or control of any husband, and further directed that *it should be lawful* for the trustees, with the consent of the daughter or other beneficiaries, to sell the property. The daughter survived the testatrix but died unmarried. It was held by the Court of Appeal that the trustees took under the

Devise to trustees in fee followed by discretionary authority to sell.

3 B. & Ald. 537. A direction to convey without any words of devise gives a power only, Doe *v.* Shotter, 8 Ad. & Ell. 905; Queen *v.* Wilson, 3 B. & S. 201 (copyhold): so a direction to settle, Knocker *v.* Bunbury, 6 Bing. N. S. 306, 8 Scott, 414.

(*c*) Maden *v.* Taylor, 45 L. J. Ch. 569. Cf. Doe *v.* Nicholls, 1 B. & Cr. 336, ante, p. 1140; see and consider Fowke *v.* Draycott, 29 Ch. D. 996, 1002.

(*d*) Cunliffe *v.* Brancker, 3 Ch. D. 393.

(*e*) 16 Q. B. D. 85.

will a legal estate in fee simple, and that the estate for life devised to the daughter and the remainder to her right heirs coalesced pursuant to the rule in Shelley's case (*f*), so as to give the daughter an equitable estate in fee simple in the property. Sir H. Cotton, L. J. (*g*), distinguished the case of Cunliffe *v.* Brancker, on the ground that there the whole will was framed on the footing of the beneficial interest being united with the legal interest, and there was an express limitation of a term to the trustees.

Lands being charged with debts and legacies will not vest the estate in the trustees.

I. — 4. *Effect of Charge of Debts.* — The mere fact, that the devised property is charged with debts or legacies, will not vest the legal estate in the trustees, unless they are directed to pay them, or the will contains some other indication of an intention to create a trust for the purpose.

[*1146] * Thus, where (*h*) the testator, as to his real and personal estate, subject to his debts, legacies, and funeral expenses, devised the same as follows, that is to say: unto M. and W. and their heirs, upon trust and to and for the several uses, &c., following, that is to say: to the intent that they the said M. and W. or the survivor of them or the heirs, executors, and administrators of such survivor should in the first place apply the testator's personal estate in discharge of debts, funeral expenses, and such legacies as he might direct; and to his real estates, subject to his debts and such charges as he might then or thereafter think proper to make, he gave and devised the same unto P. for his life, with remainders over. The Court held that the estate was executed in P. for his life. Lord Alvanley, C. J., said, "unless it appeared manifestly that the testator intended that the trustees should be active in paying the debts, the legal estate would not vest in them. The question was, whether there were such apparent intention on the face of this will. It would, indeed, be much more convenient that the legal estate should be vested in trustees for the payment of the debts, than that the trust should be executed by the devisee under the direction of a Court of Equity; for a Court of Equity could not enable the devisee to make a complete title to the estate (*i*). But this," he added, "was only an argument ab inconvenienti, from which we cannot construe the testator to have said what, in fact, he has not said."

But if the testator has devised the land to the trustees in fee simple and has appointed them executors, and directed them to pay the debts which he has charged on the land, the legal estate in fee will vest in the trustees (*k*). But a direction to pay debts will

(*f*) See as to this, post, p. 1177.
(*g*) 16 Q. B. D. at p. 110.
(*h*) Kenrick *v.* Lord Beauclerk, 3 B. & P. 178.
(*i*) This deficiency is now supplied by 1 Will. 4, c. 47, s. 12, 13 & 14 Vict. c. 60, and 15 and 16 Vict. c. 55.
(*k*) Creaton *v.* Creaton, 3 Sm. & G. 386; Spence *v.* Spence, 12 C. B. (N. S.) 199; Smith *v.*

not enlarge an estate pur autre vie, given to trustees, to a fee simple (*l*).

Here, it may be observed, that where real estate is devised to trustees for the payment of debts and legacies, though the property becomes applicable only in case of the deficiency of the personal estate, the trustees take the legal estate in fee instanter, independently of the fact of the personalty proving * deficient (*m*). But it is otherwise where [*1147] the devise is in terms made contingent on this event (the language of the will being, "*in case* my personal estate shall not be sufficient to pay debts, &c., then I devise, &c." (*n*)). But even in such case the trustees, on the happening of the contingency, take an absolute fee simple in the whole which continues in them as to the residue of the property, after they have, by a sale of part, raised sufficient money to answer the charge (*o*).

To pay debts in aid of personalty.

Where *devise* is in terms contingent on personalty being insufficient.

In Hawker *v.* Hawker (*p*), where an estate was made salable by trustees, in the event of the proceeds of another estate proving deficient, *which they did not*, to pay the testator's debts, it appears to have been considered, that having regard to the terms in which the estate was given to the beneficial devisees in the event of its not being wanted (such devises being framed in the manner of regular and formal limitations of the legal estate, including one to trustees for preserving contingent remainders), the trustees did not take the fee. As, however, the estate was in the first instance actually given to the trustees and their heirs, the point seems to have been one of great nicety and difficulty, and the propriety of the decision has been questioned by an eminent writer (*q*).

Where *trust* is contingent on that event.

A different construction prevailed in Doe d. Cadogan *v.* Ewart (*r*), where a testator devised to A., B., and C., and the survivors or survivor of them and the heirs of such survivor (*s*), all his real estate, charged with the payment of a life annuity and so much of his debts, legacies, funeral expenses, and the costs of proving his will, as his personal estate should not extend to, upon the trusts following: upon trust to pay the rents to his wife during widowhood,

Trustees held to take the fee notwithstanding expressions apparently conferring a power only.

Smith, 11 C. B. (N. S.) 121; Re Tanqueray-Willaume and Landau, 20 Ch. D. 465, 479; Marshall *v.* Gingell, 21 Ch. D. 790.

(*l*) Doe d. Muller *v.* Claridge, 6 C. B. 641; the estate of the trustees may have been restricted to the life on the principle of Bolton *v.* Bolton, L. R., 5 Ex. 145, ante, p. 1152, where the devise was without words of limitation with a gift over on the devisee's death.

(*m*) Murthwaite *v.* Jenkinson, 2 B. & Cr. 357, 3 D. & Ry. 765. See also Doe *v.* Field, 2 B. & Ad. 564.

(*n*) Goodtitle d. Hart *v.* Knott, Cowp. 43.

(*o*) Doe d. Cadogan *v.* Ewart, 7 Ad. & Ell. 636. But here the trust only was contingent.

(*p*) 3 B. & Ald. 537.

(*q*) Sugd. Pow. 8th ed. 111. See also per Jervis, C. J., Poad *v.* Watson, 6 Ell. & Bl. 619.

(*r*) 7 Ad. & Ell. 636, 3 Nev. & P. 197. But see Doe *v.* Shotter, 8 Ad. & Ell. 905.

(*s*) These words make the trustees joint-tenants for life, with a contingent remainder in fee to the survivor. See ante, p. 1115, n. (*b*).

and after her decease or marriage again, upon trust to apply the rents for the maintenance of his daughter J. until she should attain twenty-five, and after her attaining that age, upon trust, charged as aforesaid, for her and her heirs and assigns; but in case she should die without leaving issue lawfully begotten, then the testator gave [*1148] the said * real estate to D. and E., their heirs and assigns forever. And the testator ordained that the trustees, for the performance of his will, in order to raise money for the payment of his debts, funeral expenses, and legacies, should, with all convenient speed after his decease, *in case* the residue of his personal estate should be insufficient for that purpose, *bargain and sell and alien in fee simple any part of his freehold lands before mentioned;* for the doing whereof he gave to his trustees and the survivors, &c., and the heirs, &c., full power and authority to grant, alien, bargain and sell, convey and assure the same premises or any part thereof to any person or persons and their heirs forever in fee simple, by all such lawful ways and means in the law as to them should seem fit. And the testator authorized the trustees and the survivors, &c., and the heirs, &c., to give receipts for the purchase-money; and did commit the management of the estates and fortunes of his daughter to his trustees and executors until she should attain twenty-five. The testator's widow died in his lifetime. *The personal estate proved insufficient to pay the debts*, and it was held that in this event the trustees took an absolute fee in the real estate, and not (as had been contended) a mere estate of freehold until the testator's daughter attained twenty-five, with a power to sell for the payment of debts and legacies (*t*): and further, that as the will did not confine the power to sell to so much as should be sufficient to pay the debts, and as there was no devise over of such parts as should remain unsold, the trustees retained the fee simple in the unsold part.

Although the Court appeared to rely on the fact that the contingency mentioned in the trust had actually happened, the principle of their decision was that the fee originally devised to the trustees was to be cut down only if a less estate would (without reference to subsequent events) have *certainly* enabled them to fulfil all the trusts (*u*). This principle has been frequently enunciated in later cases (*x*), and would seem to make it immaterial whether [*1149] the contingency mentioned in the trust *does or does not happen. And with regard to the trust not being confined to selling so much as should be sufficient to answer the charge, the

(*t*) Sometimes a trust or a power of sale is to be exercised during the continuance of the trusts, and the question arises as to what is to be deemed a "continuance" thereof. It is clear that the mere fact of the estate being outstanding in the trustees by reason of their neglect to convey at the proper period does not prolong their power. Wood *v.* White, 3 Kee. 664; but as to this case, see 4 M. & Cr. 460.

(*u*) 7 Ad. & Ell. 666, 667, citing Doe *v.* Edlin; see also Doe d. Kimber *v.* Cafe, post, p. 1152.

(*x*) See Poad *v.* Watson, 6 Ell. & Bl. 606; Maden *v.* Taylor, 45 L. J. Ch. 569 (trust to convey *in one event*). This principle appears to have been overlooked in Ward *v.* Burbury, 18 Beav. 190; but that case has been said to stand alone, per Jessel, M. R., L. R., 17 Eq. 257.

mere possibility of the whole being required for the debts was sufficient in Lord Hardwicke's opinion "to consider them as trustees throughout" (*y*).

Authority to grant leases when it confers the fee.

I. — 5. *Effect of Power to Lease.* — An authority to grant leases of an indefinite duration has been in some cases considered to supply an argument for holding trustees to take the inheritance, scarcely less cogent than a direction to sell.

Thus in Doe d. Tomkyns *v.* Willan (*z*), where a testator devised to trustees, their heirs, executors, administrators, and assigns, all his real and personal estates, in trust to let the freehold estates *for any term they should think proper*, at the best improved yearly rent, and to pay one-third of the rents of the freehold estates to the testator's wife for life, and to pay the rents of the other two-thirds, and after the death of the wife, the remaining third to his daughter E. Longman for her separate use, and after her death the testator devised his freehold and two-thirds of his personal estate to his daughter's children, to be equally divided amongst them, and to be paid them at their respective ages of twenty-one years; and if his daughter died without leaving issue, then the testator devised his freehold estates to his wife for life, and after her death to his heir-at-law as if he had died intestate, it was contended that the trustees took an estate determinable at the decease of the daughter, when the purposes of the trusts were satisfied; and that the authority to make leases for any term conferred a power and was not a measure of their estate. It was held, however, that the trustees took the fee. Bayley, J., observed, "There are no words here which distinctly create a power in the trustees; and it seems to me, that when an estate is devised upon a trust, and the trustees are to demise for any term they think proper (although at the best improved rent), the true construction is, that they are to create a term out of their interest; and if so, they must have a reversion after that term entirely ceases." He next adverted to the trusts respecting the application of the rents during the lives of the testator's wife and daughter, and said, "Then comes a limitation * to her [*1150] [the daughter's] children, and it is said that that limitation gives to them the legal estate, and that in that part of the will there is a change of language which shows that at that period of time all the former purposes of the trust were to cease. The language there used is not so clear as to satisfy my mind that that was necessarily the intention of the testator. That the interest, if defeasible, would continue until the death of E. Longman and would not end when her

Doe d. Tomkyns *v.* Willan.

(*y*) Gibson *v.* Rogers, Amb. 95. A gift over of what might remain unsold, though relied on in some other cases (see Glover *v.* Monckton, 3 Bing. 13, presently noticed), would seem equally ineffectual as against this possibility.

(*z*) 2 B. & Ald. 84.

first husband died, seems to me to receive some confirmation from this, that if E. Longman had no child by her first husband, the limitation to her children, as far as it regarded children by a future marriage, would have been a contingent remainder, and if the trustees did not take an interest co-extensive with her life, but one which might determine on the death of her first husband, that contingent remainder might have been defeated by the acts of E. Longman in her lifetime (*a*). The estate, therefore, to the trustees seems necessary for the purpose of protecting the interests of the children; and inasmuch as the words 'to them and their heirs' are calculated to give them the fee, I am not prepared to say that they took less than the whole legal estate."

So, in Doe d. Keen *v.* Walbank (*b*), where a testator devised lands to trustees and their heirs, upon trust to permit his daughter to enjoy the same and take the rents during her life, exclusively of her husband; and after her decease upon trust to the use of such child or children and for such estate as she, notwithstanding her coverture, should by any deed or will appoint; and for want of such appointment, then to the use of the heirs of her body: and for default of such issue, to his own right heirs forever. Then, after several other devises to the trustees in the like terms, the testator concluded thus: — "And I hereby will, &c. that the said trustees and each of them shall, may, and do in every respect give receipts, pay money, and *demise the aforesaid premises* or any part thereof as shall be consistent with their duty and trust or otherwise." It was held that the trustees took the fee simple in the lands devised to them. Lord Tenterden, C. J., observed, in answer to the argument that the words might be held to confer a *power* of leasing, that the language of the clause was unlike that of any clause by which a leasing power had been given, and that it specified no limit or qualification as to duration, rent, or other matter, but [*1151] seemed intended to authorize any lease that * would not be considered in a Court of Equity as a violation of the duty of a trustee.

Indefinite power of leasing.

And where the authority to lease is accompanied by a direction to discharge taxes or other outgoings out of the rents and profits, the ground for giving to the trustees the legal estate is still more conclusive.

Power to lease, with direction to pay taxes.

Thus, in White *v.* Parker (*c*), where a testator devised property to two trustees, in trust, as to three fourth parts, to pay *or permit and suffer* his wife and two daughters respectively *to receive* each one-fourth of the *clear* yearly rents and profits to their respective sole and separate uses during their respective lives; and as to the other

(*a*) As to this vide, post, p. 1162.
(*b*) 2 B. & Ad. 554. See also Riley *v.* Garnett, 3 De G. & S. 629.
(*c*) 1 Scott, 542, 1 Bing. N. C. 573.

fourth, in trust to pay to *or permit and suffer* his son *to receive* the *clear* yearly rents and profits for life, with a contingent remainder; *and the trustees were empowered to demise the premises* for any term not exceeding seven years, *reserving the best rent*, and were directed out of the rents and profits to pay and discharge all outgoings for taxes or otherwise in respect of the premises, and to keep the premises in repair. It was held that the legal estate in the whole vested in the trustees, but whether beyond the lives mentioned it was unnecessary to decide.

But in Ackland *v.* Lutley (*d*), where a testator devised lands to A. and B. upon trust that they and their heirs should set and let the premises, and out of the rents and profits in the first place pay a debt owing by the testator to M.; and in the next place pay certain legacies, which were to be paid as soon as the clear rents and profits would admit thereof; and from and after the debt and legacies were paid and discharged, the testator gave the same to C., his heirs and assigns forever. It was contended that, according to the recent authorities, the indefinite power of leasing constituted a ground for the trustees taking the fee; but the Court of Queen's Bench decided that the estate of the trustees terminated on the discharge of the debt and legacies, and the Court of Common Pleas afterwards came to the same decision on the same will (*e*). The latter Court distinguished the preceding cases on the ground that no one could suppose at the death of the testator that the trustees could require more than a chattel interest, and that of a very limited extent, to make the specific ascertained payments which they were directed to make out of the rents of the estate (*f*).

Remarks on Ackland *v.* Lutley.

* In Doe *v.* Willan (as here) the disposition in favor of the [*1152] beneficial devisees was in the language not of a trust but of an independent devise: but, besides the distinction drawn in C. P. (the soundness of which has been questioned (*g*)), there were in Doe *v.* Willan other purposes, besides the power of leasing, requiring the trustees to take some estate (and it would seem an estate pur autre vie, the trust being for the separate use of a woman) which did not exist in the case just stated. The same remark applies to Doe *v.* Walbank. In this state of the authorities it seems too much to affirm that the giving to trustees an indefinite power to grant leases constitutes of itself an adequate ground for holding them to take the fee.

Still, the general rule now constantly acted upon is that where an estate is given to trustees all the trusts must prima facie be performed by them by virtue or out of the estate vested in them; and it

(*d*) 9 Ad. & Ell. 879, 1 Per. & D. 636.
(*e*) Ackland *v.* Pring, 2 M. & Gr. 937, 3 Scott, N. R. 297.
(*f*) See also Doe d. White *v.* Simpson, 5 East, 162; Heardson *v.* Williamson, 1 Kee. 33, both stated post.
(*g*) By Jessel, M. R., L. R., 17 Eq. 257.

seems to follow that if the devise is in fee, and there is a trust to grant leases of indefinite duration, the trustees will prima facie have the legal estate in fee, being the only estate which will enable them to perform the trust out of the estate vested in them (*h*). The case is no doubt stronger where there are other trusts which clearly require the trustees to take some estate; for "it would be a strange and artificial construction to hold first that the natural meaning of the words should be cut down because they would give an estate more extensive than the trust required, and then when the trust does require the whole fee simple that it must be supplied by way of power defeating the estate of the subsequent devisees, and not out of the interest of the trustees" (*i*).

To rebut this prima facie construction it must be shown on the face of the will what less estate of definite duration will enable the trustees to serve the trusts out of their interest and not by way of power; and this not according to subsequent events, but according to events possible at the testator's death (*k*). Thus in Doe d. Kimber *v.* Cafe (*l*), where a testator devised a house to trustees, their heirs and assigns, in trust to pay the rents to his daughter E. for life for her separate use, and after her death to apply them [*1153] for the maintenance of her children * during their minority, and upon the youngest living attaining twenty-one the testator devised the property to the children then living. Another estate was devised to the same trustees, in trust for the testator's grandson W. until he attained twenty-one, and then to W. in fee. And power was given to the trustees to lease both estates for twenty-one years. Pollock, C. B., delivered the judgment of the Court, and observed that a power to lease afforded an argument of weight in favor of the legal estate (in fee) being intended to be given to the trustees, *especially* if it was an indefinite power as in Doe *v.* Walbank, but that it was not conclusive: and they held that the purposes of the trust did not require the estate of the trustees to continue after the youngest child had attained twenty-one, and that the power to lease was a *power* only to be exercised during the continuance of this estate so limited. "The authority to lease (said the C. B.) extends to all the houses devised to them, and in one of the devises an estate in fee is devised to the grandson on attaining twenty-one; and it cannot be supposed it was meant they should lease for twenty-one years in the event of that estate coming into possession."

Definite power to lease held exercisable only during other (clear) trusts.

Doe *v.* Cafe.

The argument in favor of giving the fee to the trustees afforded by the power to lease for a limited term was thus treated as not differing

(*h*) See per Jessel, M. R., Collier *v.* Walters, L. R., 17 Eq. 265.
(*i*) Per Parke, B., Watson *v.* Pearson, 2 Ex. 581.
(*k*) Id.; per Holroyd, J., 4 B. & Ald. 93.
(*l*) 7 Ex. 675.

in kind from that afforded by an indefinite power; and it is not immediately obvious what estate of defined duration less than a fee the Court would hold sufficient in order that a lease even for a limited term might take effect out of the interest of the trustees, and not by way of power.

A power for trustees to accept surrenders of leases, though capable of a different interpretation if the context requires it, means prima facie the acceptance of the particular estate by a person having *an estate* in reversion (*m*). And a trust to apply rents and the value of mature timber in payment of debts implies such an estate in the trustees as will authorize them to cut the timber, that is the fee (*n*).

As to a power to accept surrenders of leases.

I. — 6. *Effect of informal Expressions.* — The case of Trent *v.* Hanning (*o*) is remarkable for the difference of opinion which prevailed in regard to the effect of some very ambiguous words. The will was in the following terms: "I do hereby give unto my wife 200*l.* per annum during her natural life in addition to her jointure" (which was an annuity secured to her before marriage *out of his real estate), "my just debts being previously paid, and I do give unto my younger children 6,000*l.* each, to be paid when they severally come to the age of twenty-one; and I do appoint B., C., and D. as *trustees of inheritance* for the execution thereof." The Court of Common Pleas, on a case from Chancery, held that the trustees took no estate, and had no power to create any; but Lord Eldon being dissatisfied with this opinion, and considering that upon this point turned the question, whether the annuity debts and portions were a charge upon the real estate, sent a case to the Court of King's Bench, three Judges of which (Ellenborough, Grose, and Le Blanc, dissentiente Lawrence) certified that the trustees took an estate in fee; they being of opinion that the words "trustees took of inheritance" were equivalent to the words "trustees of my inheritance" or "trustees to inherit my estates for the execution of this my will." Lord Eldon decided in conformity with this certificate, and his decision was finally affirmed in the House of Lords (*p*). [*1154]

Again, in Plenty *v.* West (*q*), the words "I appoint W. executor of this my will so far as is necessary to the performance of the trusts relating to my real estate" occurring in a testamentary paper purporting to dispose only of real estate, and containing no direct devise (*r*), but only a direction as to the division of such real estate, were held to give W. an

Appointment of persons to perform trusts of will;

(*m*) Blagrave *v.* Blagrave, 4 Ex. 550.
(*n*) Collier *v.* Walters, L. R., 17 Eq. 265.
(*o*) 1 B. & P. N. R. 116, 10 Ves. 495, 7 East, 97.
(*p*) 1 Dow. 102.
(*q*) 6 C. B. 201.
(*r*) There was in fact a devise vesting the fee in trustees, but this was omitted in the case sent from Chancery for the opinion of the Court of C. P. See 16 Beav. 175.

estate in fee simple. And an appointment of A. and B. "to be trustees as also their heirs and *assigns* to both will and codicil" (both of which instruments dealt with real and personal estate), was held by Sir R. Kindersley, V.-C., to give the legal fee to the trustees (*s*).

— "to be trustees as also their heirs and assigns."

But where there was a direct devise to two in trust, a subsequent appointment of these two and a third "to be trustees and executors" was held not to make the third a joint devisee (*t*).

Direction to trustees to pay certain sums out of estate.

A direction that annual or gross sums shall be paid out of an estate by persons who are appointed executors of the estate (*u*), or of the will (*x*) or trustees "to see justice done" (*y*), or the direction alone without such [*1155] appointment (*z*), is, it seems, an *implied devise of the fee to those persons; so also a direction for payment of debts, &c., and distribution of the residue, without saying by whom such payment and distribution is to be made, has been held to give the legal estate in fee to the executors (*a*). And a direction to executors to manage leaseholds and pay the clear rents to A. for life is a devise of the legal estate to the executors during the life of A. (*b*). So an appointment by codicil of a trustee in the place of a trustee named in the will, operates as an implied gift to the former of the trust estate (*c*).

II. — Determination of the Nature and Quantity of Estates of Trustees. — 1. *General Principles.* — The reader will have perceived (though the position has not hitherto been distinctly advanced), that the same principle which determines whether the trustees take any estate, regulates also the nature and duration of that estate; the established doctrine being (subject to certain positive rules of construction, propounded by the legislature, and which will be presently considered) that trustees take exactly that quantity of interest which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance: but whether the exigencies of the trust as they appear on the face of the will, without reference to events subsequent to the testator's death, demand the fee simple, or can be satisfied by any and what less estate (*d*). Those cases however in which

Principle which regulates the *quantity* of estate.

(*s*) Bennett *v.* Bennett, 2 Dr. & Sm. 272.
(*t*) Sidebotham *v.* Watson, 11 Hare, 170.
(*u*) Doe d. Gillard *v.* Gillard, 5 B. & Ald. 785.
(*x*) Oates *v.* Cooke, 3 Burr. 1684, 1 W. Bl. 543.
(*y*) Anthony *v.* Rees, 2 Cr. & J. 75.
(*z*) Doe d. Beezley *v.* Woodhouse, 4 T. R. 89. See also Ex parte Wynch, 5 D. M. & G. 220; Re Boyce, 33 L. J. Ch. 390; and cf. London and South Western Rail Co. *v.* Bridger, 10 Jur. (N. S.) 650.
(*a*) Davies to Jones and Evans, 24 Ch. D. 190.
(*b*) Stevenson *v.* Mayor of Liverpool, L. R., 10 Q. B. 81.
(*c*) Re Hough's Will, 4 De G. & S. 371; Re Turner, 2 D. F. & J. 527.
(*d*) 8 Vin. Ab. 262, pl. 19, 3 B. P. C. Toml. 113, 1 Eq. Ca. Ab. 383, pl. 4; 3 Taunt. 326,

it is laid down that the Courts look *solely* to the trusts to be performed, even where there are words of inheritance, must be read with this qualification, that those words are to have their natural effect to give a fee simple unless the context shows that it is cut down to an estate terminating at some time ascertained at the time of the testator's death. If no precise period for the termination can be shown, it remains an estate in fee (*e*).

Thus, in the case of a devise to a trustee and his heirs, upon trust *to pay and apply the rents* for the benefit of a person for * life, and after his decease to hold the lands *in trust* for [*1156] other persons; the direction to apply the rents being limited to the cestui que trust for life, the estate of the trustee will terminate at his decease (*f*).[1] And it seems that a limitation to trustees and their heirs may be restrained by implication to an estate pur autre vie even in a deed (*g*), if necessary to prevent inconsistency or contradiction (*h*).

Estate of trustees commensurate with duties.

Again, in Adams *v.* Adams (*i*), there was a devise to trustees and their heirs upon trust to permit and suffer J. to take the rents during his life, "subject with this proviso to pay my wife or her assigns an annuity of four guineas during her life; if J. die before my wife, to permit my wife to enjoy the lands during her life," and after the decease of J. and the testator's wife, the lands were devised to the heirs male of the body of J. The wife died in the lifetime of J. It was held, assuming that the annuity to the wife was not a legal rent-charge (*k*) and that the trustees

To pay life annuity out of rents.

and Fea. C. R. 54, Butl. n.; Lucas' Rep. 523, 10 Mod. 518; 2 Str. 798; Willes, 650; Cas. t. Talb. 145; 1 Ves. 485; 3 Burr. 1684; 2 T. R. 444; 7 id. 433, 652; 3 East, 533; 9 East, 1; 1 V. & B. 485; 2 Sw. 375; 3 Bing. 13, 10 J. B. Moo. 453; 5 J. B. Moo. 143, 1 B. & Cr. 721, 3 D. & Ry. 58; 7 B. & Cr. 206; 4 Ad. & Ell. 589; 4 B. & Ald. 93.

(*e*) Per Parke, B., Blagrave *v.* Blagrave, 4 Ex. 550; per Coleridge, J., Poad *v.* Watson, 6 E. & B. 617; and per Jessel, M. R., Collier *v.* Walters, L. R., 17 Eq. 261.

(*f*) Doe d. Hallen *v.* Ironmonger, 3 East, 533; Robinson *v.* Grey, 9 East, 1; Cooke *v.* Blake, 1 Ex. 220 (where the remainder was limited in terms of direct devise); Playford *v.* Hoare, 3 Y. & J. 175. Farmer *v.* Francis, 2 Bing. 151, 9 J. B. Moo. 310, seems contra, but the attention of the Court was directed exclusively to another point. See also Re Hart's Estate, Orford *v.* Hart, W. N., 1883, p. 164, stated post, p. 1180, note (*y*).

(*g*) Venables *v.* Morris, 7 T. R. 342, 438; Blaker *v.* Anscombe, 1 B. & P., N. R. 25; Curtis *v.* Price, 12 Ves. 89.

(*h*) Lewis *v.* Rees, 3 K. & J. 132; Cooper *v.* Kynock, L. R., 7 Ch. 398.

(*i*) 6 Q. B. 860, 9 Jur. 300.

(*k*) Where lands are devised to trustees, "subject to" or "charged with" the payment of a yearly sum of money, a legal rent-charge is, it seems, created, Buttery *v.* Robinson, 3 Bing. 392; Ramsay *v.* Thorngate, 16 Sim. 575. And that, notwithstanding the use of the word "bequeath," Patching *v.* Barnett, 45 L. T. 292. But where real and personal property to-

[1] A gift to A. in trust for B. during her life, and at her death the property to be divided equally among her living children terminates the trust estate at the death of B. in the absence of any further duties to be performed, and the entire estate, legal and equitable, becomes vested in the children. Belote *v.* White, 2 Head, 703. See Simonds *v.* Simonds, 112 Mass. 157; *s. c.* 121 Mass. 191; Provost *v.* Provost, 70 N. Y. 141; Stevenson *v.* Lesley, id. 512; Farrow *v.* Farrow, 12 S. Car. 168. If other duties of an active nature remain to be performed, either under the express terms of the will or as a necessary implication from the testator's language, the trust will continue till they are completed. See Slevin *v.* Brown, 32 Mo. 176; Scott *v.* Rand, 115 Mass. 104.

took some estate in order to enable them to pay the annuity, that such estate lasted only during the life of the annuitant; J. therefore had at all events, a previous estate of freehold which, joined to the subsequent limitation to the heirs male of his body, gave him an estate tail.

But if the annuity is charged on the corpus of the estate, the trustees take the fee, because the trust may continue after the death of the annuitant, or arrears may be raised by sale or mortgage (*l*).

And, as the estate of the trustees ceased when there was no longer any necessity for them to retain it, so it did not commence before there was a necessity that they should have it; as, under [*1157] * a devise to trustees upon trust to permit the testator's wife to receive the rents and profits till her son attained the age of twenty-one, and then upon trust to convey to the son in fee, it was held that although the trustees must take the legal estate in order to convey it to the son when of age, the wife took a chattel interest during the son's minority (*m*).

As to commencement of estate of trustees.

II. — 2. *Effect of Devise "to the Use of" Trustees.* — Though (as we have seen) where the devise is to the *use* of the trustees, they take the legal estate independently of the evidence of intention supplied by the nature of the trust; and though by a necessary consequence of this principle the extent of their estate must, if the will is clear and express on the point, in like manner be regulated by the terms of the will; yet, if the testator has affixed no express limit to its duration, such estate will, as in other cases, be measured by the exigencies of the trust or duty (if any) which is imposed on the devisees (*n*).

Indefinite devises to the *use* of trustees susceptible of enlargement or restriction.

Where a will takes effect as an appointment under a power to appoint the use, any devise which it contains will vest the legal estate in the devisee, irrespectively of any purpose or duty requiring that he should have the estate, as such devise amounts to a mere declaration of the use of the instrument creating the power, in other words, a mere nomination of the cestui que use; consequently any limitation engrafted on the devise operates only on the equitable interest, though it be in terms *to the use* of the person or persons intended to take the estate beneficially.

Rule as to appointments under powers.

And the result is the same in the case of devises of copyhold land (*o*), as wills of such property take effect merely as instruments

gether are so given, it is a personal annuity, Taylor *v.* Martindale, 12 Sim. 158; Parsons *v.* Parsons, L. R., 8 Eq. 260; unlike rent reserved on a demise of realty and chattels, which issues out of the land alone, Farewell *v.* Dickinson, 6 B. & Cr. 251, 9 D. & Ry. 245.

(*l*) Fenwick *v.* Potts, 8 D. M. & G. 506. As to when a direction to raise money out of "rents and profits" charges the corpus, see Ch. XLV.

(*m*) Doe d. Noble *v.* Bolton, 11 Ad. & Ell. 188.

(*n*) See Curtis *v.* Price, 12 Ves. 89, where the limitations were in a deed, which makes the case stronger. And see per K. Bruce, V.-C., Riley *v* Garnett, 3 De G. & S. 632.

(*o*) See Houston *v.* Hughes, 6 B. & Cr. 403, 9 D. & Ry. 464.

directory of the uses of the previous surrender to the use of the will, which was formerly essential to the validity of the devise, and the operation of which is now, by the statutes dispensing with the necessity of such surrender (*p*), transferred to the will itself. It is clear, therefore, that a devise of copyhold lands simply to A. and his heirs, in trust for B. and his heirs, would vest the legal inheritance in A. for the benefit of B., in fee (*q*). Still, however, it should seem, according to the principle *just [*1158] stated in regard to devises of freehold lands *to the use* of trustees, that the extent and duration of an estate conferred by an *indefinite* devise of copyholds would, like that of a devisee cestui que use of freeholds (whose estate is undefined), depend upon, and be regulated by, the nature of the trust reposed in the devisee.

As to devises of copyholds.

But in Houston *v.* Hughes, it was argued at the bar, and assumed by the Court, that as the copyholds included in the devise were not within the Statute of Uses, the trustees necessarily took the entire fee; however, this point does not appear to have been much canvassed, and the doctrine is not only irreconcilable with the principles of the analogous cases just stated, but is in direct opposition to Doe d. Woodcock *v.* Barthrop (*r*), which was not cited, and is as follows: — A. devised copyhold lands to B. and C., and their heirs, in trust to permit D. or her assigns to occupy the same, or to pay to or permit her or her assigns to receive the rents, for her natural life for her separate use, and, subject to such estate and interest of D., the testator devised the premises to such uses as D. should by her will appoint, and, in default of appointment, to her right heirs; it was held that under the limitation to B. and C. and their heirs, though not restricted in terms to the life of D., the estate was vested in B. and C. and their heirs for the life of D. only, on whose decease the legal estate vested in the appointee of D. (who exercised her power), and such appointee accordingly recovered in ejectment against the persons claiming under the surrenderee of the trustees.

Indefinite devise of copyholds limited by nature of trust.

The same question may arise, and the same principle, it is conceived, would apply, with respect to leaseholds for years, which, it is well known, are not within the Statute of Uses (*s*). Thus, a bequest of property of this description to A., simply in trust for B., would unquestionably vest the legal estate in A., although no duty or office were cast on him requiring that he should have the legal owner-

Bequests of leaseholds, how far influenced by nature of trusts.

(*p*) 55 Geo. 3, c. 192, and 1 Vict. c. 26. s. 3; ante, Vol. I., pp. 56, 57.
(*q*) Houston *v.* Hughes, 6 B. & Cr. 403.
(*r*) 5 Taunt. 382. See also Baker *v.* White, L. R., 20 Eq. 177; Allen *v.* Bewsey, 7 Ch. D. 457.
(*s*) Not a little practical inconvenience has arisen from the exclusion of chattel interests in land from the operation of the Statute of Uses, whatever may have been the real ground of that exclusion; which is a point on which an entire coincidence of opinion appears not to exist. The stat. 22 & 23 Vict. c. 35, s. 21. which enables any person to assign chattels real directly to himself and another, has removed one fruitful source of this inconvenience.

ship; and, by necessary consequence, A. must, in such a case, take the entire term, there being nothing to restrict or qualify his estate.

It does not follow, however, that where a definite duty or [*1159] office is imposed on the trustee, he * would take the entire legal estate in the term; for, as the law allows chattel interests in lands to be made the subject of an executory bequest after a prior limitation, not exhausting the whole term, even though the prior interest were an estate for life, it seems to be a necessary result of this doctrine, that such an executory bequest may be made ulterior to the partial or limited estate of a trustee; and it cannot be material whether the restriction of the trustee's estate was in express terms, or resulted from the nature of the duty imposed on him. For instance, if a term of years were bequeathed to A., until B. should attain the age of twenty-one years, in trust for the maintenance of B., and when he attained the age of twenty-one, then to B., there can be no doubt that the estate of the trustee would terminate at the majority of B., from which time the property would vest in possession in B. And it is conceived that the effect would be the same if the bequest were in the following terms:—"I give my leasehold estate called A., to B., his executors or administrators (without any specification of estate), upon trust to pay the rents to C. during his minority, and when he shall attain twenty-one, then I give the same to C." The estate of B. would cease at the majority of C., when the purposes of the trust would be at an end, although the bequest of B. leaves undefined the nature and extent of his estate (*t*).

And here it may be observed that where a testator has an equitable interest only in the land which is the subject of a devise in trust, and such devise would, if the testator had the legal ownership, carry the dry legal estate only, unaccompanied by any duty or office, the trustee takes nothing under the devise; the effect being the same as if the land had been devised directly to the cestui que trust. If, however, the trusteeship created by the will is of a nature to involve the performance of any office or duty (as a trust to sell or grant lease), the devise, though failing so far as it purports to vest the legal estate in the trustee, has the effect of onerating him with the prescribed duty in respect of the devised equitable interest, no less than if the legal estate had passed under it. For instance, supposing the testator to devise lands in which he has only an equity of redemption to A. in fee simple, in trust for B., the devise would not confer any estate, or impose any duty on A., but the entire beneficial interest [*1160] would pass directly to B. If, on the * other hand, the testator had devised such equity of redemption to trustees, upon trust for sale, though the trustees would not have acquired any

Effect where testator, who apparently creates a trust, has an equitable interest only.

(*t*) See acc. Stevenson *v.* Mayor of Liverpool, L. R., 10 Q. B. 81.

actual estate at law (the testator himself having none), yet the property would be salable by the trustees in the same manner as if the legal ownership had become vested in them.

II.—3. *Whether a Devise to pay Debts, &c., passes the Fee or only a Chattel Interest.* — Under the old law before 1838 a devise to persons, without words of limitation, to pay debts and legacies, raise a sum of money, secure a jointure, or the like was held, in numerous cases to give them a chattel interest only until the purpose was performed (*u*). But this construction proved to be so inconvenient in its consequences, and so difficult in its application, that its exclusion was made one of the objects of the statute 1 Vict. c. 26 (*x*).

Devise to trustees without words of limitation, to pay debts, &c., under the old law.

Even under the old law there was no case where, if the devise was in the first instance to trustees and their heirs, they were held to take an indefinite chattel interest (*y*). Under such a devise, they were in some cases held to take a base fee determinable on payment of the charges, whether those charges were to be raised out of annual rents (*z*) or by sale or mortgage of the estate (*a*). That construction, however, was inconsistent with the rule afterwards more fully recognized, that the express fee remained unless cut down by the context to a less estate of definite duration, and the cases in which it had been adopted were ignored (*b*): their very existence was lately denied (*c*).

Trustees held to take a determinable fee.

It is further to be observed that, even under the old law, it was held that if the purposes of the trust could not be satisfied by an estate pur autre vie, or by such an estate with a chattel interest superadded, the trustees took the fee, though the prescribed purposes did not require and could not exhaust the entire fee simple (*d*).

Trustees held to take a fee, though the trust was not strictly commensurate.

* The case of Wykham *v.* Wykham (*e*) presents a remarkable instance of contrariety of judicial opinion as to the estate authorized to be created by a power to jointure. A. devised lands to his eldest son for life, remainder to that son's first and other sons in tail male, with remain- [*1161]

Power to limit an estate as a jointure.

(*u*) Cordall's Case, Cro. Eliz. 316. See also 1 P. Wms. 505, 2 Eq. Ca. Ab. 224, pl. 5, 6, 3 B. P. C. Toml 64; 2 Vern. 403, Pre. Ch. 133; 5 East, 162; 1 Kee. 33; 9 Ad. & Ell. 879.

(*x*) See post, p. 1165.

(*y*) The case of a defined chattel interest either expressly limited, Warter *v.* Hutchinson, 2 B. & Bing. 349, 1 B. & Cr. 721, or implied from the trusts, Doe d. Kimber *v.* Cafe, 7 Ex. 675, must of course be distinguished.

(*z*) Wellington *v.* Wellington, 4 Burr. 2165, 1 W. Bl. 645. See also Doe d. Brune *v.* Martyn, 8 B. & Cr. 497.

(*a*) Glover *v.* Monckton, 3 Bing. 13.

(*b*) Blagrave *v.* Blagrave, 4 Ex. 550. And see Poad *v.* Watson, 6 Ell. & Bl. 606.

(*c*) By Jessel, M. R., Collier *v.* Walters, L. R., 17 Eq. 261. See this question more fully discussed in the 4th Edition of this Work, Vol. II., pp. 313, et seq.

(*d*) Harton *v.* Harton, 7 T. R. 652. See also Hawkins *v.* Luscombe, 2 Sw. 391; Toller *v.* Atwood, 15 Q. B. 929. And cf. Brown *v.* Whiteway, 8 Hare, 145.

(*e*) 11 East. 458, 3 Taunt. 316, 18 Ves. 395: Blagrave *v.* Blagrave, 4 Ex. 550. As to a direction to settle, see Knocker *v.* Bunbury, 8 Scott, 414, 6 Bing. N. C. 306.

ders to the testator's other sons and their sons in like manner. The will contained a power to the devisor's sons, as they should become entitled in possession, "from time to time to grant, convey, limit, and appoint all or any parts, &c., *to trustees*, upon trust by the rents and profits thereof to raise and pay any yearly rent-charge, not exceeding 1,000*l.*, as a jointure for any wife or wives that he or they should thereafter marry, for and during the term of such wife's natural life only." The devisor's eldest son B. in exercise of his power conveyed and appointed the lands so devised to him to trustees and their heirs, upon trust to raise and pay certain yearly rent-charges (amounting to 1,000*l.*), to his intended wife as a jointure. After the death of B., but during the life of the jointress his widow, the next tenant in tail, who was let into possession, suffered a recovery, the validity of which depended upon this, whether the appointment did or did not vest in trustees an estate of freehold for the life of the jointress. If it did, the recovery was void for want of the immediate freehold, which was, in that case, outstanding; but in every other event, *i. e.*, if the appointment passed no estate, or a chattel interest only, or the fee, it was good, in the former case as a legal, and in the latter as an equitable recovery. Lord Eldon sent a case to the Court of King's Bench, who certified that the trustees took a fee. The same question was then sent to the Court of Common Pleas, and that Court was of opinion that the trustees took *no* estate. On the conflicting certificates Lord Eldon held that the recovery was good, and that the estate which the trustees should have taken was a term of years, with a proviso for cesser of it on payment of the rent-charge during the life of the jointress and all arrears thereon at the time of her death, *as that would not have gone to disturb any of the subsequent uses* (*f*).

Remarkable diversity of judicial opinion.

It is observable that, greatly as the several opinions varied in the construction of the devise, they all conducted to the same conclusion as to the recovery, which, quacunque via, was good.

[*1162] * II.—4. *As to Devises to Trustees for preserving Contingent Remainders.* — With regard to estates limited to trustees for preserving contingent remainders, it may be observed that although they may not be (as such estates usually are) in terms confined to the life of the person taking the immediately preceding estate of freehold, yet they will be so restricted in construction, if the will disclose no other purpose which requires that the trustees should take a larger estate.

Thus, in Doe d. Compere *v.* Hicks (*g*), where a testator devised lands, after the decease of his wife, to his father A. for life, with remainder to B. for life, and after the determination of that estate, *unto trustees and their heirs, in trust to preserve contingent remainders*

(*f*) See Sugd. Pow. 399, 924, 8th. ed.
(*g*) 7 T. R. 433. And see Haddelsey *v.* Adams, 22 Beav. 266.

from being defeated, and to make entries, and nevertheless to permit B. to receive the rents and profits during his life, and after his decease, unto the first and other sons of the body of B. in tail male successively, and in default of such issue, unto his (testator's) brother C. for life, and after that estate determined, *unto the trustees and their heirs to preserve the contingent remainders in manner aforesaid* (with various remainders limited in a similar manner). On an ejectment brought by one of the beneficial devisees it was contended that the fee was in the trustees under the unrestricted limitation to them and their heirs. But the Court was of opinion that, taking the whole instrument together, it appeared that the testator intended the trustees to take only an estate for the lives of the several tenants for life, in order to protect the contingent remainders. If the trustees had taken the whole interest in the estate, it was not necessary for the testator again to give them the same estate after all the subsequent estates for life.

This decision has been noticed with approbation by Sir W. Grant (*h*), and seems to be abundantly sustained by the principles of analogous cases. Lord Kenyon in the course of his judgment, however, in allusion to Venables *v.* Morris (*i*) (which had been urged as an authority for holding the trustees to take the fee), suggested that the result would be different where, under the limitations in question, any person had a power of appointment, which, his Lordship considered, would render it necessary that the fee should be in the trustees, *with a view to the possibility of the donee creating under the power contingent remainders which might require protection.* In Venables *v.* Morris, *the limitations (in a deed) were to the use of A. for life, [*1163] with remainder to the use of trustees and their heirs for the life of A., to preserve contingent remainders, remainder to the use of B. (wife of A.) for life, remainder to the use of the same trustees *and their heirs, in trust to support the contingent uses, and permit B. and her assigns to receive the rents;* and after the decease of A. and B., to the use of the first and other sons of the marriage successively in tail, with remainder to the use of the first and other daughters successively in tail, remainder to the use of such persons as B. should by deed or will appoint, and, in default of appointment, to the use of the right heirs of B. B., by a deed-poll, appointed the estate to the right heirs of A. The contest was between the heirs of A. and the heirs of B. the former claiming under the limitation in the appointment, and the latter under the settlement. One of the points contended for by the heir of B, was that, the remainder in fee being in the trustees, an equitable interest only passed to the heirs of A. under the appointment, and which could not unite with the estate for life of A. under the settlement;

Remarks on Doe d. Compere *v.* Hicks.

Reservation of power of appointment held a ground for giving trustees the fee.

(*h*) See 12 Ves. 100.

(*i*) 7 T. R. 342 and 437.

but the Court was of opinion that the heir of A. was entitled quâcunque viâ; for if the limitation to the heir of A. under the appointment was a legal limitation, it united with A.'s estate for life under the settlement, and conferred the fee; but if it did not, then it was a contingent remainder in equity to the heir, and he took by purchase. Lord Kenyon subsequently expressed a more decided opinion that the legal estate in fee was in the trustees and the certificate of the Court (it being a case from Chancery) was in conformity to this opinion.

The ground on which Lord Kenyon rested the certificate of the Court involves a very extensive and no less novel doctrine, and one which, in the absence of any confirmatory decision, cannot be relied on. To hold that the mere circumstance of there being included in the limitations a power of appointment, by virtue of which contingent remainders *might* be thereafter created, constitutes of itself a ground for vesting the fee simple in the trustees, is evidently going much farther than making trustees take the fee because contingent remainders are actually created by the instrument containing the limitation to them; though even the latter more moderate doctrine has not been invariably countenanced by the authorities.

Remarks on doctrine of Venables *v.* Morris.

Whether the creation of contingent remainders is a ground for giving trustees the fee.

Thus, in Heardson *v.* Williamson (*k*) Lord Langdale, M. [*1164] R., * does not appear to have regarded the fact that the will contained a contingent remainder of the devised estate as a sufficient ground for holding the fee to be in the trustees.

On the other hand, in Cursham *v.* Newland (*l*) trustees were held to take the fee under a will which appeared to supply no other ground for such a construction; and in Doe *v.* Willan (*m*) and Houston *v.* Hughes (*n*), Bayley, J., considered that the circumstance of contingent remainders being created by the will favored the conclusion that the trustees took the legal inheritance. In Barker *v.* Greenwood (*o*), too, it seems to have been regarded by Parke, B., in the same point of view, though this able Judge disclaimed any reliance on the point; because the question in that case was not whether the trustees took the fee, but whether they took an estate pur autre vie, and he considered it to be doubtful whether the trustees of such an estate would be bound, in the absence of an express trust, to preserve contingent remainders, a point which has since been decided in the negative (*p*), their estate being created diverso intuitu.

At all events, the mere existence of contingent remainders will not

(*k*) 1 Kee. 33.
(*l*) 2 Scott, 113, 2 Bing. N. C. 64. But see Cunliffe *v.* Brancker, post.
(*m*) 2 B. & Ald. 84, ante, p. 1149.
(*n*) 6 B. & Cr. 420.
(o) 4 M. & Wels. 431.
(*p*) Collier *v.* Walters, L. R., 17 Eq. 265, 266.

give the legal fee to the trustees where the will contains express limitations to them of particular estates (including estates pur autre vie in trust to preserve) which would be nugatory if they already had the fee (*q*). It is also clear that an express direction to trustees to preserve contingent remainders will not have any influence on the construction, if the will contains no such remainder (*r*); nor where the subject of devise is a copyhold estate, as contingent remainders created of such property are not destructible, and therefore do not require any limitation of this nature for their preservation (*s*); nor, it is presumed, where the contingent remainder is protected by stat. 40 & 41 Vict. c. 33 (*t*).

Where devise includes other property as to which trustees take the legal estate.

It seems that where a will is so expressed as to leave it doubtful whether the testator intended the trustees to take the fee or not, the circumstance that there is included in the same devise other property which necessarily vests in the trustees for the whole of the testator's interest, affords a ground for * giving to the will the same [*1165] construction as to the estate in question (*u*).

Where trust fails ab initio.

If all the active trusts, together with all the ulterior limitations fail ab initio, as, by lapse, the devise to the trustees, if sufficient to carry the fee, will operate to the full extent, and they will hold in trust for the heir, if there be one; or if not, for their own benefit (*x*).

II. — 5. *Enactments of the Statute* 1 *Vict. c.* 26, *sects.* 30, 31. — Of all the adjudged points connected with the subject, that which has been deemed the least satisfactory is the doctrine of those decisions (*y*) which, in certain cases, gave to trustees whose estate was undefined a term of years (either with or without a prior estate for life), determinable when the purposes of the trust should be satisfied. To exclude the application of this inconvenient and very refined rule of construction, two enactments have been introduced into the statute 1 Vict. c. 26. Sect. 30 provides, "That when any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

Stat. 1 Vict. c. 26, ss. 30, 31.

(*q*) Cunliffe *v.* Brancker, 3 Ch. D. 401.
(*r*) Nash *v.* Coates, 3 B. & Ad. 839.
(*s*) See Doe d. Woodcock *v.* Barthrop, 5 Taunt. 382.
(*t*) Vol. I., p. 832.
(*u*) Houston *v.* Hughes, 6 B. & Cr. 403; Baker *v.* Parsons, 42 L. J. Ch. 228. But the argument was ridiculed by Jessel, M. R., Baker *v.* White, L. R., 20 Eq. 173.
(*x*) Cox *v.* Parker, 22 Beav. 168, 25 L. J. Ch. 873.
(*y*) Ante, p. 1160.

Sect. 31 provides, "That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

Estate of trustees, if not expressly limited, to be either freehold or an estate in fee.

These clauses have been the subject of much criticism (*z*) [*1166] It * is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of s. 30 would seem to be simply to negative the construction which, in certain cases (*a*), gave to a trustee an undefined term of years, for it allows him to take an estate of freehold, or a *definite* term of years, either expressly or by implication; but s. 31 takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in Carter *v.* Barnardiston, an estate for years, or, as in Doe *v.* Simpson, an estate for life, with a superadded term for years, but) an estate in fee simple. The result, in short, is that trustees whose estate is not expressly defined by the will must, in every case, *and whatever be the nature of the duty imposed on them,* take either an estate for life or an estate in fee.

Remarks on stat. 1 Vict. c. 26, ss. 30, 31.

It is observable that this section allows the trustees to take an estate of freehold, not whenever the purposes of the trust require such an estate, but only in the specified case of the "surplus rents and profits being given to a person for life," making no provision,

(*z*) See H. Sugd. Wills, 127; Sweet on Wills Act, 154; Sugd. R. P. Stat. 380. "I believe the real history of the two sections is that they are two drafts dealing with the same subject, though both remain in the Act," per Jessel, M. R., Freme *v.* Clement, 18 Ch. D. 514.
(*a*) Ante, p. 1160.

therefore, for the case (a possible though not a frequently occurring one) of a trust of any other kind being created for a purpose co-extensive with life; for instance, a trust to keep on foot a policy of life insurance. Possibly it would be held that such a case is excluded from s. 31 by the exception in s. 30, and thus some effect would be given to this otherwise apparently idle clause of the statute; farther than this (even if so far), it is presumed the exceptive part of s. 30 could not be construed to qualify or control the operation of s. 31, but decision alone can settle the point.

[*1167] * The enactments in question do not, beyond the particular cases which have been pointed out, interfere with the general doctrines of construction discussed in the present chapter. Even under wills made or republished since the year 1837, it may still be questionable whether trustees take *any* estate or only a power (*b*); also whether they take an estate limited to the lives of the tenants for life of the beneficial interest, or an estate in fee simple; and consequently there should be no relaxation in the anxious care of framers of wills to preclude ambiguity in this particular. It cannot, however, according to the suggested construction of s. 31, under *such* wills become a question, whether trustees take an estate in fee, or a chattel interest, in order to raise money, or for any other purpose.

Points not excluded by the Act.

The present doctrine would not, it is conceived, preclude the construction that trustees take an estate pur autre vie, with a power of sale over the inheritance. The writer is not aware, however, of any adjudged instance of such a construction, for where an estate is devised to trustees indefinitely, the authorities conduct to the conclusion, that whatever duty is subsequently imposed on them must be in virtue of their estate, the quality and duration of which are to be measured accordingly. The point, of course, depends on the conclusion to be fairly drawn from the entire will (*c*).

Similar questions may arise regarding other powers, as, to lease, or to apply rents for the maintenance of minors. Thus in Re Eddels' Trusts (*d*), where a testator devised real estate to trustees, to hold unto them and the survivor of them, his heirs and assigns, upon trust for his wife for her separate use for life; and after her death for his niece for her separate use for life; and after the death of the niece upon trust for such of her children as should attain twenty-one; and he declared that it should be lawful for his trustees, with the consent of his wife during her life, to lease the property for any term not exceeding twenty-one years at the best rent; it was held by Sir J. Bacon, V.-C., that the trustees took the legal estate in fee, apparently

Trust for separate use of f. c. with power to lease for twenty-one years;

(*b*) See *e. g.*, Spence *v.* Spence, 12 C. B. N. S. 199, cited ante, p. 1146.
(*c*) See per Jessel, M. R., Re Tanqueray-Willaume and Landau, 20 Ch. D. 479.
(*d*) L. R., 11 Eq. 559.

on the ground that any lease granted by them must be in virtue of their estate, and that this purpose *might* require an estate in them beyond the lives of the tenant for life.

[*1168] *So in Berry *v.* Berry (*e*), where a testator devised real estate to trustees, "their heirs and assigns, to the use of" A. for life; remainder "to use of" such children of A. as should attain twenty-one in fee, with an alternative remainder in fee; and he directed that A. should keep buildings insured and repaired, and in default that the trustees should receive the rents and thereout pay the cost of repairing and insuring, and pay the residue to A.; he also empowered the trustees to apply all or any part of the income for the maintenance of any infant devisee during his minority. By a codicil the testator devised "unto and to the use of" his trustees certain lands he had agreed to sell, in trust to complete the sale. Sir C. Hall, V.-C., held that whether the trustees had the legal estate during the life of A. or not (*f*), the provision for maintenance constituted a trust of the rents which the terms of that provision showed were to be received by them, not by virtue of a power of entry, but by force of an estate vested in them under the devise, and that the estate which they so took was the fee, whether considered under the old law or under s. 31 of the statute. He thought that the devise in the codicil, notwithstanding its different form, and that, according to his construction of the will, the codicil was unnecessary, was not enough to show that all the limitations in the will were to be legal uses.

— to apply rents during minority.

(*e*) 7 Ch. D. 657.
(*f*) As to the estate of trustees not commencing until wanted, vide sup. p. 1156.

WHAT WORDS CREATE AN ESTATE TAIL.

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I. — Words denoting Devise of Estate to Lineal Heirs. — A limitation to a person and the heirs of his body creates an estate tail general.[1] If it be to him and the heirs *male* or the heirs *female* of his body, he takes an estate tail special, descendible in the male or female line, as the case may be. In the one case the land devolves upon the male issue and (unless the tenure be gavelkind or Borough-English (*a*)), according to the

Proper terms of limiting an estate tail.

(*a*) See Trash *v.* Wood, 4 My. & Cr. 324; Roe d. Aistrop *v.* Aistrop, 2 W. Bl. 1228; Anon., Dy. 179 b, pl. 45.

[1] Hall *v.* Thayer, 5 Gray, 523; Wight *v.* Thayer, 1 Gray, 284. "Estates tail," it is remarked by Mr. Chancellor Kent, "were introduced into the United States with the other parts of the English jurisprudence, and they subsisted in full force before our Revolution, subject equally to the power of being barred by a fine or common recovery." 4 Kent, 14, 15. But they have been abolished in most of the states, and much of the complex learning connected with them has thereby become obsolete. Estates tail exist in Massachusetts, in Maine, and in Pennsylvania. Lithgow *v.* Kavenagh, 9 Mass. 167, 170, 173; Nightingale *v.* Burrell, 15 Pick. 104; Corbin *v.* Healy, 20 Pick. 514; Riggs *v.* Sally, 15 Maine, 408; Ide *v.* Ide, 5 Mass. 500, 502; Hawley *v.* Northampton, 8 Mass. 3; Williams *v.* Hichborn, 4 Mass. 189; Buxton *v.* Uxbridge, 10 Met. 87; Cuffee *v.* Milk, id. 366; Hall *v.* Thayer, 5 Gray, 523; Wight *v.* Thayer, 1 Gray, 284; Eichelberger *v.* Barnitz, 9 Watts, 447; Elliott *v.* Pearsoll, 8 Watts & S. 38; Shoemaker *v.* Huffnagle, 4 Watts & S. 437. Subject, nevertheless, in all these states, to be barred by deed, and in two of these states by will; and they are chargeable with the debts of the tenant. 4 Dane Abr. 621; Gauze *v.* Wiley, 4 Serg. & R. 509. See Roach *v.* Martin, 1 Harr. (Del.) 548; Waples *v.* Harman, id. 223.

Estates tail in Massachusetts, as at common law, descend to the eldest son, and to the eldest son of the eldest son. The law of descents in Massachusetts does not abrogate the rule of the common law in regard to estates tail. Wight *v.* Thayer, 1 Gray, 286, per Shaw, C. J. The law on this point seems to be otherwise in Connecticut. Hamilton *v.* Hempstead, 3 Day, 339; Allyn *v.* Mather, 9 Conn. 132. In Maryland, estates tail *general*, created since statute of 1786, are now understood to be virtually abolished, inasmuch as they descend, can be conveyed, are devisable and chargeable with debts, in the same manner as estates in fee simple. It is equally understood that estates tail *special* are not affected by the act of 1786. See Newton *v.* Griffith, 1 Har. & G. 111; Smith *v.* Smith, 2 Harr. & J. 314.

An estate tail may be followed by a limitation over on a definite failure of issue. So, like an estate in fee, it may depend for its continuance on the performance of a condition, or may be defeated by the happening of a contingency; but when once created, it remains an estate tail until the occurrence of the contingency, or until the condition is broken upon which its continuance was made to depend. Linn *v.* Alexander, 59 Penn. St. 43. It should be remembered that words which, applied to realty, would create an estate tail, create an absolute estate in gifts of personalty. Clark *v.* Clark, 2 Head, 336; Biddle's Appeal, 69 Penn. St. 190; Mengel's Appeal, 61 Penn. St. 248; Smith's Appeal, 23 Penn. St. 9; Hall *v.* Priest, 6 Gray, 18; Theological Sem. *v.* Kellogg, 16 N. Y. 83, 87.

Further as to estates tail see Bibb *v.* Bibb, 79 Ala. 437 (overruling Edward *v.* Bibb, 43 Ala. 666 and 54 Ala. 475); Lofton *v.* Murchison, 80 Ga. 391.

law of primogeniture, in the other upon the females as co-parceners. If the estate tail be general, it will run in this manner through both lives, in their established order of succession.

What informal expressions create an estate tail.

But though these are the correct and technical terms of limiting an estate tail, yet such an estate may be created in a will by less formal language; indeed by any expressions denoting an intention to give the devisee an estate of inheritance, descendible to his or some of his *lineal*, but not to his *collateral* heirs, which is the characteristic of an estate tail as distinguished from a fee simple. The former is transmissible to *lineal* descendants only; the latter in default of lineal devolves to *collateral* and now to ascendant heirs.

Limitation to "heirs male," or "right heirs male, forever,"

A devise to A. and his heirs male forever (*b*), or to A. and his heirs male living to attain the age of twenty-one (*c*), or to A. for life, and after his death to his heirs male, or his right heirs male, forever (*d*), has been held to confer an estate tail male; the addition of the word "male," as a qualifi- [*1170] cation of "heirs," *showing that a class of heirs less extensive than heirs general was intended (*e*). Of course a devise to A. for life with remainder to his right heirs by a particular wife forever gives A. an estate tail special, "heirs by" a particular wife being equivalent to "heirs of the body by" a particular wife (*f*).

—or to heirs by a particular wife.

To A. and "his heirs *lawfully begotten.*"

It has even been decided that a devise to one, et hæredibus suis legitimè procreatis, creates an estate tail (*g*), though the addition merely describes a circumstance which is included in the definition of heir simply, an heir being ex justis nuptiis procreatus. Such was the doctrine of the early authorities, and it was recognized and followed in Nanfan *v.* Legh (*h*), where a devise to H. when he should attain twenty-one, "and to his heirs *lawfully begotten* forever," was held to make the devisee tenant in tail only. In the same will other property was devised to H. and his heirs simply, which it was contended afforded an argument in favor of construing the devise in question to give an estate tail; inasmuch as the testator, in varying the phrase, must have had a different intention. Being a case out of Chancery, we are not in possession of the reasons upon which the opinion of the Court was founded; but probably it was considered that the testator, by adding the expression "lawfully begotten," intended to engraft *some* qualification

(*b*) Baker *v.* Wall, 1 Ld. Raym. 185, 1 Eq. Ca. Ab. 214, pl. 12, stated ante, p. 920.
(*c*) Doe d. Tremewen *v.* Permewen, 3 Per. & D. 303, 11 Ad. & Ell. 431.
(*d*) Lord Ossulston's case, 3 Salk. 336; Doe d. Earl of Lindsey *v.* Colvear, 11 East, 548.
(*e*) The line of descent of lands cannot be qualified, except through the medium of an entail, Co. Lit. 27 b.
(*f*) Wright *v.* Vernon, 2 Drew. 439, 7 H. L. Ca. 35, 4 Jur. N. S. 1113.
(*g*) Church *v.* Wyatt, Moore. 637, Co. Lit. 20 b, Harg. n. 2.
(*h*) 2 Marsh 107, 7 Taunt. 85.

on the description of heir, and consequently must have meant an estate tail. In Good *v.* Good (*i*), Lord Campbell, C. J., said it was a rule of construction long established and universally recognized, that such words created an estate tail. But the words "lawful heirs" standing alone will not be construed heirs of the body (*j*).

To A. and his "lawful heirs."

A devise to A., with a direction that neither he nor his heirs *to the third generation* should mortgage or sell the devised property, will, it seems, create an estate tail (*k*). And a devise "to the first and other sons of A. successively according to priority of birth and their respective heirs forever," was held to give the sons successive estates in tail, as the only way of satisfying the intention that they should take in succession (*l*).

"Heirs to the third generation."

To several and their heirs "successively."

* It is clear that the words "*heir* of the body" (in the singular) operate as words of limitation, and consequently confer an estate tail. Thus, it has been held that under a devise to A. for life, and after his decease to the heir of his body forever, A. is tenant in tail (*m*); and a devise to A. and such heir of her body as shall be living at her decease (*n*), or to A. and his heir male living to attain twenty-one, and for want of such issue male the inheritance to go over (*o*), has received the same construction. [*1171]

To heir of the body in the singular.

Nor is the effect varied by the word "next" or "first" being prefixed to "heir."[1] Thus, in Burley's case (*p*), a devise to A. for life, remainder to the *next* heir male; for default of such male heir, then to remain, was adjudged to give an estate tail male to A. So, where (*q*) the devise was to M. and his wife for their lives, remainder to the *next* heir male of their two bodies, it was held that M. and his wife were tenants in tail male. Again, a devise to A. for life, and after his death to the *first* heir male of his body, remainder over, has been adjudged to create an estate tail male (*r*).

Limitation to next or first heir male.

(*i*) 7 Ell. & Bl. 295.
(*j*) Matthews *v.* Gardner, 17 Beav. 254; Simpson *v.* Ashworth, 6 Beav. 412; and see Stratford *v.* Powell, 1 Ba. & Be. 1; but see per Busbe, C. J., in Moffet *v.* Catherwood, Alc. & Nap. 472.
(*k*) Mortimer *v.* Hartley, 6 Ex. 47. 3 De G. & S. 316; but see *s.* c. 6 C. B. 819, contra.
(*l*) Hennessey *v.* Bray, 33 Beav. 96, and post, Ch. XL.
(*m*) Pawsey *v.* Lowdall, Sty. 249, 273. See also Wilkins *v.* Whiting, 1 Bulst. 219, 1 Roll. Ab. 836; Clerk alias Cheek *v.* Day, Cro. Eliz. 314; White *v.* Collins, 1 Com. Rep. 289.
(*n*) Richards *v.* Bergavenny, 2 Vern. 324.
(*o*) Doe d. Tremewen *v.* Permewen, 3 Per. & D. 303, 11 Ad. & Ell. 431.
(*p*) Cited 1 Vent. 230.
(*q*) Miller *v.* Seagrove, Rob. Gavelk. 122, 16 Vin. Ab. Parols (H), pl. 4, n.; and see 1 Ves. 337.
(*r*) Dubber d. Trollope *v.* Trollope, Amb. 453, Lee t. Hardw. 160; and see Goodright *v.* Pullyn, 2 Ld. Ray. 1437, 2 Stra. 729; O'Keefe *v.* Jones, 13 Ves. 412.

[1] Devise to testator's "son W. and his oldest male heir forever" gives an estate tail to W. Cuffee *v.* Milk, 10 Met. 366.

II. — Rule in Archer's Case. — But though a devise to the *next* heir male simply, following a devise to the ancestor for life, does not confer on the heir an estate by purchase (the words being construed as words of limitation), yet if the testator has engrafted words of limitation on the devise to the next heir male, he is considered as indicating an intention to use the term "heir" as a mere descriptio personæ; in other words, as descriptive merely of the individual who fills the character of heir male at the ancestor's decease; the superadded words of limitation having the effect of converting the expression "next heir male" into words of purchase, — an effect, however, which (as will be shown at large in the sequel) does not, in general, belong to such superadded expressions of this nature. This rule of construction is founded on the authority of Archer's case (*s*), where lands were devised to [*1172] A. for life, and after to the next heir male and the * heirs male of the body of such next heir male, and it was unanimously agreed by the Court that this was a contingent remainder to the heir, and that A. was but tenant for life, and he having made a feoffment of the devised lands, it was held that such contingent remainder was destroyed.

To "next heir male," with superadded words of limitation.

To next heir male and the heirs male of his body.

But it should seem that this construction is not peculiar to such a case as Archer's; namely, where the word "next" is prefixed, and words of limitation are superadded to "heir male;" for a similar construction was adopted in Willis *v.* Hiscox (*t*), where the former circumstance was wanting. The devise was upon trust for the testator's son W. for life, and after his decease for the heir male of his body begotten on an European woman, and the heirs of such heir male, and in case the son should die without leaving such heir male of his body, the trustees were to pay the rents equally between the testator's daughters M. and A. for their lives, and the whole to the survivor; and after the decease of the survivor, upon trust for the heir male of the body of M. and the heirs of such heir male, and in default of such heir male of her body, upon trust for the *heir male of the body of A. and the heirs of such heir male.* W. and M. both died without issue; after which A., conceiving herself to be tenant in tail, suffered a recovery. A bill was filed by the heir male of the body of A. to compel a conveyance from the trustee; and Lord Cottenham considered his title so clear that he not only decided in his favor, but compelled the defendant trustee to pay the costs (*u*) of the suit which was occasioned by

"To heir male of the body," and his heirs.

(*s*) 1 Rep. 66.
(*t*) 4 My. & Cr. 197.
(*u*) This seems rather hard upon the trustee, as there was no authority directly in point, and the cases which had decided that a devise to the heir of the body (in the singular) of the devisee for life, without words of limitation engrafted thereon, operated to confer an estate tail (ante p. 1171), and also that superadded words of limitation had no effect in turning heirs male, in the plural, into words of purchase, afforded an argument in favor of the construction which the Court rejected, sufficiently plausible, one should have thought, to justify

his refusal to convey without the direction of the Court. His Lordship said, "The mother has an estate expressly for life; and after her death the devise is to the heir male of her body, in the singular number, with words of limitation to the heir general of such heir, which, it is clearly settled, gives an estate for life only to the parent, and the inheritance by purchase to the heir of the body, as was decided in Archer's case (*x*) and assumed by Hale in King *v.* * Melling (*y*) and subsequent cases. If, indeed, that proposition were doubtful as a general rule, all doubt would have been removed in the present case; for the words of the limitation are the same as those used in the prior devise to the testator's son; and the particular description of the heir of that son proves that he must have taken by purchase." [*1173]

To have this effect, however, the superadded words must be distinct words of inheritance. For, as we have seen, a devise to A. for life, remainder to the heir of his body *for ever*, makes A. tenant in tail; the words "for ever," though capable of creating a fee, being insufficient to show that the heir was intended to be a new stirps (*z*). But it is not necessary, as sometimes contended, that the superadded words should change the course of descent. This appears from Archer's case itself, and was expressly so decided by Sir R. Kindersley, V.-C. (*a*). Nor is it necessary that the first estate should be expressly an estate for life: a devise "to A. and the heir male of his body, and the heirs and assigns of such heir male," gives A. an estate for life merely, with a contingent remainder in fee to his heir male (*b*).

Again, a devise to A. for life, and after his death "to the heir male of his body lawfully begotten, *during his life*," gives A. an estate for life, with remainder for life to the person who at his death happens to be his heir male (*c*). "To heir male of the body for life."

A devise to A. et semini suo (*d*), or to A. and his issue, clearly

the trustee's refusal to convey without judicial sanction. The tendency of such decisions is to increase the reluctance which is now very commonly felt by cautious and well-informed persons to take trusteeships.

(*x*) 1 Rep. 66.

(*y*) 1 Vent. 214; and see Fearne, C. R. p. 148.

(*z*) Pawsey *v.* Lowdall, Sty. 249, 273, stated above. See also Fuller *v.* Chamier, L. R., 2 Eq. 682, 35 L. J. Ch. 774; the latter report supplies the material information that the devisees for life were treated as joint tenants notwithstanding the words "equal shares;" so that the entire property was in the sole survivor.

(*a*) Greaves *v.* Simpson, 33 L. J. Ch. 641, 10 Jur. (N. S.) 609.

(*b*) Chamberlayne *v.* Chamberlayne, 6 Ell. & Bl. 625.

(*c*) White *v.* Collins, 1 Com. Rep. 289. See Pedder *v.* Hunt, 18 Q. B. D. 565, 572.

(*d*) Co. Lit. 9 b.

[1] An estate tail arises in Massachusetts, as at common law, by virtue of a devise to several in equal parts, with a provision that if one of them die without issue the estate given him shall go to the testator's heirs. Hayward *v.* Howe, 12 Gray, 49. A devise to one and his children, he having no children at the time, is equivalent to a devise to him and his issue, and creates an estate tail. Nightingale *v.* Burrell, 15 Pick. 104, 114; Cote *v.* Von Bonnhorst, 41 Penn. St. 243. A deed to husband and wife, executed before the Revised Statutes of Massachusetts took effect, conveying land to be held by them during their lives and the life of the survivor, and by the heirs of their bodies, created an estate tail in the grantees. Steel *v.* Cook, 1 Met. 281.

To A. "et semini suo," or to A. "and his issue," or "offspring," or "family, according to seniority."

creates an estate tail, as is shown more at large in a subsequent chapter (*e*). A devise to A. and his offspring (*f*), and a devise to A. and his family according to seniority (*g*), have also been held to create an estate tail general.

So, where a testator, in the first instance, devises lands to a person and his heirs, and then proceeds to devise over the property in terms which show that he used the word "heirs" in the prior devise in the restricted sense of heirs of the body; such devise, of course, [*1174] confers only an estate tail, the effect being the * same as if the latter expression had been originally employed. Thus,

To A. and his heirs, and if he shall die without heirs of his body.

if lands are devised to A., or to A. and his heirs, and if he shall die without heirs of his body, or without heirs male of his body, or without an heir or an heir male of his body,[1] then over to another, such devise vests in the devisee an estate tail general, or an estate tail male, as the case may be (*h*).

Indeed so well has this been settled from an early period, that to found an argument in favor of a contrary construction, recourse is always had to special circumstances. Thus, where (*i*) a testator devised lands to his wife for life, and after her death to J., his eldest son, and his heirs, upon condition that J., as soon as the land should come unto him in possession, should grant to S., testator's second son, and his heirs an annual rent of 4*l*., and that *if J. should die without heirs of his body* the land should remain to S. and the heirs of his body; it was contended that the intent was shown that J. should have a fee, otherwise he could not legally grant such a rent to have

Direction to grant a fee farm rent not conclusive against an estate tail.

(*e*) Chap. XXXIX.

(*f*) Young *v.* Davies, 2 Dr. & Sm. 167.

(*g*) Lucas *v.* Goldsmid, 29 Beav. 657. "To A. and his family" simply gives a fee simple, ante, p. 1133.

(*h*) Tracy *v.* Glover, cit. 3 Leon. 130, pl. 183, Godb. 16; and see Blaxton *v.* Stone, 3 Mod. 123; Denn *v.* Slater, 5 T. R. 335. The rule is also applicable to deeds, Co. Lit. 21 a. Where a testator devised real estate, in the events which happened, to the sons of L. "in succession," it was held that the effect of these words was to cut down the estate in fee which would otherwise have passed by the indefinite devise to the sons, so as to give them successive estates in tail, Studdert *v.* Von Steiglitz, 23 L. R., Ir. 564. And in wills it holds where the devise over is if the prior devisee "die without issue," Browne *v.* Jervas, Cro. Jac. 290; Chadock *v.* Cowley, id. 695; Doe d. Neville *v.* Rivers, 7 T. R. 276; Doe d. Ellis *v.* Ellis, 9 East, 382; Biddulph *v.* Lees, Ell. Bl. & Ell. 289; Bowen *v.* Lewis, 9 App. Ca. 890; and see ante, Ch. XVII. s. vi. See as to deeds, Morgan *v.* Morgan, L. R., 10 Eq. 499. In Cane *v.* James, cit. Skinn. 19, where the devise was to A. and his heirs, and if A. die without heirs of his body that his sister should have 600*l*., it was held that A. took the fee. It will be observed that there was no devise over of the land itself. But if the dying without heirs male or without issue be coupled with any other contingency, as "dying without heirs male in the lifetime of A.," the first devisee takes not an estate tail, but an estate in fee, with an executory devise over, Pells *v.* Brown, Cro. Jac. 590; Dastman *v.* Baker, 1 Taunt. 179; Denn *v.* Kemeys, 9 East, 366; Doe *v.* Chaffey, 16 M. & Wels. 656, ante, p. 919. As to the effect of stat. 1 Vict. c. 26 on devisees of the above kind, see Vol. I., p. 560, and post, Ch. XLI.

(*i*) Dutton *v.* Engram, Cro. Jac. 427.

[1] See Hawley *v.* Northampton, 8 Mass. 3.

continuance after his death; but it was resolved to be an estate tail; for being limited that if he died without issue then it should be to S. and his heirs of his body, *showed what heirs of J. were intended,* viz. *heirs of his body ;* and though he was to make a grant of the rent, yet this, being by appointment of the donor, was not contra formam donationis, but stood with the gift, and it should bind the issue in tail. The Court evidently considered the direction to grant the fee farm rent as conferring *a power,* or rather, perhaps, a trust coupled with a power, in which view it was consistent with an estate tail.

* III. — **Effect of Gift over.** — Where real estate is devised [*1175] over in default of *heirs* of the first devisee, and the ulterior devisee stands related to the prior devisee so as to be in the course of descent from him, whether in the lineal or collateral line and however remote, as the prior devisee in that case could not die without heirs while the devisee over exists, the word "heirs" is construed to means heirs *of the body,* and accordingly the estate of the first devisee, by the effect of the devise over, is restricted to an estate tail, and the estate of the devisee over becomes a remainder expectant on that estate (*k*). This construction is induced by the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object.

Devise over on failure of heirs to a person in line of descent creates estate tail.

But the Court will not so construe the word "heirs" where the devise over is to a stranger, however plausible may be the conjecture that it was so intended, and consequently the devise over is void for remoteness (*l*); and formerly a relation of the half blood or a parent or grandparent was, for this purpose, considered as a stranger, such person being then excluded from taking directly by descent (*m*); but the law, as to persons dying since the 31st of December, 1833, is now regulated by the statute 3 & 4 W. 4, c. 106, which has admitted relations of the half-blood, and parents and other ancestral relations in the ascending line, to the heirship (*n*).

Otherwise where to a stranger in blood.

In Harris *v.* Davis (*o*), the gift over in default of heirs of the first

(*k*) 1 Roll. Ab. 836 ; 2 Lev. 162 ; Cro. Jac. 416 ; 1 Freem. 74 ; 2 Eq. Cas. Ab. 306, pl. 2, 3 Lev. 70 ; 2 Stra. 849 ; Amb; 363 ; 2 Ed. 297; Cas. t. Talb. 1 ; Willes, 164, 369 ; 1 P. W. 23 ; Doug. 266 ; Cowp. 234 ; 3 T. R. 491, 488, n.; 2 Marsh. 170, 6 Taunt. 485 ; 6 Beav. 412; A few early decisions to the contrary, such as Hearn *v.* Allen, Cro. Car. 57, are overruled by the current of authorities.

(*l*) Grumble *v.* Jones, 2 Eq. Ca. Ab. 300, pl. 15, 11 Mod. 207, Willes, 166, n., 1 Salk. 238 nom. Aumble *v.* Jones ; Att.-Gen. *v.* Gill, 2 P. W. 369 ; Griffiths *v.* Grieve, 1 J. & W. 31.

(*m*) Tilburgh *v.* Barbut, 1 Ves. 88, 3 Atk. 617 ; and see Preston d. Eagle *v.* Funnell, Willes, 164 ; Moffet *v.* Catherwood, Alc. & Nap. 472.

(*n*) See 1 Hayes's Introd. 5th ed. p. 319.

(*o*) 1 Coll. 416.

To several, one of whom is a stranger in blood.

devisee was to several other persons, *one of whom* was not related to the first devisee, but as all the others were related to him, he was held to take an estate tail. It would seem, therefore, sufficient to give the first devisee an estate tail that *any one* of a number of devisees over was related to him.

Of course the limiting of the estate over, in default of heirs of the body or issue, to the right heirs of the devisee, does not [*1176] vary *the construction further than to give the devisee the remainder in fee expectant on the estate tail. Thus, where (*p*) a testator devised certain lands unto his son P. and his heirs forever, on condition that he paid W. 30*l.* within one year after the death of the testator's wife, and he gave other tenements to other sons, adding the following clause: — "Item. My will and mind is, that in case any of my said children unto whom I have bequeathed any of my real or copyhold estates *shall die without issue*, then I give the estate of him or her so dying unto his or their *right heirs* forever;" and it was held that the children took estates tail, with remainder in fee to themselves.

As to limitation over to the right heirs of the devisee.

Sometimes an estate tail general is cut down to an estate tail special by implication. As where (*q*) the devise was to the use of the testator's eldest son John and his heirs forever, and failing issue of John, to the use of James the second son and his heirs forever, and failing issue of that son, to the use of the third son George and his heirs forever, and failing his issue, to the use of every other son the testator should or might have, according to priority of birth; *and failing his (testator's) issue male*, then to his *issue female* and their heirs forever, *and for want of issue female*, then to the use of his (the testator's) heirs forever: it was argued that the testator evidently intended to postpone the female to the male line of issue, and that the latter part of the will was explanatory of the devise to the sons, showing that they were to take estates tail male only; for that the intent of postponing the issue female could not be answered without postponing his granddaughters as well as daughters, who were both comprehended under the general expression of his issue female; and of this opinion appears to have been the House of Lords, confirming a decree of the Irish Court of Exchequer (*r*).

Estate tail general cut down to an estate tail special by implication.

(*p*) Brice *v.* Smith, Willes, 1.

(*q*) Fitzgerald *v.* Leslie, 3 B. P. C. Toml. 154. This seems to be the converse of Tuck *v.* Frencham, Moore, 13, pl. 50, 1 And. 8, and Doe d. Hanson *v.* Fyldes, Cowp. 833, stated Vol. I., p. 485.

(*r*) But there would be obvious difficulty in working out the case on this principle; for pari ratione the daughters should have taken estates tail female. The case is mentioned doubtingly by Lord St. Leonards, 4 H. L. Ca. 280.

This Chapter, it is obvious, does not exhaust the general subject of which it professes to treat. The numerous instances in which the words "heirs of the body," accompanied by explanatory expressions, and the words "children," "son," and "issue" have operated to confer an estate tail, are fully discussed in subsequent chapters, to which, therefore, the reader is referred.

* CHAPTER XXXVI. [*1177]

RULE IN SHELLEY'S CASE.

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I. — The Rule as applied to Direct Limitations. — 1. *Nature of the Rule.* — The rule in Shelley's case is a rule of law, and not of construction (*a*).[1] The rule simply is, that, where an estate of freehold is

(*a*) The comprehensive nature of the present work renders it impossible to present more than a brief outline of the chief practical points connected with the rule in Shelley's case, which require the attention of the student or the practitioner; and this plan is the more willingly submitted to, since the subject has received an elaborate investigation from several writers, who have brought great learning and abilities to the task.

In Bowen *v.* Lewis, 9 App. Ca. p. 907, Lord Cairns said that in his opinion the rule is "not a technical rule, but a rule of substance to give effect to the intention," *i.e.*, an intention gathered from the whole will that the estate shall travel through the issue generally of a certain person.

[1] The familiar words of inheritance employed in conveyancing were, in the Latin form et suis hæredibus, first brought into common use in England in the 12th or late in the 11th century; following upon the establishment, effected towards the close of the 11th century, of the feudal tenures, or, to speak more exactly, of the tenure by knight service. At the same time, in immediate connection with the words of inheritance, reciprocal words declaring that the feud was to be held of the donor "and *his* heirs" were introduced into general use. The gift contemplated a relation in perpetuum between the donor and his descendants and the donee and his descendants. And there are indications that with this gift of an estate of inheritance the heir apparent, not without some further ground in earlier though irregular practice, came, and for a long time continued, to think himself in some way included in the gift itself, either as dormant tenant with the ancestor, or as having some other sort of interest of which he ought not to be deprived by any gift of his ancestor alone. That is, as would be said in later times, he considered either that he took by purchase from the donor, or that the gift amounted to an entail.

Some of the many indications to this effect may be pointed out. In the Custumal known as the Laws of Henry the First, a work of the first half of the 12th century, it is said that one who has bookland (land of inheritance granted by writing out of the public domain) given him by his "parentes" should not convey it away from his family. Hen. 1, c. 70, § 21.; Placita Anglo-Normannica, Introd. 44, 45, note. In the reign of the same Henry the First (1100-1135) a son confirms (or rather makes anew) a gift of land made by his father in frankalmoign, which had been adjudged good against the son. Placita Anglo-Normannica, 128, 129. See also 2 Hist. Mon. Abingdon, 136, anno 1104. In a record of about the year of 1160, an action is stated to have been brought by the Abbot of Abingdon against one Pagan, "cum filio quem heredem habuit" to recover certain fiefs alleged to have been forfeited by Pagan the father; the litigation being terminated with a concord by which the plaintiff gave to Pagan "et heredibus suis, jure hereditario . . . in perpetuum," the land in question upon certain conditions, which Pagan "et filius suus" promised to perform. Pl. A.-N. 208, 209. Glanville, writing about twenty-

Nature of the rule in Shelley's case.

limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word "heirs" is a word of

five years later, says that a man may make a will in his last illness "with the consent of his heir;" that he cannot "without his heir's consent," give any part of his inheritance to a younger son; and that he cannot disinherit "his son and heir," even as to land which he has bought, though if he have no heir of his body he may do as he will with such land. Lib. 7, c. 1. He might, however, convey a reasonable part of purchased property without the consent of his bodily heir. Id. And see further, as to the limits upon alienation, Magna Charta, c. 39 (Henry 3, A. D. 1217), with Coke's comments, 2 Inst. 66.

This relation of the heir to his father's feud did not long survive the 12th century, though traces of it apparently are seen in Bracton, whose treatise is thought by Sir Travers Twiss to have been written all along between about the years 1227 and 1257. By that time a feoffment to a man and his heirs enabled the feoffee to convey the feud absolutely as against the heir; but a lingering assertion of the position of the heir may perhaps be seen in the remark by Bracton, in speaking of gifts to a man and the heirs of his body (which was then a gift in fee conditional upon procreation, and not, as later, an estate tail), that "some think the heirs were feoffed with their fathers," which, he adds, is not true. Lib. 2, c. 6, fol. 17 b. The only or the chief difference at that time between a gift to a man and his heirs general, and one to a man and the heirs of his body, was this, that, while in the first case the feoffee could convey the fief without his heir's consent, in the second he was deemed to have taken the fief upon condition of having an heir of his body; failing which the estate reverted at his death to the donor. But if an heir were born to him, then he held as in the first case, and could alien accordingly to the disherison of the heir; though this is afterwards declared by the statute De donis conditionalibus (confirming so far what has already been stated), to have been contrary to the will of the donor and the express form of the gift. The statute referred to, passed in the year 1285, changed all this, and declared that the intention of the donor in a conditional gift should thereafter prevail; thus, without altering the form of the gift, creating estates tail. No change was made as to gifts to a man and his heirs general; such remaining alienable by the ancestor against the heir, as they had been long before.

The growth, it may be here remarked, of a right of alienation against the heir, which terminated in one particular with the statute De donis, may have been promoted by the right of the ancestor to alien absolutely his purchased property, other than at first his fief (Hen. 1, c. 70, § 21); but the *exercise* of the right must have been greatly and directly furthered by the introduction into the feudal gift itself, early in the 13th or late in the 12th century, of the word "assigns," the feoffment now, as in modern times, often running to the feoffee, "his heirs and assigns." The assign would now be protected against the heir by the feoffor's warranty.

Thus far of the earlier history of the word "heirs." Now, it was no mere matter of words when, in Bracton's time, it was said by some that the heir was feoffed with his ancestor. Upon the decision of that contention hung, in the logic of lawyers whose acuteness has scarcely been surpassed, the chief feudal rights of the donor of the feud. If the heir was then feoffed, he was then admitted to seisin, and the right to claim the payment of reliefs for admission to the inheritance was gone, and with it, perhaps, primer seisins and the emoluments of wardship. This could not be tolerated, and hence the heir was deemed to take by descent from his ancestor, and not by purchase from the donor of the feud. Whether the rule in Shelley's Case of later times (A. D. 1581) was influenced by this consideration, is not clear; it is commonly thought to have been, and the suggestion is not improbable.

But Shelley's Case, as the report itself shows, enunciated no new doctrine, and some of the earlier cases show that other considerations were operating in the same direction. The same doctrine had been laid down as early as the year 1325, more than two and a half centuries before Shelley's Case. M. 18 Edw. 2, 577; Hargrave's Law Tracts, 501. In his opinion in Perrin *v.* Blake, Law Tracts, 501, Mr. Justice Blackstone largely quotes this very early case, as showing that one of the grounds of the rule by which an estate to a man for life, with remainder to his heirs, was deemed to give the fee to the ancestor was that of facilitating the alienation of land; a result, however indirect, of the judgment in the case referred to (M. 18 Edw. 2), by which the lands of the ancestor thus given were after his death held to be still charged with his debts. Another ground stated by Mr. Justice Blackstone, and enforced by the same case, was that the rule was necessary to prevent an abeyance of the inheritance, a thing which would have been attended with serious inconvenience.

The old policy, however, which dictated the rule, though founded upon or influenced by all these considerations, has long since ceased to be of force; and the practical result, so far as this country is concerned, is that, even in those states in which the rule in Shelley's Case prevails, every reasonable opportunity is embraced to find an escape from the application of the doctrine. Aside from plain and long-recognized distinctions, such as that the two parts must be of like quality, both legal or both equitable, in order to coalesce in the ancestor, the tendency of the American cases in such states is strongly in the direction of giving effect to the intention

limitation, *i. e.*, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee-tail; if to his heirs general, a fee simple (*b*).

(*b*) Shelley's case, 1 Rep. 93, 104 *a*. The question was not directly raised in this case, but was incidentally much discussed. Gavelkind lands are within the rule, Doe d. Bosnall *v.* Harvey, 4 B. & Cr. 610. See some observations on the nature and origin of the rule, Fea. C. R., and Hayes's Supplem.; Prest. Est., Vol. I., c. 3. See also Earl of Bedford's case, Moore, 718; Whiting *v.* Wilkins, 1 Bulstr. 219; Rundale *v.* Eeley, Cart. 170; Broughton *v.* Langley, 2 Ld. Ray. 873, 2 Salk. 679, and cases passim in the next chapter. A gift to A. and at his death to the next heir of the name of A., gives to A. a fee simple conditional, Re Catling's Estate, W. N., 1890, p. 75.

of the testator (to narrow the subject now to wills) wherever there is indication, however indirect, of a knowledge of the existence of the rule, and of a purpose to escape its consequences; provided the language of the will is sufficient for that purpose. See Lytle *v.* Beveridge, 58 N. Y. 592, 600; Huber's Appeal, 80 Penn. St. 348; Dodson *v.* Ball, 60 Penn. St. 492; Rife *v.* Geyer, 59 Penn. St. 393; Criswell's Appeal, 41 Penn. St. 288; Gernet *v.* Lynn, 31 Penn. St. 94; Steacy *v.* Rice, 27 Penn. St. 75; Yarnall's Appeal, 70 Penn. St. 335; George *v.* Morgan, 16 Penn. St. 95; Guthrie's Appeal, 37 Penn. St. 9; Chew's Appeal, id. 23; Newman's Appeal, 35 Penn. St. 339; Brown *v.* Lynn, 2 Seld. 419; Simpers *v.* Simpers, 15 Md. 160; Chilton *v.* Henderson, 9 Gill, 432; Moore *v.* Brooks, 12 Gratt. 135; Thompson *v.* Mitchell, 4 Jones, Eq. 441; Griffith *v.* Derringer, 5 Harr. (Del.) 284; Russ *v.* Russ, 9 Fla. 105; Vaden *v.* Hance, 1 Head, 300; Cooper *v.* Coursey, 2 Coldw. 416; Williams *v.* Sneed, 3 Coldw. 533; Dudley *v.* Mallery, 4 Ga. 52; Siceloff *v.* Redman, 26 Ind. 251; Crockett *v.* Robinson, 46 N. H. 454; Kennedy *v.* Kennedy, 5 Dutch. 185; Norris *v.* Hensley, 27 Cal. 439.

Of course there need be no further evidence of a recognition by the testator of the rule than is involved in the use of such language as will permit a departure from its controlling effect. But the mere fact that a purpose to give an estate for life to the ancestor is manifest, is not deemed sufficient, where the rule in Shelley's Case prevails, to justify a departure from the rule. Such a purpose appears, indeed, in most cases that clearly fall within the rule: there must be apt language to exclude a fee in the ancestor. See, *e. g.* Moore *v.* Brooks, 12 Gratt. 135; Huber's Appeal, 80 Penn. St. 348; Criswell's Appeal, 41 Penn. St. 288; Guthrie's Appeal, 37 Penn. St. 9; and other cases, supra. But it is enough to prevent an enlargement of the life-estate, by the general current of the authorities, that the will has designated *certain persons* as the objects of the ulterior bounty of the testator, though they may be the same as the heirs-at-law. Huber's Appeal, supra. See McKee *v.* McKinley, 33 Penn. St. 92.

In those states in which the rule in Shelley's case does not prevail, the intention to give an estate by purchase to the heir may, of course, more easily prevail; and language which, under that rule, would give a fee to the ancestor, may be sufficient to give a remainder to his child. Putnam *v.* Gleason, 99 Mass. 454; Carter *v.* Reddish, 32 Ohio St. 1; Bunnell *v.* Evans, 26 Ohio St. 409; Williamson *v.* Williamson, 18 B. Mon. 329. See Flournoy *v.* Flournoy, 1 Bush, 515. However, even in such states the intention must be shown by such language as the law deems appropriate for the purpose. Carter *v.* Reddish, supra. A man may, in point of fact, intend to give a remainder to the heir of A. in a gift to "A. and his heirs," according to the natural and original meaning of those words; but such is the universally established interpretation put upon that language, that, unless the indication be very clear, by other language of the will, that the testator intended to limit to A. an estate for life, he will take the property absolutely. Nor can the case be different even where, as in New York, the use of the word "heirs" is unnecessary in deeds as well as in wills to create an estate in fee. The presumption is universal that the word "heirs" is a word of limitation, and not of purchase. And so at common law, of "heirs of the body." Guthrie's Appeal, 37 Penn. St. 9. Contra by statute in Illinois. Butler *v.* Heustis, 68 Ill. 594.

The word "heirs" being therefore, prima facie, a word of inheritance, it is perfectly clear that (in applying the rule in Shelley's Case) the test as to whether the estate is given to the ancestor absolutely, or for life only, arises in connection with the use of this word. If the primary sense of the word "heirs" has not been affected by the terms of the will, it cannot be a word of purchase; and the entire fee is given to the ancestor. If, however, the strict meaning of the word is modified by the context, the persons referred to will take by purchase, and the estate of the ancestor will be limited by so much. See Physick's Appeal, 50 Penn. St. 128; Nice's Appeal, id. 143.

The rule in Shelley's case formerly prevailed in most, if not in all, of the older states. See Steel *v.* Cook, 1 Met. 282; Bowers *v.* Porter, 4 Pick. 206; Crockett *v.* Robinson, 46 N. H. 454; Dennett *v.* Dennett, 43 N. H. 499; Cooper *v.* Cooper, 6 R. I. 261; Thurston *v.* Thurston, id. 296; Williams *v.* Angell, 7 R. I. 145; Jillson *v.* Wilcox, id 515; Manchester *v.* Durfee, 5 R. I. 549; Bishop *v.* Selleck, 1 Day, 299; Lytle *v.* Beveridge, 58 N. Y. 592, 601; Brant *v.* Gelston,

Only applies to limitations by way of remainder.

The rule is usually stated in the above general terms, but by the word "limitation," we must understand a limitation by way of remainder, as distinguished from limitation by way of executory devise or a shifting use, [*1178] which, though it be to the heirs of *a person taking a previous estate of freehold, vests in the heir as a purchaser (*c*).

Perrin *v.* Blake.

The rule is well illustrated in the celebrated case of Perrin *v.* Blake (*d*). There A. by his will declared that if his wife should be enceinte with a child at any time thereafter (but which never happened), and it were a male, he devised his real and personal estate equally to be divided between the said infant and his son W., when the infant should attain twenty-one; and he declared it to be his intent that none of his children should dispose of his estate for longer than his life; and to take intent he devised all his estate to the said W. and the said infant, *for the term of their natural lives;* remainder to G. and his heirs for the lives of the said

(c) Lloyd *v.* Carew, Pre. Ch. 72, Show. P. C. 137; per Lord Cranworth, C., Coape *v.* Arnold, 4 D. M. & G. 589; Fea. C. R. 276; Gilb. Uses, 21; Hayes on Limitations, 4, 51, 52. This was questioned by Malins, V.-C., in White and Hindle's contract, 7 Ch. D. 203. In this case Crofts *v.* Middleton, 2 K. & J. 194, was cited arg. as deciding that under a devise to A. for life, remainder to her children in fee, with alternative remainder to her heirs if (as happened) she should have no children, the life-estate and the remainder to heirs would not coalesce. This is, of course, not law, and found no favor with Malins, V.-C.; nor was it, indeed, so laid down or suggested in the case cited. The question there was whether the remainder to the heirs, which, by the operation of the rule in Shelley's case, was executed in A., was vested or contingent. Wood, V.-C., held that it was contingent, and, consequently, that A., being f. c., had not effectually disposed of it by the means she had used. On appeal (8 D. M. & G. 192) the question whether the remainder was vested or contingent was left undecided; as to which see Egerton *v.* Massey, 3 C. B. N. S. 338, ante, Vol. I., p. 611.

(*d*) 4 Burr. 2579, 1 W. Bl. 672, 1 Coll. Jur. 283, Harg. Law Tracts, 489, n., Hayes's Inquiry, 227, n.

2 Johns. Cas. 384; Kingsland *v.* Rapelye, 3 Edw. 1; Quick *v.* Quick, 21 N. J. Eq. 13; Ackers *v.* Ackers, 23 N. J. Eq. 26; List *v.* Rodney, 83 Penn. St. 483; Huber's Appeal, 80 Penn. St. 348; Griffith *v.* Derringer, 5 Harr. (Del.) 284; Simpers *v.* Simpers, 15 Md. 160; Moore *v.* Brooks, 12 Gratt. 135; Payne *v.* Sale, 3 Battle, 455; Davidson *v.* Davidson, 1 Hawks, 163; Swain *v.* Rascoe, 3 Ired. 200; Dott *v.* Cunningham, 1 Bay, 453; Carr *v.* Porter, 1 McCord, Ch. 60; Dudley *v.* Mallery, 4 Ga. 251; Russ *v.* Russ, 9 Fla. 105; Carter *v.* Reddish, 82 Ohio St. 1; McFeely *v.* Moore, 5 Ohio, 466; Siceloff *v.* Redman, 26 Ind. 251; Helm *v.* Frishie, 59 Ind. 526; Williamson *v.* Williamson, 18 B. Mon. 329; Polk *v.* Faris, 9 Yerg. 209; Settle *v.* Settle, 10 Humph. 474; Ward *v.* Saunders, 2 Swan, 174; *s. c.* 3 Sneed, 387; Williams *v.* Sneed, 3 Coldw. 533; Turner *v.* Ivie, 5 Heisk. 222; Williams *v.* Williams, 10 Heisk. 566; Williams *v.* Williams, 11 Lea, 652; Butler *v.* Heustis, 68 Ill. 594; Baker *v.* Scott, 62 Ill. 86; Tesson *v.* Newman, 62 Mo. 198. But in nearly all of these states the rule has either been abolished or modified by statute, as the cases just cited show. It remains in force in many of the states. Carpenter *v.* Van Olinder, 127 Ill. 42; Belslay *v.* Engel, 107 Ill. 182; Earnhart *v.* Earnhart, 127 Ind. 397; Millett *v.* Ford, 109 Ind. 159; Allen *v.* Craft, id. 476; Hockstedler *v.* Hockstedler, 108 Ind. 506; Shimer *v.* Mann, 99 Ind. 190; Ridgeway *v.* Lamphear, id. 251; Warner *v.* Sprigg, 62 Md. 14; Dickson *v.* Satterfield, 53 Md. 317; Parsgrove *v.* Comfort, 58 Miss. 644; King *v.* Utley, 85 N. C. 59; Mannerback's Estate, 133 Penn. St. 21; List *v.* Rodney, 83 Penn. St. 483; Huber's Appeal, 80 Penn. St. 348; Burges *v.* Thompson, 13 R. I. 712; McIntyre *v.* McIntyre, 16 S. C. 290; Chipps *v.* Hall, 23 W. Va. 504.

It may be added that it is only after the intention has been discovered that the rule in Shelley's Case can be invoked. The rule cannot be used as a means of discovering the intention. List *v.* Rodney, supra; Evans *v.* Evans, 1892, 2 Ch. 173, 184, 188.

As to what will take a case out of the rule, see, among the many cases, Trumbull *v.* Trumbull, 149 Mass. 200; Millett *v.* Ford, and other Indiana cases, supra; Mannerback's Estate, and other Pennsylvania cases, supra; Rife *v.* Geyer, 59 Penn. St. 393.

W. and the infant; remainder *to the heirs of the bodies of the said W. and the said infant* lawfully begotten or to be begotten; remainder to the testator's daughters for the term of their natural lives, equally to be divided between them; remainder to G. and his heirs during the lives of the daughters; remainder to the heirs of the bodies of the said daughters, equally to be divided. The question was, what estate W. took. Lord Mansfield, with Ashton and Willes, JJ. (Yates, J., diss.), held that he was tenant for life only; but their judgment was reversed by a majority of the Judges in the Exchequer Chamber, who held that W. took an estate tail. An appeal was brought in the House of Lords, but was compromised.

Since this solemn determination (*e*) the rule in question has been regarded as one of the most firmly established rules of property, and, strictly speaking, no instance can be adduced of a departure from it. Undoubtedly, in many cases a devise to a * person for life, and after his death to the heirs of his body, has been held by force of the context to give an estate for life only to the ancestor (*f*); but this has been the result not of holding the heirs of the body, as such, to take by purchase, but of construing those words to designate *some other class of persons* generally less extensive. The rule, therefore, was excluded, not violated, by this interpretation. [*1179]

Rule never infringed.

Whether the testator, by this or any other expression, mean to describe heirs of the body, is a totally distinct inquiry, and has therefore in the present treatise been separately discussed (*g*). The blending of the two questions tends to involve, both in unnecessary perplexity.

Preliminary question of construction.

The principle of the rule in Shelley's case applies to limitations of copyholds (*h*) and of estates pur autre vie (*i*).

The rule applies to copyholds and estates pur autre vie

An analogous relation subsists between a man and his personal representatives; thus Lord Coke says (*k*), "If a man make a lease for life to one, the remainder to his executors for twenty-one years, the term for years shall vest in him, for even as ancestor and heir are correlativa as to inheritance (as if an estate for life be made to A., the remainder to B., in tail, the remainder to the right heirs of A., the fee vesteth in A. as it had been limited to him and his heirs), even so are testators and executors correlativa as to any chattel" (*l*). But this would

Gift to A. for life, remainder to his executors.

(*e*) An interesting statement of the circumstances and progress of this case may be found in Mr. Hargrave's Law Tracts, and in Mr. Holliday's Life of Lord Mansfield.

(*f*) See next Chapter.

(*g*) As to where heirs of the body, children, sons, and issue, are used as words of limitation, see post.

(*h*) Busby *v.* Greenslade, 1 Str. 445.

(*i*) Low *v.* Burron, 3 P. W. 262; Forster *v.* Forster, 2 Atk. 259.

(*k*) Co. Lit. 54 b.

(*l*) See accordingly Kirkpatrick *v.* Capel, Sugd. Pow. p. 75, 8th ed.; Holloway *v.* Clarkson, 2 Hare, 521; Devall *v.* Dickins, 9 Jur. 550; Page *v.* Soper, 11 Ha. 321.

seem to be rather a rule of construction, in order to promote the intention.

To attract the rule in Shelley's case the limitations to the ancestor, and to his heirs, must be created by the same instrument. Therefore, where (*m*) A. had, on the marriage of B. his son, settled lands on the son for life, remainder to the sons of that marriage successively in tail male, reversion to himself in fee, and by will devised the same to the issue of B. by any other wife in tail male; it was held that this devise did not make B. tenant in tail, but gave his heir of the body an estate tail by purchase.

Limitations must be created by same instrument.

But a will, and a schedule to it, are considered as one instrument for the purposes of this rule (*n*); and the [*1180] same principle *undoubtedly applies to a will and a codicil, or several codicils.

Will and schedule.

It was contended by Mr. Fearne (*o*) that where one limitation is contained in an instrument creating a power, and the other in an appointment under such power, the rule would apply (*p*); but the position has been, with much reason, questioned by other learned writers (*q*).

Deeds creating and exercising powers.

The rule in Shelley's case applies to equitable as well as legal interests (*r*); but the estate of the ancestor, and the limitation to the heirs, must be of the same quality, *i. e.*, both legal or both equitable. It frequently happens that a testator devises land in trust for a person for life, and after his death in trust for the heirs of his body, but gives the trustees some office in regard to the tenant for life that causes them to retain the legal estate during his life, but which, ceasing at his death, does not prevent the limitation to the heirs of the body from being executed in them. In such cases, by the rule just stated, they take as purchasers (*s*). The converse case of course may, but it rarely does, occur (*t*).

Legal and equitable interests.

Where the limitations to the devisee for life, and to the heirs of his body, both carry the legal estate, the fact that one of them is subject

(*m*) Moore *v* Parker, Ld. Raym. 37, Skinn. 558.
(*n*) Hayes d. Foorde *v.* Foorde, 2 W. Bl. 698.
(*o*) C. R. 75. And so Sug. Pow. 472, 8th ed.; Hayes on Limitations, 51.
(*p*) Venables *v.* Morris, 7 T. R. 342.
(*q*) Butl. n. to Co. Lit. 299 b; 1 Prest. Est. 324.
(*r*) Reynell *v.* Reynell, 10 Beav. 21; Fearne, C. R. 124, et seq. See also Richardson *v.* Harrison, 16 Q. B. D. 85. And there are no degrees of equity, Nouaille *v.* Greenwood, T. & R. 26; Re White and Hindle's contract, 7 Ch. D. 201.
(*s*) Ante, p. 1141.
(*t*) An unsuccessful attempt to support such a construction was made in Nash *v.* Coates, 3 B. & Ad. 839, ante, p. 1164, where it is observable that the trustees had not any office to perform except to preserve the contingent remainder, and there was no such remainder unless the words "heirs of the body" were construed *children*; and the Court, by rejecting this construction, destroyed the force of the argument. This case serves to show that the Courts are not disposed to strain the rules of construction for the purpose of preventing the application of the rule in Shelley's case.

to a trust does not prevent the application of the rule. Mr. Fearne, indeed, seems to have been of a contrary opinion (*u*); but the affirmative has been successfully maintained by his learned editor and Mr. Preston (*x*), on the well-known principle, that trust estates were not objects of the jurisdiction of Courts of Law.

Legal estate clothed with a trust.

In Douglas *v.* Congreve (*y*) real and personal estate were given * to a feme covert for life *for her separate use*, and after her decease to her husband for life, with remainder to the heirs of her body in tail, accompanied by a declaration that the aforesaid limitations were intended by the testator to be in strict settlement; and it was contended that as the testator had created a trust for the separate use of the devisee, she had merely an equitable interest (the husband being a trustee for her), with which the legal limitation to the heirs would not unite; but Lord Langdale conclusively answered this reasoning by observing that the legal estate was vested in the wife, and that the power which the law gave to the husband over the real estate of his wife did not alter the nature or quality of that estate. [*1181]

Limitation of life estate to separate use of married woman.

I. — 2. *What is a sufficient Estate of Freehold in the Ancestor.* — The estate of freehold may be an estate for the life of the devisee himself, or of another person, or for the joint lives of several persons, and may be either absolute or determinable on a contingency, as an estate durante viduitate (*z*), and may arise either by express devise, or by implication of law (*a*). which must be, we have seen, a *necessary* implication (*b*).

Rule considered in relation to *estate for life.*

In what cases the freehold shall be said to result by operation of law is a preliminary question of construction. In Coape *v.* Arnold (*c*), there was a devise to G. H., the testator's eldest son, for ninety-nine years if he should so long live, and subject to the said term to trustees and their heirs during the

Freehold resulting for life.

(*u*) C. R. 35.

(*x*) Treat. on Estates, Vol. I., p. 311.

(*y*) 1 Beav. 59. See Verulam *v.* Bathurst, 13 Sim. 386. But see Re Hart's Estate, Orford *v.* Hart, W. N., 1883, where Kay, J., held, upon the construction of the whole will, that a devise to trustees to the use of a married daughter for life for her separate use, gave her only an equitable life-estate so as not to coalesce with an ultimate devise "in trust for" the right heirs of the daughter. The ultimate limitation was apparently regarded as clothing the heirs with the legal estate notwithstanding the use of the word "trust," on the principle that the estate of trustees is commensurate with their duties, as there were no directions to sell or other duties imposed on the trustees beyond the life of the daughter. See on this point, ante, p. 1156; and see 16 Q. B. D. at p. 108.

(*z*) Merrill *v.* Rumsey, 1 Keb. 888, T. Raym. 126; Fea. C. R. 31; Curtis *v.* Price, 12 Ves. 89; Griffiths *v.* Evan, 5 Beav. 241.

(*a*) Pybus *v.* Mitford. 1 Ventr. 372, Freem. K. B. 351, 369, T. Raym. 228; Hayes d. Foorde *v.* Foorde, 2 W. Bl. 698; and see Fearne, C. R. 40, et seq.

(*b*) Ante, Chap. XVII.

(*c*) 2 Sm. & Gif. 311, 4 D. M. & G. 574. See a letter (7 Jur. N. S. Pt. II. 264) signed "W. H." where the writer disputes the possibility of a *particular* estate resulting to the heir (see the same author to the same effect more at large, Hayes on Limitations, p. 63), and supports the decision on independent grounds.

Coape *v.* Arnold.

life of G. H., upon trust only to support the contingent remainders thereinafter limited (but not expressly upon trust for G. H.), and after the determination of the said estates unto the heirs of the body of G. H., and for want of such issue, the testator devised to his second son, and to the same trustees, and to the heirs of the body of the second son, in like manner, with re-
[*1182] mainders over. By a *codicil the testator confirmed his will, and devised all his freehold and copyhold estates to four trustees, upon trust to convey to the trustees of his marriage settlement such part as with the provision in the settlement would make up 1,200*l.* jointure for his wife, and he empowered his trustees to sell, convey, and exchange or mortgage his said estates, and he charged them with payment of his debts. It was admitted that under the will standing alone the heirs of the body of the eldest son would have taken by purchase since the legal estate was devised to them; but it was contended that, as by the codicil the legal estate was vested in the trustees, the limitation to the heirs of the body of the eldest son became an equitable limitation and united with the equitable freehold which descended or resulted to the eldest son under the trust for preserving contingent remainders, and that he thus became equitable tenant in tail. Sir J. Stuart, V.-C., however, decided that the eldest son did not take an estate tail. He said, "As there is an express devise of the beneficial interest to G. H. for ninety-nine years if he should so long live, if an equitable freehold resulted to him by operation of law, the codicil having made all the devises in the will equitable estates, *either the term for ninety-nine years must be merged* in the resulting freehold, or G. H. must have had two equitable estates co-existing in him, one for the term of ninety-nine years if he so long live, the other the freehold said to result by operation of law. There are difficulties in holding, consistently with decided cases, that the freehold can result by implication to the *heir*, to whom an express estate is given for a term of years." He then cited authorities (*d*) to show that on a *conveyance* no estate could by implication of law result to the *settlor* which would be inconsistent with or annihilate an estate expressly limited to him.

But it is submitted that, both term and life-estate being equitable, there need have been no merger (*e*); and if it had been otherwise, still as the heir takes without, and even in spite of, intent, whatever is not well given to some one else (*f*), merger furnishes no valid argument against his title. Where was the beneficial interest during

(*d*) Particularly Adams *v.* Savage, and Rawley *v.* Holland, stated Fea. C. R. p. 42; Preston on Merger, pp. 212 and 514; but with the result in those cases of making the whole conveyance void and leaving the whole estate in the grantor.
(*e*) Prest. Merg. 557.
(*f*) Ante. Ch. XVIII.

the life of G. H., if not in him? The trustees of the term were expressly excluded(*g*).

*But the V.-C. relied on this further ground, that when [*1183] the particular purpose of the codicil, viz., raising the jointure and debts, was satisfied, the trustees of the codicil would be bound to re-convey according to the limitations of the will, and *in its very language*. And on this latter ground exclusively the decision was affirmed. Lord Cranworth's judgment contains some observations which, taken alone, might seem to favor the doctrine that the rule would not apply if it could be collected that the testator did not intend that it should operate; which would in effect make it a rule of construction. But he added, "The short ground of my decision is that the only effect of the codicil was to transfer the legal estate to the trustees, upon trust, after making due provision for the jointure and debts, to put the estate in precisely the same course of enjoyment as that in which it would have gone if no codicil had been made; and this certainly did not give G. H. an estate which enabled him to defeat the remainder, limited to the heirs of his body. I must not be understood as at all impugning the doctrine that the rule in Shelley's case does not depend upon, and cannot be controlled by, the intention of the testator; if the estates created are such as to bring the rule into operation, the rule will prevail even against a declared intention to the contrary. But where the question is, what estates, upon the true construction of the will, were meant to be created, — did the testator mean to create an estate of freehold, or only an estate for years? — there intention may and must be regarded; and here, looking to the intention of the testator, I cannot doubt that he meant to give to the first taker an estate for years only, with the express object of avoiding the operation of the rule. In such a case it is, I think, the duty of the Court to give effect to the intention."

Lord Cranworth's judgment in Coape *v.* Arnold.

It would seem, therefore, that the L. C. treated the trust as executory (*h*). He is reported, indeed, to have disclaimed this ground; but if the conveyance, when made by the trustees, would have altered the *sense* of the words as they stood in will and codicil, it matters little whether this was by adhering to the letter or by changing it. On no other ground could the Court have avoided deciding what became of the beneficial interest during the life of G. H.

It is to be observed, too, that words, however positive and *unequivocal, expressly negativing the continuance of the [*1184] ancestor's estate beyond the period of its primary express

(*g*) The V.-C.'s opinion would seem to have been that they had the equitable estate during the life of G. H. (2 Sm. & G. 325); but it is difficult to concede this against the express declaration of trust. It follows (as there are no degrees of equity) that they took no estate whatever.

(*h*) As to which see below, s. ii.

Expressions negativing a larger estate than for life.

limitation, will not exclude the rule (*i*); for this intention is as clearly indicated by the mere limitation of a life-estate, as it can be by any additional expressions; and the doctrine, let it be remembered, is a rule of tenure, which is not only independent of, but generally operates to subvert, the intention.[1]

Upon the same principle, neither the interposition of a trust estate to preserve contingent remainders, between the estate for life and the limitation to the heirs of the body (*k*), nor a declaration that the first taker shall have a power of jointuring (*n*), or that his estate shall be without impeachment of waste (*o*), or, if a woman, for her separate use (*p*), or that the devisee shall have no power to defeat the testator's intent, will prevent the remainder to the heirs attaching in the ancestor (*q*).

Interposition of trustees to preserve contingent remainders, &c.

I.—3. *What Limitation to the Heirs is sufficient.* — With respect to the limitation to the heirs of the body, it is (as before suggested) immaterial whether they are described under that *or any other denomination*, since it is clear that in every case in which the word "issue" or "son" is construed to be a word of limitation, and follows a devise to the parent for life or for any other estate of freehold, such parent becomes tenant in tail by force of the rule in Shelley's case (*r*). The words in question are read as synonymous with *heirs of the body*, and consequently, the effect is the same as if those words had been actually used. Upon the same principle, in the converse case, *i. e.* where the words "heirs of the body" are explained to mean some other class of persons, the rule does not apply (*s*).

Rule in regard to limitation to the heirs.

Immaterial under what denomination heirs are described.

[*1185] * It is clear, too, that the limitation to the heirs of the body may arise by implication; as (if the will is subject to the

(*i*) Robinson *v.* Robinson, 1 Burr. 38, 2 Ves. 225, 3 B. P. C. Toml. 180 nom. Robinson *v.* Hicks, stated infra; Perrin *v.* Blake, 4 Burr. 2579, ante, p. 1178; Hayes d. Foorde *v.* Foorde, 2 W. Bl. 698; Thong *v.* Bedford, 1 B. C. C. 313; Roe d. Thong *v.* Bedford, 4 M. & Sel. 362.

(*k*) Coulson *v.* Coulson, 2 Stra. 1125; Hodgson *v.* Ambrose, Doug 337, 3 B. P. C. Toml. 416; Sayer *v.* Masterman, Amb. 344; Measure *v.* Gee, 5 B. & Ald. 910.

(*n*) King *v.* Melling, 2 Lev. 58, 1 Ventr. 225, 3 Keb. 42.

(*o*) Papillon *v.* Voice, 2 P. W. 471; Denn d. Webb *v.* Puckey, 5 T. R. 299, 2 R. R. 601; Frank *v.* Stovin, 3 East, 548; Jones *v.* Morgan, 1 B. C. C. 206; Bennett *v.* Earl of Tankerville, 19 Ves. 170.

(*p*) Lady Jones *v.* Lord Say and Sele, 3 Vin. Ab. 262, pl. 19, 3 B. P. C. Toml. 113; though in this case it was held that the estate for life was equitable, and the gift to the heirs carried the legal estate. See also Roberts *v* Dixwell, 1 Atk. 607.

(*q*) Roe d. Thong *v.* Bedford, 4 M. & Sel. 362, 1 B. C. C. 313.

(*r*) Robinson *v.* Robinson, 1 Burr. 38, 2 Ves. 225; Mellish *v.* Mellish, 3 B. & Cr. 533, 3 D. & Ry. 804; Griffiths *v.* Evan, 5 Beav. 241; Harvey *v.* Towell, 7 Hare, 231, see *s.* c. 12 Jur. 242; Tate *v.* Clarke, 1 Beav. 100; Doe *v.* Rucastle, 8 C. B. 876; Lewis *v.* Puxley, 16 M. & Wels. 733; and see Ch. XXXVIII.

(*s*) See post, Ch. XXXVII., s. 3, and Brookman *v.* Smith, L. R., 7 Ex. 305, where a limitation to "the heirs and assigns of A. as if she had not been married" (which excluded her lineal descendants) was held not within the rule. See also Allgood *v.* Blake, id. 363.

[1] Huber's Appeal, 80 Penn. St. 348.

old law) in the case of a devise to A. for life, and in case he shall die without heirs of his body, or without issue, then to B. Such a case (in which the first taker, beyond all doubt, has an estate tail (*t*)) is an exemplification of the rule in Shelley's case. A gift to the issue or to the heirs of the body is implied; and the effect is that the devise is read as a gift to A. for life, and after his death to his issue or heirs of the body (*u*), which brings it to the common case illustrative of the rule. These positions are indisputable, but the first and third appear to be frequently lost sight of.

Limitation to the heirs by implication.

As no declaration, the most positive and unequivocal, that the ancestor shall take only, or his estate be subject to the incidents of, a life-estate, will exclude the rule, so a declaration that the heirs shall take as purchasers is equally inoperative to have such effect (*x*).

As to declaration that heirs shall take by purchase.

The rule in Shelley's case applies where the limitation to the heirs of the body is *contingent*. Thus, under a devise to A. and B. for their joint lives, with remainder to heirs of the body of him who shall die first, the heir takes by descent (*y*).

Effect of contingent limitation to the heirs.

It seems, however, that the mere possibility of the estate of freehold determining before the ancestor has heirs of his body (*i. e.* before his decease, since nemo est hæres viventis) does not render the limitation contingent. Thus, where (*z*) lands were limited to A. *during widowhood*, and, after her death, *to the heirs of her body* (in which case it is evident that, by the marriage of A., her estate would be determined before she could have any heirs of her body), Sir W. Grant, M. R., held that an absolute estate tail was executed in her; and this accords with the resolution of the Judges in the early case of Merrill *v.* Rumsey (*a*).

Such limitation contingent, when.

The difference between these and the former cases is, that there the limitation is contingent in the very terms of its creation, and the rule, therefore, does not alter it in this respect; * but in [*1186] the latter cases, the limitation is merely contingent by the application of a principle of law governing remainders; and when the rule under consideration operates to prevent its taking effect as a remainder, it destroys its contingent quality. The same principle is applicable in the case of a devise to A. for the life of B., remainder to the heirs of his body; for as the limitations operate by force of this rule to give an executed estate tail, that estate is not affected by the cir-

Possibility of freehold determining in lifetime of ancestor.

(*t*) See ante, Vol. I., p. 521.
(*u*) See Lord Hardwicke's judgment in Lethieullier *v.* Tracy, as reported 1 Ken. 56.
(*x*) See Harg. Law Tracts, 562.
(*y*) Co. Lit. 378 b, and see 1 Prest. Est. 316.
(*z*) Curtis *v.* Price, 12 Ves. 99.
(*a*) T. Ray. 126, 1 Keb. 888. But see 1 Sid. 247.

cumstance of B., the cestui que vie, dying in the lifetime of A., and, consequently, before he has any heir of his body (*b*).

I. — 4. *Questions where one or all of the Limitations relate to several persons.*— It is essential to the operation of the rule in Shelley's case, that the heirs of the body should proceed from the person taking the estate of freehold, and from that person only; for, if the devise be to A. for life, and after his decease, to the heirs of the body of A. *and of another person*, who might have a common heir of their bodies, it is a contingent remainder in tail to the heirs.

Limitation to heirs of tenant of freehold *and of another person.*

Thus in Gossage *v.* Taylor (*c*), where the limitations were to the wife for life, remainder to the heirs to be begotten on the body of the wife by the husband, the heirs were held to take by purchase. And the same construction prevailed in Frogmorton d. Robinson *v.* Wharrey (*d*), where S. surrendered copyholds to the use of M., his then intended wife, and the heirs of their two bodies lawfully to be begotten; although the limitation to the heirs was not expressed to be by way of remainder, and the estate of the wife was not limited expressly to a life estate.

To wife for life, remainder to heirs of the bodies of husband and wife.

To wife and heirs of body of husband and wife.

It may be observed, that, under such limitations, if the person taking the estate for life die in the lifetime of the other, the contingent remainder to the heirs fails (*e*); for, as there could be no heir of their bodies until the death of both (nemo est hæres viventis), the failure of the particular estate before that period defeats the remainder (*f*).

But if, in such a case, the tenant for life and the other person to whose heirs the limitation is made are of the same sex, or [*1187] *being of different sexes, are not actually married, and are so related by consanguinity or affinity, that they cannot have, or be presumed to have common heirs of their bodies, the effect is obviously different; for as the testator cannot mean heirs issuing from them both, the limitation is to be read as a limitation to the heirs of the body of A., the tenant for life, and to the heirs of the body of the other person respectively. The consequence is, that the former becomes, by force of the rule, tenant in tail of one undivided moiety, and the heir of the latter takes the other moiety by purchase.

Distinction where there could not be joint heirs of the bodies.

(*b*) See Perkins, s. 337; Merrill *v.* Rumsey, 1 Keb. 888, T. Ray. 126, Fea. C. R. 31.
(*c*) Sty. 325, cited again post, p. 1188.
(*d*) 3 Wils. 125, 144, 2 W. Bl. 728. See also Lane *v.* Pannell, 1 Roll. Rep. 238, 317, 438.
(*e*) Lane *v.* Pannell, 1 Roll. Rep. 238, 317, 438; Anon., Dy. 99 b.
(*f*) See this rule adverted to, ante, Ch. XXVI.; and remember stat. 40 & 41 Vict. c. 33, by virtue of which contingent remainders are now capable of taking effect in such cases as executory devises.

Where ancestor is tenant in common of freehold.

Pari ratione, if A. and B. were tenants in common for life, with remainder, as to the entirety, to the heirs of the body of A., A. would be tenant in tail of one undivided moiety, and there would be a contingent remainder in tail to the heirs of his body in the other moiety.[1]

Where the freehold is limited to husband and wife concurrently (and the same principle seems to apply in regard to persons capable, de jure, of becoming such), with remainder to the heirs of their bodies, the heirs, by the operation of the rule in question, take by descent (*g*). And the effect, it should seem, would be the same, if *successive* estates for life were limited to the husband and wife, or to persons capable of becoming such, with remainder to the heirs of their bodies (*h*).

Here it may be observed, that where there is a limitation to two persons jointly, with remainder to the heirs of the body of *one* of them, the disentailing assurance (now substituted for a common recovery) of the latter will acquire the fee simple in a moiety (*i*). Where these persons are husband and wife they are tenants by entireties; but the husband alone, without the concurrence of his wife, could formerly have conveyed the whole freehold and made a good tenant to the præcipe, and therefore could have barred the entail where the remainder was limited to the heirs of his body only. If the remainder was limited to the heirs of the body of both, both must have been vouched (*k*). *But now by 3 & 4 Will. 4, c. 74 (*l*), where the husband is seised in right of his wife, the husband and wife together are the protectors of the settlement. The case where husband and wife are tenants by entireties does not seem expressly provided for, though perhaps by a liberal interpretation it might be considered as included under ss. 23 and 24 taken together (*m*).

Limitation to heirs of one joint-tenant of freehold; — where husband and wife are tenants by entireties.

[*1188]

Questions of this kind have most frequently occurred under limitations in marriage settlements, but they may of course arise under

(*g*) See Roe d. Aistrop *v.* Aistrop, 2 W. Bl. 1228.
(*h*) Stephens *v.* Britridge, 1 Lev. 36, T. Ray. 36. And see 1 Preston, Est. 336.
(*i*) Marquess of Winchester's case, 3 Rep 1.
(*k*) Cuppledike's case, 3 Rep. 6; Fitzwilliam's case, 6 Rep. 32; 1 Prest. Conv. 55; but though the husband could make a good tenant to the præcipe, a recovery had against himself as tenant to the præcipe was bad, on the ground that the benefit of the recompense would not then enure to the proper parties; and it could not be good for a moiety, for the remainder depends on a joint and indivisible estate, which the husband could not sever, Owen's case, or Owen *v.* Morgan, And. 162, Moore, 210, 3 Rep. 5, a. See also Green d. Crew *v.* King, 2 W. Bl. 1211; Doe d. Freestone *v.* Parratt, 5 T. R. 654; Clithero *v.* Franklin, 2 Salk. 568; 1 Prest. Conv. 58, 124.
(*l*) Sect. 24.
(*m*) See 1 Phil. 261.

[1] Devise to the testator's wife and infant daughter jointly, on the death of either the survivor to take the whole, and on the death of both, remainder to the daughter's legal heirs, now creates only a life-estate in the daughter, the heirs taking by purchase. Dean *v.* Hart, 62 Ala. 308. See Putnam *v.* Gleason, 99 Mass. 454.

Further observations on limitations of this nature.

wills. In deciding on the application of the rule to such cases, the first object should be to see out of whose body the heirs are to issue; and if it be found that they are to proceed from any person who takes an estate of freehold, and him or her only, such person becomes tenant in tail. If from a person who takes an estate of freehold jointly with another, it seems the former will take an estate tail sub modo only (*n*). If from a person who takes an undivided estate in common, he will then, we have seen, take an estate tail to the extent of that undivided interest; but if the heirs of the body are to proceed from two persons as husband and wife, and *one* of them only takes an estate for life, the heirs will be purchasers.

If the limitation is to husband and wife and the heirs to be begotten *on* the body of the wife by the husband, this will be an estate tail in both (*o*); for, as the heirs are not in terms required to be of the body of either in particular, the construction is the same as if they were to issue from *both*; and, accordingly, we have seen that where such a limitation occurred after an estate for life to the wife only, it was held, that she did not take an estate tail (*p*).

Distinction between heirs *of* the body and heirs *on* the body to be begotten.

On the other hand, if the devise be to the wife for life, and then to the heirs *of* her body to be begotten by the husband, she takes an estate tail special, by force of the rule under consideration (*q*). The distinction, it will be perceived, is between heirs *on* the body and heirs *of* the body.

So if the limitation were to the husband for life, remainder to the heirs of the body of the husband on the wife to be begotten, he would, by the application of the same principle, have an estate tail special (*r*). But if, in the former case, the estate for life [*1189] had * been limited to the *husband*, and, in the latter, to the *wife*, the heirs of the body would have taken by purchase.

Under limitations in special tail, if the tenant in tail survive the other person from whom the heirs are to spring, and there be no issue, such surviving tenant in tail becomes, as is well known, tenant in tail after possibility of issue extinct. In Platt *v.* Powles (*s*) it was decided that such was the situation of the testator's widow, to whom lands were devised *for life, and after her decease to the heirs of her body by him*, at the expiration of the period during which she might have had issue by the testator, namely, nine or ten months after his death. During

Tenant in tail after possibility of issue extinct.

(*n*) See Fea. C. R. 36.
(*o*) Stephens *v.* Britridge, 1 Lev. 36, T. Ray. 36; Denn d. Trickett *v.* Gillot, 2 T. R. 431, 1 R. R. 516.
(*p*) Gossage *v.* Taylor, Sty. 325.
(*q*) Alpass *v.* Watkins, 8 T. R. 516.
(*r*) Roe d. Aistrop *v.* Aistrop, 2 W. Bl. 1228.
(*s*) 2 M. & Sel. 65.

that time, issue being, in contemplation of the law, possible (irrespective of age), and the devisee, therefore, being tenant in tail, she might have acquired the fee by means of a common recovery.

II. — The Rule as applied to Executory Limitations. — It has been already observed, that the rule in Shelley's case applies as well to equitable limitations as to legal estates.[1] Mr. Fearne has labored to establish this conclusion, in opposition to the case of Bagshaw *v.* Spencer (*t*), which was decided by Lord Hardwicke on the ground of the difference of construction applicable to legal and equitable interests; a doctrine which has been overruled in a long series of cases (*u*), including a subsequent decision of this eminent Judge himself (*x*).

Rule considered in regard to executory trusts.

The preceding remarks, it should be observed, apply only to *executed* trusts; for between trusts *executed* and *executory* there is a very material difference, which requires particular examination.

A trust is said to be executory or directory where the objects take, not immediately under it, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested. As where a testator (*y*) devises real estate to trustees in trust *to convey* it to certain uses, or directs money to be laid out in land *to be settled* to certain uses which are indicated in improper or informal terms (*z*). In these cases the direction to convey or settle is considered merely in the *nature [*1190] of instructions, or heads of a settlement, which are to be executed, not by a literal adherence to the terms of the will, which would render the direction to settle nugatory, but by formal limitations adapted to give effect to the purposes which the author of the trusts appears to have had in view (*a*).

Executory trust, what.

Thus, where a testator devises lands to trustees with a direction to settle them, or bequeaths a money fund to be laid out in the purchase of lands to be settled to the use of A. for life; *remainder to trustees during his life to preserve contingent remainders;* remainder to the heirs of the body of A. (limitations under which, if literally followed, A. would be tenant in tail, by force of the rule in Shelley's case), Courts of Equity, presuming that the testator could not have so absurd an intention as that a conveyance should be made vesting in the first taker an estate which

Uses in strict settlement, when directed.

(*t*) 1 Ves. 142, 2 Atk. 246, 570, 577; see Fea. C. R. 124 et seq.
(*u*) Bale *v.* Colman, 2 Vern. 670, 1 P. W. 142; Papillon *v.* Voice, 2 P. W. 471, 477; Wright *v.* Pearson, 1 Ed. 119; Austen *v.* Taylor, id. 361, Amb. 376; Jones *v.* Morgan, 1 B. C. C. 206. See also Jervoise *v.* Duke of Northumberland, 1 J. & W. 559, inf.; Regnell *v.* Regnell, 10 Beav. 21.
(*x*) Garth *v.* Baldwin, 2 Ves. 646.
(*y*) See Hayes's Inquiry, 248, 249, and 270.
(*z*) Earl Stamford *v.* Hobart, 3 B. P. C Toml. 33.
(*a*) Cited with approval by Lord Cairns, L. R., 4 H. L. 572.

[1] See Tallman *v.* Wood, 26 Wend. 9, 4 Kent, 219.

would enable him immediately to acquire the fee simple by means of a disentailing assurance, execute the trust by directing a strict settlement, *i. e.*, limitations to the use of A. for life; remainder to trustees to preserve contingent remainders, remainder to his first and other sons successively in tail (*b*).

So, in Leonard *v.* Earl of Sussex (*c*), where lands were devised to trustees and their heirs for payment of debts and legacies, with a direction afterwards to *settle* what should remain unsold, one moiety to the testatrix's son H. and the heirs of his body by a second wife, with remainder over; and the other moiety to the testatrix's son F. and the heirs of his body, with remainders over; taking special care in *such settlement* that it should *never be in the power* of either of the sons to *dock the entail of either of their moieties* (*d*): — it was held, that, in executing the settlement, the sons must be made only tenants for life, and should not have estates tail *conveyed* to them, but their estates for life should be without impeachment of waste (*e*): because here the estate was *not executed*, but only *executory*, and therefore the [*1191] *intent and meaning of the testatrix was to be pursued: she had declared her mind to be, that her sons should not have it in their power to bar their children, which they would have if an estate tail were to be conveyed to them. And the Court took it to be as strong in the case of an *executory* (trust in a) devise, for the benefit of the issue, as if the like provision had been contained in marriage articles; but had the testatrix by her will devised to her sons an estate tail, the law must have taken place; and they might have barred their issue, notwithstanding any subsequent clause or declaration in the will that they should not have power to dock the entail (*f*).

Settlement to be made on A. and the heirs of his body.

Direction that it should not be in his power to dock the entail.

So, in Lord Glenorchy *v.* Bosville (*g*), where the devise was to trustees and their heirs, in trust, till the marriage or death of A., to receive the rents and pay her an annuity for her maintenance, and as to the residue, to pay testator's debts and legacies, and after payment thereof in trust for A.; and if she married a Protestant, after her age, or with consent, &c., then *to convey* the estate after such marriage to the use of her *for life*, without impeachment of waste, remainder to her husband for life, remainder to the *issue of her body*,

To convey to A. for life, without impeachment &c., remainder to issue of her body.

(*b*) Papillon *v.* Voice, 2 P. W. 471. See also Leonard *v.* Earl of Sussex, 2 Vern. 526; Earl Stamford *v.* Hobart, 3 B. P. C. Toml. 31; Lord Glenorchy *v.* Bosville, Cas. t. Talb. 3; Ashton *v.* Ashton, 1 Coll. Jur. 402; White *v.* Carter, 2 Ed. 366, Amb. 670; Horne *v.* Barton, Coop. 257.

(*c*) 2 Vern. 526.

(*d*) See also Thompson *v.* Fisher, L. R., 10 Eq. 207. But see observation infra.

(*e*) For the rights of the first taker are to be cut down only so far as necessary to prevent a ienation by him; but where the executory trust in terms gives the first taker a life estate, he is not made dispunishable for waste, Davenport *v.* Davenport, 1 H. & M. 775; Stanley *v.* Coulthurst, L. R., 10 Eq. 259.

(*f*) As to this, see ante, p. 860.

(*g*) Cas. t. Talb. 3. See also Ashton *v.* Ashton, 1 Coll. Jur. 402, 525.

with remainders over: Lord Talbot held, that though A. would have taken an *estate tail*, had it been the case of an *immediate devise*, yet that the trust, being *executory*, was to be *executed in a more careful and more accurate manner;* and that a conveyance to A. for life, remainder to the husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

Again, in White *v.* Carter (*h*), where a testator gave his personal estate to trustees to purchase land, to be settled and assured as counsel should advise unto and upon the trustees and their heirs, upon trust and to and for the use *of A. and his issue in tail male, to take in succession and priority of birth;* and there was a direction to the trustees to pay the dividends of the moneys until the purchase to A. *and his sons* and issue male, Lord Northington decreed a strict settlement. This decree was affirmed by Lord Camden upon a rehearing (*i*), who observed that the latter clause put it out of doubt; the testator had there explained his meaning by making use of the words, "sons and issue."

To be purchased and settled to A. and his issue in tail male.

* And in Roberts *v.* Dixwell (*k*), where a testator directed his trustees to convey lands in trust for the separate use of his daughter for her life, and so as her husband should not intermeddle therewith, and, after her decease, in trust for the heirs of her body, Lord Hardwicke held this to be an executory trust; and therefore, to prevent the husband becoming tenant by the curtesy (which he could not be consistently with the testator's intention that he should have no manner of benefit from the estate), he decreed that the daughter should be made tenant for life only and not tenant in tail. [*1192]

To be conveyed to A. for her separate use for life, and after her decease to the heirs of her body.

Again, in Parker *v.* Bolton (*l*), where the testator devised lands to A. and directed him to settle them upon himself and his issue male by his lawful wife, and for want of such issue upon B. and his lawful issue, it was held by Pepys, M. R., that A. was tenant for life only.

To be settled upon A. and his issue.

And in Shelton *v.* Watson (*m*), the testator directed an estate "to be purchased and made *hereditary and settled upon* my here consti-

(*h*) 2 Ed. 366.
(*i*) Amb. 670.
(*k*) 1 Atk. 607, cited 2 Ves. 652, nom. Sands *v.* Dixwell.
(*l*) 5 L. J. N. S. Ch. 98. Compare Seale *v.* Seale, stated post. In Sweetapple *v.* Bindon, 2 Vern. 536, it does not appear to have been argued that the daughter ought to have taken only a life estate under the settlement. The two cases last stated in the text seem opposed to the subsequent decision of Samuel *v.* Samuel, 14 L. J. Ch. 222, 9 Jur. 222, where a testator directed that personalty should be settled on A, for the *sole* use of A. and her lawful issue, and Sir L. Shadwell held that A. was absolutely entitled. It is evident that if the subject of gift had been real estate, he would have held A. to be tenant in tail.
(*m*) 16 Sim. 542.

To be purchased and settled on A., his heirs and successors in the direct male line.

tuted heir, and *to descend to his heirs*, or dying without issue as I shall now provide, and I hereby constitute W. S. my heir and successor, and the said estate when purchased to be settled on him, his heirs and *successors in the direct male* line lawfully begotten. In case W. S. die without issue," a similar settlement was directed with respect to the two brothers of W. S. successively, the testator expressing his intent *that the estate should never pass out of his name and family*. Sir L. Shadwell, V.-C., held that W. S. and his brothers were to be made tenants for life only.

But a distinction has been sometimes taken between the effect of a clause directing the trustees to purchase land *and settle it*, as in Papillon *v.* Voice and White *v.* Carter, and a direction to them simply to purchase, the testator himself declaring the uses of the land so to be purchased. Thus, in Austen *v.* Taylor (*n*), where the testator devised lands to A. for life with impeachment of waste, remainder to trustees to preserve contingent * remainders, remainder to the heirs of the body of A.; and bequeathed personal estate to be laid out in land, *which should remain, continue, and be* to the same uses as the land before devised; Lord Northington, after observing in reference to Papillon *v.* Voice and Leonard *v.* Earl of Sussex, that there the trustees were directed *to settle, and that an estate tail would have been no settlement*, held that the case before him was distinguishable, inasmuch as the testator had referred to no settlement by the trustees, but had declared his own uses and trusts; which being declared, he knew no instance where the Court had proceeded so far as to alter or change them; accordingly, A. was to be tenant in tail in the lands to be purchased.

Alleged distinction where testator himself declares uses of lands to be purchased.

[*1193]

This case is stated by Mr. Ambler to have been dissatisfactory to the profession, which is denied by Lord Henley (*o*); but Lord Eldon has spoken of the decision in terms which imply doubt of its soundness (*p*). He also observed that the Judges who decided Papillon *v.* Voice and Austen *v.* Taylor agreed in the principle, but differed in the application of it. The distinction upon which the latter case is founded (or at least is usually supposed to be founded) certainly has not been invariably adopted; for in Meure *v.* Meure (*q*), where lands were devised to trustees in trust to sell, who with the money arising

Disapproved by Lord Eldon.

Disregarded in certain cases.

(*n*) 1 Ed. 361, Amb. 376.
(*o*) See note, 1 Ed. 369.
(*p*) See Green *v.* Stephens, 17 Ves. 76; Jervoise *v.* Duke of Northumberland, 1 J. & W. 574.
(*q*) 2 Atk. 265. The issue will generally take successive estates tail, Grier *v.* Grier, L. R., 5 H. L. 707; even though words of limitation be superadded to "issue," Phillips *v.* James, 2 Dr. & Sm. 404, aff. (diss. K. Bruce, L. J.), 3 D. J. & S. 72. In Hadwen *v.* Hadwen, 23 Beav. 551, words were added importing a tenancy in common, and the *children* were held to be tenants in common in tail.

from the sale were to purchase other freehold lands, or some stock in the public funds, and then to permit A. and his assigns to receive the interest and profit for his life, and after his decease to permit the plaintiff and his assigns to receive the interest and profits of the said money as aforesaid, or the rents and profits of the said land if unsold, or such other lands as should be purchased *during his natural life*, and after his decease, then in trust *for the use of the issue of the body of the plaintiff lawfully begotten*, and in default of such issue over; Sir J. Jekyll, M. R., held that, in executing the trust, lands should be purchased *and the plaintiff made tenant for life only.*

Devise of lands to be purchased to A. for life, remainder to his issue.

Here the lands to be purchased were devised immediately to these limitations, without any express direction to settle; and the terms used would, if applied to lands directly devised, clearly * have made A. tenant in tail (*r*), and yet he was held to be [*1194] tenant for life only.

So, in Harrison *v.* Naylor (*s*), where the testator directed his executors to purchase a freehold estate, and *gave and devised* such estate, when purchased, to A., to him and the heirs male of his body forever; and if A. should die without issue male, then *he gave and devised* the said estate to the heir male of his (testator's) daughter E., but if E. had no issue, then he gave and devised the said estate, on a certain condition, to his (testator's) next heir-at-law; and reciting that he was not certain whether it was possible to entail an estate not yet purchased, he directed his executors to consult some eminent lawyers; and if they held that such entail as was expressed in the will was repugnant to law, then his personal estate should be equally divided between T. and E. Lord Thurlow said it was impossible to argue against A.'s having an estate tail, and that the money must be invested (in lands to be settled) to the use of A. and the heirs of his body, with a contingent remainder in tail to the person who should answer the description of heir male of E. at the time of her death, with remainder to the right heir of the testator; but counsel suggesting that, as this was an *executory trust*, the Court would interpose, after the estate tail to A., a limitation to trustees to preserve the contingent remainder to the heir male of E., the daughter, his Lordship was of opinion that such a limitation should be inserted; and declared that the uses were to be to A. and his heirs in tail male, *with remainder to trustees to support contingent remainders*, remainder to the heirs male of E., the daughter, in fee; and if she should have no heirs male, then to the heir-at-law of the testator in fee.

Devise of lands to be purchased to A. and the heirs male of his body;

trust executed by simply interposing trustees to preserve contingent remainders.

By interposing the estate in the trustees Lord Thurlow evidently

(*r*) See post, Chap. XXXIX. (*s*) 2 Cox, 247.

treated the trust as executory, though the testator had in direct terms devised the purchased lands. In this respect, therefore, the case is another authority against Austen *v.* Taylor, of which, however, it may be observed, that to have made A. tenant for life only of the lands to be purchased, would have created a diversity between them and the lands devised, which the testator evidently intended should be held together (*t*). This * distinguishes the case from and reconciles it with those just stated.

Austen *v.* Taylor explained.

[*1195]

But even where there is a clear direction to the trustees to frame the settlement, the doctrine of some of the cases requires that, to warrant the introduction of limitations in strict settlement, it should be indicated by the context that the testator did not intend an estate tail to be created according to the technical effect of the expressions used.

Indication that testator did not intend an estate tail, required.

Thus, in Seale *v.* Seale (*u*), where a testator bequeathed money to be laid out in the purchase of lands, to be settled *on A. and the heirs male of his body*, Lord Cowper held that A. was absolutely entitled to the money not laid out; and, though it was suggested that the Court would order a strict settlement, his Lordship observed that in marriage articles the children are considered as purchasers, but in the case of a will (as this was), where the testator expresses his intent to give an estate tail, a Court of Equity ought not to abridge the bounty given by the testator.

Direction to settle on A. and the heirs of his body.

This principle was carried to a great length in Blackburn *v.* Stables (*x*), where the testator devised the remainder of his real and personal estate in trust to his nephew J., and to M. his executor, for the sole use of a son of the said J., at the age of twenty-four; if he had no son, to a son of testator's great-nephew J.; but if neither of those had a son, then to a son of testator's great-niece's daughter E., with a direction to take his (testator's) name: but on whomsoever such his disposition should take place, his will was that he should not be put in possession of any of his effects till the age of twenty-four, nor should his executors give up their trust *till a proper entail were made to the male heir by him* (the person so being entitled). J., the nephew, had no son born at the testator's death, but his wife was then enceinte with a son, who was afterwards born, and attained twenty-four: Sir W. Grant, M. R., said, "It is settled that the words 'heir,' or

That a "proper entail be made to the male heir;"

(*t*) But a direction to settle land, to go with a dignity which is limited to A. and the heirs of his body, will be executed by making A. tenant for life; for notwithstanding the limitation the dignity is wholly inalienable, Sackville-West *v.* Holmesdale, L. R., 4 H. L. 543. See also Bankes *v.* Le Despencer, 10 Sim. 576, 11 Sim. 508; Montague *v.* Lord Inchiquin, 23 W. R. 592. And the same rule applies to a direction to settle chattels to go with a title. Re Johnston, Cockerell *v.* Earl of Essex, 26 Ch. D. 538, 549.

(*u*) Pre. Ch. 421, 1 P. W. 290.

(*x*) 2 V. & B. 367.

'heir male of the body,' in the singular number, are words of limitation, not of purchase, unless words of limitation are superadded, or there is something in the context to show that the testator did not mean to use the words in their technical sense. But there is nothing in the context of this will from which that can be collected; there is an absence of every * circumstance that has com- [*1196] monly been relied on as showing such an intention. The word is 'heir,' not '*issue.*' There is *no express estate for life* given to the ancestor; no clause that the estate shall be *without impeachment of waste; no limitation to trustees to preserve contingent remainders;* no direction so to frame the limitation that the first taker shall not have the power of barring the entail. Everything is wanting that has furnished matter for argument in other cases: the words are therefore to be taken in their legal acceptation, and the son of J. is entitled to have the conveyance made to him *in tail male.*"

estate tail directed.

So, in Marshall *v.* Bousfield (*y*), where a testator devised to his wife and her heirs, upon trust that she should enjoy the estates during her life, and, after her decease, that the same *should be settled by able counsel,* and go to and amongst the grandchildren of the male kind *and their issue in tail male,* and for want of such issue, upon his female grandchildren who should be living at his decease: but the testator declared that the shares and proportions of the male and female grandchildren, and their respective issues, should be in such proportions as his wife should by deed or will appoint; and, for want of such appointment, to the testator's own right heirs forever. The wife appointed in favor of the testator's grandson W. and the heirs male of his body. It was objected that this was an executory trust, under which W. would be made tenant for life, with remainder to his issue in strict settlement: but Sir T. Plumer, V.-C., held that the words "in tail male" applied to the grandchildren, and that no language was used which had been held in other cases to give only an estate for life. He observed, that unless the grandchildren took an estate tail, the limitation, so far as regarded a grandson who was born after the testator's death, would be void, as being too remote (*z*).

To be settled upon grandchildren and their issue in tail male.

The latter circumstance constitutes a peculiarity in this case, which otherwise afforded strong arguments in favor of a strict settlement. The estate was to be settled *by able counsel* (*a*), and the word was "issue," not "heirs of the body" (*b*). Confidence in the case, too, is weakened by the fact, that

Remark on Marshall *v.* Bousfield.

(*y*) 2 Mad. 166.

(*z*) But there was ground to contend that, as the limitation to the female grandchildren was confined to those living at his death, the same construction might be given to the gift to the *male* grandchildren.

(*a*) See White *v.* Carter, 2 Ed. 366, Amb. 670; Bastard *v.* Proby, 2 Cox, 6.

(*b*) See judgment in Meure *v.* Meure, 2 Atk. 265. And Blackburn *v.* Stables, 2 V. & B. 367, ante, p. 1195.

[*1197] another determination * of the same Judge on a question of this nature has been impeached (*c*).

The reader should suspend any conclusion he may be disposed to draw from Blackburn *v.* Stables and Marshall *v.* Bousfield, until he has carefully weighed them with Lord Eldon's decision in the subsequent case of Jervoise *v.* Duke of Northumberland (*d*), where the words were, "To my son R. I leave all my estates at" B. &c., "*to be entailed upon his male heirs;* and, failing such, to pass to his next brother, and so on from brother to brother, allowing 2,500*l.* each to be raised upon the estates for female children. The above-named estates are to be liable to all my debts at my decease, and to the fortunes left to my younger children, unless otherwise discharged. I direct my estates at M. to be sold, in order to raise money for the above-named legacies, and what falls short to be raised or charged on the other property at" B., &c. The legal estate was not in the testator. In a suit for declaring the right of all parties, Sir T. Plumer, V.-C., decreed that R. was entitled to an *estate tail.* The estate was afterwards settled on the marriage of R., and was purchased under a power of sale in the settlement; but the purchaser objecting to the title, a bill was filed to enforce specific performance. It was contended for him that the trust was merely directory, and that the Court, in executing it, would mould the limitations in the nature of a strict settlement; and Lord Eldon thought the contrary so doubtful, that he could not compel a purchaser to take the title. His Lordship, indeed, expressed a strong opinion that the trust was directory; and his observations leave us not much room to doubt that, if called upon to execute it, he would have decreed a strict settlement, and not have given R. an estate tail (*e*).

Devise to R. *to be entailed* upon his male heirs;

not a clear estate tail in R.

Lord Eldon in this case intimated that he did not think that the circumstances of the power being given to the devisee to charge a sum of money on the estate was a conclusive argument that he was to be only tenant for life, since, in many cases, powers are usefully given to a tenant in tail, enabling him to do certain acts more conveniently than by destroying the entail.

As to giving tenants in tail power to charge.

Most of the cases of this kind have arisen on marriage articles (*f*), to which the same principles are applicable as to [*1198] * executory trusts by will, with this difference, that, as it is in every case the object of marriage articles to provide for the issue of the marriage, the nature of the instrument affords a

(*c*) See Jervoise *v.* Duke of Northumberland, 1 J. & W. 559.
(*d*) 1 J. & W. 559.
(*e*) But see Lowry *v.* Lowry, 13 L. R. Ir. 317.
(*f*) See Fea. C. R. 90; 1 Prest. Est. 354.

Distinction between marriage articles and wills.

presumption of intention in favor of the issue, which does not belong to wills; and Lord Eldon, in the last case (*g*), intimated that the observations imputed to him in Countess of Lincoln *v.* Duke of Newcastle (*h*), questioning the distinction, were to be received with this qualification (*i*).

General observations upon the cases.

The preceding cases do not clearly demonstrate the precise ground on which Courts of Equity will execute a trust of the nature of those under consideration by the insertion of limitations in strict settlement. It has sometimes been thought that the principle extends to every case in which the testator has left *anything to be done;* and that the Court only requires it to be shown that the trust is executory, in order to mould the limitations in this manner. Some of Lord Eldon's observations in Jervoise *v.* Duke of Northumberland have been supposed to go to this length (*k*); and perhaps it is difficult to place the doctrine, consistently with the liberty which has been taken with the testator's expressions, upon a narrower basis (*l*); but, in the actual state of the decisions, it is too much to hazard a general position of this nature. No case has yet determined that a trust *in a will* to settle land simply on A. and the heirs of his body, authorizes the Court to limit estates in strict settlement. Leonard *v.* Earl of Sussex, it is true, had only the additional circumstance of a direction that it should not be in the power of A. to dock the entail, with respect to which the writer fully concurs in the observation of a learned friend (*m*), "that this rather weakened than strengthened the presumption, that the testator intended A. to be merely tenant for life;" the direction seeming rather to import that A. was to take an estate tail, without the power of docking it. The case, however, was decided, and has been since generally referred to, as standing upon this ground; and it is to be observed also that Seale *v.* * Seale (*n*) is a direct [*1199] authority against applying the doctrine to the simple case suggested.

Indeed some Judges have denied its application even to the case of a direction to settle lands upon A. *for life*, and after his death to the heirs of his body. Such was the opinion expressed by Sir

(*g*) 1 J. & W. 571, 574.
(*h*) 12 Ves. 227, 230.
(*i*) See Rochford *v.* Fitzmaurice, 1 Con. & L. 158, 2 D. & War. 1; Sackville-West *v.* Holmesdale, L. R., 4 H. L. 543.
(*k*) See Hayes's Inq. 262, n.
(*l*) If the Courts are bound to require an indication that the testator intended only an estate for life, would it not seem that by parity of reason they are obliged to adhere to the testator's language, ultra this object, provided the will contain no further evidence that he does not mean an estate tail, *i. e.*, by giving the ancestor an *equitable* freehold, and the heirs a *legal* remainder, thus making the heirs purchasers? Their not having done this certainly affords an argument in favor of the hypothesis suggested.
(*m*) Hayes's Inq. 262, n.
(*n*) 1 P. W. 132, ante, p. 1195. See also Sweetapple *v.* Bindon, 2 Vern. 536; Harrison *v.* Naylor, 2 Cox, 247; Marryatt *v.* Townly, 1 Ves. 102; Randall *v.* Daniel, 24 Beav. 193.

Whether a direction to settle on A. for life, remainder to the heirs of his body, authorizes a strict settlement.

J. Jekyll in Meure *v.* Meure (*o*), and Sir W. Grant in Blackburn *v.* Stables, though the former decided that a different construction was to be given to the word "issue," and the latter, we have seen, was disposed to yield to a declaration that the estate should be without impeachment of waste, or that there should be a limitation to trustees to preserve contingent remainders (*p*). This distinction is certainly very refined. How can a testator intimate that he intends the object of the trust to be tenant for life more strongly than by expressly so limiting the estate? If the rule in Shelley's case be objected as destroying that inference of intention, the answer is, that neither of the other circumstances, to which this potency of operation is admitted to belong, prevents the application of that rule. In this respect they are all equally inoperative, though they all indicate an intention to confer an estate for life only. Even, therefore, if we hesitate to subscribe to the more general (though perhaps the more reasonable) doctrine, that a direction to settle authorizes the Court to adopt its own mode of settlement, without regard to the particular force of the terms used by the testator, and require *distinct indication of intention* that the testator did not mean that the legal effect of those terms should be followed, yet even upon this principle the case under consideration would warrant the Court in moulding the limitations.

In fact, Bastard *v.* Proby (*q*) is a direct authority in favor of the affirmative. A testator devised lands to trustees, in trust to lay out the rents for the benefit of his daughter J. until twenty-one or marriage; and, on her attaining that age, directed that the trustees should, *as counsel should advise, convey, settle, and assure* the lands unto or to the use of, or in trust for, the said J. *for her life*, and, after her death, then *on the heirs of her body* lawfully issuing; and, Sir Ll. Kenyon, M. R., directed that conveyances should be executed limiting uses in strict settlement.

Affirmative established by Bastard *v.* Proby.

[*1200] * Where the testator, instead of employing technical terms, as in the cases just noticed, expresses himself in very brief informal language by directing *an entail to be made*, as in Blackburn *v.* Stables and Jervoise *v.* Duke of Northumberland, it is useless to look for a specification of particulars, as that the devisee shall be tenant for life, &c.; the general indefinite nature of the testator's language forbids it: he may be supposed to have intended to exclude a strict interpretation by the use of terms the farthest removed from technicality, and which, in their popular sense, certainly mean something very different from placing the estate in the power of the first taker. No conveyancer

Observation upon Blackburn *v.* Stables.

(*o*) 2 Atk. 265, ante, p. 1193.
(*p*) *I.* e., he relied on the absence of these *and other* clauses.
(*q*) 2 Cox, 6.

receiving instructions for a settlement in these terms would hesitate to insert limitations in strict settlement; and the principle upon which Courts of Equity proceed in the execution of directory trusts is not very widely different. Considering Lord Eldon's determination in Jervoise *v.* Duke of Northumberland, and more especially the doctrines advanced by him in his elaborate judgment in that case, it seems unsafe to rely on Blackburn *v.* Stables, to which it is extraordinary that, in his comment upon the cases, he makes no allusion (*r*). Where lands are directed to be settled on A. and his heirs *in strict entail*, there seems little doubt that A. ought to be made tenant for life only (*s*).

To be settled "on A. and his heirs in strict entail."

"All trusts," said Lord St. Leonards (*t*), "are in a sense executory, because a trust cannot be executed, except by conveyance, and therefore there is something always to be done. But that is not the sense which a Court of Equity puts upon the term 'executory trusts.' A Court of Equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner: — Has the testator been what is called his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to * do but to take the limitations he has given [*1201] you, and to convert them into legal estates?"

Mere direction to convey does not make a trust executory.

It is clear, that where a testator devises real estate to trustees upon trusts, and then directs, that, in certain events, they shall convey the estate in a prescribed manner, the fact that the will contains such a direction does not constitute a ground for regarding the whole series of trusts as executory, and for applying to the former that liberality of construction which is peculiar to trusts of this nature (*u*).

Trust in terms partly direct and partly executory.

The Court will, of course, execute directions for any settlement that can legally be made, whether such directions are specific or general, provided the intention is apparent; but will not, in order to tie up the estate for a longer period than would be secured by making the first taker tenant for life with

The Court will not appoint protectors.

(*r*) See further, as to executory trusts, post, Ch. XLIV.; Fea. C. R. 113; Prest. Est. 387; 1 Sand. Uses, 310; 1 Fonbl. Eq. 407, n.; Hayes's Inq. 264, where see strictures upon the observations of the other writers referred to. Lord Eldon, in Jervoise *v.* Duke of Northumberland, intimated his assent to the conclusions of Mr. Fearne on the subject of executory trusts, which is one of the many tributes of respect paid to the labors of this very eminent writer by those whose profound knowledge of the laws of real property enabled them to appreciate those labors. See also Stonor *v.* Curwen, 5 Sim. 264; Boswell *v.* Dillon, 1 Dru. 291.

(*s*) Graves *v.* Hicks, 11 Sim. 536; Woolmore *v.* Burrows, 1 Sim. 526.

(*t*) Egerton *v.* Brownlow, 4 H. L. Ca. 210, 23 L. J. Ch. 406, 18 Jur. 104; and see East *v.* Twyford, 9 Hare, 733; Herbert *v.* Blunden, 1 D. & Wal. 90; Randall *v.* Daniell, 24 Beav. 193; Doncaster *v.* Doncaster, 3 K. & J. 35; Fullerton *v.* Martin, 1 Dr. & Sm. 31 (personalty).

(*u*) Franks *v.* Price, 3 Beav. 182. See also Jackson *v.* Noble, 2 Kee. 590; Re Nelley's Trusts, W. N., 1877, p. 120.

remainder to his sons successively in tail male, &c., appoint any persons protectors of the settlement (*v*).

It is beyond the scope of the present chapter to deal with the subject of carrying into effect executory trusts, except as it bears on the rule in Shelley's case; but it may be convenient to refer to the cases which decide that usual powers of management, such as leasing, sale, and exchange, and the appointment of new trustees, may generally be inserted, whether "usual" powers are authorized or not (*x*); unless the testator's meaning appears to have been fully expressed in detail, and not to admit of addition (*y*); or unless by expressly authorizing particular powers the context impliedly excludes others (*z*). But powers to jointure and to charge with portions, however usual, cannot be inserted without express authority, for want (it is said) of a certain guide to the amount (*a*).

Powers authorized by executory trust to settle.

[*1202] * **III. — Practical Effect of the Rule considered.** — It may be useful here to state the practical bearings of the alternative whether the heir takes by descent or by purchase; which will be best shown by suggesting a case of each kind. Suppose, then, a devise *to A.* for life, remainder to the heirs of his body; and suppose another devise to the use of *trustees for the life of B.*, in trust for B., remainder to the use of the heirs of his body. In the former case, the ancestor being tenant in tail, the *heirs* of his body *claim* derivatively through him by *descent* per formam doni, but if A. die in the lifetime of the testator, the heir now takes as if the death of the ancestor had happened immediately after the death of the testator (*b*).

Practical bearings of the rule in Shelley's case.

As to lapse.

On the other hand, in the latter supposed case, if B. should die in the testator's lifetime, it would not affect his heir, who claims not derivatively through his ancestor, but originally in his own right by

(*v*) Bankes *v.* Le Despencer, 11 Sim. 508; but see Woolmore *v.* Burrows, 1 Sim. 527.

(*x*) Turner *v.* Sargent, 17 Beav. 515; Wise *v.* Piper, 13 Ch. D. 848. And see Lindow *v.* Fleetwood, 6 Sim. 152.

(*y*) Wheate *v.* Hall, 17 Ves. 80. See also Horne *v.* Barton, Jac. 437.

(*z*) Hill *v.* Hill, 6 Sim. 144; Pearse *v.* Barroo, Jac. 158.

(*a*) Grier *v.* Grier, L. R., 5 H. L. 688. See Sackville-West *v.* Holmesdale, L. R., 4 H. L. 543, where the settlement was to be with such powers as the trustees should think proper. In this case Lord Cairns said, p. 577, "I cannot think that, if an executory instrument on its proper construction authorizes the insertion of powers of jointuring and portioning, the absence of any mention of amount ought to be an insurmountable difficulty."

As to the effect of a direction that the legacies or shares of daughters shall be "settled on their marriage," or "on themselves strictly," see Magrath *v.* Morehead, L. R., 12 Eq. 491; Loch *v.* Bagley, L. R., 4 Eq. 122. And as to adding a restraint on anticipation by f. c., Symonds *v.* Wilkes, 11 Jur. N. S. 659 (articles).

(*b*) See 1 Vict. c. 26, s. 32. Under the old law the heir would have taken nothing, as the devise to his ancestor would have lapsed. Brett *v.* Rigden, Plow. 340; Hartop's case, Cro. El. 243; Hutton *v.* Simpson, 2 Vern. 722; Hodgson *v.* Ambrose, Dougl. 337, 3 B. P. C. Toml. 416; Wynn *v.* Wynn, id. 95; Warner *v.* White, id. 435; Goodright *v.* Wright, 1 P. W. 397; Fuller *v.* Fuller, Cro. El. 422. The abstract prefixed to Warner *v.* White is singularly inaccurate.

purchase; and who would therefore, even under the old law, be entitled under the devise, notwithstanding his ancestor's death in the lifetime of the testator. The estate tail would go by a sort of quasi descent (*c*) through *all* the heirs of the body of the ancestor, first exhausting the inheritable issue of the first taker (and which issue would claim by descent), and then devolving upon the collateral lines; the head of each stock or line of issue claiming as heir of the body of the ancestor by purchase, but taking in the same manner as such heir would have done under an estate tail vested in the ancestor.

Another difference to be observed is, that where the heir takes *by descent*, the property, if in possession, devolves upon him, subject to the dower of the widow of his ancestor, if he were married at his death (*d*), or subject to curtesy, if the ancestor were a married woman, who left a husband by whom she had had issue born alive, *capable of inheriting*, and which attaches whether the estate be legal *or* equitable (*e*). On the other hand, where the heir takes by purchase, of course none of these rights, * which [*1203] are incident to estates of inheritance, attach, the ancestor being merely tenant *for life*.

As to dower and curtesy.

And, lastly, if the heir of the body take by descent, his claim may be defeated by the alienation of his ancestor by means of a conveyance enrolled, now substituted for a common recovery, the right to make which is, we have seen, an inseparable incident to an estate tail (*f*). On the other hand, the heir claiming by purchase is unaffected by the acts of his ancestor, except so far as those acts might before the statute 8 & 9 Vict. c. 106, s. 8, have happened to destroy the contingent remainder of such heir, if not supported (as it always should have been) by a preceding vested estate of freehold. The conveyance, it should be observed, of a person becoming tenant in tail by force of the rule in Shelley's case under a limitation to the heirs of his body not *immediately* expectant on his estate for life, had no effect upon the mesne estates, unless they happened to be legal remainders contingent and unsupported. Thus in the case of a limitation to A. for life, remainder to his first and other sons in tail male, remainder to the heirs of the body of A., with remainders over; A., being tenant in tail by the operation of the rule, may make a disentailing assurance; but though such assurance will bar the remainders ulterior to the limitation to the heirs of his body, it will not affect the intervening es-

Alienation by an enrolled conveyance.

Operation of disentailing assurance upon estates intervening between the freehold and the limitation to the heirs.

(*c*) Mandeville's case, Co. Lit. 26 b. ante, p. 907. See Fea. C. R. 80.

(*d*) It now makes no difference whether the estate be legal or equitable only, stat. 3 & 4 Will. 4, c. 105.

(*e*) Curtesy attaches to property saved from lapse by the 1 Vict. c. 26, s. 33, see Eager *v.* Furnival, 17 Ch. D. 115. The same rule would apparently apply under s. 33.

(*f*) Ante, p. 860.

tate of the first and other sons, unless there were no son born at the time, and no estate interposed to preserve the remainders of the sons, in which case such remainders, being contingent, would, before the statute above referred to, have clearly been destroyed. That statute puts it out of the power of the owner of the preceding estate of freehold to destroy the contingent remainders depending thereon.

It may be useful to illustrate the practical consequences of a limitation of another description. Suppose a devise to A. and B. *jointly* for their lives, remainder to the heirs of their bodies; if they were *not* husband and wife (or, it would seem, persons who may lawfully marry), they would be *joint*-tenants for life, with *several* inheritances in tail (*g*). An enrolled conveyance by either would acquire the fee simple in an undivided moiety, and they would thenceforward be tenants in common; by parity of reason, a similar conveyance by both would comprise the entirety.

Further points suggested.

If the limitations were to them *successively* for life, A. [*1204] would be * tenant for life of the entirety, with the inheritance in tail in one moiety, subject, as to the latter, to B.'s estate for life, and B. would be tenant for life in remainder of one moiety, and tenant in tail in remainder of the other moiety. A. being tenant in tail in possession, might make a disentailing assurance, which would give him the fee simple in a moiety of the inheritance, but would not, as before shown, affect B.'s estate for life in remainder in that moiety. B., on the other hand, having no immediate estate of freehold, could not during the life of A., and without his concurrence, acquire, by means of an enrolled conveyance, a larger estate than a base fee determinable on the failure of issue inheritable under the entail. A. and B. might conjointly convey the absolute fee simple in the entirety.

Under a devise to A. and B. jointly for their lives, with remainder to the heirs of their bodies, A. and B., being persons who might lawfully marry, would be joint-tenants in tail; if actually husband and wife, they would be tenants in tail by entireties (*h*). In the former case, each might acquire the fee simple in his or her own moiety, by making a disentailing assurance thereof; but, in the latter case, the concurrence of both would be essential, on the ground of the unity of person of husband and wife (*i*), and the deed of course must be acknowledged by the wife. In each of the suggested cases, if the estate remained unchanged at the decease of either of the two tenants in tail, it would devolve to the survivor, according to the well-known rule applicable as well to joint-tenancies as tenancies by entireties.

(*g*) See Lit. s. 283; Ex parte Tanner, 20 Beav. 374.
(*h*) Co. Lit. 187 b.
(*i*) See Green d. Crew *v.* King, 2 W. Bl. 1211.

WHAT WILL CONTROL THE WORDS "HEIRS OF THE BODY."

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I. — Superadded Words of Limitation. — It has been already shown that a devise to A. and to the heirs of his body (*a*), or to A. *for life* and after his death to the heirs of his body (*b*), vests in A. an estate tail. On a devise couched in these simple terms, indeed, no question can arise; for wherever the contrary hypothesis has been contended for, the argument for changing the construction of the words has been founded on some expressions *in the context;* as where words of limitation are superadded to the devise to the heirs of the body; the effect of which has been often agitated, and will here properly form the first point for inquiry.

Effect of context in controlling "heirs of the body."

Where the superadded words amount to a *mere repetition of the preceding words of limitation,* they are of course inoperative to vary the construction. Expressio eorum quæ tacite insunt nihil operatur.[1]

Similar limitation superadded is inoperative.

Thus in Burnet *v.* Coby (*c*), where a testator devised lands to A. for life, and after his decease to the heirs male of the body of A. *and the heirs male of such issue male,* it was held that A. had an estate tail, and the settled distinction was said to be that where, after a limitation to the ancestor, the word "heir" is in the singular number, and a limitation made to the issue of such heir, the word "heir"

(*a*) Ante, p. 1169.
(*b*) Ante, p. 1177.
(*c*) 1 Barn. B. R. 367. See also Shelley's case, 1 Rep. 93; Minshull *v.* Minshull, 1 Atk. 411; Legatt *v.* Sewell, 2 Vern. 551, 4 Eq. Ca. 394, pl. 7, 1 P. W. 87, cit. 2 Ves. 657, where the trust was *executory,* and would, it is clear, according to the doctrine now established, be executed by a strict settlement. See ante, p. 1189.

[1] A testator devised one half of certain real estate to his "son John and the heirs lawfully begotten of his body, and their heirs and assigns;" and it was held that the first words gave an estate tail to John, and that the words "their heirs and assigns" did not enlarge the devise to a fee simple, either to him or the heirs of his body. Buxton *v.* Uxbridge, 10 Met. 87; Wight *v.* Thayer, 1 Gray, 284, 287. See Corbin *v.* Healy, 20 Pick. 514.

[*1206] is considered as a word of purchase (*d*), * and a descriptio personæ; but wherever the word "heirs" is in the plural number, and a limitation made to the issue of such heirs, the word "heirs" is considered as a word of descent and not of purchase.

Construction not varied by superadded limitation to *heirs general* of heirs of the body.

It is also well established that a limitation to the *heirs general* of the heirs of the body, is equally ineffectual to turn the latter into words of purchase.

Thus in Goodright d. Lisle *v.* Pullyn (*e*), where a testator devised lands to N. for life, and after his decease then he devised the same unto *the heirs male of the body* of N. lawfully to be begotten *and his heirs forever*;[1] but if N. should happen to die without such heir male, then over; the Court was of opinion that the devise vested an estate tail in N. A similar decision was made by the Privy Council on a similar devise (*f*).

So, in Wright *v.* Pearson (*g*), where the devise was to R. and his assigns for his life, remainder to trustees to support contingent remainders, remainder to the use of *the heirs male of the body* of R. lawfully to be begotten *and their heirs* (provided that in case R. should die without leaving any issue male of his body living *at his death*, then the testator subjected the premises to certain charges (*h*)), and in default of such issue male of R., he devised the premises to certain grandchildren, or such of them as should be living at the time of the failure of issue of R.; Lord Keeper Henley held it to be an estate tail in R.

Again, in Denn d. Geering *v.* Shenton (*i*), where the testator devised lands to S. to hold to him and *the heirs of his body* lawfully to be begotten *and their heirs forever*, chargeable with an annuity to M. for life; but in case S. should die without leaving issue of his body, then the testator devised the lands to W. and his heirs, chargeable as aforesaid, and also subject to the payment of 100*l.* to A. *within one year after W. or his heirs should become possessed of the premises.* It was contended, on the authority of Doe *v.* Laming (*j*), that the words "heirs of the body" might be words of purchase, with these superadded words of limitation, and that this construction was much strengthened by * the circumstance of the legacy of 100*l.*, which must have referred to a dying without issue at the death, and not to an indefinite failure of issue, which might happen a hun-

[*1207]

(*d*) See ante, p. 1171.
(*e*) 2 Ld. Raym. 1437, 2 Stra. 729.
(*f*) Morris d. Andrews *v.* Le Gay, noticed 2 Burr. 1102, and 2 Atk. 249, and more fully and somewhat differently stated nom. Morris *v.* Ward, by Lord Kenyon, 8 T. R. 518.
(*g*) 1 Ed. 119, Amb. 358, Fea. C. R. 126, where the case is very fully commented on. See also Alpass *v.* Watkins, 8 T. R. 516.
(*h*) The Lord Keeper read these words as in a parenthesis.
(*i*) Cowp. 410. See also Alpass *v.* Watkins, 8 T. R. 516.
(*j*) 2 Burr. 1100, as to which see post. In Denn *v.* Shenton, as also in Wright *v.* Pearson, the gift over was much relied on.

[1] See Lillibridge *v.* Ross, 31 Ga. 730; Borden, 100 Mass. 273; Canedy *v.* Haskins, 13 Blair *v.* Van Blarcum, 71 Ill. 290; Valentine *v.* Met. 389; Tanner *v.* Livingston, 12 Wend. 83.

dred years hence. But Lord Mansfield, and the rest of the Court of K. B., held it to be a clear estate tail in S.

Even if the devise over had been made in express terms to depend on the prior devisee leaving no issue *at the time of his death*, this would not, according to Wright *v.* Pearson (*k*), have prevented the prior devisee taking an estate tail.

So, in Measure *v.* Gee (*l*), where the devise was to J. for his life, remainder to trustees to preserve contingent remainders, and after the decease of J. the testator devised the premises to *the heirs of the body* of J. lawfully to be begotten, *his, her, and their heirs and assigns forever;* but in case there should be a failure of issue of J. lawfully to be begotten, then over. It was contended that the early cases on this subject had been shaken by modern decisions; but the Court of K. B. considered them to be irrelevant (*m*), and held that the devise vested an estate tail in J.

Nor by interposition of estate to preserve contingent remainders.

This case, as well as Wright *v.* Pearson, shows that the interposition of trustees to preserve contingent remainders is inoperative to invest superadded words of limitation with any controlling efficacy.

The next case in order is Kinch *v.* Ward (*n*) where a testator devised freehold and leasehold lands to trustees, in trust to permit his son T. to receive the rents for his life, and after his decease, the testator devised the same to *the heirs of the body* of his said son lawfully begotten, *their heirs, executors, administrators, and assigns forever;* but in case he should die without issue, then over. It was assumed, in the discussion of another question, that the devise of the freehold lands vested in T. an estate tail.

And it is clear that the circumstance of the heirs of the body being directed to assume the testator's name does not constitute a ground for varying the construction, although the effect is, by enabling the ancestor to acquire the fee simple, to place within his power the means of rendering the injunction nugatory (*o*); * this [*1208] being, in fact, merely one of the consequences which a testator does not usually intend or foresee when he employs words that, in legal construction, make the first taker tenant in tail, and which consequences, whether apprehended or not, do not authorize the testator's judicial expositor to divert his bounty into another channel, by giving to his

As to heirs of the body being directed to assume testator's name.

(*k*) Ante, p. 1206.

(*l*) 5 B. & Ald. 910. See also King *v.* Burchell, 1 Ed. 424; Denn *v.* Puckey, 5 T. R. 299; Frank *v.* Stovin, 3 East, 548, where the word was "issue," as to which see Ch. XXXIX.

(*m*) The only case cited in Measure *v.* Gee, which afforded a shadow of opposition to the principle of the cases in the text was Doe *v.* Goff 11 East, 668, which had other circumstances, and has been, as we shall presently see, itself overruled by the highest authority.

(*n*) 2 S. & St. 411.

(*o*) Such a condition, too, if imposed on a person taking an estate tail by purchase, would (unless made a condition precedent) be liable to be defeated by an enrolled conveyance, which, like a common recovery, destroys all estates limited in defeasance of, as well as those which are made to take effect after the determination of, the estate tail.

language a strained construction, which would make it apply to a different class of objects (*p*).

Thus, in Nash *v.* Coates (*q*), where a testator devised lands to trustees and the survivor of them and the heirs of such survivor, in trust for F. W., then an infant, till he should arrive at the age of twenty-one years, upon his legally taking and using the testator's surname; and then, upon his attaining such age and taking that name, habendum to him for life; and *from and after his decease,* to hold to the trustees and the survivor of them and the heirs of such survivor, to preserve contingent remainders, in trust for the *heirs male of the body of F. W.,* taking the testator's name, *and the heirs and assigns of such male issue forever;* but in default of such male issue, then over. It was held that the trustees did not take the legal estate in the lands devised (*r*), but that F. W. had a legal estate tail in them on his coming of age and adopting the testator's surname.

Result of the cases.

Down to the very latest period, then, we have a confirmation, if confirmation were wanted, of the inadequacy of words of limitation in fee, annexed to *heirs of the body,* to control their operation. The only remark suggested by the later decisions is an expression of surprise that adjudication should be deemed necessary on a point so clearly settled by anterior decisions; and our surprise is greatly increased when, in such a state of the authorities, we find two distinguished Judges attempting to found a distinction between the two cases, on the mere existence in one, and the absence in the other, of superadded words of limitation (*s*).

Distinction where the words of limitation change the course of descent.

But it seems that if the superadded words of limitation *operate to change the course of descent,* they will convert the words on [*1209] * which they are engrafted into words of purchase; as in the case of a devise to a man for life, remainder to his *heirs* and the *heirs female* of their bodies (*t*). And the same principle of course would apply where a limitation to the heirs *male* of the body is annexed to a limitation to the heirs *female,* and vice versa; but the books contain no such case, and the doctrine rests entirely on the position arguendo of Anderson in Shelley's case, which, however, has been since much cited and recognized.

An eminent writer has laid it down (*u*) "that as often as the superadded words are included in, and do *not* in their extent *exceed* the preceding words, but the words 'heirs,' &c., in the sev-

(*p*) Per Lord Kingsdown, Atkinson *v.* Holtby, 10 H. L. Ca. 332, acc.
(*q*) 3 B. & Ad. 839. See also Toller *v.* Attwood, 15 Q. B. 929, post, p. 1216.
(*r*) See ante, pp. 1164, 1180.
(*s*) See judgment of Bayley, J., in Doe d. Bosnall *v.* Harvey, 4 B. & Cr. 623, and of Sugden, C., in Montgomery *v.* Montgomery, 3 Jo. & Lat. 52; and see observations on the latter case, post.
(*t*) Per Anderson, in Shelley's case, 1 Rep. 95 b.
(*u*) 1 Preston on Estates, 353.

eral parts of the gift are in terms, or at least in construction, of equal extent, the latter words are surplusage, and the preceding words, as connected with the limitation to the ancestor, will be taken to be words of limitation."

Position of Mr. Preston examined.

The position, that the preceding words are words of limitation where the superadded words do *not* exceed them, seems to be the reverse of the established rule (*x*); the very case put by Anderson as an instance of their being words of purchase is one in which the superadded words *narrowed* the preceding words; and, on the other hand, we have seen that in all the cases in which the superadded words have been held to be inoperative they have been either equal to, or more extensive than, the words of limitation upon which they were engrafted (*y*).

II. — Words of Modification inconsistent with an Estate Tail. — We next proceed to inquire as to the effect of coupling a limitation to "heirs of the body" with words of modification importing that they are to take concurrently or distributively, or in some other manner inconsistent with the course of devolution under an estate tail, as by the addition of the words "*share and share alike*" or "*as tenants in common*," or "*whether sons or daughters*," or "*without regard to seniority of age or priority of birth.*"[1] In such cases the great struggle has been to determine whether the superadded words are to be treated as explanatory of the testator's intention to use the term "heirs of the body" in some other sense, * and as descriptive of [*1210] another class of objects, or are to be rejected as repugnant to the estate which those words properly and technically create. It will be seen by an examination of the following cases, that, after much conflicting decision and opinion, the latter doctrine has prevailed, even where words of limitation are superadded to words of modification, and it seems to stand on the soundest principles of construction. Those principles were violated, it is conceived, in per-

Effect of superadded words of modification inconsistent with an estate tail.

(*x*) And see Fea. C. R. 183. But see Hamilton *v.* West, 10 Ir. Eq. Rep. 75, stated Ch. XXXIX. It would almost seem that Mr. Jarman must have misunderstood Mr. Preston, and that the latter meant by "exceed" exceed in *particularity*; otherwise, the subsequent use of the words "equal extent" are not very intelligible. By an excess of particularity, or, in other words, by adding to the description, the class is narrowed. Both writers would thus appear to be in substantial agreement on this question.

(*y*) See ante, pp. 1206, 1207.

[1] It is well settled that a devise to one for life, with remainder to one's issue as tenants in common, with a limitation to the heirs general of the issue, gives to the issue a fee by purchase. Robins *v.* Quinliven, 79 Penn. St. 333; Greenwood *v.* Rothwell, 5 Man. & G. 628. And even when the limitation is to heirs of heirs of the body, to take distributively, with superadded words of limitation, such a direction is held to convert even the technical words "heirs of the body" into words of purchase. Robins *v.* Quinliven, supra. See Physick's Appeal, 50 Penn. St. 128; Nice's Appeal, id. 143. Further, Sharman *v.* Jackson, 30 Ga. 224; Tongue *v.* Nutwell, 13 Md. 415; Quick *v.* Quick, 6 C. E. Green, 13; Cushney *v.* Henry, 4 Paige, 345; Williams *v.* Sneed, 3 Cold. 533; Vaden *v.* Hance, 1 Head, 300.

mitting words of a clear and ascertained signification to be cut down by expressions from which an intention equally definite could not be collected. The inconsistent clause shows only that the testator intended the heirs of the body to take in a manner in which, as such, they could not take; not that persons other than heirs were meant to be the objects. To make expressions of this nature the ground of such an interpretation is to sacrifice the main scope of the devise to its details. The Courts have, therefore, wisely rejected the construction which reads "heirs of the body" with such a context as meaning *children*, and thereby restricts the testator's bounty to a narrower range of objects; for, it will be observed, that although children are included in "heirs of the body," yet the converse of the proposition does not hold, for an estate tail is capable of transmission through a long line of objects whom a gift to the children would never reach (as grandchildren and more remote descendants); to say nothing of the difference in the *order* of its devolution.

Expressions superadded to the limitation "to heirs of the body."

This rule of construction is supported by a series of decisions, commencing from an early period, and sufficiently numerous and authoritative to outweigh any opposing decision and dicta which can be adduced.

Thus, in Doe d. Candler *v.* Smith (*z*), where a testator devised his freehold lands to his daughter A., and *the heirs of her body* lawfully to be begotten, forever, *as tenants in common and not as joint-tenants;* and in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then over; Lord Kenyon and the other Judges of K. B. held that the daughter took an estate tail.

"Forever as tenants in common, and not as joint-tenants."

So, in Pierson *v.* Vickers (*a*), where a testator devised his [*1211] *estates at B. unto his daughter A., and to the heirs of her body lawfully to be begotten, *whether sons or daughters, as tenants in common and not as joint-tenants;* and in default of such issue, over; Lord Ellenborough and the other Judges of K. B. held, on the authority of the last case, and Doe *v.* Cooper (*b*), that the daughter took an estate tail.

"Whether sons or daughters as tenants in common," &c.

Again, in Bennett *v.* Earl of Tankerville (*c*), where the devise was to the use of A. and his assigns for his life without impeachment of waste, and after his decease to *the heirs of his body, to take as tenants*

(*z*) 7 T. R. 532. It should be stated that the reader will not find in this and some of the other cases of the same class any distinct recognition of the principle stated in the text; but as that principle is sanctioned by the later cases, and affords a more intelligible and definite guide than the doctrine of general and particular intention on which some of these decisions proceed, the writer has felt himself authorized to rest them on the former ground. An able and extended examination of most of the cases stated in this chapter may be found in Mr. Hayes's "Inquiry."

(*a*) 5 East, 548. See Grimson *v.* Downing, 4 Drew. 125, where the estate to A. was expressly for life.

(*b*) 1 East, 229, stated Ch. XXXIX.

(*c*) 19 Ves. 170.

in common and not as joint-tenants; and in case of his decease without issue of his body, then over: Sir W. Grant, M. R., held that the devisee took an estate tail.

So, in Doe d. Cole *v.* Goldsmith (*d*), where a testator devised his lands to his son F. to hold to him and his assigns for his natural life, and immediately after his decease the testator devised the same unto the heirs of his body lawfully to be begotten, in such *parts, shares and proportions, manner and form, as F. should by will or deed devise or appoint,* and in default of such heirs of his body lawfully to be begotten, then *immediately after his decease* the testator devised the premises over to another son, J., in fee. It was held in C. P. that F. took an estate tail. Gibbs, C. J., observed that it was the testator's evident intent that the estate should not go over to J. until all the "heirs of the body" of F. were extinct.

In such shares, &c., as F. should appoint.

In this and several of the preceding cases, much stress was laid on the words "in default of issue," or "in default of heirs of the body," occurring in the devise over, or rather in the clause introducing such devise, as demonstrating a "general intent" that the estate was not to go over until a general failure of issue of the first taker; but it is difficult to understand how this intention could be rendered more distinctly and unequivocally apparent by such referential language than by an *express* devise to these very objects, viz. "heirs of the body."

Observations.

We now proceed to the important case of Jesson *v.* Wright (*e*),[1] which was as follows. A testator devised to W. certain real estate for the term of his natural life, he keeping the buildings in tenantable repair; and after W.'s decease devised the same to the *heirs of the body of W.* lawfully issuing, *in such shares* and proportions *as W.* by deed or will *should appoint,* and for * want of such appointment, then to [*1212] *the heirs of the body of W. lawfully issuing, share and share alike, as tenants in common,* and if but one *child,* the whole to such only *child;* and for want of *such* issue, then over. It was held in K. B. that W. took an estate for life only, with remainder to his children for life as tenants in common. The House of Lords after a very full argument reversed the decision. Lord Eldon observed: "It is definitively settled, as a rule of law, that where there is a particular and a general or paramount intent, the latter shall prevail, and Courts are bound to give effect to the paramount intent (*f*). The decision of

In such shares as W. should appoint, *and if but one child,* &c.

Doe *v.* Jesson in K. B.; reversed in D. P.

(*d*) 7 Taunt. 209, 2 Marsh. 517.
(*e*) 2 Bligh, 1; from which the statement of the will is here taken.
(*f*) By "general intent" Lord Eldon must be understood to mean an intent to include heirs of the body in the gift. It is submitted that those parts of the judgment in which he

[1] See Sisson *v.* Seabury, 1 Sum. 235, 251.

Jesson v. Wright. Lord Eldon's observations.

the Court below has proceeded upon the notion that no such paramount intent was to be found in the will." He then read the devise, observing, that if he stopped at the end of the first devise to W., it was clear that he was to take for life only; if at the end of the first following words, "lawfully issuing," he would, notwithstanding the express estate for life, be tenant in tail: "and in order to cut down this estate," continued his Lordship, "it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed. The words 'heirs of the body' will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator, *but that must be clearly intelligible and unequivocal.* The will then proceeds, 'in such shares and proportions as he the said W. shall by deed, &c. appoint.' Heirs of the body mean one person at any given time, but they comprehend all the posterity of the donee in succession. W. therefore could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power, — 'and for want of such gift, &c., then to the heirs of the body, &c., share and share alike, as tenants in common.' It has been powerfully argued (and no case was ever better argued at this bar), that the appointment could not be to all the heirs of the body in succession forever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the [*1213] descendants in all time to come could not be * tenants in common; that 'heirs of the body,' in this part of the will, must mean the same class of persons as the 'heirs of the body' among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side; as, for instance, how the children should take in certain events, as where some of the children should be born and die before others come into being. How is this limitation in default of appointment in such case to be construed and applied? The defendants in error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words 'heirs of the body' mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because in the concluding clause of the limitation in default of appointment the whole estate is given to one *child*, if there should be only one.

Jesson v. Wright.

refers to the uncontrolled force of the words "heirs of the body" contain a more satisfactory explanation of the principle than these passages. Lord Redesdale, it will be seen, strenuously insists upon this being the true ground of the decision.

Their construction is, that the testator gives the estate to W. for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body; but *because children are included in the words 'heirs of the body,' it does not follow that heirs of the body must mean only children*, where you can find upon the will a more general intent comprehending more objects (*g*). Then the words *'for want of such issue'* which follow, it is said, mean for want of children; because the word 'such' is referential, and the word 'child' occurs in the limitation immediately preceding. On the other hand it is argued, that heirs of the body, being the general description of those who are to take, and the words 'share and share alike as tenants in common,' being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation, 'if but one child, then to such only child,' being, as they say, the description of an individual who would be comprehended in the terms 'heirs of the body.' 'for want of such issue,' they conclude, *must mean for want of heirs of the body.* If the words 'children' and 'child' are so to be *considered as merely within the meaning of the words [*1214] 'heirs of the body,' which words comprehend them and other objects of the testator's bounty (and I do not see what right I have to restrict the meaning of the word 'issue' (*h*)), there is an end of the question." Jesson v. Wright.

Lord Redesdale said: "There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult for a professional adviser to say what is the estate of a person claiming under a will. It cannot at this day be argued that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In Colson *v.* Colson (*i*), it is clear that the testator did not mean to give an estate tail to the parent. If he meant anything by the interposition of trustees to support contingent remainders, it was clearly his intent to Lord Redesdale.

(*g*) See a similar clause similarly treated in Dunk *v.* Fenner, 2 R. & My. 566.

(*h*) But these words, it is submitted, derive all their force from the terms of the preceding devise, having in themselves no independent operation whatever; for it is settled that the words "in default of such issue," preceded by a gift to children, refer to those objects. See Rex *v.* Marquess of Stafford, 7 East, 521; Doe d. Tooley *v.* Gunniss, 4 Taunt. 313; and other cases stated post.

(*i*) 2 Stra. 1125.

give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication. In this case it is argued that the testator did not mean to use the words 'heirs of the body' in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but Doe *v.* Goff (*k*) decide that the latter words, unless they contain a clear expression or a necessary implication of some intent contrary to the legal import of the former, are to be rejected. *That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise.* In many cases, — in all, I believe, except Doe *v.* Goff (*l*), — it has been held that the words '*tenants in common*' do not over-[*1215] rule the legal sense of words of settled * meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; *but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed.* This only follows, that having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and *the words of modification are to be rejected.* Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties, but look to the words used in the will. The words 'for want of *such* issue' are far from being sufficient to overrule the words 'heirs of the body' (*m*). They have almost constantly been construed to mean an indefinite failure of issue, and of themselves have frequently been held to give an estate tail. In this case the word 'issue' cannot be construed children, except by referring to the words 'heirs of the body,' and in referring to those words they show another intent. The defendants in error interpret 'heirs of the body' to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words 'heirs of the body' to mean children in this will."

Lord Redesdale's statement of the principle of the decision.

So in Doe d. Bosnall *v.* Harvey (*n*), where a testator devised his real *estate,* subject to his debts and legacies, to T. for the term of his

(*k*) Infra.
(*l*) But see cases infra.
(*m*) It could not for a moment be contended that these words *overruled heirs* of the body. The argument was, that if those words, as used in the preceding devise, meant children (but which his Lordship shows incontrovertibly they did not), then the words "for want of such issue" meant for want of such children. See p. 1214, n. (*h*).
(*n*) 4 B. & Cr. 610.

natural life, and after the determination of that estate, to A. and B. and their heirs during the life of T. to preserve contingent remainders; and after the decease of T. the testator devised the same to and among all and every *the heirs of the body of T., as well female as male, lawfully to be begotten, such heirs, as well female as male, to take as tenants in common, and not as joint tenants;* and for default of such issue, over. The lands were gavelkind. It was held that T. took an estate tail; Abbott, C. J., observing, — "that though the heirs could not take by descent *as tenants in common*, but would be coparceners, yet it was not to be inferred because they could not take in the particular mode prescribed by the testator, that therefore they were not to take at all."

Effect of limitation to preserve contingent remainders.

"As well female as male to take as tenants in common," &c.

Again, in Doe d. Atkinson *v.* Featherstone (*o*), where a testator * devised to J., and E. his wife, for the term of their natural lives, and for the life of the longer liver of them, and after the decease of the survivor, he devised to *the heirs of the body of E.* by J. already begotten or to be begotten, to *be equally divided amongst them, share and share alike.* There was no gift over. It was held, on the authority of Jesson *v.* Wright, that E. took an estate tail, and not (as had been contended) an estate for life, with remainder to the children of E. and J.

[*1216]

"Equally to be divided amongst them, share and share alike."

And in Grimson *v.* Downing (*p*), where the testator devised "the said *estate*" to A. for life with remainder "to the heirs of his body lawfully begotten forever equally, share and share alike, sons and daughters, but if A. should die without heirs or heir" then over, Sir R. Kindersley, V.-C., held that A. took an estate tail.

Devise of "estate" to heirs of the body, "share and share alike."

III. — Words of Limitation and Modification combined. — Nor will words of limitation to the heirs general, in addition to words of inconsistent modification, avail to convert "heirs of the body" into words of purchase.

Thus, in Toller *v.* Attwood (*q*), there was a devise to the use of E., a married woman, for her separate use for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the heirs male of the body of E. to be begotten, *who shall live to attain the age of twenty-one years, and to his heirs and assigns forever;* but in default of such heirs male, or there being such, he or they should die before he or either of them should attain the age of twenty-one years without lawful issue, then over. It was held by the Court of Q. B.

"Heirs male who shall live to attain twenty-one and his heirs."

(*o*) 1 B. & Ad. 944.
(*p*) 4 Drew. 125. See also Anderson *v.* Anderson, 30 Beav. 209.
(*q*) 15 Q. B. 929. The trustees were held to take the fee, ante, p. 1142.

that the words, "who shall live, &c.," could not restrict the force of the previous limitation, and that E. took an estate tail, citing the rule as distinctly and emphatically laid down in Jesson *v.* Doe, that technical words should have their legal effect unless from subsequent inconsistent words it was very clear that the testator meant otherwise; and in this case the form of the gift over rather favoring the conclusion of an estate tail in E., than of a limitation by purchase to her sons. The Court did not advert to the form of limitation being "to *his* heirs and assigns," as showing that one person only was intended to take at one time as heir of the body, and as [*1217] strengthening the conclusion that * "heirs of the body" must be held to be words of limitation in order to let in all the issue (*r*).

The clause in Toller *v.* Attwood which required "heirs" to be of full age (*s*), was no less inconsistent with a devolution by inheritance than one that would make them tenants in common. But actual decision is not wanting on a clause of the latter kind in combination with superadded words of limitation. Thus, in Mills *v.* Seward (*t*), where a testator devised his real estate to A. for life without impeachment of waste, with remainder to the heirs of the body of A. habendum to such heirs and his, her, or their heirs and assigns forever as tenants in common; and if A. should die under twenty-one, but should leave heirs of his body surviving, then to such heirs of A. and his, her, and their heirs and assigns forever in like manner; but in case A. should die without leaving any such heirs of the body him surviving, then over. It was held by Sir W. P. Wood, V.-C., that neither the words importing a tenancy in common nor the superadded words of limitation were sufficient to deprive the words "heirs of the body" of their proper meaning. It was argued that in the gift over on the death of A. under twenty-one "heirs of his body" must mean children (since in that event he could not leave issue more remote), and that the same construction must be given to the words in the previous clause. But the V.-C. said that the fact that children would be included among the heirs of the body did not make the phrase signify children exclusively. He therefore held that the rule in Shelley's case applied, and that A. was tenant in tail.

"Heirs of the body and their heirs as tenants in common."

The preceding cases present many shades of difference, but they *all* concur in establishing the principle, that words of inconsistent mod-

(*r*) See Ch. XXXIX.

(*s*) See similar modification in Jack *v.* Fetherstone, stated this Ch. ad. fin.

(*t*) 1 J. & H. 733. In Montgomery *v.* Montgomery, 3 Jo. & Lat. 55, Lord St. Leonards, said, Doe *v.* Jesson only decided that "heirs of the body" should operate as words of limitation where otherwise the issue would not take estates of inheritance. But as to this Wood, V.-C., observed that, in the case before Lord St. Leonards the word "issue" was used, and that (except Right *v.* Creber, 5 B. & C. 866, which he referred to a different ground) there was not a single decision to be found where the words "heirs of the body" had been read as words of purchase, on the single ground that they were followed by "and their heirs and assigns." See also per Kindersley, V.-C., 4 Drew. 133.

ification engrafted on a limitation to heirs of the body are to be rejected. It follows, then, that every decision not strictly reconcilable with this principle may be regarded as overruled by them. How far the line of cases about to be * stated falls under the remark, the reader will form his own opinion, keeping in view the general scope of the reasoning of Lord Eldon and Lord Redesdale in Jesson *v.* Wright, and their pointed reprobation of "petty distinctions." [*1218]

Observations.

Cases in which expressions were held to control "heirs of the body."

In Doe d. Browne *v.* Holmes (*u*) the devise was to L. for life, with impeachment of waste, remainder unto the *heirs, male or female,* lawfully to be begotten of the body of L, forever, they paying certain sums thereout. The Court *inclined* to the opinion that this was not an estate tail in L., but a contingent remainder in fee to the issue; but it was unnecessary to decide the question, as a recovery had been suffered, which had either barred the entail, or destroyed the contingent remainder. This case seems to be destitute of even the slender grounds upon which the construction of an estate tail is commonly resisted in cases of this nature, nor did the Court, it will be perceived, assume to decide the point.

To "heirs male or female" forever.

Another case which must be classed with this series is Doe d. Long *v.* Laming (*x*),[1] where a testator devised gavelkind lands to his niece *A. and the heirs of her body* lawfully begotten or to be begotten, *as well females as males, and to their heirs and assigns forever, to be divided equally, share and share alike, as tenants in common.* A. died in the testator's lifetime. Lord Mansfield said the devise could not take effect at all, but must be absolutely void unless the heirs took as purchasers; that the term "heirs" in the plural, in the case of gavelkind lands, answered to the term "heir" in the singular in the common case of lands not being gavelkind: that the testator mentioned females not only expressly and particularly, but even prior to males; and that it was clear that he did not mean that the lands should go in a course of descent in gavelkind. Influenced by these and other such considerations, the Court held the true construction of the devise to be, that the children of A. took estates in fee..

"As well females as males, and to their heirs."

Few cases have been more cited than this. There being both words of limitation and words of distribution annexed to "*heirs of the body,*" it has been commonly relied upon as an authority for giving to both those circumstances occurring conjunctively the operation of changing heirs of the body into *children.* It is observable that the Court had to encounter, not only the difficulty of doing this violence to the words, but also that of reading the

Remark on Doe *v.* Laming.

(*u*) 3 Wils. 237, 241, 2 W. Bl. 777. (*x*) 2 Burr. 1100.

[1] See Sisson *v.* Seabury, 1 Sum. 235, 241.

limitation to the heirs as a *remainder;* for the devise was to
[*1219] A. * and the heirs of her body in one entire unbroken clause, and not to A. for life, *remainder* to the heirs; and, therefore, even if the devise had been *expressly* to children, they must have taken jointly with their parent, or not at all; indeed so strongly is the impossibility of reading the devise to the children as a remainder felt in such cases, that where they cannot take jointly with their parent, on account of their non-existence when the devise takes effect, the word "children" is, we shall see in the next chapter, actually construed as a word of limitation, in order to give the parent an estate tail which *may* devolve upon the children, this being, it is considered, the *only* means of preventing the total failure of the testator's intention in their favor. Such cases form a singular contrast to the construction adopted in Doe *v.* Laming.

As to the circumstance of the land being *gavelkind*, this extraordinary ground of distinction is overturned by Doe d. Bosnall *v.* Harvey (*y*), which, it is observable, has *all* the ingredients that have been relied upon by the Judges who decided or who have since cited Doe *v.* Laming, viz. the land being gavelkind; there being words to carry the fee to the children, if the devise had been construed as designating them (*z*); and lastly, there being a direction that *females* should take as well as *males*, and the whole as tenants in common. We might then reasonably have hoped never to hear the case of Doe *v.* Laming again cited as an authority in a court of law. The circumstance that the devise would have lapsed if the devisee had taken an estate tail, seems to have an undue influence on Lord Mansfield's mind, and the case may be regarded as one of those in which this distinguished Judge suffered the established rules of construction to be violated in order to avoid hardship in the particular instance.

Doe *v.* Laming virtually overruled by Doe *v.* Harvey.

However, in Montgomery *v.* Montgomery (*a*), Sir E. Sugden, C., said that though Doe *v.* Laming had been sometimes questioned he thought it properly fell within the fourth exception mentioned by Blackstone, J., in his judgment in Perrin *v.* Blake (*b*);
[*1220] *namely, where the testator has superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he has given the estate. Blackstone, J., does indeed himself (*c*) class Doe *v.* Laming within his fourth exception, but he also classes it under his third exception, namely, where

(*y*) 4 B. & Cr. 610, stated ante, p. 1215; see accord. per Lord Brougham, 3 Cl. & Fin. 77.
(*z*) In Doe *v.* Harvey, the word "estate," used in the description of the subject-matter of the preceding devise, would clearly have extended to the devise in question. This makes Mr. Justice Bayley's observation, in regard to Doe *v.* Laming before adverted to (ante, p. 1208), the more extraordinary; for the alleged distinction with respect to the words of limitation occurring in that case was not only altogether untenable according to the doctrine of the authorities, but was not presented by the actual circumstances of the case.
(*a*) 3 J. & Lat. 52.
(*b*) Harg. Law Tracts, 506.
(*c*) See ibid.

words of *explanation* are added to the words "heirs to the body;" and, at the time he wrote, this certainly (if any) was the only exception under which to class it, though that exception, so far as it depends on such words as were used in Doe *v.* Laming, namely, "female as well as male, and to take as tenants in common," has, as we have seen, been expressly overruled by Jesson *v.* Wright; moreover, we have Lord Northington's authority, that in his time there was *no case in the books* where "heirs," used in the plural number with words of limitation added, had been held words of purchase (*d*). It is impossible, therefore, to come to any other conclusion than that the cases did not, in Mr. Justice Blackstone's time as they have not since, recognized his fourth exception as applying to cases where the word "heirs" in the plural number is used; that exception must be taken to apply solely to cases in which the word "heir" in the singular is used as in Archer's case (*e*), or where the line of descent is altered as in the case put by Anderson, C. J., in Shelley's case; and this conclusion is abundantly confirmed (if confirmation is wanted) by Toller *v.* Attwood (*f*) and Mills *v.* Seward (*g*), both decided since Montgomery *v.* Montgomery.

Remarks of Sir E. Sugden on Doe *v.* Laming.

The case next in chronological order to Doe *v.* Laming is Doe d. Hallen *v.* Ironmonger (*h*), which arose on a devise to A. and his heirs, upon trust to receive the rents, *and apply the same* for the support of S. and the issue of her body lawfully begotten or to be begotten, *during the life of S.;* and after the decease of S., upon trust *for the use of the heirs of the body* of S. lawfully begotten or to be begotten, their heirs and assigns forever, *without any respect to be had or made in regard to seniority of age or priority of birth,* and in default of such issue over. S. had three children, one son and two daughters. The son died in her lifetime leaving several children, and his eldest son, on the death of S., claimed the property as the heir of her body at her death; but it was held that he was not entitled.

"Without any respect to seniority of age, &c."

By the few observations which fell from the Court in the
* course of the argument, it appears that the Judges relied [*1221]
upon the words "without respect, &c., to seniority of age and priority of birth," as plainly showing that the heirs should take "as *purchasers,*" meaning, it should seem, as *children,* for even as heirs of the body they were clearly *purchasers,* inasmuch as the limitation to the heirs and the limitation to the ancestor were of a different quality (*i*). Perhaps it will be said that this circumstance distinguishes the case from those under consideration; but it would be difficult to support such a distinction. The words "heirs of the body" are as clear and well ascertained in the one case as in the other, and therefore require a demonstration of intention equally clear and decisive to control

Observations upon Doe *v.* Ironmonger.

(*d*) 1 Ed. 432.
(*e*) Ante, p. 1171.
(*f*) 15 Q. B. 929, ante, p. 1216.
(*g*) 1 J. & H. 733, ante, p. 1217.
(*h*) 3 East, 533.
(*i*) Ante, p. 1180.

them. The class of objects embraced by the two gifts is the same. Indeed the question whether the rule in Shelley's case will or will not operate upon the two limitations, seems to be quite irrespective of the construction (*k*); though it cannot be denied that a regard to the effect of the application of that rule, in making the ancestor tenant in tail and thereby enabling him to exclude all the ulterior objects by means of a disentailing assurance, has not unfrequently biassed the minds of Judges in determining the construction.

The next case is Doe d. Strong *v.* Goff (*l*), where the devise was to the testator's daughter M. and *to the heirs of her body* (*m*) lawfully begotten or to be begotten, *as tenants in common, and not as joint tenants;* but if such issue should depart this life *before he, she, or they should respectively attain their age or ages of twenty-one years,* then over to the testator's son. It was held in K. B. that the daughter took an estate for life only, with remainder to her children as tenants in common. Lord Ellenborough considered that the heirs of the body being to take as *tenants in common* clearly demonstrated that children were meant by that description, as heirs of the body would take by succession, which he considered was rendered still more plain by the following words, "that if such issue should depart this life *before twenty-one;*" and he held that this was too plain to be defeated by a mere conjecture that the devisor might have a paramount intention inconsistent therewith; and, even admitting such intention, he [*1222] thought it might afford a reason for implying *cross remainders between the children (*n*) (which he observed it was not necessary to decide), but not for making so important a difference as converting into an estate in the mother what would otherwise be separate and distinct interests in the children. He ridiculed the idea that the eldest son and his issue should take, to the exclusion of the rest, lest the share of a child dying under twenty-one should go over to the testator's son (*o*) before all the issue of the daughter were extinct. He observed that the Court had looked through all the cases, and did not think they should break in upon any of them by this decision.

"As tenants in common, with devise over, if the issue died under twenty-one."

Lord Ellenborough's judgment in Doe *v.* Goff.

Of this it is enough to say, that it has been distinctly overruled by the highest authority (*p*).

(*k*) See acc. per Kindersley, V.-C., 4 Drew. 132, and per Cur. 15 Q. B. 955.

(*l*) 11 East, 668.

(*m*) This case is open to the same observations as Doe *v.* Laming, in regard to the circumstance of the limitation to the heirs not being by way of remainder.

(*n*) By cross remainders he must have meant cross executory limitations; for it is clear that the children, if they took at all, had *a fee* by implication from the gift over in the event of their dying under twenty-one (ante, p. 1132), on which fee of course no remainder could be limited; but it seems to be the better opinion, that in such cases no cross executory limitation in fee would be implied. See post, Ch. XLIII.

(*o*) But upon the terms of the devise, as settled by decision, it is clear that no share could go over to the son unless *all* the issue of the daughter died under twenty-one.

(*p*) But see 3 J. & Lat. 54, where Sir E. Sugden seems to say Doe *v.* Goff is not overruled.

Thus, in Jesson *v.* Wright (*q*), Lord Redesdale said, "Doe *v.* Goff seems to be at variance with preceding cases. In several cases it has been clearly established that a devise to A. for life, with a subsequent limitation to the heirs of his body, created an estate tail, and that subsequent words such as those contained in this will" (alluding, no doubt, to the words "share and share alike, as tenants in common," occurring in that case), "had no operation to prevent the devise from taking an estate tail. In Doe *v.* Goff there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to be so far from amounting to a declaration that he did *not* mean heirs of the body in the technical sense of the words, that I think they peculiarly show that he *did* so mean. They would otherwise be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator's conception, that at twenty-one the children (*i. e.* the issue) should have the power of alienation. *It is impossible to decide this case without holding that Doe* v. *Goff is not law.*"

Authority of Doe *v.* Goff denied in Jesson *v.* Wright.

Lord Eldon expressed the same opinion (*r*), tempered, however, with his characteristic caution. "Doe *v.* Goff," he said, *"is difficult to reconcile with this case, I do not say impossible; but that case is as difficult to be reconciled with other cases." [*1223]

The deliberate denial by these eminent judges of the case of Doe *v.* Goff, may be considered as equivalent to an affirmative decision, that under such a devise an estate tail is created; in other words, that a devise to A. and the heirs of his body as tenants in common, with a limitation over in case the issue or the heirs of the body should die under twenty-one, gives A. an estate tail. Indeed such a devise over is not absolutely *inconsistent* with an estate tail, as the testator *may* intend (though the intention is rather improbable) that the remainder shall be contingent on the event of the *issue* of the tenant in tail (not the tenant in tail himself) dying under age. But Lord Redesdale went a great length in asserting that these words *assisted* the construction which gave the ancestor an estate tail, for the absurdity which he seemed to think attached to the supposition that they were applied to children is quite removed by giving them, as the established rule does, the fee simple. Admitting, however, that the inference, so far as it goes, is the other way, it does not approach to that necessary irresistible kind of evidence, which alone should be allowed to vary the construction of words of an established signification.

Observations.

Another case, which perhaps it may be difficult to rescue from a

(*q*) 2 Bligh, 58, stated ante, p. 1211. (*r*) 2 Bligh, 55.

similar condemnation, is Crump d. Woolley *v.* Norwood (*s*), where a testator devised to his three nephews W., J., and R., equally between them during their respective lives as tenants in common; and after their respective decease he devised the share of him or them so dying *unto the heirs lawfully issuing of his and their body and bodies* respectively, and, if more than one, *equally to be divided* and to take *as tenants in common;* and, if but one, to such only one, and to his, her, or their heirs and assigns forever, and if any of the testator's said nephews should die without such issue, or, *leaving any such, they should all die without attaining twenty-one,* then he devised the part of him and them so dying unto the survivor and survivors, and the heirs of the body of such surviving and other nephew equally, as tenants in common, and to hold the same as he had [*1224] *thereinbefore directed as to the original share, and with the like contingency of survivorship on failure of issue; and in default of such issue of his said nephews, then over to the testator's own right heirs. It seems to have been rather taken for granted in this case (for the contrary was scarcely contended for), that the nephews took an estate for life only, with remainder in fee to their *children.* Gibbs, C. J., observed that he would state the interest which W. and his *children* took in the premises. "The devise," he said, "is to W. for life, and if he has children (*for heirs here mean children*),[1] then to them in fee; if he has no children, then the estate goes to the testator's nephews J. and R. *It is admitted on all hands that this is the true construction.*" And the Court held that the contingent remainder in W.'s share was destroyed by the descent of the reversion in fee on him at the decease of his father, to whom it devolved immediately from the testator (*t*).

"As tenants in common," with devise over if the issue died under twenty-one.

"*Heirs of the body*" assumed to mean *children.*

This case was not cited in Jesson *v.* Wright, which accounts for its not having fallen under the censure there applied to Doe *v.* Goff, which it closely resembles, and on the authority of which, probably, the translation of heirs into children was considered as almost too clear for argument.

Remark on Crump *v.* Norwood.

Gretton *v.* Haward (*u*) is another of the decisions which occurred during the time that Doe *v.* Goff was regarded as an authority. The

(*s*) 7 Taunt. 362, 2 Marsh. 161. In Lees *v.* Mosley, 1 Y. & C. 595, the Court lent no countenance to the attempt of counsel to uphold Crump *v.* Norwood and Doe *v.* Goff. Lees *v.* Mosley itself was decided mainly on the difference between the terms "heirs of the body" and "issue" in regard to the force of explanatory words. It therefore belongs not to the present Chapter, but to Ch. XXXIX.

(*t*) See Hartpoole *v.* Kent, T. Jones, 76, 1 Vent. 306; Hooker *v.* Hooker, Lee's Cas. t. Hardw. 13.

(*u*) 6 Taunt. 94, 2 Marsh. 9.

[1] See Powell *v.* Glenn, 21 Ala. 458; Bowers *v.* Porter, 4 Pick. 198; Richardson *v.* Wheatland, 7 Met. 169, 173; Carter *v.* Reddish, 32 Ohio St. 1; Bunnell *v.* Evans, 26 Ohio St. 409; Brailsford *v.* Heywood, 2 Desaus. 18.

Devise over in default of issue *by the testator* following a devise to his wife in tail.

devise was in these words: — "I give, devise, and bequeath unto my loving wife A. all my real and personal estate, she paying debts, &c.;" and after her decease to *the heirs of her body, share and share alike* if more than one, "and in default of issue to be lawfully begotten *by me*, to be at her own disposal." Doe *v.* Goff was cited in argument, and the now exploded doctrine of that case, that the testator, having given the estate to the heirs of the body share and share alike, could not have intended an estate tail under which the eldest son would take the whole, was much relied on. The Court certified (on a case from Chancery), that the wife took an estate for life, with remainder to the *children* as tenants in common in fee; and this certificate was confirmed by Sir W. Grant, M. R. (*x*).

No remark fell from the Court during the argument, so that the precise grounds of the decision are not known; but it has been sometimes considered as distinguished from the other cases * by the circumstance, that the limitation over was in default of issue begotten *by the testator*, which must, it is said, have referred exclusively *to children*. This, however, is a non sequitur; for, allowing to these words their utmost operation, they are only explanatory of the species of heirs of the body intended by the testator in the preceding devise, namely, heirs by himself (*y*); and the effect would then be to make the wife tenant in special tail, if she had issue by the testator, or while the possibility of her having issue continued; and in case she had no issue by him, she would, from the time that such possibility ceased, be tenant in tail after possibility of issue extinct (*z*). [*1225]

Observations upon Gretton *v.* Haward.

Such is the long line of cases which appear to have been overturned by Jesson *v.* Wright; a decision, which will be appreciated when the state in which the subject has been left by the prior adjudications is contemplated. The frequent demand upon the Courts to pronounce on the construction of the words "heirs of the body," when associated with words of modification which did not exactly quadrate with an estate tail, evinces the uncertainty that prevailed in the profession in regard to the actual effect of such a devise. The slightest variation of phrase was thought to render a case proper for judicial investigation, in order to try the experiment whether these words, or the inconsistent modifying expressions, would be held to preponderate. The mischief, however, did not altogether *originate* in the class of cases just stated, but may be traced to an earlier source. It seems to have been a consequence of the line of argument adopted by Lord Kenyon in Doe d. Candler *v.* Smith (*a*), and other cases, where, though a

General remarks upon the class of cases overruled by Jesson *v.* Wright.

(*x*) 1 Mer. 448.
(*y*) See accordingly cases cited supra, p. 952, n. (*c*).
(*z*) See Platt *v.* Powles, 2 Mau. & Sel. 65.
(*a*) 7 T. R. 531, ante, p. 1210. See also Robinson *v.* Robinson, 1 Burr. 38, post.

devise of the nature of those under consideration was held, and properly held, to confer an estate tail, this construction was founded, not on the uncontrolled effect of the words of limitation, but upon the *general intention* manifested by the words disposing of the property to the next taker, if the devisee in question died *without issue;* which, it was said, demonstrated that the estate was not to go over until a general failure of issue of such prior devisee. Having therefore first reasoned upon the devise to the heirs of the body or issue as a gift to *children* or to issue *of a particular class*, the Court sacrificed the intention in favor of these objects, which was de-
[*1226] nominated the *particular* intent, in order * to give effect to the "*general* intent," which was discerned in the subsequent words. Lord Ellenborough, the successor of Lord Kenyon, acceded to the reasoning, or, at all events, to the authorities, which read the devise to the heirs of the body and issue as a gift to *children;* but, probably seeing no reason why the devise so construed should be affected by the use of the same or nearly similar words in the clause introducing the devise over (which clearly referred to the objects of the preceding devise, whatever those objects were), held that the *children* were entitled, notwithstanding the subsequent words referring to the failure of issue. This appears to be the short history of the rise and progress of the doctrine which the case of Jesson *v.* Wright overturned.

But the uncertainty induced by a series of erroneous decisions is not easily removed; and we shall see that the effect of inconsistent words of modification, engrafted on a devise to the heirs of the body, has been since repeatedly agitated.

Thus, in Wilcox *v.* Bellaers (*b*), where the testator devised his lands to his son H. during his natural life, and after his decease to *such* of his said son's *children*, and in such shares and proportions as his said son should, by his last will and testament duly executed, limit, direct, and appoint, *and to their heirs*, and for want of such direction and appointment, and as to such part of the estate of which no such appointment should be made, to *the heirs of the body* of the said H., *their heirs and assigns forever;* and in case his said son should happen to die without issue, then *from and immediately after his decease* the testator devised the said estate unto his daughter E. for life, remainder to such of her children and in such shares as she should by deed or writing appoint, and to their heirs; and in default to the heirs of the body of the said E., their heirs and assigns forever; and in case his son should live, *and have children as aforesaid*, then he bequeathed unto his daughter E. a legacy of 500*l.* H., before issue born, suffered a common recovery. To a title derived under this recovery, it

Limitation to *heirs of the body*, with power of appointment to *children*, &c.

(*b*) Hayes's Inquiry, p. 2.

was objected that H. was not tenant in tail, but that his children took by purchase. The vendor instituted a suit in equity to enforce the performance of the contract, and the Master reported in favor of the title. The purchaser excepted to the report, and the exception was argued at the Rolls (*c*), before Graham, B., and Master (afterwards C. B.) * Alexander, and Master Stratford (sitting for the then M. R.), who, after taking time to examine the authorities, differed in opinion; the two former thinking it very doubtful at least whether H. took more than an estate for life, and Master Stratford being of a contrary opinion, so that no judgment was given. The exception was afterwards (*d*) argued before Sir T. Plumer, M. R., who, upon looking into the cases, thought there was so much doubt whether H. took an estate tail, that the purchaser ought not to be compelled to take the title, and accordingly dismissed the bill; and the Lord Chancellor (Lyndhurst), on appeal, affirmed the order (*e*). [*1227]

Examination of the circumstances in which Wilcox *v.* Bellaers differs from Jesson *v.* Wright.

The only circumstances affording the slightest pretext for distinguishing this case from Jesson *v.* Wright are, — first, the power to appoint to the *children*, secondly, the legacy to the devisee in remainder, in case H. "should live and have children as aforesaid," and thirdly, the words of limitation superadded to the gift to the heirs of the body.

As to the first point, we learn from Smith *v.* Death (*f*), that there is no *necessary* implication, that the term "heirs of the body" in the limitation is used to describe the same objects as "children" in the power. As to the second, it will perhaps be said that the testator evidently intended the devisee in remainder to have the legacy if the objects of the prior devise came into existence, and which, therefore, is explanatory of those objects being children. But this is merely conjectural; the testator might intend the legacy to be a charge only as against the objects of the power, as distinguished from the objects of the limitation, because the donee might have appointed to those objects in fee to the total exclusion of even a chance of succession by the devisee in remainder. However this may be, the circumstance is far too equivocal to be made a ground for departing from the construction of words of an established meaning. As to the third point, it has been repeatedly decided that a limitation to the heirs general, superadded to a gift to "heirs of the body," will not convert the latter into words of purchase with the restricted sense of "children."

Nor is Wilcox *v.* Bellaers the only instance in which reluctance has been manifested to follow up the principle of Jesson *v.* Wright; for in other cases the term "heirs of the body" has since been cut down to *children*, in subservience to expressions in the * con- [*1228]

(*c*) June, 1823. (*d*) 17 Dec., 1823.
(*e*) T. & R. 495. (*f*) 5 Mad. 371; stated ante, Vol. I., p. 519.

text which that case had appeared forever to have stripped of all controlling operation.

Thus, in Right d. Shortridge *v.* Creber (*g*), where a testator devised a messuage to trustees and their heirs, in trust to permit his daughter J. and her assigns, to receive the rents for her life free from her husband, and after her death then the testator devised the same to *the heirs of the body* of J., share and share alike, their heirs and assigns forever, it was held that the words "share and share alike" denoted that the testator meant by "heirs of the body" to designate children.

"Share and share alike," their heirs and assigns forever.

It is proper to observe that Jesson *v.* Wright, although decided several years before Right *v.* Creber, was not cited in the latter case, and the subsequent determination of the Court of Queen's Bench in Doe *v.* Featherstone (*h*), already stated, shows that a similar decision would not now be made. It is surprising, however, that in Doe *v.* Featherstone the case of Right *v.* Creber was referred to by Patteson, J., as not inconsistent with what the Court was then about to decide; for the only distinction is, that in one case there were, and in the other there were not, superadded words of limitation, which were, we have seen, wholly immaterial, and on which indeed no stress was laid by the Judges who decided Right *v.* Creber.

Remarks on Right *v.* Creber.

It may be observed, in conclusion of this section, that a different construction will not necessarily be put upon limitations by way of trust expressed in words such as those now under consideration, merely because the trust is a trust to convey and not a direct trust (*i*).

No distinction made where there is a direction to convey.

IV. — Effect of Clear Words of Explanation. — But it is not to be inferred from the preceding cases that the words "heirs of the body" are incapable of *explanation* by the effect of superadded expressions clearly demonstrating that the testator used those words in some other than their ordinary acceptation, and as descriptive of another class of objects. The rule established by those cases only requires a clear indication of intention to this effect. Where the words in question are accompanied by such an explanatory context, the devise [*1229] is to be read as if the terms * which they are explained to mean were actually inserted in the will.

Effect of clear words of explanation annexed to heirs of the body.

Accordingly, in Lowe or Lawe *v.* Davies (*k*), where a testator de-

(*g*) 5 B. & Cr. 866.
(*h*) 1 B. & Ad. 944; ante, p. 1215. Right *v.* Creber was thought by Wood, V.-C., to be reconcilable with Doe *v.* Jesson and Doe *v.* Featherstone, on the ground that the estate for life was equitable and the remainder legal, so that the rule in Shelley's case, did not apply, 1 J. & H. 737. But as to this, vide sup. pp. 1220, 1221.
(*i*) Marryat *v.* Townly, 1 Ves. 102.
(*k*) 2 Ld. Ray. 1561, 2 Stra. 849, 1 Barn. B. R. 238.

vised to B. and his heirs lawfully to be begotten, "that is to say, to his first, second, third, and every other son and sons successively, lawfully to be begotten of the body of said B., and the heirs of the body of such first, second, &c., it was held that B. took but an estate for life; for the subsequent clause was explanatory of what "heirs" meant.

Lowe *v.* Davies.

Heirs, "that is to say," &c.

So, in Lisle *v.* Gray (*l*), where real estate was limited by deed to the use of E. for life, remainder to the use of the first son of the body of E. and the heirs male of the body of such first son, and for default of such issue, to the use of the second son of the body of E. and the heirs male of the body of such second son (similar limitations were carried on to the fourth son), "and *so* to all and every other the *heirs male of the body* of E. respectively and successively, and to the heirs male of their body, according to seniority of age." There was a power to raise portions out of the land if E. died without issue male. It was held that E. took only an estate for life; the words "and so," &c., showing that the words "heirs male" in the latter clause meant *sons*, by relation to the preceding limitation.

Lisle *v.* Gray.

"Heirs male of the body," explained to mean *sons*.

Again, in Goodtitle d. Sweet *v.* Herring (*m*), where the devise was to A. for life, remainder to trustees to preserve contingent remainders, remainder to the *heirs male* of the body of A. to be begotten severally, successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, *the elder of such sons* and the heirs male of his body lawfully issuing, being always to be preferred to *the younger of such sons* and the heirs male of his and their body and bodies; and for default of such issue, to the *daughters*, as tenants in common, and the heirs of their bodies. The Court held that the testatrix had, by the words "the elder of *such sons*," &c., explained herself by "heirs of the body" to mean *sons*, so that A. took only an estate for life.

Goodtitle *v.* Herring.

Same construction.

So, in North *v.* Martin (*n*), where by a marriage settlement *lands were conveyed to the use of A., the intended [*1230] husband, for life, with remainder to trustees to preserve contingent remainders, with remainder to B., the intended wife, for life, and after the decease of the survivor, to the use of the heirs of the body of A. on the body of B. to be begotten and their heirs, and if more children than one, equally to be divided among them, to take as tenants in common, and in default of such issue, then over. It was

North *v.* Martin.

"Heirs of body" held to mean children.

(*l*) 2 Lev. 223, T. Jo. 114, T. Ray. 278, 315, affirmed in Ex. Ch., Pollex. 591, 1 P. W. 90, 2 Burr. 1109, not, as erroneously stated in Jo. & Ray., reversed; see also Hayes's Inq. 81.

(*m*) 1 East, 264, affirmed in D. P., see 3 B. & P. 628; see also Mandeville *v.* Lackey, 3 Ridg. P. C. 352, post. As to the expression heirs male *now living*, see Burchett *v.* Durdant, 2 Vent. 311, Carth. 154, ante, Vol. I., p. 289, n. (*b*). For some other instances of the same kind, see ante, p. 916.

(*n*) 6 Sim. 266.

contended that, according to the authorities, particularly Wright *v.* Jesson, A. was tenant in tail by force of the limitation to the heirs of his body; but Sir L. Shadwell, V.-C., held that the words "and if more children than one" were interpretative of those words, observing that no case had been cited, nor did he recollect any in which the words "heirs of the body" had been held to create an estate tail, where those words of interpretation had been used; and he added (and the remark is deserving of attention), that this did away with the effect of the argument founded on the limitation over for default of such issue, which must be construed for default of such children.

Again, in Doe d. Woodall *v.* Woodall (*o*), there was a devise to the testator's four grandchildren for their lives as tenants in common, with remainder as to the share of which each was tenant for life to his or her first and only sons successively in tail, with remainder to his or her daughters as tenants in common in tail, with cross remainders in tail between the daughters and then the testator proceeded, "in case either of my said grandchildren shall happen to die leaving no issue behind him, her, or them, then my will and meaning is that all and singular the premises herein lastly devised shall go and remain to the survivor of them and the heirs of his or her body lawfully to be begotten *in manner aforesaid.*" It was contended that, under the last clause, a surviving grandchild took an estate tail in the share of a grandchild who left no issue; but the Court of C. B. held that the limitation to the "heirs of his or her body" was explained by the words "in manner aforesaid" to mean a limitation to the first and other sons successively in tail, with remainder to the daughters as tenants in common in tail, as in the preceding limitations, and that the surviving grandchild therefore took only an estate for life.

Doe *v.* Woodall.

Heirs of body "in manner aforesaid," explained by preceding limitations.

In Gummoe *v.* Howes (*p*) the devise was upon trust for [*1231] A. and *B. equally for life, and in case of the death of either of them without issue, the part or share of her so dying to go to the survivor of them, but if either of them should depart this life leaving issue, then the part or share of her so dying to go to her children in equal proportions if more than one, and if but one, then to such only *child*; and after the death of both A. and B., the testator directed his trustees to convey, assign, and transfer the property to the heirs of the body of A. and lawfully begotten, share and share alike, or to the survivor or survivors of them if more than one, and if but one, then to such only *child* when and as

Gummoe *v.* Howes.

Heirs of the body explained to mean children.

(*o*) 3 C. B. 349; and see Green *v.* Green, 3 De G. & S. 480.
(*p*) 23 Beav. 184.

often as he, she, or they should attain his, her, or their respective age or ages of twenty-one years of age; and the will contained a devise over on the death of A. and B. without issue. Sir J. Romilly, M. R., held that the words "heirs of the body" were interpreted to mean "children," and that A. and B. took estates for life only.

And in Jordan *v.* Adams (*q*), where a testator devised lands to W. T. for life, and after his decease "to the heirs male of his body for their several lives in succession according to their respective seniorities, or in such parts, shares, and proportions, manner, and form, and amongst them as the said W. T. *their father* should appoint. And in default of such issue male of W. T.," over. It was held by the Court of C. B. that the testator had here shown that by heirs male of the body he meant sons, for in case of an appointment the appointor must stand in the relation of "father" to the appointees. In delivering the judgment of the Court, Erle, C. J., allowed greater weight than was warranted by Jesson *v.* Wright to the words of modification contained in the devise: but Williams, J., declared his concurrence with the rest solely on the ground of the use of the words "their father." On appeal to the Exch. Ch. that Court was equally divided: and the two Judges who agreed with the decision below did so only on the ground taken by Williams, J.; Cockburn, C. J., one of them, declaring that the authorities forbade them to ascribe to the words of modification the effect claimed for them.

Jordan *v.* Adams.

Heirs male of the body held to mean sons, by mention of "their father."

In all the preceding cases it will be seen that the testator had annexed to the term "heirs of the body," words of explanation, * which were held to prove that he had used the expression as synonymous with *sons*. These cases, therefore, may be supported, without impugning the general principle, as stated by Lord Alvanley in Poole *v.* Poole (*r*), that the Courts will not deviate from the rule which gives an estate tail to the first taker if the will contains a limitation to the heirs of his body, except where the intent of the testator *appears so plainly to the contrary that nobody can misunderstand it;* for the will in these cases seemed to supply the clear incontrovertible evidence of intention required by such a statement of the doctrine.

[*1232]

Remark on preceding cases.

On the other hand, in Jones *v.* Morgan (*s*), it was decided, and that in perfect consistency with the principle of the cases just stated, that a devise to W. for life, without impeachment of waste, and after his decease to the use of the heirs male of the body of W. lawfully begotten

(*q*) 6 C. B. (N. S.) 748. 9 id. 483. It is remarkable that no reference was made to Shaw *v.* Weigh, 2 Str. 798 stated Ch. XXXIX., s. iii., where, notwithstanding the word "mother" occurring in similar relation to "*issue*," the latter word was held a word of limitation.

(*r*) 3 B. & P. 627. There is a striking similarity between the general scope of Lord Alvanley's reasoning here and that of Lords Eldon and Redesdale in Jesson *v.* Wright, ante, pp. 1211, seq.

(*s*) 1 B. C, C. 206.

Heirs male of the body, "severally, respectively, and in remainder, the one after the other."

severally, respectively, and in remainder, the one after the other as they and every of them shall be in seniority of age and priority of birth, gave W. an estate tail. Lord Thurlow said, "Where the estate is so given that it is to go to every person who can claim as heir to the first taker, the word 'heirs' must be a word of limitation. All heirs taking *as heirs* must take by descent."

So, in Poole *v.* Poole (*t*), where a testator devised all his real estate to the use of trustees, in trust for his first son during his life, and also upon trust to preserve contingent remainders, and after his decease in trust for the several *heirs male of such son lawfully issuing,* so that the elder of *such sons* and the heirs male of his body should always take before the younger and the heirs male of his body, remainder to the second, third, fourth, and other son and sons of the testator for their respective lives, and also upon trust to preserve, remainder in trust for the several heirs male of their bodies lawfully issuing, so as the elder of such sons and the heirs male of his body should take before the younger of such sons and the heirs male of his body, remainder to his first and every other daughter for their lives, and upon trust to preserve, remainder to the several heirs male of their respective bodies, so that the elder of such daughters and the heirs male of her body should always be preferred to the [*1233] younger of such daughters and the heirs male *of her and their body and bodies. The testator then charged the estates with certain portions, and devised them, in failure of such issue by him as aforesaid, but not otherwise, upon trust for his nephew A. for life, and upon trust to preserve, remainder in trust for the first and other son and sons of A., as they should be in seniority of age and priority of birth, and the several heirs of their respective bodies lawfully issuing, so that the eldest of such sons and the heirs of his body should be preferred to the younger of the same sons and the heirs of his and their body and bodies. The question was, whether the eldest son of the testator took an estate for life or in tail; in other words, whether the testator had not explained himself by the words "heirs male of the body" in that devise to mean *sons,* by declaring that the elder of "*such sons*" should be preferred to the younger. Lord Alvanley and the rest of the Court of Common Pleas, expressly avoiding an intimation of what their opinion would have been if that clause had stood alone in the will, held that, in connection with the devise to the other sons, the daughters, and the nephew, the son took an estate tail.

"Such sons" construed such *heirs male* upon the effect of the whole will.

In this case the context certainly much assisted the construction adopted by the Court, for as the other sons of the testator, as well as

(*t*) 3 B. & P. 620.

his daughters, took successive estates tail, it was scarcely supposable that he could intend the first son to have only an estate for life. To have made such a difference between the sons would have violated the general plan of the will. The clause which gave rise to the question, although applied properly enough in a subsequent part of the will to the devise to the other sons of the testator, was redundant in the position which it here occupied, where its insertion was evidently an error.

Remarks upon Poole *v.* Poole.

Again, in Jack *v.* Fetherstone (*u*), where the words of devise were: "I give, &c. to W. and to his heirs male, according to their seniority in age, on their respectively attaining the age of twenty-one years, all my estates real and personal in lands, houses, and tenements not hereinbefore disposed of, *the elder son surviving of the said W. and the heirs male of his body lawfully begotten always to be preferred to the second or younger son;* and in case of the failure of issue male in the said W. surviving him, or their dying unmarried and without lawful issue male attaining the age of twenty-one years, then to T. (brother of the said W.) * and his heirs [*1234] male lawfully begotten on attaining the age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said T. lawfully begotten, and their not attaining the age of twenty-one years, then to my right heirs forever." The House of Lords held that W. took an estate tail male. Tindal, C. J., declared the unanimous opinion of the Judges to be, that the present case was governed by the rule laid down by Lord Alvanley in Poole *v.* Poole, "that the first taker shall be held to have an estate tail where the devise to him is followed by a limitation to him and the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Here the subsequent words were not wholly incompatible with an estate tail. If W. took an estate tail, the elder son surviving and the heirs male of his body would be preferred to the second or the younger son, and any difficulty created by the words referring to the majority of the devisees occurred equally whether the estate tail was in W. or in his sons.

To W. and to his heirs male, the elder son surviving and the heirs male of his body always to be preferred, &c.

By contrasting Lowe *v.* Davies and Lisle *v.* Gray with Jones *v.* Morgan, and Goodtitle *v.* Herring with Poole *v.* Poole, and Jack *v.* Fetherstone, the limits of the doctrine of the respective cases will be perceived.

In further confirmation of the doctrine that the words "heirs of the body" are not controlled by expressions of an equivocal import, may be cited the case of Douglas *v.* Congreve (*x*), where

(*u*) 9 Bligh, 237, 3 Cl. & Fin. 67 (Fetherston *v.* Fetherston), Sug. Law of Prop. 254.
(*x*) 5 Scott, 223, 4 Bing. N. C. 1, 1 Beav. 59.

Declaration that devise to heirs of the body was intended to be *in strict settlement.*

a testator devised real estate to A. for life, and after his decease to the *heirs of his body,* and so on to several other persons by way of remainder in like manner, and then declared that all the aforesaid limitations were intended by him to be *in strict settlement,* with remainder to his own right heirs forever; and the Court of Common Pleas certified that these ambiguous words did not prevent the devisees from taking estates tail under the prior words of devise; which certificate was afterwards confirmed by Lord Langdale, M. R., who observed, "In the present case there is no executory trust. It is a case of direct devise of the legal estate, and in terms which, according to the rule of law, give an estate tail to the plaintiff; and it does not appear to me that the words 'in strict settlement' can have the legal effect of altering that estate. An executory trust would have admitted greater latitude of interpretation, and the effect of the words might have been different."

* CHAPTER XXXVIII. [*1235]

"CHILDREN," "CHILD," "SON," "DAUGHTER," WHERE WORDS OF LIMITATION.

PAGE

I. Rule in Wild's Case 1235

II. "Child," "Son," Daughter," &c., where used as nomina collectiva 1247

I. — Rule in Wild's Case. — The rule of construction commonly referred to as the doctrine of Wild's case (*a*), is this, that where lands are devised to a person *and his children, and he has no child at the time of the devise,* the parent takes an estate tail;[1] for it is said, "the intent of the devisor is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not in rerum naturâ, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation." In support of this position, a case is referred to, as reported by Sergeant Bendloes (*b*), in which the devise was to husband and wife, "and to the men children of their bodies begotten," and it did not appear that they had any issue male at the time of the devise, and therefore it was adjudged that they had an *estate tail* to them and the heirs male of their bodies. The principle has been followed in several subsequent cases.

"Children" where a word of limitation.

Rule in Wild's Case.

1. When no child at the time of the devise.

Thus, in Davie *v.* Stevens (*c*), where a testator devised to his

(*a*) 6 Rep. 17; *s.* c. Anon., Gouldsh. 139, pl. 47; *s.* c. nom. Richardson *v.* Yardley, Moore, 397, pl. 519. The words of the rule are "children or issue." But as to "issue" see Ch. XXXIX. The rule (which is not stated in Gouldsh. or Moore) is distinct from the point *decided* in Wild's case, which arose on a devise to A. and his wife, and after their decease to their children. And see Doe d. Tooley *v.* Gunniss, 4 Taunt. 313; Doe d. Liversage *v.* Vaughan, 5 B. & Ald. 464; Beauchant *v.* Usticke, W. N. 1880, p. 14.

(*b*) 1 Bulstr. 219, Bendl. 30.

(*c*) Dougl. 321. Wharton *v.* Gresham, 2 W. Bl. 1083, is generally classed with these cases; but as the devise was to J. W. and his sons *in tail male,* it is clear that he took an estate tail without construing "sons" as a word of limitation; and the only consequence of the non-existence of a son was his exclusion from taking immediately under the devise.

[1] Vanzant *v.* Morris, 25 Ala. 285; Beacroft *v.* Strawn, 67 Ill. 28; Baker *v.* Scott, 62 Ill. 86; Nightingale *v.* Burrell, 15 Pick. 104, 114; Akers *v.* Akers, 8 C. E. Green. 26; Chrystie *v.* Phyfe, 19 N. Y. 344; Guthrie's Appeal, 37 Penn. St. 9; Moon *v.* Stone, 19 Gratt. 130; Parkman *v.* Bowdoin, 1 Sum. 359. See Bassett *v.* Hawk, 118 Penn. St. 94; Ellet *v.* Paxon, 2 Watts & S. 418, 434. But see Carr *v.* Estill, 16 B. Mon. 309; Lampley *v.* Blower, 3 Atk. 396. Wild's case has never been followed in Tennessee. Turner *v.* Ivie, 5 Heisk. 222.

son S., when he should accomplish the full age of twenty-one
[*1236] * years, the fee simple and inheritance of Lower Shelstone, *to him and his child or children* for ever, but if he should happen to die before twenty-one, then over to testator's wife for ever. S. was unmarried at the death of the testator, and it was held that he took an estate tail, *there being no children to take an immediate estate by purchase.* The meaning, Lord Mansfield said, was the same as if the expression had been "to S. and his heirs, that is to say, his children or his issue." The words "for ever" made no difference, for the heirs (of the body) of S. might last for ever (*d*).

To A. *and his child or children* for ever.

So, in Seale *v.* Barter (*e*), where the devise was in these words, "It is my will that all my lands and estates shall after my decease come to my son J. *and his children* lawfully to be begotten, with full power for him to settle the same or any part or parts thereof by will or otherwise on them or any of them as he shall think proper, and for default of such issue, then" over in like manner to a daughter. J. had no child at the date of the will, but had a daughter living at the testator's death (*f*). The Court of Common Pleas, on the authority of Wild's case, Wharton *v.* Gresham, and several other cases (which the writer has referred to other grounds, as they did not involve the inquiry whether the devisee had children or not at the time), held that J. took an estate tail, Lord Alvanley, C. J., expressly intimat-
[*1237] ing that * the Court gave no opinion as to what would have been the construction if there had been children born at the time of the devise.

To J. *and his children* lawfully to be begotten.

Again, in Broadhurst *v.* Morris (*g*), where the testator devised all

(*d*) In Hodges *v.* Middleton, Dougl. 431, Lord Mansfield and the Court of K. B. inclined to think that where a testator devised to A. for life, and after her death to *her children*, upon condition that she or they constantly paid 30*l.* a year for a clergyman to officiate in her chapel, and on failure thereof to testator's own next heirs, and in case of failure of children of A., then to her brother G., &c., A. had an estate tail; or that if she took an estate for life, the children took an estate tail; and as recoveries had been suffered by both, the alternative of these propositions was not material. As the limitation to the children in this case was by way of remainder, there seems to have been no ground, whether a child existed at the date of the will or not, for holding the parent to be tenant in tail. It is as difficult to perceive any satisfactory reason for giving the children estates tail. The direction to pay the 30*l.* a year would have enlarged their devise to a fee simple. See sup. p. 1132.

(*e*) 2 B. & P. 485; but see Doe d. Davy *v.* Burnsall, 6 T. R. 30; *s.* c. nom. Burnsall *v.* Davy, 1 B. & P. 215; Doe d. Gilman *v.* Elvey, 4 East, 313, post, where it seems to have been taken for granted that under a devise to A. and his issue where the issue were tenants in common in fee, the issue took by way of remainder; and it is observable that in Heron *v.* Stokes, 2 D. & War. 107, Sir E. Sugden, suggested that the more natural construction of a gift to one and his children, *there being no children in esse at the time*, and that which he should have adopted in the absence of authority the other way, would be to hold it to be a gift to the parent for life, with remainder to the children. These remarks do not show that he considered that the authorities would have left him free to adopt such a construction if the point had called for decision. He would doubtless have felt himself bound to follow, in regard to real estate, the often-recognized rule in Wild's case, either with or without the modification suggested. With respect to personalty, slight circumstances have been held sufficient to warrant his construction. Vide post, p. 1244.

(*f*) See 2 B. & P. 487.

(*g*) 2 B. & Ad. 1. See also Clifford *v.* Koe, 5 App. Ca. 447.

his share of his two estates in W. to his daughter E. for life, and at her decease to F., her husband, during his life; and at the decease of his said son-in-law F. he directed that the whole legacy to him should go to his (testator's) grandson B. *and to his children lawfully begotten for ever;* but in default of such issue *at his* (*B.'s*) *decease* to G. and his heirs. B. was unmarried at the death of the testator. It was contended that the words "at his decease" distinguished the present case from the previous authorities; and it was also suggested that by the effect of the words "forever" the children might take the fee; but the Court of King's Bench certified (the case being from Chancery) that the devise conferred an estate tail on B.

Devise in remainder to B. and to his children lawfully begotten for ever.

Thus, the cases have established, it should seem, that a devise to a man and his children, he having none at the time of the devise, gives him an estate tail.

The time of the devise appears to denote rather the period of the *making* of the will, than the time of its *taking effect* (*h*), and yet it is impossible not to see that the material period in regard to the evident design of the rule is the death of the testator, when the will takes effect.

Suggested modification of the terms of the rule.

The object of the rule manifestly is, that the testator's intention in favor of children shall not *in any event* be frustrated; but if it be applied only in case of there being no child living at the time of the making of the will, the accident intended to be so carefully guarded against may occur. For suppose there should happen to be a child or children at that time, who should subsequently die in the testator's lifetime, so that no child was living at his death; in this case, though there was no child to take jointly with the parent, yet the rule would not be applied in favor of after-born children. On the other hand, in the converse case, namely, that of there being a child at the death, but not at the date of the will, an estate tail would be created, though there was a child competent to take by purchase, so that the ground upon which that construction has been resorted to did not exist. Indeed, under the law before the stat. 1 Vict.
* c. 26 (*i*), a still more absurd consequence might have fol- [*1238]
lowed from an adherence to the literal terms of this rule of construction in the latter case; for suppose there had been no child at the making of the will, but a child had subsequently come into existence, who survived the testator, and the parent did not, the devise would have failed together, notwithstanding the existence of a child at the death of the testator, if it had been held that the parent would have been tenant in tail (*j*).

(*h*) See acc. Seale *v.* Barter, stated above; and per Malins, V.-C., Grieve *v.* Grieve, 36 L. J. Ch. 932.
(*i*) But see s. 32 of that Act, ante, Vol. I., p. 322.
(*j*) Buffar *v.* Bradford, 2 Atk. 220, in which these circumstances actually occurred.

If the literal terms of the rule in Wild's case can be departed from in the manner suggested, in order to give effect to its spirit, it would seem to follow that the parent would never be held to take an estate tail if there were a child, who, according to the established rules of construction, could have taken jointly with the parent. Consequently, if the devise were future, so that all children coming in *esse* before the period of vesting in possession would be entitled (*k*), the rule which makes the parent tenant in tail would (if at all) only come into operation in the absence of any *such objects*. In Broadhurst *v.* Morris (*l*), the rule seems to have been applied to a devise of this description, but this peculiarity in the case does not appear to have attracted attention, and it must be confessed that, in reference to cases of every class, the modification of the doctrine suggested in the preceding remarks has to encounter the objection, that it makes the construction of the devise depend upon subsequent events, and therefore its adoption is not too hastily to be assumed.

Application of the rule to future devises.

Lord Hardwicke, in Buffar *v.* Bradford (*m*),[1] refused to apply the rule in that case, because the context showed that it would disappoint the intention. The gift was to the testator's sister during her widowhood; then the property was to be valued and divided into eight parts, four of which the testator gave to A. and the children born of her body; but if any part should be thought too highly valued, "such part shall, *when the time of possession comes*, go to A. and her children, because *they* will have *then* four of the eight parts." A. having died in the testator's lifetime, leaving a child who was born after the date of the will, when A. had no child, it was contended, on the authority of Wild's case, that the [*1239] devise had lapsed. But Lord Hardwicke * held the child to be entitled. He said, "It is the time of possession in the present case which takes it out of the reasoning in Wild's case; for here A. and her children are to have four eighths, and are to take at the same time as joint-tenants. . . . The child, being born in the lifetime of the testator, would have taken with his mother as joint-tenants, if she had lived; as she is dead he *shall take the whole* by way of remainder." This, as pointed out by Lord Cranworth (*n*), is "a conclusion founded, not on the notion that there could be a varying interpretation of the will according to circumstances which might happen after it was made, but on its evident meaning when it was

Rule excluded by contract.

(*k*) Ante, p. 1011.
(*l*) Ante, p. 1237; and see Scott *v.* Scott, 15 Sim. 47.
(*m*) 2 Atk. 220.
(*n*) 10 H. L. Ca. 179. See also per Wood, V.-C., 2 K. & J. 674. Lord Cranworth treated the gift as entitling all children born before the death or marriage of testator's sister, and this would seem to be according to the rule as now established.

[1] See Parkman *v.* Bowdoin, 1 Sum. 366; Annable *v.* Patch, 3 Pick. 360.

made." So, in Sparling *v.* Parker (*o*), where the gift was of personalty to be laid out in land "to A. and to his first and other sons after him in the usual mode of succession," it was held by Sir J. Romilly, M. R., that A. (who was a bachelor) took an estate for his life only.

In Re Buckmaster's Estate (*p*) real estate was devised to A. and B., "share and share alike, and, in their respective proportions, to their children, or according to their wills." Sir E. Kay, J., considered that the rule in Wild's case did not apply, and held that A. and B. took the fee as tenants in common, with an executory devise over at the death of each of them, to his children, if any, or to his devisees.

It has been hitherto treated as an undeniable position, that in the devises under consideration, children, if there be any, will take jointly with their parent by purchase; and such certainly is the resolution in Wild's case, as reported in Coke (*q*), who lays it down, "If a man devise land to *A. and to his children or issue*, and *they* then have issue of *their* bodies, there his express intent may take effect according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary: and therefore, in such case, they shall have but a joint estate for life." [1]

Rule in Wild's case.

2. Where there are children at the time of the devise.

And in conformity to this doctrine seems to be the case of * Oates d. Hatterley *v.* Jackson (*r*), where a testator devised [*1240] to his wife J. for her life, and after her decease to his daughter B. *and her children* on her body begotten or to be begotten by W. her husband *and their heirs* forever. B. had one child at the date of the will, and afterwards others; and it was held that she took jointly with them an estate in fee, and consequently that on their deaths (which had happened) she became entitled to the entirety in fee. This, it will be observed, was the case of a devise *in fee*.[2]

(*o*) 29 Beav. 450. And in Grieve *v.* Grieve, L. R., 4 Eq. 180, testatrix gave a house to her two nieces (then spinsters) "and to their children, and if they have not any," over; "the furniture to go with the house." The gift of the furniture was held by Malins, V.-C., to show that the nieces were not intended to take estates tail in the house.

(*p*) 47 L. T. 514.

(*q*) 6 Rep. 17. The plural "they" and "their" appears to be used by mistake.

(*r*) 2 Stra. 1172. See also Buffar *v.* Bradford, 2 Atk. 220; Caffary *v.* Caffary, 8 Jur. 329.

[1] But in a case where a testator devised as follows, "I give to my son R. the improvement of all my real estate, which is not otherwise disposed of, to him, his children or grandchildren; and if my said son R. should decease without children or grandchildren, the said real estate is to descend to heirs of my son J., deceased," and when the will was made, R. had children, but no grandchild, it was held, that R. took an estate tail under the will. Wheatland *v.* Dodge, 10 Met. 502. Wilde, J., in this case said: "It is true that the defendant at the time of the devise, had children, but he had no grandchildren, and by the express words of the will, they were to take under it, which they could not do, unless the defendant took an estate tail."

[2] Parkman *v.* Bowdoin, 1 Sum. 366; Allen *v.* Hoyt, 5 Met. 324.

But in Jeffery *v.* Honywood (*s*), where a testator gave certain estates, subject to charges, to A., and to all and every the *child and children* whether male or female of her body lawfully issuing, and *unto his, her, and their heirs or assigns forever as tenants in common.* A. died in the lifetime of the testator, leaving ten children. (It is not expressly stated whether any of the children were living at the date of the will, but it seems probable that this was the case.) The question was, whether A. took an estate in fee in an eleventh share, the consequence of which would be that it lapsed by her death in the testator's lifetime. The affirmative was contended for on the authority of Oates *v.* Jackson; but Sir J. Leach, V.-C., held that A. had a life estate only.[1] He said: "There are two gifts, one to the mother, without words of limitation superadded, and another to her children, their heirs and assigns; and these two gifts can only be rendered sensible by construing, as the words import, a life estate to the mother, and a *remainder in fee* to the children. In Oates *v.* Jackson the mother was, by the plain force of the expression, comprehended in the limitation in fee."[2]

To A. and her children, and their heirs.

Children held to take by way of remainder.

The difference of expression, however, in the two cases is extremely slight. In Jeffery *v.* Honywood, the gift is "to A. and *to* all and every the child and children." In Oates *v.* Jackson, "to A. and her children." The only difference consists in the word "to," and, according to one report of the latter case, even this slight difference is extinguished, the expression there being "to B. and *to* the children of her body" (*t*).

Observations upon Jeffery *v.* Honywood.

[*1241] * Even supposing the words of the limitation not to apply to the mother (in which case, however, it might have been contended that she took the fee by force of the word "estates"), it is difficult to see upon what ground the devise to the children could be held to be *a remainder* expectant on the mother's estate, and not to be immediate or in possession as to all the objects. His Honor's objection to the latter construction is, that "after-born children would be included in this devise, and it is a singular intention to impute to a father, that he means his daughter's personal interest in an estate should continually diminish upon the birth of a new child." But, according to all the authorities (*u*), including a decision of the V.-C.

(*s*) 4 Mad. 398. See also Newman *v.* Nightingale, 1 Cox, 341, stated ante, Vol I., p. 482.

(*t*) 7 Mod. 549. It has been justly remarked, however, that the substitution of the words "his, her, and their" for the simple "their" of Oates *v.* Jackson, showed the testator's idea that it was probable (qu. possible) that only one, and that either male or female, might become entitled to his bounty; whereas, if he had intended the mother to take as tenant in common in fee, in no case would the estate have gone to one male. Prior on Issue, &c., pl. 54.

(*u*) Heathe *v.* Heathe, 2 Atk. 121; Singleton *v.* Singleton, 1 B. C. C. 542, n., and other cases cited ante, p. 1010.

1 Chew's Appeal, 37 Penn. St. 23.

2 See Rich *v.* Rogers, 14 Gray, 174; Hubbard *v.* Selser, 44 Miss. 705; Springer *v.* Arundel, 64 Penn. St. 218.

himself (*x*), an *immediate* gift *to children vests exclusively in the objects living at the death of the testator.*

Jeffery *v.* Honywood seems to be inconsistent with, and must, therefore, be considered as overruled by Broadhurst *v.* Morris (*y*) already stated. It is true that the former case was cited with seeming approbation in Bowen *v.* Scowcroft (*z*) by Alderson, B., who founded the latter decision mainly on its authority; but the cases are, it is submitted, distinguishable.

The second branch of the rule will not any more than the first be applied where it would defeat the intention as shown by the context. To give effect to the intention so manifested the Courts will construe "children" a word of limitation, notwithstanding the existence of children. Thus, in Wood *v.* Baron (*a*), where a testator devised to his daughter his whole *estate* and effects, real and personal, *who should hold and enjoy the same as a place of inheritance to her and her children, or her issue, forever;* and if his daughter should die leaving no child or children, or if her children should die without issue, then over. It was held that the daughter took an estate tail, though she had issue at the time of the making of the will, and of the death of the testator.

"Children" held to be a word of limitation, notwithstanding the existence of children.

Devise to A. as a "place of inheritance to her and her children, or her issue."

So in Webb *v.* Byng (*b*), where the testatrix, Anne Cranmer, devised as follows: "I give in trust to my executors for my niece Mary Anne Byng and her children all my Q. estates, * provided she takes the name of Cranmer and arms, and her children, with my mansion house, plate, books, linen, &c., Archishop Cranmer's portrait by Holbein," and other articles "as heirlooms with my estate:" there were children of Mary Anne Byng in esse at the date of the will and at the death of testatrix; but it was held by Sir W. P. Wood, V.-C., that Mary Anne Byng took an estate tail. She and her children could not take concurrently; since that would involve this manifest absurdity, viz., that they must all live together in the same house and enjoy the various articles given as heirlooms with the estate. And the object of the testatrix being to perpetuate the name of Cranmer, she could not have intended that Mary Anne Byng should take for life, with remainder to her eight children as joint-tenants in fee; because then, independently of the fact that Jeffery *v.* Honywood had been overruled by Broadhurst *v.* Morris, the estate would by that construction be divisible into eight separate estates, and as the parties to take the property were also to take the

[*1242]

Devise to A. and her children of mansion house with articles as heirlooms.

(*x*) Scott *v.* Harwood, 5 Mad. 332.
(*y*) 2 B. & Ad. 1. See acc. per Wood, V.-C., 2 K. & J. 673, and Cormack *v.* Copous, 17 Beav. 403.
(*z*) 2 Y. & C. 640, stated post, Ch. XLVIII. ad fin.
(*a*) 1 East, 259.
(*b*) 2 K. & J. 669; affirmed 8 D. M. & G. 633, and 10 H. L. Ca. 171 (Byng *v.* Byng).

name and arms, the result would be to found as many small families all bearing the name and arms of Cranmer, whereas the testatrix spoke of her estate as one and indivisible and to be enjoyed in its entirety.

So a devise of the testator's "property to A. and to his children in succession" has been held to give A. an estate tail although he had children at the date of the will (*c*). And a devise "to my daughter A. to her and her children forever," she being with child at the date of the will, was held to make A. tenant in tail on the ground that the words "to her" would be surplusage if the words "and her children" were words of purchase and not of limitation. "To her," &c. was read as the tenendum defining what estate A. was to take by the previous devise (*d*).

"To A. and his children in succession."

"To A., to her and her children."

In Seale *v.* Barter (*e*) Lord Alvanley observed that, according to the report of Wild's case in Moore (*f*), two of the Judges thought it was an estate tail in him, though there were children at the time of the devise; but probably it did not occur to his Lordship [*1243] that the devise in that case was to A. and his wife, * and *after their death* to their children, which it is now admitted on all hands gives an estate for life to the parents, with remainder to their children; so that the notion as to its being an estate tail was clearly untenable (*g*). Had the observation been applied to a devise to A. and his children simply, it might have had more weight.[1]

The word "children" seems to have been construed as a word of limitation (in a very obscure will) in Doe d. Gigg *v.* Bradley (*h*), where a testator bequeathed a *leasehold* property to A. and B. for life, share and share alike, with survivorship for life to A., and after their decease to the children of A., "to be equally divided between them, share and share alike, and to the survivor of them *and their children;*" it was held that these words were words of limitation, applicable to the gift to

Rule whether applicable to *bequests* of personalty;

(*c*) Earl of Tyrone *v.* Marquis of Waterford, 1 D. F. & J. 613. See Re Childe, W. N., 1883, p. 48 ("eldest and other sons in succession").

(*d*) Roper *v.* Roper, 36 L. J. C. P. 270, and in Ex. Ch., L. R., 3 C. P. 32. It was doubted by Kelly, C. B., in this case, whether a child en ventre could be considered in esse within the rule (as to which vide sup. p. 1043); and, if it could, whether one child would satisfy the word "children" in the plural; but see Oates d. Hatterley *v.* Jackson, 2 Str. 1172.

(*e*) 2 B. & P. 485, ante, p. 1236.

(*f*) 397, pl. 519, nom. Richardson *v.* Yardley.

(*g*) See also his Lordship's observations upon Hodges *v.* Middleton, stated ante, in Seale *v.* Barter, 2 B. & P. 494, which are susceptible of the same answer. But a devise to A. for life, remainder to "his children and so on forever, and for want of such children," over, is an estate tail in A., Trash *v.* Wood, 4 My. & Cr. 328.

(*h*) 16 East, 399. See also Snowball *v.* Proctor, 2 Y. & C. C. C. 478 (to children and their children after them).

[1] Devise to a son for his natural life "and in trust for and for the use of his children" gives the son an estate for life only. Newman's Appeal, 35 Penn. St. 339.

the children (though there were children of such children living at the death of the testator (*i*)),[1] and accordingly it was to be construed as a gift to the children absolutely (*k*), with survivorship between them for *life*.

This case has too much of peculiarity to authorize any general conclusion. Lord Hardwicke, in Buffar *v.* Bradford (*l*), seems to have been adverse to the application of the rule in Wild's case to personal estate, where, he said, the effect of construing "children" to be a word of limitation must be, that the first taker would have all; and in Audsley *v.* Horn, Lord Campbell decided that the rule was not generally applicable to personal estate (*m*).

In such cases, however, the point seems to be immaterial; for as the rule only applies where there is no child to take jointly with the parent, and as the absolute interest in personalty passes without words of limitation, the result is, that the parent, as the only existing object at the time of distribution, would be solely entitled quâcunque viâ (*n*).

* There is one class of cases, however, where the point [*1244] would be material; that is, where there is a gift of an annuity to a person and his children. For though a simple gift of personalty or of the dividends or annual proceeds of a specified fund, passes the absolute interest to the legatee without words of limitation (*o*); yet, where an annuity is so given, the annuitant takes only for life (*p*).

— to bequests of personal annuities.

Indeed, with respect to personal estate, an attempt has often been made on slight grounds, and sometimes with success, to cut down the parent (according to Sir J. Leach's construction in Jeffery *v.* Honywood) to a life interest, the children taking the ulterior interest by way of a remainder. Thus, in Crawford *v.* Trotter (*q*) (a decision of the same Judge), a bequest of 1,000*l.* reduced annuities to A. and her heirs (say children), was held to give a life interest to A., and the capital

What context will give life interest to parent with remainder to the children.

(*i*) It does not appear whether any were living at the date of the will; possibly there were, as one of the children of A. was then married.

(*k*) See rule discussed Ch. XLIV.

(*l*) Ante, p. 1238.

(*m*) 1 D. F. & J. 226, affirming 26 Beav. 195. See also Stone *v.* Maule, 2 Sim. 490; Heron *v.* Stokes, 2 Dr. & War. 89, 1 Con. & Law. 270, Sugd. Law of Prop. 236 seq.

(*n*) See Cape *v.* Cape, 2 Y. & C. 543. And the result would be the same in reference even to real estate under wills made or republished since 1837, as the fee would pass by such wills without words of limitation.

(*o*) Heron *v.* Stokes, 2 Dr. & War. 89, 12 Cl. & Fin. 161; Kerr *v.* Middlesex Hospital, 2 D. M. & G. 576; Bent *v.* Cullen, L. R., 7 Ch. 235.

(*p*) Savery *v.* Dyer, Amb. 139; Yates *v.* Maddan, 3 Mac. & G. 532; and the rule is not altered by the stat. 1 Vict. c. 26, Nichols *v.* Hawkes, 10 Hare, 342. See Re Foster's Estate, 23 L. R., Ir. 269. As a personal annuity cannot be entailed, the limitation to children, if it attracted the rule in Wild's case, would create a conditional fee, Stafford *v.* Buckley, 2 Ves. 170.

(*q*) 4 Mod. 361.

[1] See Stokes *v.* Tilley, 1 Stockt. 130.

to her children, the word "heirs," which was used as synonymous with "children," importing that they were to take after her death.

So, in Morse *v.* Morse (*r*), where a testator gave to his daughter *A. and her children* 5,000*l.* for their sole use and benefit, 3,000*l.* to be paid in one year after his decease, and 2,000*l.* after the decease of his wife, and appointed A. B. *trustee of those sums for his daughter and her children;* Sir L. Shadwell, V.-C., held the 5,000*l.* to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's lifetime or after his decease.

Again, in Vaughan *v.* Marquis of Headfort (*s*), a testator bequeathed a legacy to A. and his children, *to be secured for their use*, and Sir L. Shadwell, V.-C., held that, as the latter words were inapplicable to A., since he might have taken his share and secured it for himself, they could only mean that the fund was to be secured for A. for life, and for his children after his decease.

So, where the testator shows that the children when they take are to take the whole fund; as, where the bequest was in trust for A. (then an infant) and such younger sons as she might [*1245] * have in equal shares, and if but one, then the whole to such one (*t*); or to A. (then a spinster) and her children, but if *they* (which could only mean the children) should die without issue, the whole to go over (*u*): so, where the children are to take in unequal shares, which is incompatible with a joint tenancy with the parent (*x*); or where the testator appears to contemplate that their title will arise, or that the class will be ascertained, at the death of the parent, as in the case of a bequest to A. and B. and their children, "without comprehending the husband of A. and B. unless they should die without issue" (*y*), or to A. "for the benefit of herself and such children as she then had or thereafter might have by her then husband" (*z*), —in all these cases the parents were held to take a life interest with remainder to their children. And where the testator gave a pecuniary legacy in trust for A. for life with remainder to her children "exclusive of the two eldest;" and then gave the residue to A. and her children, "including the two eldest," the gift of residue was construed by reference to the pecuniary bequest (*a*). The exclusion

(*r*) 2 Sim. 485.
(*s*) 10 Sim. 639. See also Combe *v.* Hughes, L. R., 14 Eq. 415; Ogle *v.* Corthorn, 9 Jur. 325.
(*t*) Garden *v.* Pulteney, 2 Ed. 323, Amb. 499.
(*u*) Audsley *v.* Horn, 26 Beav. 195, 1 D. F. & J. 226.
(*x*) Per James, V.-C., Armstrong *v.* Armstrong, L. R., 7 Eq. 522, approved by Lord Hatherley, in Newill *v.* Newill, L. R., 7 Ch. 257.
(*y*) Dawson *v.* Bourne, 16 Beav. 29. See also Lampley *v.* Blower, 3 Atk. 396, post, Ch. XXXIX., s. 1, n.; and cf. Fisher *v.* Webster, L. R., 14 Eq. 283.
(*z*) Jeffery *v.* De Vitre, 24 Beav. 296.
(*a*) Re Owen's Trusts, L. R., 12 Eq. 316. See also Cator *v.* Cator, 14 Beav. 493; and Parsons *v.* Coke, 4 Drew. 296, where gift of accruing shares was governed by gift of original shares.

of the two eldest children from the latter being the only apparent reason for separating the two bequests.

It was even said by Sir J. Romilly (*b*) that "generally under a gift to a wife and her children, if there was nothing to denote the proportious in which they were to take, the most natural disposition was to give the property to the wife for her life, and afterwards to her children," and he cited Crockett *v.* Crockett (*c*), as having laid down that rule. In that case, however, Lord Cottenham expressly distinguishes a simple gift to the mother and her children from one where there is an indication, however slight, of an intention that the children should not take jointly with the mother (*d*), and throughout his judgment it appears * to be assumed that in [*1246] the absence of all indication of such an intention concurrent interests will be created. And such is clearly the law. Thus, in Pyne *v.* Franklin (*e*), where a testator gave 200*l.* to each of his nieces and their children, to be paid within nine months after the death of his wife, amongst his nieces *and their children,* as his wife should by will appoint. The wife died without having made any appointment. The executors, within nine months after her death, paid the legacies to the nieces, who afterwards died without having had any child. It was held that the payment was properly made.

Parent and children take concurrently where no contrary intention appears.

So, in Newill *v.* Newill (*f*), where a testator bequeathed all his property, real and personal, to his wife for the use and benefit of herself and all his children, whether by her or by his former wife, and appointed his wife and other persons his executors; it was held by Lord Hatherley that the wife and children took as joint tenants; that this was the ordinary construction in the absence of a different intention being indicated in the will, and that although very small circumstances had been laid hold of, the mere circumstance that had been urged in argument, of the wife being made trustee, was not enough to warrant the Court in presuming that the fund was intended to be settled on herself for life, with remainder to the children.

Newill *v.* Newill.

(*b*) Salmon *v.* Tidmarsh, 5 Jur. N. S. 1380, where, however, *on the context* the wife and children were held to take concurrently. See also Ward *v.* Grey, 26 Beav. 485; and Lord St. Leonards' remarks cited ante. p. 1236, n. (e). Instructions, or an executory trust, for a settlement on A. and her children will be executed by making A. tenant for life with remainder to the children, Re Bellasis' Trusts, L. R., 12 Eq. 218; Cator *v.* Cator, 14 Beav. 463.

(c) 2 Phill. 553, stated Vol. I., p. 372.

(*d*) See 2 Phill. 555, 556.

(e) 5 Sim. 458.

(*f*) L. R., 7 Ch. 253, reversing Malins, V.-C., L. R., 12 Eq. 432, and discussing the principal authorities. See also De Witte *v.* De Witte, 11 Sim. 41; Sutton *v.* Torre, 6 Jur. 234; Lenden *v.* Blackmore, 10 Sim. 626; Paine *v.* Wagner, 12 id. 184; Read *v.* Willis, 1 Coll. 86; Cunningham *v.* Murray, 1 De G. & S. 366; Gordon *v.* Whieldon, 11 Beav. 170; Beales *v.* Crisford, 13 Sim. 592; Mason *v.* Clarke, 17 Beav. 126; Curtis *v.* Graham, 12 W. R. 998; Bibby *v.* Thompson, 32 Beav. 646; Fisher *v.* Webster, L. R., 14 Eq. 283. See as to policies of assurance effected under the Married Women's Property Act, 1870, Re Adams' Policy Trusts, 23 Ch. D. 529; Re Seyton, Seyton *v.* Satterthwaite, 34 Ch. D. 511.

Trust for separate use of parent, when it excludes the rule.

A declaration annexed to a bequest to a woman and her children, that she shall be entitled for her separate use, is not sufficient of itself to exclude the general rule (*g*), unless it can be collected that the declaration is intended to affect the whole fund (*h*).

Devises to *sons* not distinguishable from devises to *children*.

The same principle which regulates devises to children applies to devise to *sons*, the only difference being that the estate tail, which the latter term, where used as nomen collectivum, creates, will be an estate tail *male* (*i*). A devise [*1247] to A. for life, and after * his decease to his sons, of course gives to A. an estate for life, with remainder to his sons as joint tenants in fee.

II. — "Child," "Son," "Daughter," &c., where used as nomina collectiva. — We now proceed to consider a point which has often occupied the attention of the Courts, and still more frequently that of the conveyancing practitioner, — namely, whether the word "son" or "child" in the singular is a word of limitation; which, of course, is commonly its effect where used in a collective sense, *i. e.*, as synonymous with issue male or issue general.

"Son," "child," "daughter," &c., where used as nomina collectiva.

One of the earliest cases of this kind is Bifield's case (*j*), where, upon a devise to "A., and if he dies *not having a son*, then" over to the heirs of the testator, it was held that the word "son" was used as nomen collectivum, and that the devise created an entail.

To A., and if he die *not having a son*.

So, in Milliner *v.* Robinson (*k*), where a testator devised to his brother J., and if he should die *having no son*, that the land should remain over; it was held that J. had an estate tail.

To J., and if he die having no son.

Again, in Robinson *v.* Robinson (*l*), where the testator devised his real *estate* to L. for the term of his natural life and no longer, provided he altered his name and took that of R. and lived at the testator's house at B., and after his decease *to such son as he should have lawfully to be begotten* taking the name of R., and for default of *such* issue, then over

To A. for life, and after his death "to such son as he shall have."

(*g*) De Witte *v.* De Witte, 11 Sim. 41; Bustard *v.* Saunders, 7 Beav. 92, 7 Jur. 986; Fisher *v.* Webster, L. R., 14 Eq. 283.

(*h*) Froggatt *v.* Wardell, 3 De G. & S. 685 (a somewhat special case). See also French *v.* French, 11 Sim. 257; Bain *v.* Lescher, id. 397; which however in this respect are similar to De Witte *v.* De Witte and Bustard *v.* Saunders, sup.

(*i*) 1 Bulst. 219, Bendl. 30.

(*j*) Cited by Hale, C. J., in King *v.* Melling, 1 Vent. 231. See also Andrew *v.* Andrew, 1 Ch. D. 410; with which compare Bennett *v.* Bennett, 2 Dr. & Sm. 274, stated below. "Die without having a son" is a phrase the construction of which seems now to be governed by 1 Vict. c. 26, s. 29, as to which see Ch. XLI.

(*k*) 1 Moore, 682, pl. 939, said by Jessel, M. R. (W. N. 1880, p. 14), to be the same as Bifield's case. See also Re Bird and Barnard's Contract, W. N., 1888, p. 139 ("leaving no son.")

(*l*) 1 Burr. 38, 2 Ves. 225, 1 Kenyon, 298, 3 B. P. C. Toml. 180 (Robinson *v.* Hicks).

to W. in fee; and the testator willed that L. might present whom he pleased to any vacancy in any of the testator's presentations during his (L.'s) life, and that bonds of resignation should be given in favor of L.'s children who were designed for holy orders; and, after the same should be disposed of as aforesaid, gave the *perpetuity* of the presentations to the said L. in the same manner and to the same uses as he had given his estates. On a bill to establish the will, Sir J. Jeykll, M. R., held that L. was entitled for life, remainder to his eldest, and but one, son for life, remainder in fee to W.; and Lord Talbot, on appeal, affirmed the * decree. But afterwards, a bill having been filed by the second son of L. (the first having died an infant), the Court of King's Bench, on a case sent by Lord Hardwicke, certified "that L. must by necessary implication, to effectuate the manifest general intention of the testator, be construed to take an estate in tail male." The Lords Commissioners, who succeeded Lord Hardwicke in the custody of the great seal, confirmed this certificate; and their decree was affirmed in the House of Lords after great consideration and with the concurrence of all the Judges. [*1248]

The authority of this case has long been beyond the reach of controversy, not only from its having been decided by the highest tribunal, but in consequence of its frequent recognition. Lord Kenyon founded a great number of decisions (*m*) upon it, and though he did not invariably advert to the true principle (sometimes laying an undue stress on the words "in default of *such* issue") which a long line of cases has established to be merely referential (*n*), yet in Doe *v.* Mulgrave (*o*), he distinctly treated the case as standing on the ground to which it has been here referred.

Remark on Robinson *v.* Robinson.

Again, in Mellish *v.* Mellish (*p*), where the devise was in these words: "Hamels to go to my daughter C. M. as follows: *in case she marries and has a son, to go to that son;* in case she has more than one daughter at her death, or her husband's death, *and no son,* to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother W. M." In a subsequent part of his will the testator added, "Mrs. P. to receive 200*l.* a year from C. M., during the life of Mrs. P." The question was what estate

To A., and if she marries and has a son, then to that son.

(*m*) See Hay *v.* Coventry, 3 T. R. 86, 1 R. R. 652; Doe *v.* Applin, 4 id. 82, 2 R. R. 337; Denn d. Webb *v.* Puckey, 5 id. 303, 2 R. R. 601; Doe d. Candler *v.* Smith, 7 id. 533; Doe d. Bean *v.* Halley, 8 id. 5; Doe d. Cock *v.* Cooper, 1 East, 235.

(*n*) See post, Ch. XL. s. iii. In this observation, which the writer has found it necessary often to make, he leaves out of view the well-known operation of the words "in default of such issue" to create cross-remainders among several tenants in tail, which turns on a different principle.

(*o*) 5 T. R. 323, 2 R. R. 607.

(*p*) 2 B. & Cr. 520. Examine the case of Seaward *v.* Willock, 5 East, 198, in reference to this doctrine.

C. M. took in Hamels. It was contended for her, on the authority of Wight *v.* Leigh (*q*), Wharton *v.* Gresham (*r*), Chorlton *v.* Craven (*s*), Sonday's case (*t*), and Wyld *v.* Lewis (*u*), that she took an estate tail.

On the other side it was insisted that C. M. took the fee [*1249] * by the effect of the annuity made payable by her (*x*), and which fee was defeasible on either of three events: first, if she married and had a son, it was to go to that son; secondly, if she had more than one daughter and no son, it was then to go to the eldest daughter; and, thirdly, if she had no child at all (or, it seems, if she had only one daughter), it was to go to W. M. The Court, however, held that C. M. took an estate tail male. Bayley, J., said: "It may be collected from the authorities that if the word 'son' be used, not as designatio personæ, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is the manifest intention of the testator to give an estate tail; and it is equally clear that words are not to operate as an executory devise which are capable of operating in any other way. In this case the words are, 'Hamels to go to my daughter C. M. as follows, viz., in case she marry and has a son, then it is to go to that son.' Now, if the word 'son' be used as nomen collectivum, it would give to C. M. an estate to continue as long as there should be any male descendants of her, and that would be an estate in tail male. I cannot find in the subsequent part of this will anything inconsistent with the construction that ought to be put upon it, if he had stopped here." Holroyd, J., said the word "son" should be read "any son." The Court afterwards certified "that C. M. took an estate in tail male, with a reversion in fee (*y*), subject to other estates created by this will."

"Son," held to be a word of limitation.

It is evident, from the concluding words of the certificate, that the Court considered the eldest daughter would take an estate in the event described. The intention expressed in favor of the *eldest* daughter, of course, would not operate to confer on the parent an estate tail which would descend to daughters.

Remark on Mellish v. Mellish.

Again, in Doe d. Garrod *v.* Garrod (*z*), where a testator by his will devised thus: "As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have and to hold during his life, *and to his son, if he has one, if not,* to the eldest son of my nephew J. G. and to his son after him, if he has one, if not, to the regular male heir of the G. family." By codicil, stating that his nephew T. G. then had a son born, the testator gave all his lands to that son after his father's

"Son" held to be a word of limitation.

(*q*) 15 Ves. 564, post.
(*r*) 2 W. Bl. 1083; ante, 1235, n. (*c*).
(*s*) Cit. 2 B. & Cr. 524, post, p. 1253.
(*t*) 9 Rep. 127.
(*u*) 1 Atk. 432, post.
(*x*) And other grounds which were clearly inadequate.
(*y*) She was heir-at-law.
(*z*) 2 B. & Ad. 87.

decease; and to his "*eldest son, if he has one;* but if he
* has no son, then to the next eldest regular male heir of the [*1250]
G. family." It was held that by the will and codicil the son of T. G. took an estate tail. Lord Tenterden, C. J., considered that the testator did not intend the estate to go over to the G. family while any issue male of his great-nephew should remain, and that the giving an estate tail to the devisee was warranted by Sonday's case.

So, in Doe d. Jones *v.* Davies (*a*), where a testator, after premising that, should his daughter die unmarried, he would not have his estate sold or frittered away after her decease, but that it should be entailed, devised all his real estate to trustees, to permit his daughter, not only to receive the rents and profits thereof for her own use, or to sell or mortgage any part, if occasion required, but also to settle on any husband she might take the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste or non-residence, or neglecting repairs. He then added, that should "*my daughter have a child, I devise it to the use of* SUCH CHILD from and after my daughter's decease, with a reasonable maintenance for the education, &c. of such child in the mean time. Should *none of these cases happen,*" the testator devised the estate to a nephew, subject to a condition to reside, &c., and to his first and every other son, and in default he gave the estate to another person on a like condition, and his first and every other son. The will then proceeded as follows: "My will and meaning for having the house and farm occupied is for the sake of improving the neighborhood as far as my poor abilities extend, which would be otherwise proportionably impoverished, for protecting the parish and supporting its poor. This I am persuaded is my daughter's wish as well as my own, whom I by no means will to restrain as a tenant for life; but in case that either of the remaindermen should ill-treat her, or should be likely to turn out an immoral man, or a bad member of society, she may, by the advise or consent of the trustees, set aside such an one by her own will and testament, that my intention of doing good in the neighborhood might not be defeated. I recommend it to my daughter, for *want of issue to herself,* not to leave in legacies above five or six hundred pounds, and that out of my charge on Nevern" (a distinct property of the testator), "which I have also articled for, and entail the rest for the further support of
* this house." At the time of the making of the will, and [*1251]
at the death of the testator, the daughter had no child. It was held, that the word "child," as here used, was nomen collectivum; it being evident from the whole tenor of the will that the

Word "child" held to be used as nomen collectivum, and to confer an estate tail.

(*a*) 4 B. & Ad. 43.

testator intended that the estate should not go over to the devisees in remainder until the failure of issue of his daughter. The Court considered that the case came within the principle of those in which the word "son" had been held to be nomen collectivum, particularly Bifield's case.

To this class of cases it is conceived also belongs the case of Raggett *v.* Beaty (*b*), where a testator devised a messuage to the use of G. (the second son of his nephew J.) to enter upon and possess the same after the decease of his father, and he directed the said J. and G. to pay the sum of 100*l.* within one year after his decease to A. and B. upon certain trusts; but in case they did not pay the said sum, he ordered A. and B. to let the premises and receive the rents until the 100*l.* should be paid, they keeping possession of the deeds and not allowing the said J. and G. either to sell or mortgage any part of the premises until the legacies were all paid and G. was twenty-one years of age; *or, if in case the said G. should die and leave no child lawfully begotten of his own body,* it was his will that the said A. and B. their heirs and assigns should sell the premises and distribute the money arising therefrom amongst his (the testator's) brothers and sisters and C. and D. or their heirs, in such shares as the trustees should think proper. The question sent for the opinion of the Court of C. P. was, what estate G. had upon the death of his father. It was contended that G. took an estate tail as the result of the apparent intention that the estate should not go over unless there was an ultimate indefinite failure of issue of G.; and the cases relied upon for this construction were those in which words importing a failure of issue had been so construed. On the other side it was argued that the intention to be collected from the whole will was, that G. should take an estate in fee, with an executory devise over in case of his not leaving issue at his death; and the argument for holding the devisee to take a fee was founded mainly on the testator's direction to the devisees to pay the 100*l.*; and no attempt seems to have been made to distinguish the word "child," as used in this devise, [*1252] from the * word "issue," which occurred in the cited cases. The Court, however, certified that G. took an estate tail.

"In case A. should leave no child," with context: — Held, to create an estate tail.

This is the most signal instance in which an estate tail has been created by a devise over in case of the prior devisee leaving no child, though the tenor of the authorities discussed in the present chapter and some others, especially Doe *v.* Webber (*c*), (in which Lord Ellenborough made very little difficulty of construing the word "children" in such a position as synonymous with *issue*), had certainly paved the way to such a result. An example of this species of construction has since occurred (though

Remark on Raggett *v.* Beaty.

(*b*) 2 M. & Pay. 512, 5 Bing. 243.
(*c*) 1 B. & Ald. 713. See also Hughes *v.* Sayer, 1 P. W. 534, ante, p. 1055, Wyld *v.* Lewis, 1 Atk. 432, post; Voller *v.* Carter, 4 Ell. & Bl. 173; Coles *v.* Witt, 2 Jur. N. S. 1226.

with an assisting context), in Doe d. Simpson *v.* Simpson (*d*), where a testator gave certain lands to his son A., his heirs and assigns forever; but if it should happen that A. should die *without leaving any child or children*, he devised the estate to B., C., D., E., and F., their heirs and assigns forever, as tenants in common, with a limitation over to the survivors in case of any of them dying under age and without issue. And the testator in a certain event devised other property, subject to the same mode of distribution among the five devisees over as the before-mentioned property given to A. "in case he died *without issue.*" It was considered by the Court that the testator had, by the latter clause, expressly declared the meaning of the prior devise to be, if the first taker should die *without issue* (*e*). They thought, however, that even without this clause there would have been strong grounds for coming to the same conclusion. And in Bacon *v.* Cosby (*f*), where a testator left "his entire **fortune* equally [*1253] divided between his two daughters, and directed that the portion of his youngest daughter should devolve, in case of her dying without children, to his eldest daughter and her children;" a similar construction prevailed, though there was no explanatory context, and the consequence was that the gift over was void as to the personal estate. The younger daughter never had a child (*g*), but the elder had two children living at the date of the will, and, in giving judgment, Sir J. K. Bruce, V.-C., said that, according to the whole course of the decisions and the plainest rules of construction, the younger daughter would have been held to take an estate tail in the realty, and an absolute interest in the personalty, but for the words "and her children" occurring at the end of the will and applied to the elder daughter, coupled with the fact that the elder daughter had children at the date of the will. This, however, he thought was much too slight and conjectural a ground for departing from a settled rule of construction.

Words referring to leaving no *children* held to mean leaving no *issue*.

(*d*) 5 Scott, 770, 4 Bing. N. C. 333, 3 M. & Gr. 929.

(*e*) A strong instance of refusal to construe the word "issue" as synonymous with *children* occurs in the case of Malcolm *v.* Taylor, 2 R. & My. 416, as the testator had, in reference to another subject-matter, clearly used the word "issue" in that sense.

A. bequeathed the residue of her funded property and her plate to B. and C. for their lives, and after the decease of the survivor to such of the children of C. as she should by deed or will appoint,* and in default of appointment, the residue of the money in the funds to be equally divided among the said children; *and, in case C. should die without issue as aforesaid*, the testatrix bequeathed her funded property and plate to certain persons. It was held that the words "without issue as aforesaid," in reference to the funded property, meant without such issue as were objects of the prior gift, i. e., children, but that as to the plate, of which there was no gift to the children of C., the words were to be construed as importing a general failure of issue, and consequently that C. was absolutely entitled.

(*f*) 4 De G. & S. 261. See Egan *v.* Morris, 2 Ll. & Goo. 297, where there was a devise to A. for life, with a gift over if he should die unmarried or without children.

(*g*) So that if the devise had been to her and her children, she would have taken an estate tail on the authority of Wild's case, see 3 M. & Gr. 954. But this reasoning is not applicable in case of personal estate alone, semb. Stone *v.* Maule, 2 Sim. 490; Audsley *v.* Horn, ante, p. 1243.

* This power, it is observable, was not considered to raise an implied trust for the children as to the plate.

An instance of the word "child" being construed as qualifying the word "heirs" in the preceding devise, is afforded by Doe d. Jearrad *v.* Banister (*h*), where a testator devised a certain property to A. and her heirs, *if she has any child;* if not, after the decease of herself and her husband, then to B. and her heirs. It was contended that it was a devise in fee, upon the condition of A. having a child; but the Court of Exchequer held that she was tenant in tail.

"If she has any child."

But it is not to be inferred from the preceding cases that a devise, definitely pointing out the eldest, or any other individual son, will (unaided by the context) have the effect of conferring an *estate tail* on the parent. If any doubt was thrown on this position by Chorlton *v.* Craven (*i*), it is removed by Parker *v.* Tootal (*k*). Both cases arose on the same will, in which the devise was to Thomas C. during his natural life, with remainder to the first son of the body of the said Thomas lawfully begotten severally and successively in tail male of the name of C., and for want of such lawful issue of that name either by his (testator's) son Thomas C. or his son James C., then the testator [*1254] devised the * estate to his daughters and their children, share and share alike. The Court of King's Bench, on a case from Chancery, certified Thomas to be tenant *in tail male*, which was confirmed by Lord Eldon; and in 1823 the Court of Exchequer came to the same decision upon the same devise.

Whether term "eldest son" used as nomen collectivum:

In the absence of all information as to the precise grounds of the decision it might seem that the devise to the son had some influence on the conclusion that Thomas C. had an estate tail male. The words "severally and successively," however, give rise to a strong suspicion that a devise to the second and other sons successively in tail was inadvertently omitted: and the true construction of the will being again mooted in 1865, it was held in the House of Lords (*l*), that such a devise was necessarily implied by those words; and that the words "first and other sons" were not words of limitation enlarging the estate of Thomas, but that they gave all the sons of Thomas successively estates in tail male by purchase in remainder after Thomas's life estate. The decision in the Court of King's Bench, according to which Thomas was tenant in tail male, and in which (understanding thereby tenant in tail mail in remainder after the estates tail of his sons) the House

Remark on Chorlton *v.* Craven.

(*h*) 7 M. & Wels. 292. See Goodtitle d. Cross *v.* Woodhull, Willes, 592.
(*i*) 3 D. & Ryl. 808, cited 2 B. & Cr. 524.
(*k*) 11 H. L. Ca. 143.
(*l*) Parker *v.* Tootal, 11 H. L. Ca. 143. The actual decision turned on a totally different point; but the opinions of Lords Westbury, Cranworth, and Chelmsford (as stated above) were deliberately given for the express purpose of discouraging future litigation. Thomas never had a son, and no decided opinion was given whether he was tenant in tail in remainder after the estates expressly limited to his sons with vested remainders over (to which, however, the House inclined), or tenant for life only with contingent remainders over. Either way he had acquired the fee simple by recovery, and this was all that was *decided* in the Court of Exch., Rushton *v.* Craven, 12 Pri. 599.

was inclined to agree, was considered to depend on the subsequent words "in default of *such* issue of that name either by Thomas or James," the word "such" being referred to "male" in the previous gift (*m*).

A question of this kind was much discussed in Doe d. Burrin *v.* Charlton (*n*), where a testator devised a messuage to his kinsman S. C. for his life, and after his decease to the *eldest son* of S. C., but for want of such issue, then to his (S. C.'s) daughters or daughter, share and share alike, forever; but in case his said kinsman had no issue, then to hold to S. C. his heirs and assigns forever. It was contended, on the authority of the last case, that the word "son" was to be construed as nomen collectivum; and consequently that S. C. took an estate tail male, precedent * to the general estate tail [*1255] which was assumed to arise by implication from the words referring to a failure of issue in the devise over (*o*). But the Court decisively negatived this construction, being of opinion that neither the devise to the eldest son alone, nor the words "for want of such issue" following such devise, created an estate tail. In none of the cases had there been that strict reference to a single individual which occurred in the case before the Court, except in Chorlton *v.* Craven (*p*), where considerable weight was probably attached to the expressions "severally and successively."

Devise to "eldest son" held not to confer an estate tail male.

And in Bennett *v.* Bennett (*q*), where a testator devised all his property to his sister in fee simple, except one tenement, which she was to have for her life only, "and afterwards to my sister's *eldest son* on his taking the name of M.; but should he refuse to take that name, or *my sister die without a son*," then to P. on his taking the name of M., and so on to his heirs, each of them taking the name of M.; it was contended that "eldest son" taken with the gift over "if my sister die without a son" gave the sister an estate tail: but it was held by Sir R. T. Kindersley, V.-C., that primarily "eldest son" meant an individual; and that although it might bear the sense of issue male if the context required it, there was here no such context; on the contrary, if "eldest son" were so construed the gift over if "he" refused to take the name must also be read "if all issue male" however remote refused, — which could not be the intention. As to the gift over "without a son" the V.-C. said it was exactly correlative to "eldest son:" it was the same thing whether the testator said "if she die without a son" or "if she die without an eldest son;" since if she die without a son she must die without an eldest son (*r*).

(*m*) As to this last point, see *s. c.*, mentioned again, Ch. XL. s. iii., sub-s. 1.
(*n*) 1 Scott, N. R. 290, 1 M. & Gr. 429. And see Foord *v.* Foord, 3 B. P. C. Toml. 124.
(*o*) Ante, Chap. XVII. s. vi.
(*p*) Since explained in Parker *v.* Tootal, sup.
(*q*) 2 Dr. & Sm. 266. It was held that the sister's first-born son took at his birth a vested fee simple subject to a condition subsequent which was void for remoteness.
(*r*) Cf. Andrew *v.* Andrew, 1 Ch. D. 410, where a gift over "in default of a son" (follow-

But in Forsbrook *v.* Forsbrook (*s*), where a testator declared that his real and personal property should be inherited by his nephews T. F. and C. F. during their lives, and after their death by their eldest sons for their lives, and so on, *the eldest son* of the two families of the name of F. to inherit the aforesaid property for-
[*1256] ever, * and that each two of the succeeding inheritors should inherit the property free from incumbrances; it was held by Lord Cairns and Sir J. Rolt, L. JJ., that the words "and so on, &c. forever" indicated a series of inheritances, and were words of limitation giving estates tail, not to the eldest sons of T. F. and C. F. (for they were expressly made tenants for life), but to T. F. and C. F. by way of remainder after those life estates. That estates of inheritance were intended (it was added) was further shown by the direction respecting incumbrances, which would have been unnecessary if the estates were only for life.

Devise to "eldest son" held to give an estate tail, on the context.

In Lewis *v.* Puxley (*t*), a testator devised his real estate in the county of P. to his eldest son John, for life, and to *his eldest legitimate son* after his death; and in default of such issue, he gave it *in like manner* to his son Richard; *and in case Richard had no legitimate issue male, then in like manner* to the offspring about to be born of his (testator's) wife, and in default of such issue, to his own right heirs. And he declared that he made no provision for his son Richard if John lived, because he knew he was otherwise well provided for. It was contended, on the authority of Doe *v.* Charlton, that the devise to John and his eldest son after him, gave John no more than an estate for life, and on the authority of Goodtitle *v.* Woodhull (*u*), that this could not be effected by the subsequent expressions in the devise to Richard: but the Court of Exchequer, while allowing the first branch of the argument, rejected the second, and held that the expression "eldest legitimate son" was explained by the subsequent part of the will to be nomen collectivum, and gave John an estate tail.

"To A. for life, and to his eldest son after his death," held an estate tail in A. by force of subsequent devise in tail "in like manner."

But the case may be reversed, and the words "eldest son," or the like, which might otherwise have conferred an estate tail on the parent, may, by a similar argument, be confined to their literal meaning. By such referential expressions the testator is supposed to show the sense in which he understands the preceding devise (*x*).

ing a gift to the eldest son) was held to mean a general failure of issue. But Bennett *v.* Bennett is distinguished by the additional event of refusal to take the name of M.

(*s*) L. R., 3 Ch. 93. See also Jenkins *v.* Huges, 8 H. L. Ca. 571.

(*t*) 16 M. & Wel. 733.

(*u*) Willes, 592.

(*x*) East *v.* Twyford, 9 Hare, 713, 4 H. L. Ca. 517, overruling the decision of the Court of Exchequer on the same will, 9 Hare, 730, n.

* CHAPTER XXXIX. [*1257]

"ISSUE," WHERE CONSTRUED AS A WORD OF LIMITATION.

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I. — Devise to a Person and his Issue. — "Issue" is nomen collectivum, and a word of very extensive import. The term embraces descendants of every degree whensoever existent, and, unless restricted by the context, cannot be satisfied by being applied to descendants at a given period. The only mode by which a devise to the issue can be made to run through the whole line of objects comprehended in the term is by construing it as a word of limitation synonymous with "heirs of the body," by which means the ancestor takes an estate tail; an estate capable of comprising in its devolution, though not simultaneously, all the objects embraced by the word "issue" in its largest sense.[1]

"Issue" a word of limitation, when.

Opinions certainly have differed as to the signification of the word "issue." It has been denominated by some Judges (*a*) and writers a

(*a*) See per Parke, B., in Slater *v.* Dangerfield, 15 M. & Wels. 272; Roddy *v.* Fitzgerald, 6 H. L. Ca. 823.

[1] The word "issue" in a will *prima facie* means "heirs of the body," and in the absence of explanatory words showing that it was used in a restricted sense, it is to be construed as a word of limitation. But if there be on the face of the will sufficient to show that the word was intended to have a less extensive meaning, and to be applied only to children or to descendants of a particular class or at a particular time, it is to be construed as a word of purchase, and not of limitation. Robins *v.* Quinliven, 79 Penn. St. 333; Kleppner *v.* Laverty, 70 Penn. St. 70; Taylor *v.* Taylor, 63 Penn. St. 481; Powell *v.* Board of Dom. Missions, 49 Penn. St. 46; Angle *v.* Brosius, 43 Penn. St. 187; Guthrie's Appeal, 37 Penn. St. 9; Kay *v.* Scates, id. 31; Shreve *v.* Shreve, 43 Md. 382; King *v.* Savage, 121 Mass. 303; O'Byrne *v.* Feeley, 61 Ga. 77. The words "lawful issue" have as extensive a signification as "heirs of the body," and embrace lineal descendants of every generation. And when used in a devise, by which the immediate devisee takes an unrestricted freehold, it is a word of limitation, and has the same effect as "heirs of the body." Kingsland *v.* Rapelye, 3 Edw. 1.

word of limitation: and a devise to A. and his issue has even been stated by an eminent Judge as "the aptest way of describing [*1258] an estate tail according to the statute" (*b*); by * others, "issue" has been called a word of purchase, or an ambiguous word (*c*). However, it is not from such dicta that the true legal acceptation of the word is to be collected, but from the adjudications *fixing its operation.* Unhappily, some discordancy prevails even here, and an examination of the cases will serve to evince that, in the enunciation of any general proposition on the subject, the utmost caution is requisite. According to the latest decisions, however, "issue" is prima facie a word of limitation, equivalent to "heirs of the body," but more flexible than these and more easily restricted in its meaning by the context (*d*).

With regard to a devise simply to a person and his issue, no doubt can at this day be raised as to its conferring an estate tail; and it may be observed that such a devise is not (like a devise to a person and his children (*e*)) dependent on, or, it seems, in the least degree influenced by the fact of there being or not being issue of the devisee living at the date of the will, or at any other period (*f*). Upon the same principle as that on which, in the cases just referred to, the devisee is held to be tenant in tail where the property can reach the children in no other way, he is here construed to take an estate tail at all events, namely, because there is no other mode by which the testator's bounty can be made to flow to and embrace the whole range of intended objects.

Devise to A. and his issue simply gives estate tail.

So, to a class and their issue.

So a devise to several persons and their issue (*g*), or to a class and their issue (*h*), confers an estate tail.

(*b*) Per Lord Thurlow, in Hockley *v.* Mawbey, 1 Ves. Jr. 149, 1 R. R. 93.

(*c*) See judgment in Ginger d. White *v.* White, Willes, 348; Roe d. Dodson *v.* Grew, 2 Wils. 324; Doe d. Cooper *v.* Collis, 4 T. R. 299, 2 R. R. 388; Earl of Orford *v.* Churchill, 3 V. & B. 67; Lyon *v.* Mitchell, 1 Mad. 473; Tate *v.* Clarke, 1 Beav. 105; Doe d. Gallini *v.* Gallini, 3 Ad. & Ell. 340.

(*d*) Per Wood, V.-C., Kay, 24, 1 K. & J. 362. See also Bradley *v.* Cartwright, L. R., 2 C. P. 511.

(*e*) Ante, p 1235.

(*f*) Hale, C. J., in King *v.* Melling, 2 Vent. 231, says, "though the word 'children' may be *made* nomen collectivum, the word 'issue' *is* nomen collectivum of itself." See *s. c.*, 2 Lev. 58, 3 Keb. 95. This dictum seems to refer only to issue when taking expressly by way of remainder; for, after stating the effect of a devise to B. and the issue of his body (B. having no issue at the time) to be an estate tail, the C. J. adds, "I agree it would be otherwise if there were issue at that time." However (as Lord Hardwicke said, 3 Atk. 396), Wild's case was decided before it was fully settled that "issue" was as proper a word of limitation as "heirs of the body;" and in Martin *v.* Swannell, 2 Beav. 249, the question whether there was issue or not at the time of the devise appeare to have been thought immaterial, since it was not adverted to.

(*g*) Parkin *v.* Knight, 15 Sim. 83: the gift was to several *or* their issue, and "or" was read "and."

(*h*) Beaver *v.* Nowell, 25 Beav. 551; Campbell *v.* Bouskell, 27 Beav. 325. It seems extremely probable that a devise to A. and his *next* or *eldest* issue male would now be held to give an estate tail male, though the contrary was decided in the early case of Lovelace *v.* Lovelace, Cro. El. 40, which cannot be reconciled with later cases, especially Doe *v.* Garrod, 2 B. & Ad. 67, ante, p. 1249. That a devise to A. and his *next* or *eldest* heir confers an estate tail, vide sup. p. 1171. But since Lees *v.* Mosley, 1 Y. & C. 589, stated post establishing the greater inflexibility of limitations to heirs of the body than limitations to issue, this must not be considered conclusive.

* It has even been held that a devise to A. and his issue [*1259] *living at his death* creates an estate tail in A, (*i*). In such a case it is clear the issue cannot take as joint tenants with him, since the objects are not ascertainable until the death of the parent. It is only through him that they can become entitled, and the case falls, therefore, within the principle of the rule in Wild's case, namely, that the parent must take an estate tail in order to let in the other objects. Had the devise been to A. for life *with remainder* to the issue living at his death, the case might have been different (*k*). All the objects might then have taken by purchase (*l*).

To A. and his issue *living at his death*, held an estate tail.

— Effect of Words creating a Tenancy in Common, and other modifying Expressions. — So far the cases present little that can be the subject of controversy; but difficulty frequently arises from the introduction into the devise of expressions inconsistent with the course of devolution or enjoyment under an estate tail, as, that the issue shall take in equal shares, or *as tenants in common*, or that the estate shall go *over in case they die under twenty-one*, which has been regarded as inapplicable to issue indefinitely. If the Courts had uniformly rejected these inconsistent provisions as repugnant, immense litigation and discordancy of decision would have been prevented. This has been shown to be now the established rule in regard to limitations to *heirs of the body* (*m*); and there might seem, upon principle, to be strong ground to contend for the application of the same * doctrine to the cases under considera- [*1260] tion. The word "issue" is not less extensive in its import than heirs of the body: it embraces the whole line of lineal descendants; it is used in the statute De Donis (*n*), in some instances at least, synonymously with heirs of the body, and the cases are very numerous

Effects of words of modification inconsistent with an estate tail.

(*i*) University of Oxford *v.* Clifton, 1 Ed. 473. And see Jenkins *v.* Hughes, 8 H. L. Ca. 571, 585.

(*k*) See Lethieullier *v.* Tracy, 3 Atk. 774, 784, 796, Amb. 204, 220, 1 Ken. 56.

(*l*) Considering the inclination manifested in some of the cases to construe a devise to a person and his children as amounting to a devise to A. for life, with remainder to his children (ante, pp. 1240, 1244), perhaps the reader will not be disposed to place implicit confidence in the adjudication that a devise to A. and his issue living at his decease gives to A. an estate tail. There would seem to be less difficulty in such a case in reading the gift to the issue as a remainder than in that of a devise to A. and his children. Such a remainder, though contingent, would not now be destructible during the life of A. At all events, there can scarcely be a doubt that the words in question applied to *personal* estate, would be construed in the manner suggested, namely, as giving a life interest to A., with a contingent disposition of the ulterior interest to the issue living at his death; and this seems to have been Lord Hardwicke's construction in Lampley *v.* Blower, 3 Atk. 396, where he held that the gift over on death without *leaving* issue explained the word "issue" in the gift "to Francis and Ann each one-half, and to their issue," to mean such issue as was left at the time of the death. He denied that the issue took jointly with the parent, while at the same time he decided that there was no lapse, which there would have been if "issue" had been taken as a word of limitation.

(*m*) Ante, p. 1209.

(*n*) 13 Edw. 1, c. 1.

in which it has been held to create an estate tail. It will be seen, however, that, in some instances, the word "issue" has been diverted from its general legal acceptation by the occurrence of words of distribution, or other expressions which point at a mode of devolution or enjoyment inconsistent with an estate tail, and which has been decided to be insufficient to convert the term "heirs of the body" into children, or to prevent its conferring an estate tail.

Some confusion arises in the cases from the neglect to distinguish between a devise to A. and his issue in one unbroken limitation, and a devise to A. *for life and after his death* to his issue. It is true they both converge to the same point, when "issue" is construed a word of limitation; but if, on the other hand, the issue are held to be purchasers, they must, it is conceived, take differently in the two cases; in the former *jointly with the parent*, in the latter *by way of remainder* after him; though certainly, in some of the cases this distinction has been overlooked, and the Courts have shown a readiness, even where the devise is to a person and his issue, not only to read "issue" as a word of purchase, on account of words of modification inconsistent with an estate tail being found in the devise, but to hold the issue to take by way of remainder expectant on the estate for life of the ancestor.

Thus, in Doe d. Davy *v.* Burnsall (*o*), where a testator devised freehold and leasehold *estates to M. and the issue of her body* lawfully to be begotten *as tenants in common* (if more than one), but in default of such issue, or, living such, if they *should all die under the age of twenty-one years*, and without leaving lawful issue of any of their bodies, then over to A.; M., before the birth of a child, suffered a recovery. It was held by the Court of K. B. that M. took for life, with remainder in fee to her children, if she had any; but if she had none, or they died under twenty-one and without leaving lawful issue, then over; and that this remainder, therefore, being contingent, was barred by the recovery of M. The same devise afterwards came before the Court of Common Pleas (*p*), on a [*1261] case from Chancery; and that * Court certified that M. took only an estate for life (*q*), with contingent remainders over. Eyre, C. J., said, "If it were not for the words 'if they shall all die under the age of twenty-one years,' I should be of opinion that this must be construed to be an estate for life in M., remainder in tail to her issue as purchasers, with cross remainders to every one of that family, and then over; but I am at a loss to know what to do with these words. If I were perfectly satisfied with the rejection of the

To A. and his issue, *as tenants in common*, but in default of such issue, *or in case they should die under twenty-one*, over.

(*o*) 6 T. R. 30, 3 R. R. 113.
(*p*) Burnsall *v.* Davy, 1 B. & P. 215.
(*q*) The certificate does not state who were entitled under the contingent remainders, the case not embracing that point.

word 'amongst' in Doe *v.* Applin (*r*), I would reject them, and consider this as a devise over in case the issue of M. should die without leaving lawful issue of their bodies" (*s*).

So in Doe d. Gilman *v.* Elvey (*t*), where a testator devised his real estate to his wife for life, and after her decease to his son, H. *and to the issue of his body* lawfully begotten or to be begotten, *his, her, or their heirs, equally to be divided if more than one,* and if H. should have no issue of his body lawfully begotten living at his decease, then to A. in fee. H. survived the testator's widow, and before he had any issue, suffered a recovery. The Court considered the case as falling exactly within Doe *v.* Burnsall, the devise being in effect to the issue as tenants in common. It was held, however, that whether H. took for life or in tail, the title under the recovery was good; the remainders in the former case being contingent, and consequently destroyed by it.

To H. and his issue, his, her, or their heirs, *equally to be divided.*

Of these two cases it may be observed that they *decided* nothing more than that A.'s estate was *either* a contingent remainder after an estate for life, *or* a vested remainder after an estate tail, either of which was defeated by the recovery. The opinion of the Court upon the alternative of these propositions can hardly be considered as an *adjudication* on the point here discussed.

Remarks on Doe *v.* Burnsall and Doe *v.* Elvey.

As there was no issue of the devisee at the time of the devise taking effect, the testator's bounty could only be made to reach the issue (assuming that word to be intended for a word of purchase), * under the joint devise to them and their parent, by [*1262] giving him an estate tail, unless the gift to the issue were construed as a remainder, which the Court undoubtedly seemed inclined to do; but it is difficult to reconcile such a construction with the principle of the cases establishing that even a devise *to* A. *and his children* must, under such circumstances, be construed an estate tail in order to let in the children (*u*). If the children could be treated as taking by way of remainder, there is no necessity for having recourse to such a rule. If in such cases the Court is authorized to turn the devise to the issue into a remainder, the cases treated of in the present section cease to exist as a distinct class, and become blended with those which form the subject of the next section. The authorities, however, do not warrant any such conclusion, as the two

(*r*) 4 T. R. 82, 2 R. R. 337, post.

(*s*) It is evident that the word "issue" in this passage of the judgment is used in two senses, differing in comprehensiveness; for if used as nomen generalissimum in regard to the issue of M., it is clear that such issue could never fail without involving the failure of the issue of such issue. To render the sentence intelligible, we must suppose the learned Judge to mean, in the first instance, either issue of a given class or issue existent within a given period, *i. e.*, either children or all issue born in the lifetime of the tenant for life, probably the latter.

(*t*) 4 East, 313.

(*u*) Wild's case, 6 Co. 17; Davie *v.* Stevens, Doug. 321; Seale *v.* Barter, 2 B. & P. 486, ante, p. 1236.

preceding cases are, for the reason already stated, scarcely to be regarded as adjudications on the point, and are unsupported by any subsequent cases. Indeed, in the only case that has since occurred, in which the devise to the issue was concurrent with that to the ancestor, and not by way of remainder, the devisee was held to take an estate tail, although words of limitation in fee were superadded. The case here referred to is Franklin *v.* Lay (*y*), where a testator devised to his grandson J., and to the issue of his body lawfully to be begotten, *and to the heirs of such issue forever*, chargeable with a mortgage; but, if his said grandson J. should die without leaving any issue of his body lawfully begotten, then over; Sir J. Leach, V.-C., held it to be an estate tail in J.; observing that the words "dying without leaving issue" might of course be restrained by other expressions in the will to issue living at the death; as the general words "in default of issue" might also be, *but not by words of limitation superadded to the issue.*

To A and to his issue, and to the *heirs* of such issue.

Although there seems to be considerable difficulty in reading a devise to A. and his issue, as a devise to A. for life with remainder to his issue, even when accompanied with expressions pointing at a mode of enjoyment inconsistent with an estate tail; yet it is not denied that a slight indication of intention in the context would be sufficient to induce such a construction, and the devise would then be brought within the scope of the authorities discussed under the next division.

[*1263] ***III. — Devise to A. for life with Remainder to his Issue.**—We come now to the consideration of those cases in which a devise to A. *for life*, and after his death to his issue, becomes, by the operation of the rule in Shelley's case (*z*), an estate tail.

One of the earliest cases of this kind is King *v.* Melling (*a*), where a testator devised lands to A. *for life*, and after his decease he gave the same *to the issue of his body* lawfully begotten on a second wife; and for want of such issue to B. and his heirs forever, provided that A. might make a jointure of the premises to such second wife, which she might enjoy for her life. Twisden and Rainsford, JJ., held it to be an estate for life in A., in opposition to Hale, C. J., who delivered an elaborate and argumentative opinion in favor of an estate tail, which construction was afterwards adopted by all the Judges in the Exchequer Chamber, reversing the judgment of the King's Bench.

To A. for life, *remainder* to the issue of his body, held an estate tail.

So, in Shaw *v.* Weigh (*b*), where the testator devised lands to his

(*y*) 6 Mad. 258, 2 Bli. 59, n.
(*z*) Ante, p. 1177.
(*a*) 1 Vent. 225, 232, 2 Lev. 58, 61. See also Taylor *v.* Sayer, Cro. El. 742; Jordan *v.* Lowe, 6 Beav. 350.
(*b*) 2 Stra. 798, 1 Barn. B. R., 54, 1 Eq. Ca. Ab. 184, pl. 28, 3 B. P. C. Toml. 120. Vide ante, p. 1231, n.

wife for life, and after her decease in trust for his sisters A. and D., equally betwixt them *during their natural lives*, without committing any manner of waste, and if either of his sisters happened to die *leaving issue or issues of her or their bodies* lawfully begotten, then in trust *for such issue or issues* of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it should happen that both his said sisters died without issue as aforesaid, *and their issue or issues to die without issue lawfully to be begotten* (*c*), then over. The chief question was whether this was an estate for life, or an estate tail in the sisters. It was adjudged in the House of Lords (affirming a judgment of the Court of Great Sessions for Flintshire, which had been reversed in the King's Bench) that the devise created an estate tail (*d*).

To A. and D. for their lives; if either die leaving issue, then to such issue; held an estate tail.

In Ginger *v.* White (*e*) Willes, C. J., questioned this decision; but subsequent cases have placed its authority beyond all doubt (*f*).

In Haddelsey *v.* Adams (*g*), the devise was to the testator's * four granddaughters as tenants in common for life, [*1264] with benefit of survivorship, the remainder to trustees and their heirs upon trust to support the contingent remainders thereinafter limited, remainder to the issue male of the granddaughters successively lawfully to be begotten, and in default of such issue to the testator's right heirs forever. Sir J. Romilly, M. R., held that the granddaughters took estates tail.

IV. — Effect of superadded Words of Limitation. — 1. *Limitations to Heirs of same Species as the Issue.* — It is clear, too, that "issue" is not converted into a word of purchase by the addition of words of limitation, descriptive of heirs of the same species as the issue described (*h*). Thus, in Roe d. Dodson *v.* Grew (*i*), where a testator devised unto his nephew G. for his natural life, and after his decease to the use of the *male issue of his body* lawfully to be begotten and the *heirs male of the body of such issue male*, and for want of such male issue, then over; the Court of Common Pleas held that G. took an estate tail. Wilmot, C. J., said that the intention certainly was to give G. an estate for life only; but the intention also was that as long as he had any issue male the estate should not go over (*k*); and if we balance the two intentions, the weightier is that

To the *heirs male* of the body of such issue male.

(*c*) As these words would raise an implied gift in the issue of the issue, the case may be classed with those in which words of limitation in tail are superadded to the devise of the issue. See also Franks *v.* Price, 3 Beav. 182, post.

(*d*) This seems to have been one of those cases where lay Lords voted on a question to law and decided it against the opinions of a majority of the Judges, only three of whom held it an estate tail, and *nine* an estate for life.

(*e*) Willes, 359, post.

(*f*) See cases passim in the sequel of this chapter.

(*g*) 22 Beav. 266.

(*h*) See same rule as to heirs of the body, ante, p. 1205.

(*i*) 2 Wils. 322; better reported Wilm. 272. See also Shaw *v.* Weigh, in the text.

(*k*) Or rather that the issue should take it.

all the sons of G. should take in succession. Clive, J., said too great a regard had been paid to the superadded words "heirs male of the body of such heirs male." Bathurst, J., laid it down as a rule, that where the ancestor takes an estate of freehold, if the word "issue" in a will comes after, it is a word of limitation. Gould, J., observed that the word is used in the statute De Donis promiscuously with the word "heirs;" *that the term "issue" comprehends the whole generation as well as the word "heirs"* (of the body), and, in his judgment, the word "issue" was more properly a word of limitation than a word of purchase.

This case (which has always been regarded as a leading authority) seems to have overruled Backhouse *v.* Wells (*l*), where the devise being to J. *for his life only*, without impeachment of waste, [*1265] * and after his decease then *to the issue male of his body* lawfully to be begotten, if God should bless them with any, *and to the heirs male of the body of such issue* lawfully begotten; and for default of such issue, over; it was adjudged that J. took an estate *for life*, and that the limitation to the issue was a description of the person who was to take the estate tail.

To the *heirs male of the body* of the issue male.

It would be idle to attempt to distinguish Backhouse *v.* Wells from Roe *v.* Grew, on the ground of the words "only," and "without impeachment of waste," and "if God shall bless him with any." The two first expressions merely show that the testator intended to confer an estate for life, and nothing more, which sufficiently appeared by the express limitation for life, and the last words are obviously implied in every gift of this nature.

Observations upon Roe *v.* Grew and Backhouse *v.* Wells.

The authority of Roe *v.* Grew has been confirmed by Hodgson *v.* Merest, where the devise was to A. for the term of his natural life, and, after his decease, then to the issue of his body, and to the heirs of the body of such issue, with remainders over: and it was held that A. took an estate tail (*m*).

IV. — 2. *Limitation to Heirs general of the Issue.* — It is also established, that the addition of a limitation to the heirs *general* of the issue will not prevent the word "issue" from operating to give an estate tail as a word of limitation (*n*).[1] This position, indeed, may appear to be encountered by

Superadded limitation to the heirs *general* of the issue.

(*l*) 1 Eq. Ca. Ab. 184, pl. 27, Fort. 133. It has been suggested by Sir E. Sugden, 3 Jo. & Lat. 57, that the Court may have considered the word "issue" as used in the singular number, on the ground that according to 10 Mod. 181, the remainder was "to the heirs males of *that* issue." As to "issue" in the singular, see below, p. 1265.

(*m*) 9 Price, 556. So stated in marginal note only. See also Irwin *v.* Cuff, Hayes, 30; with which compare Hockley *v.* Mawbey, 1 Ves. Jr. 143, 1 R. R. 93.

(*n*) See same rule as to heirs of the body, ante, p. 1205.

1 See however Shreve *v.* Shreve, 43 Md. 382; Simpers *v.* Simpers, 15 Md. 160; Chelton *v.* Henderson, 9 Gill, 432; Way *v.* Gest, 14 Serg. & R. 40.

A. for life, remainder to issue male and *his* heirs, and if *he* die, over.

the well-known case of Loddington *v.* Kime (*o*), where under a devise to A. *for life* without impeachment of waste, and in case he should have any issue male, then *to such issue male and his heirs forever*, and if *he* die without issue male, then to B. and his heirs, it was held that A. took an estate *for life only*, with a contingent fee to his issue male.

It will require some very fine-spun distinctions to reconcile this case with subsequent decisions. In King *v.* Burchell (*p*) the testator devised his houses at Maidstone to J. *for his life*, and *after the determination of that estate unto *the issue male* [*1266] *of the body of* J. lawfully to be begotten *and to their heirs*, and, for want of such issue, over; and if J. or his issue should alien the premises they were charged with 2,000*l.*; Lord Keeper Henley held that J. was tenant in tail, and that the proviso was repugnant and void: he distinguished Loddington *v.* Kime because there the remainder was expressly contingent; and because the word "his" was used instead of the word "their" in the limitation to the heirs of the issue, whereby it appeared that one particular person was pointed at, and that all the issue were not intended to take. This force of the word "his" is noticed by Lord Raymond in Goodwright *v.* Pullyn (*q*), where, however, he referred the word to the ancestor. If Loddington *v.* Kime is referable to these special grounds, it is not opposed to the position above laid down. As to the other distinction taken by the Lord Keeper, it may be asked, is not every remainder to a class contingent in this sense, namely, as respects the event of there being objects to claim under it. Upon this principle, Sir W. Grant, in Elton *v.* Eason (*r*), held that the words "if any," annexed to a limitation to the heirs of the body, did not vary the construction. It is futile, therefore, to attempt to preserve Loddington *v.* Kime by any such distinction.

To A. for life, remainder to his issue male and *their heirs*, held estate tail in A.

Loddington *v.* Kime distinguished by Henley, L. K.

Remark on Loddington *v.* Kime.

Another decision which may seem to militate against the rule before laid down is Doe d. Cooper *v.* Collis (*s*), where a testator devised to his daughter E., and to S. the wife of W., to be equally divided between them, not as joint-tenants but as tenants in common, viz. the one moiety to E. and her heirs forever, and the other moiety to S. for the term of *her natural life*, and after her decease *to the issue of her body*

To S. for life, remainder to her issue and *their heirs*, held estate for life in S.

(*o*) 1 Salk. 224, Ld. Raym. 203, 3 B P. C. Toml. 64 nom. Barnardiston *v.* Carter.

(*p*) 1 Ed. 424, Amb. 379. The devise here referred to is the second one in the will, namely, of the Maidstone estate. The case, so far as it relates to the first devise, properly belongs to the next division of this section. No distinction was taken between the two, though, as we shall hereafter see, they would now be considered to have different effects.

(*q*) 2 Stra. 731, stated ante, p. 1206. And see per Sir E. Sugden, 3 Jo. & Lat. 57, cited above, n. (*l*).

(*r*) 19 Ves. 73. See also Marshall *v.* Grime, 28 Beav. 375.

(*s*) 4 T. R. 294, 2 R. R. 388.

lawfully begotten *and their heirs* forever. There was no devise over. The question was whether S. took an *estate tail* or an estate for *her life*, with remainder in fee to her children (*t*), and the Court decided in favor of the latter construction, Lord Kenyon observing that "issue" was either a word of purchase or of limitation, as would answer best the intent of the devisor; and he remarked that the property was *to be equally divided*, which it would not be if [*1267] *S. were held to take an estate tail; for, in that case, the reversion in fee of that moiety would be again subdivided between the heirs of the two daughters.

It is difficult to accede to the reasoning which ascribed to the words of division this influence on the construction, since they were merely applied to the corpus of the land, not to the inheritance. At all events, it is enough for our present purpose to show that the case was decided upon special grounds, and not in opposition to the doctrine that a limitation to the heirs of the issue superadded to the devise to the "issue" is inoperative to vary the construction. As such, indeed, it would have been clearly overruled by subsequent cases.

Remark on Doe *v.* Collis.

Thus, in Denn d. Webb *v.* Puckey (*u*) the testator devised to his grandson N. *for life* without impeachment of waste, and after his decease *to the issue male of his body* lawfully begotten and *to the heirs and assigns of such issue male forever;* and in default of *such* issue male, then over. N. suffered a recovery, and the question raised was whether, under the devise, he was tenant in tail or tenant for life only. The Court held that the general intention of the testator was that the male descendants of his grandson N. should take the estate, and that none of those to whom the subsequent limitations were given should take until all such male descendants were extinct, and to effectuate this it was necessary to give him an estate tail; for if his issue took by purchase, Lord Kenyon thought it would be difficult to extend it to more than one (*x*), and that even if the words comprehended all the male issue as tenants in common in tail, yet that would not have answered the devisor's intention, because there were

To A. for life, remainder to his issue and to the *heirs and assigns* of such issue, held an estate tail in A.

(*t*) This case is not an authority that "issue" in such a limitation is to be read "children," for it does not appear that there were any other issue who could have taken; it is most probable there were not, as the eldest child was only sixteen when S. levied a fine *sur conuzance*, &c.

(*u*) 5 T. R. 299, 2 R. R. 601.

(*x*) He is made to say, "It has been contended that N. took only an estate for life; if so, what estate was given by the words 'to the issue male of his body lawfully begotten, and the heirs and assigns of such issue male?' Was it to extend to more than one son? It would be difficult to extend it to more than one, and I conceive that the eldest must have taken the *absolute interest in the estate*. But that would have defeated the devisor's intention, because if it had *descended* (Qu. devolved?) to that one son, and he had died without making any disposition of it, it would have gone over to the other sons of the devisor," *i. e.*, by descent, for if it were a devise in fee to the son, of course no remainder could be limited on that estate.

no words to create cross remainders between them (*y*). But it was held, even if the issue would have taken by purchase, yet that, being a contingent remainder, it was destroyed by the recovery which was suffered before the birth of * issue, so that the [*1268] defendant, who claimed under the recovery, was entitled quâcunque viâ datâ (*z*).

So, in Frank *v.* Stovin (*a*), where a testator devised to B. *for life* without impeachment of waste, with power to make a jointure to any future wife, and after his decease then *to the use of the issue male of the body of B.* lawfully begotten and to be begotten *and their heirs;* and in default of such issue, then over. B. had issue, and afterwards suffered a recovery. Lord Ellenborough was of opinion that the case was governed by Roe *v.* Grew, and accordingly that B. took an estate tail.

To B. for life, remainder to his issue male *and their heirs,* held an estate tail.

And if the addition of formal words of inheritance will not prevent the word "issue" from operating as a word of limitation, still less (*b*) will informal words do so though sufficient to carry the inheritance, such as "all my interest" (*c*) or "forever" (*d*).

It should be observed that in Frank *v.* Stovin (*e*), Le Blanc, J., made a distinction between that case and Denn *v.* Puckey (*f*) and the case of Doe *v.* Collis (*g*), by reason of the limitation over "in default of such issue," which occurred in the former of those cases. This distinction has been the subject of much discussion. On the one hand reference is made to the cases discussed in the next chapter establishing that this expression, following a devise to any class of issue, refers to those objects, and it is argued that if in the case of a devise to sons or children, and in default of such issue over, the clause introducing the devise over is inoperative to vary the construction of the prior devise, how can it have more power where following an express devise to issue explained by the context to mean sons or children? The two cases it is said are identical in principle: and to say that the words "in default of such issue" refer to the objects of the prior devise, whoever they may be, and that those objects mean issue indefinitely by the effect of the words in question, seems very much like reasoning in a circle (*h*). The answer is, that * when it is a question [*1269]

Effect of limitation over "in default of such issue."

(*y*) They would clearly have been implied, but there seem to have been insuperable obstacles to the suggested construction.
(*z*) Since 8 & 9 Vict. c. 106, s. 8, no act of the tenant for life before issue born can now destroy subsequent contingent remainders. See Ch. XXVI.
(*a*) 3 East, 548. See also Sturge *v.* Sturge, 12 Beav. 230.
(*b*) See Fuller *v.* Chamier, L. R., 2 Eq. 682, ante, p. 1173, n.
(*c*) Mannin *v.* Moore, Alc. & Nap. 96.
(*d*) Griffiths *v.* Evan, 5 Beav. 241.
(*e*) 3 East, 551.
(*f*) Ante, p. 1267.
(*g*) Id.
(*h*) The argument is Mr. Jarman's, who concluded that, if in Doe *v.* Collis "issue" was

whether the general term "issue" is or is not explained by the context to mean children, the *whole* context must be taken into account, and that it is no more permissible to exclude the words "in default of such issue" from consideration than any other part of the context. Nearly every Judge who has had to construe a devise to issue, and has found such a clause in the will, has expressly relied on it as one ground for giving the ancestor an estate tail; and in Woodhouse *v.* Herrick (*i*) Sir W. P. Wood distinctly asserted its importance as a material part of the context. Of course its absence is not conclusive in favor of construing "issue" as a word of purchase, and falls far short of reconciling Doe *v.* Collis with other authorities, which have established that a devise to A. for life, remainder to his issue and the heirs of such issue with or without a limitation over, confers an estate tail on A. (*k*). Lord St. Leonards is sometimes cited as if he had laid down a contrary rule: but what he says is "a devise to A. for life, with remainder to his issue, with superadded words of limitation *in a manner inconsistent with a descent from A.* will give the word 'issue' the operation of a word of purchase" (*l*). In Morgan *v.* Thomas (*m*), land was devised to L. "for life and after his decease to his lawful issue and their heirs forever if any," and "if he should die without having any *children* born in wedlock" then to E. and his heirs. The Court of Appeal, affirming the decision of Cave, J. (*n*), held that L. took an estate for life only, not an estate tail.

IV. — 3. *Limitations changing the Course of Descent.* — But, as already shown (*o*), if the superadded words of limitation narrow the course of descent, they convert even "heirs of the body" into words of purchase, since "it is absolutely impossible by any implied qualification to reconcile the superadded words to those preceding
[*1270] * them, so as to satisfy both by construing the first as words of limitation" (*p*). This principle appears to be equally

properly construed to mean children, the words "in default of *such* issue" in Denn *v.* Puckey and Frank *v.* Stovin ought, according to the class of cases just mentioned, to have been read in default of such *children:* but that as they were not so construed it followed that Doe *v.* Collis, as far as it rested on this distinction, was overruled. The whole argument was obviously directed against Lord Kenyon's method of dealing with these cases, viz. first inferring from the superadded words of limitation or distribution, without taking into account the gift over in default of issue, that "issue" was used for "children" (which he called the particular intent), and then sacrificing that in order to give effect to the "general intent," which he inferred from the gift over in default of issue: see further Ch. XL., s. iii., subs. 4.

(*i*) 1 K. & J. 352.

(*k*) See acc. per Lord Cranworth, Parker *v.* Clarke, 6 D. M. & G. 109; Hayes, Inq. 302. Cf. Phillips *v.* James, 2 Dr. & Sm. 404, 3 D. J. & S. 72 (executory articles for settlement).

(*l*) Montgomery *v.* Montgomery, 3 Jo. & Lat. 57. In Bowen *v.* Lewis, 9 App. Ca. 902. Lord Selborne pointed out that the presence or absence of words of distribution are material in assisting the construction.

(*m*) 9 Q. B. D. 643.

(*n*) 8 Q. B. D. 575.

(*o*) Ante, p. 1208.

(*p*) Fea. Cr. 183.

applicable where the prior word is "issue." In Hamilton *v.* West (*q*), where there was a devise to A. for life, with remainder to her first and other sons in tail male, with remainder "to the issue female of the said A. and the '*heirs of their bodies,*' with remainder over: it was held by Smith, M. R., Ir., that A. did not take an estate in tail female expectant on the estates tail of her first and other sons, but that the daughters of A. took estates in tail general by purchase, the limitation to the heirs general of the bodies of the issue being inconsistent with an estate in tail female in the ancestor.

Superadded words of limitation which change the course of descent.

To A. for life, with remainder to her issue female and the heirs of their bodies.

Here, it will be observed, the superadded words of limitation (heirs of the body) were more extensive than those upon which they were engrafted (issue *female*), and might have been satisfied in a qualified sense without attributing to them the effect of changing the course of descent; just as in the case of a devise to A. for life, remainder to his issue or to the heirs of his body *and their heirs general,* in which case "issue" is a word of limitation notwithstanding the superadded words, the reason given being that "the superadded words are not contrary to or incompatible with the preceding, but in their general sense include them; and there is no improbability in the supposition that they were used in the same qualified sense as the preceding; and then both may be satisfied by taking the first as words of limitation (*r*)." However, this construction does not appear to have been applied in any decided case where the superadded words indicate a special course of descent, less general than one in fee simple; and it is not improbable that the doctrine of Hamilton *v.* West will be supported as well where the preceding words are "male" or "female heirs of the body" as where the more flexible term "issue" is used.

V. — Effect of Words of Distribution and Modification. — It might seem upon principle to follow that words of distribution annexed to the devise to the issue, or any other expressions prescribing a mode of enjoyment inconsistent with the course of descent under an estate tail, would be no less inoperative than superadded words of limitation to turn "*issue*" into a word * of designation; and such is the doctrine [*1271] which apparently prevails with regard to cases where words of distribution alone are superadded in devises to issue contained in wills made before 1838, and where, accordingly, the issue would not take the inheritance in the absence of expressions indicating a contrary intention (*s*).

Words of modification inconsistent with an estate tail.

With regard to this class of cases, though the decisions are not

(*q*) 10 Ir. Eq. Rep. 75. (*r*) Fearne, C. R., 184, ante, p. 1209.
(*s*) See as to this, ante, pp. 1131, et seq.

altogether in unison, yet, having regard to the fact that the later cases clearly overrule some of those of earlier date, we may venture to lay down the following propositions as now recognized (*t*) : —

First. Where words of distribution, but without words to carry an estate in fee, are annexed to the devise to the issue, and there is a gift over in default of issue of the ancestor generally (*u*), or in default of "such" issue (*x*), or in default of issue living at the death of the ancestor (*y*), the ancestor takes an estate tail. As to the validity of this position, the cases seem to admit of no reasonable doubt, and it appears to be immaterial that between the gift to the ancestor and that to the issue, there is a limitation to trustees to preserve contingent remainders (*z*).

Secondly. Where the gift is as in the first proposition, but there is *no* gift over in default of issue, still, since the issue taking by purchase could only take for their lives, the ancestor is held to take an estate tail, which, if not barred, will descend to his issue, this being the only mode of carrying the inheritance to the issue (*a*).

These propositions, as will be seen hereafter, are materially affected by the Statute 1 Vict. c. 26.

But even under the old law before 1838, the doctrine above referred to was held to be inapplicable to cases where a devise to issue was accompanied by words of distribution, together with words of limitation which would carry an estate in fee, or expressions [*1272] * sufficient to justify the Courts in holding that the fee was intended to pass by the devise (*b*).

With regard to the effect of express words of limitation superadded to words of distribution in a gift to issue, the rule is thus stated by Parke, J., in Slater *v.* Dangerfield (*c*), "Where there is a devise to one with remainder to his issue as tenants in common with a limitation to the heirs general of the issue, the issue take as purchasers in fee."

The leading case on this point is Lees *v.* Mosley (*d*), where a testator devised certain lands unto his two sons, Henry James and Oswald, in moieties as tenants in common, in such manner and subject to such charges as thereinafter mentioned,

Lees *v.* Mosley.

(*t*) For a fuller consideration of the authorities on which the two propositions here stated are founded, see the 4th Edition of this Work, Vol. II., pp. 424, et seq.

(*u*) Doe d. Blandford *v.* Applin, 4 T. R. 82, 2 R. R. 337; Doe d. Cook *v.* Cooper, 1 East, 229; Ward *v.* Bevil, 1 Y. & J. 512; Croly *v.* Croly, Batty, 1; Heather *v.* Winder, 5 L. J. N. S. Ch. 41; Kavanagh *v.* Morland, Kay, 16; Roddy *v.* Fitzgerald, 6 H. L. Ca. 823 (where the cases on this subject are cited and discussed).

(*x*) Woodhouse *v.* Herrick, 1 K. & J. 352.

(*y*) Doe *v.* Rucastle, 8 C. B. 876.

(*z*) Woodhouse *v.* Herrick, sup.

(*a*) Per Sugden, C., Crozier *v.* Crozier, 3 D. & War. 373, per Wood, V.-C., Kavanagh *v.* Morland, Kay, 16: Jackson *v.* Calvert, 1 J. & H. 235.

(*b*) *E. g.*, by such words as "estate" "part" "share" &c., occurring in the description of the subject of gift, or words imposing a pecuniary charge upon the issue. See ante, pp. 1131, et seq., and post, p. 1276.

(*c*) 15 M. & W. 273, post, p. 1275.

(*d*) 1 Y. & C. 589.

that is to say, as to one moiety thereof, to his son Henry James for life, *with remainder to his lawful issue and their respective heirs, in such shares and proportions and subject to such charges as he* (*H. J.*) *should by deed or will appoint; but in case his son Henry James should not marry and have issue who should attain the age of twenty-one years,* then he devised the said moiety to his son Oswald and his heirs forever. And as to the other moiety of the property, the testator devised the same to his son Oswald and his heirs absolutely forever. At the date of the will, and at the death of the testator, Henry James was a bachelor. He suffered a recovery of his moiety, and the question (raised in an action between vendor and purchaser) was as to the validity of the title derived under such recovery. The case was elaborately argued, the plaintiff contending that, according to the true construction of the will, there was a gift to the parent for life, with remainder to the children in fee; and the defendants insisting that Henry James took an estate tail. The Court decided that he was tenant for life only. Alderson, B. (who delivered the judgment of the Court) drew a distinction between a devise to "heirs of the body," which he considered were technical words admitting but of one meaning, and a devise to "issue," which he characterized as a word in ordinary use not of a technical nature, and capable of more meanings than one; observing that it was used in the statute De Donis both as synonymous with children and as descriptive of descendants of every degree, and though the latter might be its primâ facie meaning, yet the authorities showed that it would * yield to the intention of the testator to be collected from the will, *and that it requires a less demonstrative context to show such intention than the technical expression "heirs of the body" would do.* He then proceeded as follows: "The Court in the present case have to look to the terms in this will in order to ascertain whether, by construing the word 'issue' here as a word of purchase or of limitation, they best effecutate the intention of the devisor. The testator begins by devising an express estate for life to his son Henry James. He then devises in remainder to his lawful issue. If it stopped there, it would be an estate tail. For the word 'issue' might include all descendants; and here all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in Shelley's case would apply, and would convert the estate for life previously given into an estate tail. But the testator then adds, 'and their respective heirs in such shares and proportions and subject to such charges as he the said Henry James should by will or deed appoint.' Now, according to Hockley *v.* Mawbey (*e*),

To H. for life, with power of distribution in fee in favor of issue, and limitation over, in case of being no issue who should attain twenty-one, held estate for life in H.

Judgment of Alderson, B., in Lees *v.* Mosley.

[*1273]

(*e*) 1 Ves. 143, 3 B. C. C. 82 (where the will is stated at length). In that case the devise was to A. for life, and after her decease to B. and his issue, to be divided among them as he

the effect of this clause would be to give the objects of the power an interest in an equal distributive share, in case the power were not executed. The clause, therefore, is equivalent to a declaration by the testator, that the issue and their respective heirs should take equal shares, but that Henry James should have a power of distributing amongst them the estate in unequal shares if he thought fit. Now, if 'issue' be taken as a word of limitation, the word 'heirs' would be first restrained to 'heirs of the body,' and then altogether rejected as unnecessary. The word 'respective' could have no particular meaning annexed to it; and the apparent intention of the testator to give to Henry James for life, and afterwards to distribute his property in shares among the issue, would be frustrated. On the other hand, if 'issue' be taken as a word of purchase, designating either the immediate issue or those living at the death of Henry James, the apparent intention will be effectuated, and all these words [*1274] will have their peculiar and * ordinary acceptation. If, then, the will stopped here, it would seem clear that the Court ought to read 'issue' as a word of purchase. Then comes the devise over. 'But in case my son Henry James shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son Oswald in fee.' Now, the effect of such a clause, if superadded to a remainder to children, would be to show an intention to give a fee to the children on their attaining twenty-one. And if by the former part of the will the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert the estate previously given into an estate tail. In fact, the case of Doe *v.* Burnsall (*f*) is a distinct authority on this part of the case. Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail, and we think that we best effectuate that intention by construing the words 'lawful issue' in this will, accompanied by their context, as words of purchase; and, in so doing, we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words, with such a context as in this will, have been held to be words of limitation."

Lees *v.* Mosley may be considered as deciding that under a devise to A. for life, with remainder to his issue and their respective heirs, in such shares as he shall appoint, with a limitation over in case of his dying without issue who should attain

Remark on Lees *v.* Mosley.

should think fit, and in case he should die without issue, over. Lord Thurlow held that B. took an estate for life only. Assuming that the words were sufficient to carry the fee to the issue as purchasers, the decision agrees with later cases. The gift to the issue was not expressly by way of remainder, but could not, it is conceived, be read otherwise. The case is generally treated as one in which the issue taking by purchase might have taken the fee by implication in default of appointment, see Kavanagh *v.* Morland, Kay, 25; Prior on Issue, p. 117; but except as to the property described as the testator's "reversion" this point does not seem free from doubt. See Sugd. Pow. 400, 594, 8th ed.; and ante, Ch. XVII., s. vi.

(*f*) 6 T. R. 30, 3 R. R. 113, ante, p. 1260.

majority, the issue take estates in fee as tenants in common, and A. is not tenant in tail. It may be also collected from the judgment, that the Court (or at least the Judge who delivered it) would have arrived at the same conclusion if the devise to the issue had been simply to them as tenants in common in fee, without any devise over; in other words, that if a testator devises lands to A. for life, with remainder to his issue and their heirs in equal shares, or as tenants in common, the effect is to give to A. an estate for life, with remainder to the issue in fee. If, however, the devise was so framed as that the issue, if they took as purchasers, would have an estate for life only (a circumstance which is less likely to occur under a will made or republished since 1837 than any other), it is conceded that the leaning to the construction which makes "issue" a word of purchase would be less strong, and the fate of the devise was, thus far, left uncertain.

[*1275] * So, in Greenwood *v.* Rothwell (*g*) the devise was to Jonas Greenwood for life, and after his decease unto *all and every the issue* of the body of the said Jonas, *share and share alike, as tenants in common*, and the heirs of such issue. On a case sent for the opinion of the Court of Common Pleas the Judges certified that Jonas Greenwood took only an estate for life; and Lord Langdale, relying on the direction that the issue should take share and share alike, and on the words of limitation superadded, and adverting also to the absence of a gift in default of issue, affirmed their decision (*h*).

To A. for life, with remainder to his issue as tenants in common in fee. Held issue take by purchase.

Again, in Slater *v.* Dangerfield (*i*), where the devise was to G. D. for life, and from and immediately after his decease unto and to the use *of all and every the lawful issue* of the said G. D., *their heirs and*

(*g*) 5 M. & Gr. 628, 6 Scott, N. R. 670.

(*h*) 6 Beav. 492.

(*i*) 15 M. & Wels. 263. See also Golder *v.* Cropp, 5 Jur. N. S. 562; Crozier *v.* Crozier, 3 D & War. 373. 2 Con. & L. 309; Montgomery *v.* Montgomery, 3 Jo. & Lat. 47; Morgan *v.* Thomas, 8 Q. B. D. 575. These cases must be considered to have overruled Mogg *v.* Mogg, 1 Mer. 654, if at least that case proceeded on the ground that "issue" was to be read as a word of limitation notwithstanding the addition of words of distribution as well as of words of limitation. The testator devised the residue of his messuages, &c., equally among the child or children begotten and to be begotten of S. *during his, her, and their life and lives*, and after the decease of such child and children he gave the same *unto the lawful issue* of such child and children of S., to hold unto such issue, *his, her, and their heirs* as tenants in common without survivorship, and in default of issue over; the Court of K. B. on a case from Chancery certified that the children of S. took *estates tail*. But it is impossible to ascertain the precise ground on which the case was decided. The limitation to the issue, as purchasers, of children born and to be born would have transgressed the rule against perpetuities; and possibly this circumstance may have induced the Court to apply the doctrine of cy-près, but to which there seems to be this objection, that it would extend the doctrine (which all agree has already been carried quite far enough) to cases in which an estate in fee simple is given to the issue, in opposition to the rule considered to have been established by the authorities (Vol. I., p. 270); besides which if the Court saw a very decided reason for holding "issue" to be a word of purchase, why was not the devise restricted to the children (and the issue of children) who were born in the lifetime of the testator, as was done (though perhaps unwarrantably) in certain other devises in the same will, under which the ancestor took an equitable interest only and the issue a legal remainder (ante. p. 948), which two limitations being of different quality could not unite by force of the rule in Shelley's case? In the following cases, the devisees were held, having regard to the context of the wills, to take estates tail, viz., Doe d. Cannon *v.* Rucastle, 8 C. B. 876; Kavanagh *v.* Morland, Kay, 16; Woodhouse *v.* Herrick, 1 K. & J. 352; Roddy *v.* Fitzgerald, 6 H. L. Ca. 823.

assigns forever, as tenants in common and not as joint-tenants, when and as he, she, or they should attain his, her, or their age or ages of twenty-one years. There was no devise over in default of issue, but the will contained a general residuary devise which would have comprised the interest (if any) undisposed of under the first gift. The Court of Exchequer held that G. D. took an estate for life only, and relied upon Greenwood *v.* Rothwell, as being exactly in point, [*1276] and on Lees *v.* Mosley as * going even further, inasmuch as in that case there was what was not found in the case before the Court, namely, a devise over; for the residuary devise was not equivalent.

And it has been held that the rule under consideration applies where in a devise to issue words of distribution are followed by words of limitation appropriate for carrying an estate tail. In Parker *v.* Clarke (*k*), where lands were directed to be conveyed upon trust for the children of the testator's niece during their lives, and for the survivors or survivor of them during their, his, or her lives or life, and after the decease of the last survivor of the said children, then in trust for all and every the lawful issue male and female of such of the children of his niece then or thereafter to be born as should be living at the testator's decease, in equal shares and proportions as tenants in common and not as joint-tenants, and the heirs of the body and respective bodies of all and every the issue of the said children; and on the death and failure of heirs of the body of any one or more of the issue of the said children, as well the original share or shares of him, her, or them so dying, and of whom there should be such a failure of heirs of the body as aforesaid, as also such share or shares as should accrue to him, her, or them, or his, her, or their issue, should be in trust for the survivors and survivor and others or other of them, if more than one in equal shares as tenants in common and not as joint-tenants, and for the heirs of the body or respective bodies of such surviving issue, and for default of issue to inherit under the preceding limitations, then upon certain other trusts. It was held by Lord Cranworth, C., affirming the decision of Sir J. Stuart, V.-C., that the children of the nieces took estates for life only.

To children and the survivors and survivor for life, and then to their lawful issue, and the heirs of the body of such issue, with cross remainders between the issue. Held that the children took for life.

So far the rule in question seems to have been firmly established. And it has in numerous instances been extended, so as to apply to cases where the context of the will contained expressions from which the Courts were, under the old law, at liberty to infer that the fee was intended to pass to the issue (*l*). Thus if a testator devised his "estate" or a "part" or "share" of his lands to one for life, and upon

Doctrine extended when under the old law of limitation in fee could be implied.

(*k*) 3 Sm. & G. 161, 6 D. M. & G. 104.

(*l*) See this subject shortly treated of ante, pp. 1131, et seq., and more fully discussed in the 4th Edition of this Work, Vol. II., Ch. XXXIII., pp. 267 et seq.

his death to his issue or issue male, share and share alike, with a gift over in default of such issue, the gift was construed as a devise to the ancestor for life with remainder to the issue in fee as purchaser (*m*). So also *where the devise was to one for life [*1277] with remainder to his issue, to be divided among them as he should appoint, it was held that the issue took an estate in fee by implication (*n*). And a similar implication was held to arise where there was a devise to A. for life with remainder to his issue as tenants in common, with a gift over in the event of the issue dying under twenty-one years of age (*o*).

It would seem then that, as to devises to one for life with remainder to his issue, when to the words of distribution are superadded expressions sufficient to carry the inheritance, the rule may be stated as follows: Where the words of distribution together with words which would carry an estate in fee are annexed to the gift to the issue, the ancestor takes an estate for life only, and the result is the same whether the fee is given by the technical words "heirs and assigns" (*p*), or by such words as "estate," "part," "share," &c., occurring in the description of the subject of gift, or by words imposing a pecuniary charge upon the issue, and whether the gift to the issue be direct or by implication from a power to appoint to them (*q*), and whether there is a gift over on general failure of the issue of the ancestor (*r*) or not (*s*); and the same rule applies where the issue would take an estate tail (*t*).

General proposition to be deduced from the cases.

Since the rule here laid down applies not only to those cases where the issue would take the fee under an express limitation to their "heirs and assigns," but also apparently includes all other cases where the words are sufficient to give them the fee, and since under the statute 1 Vict. c. 26 a devise to issue indefinitely will give the fee to the issue and not an estate for life merely as under the old law, it follows that we must, in a will made since 1837, construe devises to one for life with remainder to his issue with words of distribution whether there is

The result of the cases as applied to wills made since 1837.

(*m*) Montgomery *v.* Montgomery, 3 J. & L. 47. See Hockley *v.* Mawbey, 1 Ves. Jr. 143, 1 R. R. 93. In Harrison *v.* Harrison, 7 M. & Gr. 938, 8 Scott, N. R., 862, the devise was in similar terms except that there was no gift over. It was held that the ancestors took estates tail. The decision if not referable to the ground noticed is clearly opposed to the case of Montgomery *v.* Montgomery and to the current of authority.

(*n*) Crozier *v.* Crozier, 3 D. & War. 373, 2 Con. & L. 309; Bradley *v.* Cartwright, L. R., 2 C. P. 511.

(*o*) Doe *v.* Burnsall, 6 T. R. 30, 3 R. R. 113. See Merest *v.* James, 4 J. B. Moo. 327, 1 Br. & B. 484.

(*p*) Lees *v.* Mosley, 1 Y. & C. 589, ante, p. 1272; Greenwood *v.* Rothwell, 5 M. & Gr. 628, 6 Scott, N. R. 670, 6 Beav. 492, ante, p. 1275; Slater *v.* Dangerfield, 15 M. & Wels. 263, ante, p. 1275; Golder *v.* Cropp, 5 Jur. N. S. 562.

(*q*) Crozier *v.* Crozier, 3 D. & War. 373; Montgomery *v.* Montgomery, 3 Jo. & Lat. 47; Bradley *v.* Cartwright, L. R., 2 C. P. 511, where the statement in the text was approved.

(*r*) Montgomery *v.* Montgomery, 3 Jo. & Lat. 47.

(*s*) Lees *v.* Mosley, Greenwood *v.* Rothwell, Slater *v.* Dangerfield, all cited ante, n. (*p*).

(*t*) Parker *v.* Clarke, 6 D. M. & G. 104, ante, p. 1276.

[*1278] a gift over or not (*u*), *in the same manner as if words of limitation were superadded, and such devises will then coincide with those falling within the rule above stated. The law on this point as to wills made since 1837 will thus be reduced to a very simple general rule, — namely, that *every* devise to a person for life, and after his decease to his issue, in words which direct or imply distribution between the issue, gives the issue an estate in fee in remainder by purchase.

General rule as to such wills.

It is observable that in Lees *v.* Mosley (and the same remark applies to many other cases), it does not distinctly appear whether, in pronouncing "issue" to be a word of purchase, the Court intended to construe it as synonymous with *children*, or as admitting descendants of every degree (*x*). The latter, it is presumed, would be its construction in the absence of a restraining context (*y*). What amounts to such a context will be the subject of consideration in the next section, which this remark will serve to introduce.

Whether "issue," where a word of purchase, is confined to *children*.

VI. — Effect of clear Words of Explanation. Issue synonymous with Sons or Children. — If the testator annex to the gift to the issue words of explanation indicating that he uses the term "issue" in a special and limited sense, it is of course restricted to that sense.

"Issue" explained to mean *sons*.

As in Mandeville *v.* Lackey (*z*), where a testator devised his real estate in certain counties to M. during his life only, subject [*1279] *to a certain condition, and after the determination of that estate to M.'s *lawful issue male*, and the lawful issue male of such heirs, the eldest always of *such sons* of M. to be preferred before the youngest, according to their seniority in age and priority

(*u*) See ante, p. 1271.

(*x*) Dalzell *v.* Welch, 2 Sim. 319, seems to bear upon this point, and favors the more enlarged construction of the term "issue."

A moiety of certain real estate was devised to D. for life, remainder to and among his issue as he should by will appoint, remainder to his issue living at his death, in fee. D. made an appointment in favor of his children only, though he left also grandchildren and great-grandchildren. Sir L. Shadwell, V.-C., held the appointment to be invalid, on the ground of its excluding the donee's grandchildren and great-grandchildren, who were objects of the power, as being included under the denomination of issue. The chief argument for the contrary construction was founded on a previous part of the will, in which the testator had bequeathed personalty to A. for life, and, in case she should leave *issue* living, then to be paid and applied among *such child or children* in such proportions, &c. as A. should appoint; and, in default of appointment, among *such issue* in equal shares, and, if but one *child*, the whole to be paid to such one; and, in case there should be no issue of A. living at her decease, or if they should all die before attaining twenty-one, then over. The V.-C. thought that the word "children" meant *issue* in this instance, for that the testator could not intend that, if A. left a grandchild and no child, the property should go over. *At all events, as a similar phraseology was not adopted in the latter part of the will, the word "issue" must be considered as used in the sense it generally bears.* Compare this with Ryan *v.* Cowley, and Carter *v.* Bentall, post, pp. 1279, 1280. And see Hall *v.* Nalder, 17 Jur. 224.

(*y*) As to the mode in which the several degrees of issue take in such cases, see ante, pp. 946, 947.

(*z*) 3 Ridg. P. C. 352, Hayes's Inq. 145, n. See same principle as to *heirs of the body*. Goodtitle d. Sweet *v.* Herring, 1 East, 264, and other cases stated ante, pp. 1229, et seq.

in birth, and for want of such lawful issue in M., over: the Court of King's Bench, Ir., held that M. took only an estate for life, which was affirmed in the House of Lords, Ir., with the unanimous concurrence of the Judges, on the ground that the word "issue" was explained to mean "sons." The L. C. said the subsequent words of explanation seemed to him to point out the *sons* of M. by name, as the persons whom the testator meant by issue male.

So, in Ryan *v.* Cowley (*a*), where a testator devised and bequeathed to trustees freehold and leasehold and other personal property, upon trust for his daughter for life; and after her decease the rents and profits and interest of money he gave, devised, and bequeathed to and amongst the *issue* of his said daughter lawfully to be begotten, in such shares and proportions as she should by her last will and testament appoint, provided such *child or children* should arrive at the age of twenty-one years; and for want of such issue of his daughter, or in case of the death of such issue, and of the death of his wife, the testator devised all his property to other persons. It was contended on behalf of the daughter that the word "issue" was to be construed as a word of limitation, and consequently that she took an estate tail in the freehold, and an absolute interest in the chattel property. But the L. C. (Sugden) held that the daughter took a life interest only. "The term 'issue' (he observed) may be employed either as a word of purchase or of limitation; but when the testator adds, 'provided such child or children shall attain twenty-one, and for want of such issue, then' over, he translates his own language, and clearly shows that he uses the word 'issue' as synonymous with child or children."

"Issue" explained to mean *children*.

So, in Bradley *v.* Cartwright (*b*), where land was devised to S. B. for life, remainder to trustees to preserve contingent remainders, remainder to the use of *all and every the issue, child, or children* of the body of S. B., in such shares, manner, and form as S. B. should by deed or will appoint, and in default of such *issue over; [*1280] it was held that "issue" was explained to mean children.

But in Roddy *v.* Fitzgerald (*c*) the words "if only one child to such only child" were held insufficient to limit the generality of the term "issue;" for although "issue" included children, it did not follow that it included none besides. The testator "certainly meant (said Lord Cranworth) that if there was only one child that child should take. But that the child would do consistently with the intention that the estate should go to the issue through all time of the first taker" (*d*).

"Issue" not explained to mean children.

(*a*) 1 Ll. & G. 7. See also Machell *v.* Weeding, 8 Sim. 4, ante, Vol. I., p. 521; Pruen *v.* Osborne, 11 Sim. 132; Bradshaw *v.* Melling, 19 Beav. 417.

(*b*) L. R., 2 C. P. 511. See this case observed on by Cotton, L. J., Richardson *v.* Harrison, 16 Q. B. D. 85, 108. See also Farrant *v.* Nichols, 9 Beav. 327 (personalty); and see a similar construction applied to articles for a settlement, Campbell *v.* Sandys, 1 Sch. & Lef. 281.

(*c*) 6 H. L. Ca. 823.

(*d*) Applying what Lord Eldon said in Jesson *v.* Wright, with reference to "heirs of the body," ante, p. 1213.

But in the previous case of Carter *v.* Bentall (*e*), where a testator gave the dividends of certain stock to his wife for life, and gave the income of the residue of his personal estate and the rents of his real estate to his daughter for her life; and after the death of his wife and daughter he gave the residue of his real and personal estate to trustees, upon trust to sell and to transfer one moiety of the produce to the issue of his daughter in equal shares, to be paid to them at their respective ages of twenty-one; and if only one *child* then to such one *child*, for his, her, or their benefit. And the testator ordered the trustees to lay out the dividends in the maintenance of such "issue;" and in default of such issue, over (*f*); Lord Langdale, M. R., held that the word "issue" was here explained to mean *children*.

"Issue" explained to mean *children*.

After Roddy *v.* Fitzgerald, this cannot be considered an authority upon the construction of such terms in a gift of real estate, unless it can be distinguished by reason of the trust for sale, which certainly seems inconsistent with the existence in the daughter of an estate tail in one moiety. But personalty differs from realty in this, that it is not descendible but distributable: the use of the word "issue" in a gift of personalty as an equivalent for "heirs of the body" is, therefore, a misapplication of it which suggests the probability that it was not intended to be so used; and thus the case is freed from the chief considerations which have prevented the word when used in a gift of realty from receiving a restricted meaning from the context.

Distinction between real and personal property.

Carter *v.* Bentall was followed by Sir C. Hall, V.-C., in a [*1281] *case (*g*) where personalty was given to A. for life, and after his death to his issue surviving him, equally if more than one, and "if but one (*i. e.*, one issue) then for *such* only *child*," with a gift over "in default of issue becoming entitled to" the legacy. And of course where personalty was bequeathed to several for their lives, and after the death of each leaving issue her share to be paid to such issue, *if more than one child* equally to be divided between them, it was held that "issue" was explained to mean children (*h*).

Even a devise of real estate worded as in the last case would, according to North *v.* Martin (*i*), be construed in like manner. The case at least would be quite different from Roddy *v.* Fitzgerald, since

(*e*) 2 Beav. 551.

(*f*) The chief discussion was, whether, in respect of the *other* moiety, a gift over on failure of issue of the testator's mother and daughter (to whose children no gift was made), the word "issue" was to be read "children," and it was held not.

(*g*) Re Hopkins's Trust, 9 Ch. D. 131. See also Swift *v.* Swift, 8 Sim. 168 (articles for a settlement). In Stonor *v.* Curwen, 5 Sim. 264, a testator directed personalty to be settled in trust for his niece A. for life, but to devolve *to her issue at her death*, and, failing issue, to his nephew C. It was held that the trust embraced the children living at the death of A., and the issue then living of any deceased child or children. It will be observed that this was an executory trust; and see Lister *v.* Tidd, 29 Beav. 618.

(*h*) Bryden *v.* Willett, L. R., 7 Eq. 472. That in a bequest of personalty to A. for life, remainder to his issue, "issue" is not a word of limitation. See Ch. XLIV.

(*i*) 6 Sim. 266, stated ante, p. 1229.

a plurality of children taking as tenants in common would not be consistent with an estate descending from A.

Effect where "issue" and "children" have elsewhere been used indifferently.

And of course it is a circumstance favorable to the construction in question, that the testator has in other parts of his will used the words "children" and "issue" indifferently (*k*).

Indeed it has been considered to be a conclusive ground for construing the word "issue" to mean *children*, that the testator has elsewhere employed it in this limited sense (*l*).

* But of course the word "issue" will not be cut down to *children* by the mere circumstance of the words "children" and "issue" being previously used synonymously, if in those prior instances there was fair ground to conclude that both terms were used in the sense of issue (*m*). [*1282]

"Children" held to mean *issue*.

A leading and often-cited example of the word "children" being used in the sense of *issue*, is Gale *v.* Bennett (*n*), where a testator gave real and personal estate to his daughter H. for life, and remainder to her children at twenty-one; and, in default of such issue, then to his other daughters that should be living at the time of the death and failure of issue of H., and the *child or children* of such of his other daughters as should be dead, as tenants in common in fee; but such children to take only their parent's share: but in case there should be none of his other daughters, nor any *issue* of his other daughters then living, the testator bequeathed over the property. H. died childless; and it was held that the grandchild of another daughter who died in the lifetime of the testator was entitled, the word "child" and "children" being here used as synonymous with issue (*o*).

(*k*) Cursham *v.* Newland, 2 Bing. N. C. 58, 2 Scott, 105, 2 Beav. 145, 4 M. & Wels. 101.

(*l*) Ridgeway *v.* Munkittrick, 1 Dr. & War. 84. In this case Sir E. Sugden said, "It is a well-settled rule of construction, and one to which from its soundness I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." To this proposition no objection can be advanced; but it seems not entirely to dispose of the difficulties attending these cases, for the question still is, what amounts to such "a clear intention to the contrary" as will take any given case out of the rule. Different minds may (as the reports abundantly testify) estimate variously the force of context requisite to outweigh the presumption of similarity of intention from the recurrence of the same expression. Where a term is in some instances accompanied by an explanatory context, and in other instances not, a Judge may see in the occasional omission of the explanatory phrase sufficient ground to infer a difference of intention in the respective instances, of which Dalzell *v.* Welch, 2 Sim. 319, ante, p. 1278. n., affords an example. See also Re Warren's Trust, 26 Ch. D. 208 (settlement). In such cases, the general plan of the will must be regarded. See Clifford *v.* Koe, 5 App. Ca. 447. And if we find that the testator's dispositive scheme would be violated by not giving to any term a uniform construction throughout the will, the argument for its adoption is very strong. Where the dispositions of the will are of a nature not to afford any such light, the task of its expounder becomes very embarrassing.

(*m*) Dalzell *v.* Welch, 2 Sim. 319, ante, p. 1278, n.; and see further on this point, ante, p. 952.

(*n*) Amb. 681, and stated from Reg. Lib. 3 De G. & J. 276. See also Wyth *v.* Blackman, 1 Ves. 196, ante, p. 952, Amb. 555, nom. Wythe *v.* Thurlston.

(*o*) Much stress in the arguments at the bar was laid on the fact of there being no child; but the inadmissibility of such a principle of construction has been elsewhere shown, ante, p. 1002.

The present division will be concluded by the statement of two cases of the converse kind, namely, in which the word "issue" has been used in the restricted sense of *children*. In one of these, Ellis *v.* Selby (*p*), a testator bequeathed his funded property upon trust for A. for life, and after his decease, should he have *issue* lawfully begotten, whether male or female, to pay the interest for the maintenance and education of such *issue*, if more than one, share and share alike, and if only one for the maintenance of such one, during his, her, or their nonage; and, on their attaining the age of twenty-one years, to transfer the same to them if more than one, and if only one then to such one; and, after the decease of B. (to whom the testator had given the dividends on his bank stock for life), he gave the dividends thereof to A. for the term of his life, and, after his decease, upon trust for the lawful *children, or child* if only one, of A. *in such manner as he* (the testator) *had thereinbefore willed and directed respecting his funded property;* and, if A. should happen to die without *issue male or female* [*1283] of his body lawfully *begotten, then over: Sir L. Shadwell, V.-C., was of opinion that the words "die without issue male or female" in the bequest over referred to *children*, the testator having clearly explained himself to mean children in the prior gift to the issue male and female.

Bequest to children made to govern prior gift to "issue."

The other case referred to is Peel *v.* Catlow (*q*), where a testator bequeathed one-sixth part of his residuary estate amongst the *children* of his late sister Jane T., to be paid at twenty-one, and, in case any such *child* or *children* should die under age leaving *issue* living at his, her, or their decease, their shares to be paid to the issue of such child or children respectively, with a bequest over of the shares of any child or children dying in minority without leaving issue, to the survivors and the issue of any who should have died leaving issue as aforesaid (such issue to take no greater share than their respective parents would have been entitled to, if living). And, as to one other sixth part, upon trust to pay the interest to the testator's sister, Mary C.; and, after her decease, to pay and apply the said share unto and amongst her *issue*, and to be payable at the like times, and with the like benefit of survivorship and accruer, *and in like manner as is thereinbefore expressed concerning the sixth part given to the children of his* the testator's *late sister Jane T.;* and in case the testator's sister Mary should die without leaving issue at her decease, or leaving any, they should die under twenty-one and should leave no issue living at his, her, or their decease, then over: Sir L. Shadwell, V.-C., was of opinion that the bequest to the "issue" of the testator's sister Mary must of necessity be taken to mean *children*, by force of the terms of reference to the prior bequest to the children of Jane.

"Issue" held to mean *children* by reference to another gift.

(*p*) 7 Sim. 352. (*q*) 9 Sim. 372.

It may be observed, in support of the construction adopted by the Court, that the testator had used the word "issue" in the sense of *children* in reference to both the share of the children of Jane and the share of Mary, namely, in the clauses which provided for the event of their respectively dying *under age* without issue living at their decease, where it is obvious the word "*issue*" necessarily meant *children*, as a minor could not leave issue of a remoter degree.

Remark on Peel *v.* Catlow.

VII. — Devise over in case of Failure of Issue at the Death. — It remains to be observed, that where a devise to a person and his *issue (or to him and the heirs of his body (*r*)) is followed by a limitation over in case of his dying without leaving issue *living at his death*, the only effect of these special words is to make the remainder contingent on the prescribed event. They are not considered as explanatory of the species of issue included in the prior devise (*s*), and, therefore, do not prevent the prior devisee taking an estate tail under it (*t*). The result simply is, that if the tenant in tail has no issue at his death, the devise over takes effect: if otherwise, the devise over is defeated, notwithstanding a *subsequent* failure of issue (*u*). [*1284]

Limitation over if the devisee leave no issue at his death.

In Doe d. Gilman *v.* Elvey (*x*), the circumstances of there being a limitation over on failure of issue at the death of the prior devisee does not appear to have given rise to an argument against an estate tail. The only doubt, it is conceived, could possibly be, whether it would have the effect of rendering the remainder expectant on the estate tail contingent on the event of the devisee in tail leaving no issue *at his death* (*y*). The affirmative, however, seems to be the

(*r*) Wright *v.* Pearson, 1 Ed. 119, ante, p. 1206, but where it was not necessary to decide its effect upon the remainder. Cf. Abram *v.* Ward, 6 Hare, 165. In Richards *v.* Davies, 13 C. B. N. S. 69, 861, where a devise was to A. for life, remainder to such of her children as she should by *will* appoint, and in default to her children and the heirs of their bodies in equal shares, "and in case of the death of A. without leaving any child living at her death, and in the event of such child or children surviving her and dying without leaving issue," to testator's right heirs; it was held that the express gift in tail to the children was not made contingent on their surviving A. by the terms of the power (see Vol. I., p. 519) and of the gift over.

(*s*) See Hutchinson *v.* Stephens, 1 Kee. 240. post.

(*t*) Doe *v.* Rucastle, 8 C. B. 876; Marshall *v.* Grime, 28 Beav. 375. Indeed, in one instance, we have seen (ante, p. 1259) even an express devise to A. and the issue living at his death was held to confer an estate tail; but this is a construction which probably would not be universally acquiesced in.

(*u*) Eden *v.* Wilson, 4 H. L. Ca. 257, 281, ante, Vol. I., p. 468.

(*x*) 4 East, 313, ante, p. 1261.

(*y*) See an instance of such construction applied to personalty in Lyon *v.* Mitchell, 1 Mad. 467, where personal estate was bequeathed to A. B., C., and D. as tenants in common, and to the issue of their respective bodies: but in case of the death of any or either of them without issue living at the time of his or their respective deaths, then over to the survivors, and to the issue of their respective bodies. It was held that the bequest passed absolute interests to A., B., C., and D, subject to an executory bequest in case of their respectively dying without leaving issue at their decease.

better opinion, as the Courts would hardly feel themselves authorized, without a context, to reject the clause "living at his decease." But words of an equivocal import would certainly not have the effect of subjecting the remainder to such a contingency (*z*).

(*z*) See Broadhurst *v.* Morris, 2 B. & Ad. 1, ante, p. 1237.

WORDS "IN DEFAULT OF ISSUE," ETC., WHEN REFERABLE TO THE OBJECTS OF A PRIOR DEVISE.

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I. — Preliminary Remarks. — The expression which forms the subject of consideration in this chapter stands pre-eminent for the number and variety of the questions of construction to which it has given rise. The offices assigned to it are very numerous, and vary, of course, with the context. Following a devise to heirs *general*, a clause of this nature, we have seen, 1, frequently explains the word "heirs" to mean heirs *special*, *i. e.*, heirs of the body, and cuts down the estate comprised in the prior devise to an estate tail (*a*),[1] if there is ground for not restraining the term "issue" to issue living *at the death* (*b*). Preceded by a devise indefinitely, or expressly for life, to the person whose issue is referred to, the words in question (occurring in a will which was subject to the old law) had the effect of enlarging such prior devise to an estate tail (*b*), unless they were restrained as before suggested, or *unless there was an intermediate devise to some class or denomination of issue to which they could be referred.*

General rules of construction with regard to the word "issue."

The statute 1 Vict. c. 26, s. 29, provides, "that in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' 'have no issue,' or any other words which may import either a want or failure of issue * of any [*1286] person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or fail-

(*a*) Ante, Vol. I., p. 521. (*b*) But now see 1 Vict. c. 26, s. 29, infrs.

[1] See 4 Kent, 276.

1 Vict. c. 26, s. 29. Words importing a failure of issue to mean issue living at the death, except where merely reference.

ure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, *by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise;* provided, that this act shall not extend to cases where such words as aforesaid import *if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue* (*c*).

It is evident, therefore, that the question, whether words importing a failure of issue refer to the objects of the preceding devise (which forms the main topic of the present chapter) may still arise under wills that are within the statute (*d*). It will therefore be proper to examine in detail some of the earlier authorities, and to consider how far the doctrines thereby laid down are applicable to wills which are within the existing law. The distinctions which these authorities present require particular attention, and they will be found upon the whole to be more easily reducible to a few general propositions than is commonly supposed.

II. — Construction in regard to Personalty. — *In regard to personal estate*, it seems to be clear that words denoting a failure of issue, following a bequest to *children*, refer to the objects of that gift.

In regard to personal estate.

As in Doe d. Lyde *v.* Lyde (*e*), where a term of years was bequeathed to G. for life, and after his decease to M. for life, and after the decease of the survivor to *the children of G.*, share and share alike, and *if G. died without issue* of his body, then over; it was held that there being no child of G. the ulterior gift took effect.

Preceded by a bequest to *children;*

[*1287] *So, in Salkeld *v.* Vernon (*f*), where a testator bequeathed 1,000*l.* to his daughter R.'s child or children, to the number of *four;* and if she should have a greater number than four living at his decease, then he bequeathed 4,000*l.* to be divided among the said children *who should be so living at his decease*, to be paid at twenty-one; *but if his daughter should happen to die "without issue,"* then he bequeathed the said legacy over. It was contended that the ulterior

— by a bequest to children living at testator's death.

(*c*) See Re O'Bierne, 1 Jo. & Lat. 352; Harris *v.* Davis, 1 Coll. 416; Green *v.* Green, 3 De G. & S. 480; Dawson *v.* Small, L. R., 9 Ch. 651; all noticed Ch. XLI., s. i.

(*d*) See post p. 1312.

(*e*) 1 T. R. 593. See also Att.-Gen. *v.* Bayley, 2 B. C. C. 553; Vandergucht *v.* Blake, 2 Ves. Jr. 534; Farthing *v.* Allen, 2 Mad. 310 (but as to which see post); Robinson *v.* Hunt, 4 Beav. 450; Cormack *v.* Copous, 17 Beav. 397; Re Wyndham's Trusts, L. R., 1 Eq. 290; Re Sanders' Trusts, id. 675; per Parker, V.-C., Bryan *v.* Mansion, 5 De G. & S. 737. But see also per Lord Cottenham, post, p. 1289, and per Turner, L. J., post, p. 1292, and 4 D. M. & G. 88.

(*f*) 1 Ed. 64.

bequest was void, being after a general failure of issue; but Lord Northington held that it was a legacy to the children, if there were any, living at his decease, and, if not, to the substituted legatees.

And a similar doctrine prevailed in Malcolm *v.* Taylor (*g*), though the trust for children was confined to those who attained a prescribed age; but the construction was considered to be aided by an expression in the context. The testator gave certain lands and all the residue of his money in the funds to his mother and his sister M., for their lives and the life of the survivor, and, after the decease of the survivor, to such of the children of M. as she by deed or will should appoint; and, in default of appointment, to be equally divided among the said children, their heirs and assigns; the funded property to be an interest vested in and paid to them or the survivors or survivor, being sons at twenty-one, or being daughters at twenty-one or marriage. And *in case M. should die without issue of her body lawfully begotten,* then the testator devised the estate to the children of A. in fee; and in case M. should *die without issue as aforesaid,* the testator gave the residue of his money in the funds to J., and after his decease to his (testator's) eldest son. M. died unmarried; whereupon a doubt arose as to the validity of the bequest over to J., which of course failed if the words referred to an extinction of issue at any time. It was held by Sir J. Leach, M. R., and afterwards by Lord Brougham, that the words "without issue as aforesaid" meant without such issue of M. as were objects of the preceding gift of the funded property, *i. e.,* the children; his Honor observing, that it was a reasonable intendment that a subsequent limitation is meant to take effect upon failure of the prior gift, and is a substitution in that event. This was the plain intention of the testator with respect to the real estate; and it was to be supposed, when real and personal estate were given together, that the testator had the same intention with * respect to the funded property and the real [*1288] estate. In Lord Brougham's judgment there is much criticism on the words "as aforesaid" (*h*), which he considered to refer, not to the objects of the immediately preceding devise, but to the more remote antecedent, the legatees of the stock, which seems to have been rather a nice question.

"Without issue as aforesaid," held to refer to objects of prior contingent gift.

Where the prior gift is expressly to "issue," though restricted by the context to issue of a particular class, or existing at a prescribed period, it seems more obvious to apply to the objects of such prior gift the words importing a failure of issue (the term being identical in both clauses), than where the prior gift is in favor of *children.*

Thus, in Leeming *v.* Sherratt (*i*), where a testator bequeathed to

(*g*) 2 R. & My. 416.
(*h*) As to these words, see also Walker *v.* Petchell, 1 C. B. 65, stated post, p. 1297.
(*i*) 2 Hare, 14, following Target *v.* Gaunt, 1 P. W. 432 and Hockley *v.* Mawbey, 1 Ves. Jr. 143, both stated Ch. XLI., s. ii., subs. 2, post, p. 1337.

each of his children 1,000*l.*, to be paid at twenty-one, but as to the girls one-half to be placed out at interest, to be secured from the control of any husband, the interest in the mean time to be paid to them, and the principal to be disposed of in such manner as they might direct to their *issue; but in case they should die without issue*, the testator gave the principal among the survivors of his children; Sir J. Wigram, V.-C., was of opinion that the original bequest applied to issue living at the death of the children, and that the gift over, on the failure of "issue," referred to the same objects.

Words held to be referential to prior gift to "issue."

In two earlier cases, however, a different construction seems to have prevailed. Thus, in Andree *v.* Ward (*k*), where a sum of 5,000*l.* stock was bequeathed to A. for life, and in case he should marry any woman with 1,000*l.* fortune, then the testator's will was that the 5,000*l.* should be settled on his wife and the *issue of such marriage;* but in case A. died *leaving* no issue of his body lawfully begotten, then over: Sir T. Plumer, M. R., was of opinion that "issue" in the ulterior gift could not be confined to issue of such marriage as before mentioned, and that therefore A. having left issue not of such a marriage, the gift over failed.

Words held in an executory trust not to refer to prior objects.

The strong tendency of the more recent cases towards the referential construction suggest a doubt whether the doctrine of this case would now be followed.

[*1289] *So, in Campbell *v.* Harding (*l*), where a testator bequeathed to his adopted daughter, Caroline H., 20,000*l.* Consols, and his house and landed property at Culworth; *but in case of her death without lawful issue*, then the testator willed the money so left to her to be equally divided betwixt his nephews and nieces who might be living *at the time* (*m*), and the land, &c., at Culworth to his nephew J. H.; and the testator requested his friends C. and S. to be guardians for Caroline H., and if she married it must be with their consent, and "the property to be solely settled *upon herself and her children*, and in no way charged or alienated." It was contended that the words "death without lawful issue" in this case meant death without having had any such issue as would have taken under the settlement subsequently directed by the testator, and not death without issue indefinitely; but it was held by Sir L. Shadwell, V.-C., and afterwards by Lord Brougham, and ultimately in the House of Lords (where the case was very elaborately argued), that the words could not be restricted, and consequently that Caroline H. (who had died unmarried) became absolutely

Referential construction rejected.

(*k*) 1 Russ. 260. In Allanson *v.* Clitherow, 1 Ves. 24 (an executory trust of realty), the gift over on death without issue was also held non-referential in like circumstances.
(*l*) 2 R. & My. 390, 8 Bli. N. S. 469, 2 Cl. & Fin. 421 (Candy *v.* Campbell).
(*m*) See *s. c.*, cited Ch. XLI, s. ii.

entitled to the stock. Lord Brougham considered that the introduction of the direction to settle the stock on the marriage of the legatee did not vary or affect the construction which was to obtain in the alternative event of her not marrying at all (*n*).

The frame and language of the will in this case were peculiar, and it must not be considered as intrenching on the general principle of construction exemplified in the preceding cases. That principle was recognized and forcibly stated by Lord Cottenham in Ellicombe *v.* Gompertz (*o*), where he held that the words "from and immediately after the decease of all the sons and grandsons of my said son J. J." were confined to such sons and grandsons as were embraced by the preceding gifts, a construction which supported the validity of the ulterior gift (*p*). * He thus stated the general doctrine: [*1290] "Provision is made for certain members of a class answering a particular description, and then a gift over is made on failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend on the failure of the whole class, will be construed to take place upon the failure of that description of the class who were to take; and, on the other hand, if it appear that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the Court will adopt such a construction as will extend the benefit in the best way the law will admit to the whole class."

Remark on Campbell *v.* Harding.

Lord Cottenham's statement of the general doctrine.

So, in Trickey *v.* Trickey (*q*), where a testator bequeathed the residue of his personal estate to his daughter A. for life, and after her decease to her children at twenty-one; and in case any of such children should die under twenty-one, and have one or more children *who should survive A.* and live to attain the said age, the last-mentioned children should be entitled to their parents' share; provided that, in case any child of A. should die under twenty-one, his, her, or their share or shares should go to the survivors of the said children, and the issue of any deceased child or children who should marry and die under the said age; provided further, that *if there should be no child of A., or there being any such, no one child living to attain the age of twenty-one*

Words held to refer to objects of prior gifts.

(*n*) This case was cited as a leading authority by K. Bruce, V.-C., in Pye *v.* Linwood, 6 Jur. 618; and by Bacon, V.-C., in Fisher *v.* Webster, L. R., 14 Eq. 283. But in the former case it was unnecessary in the events which had happened to decide whether the words importing a failure of issue applied to the objects of the preceding bequest to "children" or extended to issue indefinitely; the case therefore has really no connection with the present subject of discussion. The material question was, whether the words referred to issue living at the death (vide next chapter), which construction the Court (it is considered most properly) negatived. In Fisher *v.* Webster, the prior bequest being to A. and her children jointly, the simply referential construction of the gift over if A. should die without issue was of course inapplicable.

(*o*) 3 M. & Cr. 127.

(*p*) The will was found too long and special for insertion.

(*q*) 3 My. & K. 560.

years, nor leave any issue who should attain thereto, then over: Sir J. Leach, M. R., held that the gift over must be intended to take effect on failure of the former gifts; and as such former gifts were confined to those grandchildren who should survive (and who should therefore necessarily have been born in the lifetime of) the daughter, the ulterior bequest was valid (*r*).

In Westwood *v.* Southey (*s*), a very material distinction was drawn by Sir R. Kindersley regarding those cases where, by express direction, or by the true construction, of the will, the death of the [*1291] first taker without issue means without issue living * at his death (*t*). He said: "It is true that where there is a legacy to one for life, and after his death to his children, with a gift over if he die without issue, and there is nothing to restrain those words, the words 'without issue' are limited to the issue before mentioned. But the ground on which the Court has used violence with the words and interpolated the word 'such' is this, that if there were no restriction on the generality of the words 'dying without issue,' the limitation over would be void. But when the dying without issue is either in terms, or by the proper construction, limited to dying without issue living at the death, there is no reason for interpreting the words as meaning 'such issue as before mentioned.' I am not aware of any case in which a legacy being given to one for his life, with remainder to his children, and a gift over if he dies without issue, in the sense of issue living at his death, the limitation has been restricted to issue before mentioned. Such a construction might, in fact, wholly defeat the testator's intention; for the tenant for life might have an only child who might attain twenty-one, marry and have children, and die before the tenant for life, and then the child and the issue of that child would be excluded." In the case before him the V.-C. acted upon the distinction, although the effect was to divest a previously vested gift to the children.

Suggested distinction where the gift over is on death without issue living at the death.

In Pride *v.* Fooks (*u*), where the bequest was in trust for *such* child or children *as* the testator's niece and two nephews should *leave at the time of their respective deceases,* one-third to the child or children of each (but not giving life interests to the parents), and in case the niece or either of the nephews should happen to die without leaving any children or child lawfully begotten, her or his third part to be paid to

(*r*) Although in Ellicombe *v.* Gompertz, and Trickey *v.* Trickey, above stated, the expression which connected the prior and ulterior gifts did not correspond with that which is the subject of the present chapter; yet, as the general principle was much discussed, and as these cases exemplify the application of the doctrine to bequests of personalty, they appeared to call for insertion in this place. Ellicombe *v.* Gompertz was cited as a leading authority by Sir J. Wigram, in Leeming *v.* Sherratt, 2 Hare, 14, ante, p. 1288; see also Hillersdon *v.* Lowe, 2 Hare, 355; Cardigan *v.* Curzon-Howe, L. R., 9 Eq. 358 (settlement of family plate).

(*s*) 2 Sim. N. S. 202. See also Walker *v.* Mower, 16 Beav. 365.

(*t*) The V.-C. repeated this statement of the rule in Madden *v.* Ikin, 2 Dr. & Sim. 213. So Parker, V.-C., Bryan *v.* Mansion, 5 De G. & S. 737.

(*u*) 4 Jur. N. S. 678, 3 De G. & J. 252.

the children or child of the other or others leaving children or a child, in equal proportions if more than one, and in case all of them the nephews and niece should happen to die *without leaving* (*x*) *any issue* lawfully begotten, in trust for the children of X. then living and the issue of his children then dead, equally per stirpes. Neither of the nephews left any child at his death, nor did the niece, but the niece left grandchildren. It was held by Sir J. Romilly, M. R., that "issue" in the gift over was not to be restricted to "children," and that there was an intestacy. He approved and *relied much on the V.-C.'s distinction. On appeal, the [*1292] decision was affirmed by K. Bruce and Turner, L. JJ., upon the construction of the particular will, "children" being strongly contrasted with "issue," and there being, not a series of limitations to take effect in succession, but only two sets of concurrent contingent limitations. Sir G. Turner said he would not give any opinion upon Westwood *v.* Southey.

Referring to the general doctrine, the L. J. said: "Amongst the cases on the point, which are almost innumerable, may be placed on the one side Malcolm *v.* Taylor and Ellicombe *v.* Gompertz, and on the other Andree *v.* Ward and Campbell *v.* Harding. If the primary limitation be in favor of children, and be so expressed that they take immediate vested interests, and there be a limitation over in default of issue, it is not difficult to see reasons for construing default of issue to mean default of children; for if there be no child, there can be no other issue, and if there be a child the child will take the whole, and there will be nothing to limit over; but where the primary limitation is so expressed that there may be issue who may not take under it, as in the case of gifts to children to vest at twenty-one, it is not so easy to see the reasons on which this construction has prevailed. It is true that by adopting the construction the limitations are made to follow in regular order and succession, but it is equally true that the general terms in which the limitation over is expressed, prove that there has been some omission or some mistake on the part of the testator, and the difficulty seems to be to determine what the omission or mistake has been, whether it has been in the gift over not having been limited, or in the primary gift not having been extended." He had endeavored to extract some definite rule from the authorities, but the result of them was that each case depended on the construction of the particular will, and that no general rule could be laid down.

Statement of the general doctrine by Turner, L. J.

But of course, although the primary gift is so expressed that there may be issue who may not take under it, the context may show that the omission or mistake is not in that gift, but in the gift over. This

(*x*) This as to personalty meant leaving at their deaths, see Ch. XLI., s. ii.

was considered to be the case in Re Merceron's Trusts (*y*), where a testator gave a legacy to each of his two daughters for life, and after her death unto and equally among all and every such child [*1293] and children she might happen to *leave* * *at her decease;* and in case she should *die without issue,* then to such persons and in such manner as she should by will appoint. The will then contained a gift of residue to the testator's son. The daughter died leaving grandchildren but no child living at her death. It was held by Sir R. Malins, V.-C., that "die without issue" meant such issue as was before mentioned, namely, children living at the daughter's decease; and, there being none, that the power to appoint had arisen. The V.-C. thought it perfectly clear that, as the children of the daughters who were the primary objects of the disposition could not take, the next object of the testator's bounty was the daughter herself, who, if she had no children or only children who could not take, was to have the absolute dominion over the fund.

Where the words are not "in default of issue" simply, but "in default of *such* issue," it is clear that whatever be the class of issue included in the preceding gift, whether children, sons, or daughters, and whatever the extent of interest given to those objects, the bequest over *in default of such issue* is construed to mean in default of such *children, sons, or daughters* (*z*). And if the prior gift is confined to children who survive their parent, a gift over in default of such issue, or (which is the same) of issue *becoming entitled,* means in default of children who survive their parent (*a*).

In default of *such* issue.

III. — Construction in regard to real Estate. — 1. *Where the Expression is "such Issue."* — With regard to *real estate* also (bearing in mind that, where the referential construction is adopted, the rules laid down in the earlier decisions still apply), it is clear that the words "in default of *such* issue," following an express devise to any particular branch of issue, as *children, sons, or daughters,* will be construed to refer to the issue before described; that is, as meaning in default of "*such*" *children, sons,* &c. (*b*). And in cases of *this* class (as distinguished from those which form the subject of the next section), this rule prevails, whether the objects of such preceding devise take estates of inheritance, or only estates for life (*c*).

1. "Default of *such* issue."

(*y*) 4 Ch. D. 182 (will dated 1838, but the Wills Act was not referred to). It is clear that where words importing failure of issue refer to the objects of the preceding gift, the construction is not affected by the change in the law.

(*z*) Maddox *v.* Staines, 2 P. W. 421, 3 B. P. C. Toml. 108; Stanley *v.* Leigh, 2 P. W. 685; and see 3 M. & Cr. 153.

(*a*) Re Hopkins' Trusts, 9 Ch. D. 131.

(*b*) Lethieullier *v.* Tracey, Amb. 204, 220; Denn d. Briddon *v.* Page, 11 East, 603, n., 3 T. R. 87, n; Hay *v.* Lord Coventry, 3 T. R. 83, 1 R. R. 652; Doe d. Comberbach *v.* Perryn, id. 484; Goodtitle d. Sweet *v.* Herring, 1 East, 264; and other cases, ante, p. 1229.

(*c*) A limitation over in default of issue, following an estate in fee to children or any other particular branch of issue, operates as an alternative contingent remainder which is defeated

*The reported cases supply numerous examples of such [*1294] kind.

In Doe d. Comberbach *v.* Perryn (*d*), Rex *v.* Marquess of Stafford (*e*) and Foster *v.* Hayes (*f*) the words "in default of *such* issue" following a devise to *children in fee* were held to refer to such children. — Preceded by a devise to children in fee;

In Doe d. Tooley *v.* Gunniss (*g*) and Doe d. Liversage *v.* Vaughan (*h*) the same construction was given to a devise to children (without words of limitation), with a devise over "on *failure of such issue;*" and also in Ashley *v.* Ashley (*i*), where a similar devise was followed by the words, for "want of such issue." — to children for life;

In Denn d. Briddon *v.* Page (*k*), the limitations of the will were to the first and other sons in tail male in strict settlement, and in default of such issue to all and every *the daughters* (without words of limitation), *and in default of such issue,* over; Lord Mansfield held that the daughters took estates for life only; but he said, "If, after the limitation to the daughters, the words had been, 'and if they die *without issue,*' we would have implied an estate tail (*l*); but here the words are '*such* issue,' *which can only mean the issue before mentioned.*" Hay *v.* Earl of Coventry (*m*) was precisely similar. — to daughters for life;

So, in Doe d. Phipps *v.* Lord Mulgrave (*n*), where the devise being to the first and every other son in tail male, "*failure of such issue*" over, the latter words were treated as merely referring to the preceding devise. — to sons in tail male;

Again, in Foster *v.* Romney (*o*), where the devise was to A. for life, and after his decease to *his sons* successively (without *words of limitation), and *in default of such issue,* over; it [*1295] was held that A. and his sons took for life only, the words "*such* issue" meaning such *sons.* — to sons for life.

the moment that, by birth of a child or other issue taking under the previous limitation in fee, such limitation in fee becomes vested. On the other hand, a limitation over in default of issue, following an estate for life or in tail given to the issue, is construed as a vested remainder expectant on the estate for life or in tail, and is not defeated by the birth of issue, but takes effect upon the determination of the estates for life or in tail limited to them. It is clear, therefore, that, according as the issue take, (1) in fee, (2) in tail, or (3) for life, the words in default of issue mean, — (1) if there never are any issue; (2) if there never are any issue, or being such, upon their deaths and the failure of their issue inheritable under the estate tail; (3) if there never are any issue, or being such, upon their deaths.

(*d*) 3 T. R. 484, 1 R. R. 757.
(e) 7 East, 521.
(*f*) 2 Ell. & Bl. 27, 4 Ell. & Bl. 717.
(*g*) 4 Taunt. 313.
(*h*) 1 D. & Ry. 52, 5 B. & Ald. 464.
(*i*) 6 Sim. 358.
(*k*) 3 T. R. 87, n., 11 East, 603, n.
(*l*) See Wight *v.* Leigh, 15 Ves. 564; Parr *v.* Swindels, 4 Russ. 283; both stated post.
(*m*) 3 T. R. 83, 1 R. R. 652.
(*n*) 5 T. R. 320, 2 R. R. 607.
(*o*) 11 East, 594. See also Goodright d. Lloyd *v.* Jones, 4 M. & Sel. 88; Purcell *v.* Purcell, 2 D. & War. 219, n.; Bridger *v.* Ramsey, 10 Hare, 320; Bevan *v* White, 7 Ir. Eq. Rep. 473; Re Arnold's Estate, 33 Beav. 163; Re Pollard's Estate, 3 D. J. & S. 541.

These decisions must be considered as overruling Lomax *v.* Holmden (*p*), and Evans d. Brook *v.* Astley (*q*) unless the latter cases can be referred to their special circumstances. Lord Kenyon (*r*) certainly so treated the latter. Robinson *v.* Robinson (*s*), would be in the same predicament, were it not that the word "*son*," in the devise in that case, appears to have been regarded as a word of limitation (*t*), and consequently the first taker was properly held to be tenant in tail, without imposing on the subsequent words, "in default of *such* issue," the office of conferring that estate, to which, indeed, upon every sound principle of construction, they appear to be inadequate. The cases just stated, establishing that expression to be purely referential, are decisive authorities against the stress which in some parts of the discussion of Robinson *v.* Robinson was laid on these words.

Remarks on Robinson *v.* Robinson, Roe *v.* Grew, Frank *v.* Stovin.

So where there was a devise to one for life, remainder to her sons and daughters in fee, but should she die without having *such heirs* over, the words "such heirs" were held to refer to the sons and daughters (*u*).

"Such heirs" preceded by gift to sons and daughters in fee.

Of course where the word "issue," occurring in an express devise to issue, is therein explained to mean *children*, the words "in default, or for want of such issue," immediately following, are construed in default of such *children* (*v*).

But in one instance the word "such issue," preceded by a devise to first and other *sons* and *their heirs*, were held to refer to *the heirs* of the sons. Thus, in Lewis d. Ormond *v.* Waters (*w*), where the devise was to the testator's eldest son for life, remainder to a trustee to preserve contingent remainders, remainder to *the first and other sons of the testator's eldest son and their heirs*, and *for want of such issue*, to his second son B. for life, with similar remainders; it was held that the word "issue" in the limitation over referred to the *heirs of the sons*, and consequently that they took successive *estates tail*, which would effectuate the apparent intention of the testator to continue the estates in his family.

"Such issue" preceded by a devise to first and other sons *and their heirs.*

This is a strong case, inasmuch as there was an antecedent [*1296] * class of issue to which the clause might have been applied; but as the words "first and other" evidently imported that the sons were to take *successively* (*x*), there was no mode of giving effect to the intention except to cut down the fee simple of the sons to an estate tail.

Remark on Lewis *v.* Waters.

(*p*) 1 Ves. 296.
(*q*) 3 Burr. 1570.
(*r*) 3 T. R. 87, 1 R. R. 654.
(*s*) 1 Burr. 38, 3 B. P. C. Toml. 180.
(*t*) See Lord Kenyon's judgment in Doe *v.* Mulgrave, 5 T. R. 323, 2 R. R. 608.
(*u*) Polley *v.* Polley, 29 Beav. 134.
(*v*) Ryan *v.* Cowley, 1 Ll. & G. 7.
(*w*) 6 East, 337.
(*x*) See Kershaw *v.* Kershaw, 13 Ell. & Bl. 845; Cradock *v.* Cradock, 4 Jur. N. S. 656, ante, p. 1117. As to the force of "successively," see Ginger *v.* White, infra.

Again, in Biddulph *v.* Lees (*y*), a devise to A. for life, and to his sons in tail male successively, and for default of such issue to B. and C. and their sons in like manner; and for default of such issue to the daughters of A. and their heirs forever as tenants in common, and for *default of such issue* to the daughters of B. and C. in like manner (which it was admitted by the Court would per se have given an estate in fee simple to the daughters of A.) was held to create an estate tail in the daughters on the ground that the testator had expressly interpreted his meaning by a shifting clause which provided that if any daughter became a nun, the use declared in her favor should cease, and that "the person next in reversion to take according to the aforesaid limitation should, immediately thereupon, enter upon and enjoy the premises as he would have been entitled to hold and enjoy the same in case the person so entering into religion had been then dead without issue of her body."

"Such issue" controlled by subsequent clause showing an estate tail to be intended.

In Ginger d. White *v.* White (*z*), Willes, C. J., read a devise to children and their heirs *successively* as conferring an estate tail only (*a*), though he distinctly held, as we shall presently see, that the subsequent words, importing a failure of issue, referred to the children themselves (*b*). He seems even to have thought that a gift over in default of *male* children to *female* children, and in default of female children to a person who was their cousin, explained heirs to mean heirs *of the body*, "because the male children could not die without heirs if any of their sisters were living, and the female children could not die without heirs if the cousin were living" (*c*): but he evidently confounded *a remainder* with an *alternative limitation;* in other words, he failed to distinguish between a devise over if the children should die without heirs, and a devise over if there should be *no* children. With the latter the doctrine to which he refers has no connection.

Remarks on doctrine advanced in Ginger *v.* White.

*Even where the prior devise embraces a single child only, [*1297] the words "for want of such issue" are construed for want of such *child*, and have not the effect of conferring an estate tail on the parent of that child (*d*).

Effect where prior devise is in favor of a single child.

The words "as aforesaid," may have the same force as the word "such." Thus, in Walker *v.* Petchell (*e*) the testator devised land in trust for his wife for life, remainder in trust for all and every such one or more of the child or children whether male

(*y*) Ell. Bl. & Ell. 289.
(*z*) Willes, 352, stated post, p. 1298.
(*a*) See also Hennessey *v.* Bray, 33 Beav. 96, ante, p. 1170.
(*b*) See post, p. 1298.
(*c*) See as to this doctrine, ante, p. 1175.
(*d*) Doe *v.* Charlton, 1 Scott, N. R. 290, 1 M. & Gr. 429, ante, p. 1254; Boydell *v.* Golightly, 14 Sim. 327; Ashburner *v.* Wilson, 17 Sim. 204.
(*e*) 1 C. B. 652.

Words "as aforesaid" equivalent to "such."

or female of the said wife lawfully begotten, for such estates, &c., as the wife should appoint, and in default of appointment, in trust for the children as tenants in common in fee, "but in case his wife should happen to die without leaving lawful issue as aforesaid," then over; it was held that the words "issue as aforesaid" meant children, and, therefore, that the gift over was not too remote.

In this state of the authorities, then, the proposition seems undeniable that the phrase "in default of such issue," "for want of such issue," or "on failure of such issue," following a devise to any class of issue, or even to any individual child or other descendant, is simply and exclusively referential, and does not enlarge, or in any manner affect any of the prior estates. It is true that in Doe d. Harris *v.* Taylor (*f*) it was held on the authority of Evans *v.* Astley (*g*), which is overruled, and of Clements *v.* Paske (*h*), which it is submitted is not in point, that the words "for default of such *first* issue" did not mean for default of such "*first* son" as took under the previous limitation, but "for default of issue of such first son," and therefore that the first son took an estate tail. But Sir J. Romilly, M. R., declined to follow this decision (*i*), and it is submitted that it cannot be supported.

General position deducible from the cases.

Doe *v.* Taylor, opposed to other cases.

In Chorlton *v.* Craven, already stated (*j*), it was impossible to read the gift over "for want of *such* lawful issue of the name of C. either by Thomas or James" as simply referring to the sons who were objects of the preceding devise, for the sons of James were not objects of that devise. The intention, it was said, plainly was that the estate should not go over to the daughters until all the issue male of Thomas had been provided for; to * effectuate which it was considered an estate tail might be implied in Thomas in remainder after the estate tail male previously limited to his sons (*k*). Sufficient operation it was thought was given to the word "such" by referring it to the word "male" in the previous devise, — the intention that Thomas's entail should descend in the male line, being also manifested by the express desire to preserve the name of C. This construction by parity of reasoning enabled them to give the same estate tail in remainder to James (*l*), and the ultimate remainder to the daughters followed as a vested remainder, and completed the scheme of the will.

Referential construction excluded by context.

[*1298]

(*f*) 10 Q. B. 718.
(*g*) Ante, p. 1295.
(*h*) Ante, Vol. I., p. 456, n.
(*i*) Re Arnold's Estate, 33 Beav. 163.
(*j*) Ante, p. 1253, and (same devise) Parker *v.* Tootal, 11 L. J. Ca. 143.
(*k*) This construction was thought to have the greater weight as it accounted for the antecedent decisions of K. B. and of Lord Eldon; but, as already stated, no final opinion was expressed upon it, ante, p. 1254, n. (*l*).
(*l*) As to this see Vol. I., p. 521.

III. — 2. *Construction where the Expression is "Issue" simply.* — It is well settled also, that words importing a failure of issue (without the word "such"), following a devise to *children* in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large.[1]

2. In default of issue generally (without the word "such").

Thus, in Ginger d. White *v.* White (*m*), where a testator devised a house to his son J. (subject to an undivided interest given to a daughter during widowhood), and after the determination of that estate to the *male children of* J. successively, one after another, as they should be in priority of age, *and to their heirs;* and in default of such male children, to the *female children of J. and their heirs;* and *in case J. should die without issue,* then over to the testator's grandson W. and his heirs. One question was, whether the last words in italics did not give an estate tail by implication; and it was held that they did not. Willes, C. J., said that the word "issue" meant *such issue as the testator had mentioned before,* and he could mean no other, for he had devised the estate before to all J.'s sons and daughters. It seems that the learned Judge considered that the children took estate *tail,* on a ground which has been already alluded to (*n*).

So, in Goodright d. Docking *v.* Dunham (*o*), where a testator devised to his son J. for life, and after his death to all and every his *children* equally *and their heirs;* and in case his son died **without issue,* then unto his (the testator's) two daughters [*1299] and their heirs; Lord Mansfield without hesitation held that the limitation over was the same as if it had been "in case the son had died without *children.*"

Words held to refer to children objects of prior devise.

Again in Malcolm *v.* Taylor (*p*), where a testatrix devised (among other things) the moiety of an estate in Jamaica to her mother, and her sister Maria Taylor, for their lives, and the life of the survivor, and after the decease of the survivor, to such of the children of Maria Taylor as she by deed or will should appoint; and in default of appointment, then the said moiety to be divided equally between the said children, their heirs and assigns forever; and if but one then to such one child, his or her heirs and assigns forever; *and in case the said Maria Taylor should die without issue of her body lawfully begotten,* then the testatrix devised the moiety in question

(*m*) Willes, 348; Cormack *v.* Copous, 17 Beav. 397; Peyton *v.* Lambert, 8 Ir. Com. Law Rep. 485; Towns *v.* Wentworth, 11 Moo. P. C. C. 526; see Bowen *v.* Lewis, 9 App. Ca. 890.
(*n*) Ante, p. 1296.
(*o*) Doug. 264.
(*p*) 2 R. & My. 416. See also Doe *v.* Selby, 2 B. & Cr. 926, ante, Vol. I., p. 834; Tarbuck *v.* Tarbuck, post, p. 1301; Hale *v.* Pew, 25 Beav. 335; Maden *v.* Taylor, 45 L. J. Ch. 569, 572.

[1] Daley *v.* Koons, 90 Penn. St. 246; Sheets's Estate, 52 Penn. St. 257, 268.

over to other persons: it was considered clear that these words referred to the children who were the objects of the prior devise (*q*).

So, in Baker *v.* Tucker (*r*), where the devise was to the testator's natural son John for life, with remainder to the first and other sons of John successively in *tail male*, and in default of *such* issue, [*1300] to the daughters of John and their heirs as tenants in * common, and *in default of issue of the said John*, to the testator's right heirs; it was urged that, wherever any chasm of events occurs between the actual limitations to the children, and that upon which the gift over is made to depend, an estate tail in the parent whose issue is referred to in the gift over ought to be implied to fill up the chasm, and that an estate tail general ought therefore to be here implied in John to fill up the chasm occasioned by the absence of a provision for the female issue of his sons; such estate to be in remainder after the estates expressly given to his daughters, which for that purpose must be cut down to estates tail (*s*). But it was held in the House of Lords that the case was covered by Blackborn *v.* Edgley (*t*), where, the limitations being precisely similar (except that the limitation to the daughters was expressly in tail, and would therefore have required no cutting down in order to admit a remainder by implication), the referential construction prevailed: John therefore took an estate for his life only.

"Default of issue" referred to issue taking previous estates tail.

Again, in Gaymour *v.* Pigge (*u*) where the testator devised copyholds to his wife for life, remainder to his daughter for life, remain-

(*q*) In the unreported case of Clonmert *v.* Whitaker, (8th August, 1807, MS., with a note of which the Author has been favored), a testator devised unto his three sons, Thomas, George, and John, share and share alike, all his freehold, leasehold, and personal estate and effects. And he also further bequeathed, that, in case of the demise of either of his said sons, the said estate should be equally divided between his surviving sons; and if his sons had issue, *his* (the son's) *child or children should be entitled to the father's share. And in case they all died without issue*, then his freehold estate or estates situated in South Street, Peckham, should devolve to the heirs of his late brother Thomas, to be equally divided. The three sons suffered a common recovery, and the question, on a bill for specific performance filed by a person who claimed under the recovery and had contracted for the sale of the estate, was, whether the fee simple was acquired by their recovery. The Judges of C. P. (on a case from Chancery) certified that Thomas, George, and John who suffered the recovery, took such an estate as would have enabled them to make a good title, whereupon Lord Eldon decreed the specific performance of the contract.

It seems unnecessary to assume that the three sons were held to be tenants in tail contrary to the rule of construction deducible from the three last cases. The devise was sufficient to carry the fee to the three sons by force of the word "estate;" and all the subsequent limitations may be read as to be substituted only in case the sons died in the testator's lifetime, leaving their estates absolute if they survived him. But supposing this not to be so, the sons acquired a good title by the recovery quâcunque viâ: for if they were tenants in tail the entail was barred by it; if tenants for life with remainder (adopting the referential construction) to their children by purchase, still, as there do not appear to have been any children born when the recovery was suffered, the remainder was destroyed and a fee acquired by the sons.

(*r*) 3 H. L. Ca. 106. See also Watkins *v.* Frederick, 11 H. L. Ca. 358, 370.

(*s*) Citing Doe *v.* Halley, 8 T. R. 5, stated post.

(*t*) 1 P. W. 600. This case was alleged arg. to be misreported, and extracts from R. L. were cited to show that the gift over there was one from which in no case could an estate tail have been implied. But Lord Brougham observed that if the case had always been supposed to be of one purport, and as such had ruled subsequent cases, it would not do to go back to some critical difference; because the law might have been settled.

(*u*) 7 Beav. 475.

der to the first child of her body whether male or female and to his or her heirs and assigns forever; but if such child should depart this life under the age of twenty-one years without leaving issue of his or her body lawfully begotten, then the testator devised to the second and third child in similar words, and so on to the other children; but in case his daughter should die *without leaving issue of her body* lawfully begotten, or, having issue, such issue should die under the age of twenty-one years without leaving issue lawfully begotten as aforesaid, then he devised the estate over. Lord Langdale considered that the words "issue of the body," when used with reference to the daughter, must be understood to mean the children to whom, subject to the daughter's life estate, the property was previously given.

"Die without issue" referred to issue taking previous estates in fee.

It will be observed that in the last case the devise over was on the devisee for life dying without *leaving* issue, not, as in all that precede it, simply without issue; but the devisee for life never *having had a child, the effect of the word "leaving" was [*1301] not discussed. It should seem, however, that the introduction of that word would not vary the construction, inasmuch as the phrases "without issue" and "without leaving issue" have (we shall hereafter find) been held to be undistinguishable, in regard to their importing an indefinite failure of issue in reference to real estate. This remark, however, is made with great diffidence, as it may seem to clash with an opinion expressed by Lord Cottenham (when M. R.), in Tarbuck *v.* Tarbuck (*x*), where a testator devised his lands at Barnhill to his son James for his life, and after his decease to all the children of James lawfully to be begotten and to their heirs and assigns forever as tenants in common, and if but one child then to such only child, his or her heirs and assigns forever. And the testator charged the lands with the payment of an annuity. He then gave all his other lands to his son Jonathan, and his children in similar terms, also charged with an annuity. *And in case the testator's son James should happen to die without leaving lawful issue,* then the testator gave the lands devised to him to his (testator's) son Jonathan, his heirs and assigns; *and in case the testator's son Jonathan should happen to die without leaving lawful issue,* then the testator gave the lands devised to him to his (testator's) son James, his heirs and assigns forever. *But if both the testator's said sons should happen to die without leaving lawful issue,* then he gave the whole of the said hereditaments to his nephews and nieces in fee. The testator's sons, James and Jonathan, both died in the testator's lifetime, James leaving a son, who also died in the testator's lifetime. Jonathan died a bachelor. The M. R. held that in these events the devise over failed, on the ground that the son of

Whether any different effect attributed to "die without *leaving* issue."

Tarbuck *v.* Tarbuck.

Devise to children in fee followed by devise over on death without *leaving* issue.

(*x*) 4 L. J. Ch. N. S. 129.

James would, if he had survived the testator, have taken an estate in fee, and therefore the lapse of such devise, instead of letting in the ulterior devisee, occasioned intestacy (*y*). "The first question," said his Honor, "to be considered is, what estates would James and Jonathan have taken had they survived the testator? On the part of the nephews and nieces it was contended that they had estates tail, upon the ground that the gift over, being to take effect in case either died without leaving lawful issue, is postponed until an indefinite failure of issue, and therefore creates an estate tail. This rule has been adopted for the purpose of giving effect to the general intent of the testator, [*1302] *manifested in his devises over depending on a failure of issue generally, in order to give a chance at least of succession to persons who, though they cannot claim under a particular gift, are included in the general description of issue. That rule does not apply where this object is not to be attained, and amongst the exceptions is the very case which occurs here; namely, a gift to A. for life, with remainder to the children of A. in fee, that is, the children of A. in fee generally, and a gift over on the death of A. without issue, which means *such* issue, that is, children. This was the case of Goodright *v.* Dunham (*z*), which is precisely in point on this subject. In such cases the general term 'issue' is construed to mean that particular description of issue before specified, namely, children. It was indeed in this case, as it has been in former cases, contended, that such construction is a restricting of the meaning of the term issue, because thereby children's children would be excluded in the event of their parent's death before the testator's death (*a*); but this argument has not prevailed against the rational construction of making the gift over depend on the failure of the object before distinctly specified. Such were the cases of Blackborn *v.* Edgley (*b*), and Morse *v.* Marquess of Ormaode (*c*). I am therefore of opinion, that if James and Jonathan had survived the testator they would have taken estates for life, with remainder to their children in fee, *with gifts over in the event of there being no children at the respective times of the death of the tenants for life.* If they had so survived the testator, it is clear the gift to the nephews and nieces could not have taken effect, for that gift is only to take effect in the event of James and Jonathan not having lawful issue, that is, children according to the above construction; and

"Issue" held to refer to children, objects of preceding devise.

Lord Cottenham's construction of "die without *leaving* issue."

(*y*) As to this doctrine, vide post, Ch. L.

(*z*) Ante, p. 1298.

(*a*) But according to Goodright *v.* Dunham, and Malcolm *v.* Taylor, a child on its birth, or at the death of the testator, takes a vested fee, which of course, in the event of that child subsequently dying in the lifetime of the tenant for life, leaving issue, would descend to such issue, if not otherwise disposed of.

(*b*) 1 P. W. 600, cited ante, p. 1300.

(*c*) 5 Mad. 99, cited post, sub-s. 3. The M. R. also, it seems, adverted to the fact of the children of James and Jonathan taking as tenants in common; and on this point cited Doe *v.* Elvey, 4 East, 313; Gretton *v.* Haward, 6 Taunt. 94.

James, at the time of his death, had a son James who survived both his father and uncle Jonathan."

Remark on Tarbuck *v.* Tarbuck.

As in this case the child whose existence was held to have defeated the devise over, survived the parent, the devisee for life, it was not necessary to consider whether the words in question meant without having had a child, or without leaving a child * living at his decease; and therefore [*1303] the opinion of the M. R. on this point must be regarded as extra-judicial: and though even that opinion is entitled to great weight, yet it seems to present a more legitimate subject for critical examination. The construction, it is conceived, is not only unsupported by analogy, but is most inconvenient, as it diverts the interest of a child in the event of his dying before his parent, though he might leave twenty descendants of various degrees. It is conceived however that this opinion was virtually overruled in Doe d. Todd *v.* Duesbury (*d*), where the testatrix devised land to Thomas D. for life, with remainder to his child and children, if only one child then to such child, his or their heirs or assigns, but if more such children, then equally to be divided amongst them share and share alike, and to the heirs, executors, administrators, and assigns of such children respectively as tenants in common; but in case the said Thomas should happen to die *without leaving lawful issue*, then over. Thomas died without leaving any issue living at his death, but having had children (one of them born at the date of the will) who survived the testatrix, and it was contended on behalf of the devisees over that Thomas took only an estate for life with remainder either to his children as tenants in common in tail with remainder over, or with remainder to the children in fee with an executory devise over in the event of his not leaving issue at his death, which event happened. The Court of Exchequer negatived both constructions, holding that, if the gift over was to be construed as an executory devise limited on the estate to the children, it was too remote as being limited on a general failure of issue. Rolfe, B., delivered the judgment of the Court and said, "Whenever the words 'die without leaving issue' have been construed to mean 'die without leaving issue living at the death,' the Courts have always relied or professed to rely on some other expressions or circumstances apparent on the face of the will, and have never assumed to act against that which we consider to be a long-established settled rule of construction, namely, that in wills of real estates these words refer to a general failure of issue at any time, however remote."

"Die without *leaving* issue" held to mean failure of previous estates in fee to issue.

As the Court negatived the only two constructions upon which the plaintiff could recover, it was not necessary for them to say what was the true construction; but the case appears to fall within the decision in Goodright *v.* Dun-

Observations on Doe *v.* Duesbury.

(*d*) 8 M. & Wels. 514.

ham, and the words "die without leaving lawful issue" to [*1304] be referable to such issue of Thomas as *before mentioned. The gifts to the children of Thomas and to the devisees over were thus alternative contingent remainders, and the gift to the children having vested, that to the devisees over failed. It has indeed been said (*e*) that this construction was necessarily excluded, because there was one child already born at the date of the will, which survived the testatrix: so that no such contingency was possible as Thomas dying *without having had* any children. But this treats the child as persona designata, whereas the gift was to children as a class, of which the child existing at the date of the will might or might not turn out to be a member; and if that child had died before the testatrix and no other had been born, it is submitted that the gift over would have taken effect, for there would have been no object of the preceding devise within Goodright *v.* Dunham.

It must be observed that Tarbuck *v.* Tarbuck was not cited; and that it was not argued that the word "issue" in the gift over ought, by reference to the preceding devise, to be construed *children.* This, however, was Lord Cottenham's construction in Tarbuck *v.* Tarbuck; and the argument would be that "die without leaving *children*" was a phrase not governed by the settled rule to which the Court adverted, but was to be taken in its natural sense of "leaving *children* him surviving." But Ginger *v.* White and Goodright *v.* Dunham (*f*) were cited, and it is unlikely that this argument was overlooked by the Court. The inconvenience of such a construction has already been pointed out: moreover, it seems to be opposed to that series of cases which have decided that a gift over without *leaving* children following a vested gift to the children, is generally to be read without *having had* children (*g*). Indeed if the words in question are not held to be simply referable to the objects of the preceding devise (as in Goodright *v.* Dunham and that class of cases), it would seem to be even better to construe them as denoting a failure of issue of *every degree* living at the decease, than the failure of surviving *children.* An example of the former of these two species of construction is afforded by Hutchinson *v.* Stephens (*h*), where the devise was to trustees in fee upon trust for H. for his life, and after his decease upon trust for the child and children of H. lawfully to be begotten, at his, her, or their respective ages of twenty-one years, if more than one as [*1305] tenants *in common; and if there should be but one child living at his decease then in trust for such only child at twenty-one: *but in case H. should die without leaving any issue of his body*

Remark on Doe *v.* Duesbury.

(*e*) By Jarvis, C J., Foster *v.* Hayes, 4 Ell. & Bl. 739.
(*f*) Ante, p. 1298.
(*g*) White *v.* Hill, L. R., 4 Eq. 265; Treharne *v.* Layton, L. R., 10 Q. B. 459 (will dated 1863), and other cases cited Ch. XLIX. ad fin.
(*h*) 1 Kee. 240.

living at the time of his decease, then over. H. had two children, both of whom died in his lifetime, one of them leaving children who survived H. Lord Langdale, M. R., held that, in the event which had happened, the children took estates in fee simple as tenants in common. In this case the words, "if there shall be but one child *living at his decease*," appeared to supply a plausible argument for readiug the word "issue," subsequently occurring in juxtaposition with the same words, in the sense of *children*, and its rejection serves to show the strong disinclination of the Courts to adopt a construction which exposes the vested interest of a child to be divested on decease within a given period, although leaving issue who survive that period: and hence the case tends to confirm the remarks made on Lord Cottenham's construction in Tarbuck *v.* Tarbuck.

Remark on Hutchinson *v.* Stephens.

So, in *Ex parte* Hooper (*i*), where the devise was to A. for life, and after her decease to her children "(in case she shall *leave* more than one child), their heirs and assigns as tenants in common, but in case she shall *have* only one child then to such one child in fee;" but in case A. should "die without *leaving* any issue," then to such children as the testator should *leave or have living at the time of the death of A.* Sir R. Kindersley, V.-C., decided, first, that under the original devise the property vested in the children on their birth; secondly, that the testator plainly meant failure of issue at the death of A.; and thirdly, that, as there was a grandchild then living, the limitation over failed (*j*).

"Die without leaving issue" held not to refer to issue before mentioned.

But if the original devise is to such children as survive their parent, the construction which reads the words "die without leaving issue" as denoting a failure at that time of issue of every degree, might defeat the gift over without benefiting any previous devisee. The simply referential construction, though it would not, any more than that just mentioned, provide for surviving issue of remoter degree than children, would save the * gift over. Thus, in East- [*1306] wood *v.* Avison (*k*), where the primary gift (implied from a power of testamentary appointment) was to children living at the death of their father, the donee, with a gift over on his death "without issue," it was held that this meant without children objects of the previous gift, viz. children living at the death of their father. But for the power (*l*) it seems that the father might have been held en-

(*i*) 1 Drew. 264, 21 L. J. Ch. 402.

(*j*) The first was the principal point. The V.-C. held "leave" *in the parenthesis* to mean "have," assisted thereto by finding "have" used in a corresponding portion of a similar devise to a brother of A. and his children. He is sometimes cited (L. R., 4 Eq. 269, 270, 7 Eq. 476, 10 Q. B. 462) as having construed "leaving" in *the gift over* as "having;" but, notwithstanding the marginal note in 1 Drew. his opinion on that clause was distinctly contrary (1 Drew. 268), and therein agrees with his opinion, 2 Sim. N. S. 202, 203, stated ante, p. 1291. See also Re Ball, Slattery *v.* Ball, 36 Ch. D. 508, 511.

(*k*) L. R., 4 Ex. 141. But see Doe *v.* Hopkinson, post, p. 1309.

(*l*) As to the restriction thus imposed on the words "die without issue," vide Ch. XLI., s. ii., sub-s. 2.

titled to an estate tail by implication from the words "die without issue," such estate tail to take effect in the alternative of there being no children at his death. An implication of this kind (as will presently be seen) is frequently made to supply a gap caused by the exclusiveness of the primary gift.

It seems that where the testator not merely devises over the property in the event of the parent dying without issue, but goes on to provide for the contingency of the *issue* also dying without issue, the effect is to cut down the fee simple of the children to an estate tail (*m*); although, it will be observed, by this construction two different meanings are given to the word "issue" in the same sentence (*n*). In Ives *v.* Legge (*o*) this construction was given to the phrase "in default thereof," following a devise to the parent for life, with remainder to the children in fee: it was held to refer to both the children and the heirs of the children; and, as the devisee over stood in the relation of uncle to the children (so that there could not be a failure of their heirs while he lived), the word "heirs" was read heirs *of the body* (*p*).

Effect where words refer to failure of issue of children, objects of prior devise.

"In default thereof."

An examination of the preceding cases will suffice to show how numerous, and, in some instances, how refined, are the [*1307] *distinctions upon which the construction of words importing a failure of issue depends. They cannot, it is conceived, but suggest the wish, that these words had been more strictly confined to the office of merely connecting the two limitations between which they are interposed: and that whenever the preceding devise embraced *any* class of issue, they had been considered as referential to those objects, which is the established rule in regard to the expression *such* issue. The application of this rule to the cases under consideration would have required only the implication of the word "such." Though, in the state of the authorities, it may seem dangerous to advance any general conclusions upon the subject, the writer ventures to submit

General remarks on preceding cases.

(*m*) Doe d. Barnard *v.* Reason, cit. 3 Wils. 244; but as the words were "in default of such issue," the case hardly seems to fall within the present section. The devise was to E. for life, and after her decease to such issue of the body of E. as should be then living, and to the heirs of such issue; and if there should be only such issue one child, then the whole to that one child and its heirs; and if two or more children, then to such two or more and their heirs, as tenants in common: and in case E. should die without issue then living, *or in case all such issue should die without issue*, so that the descendants of her body should be dead without issue, then to B. and F. in fee. It was held that E. took an estate for life only, with remainder to her issue (qu. children) in tail, with a vested remainder to B. and F. See also Southby *v.* Stonehouse, 2 Ves. 611; Smith *v.* Horlock, 7 Taunt. 129.

(*n*) But the force of this objection is somewhat weakened by the fact that the word "issue" in this position must be used, in the first instance, in a restricted sense, since the failure of such first-mentioned issue is treated as an event distinct from the failure of the issue subsequently mentioned, which of course would be involved therein if the word "issue" denoted issue indefinitely.

(*o*) 3 T. R. 488, n.

(*p*) Ante, p. 1173.

the following propositions, as deducible from the cases; in framing which, to avoid the risk of misleading the reader, he has cautiously adhered to the circumstances of the several cases, without extending his propositions to others apparently within the scope of the principle.

1st. That the words, *in default of issue* or expressions of a similar import, following a devise to *children in fee simple*, mean in default of *children*, and following a devise to children in tail, mean in default of children or of issue inheritable under the entail (*q*). This is free from all doubt.

Conclusions suggested.

2d. That these words following a devise to *all* the sons successively in tail male, and daughters concurrently or successively in tail general, or in tail special, are also to be construed as signifying *such issue*, even in the case of an executory trust (*r*)

3d. That words devising over the property on failure of issue *male*, following a devise to the whole line of sons successively in tail male, are also referential to those objects (*s*).

3. When words importing failure of issue raise an estate by implication.

3. *When words importing Failure of Issue raise an Estate by Implication.* — It may be observed, that whatever tends to narrow the range of objects comprised in the express devise to issue of a certain class or denomination, tends in the same degree to weaken the ground for construing subsequent words importing a failure of * issue [*1308] to refer exclusively to those objects. Thus, the circumstance of the prior gift to children being restricted to such as should attain a particular age was considered to exert this kind of influence upon the construction in Doe d. Rew *v.* Lucraft (*t*), where a testator devised certain hereditaments to A. and B. and their heirs, in trust nevertheless as to one undivided moiety for N., his heirs, and assigns forever; and as to the other moiety in trust for such *son* of the testator by his then wife *as should first attain the age of twenty-one years*, as and when such son should attain such age, and for his heirs and assigns forever; but in case the testator should depart this life without leaving a son, or, leaving such, none should live to attain the age of twenty-one years, then, as to the last-mentioned moiety, in trust for the testator's *daughter J., if she should live to attain the said age of twenty-one years*, and for her heirs and assigns forever; but, in case J. should depart this life under that age, then unto A. and B. and their heirs, in trust for such *other his* (testator's) *daughter* by his then wife *as should first live to attain the age*

Doe *v.* Lucraft.

(*q*) Goodright *v.* Dunham, Doug. 764, ante, p. 1298; Doe *v.* Duesbury, 8 M. & Wels. 514, ante, p. 1303; Ginger d. White *v.* White, Willes, 348; Baker *v.* Tucker, 3 H. L. Ca. 106, 14 Jur. 771, ante, p. 1299.

(*r*) Blackborn *v.* Edgley, 1 P. W. 600, ante, p. 1300; Morse *v.* Marquis of Ormonde, 5 Mad. 99, 1 Russ. 382, ante, p. 1302; Peyton *v.* Lambert, 8 Ir. Com. Law Rep. 485.

(*s*) Bamfield *v.* Popham, 1 P. W. 54, 760, 1 Eq. Ca. Ab. 183, 2 Vern. 427, 449.

(*t*) 1 M. & Sc. 573, 8 Bing. 386. See also Alexander *v.* Alexander, 16 C. B. 59.

of twenty-one years, and for her heirs and assigns forever; *but should he* (testator) *depart this life without leaving issue*, then he gave the entirety of the said hereditaments unto A. and B. and their heirs, in trust for N. in fee. The testator died leaving issue his daughter J., who died at the age of four years. The point of construction related to the words in italics, as affecting the devise over. Tindal, C. J., said, "The natural meaning of the words is, either a general failure of issue, in which case the devise over would be too remote, and, consequently, would be void; or they may be taken to contemplate the case of the testator dying leaving no child or children, in which case the event upon which the devise over was to depend never happened; for the testator left a daughter living at the time of his death. But it is contended that these words will also admit of a third interpretation; thus, 'should I depart this life without leaving *such* issue *as before mentioned;*' that is, not only without leaving a son or a daughter, but accompanied by the restriction before recited in the will, viz. a son or a daughter who shall live to attain the age of twenty-one years. Cases have been cited to show that the word 'issue' may be construed to mean such issue as the testator had before referred to; but no case can be found wherein the principle has been carried further. It has never been held that [*1309] * the term may also include any restrictions which may have accompanied it in any former part of the will. Admitting that we may read the clause thus — 'without leaving a son or daughter' — what authority have we to insert a restriction — 'who shall live to attain the age of twenty-one years?' We clearly are not at liberty to insert any such restriction. It seems to me that if we were to import the latter words into this part of the will we should be doing violence to other parts of it, or in fact making a new will altogether. The earlier part of the will contains a different disposition from that in dispute. It is material to observe that when the testator is disposing of the moiety in question to his son, and afterwards to his daughter, he does insert the words of restriction, and that he has omitted them in the devise over to the defendant. When, therefore, we see that in one part of his will the testator has used expressions restraining the meaning of the word "issue," and that in another part he has not used them, it seems to me that we should not be warranted in concluding that such omission was not intentional."

Words held not to be referable to issue before mentioned, being issue who should attain a certain age.

So in Doe d. Bills *v.* Hopkinson (*u*), where a testatrix devised land to A. and B. for their lives in equal shares, and after their death she gave the moiety of A. to such child or children *as he should happen to leave lawful issue at the time of his death*, as tenants in common in fee; and

Words held not referable to "children (prior devisees) who should survive" the ancestor.

(*u*) 5 Q. B. 223.

gave the share of W. "to such child or children *as he should happen to leave living lawful issue at the time of his death*, as tenants in common in fee; but if either A. or B. should die *without lawful issue* the testatrix gave his moiety to the other and to C. for their lives with remainder to their lawful issue in equal moieties in fee; and if both A. and B. should die and neither of them should leave any lawful issue, then she gave the whole to C. for life, remainder to such children, &c.; and if A., B., and C. should all die without lawful issue, or if any of them should leave lawful issue and such issue should die under twenty-one and without issue, then over. The question was whether the remainder to the children of A. was contingent until his death, or vested on the birth of one, with a liability to open and let in any after-born child. It was contended that the former was the true construction, and that the words "without lawful issue" in the gift over meant without such issue as before mentioned, namely, children living at the death of A. But the Court said that, according to this, A. might have issue * (children) who should [*1310] die in his lifetime leaving issue, and yet the estate might go over to B. and such issue would be barred: so of the issue of B. and C. To avoid these inconsistencies the Court, apparently not seeing any other way of escape (*x*), held that the remainder was vested. Rejecting wholly the referential construction of the words, it would seem that the Court acquiesced in the contention that the only alternative was to read them as importing an indefinite failure, which, unless an estate tail was implied in A., would of course have been void for remoteness. But nothing was decided except that the remainder to the children was vested, a decision which is scarcely reconcilable with the authorities relating to the vesting of estates (*y*).

In Doe *v.* Lucraft the Court did not refuse to construe "issue" (in the gift over) as *children*, but only to construe it as "children of the restricted class before mentioned" (*z*). In Doe *v.* Hopkinson the Court did both. But in Sanders *v.* Ashford (*a*), where a testator devised lands to A. for life, remainder to his first son who should attain twenty-one in fee, and in case A. should have no son to attain that age, then to the daughters of A. as tenants in common in fee; but "in the event of A. dying without having any issue male who should attain the age aforesaid, or any issue female, then over;" it was held by Sir J. Romilly, M. R., that the gift over on failure of issue meant on failure of such issue male and female as mentioned in the prior devise; for the repetition of the restrictive words showed that this was the issue he had present to his mind.

"Die without issue to attain twenty-one," referred to prior gift to "first son who should attain twenty-one."

(*x*) But see end of this s.
(*y*) See Vol. I., pp. 775, 776.
(*z*) See per Parker, V. C., Bryan *v.* Mansion, 5 De G. & S. 737.
(*a*) 28 Beav. 609.

Again in Franks *v.* Price (*b*), where there being in a will (among numerous limitations) a devise *in certain contingent events* of the respective moieties to A. and B. for life, with remainder to their respective first and other sons in tail male, which were followed by a devise over in case A. and B. should both die without leaving issue male, or such issue male should die without leaving issue male; it was held after much argument that, as the preceding devises did not carry the property to the issue male of A. and B. in every possible event, the words introducing the devise over had the effect of creating an implied estate tail in remainder expectant on the estates conferred by those devises (*c*).

"Die without leaving issue male" not confined to sons being prior contingent devisees.

[*1311] *By keeping steadily in view the principle above suggested, namely, that the argument in favor of applying to the objects of a prior express devise words denoting a failure of issue, gains or loses force in proportion as such prior devise is more or less comprehensive in its range of objects, we shall be able to reconcile the preceding cases (in which a clause of this nature, following a devise to the whole line of children or sons, has been held to refer to the objects of such prior devise), with those in which similar words, preceded by a devise to one or more son or sons only, have been decided not to be simply referential, but to import, under the old law, a general failure of issue, and, therefore, in the case of real estate, to confer an estate tail on the parent; such implied estate tail being either an estate in possession, or in remainder expectant on the determination of the estates comprised in the prior express devise (*d*).

Principle on which preceding are reconcilable with cases where the referential construction was not adopted.

Estate tail raised by implication.

The following would seem to be the result of the decisions on this subject under the law prior to 1838 (*e*):—

1st. That where the children took a life estate only, the words "in default of issue" introducing the gift over created an estate tail by implication in the parent subject to the children's life estates (*f*).

2d. That where there was a prior devise to a *definite number of*

(*b*) 6 Scott, 710. 5 Bing. N. C. 37, 3 Beav. 182.

(*c*) It is observable that, A. having died without issue male, B. was held to be tenant in tail of the entirety; so that it should seem that Lord Langdale considered that the words in the text distinguished by italics had the effect of giving to A. and B either successive estates tail male by implication in the entirety (as in Tenny *v.* Agar and Romilly *v.* James, ante, Vol. I., p. 521), or, as seems more probable, estates in tail male in the respective moieties, with cross-remainders in tail male. He did not advert to this point (which is one of considerable nicety), conceiving, probably, that B. was entitled in either case.

(*d*) See for a fuller statement and discussion of the cases bearing on this question (which are here merely referred to), the 4th Edition of this Work, Vol. II., pp. 471, et seq.

(*e*) The reader is recommended, before he unreservedly accedes to the above propositions, to consult the cases themselves, in order that he may see how far the construction may have been aided by the circumstances of the particular case.

(*f*) Doe *v.* Gallini, 3 Ad. & Ell. 340. Parr *v.* Swindels, 4 Russ, 283; and per Lord Kingsdown, Towns *v.* Wentworth, 11 Moo. P. C. C. 546.

sons only in tail male, with a limitation over in case of default of issue or issue male of the parent, an estate tail was also implied in the parent, in order to give a chance of succession to the other sons (*g*).

3d. That in the case of executory trusts, words importing *a dying without issue*, following a devise to the first and other sons of a particular marriage in tail male, authorized the insertion of *a limitation to the parent in tail general, in remainder [*1312] expectant on those estates (*h*).

4th. That such words (whether they referred to issue or issue male), succeeding a devise to the eldest son for life or in tail, were not referable to such son exclusively, but created in the parent an implied estate tail (*i*) in remainder expectant on the estate for life or in tail of the son (*j*); and which rule also, it seems, applied where children only who survived a specified period took estates tail (*k*).

5th. That the circumstance of the preceding devise to children, &c., being subject to a contingency (*l*), is rather unfavorable to the construction which reads words importing a failure of issue to a failure of the objects of such perceding devise.

The only practical importance of the above propositions, as regards wills which operate under the present law, is to indicate classes of cases in which the referential construction has been rejected. Where in the case of a will made or republished since 1837, a question is raised as to whether words importing failure of issue are referable to the objects of the preceding devise, if this question be decided in the affirmative the construction will not be in the least affected by the change in the law; but if it be adjudged that the words under discussion do not refer to the objects of the prior devise, the result now will be widely different; for, instead of being construed (as formerly) to import an indefinite failure of issue, they must (unless the context forbids) be held to point exclusively to issue living at the death, and, consequently, can never under any circumstances, by their own intrinsic force (*m*), have the effect of creating an estate tail by implication (*n*).

Effect on this question of the stat. 1 Vict. c. 26.

(*g*) Langley *v.* Baldwin, 1 P. W. 759, 1 Eq. Ca. Ab. 185, pl. 29, 1 Ves. 26; Att.-Gen. *v.* Sutton, 1 P. W. 754, 3 B. P. C. Toml. 75,

(*h*) Allanson *v.* Clitherow, 1 Ves. 24.

(*i*) Stanley *v.* Lennard, 1 Ed. 87; Key *v.* Key, 4 D. M. & G. 73.

(*j*) Doe d. Bean *v.* Halley, 8 T. R. 5.

(*k*) Doe *v.* Gallini, 5 B. & Ad. 621, 3 Ad. & Ell. 340.

(*l*) Doe *v.* Lucraft, 8 Bing. 386, 1 M. & Sc. 573; Franks *v.* Price, 6 Scott, 710, 5 Bing. N. C. 37, 3 Beav. 182; Alexander *v.* Alexander, 16 C. B. 59; Doe *v.* Gallini, supra; and per Lord Cranworth, 8 H. L. Ca. 598.

(*m*) See Ch. XLI ad fin.

(*n*) In connection with the implication of estate tail under the old law, the doctrine of general and particular intention may be here adverted to, *i.e.*, that supposed rule of construction by which the particular intention expressed in a will was sacrificed to the general and paramount intention that the estate should not go over to the next devisee until the issue of the preceding devisee should have become extinct, and which was considered to authorize the

In such a case, the effect of holding the words in question [*1313] *not* * to refer to the issue who are the objects of a preceding devise, will be to render the estate of the *children*, conferred by such devise, determinable on the event of the parent dying without leaving *issue* living at his death, as in Hutchinson *v.* Stephens (*o*), which is a result that ill accords with probable intention. Such a case, however, can only occur where the devise to the children, or any other class of issue, gives estates in fee, as it would under wills which are subject to the present law, even without words of limitation; for if the devise in question confers estates for life only, the determination of such estates is involved in the failure of the issue whose extinction is the contingency on which the ulterior devise depends. We see, therefore, in the effect of the present law increased motive for adhering to the principle of Goodright *v.* Dunham and Malcolm *v.* Taylor (*p*), which it will be remembered authorize the proposition, that, where a devise to children in fee is followed by a devise over to take effect on the failure of the issue of the parent of such children, the words importing a failure of issue refer to the children or other issue who are the objects of the prior devise, which principle would, it is conceived, apply to devises embracing any other class of children, as sons or daughters (*q*).

Effect under the Wills Act of rejecting referential construction.

For instance, if lands are devised to A. for life, with remainder to his sons, and if A. should die without issue, then to B., each

giving to such prior devisee an estate tail. This doctrine occupies a conspicuous place in the will cases of one period, and gave rise to a long series of legal decisions indicating much conflict of judicial opinion. It does not seem quite clear what was the "particular intention" which was thus to be sacrificed. In Robinson *v.* Robinson, 1 Burr. 38, 2 Ves. 225, ante, p. 1247 (where the expression in this sense first appears), no *particular* intent was referred to. In Roe *v.* Green, 2 Wils. 322, ante, p. 1264, Wilmot, C. J., appears to have meant by it simply the estate for life. See also per Lord Kenyon, in Doe *v.* Applin, 4 T. R. 87, 2 R. R. 387; Denn *v.* Puckey, 5 T. R. 303, 2 R. R. 601. In this sense, however, it is merely descriptive of the operation of the rule in Shelley's case (as to which see ante, Ch. XXXVI.). In some cases indeed, the phrase "particular intent" appears to have been construed to include an express gift to a particular degree of issue. See Doe d. Candler *v.* Smith, 7 T. R. 532, 4 R. R. 521; Doe *v.* Cooper, 1 East, 229. But there is conclusive authority against such an extension of the supposed doctrine. See Langley *v.* Baldwin, 1 P. W. 759; Att.-Gen. *v.* Sutton, 1 P. W. 754; Stanley *v.* Lennard, 1 Ed. 87; Doe d. Bean *v.* Halley, 8 T. R. 5; Parr *v.* Swindels, 4 Russ. 283; Doe *v.* Gallini, 5 B. & Ad. 621. So far, therefore, it is clear that the doctrine had existed only in name. And in Doe *v.* Gallini, Lord Denman thus explains the meaning of the supposed rule so far as it is now of any force:—"Technical words or words of known import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense." For a fuller discussion of the doctrine of general and particular intention, see the 4th edition of this work, Vol. II., p. 484 et seq.

(*o*) 1 Kee. 240, ante, p. 1304.

(*p*) See ante, pp. 1298, 1299.

(*q*) In Treharne *v.* Layton, L. R., 10 Q. B. 459, a testatrix by will, dated 1863, gave her real and personal estate to M. for life and after her death to her *children;* M. to make a weekly allowance to R. during his life: if M. "dies *leaving* no *issue*" the whole of the property to go to the next of kin, they making the same allowance to R. during his life. M. had only one child, who died before her. It was held in Ex. Ch., affirming Q. B., that "leaving" must be construed "having had." The Court proceeded wholly on the authority of Maitland *v.* Chalie, 6 Mad. 243 and similar cases (as to which see Ch. XLIX.), and no reference was made to the statute, or (expressly) to the doctrine discussed in this chapter.

* son of A. under the original devise would, immediately on [*1314] his birth, take a vested remainder in fee simple in his own aliquot share; and if the subsequent words were held merely to refer to the objects of the prior devise, the ulterior limitation of course would not disturb or affect such vested remainder; but if the words in question were adjudged not to bear this construction, but to point to issue of every degree living at the death of A., they would subject the vested estate of the sons of A. to an executory devise, to take effect in the event of A. dying without leaving issue *surviving him*, a result which it is conceived the Courts, when applying the new rules of construction, will not hesitate to reject, in deference to the authority of the cases just referred to. The enactment which makes a devise pass the fee simple without words of limitation will, it is obvious, greatly extend the application of the doctrine of Goodright *v.* Dunham and Malcolm *v.* Taylor (*r*), and in this respect seems to operate very beneficially, in concurrence with that which reads words importing a failure of issue as denoting issue living at the death, when not simply referential to the issue described in the prior devise.

4. *Devises of Reversions.* — Devises of reversions sometimes give rise to a question which bears a strong analogy to that discussed in the present chapter. This occurs where a testator, having a reversion in fee, subject to estates tail belonging to the sons or other partial issue of a person (*s*), devises the reversion as property in the event of that person dying *without issue*, which necessarily raises the question whether or not these words refer to the determination of the subsisting estates, or, in other words, whether they are words of description or donation: in the former case the devise operates as an immediate disposition of the reversion (*t*), and therefore was, as it still is, unquestionably valid. The sound rule to be deduced from the authorities would seem to be that, wherever it may be collected from the general context of the will, that it is the testator's intention to dispose of his reversionary interest expectant on the subsisting estates tail, such intended * disposition will [*1315] not be defeated by the neglect of the testator to adapt his language with precision to the events on which the reversion will fall into possession. The consequence of rejecting this construction commonly was, under the old law, to invalidate the intended devise of the reversion for remoteness, as depending on a general failure of

4. Devises of reversions.

Whether words refer to determination of subsisting estates.

(*r*) See note (*p*).

(*s*) The writer has avoided suggesting the case of the limitations being to the testator's *own* sons, because such cases may perhaps be considered as falling within another principle, discussed in the next chapter. See Sanford *v.* Irby, 3 B. & Ald. 654, and other cases there discussed.

(*t*) See ante, Vol. I., p. 757. Of course as well under the present, as under the old law the gift over is liable to be defeated by a disentailer.

issue; but in this respect the law is altered by the statute 1 Vict. c. 26 (*u*). So that, even if the referential construction is rejected, the gift over will now be valid, and take effect, provided that there is no issue of the person named living at his death; otherwise, the gift over will altogether fail to take effect, not on the ground of remoteness, but because the contingency on which the gift depends, as interpreted by the statute, has not occurred. Having regard to this latter alternative, a consideration of the cases may still occasionally be of some value, as illustrating the considerations which have led the Courts to adopt or reject the referential construction.

A point of this nature occurred in Lady Lanesborough *v.* Fox (*x*), where A., having settled the lands in question on the marriage of his son B., to the use of himself (A.) for life, remainder to his son B. for ninety-nine years if he so long lived, remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of B. *on his intended wife to be begotten* successively in tail male, remainder to the heirs *male* of the body of B., with reversion to the right heirs of himself (A.), by his will devised the lands contained in the settlement *on failure of issue of the body of* B., *and for want of heirs male of his* (A.'s) *body, to his daughter* F. *in tail:* and the House of Lords adjudged, in concurrence with the unanimous opinion of the Judges, that the will did not give an estate tail by implication to B., and that therefore the devise over to F. was executory, and void, as being on too remote a contingency.

Observations upon Lanesborough *v.* Fox.

If this case had rested solely on the circumstances that the subsisting estate tail in B. embraced the heirs *male* only, and the devise in the will referred to his (B.'s) issue *generally* (which certainly was argued as the chief point in the case), the decision, it is conceived, could hardly have been sustained, consistently with the rules of construction deducible from the cases discussed in the present chapter, in many of which we have seen that words referring in terms to issue or issue male have been held to apply to *children* or *sons*, being the objects of the antece-
[*1316] dent * limitations (*y*). A fortiori therefore in the present instance would they have been construed to be referential, where the approximation to a correct reference to the subsisting estates was such as to require only the word "male" to be supplied; and Tuck *v.* Frencham (*z*) affords an instance (if authority were requisite) of this word being supplied to make words referring to issue generally correspond with the antecedent limitations in favor of issue male created by the same will.

Whether words of contingency refer to subsisting estate tail.

These remarks assume that the principle which governs the application of phrases of this nature to limitations created by the same

(*u*) See ante, p. 1285.
(*x*) Cas. t. Talb. 262.
(*y*) Ante, p. 1307.
(*z*) 1 And. 8, Moore, 13, pl. 50; ante, Vol. I., p. 449.

will, and to estates antecedently created, is identical. It seems difficult to find a solid distinction between the cases, especially where, as in Lanesborough *v.* Fox, the testator refers to the settlement in describing the subject of disposition; the difference between the two cases, indeed, if any, would seem to be, that the courts would incline more strongly to the referential construction in the latter case, where the effect is to support a devise otherwise void (*a*), than in the former, where, as an estate tail can generally be implied, the devise is valid quâcunque viâ. The preferable ground, however, upon which Lanesborough *v.* Fox appears to stand, is afforded by the other words "and for want of heirs male of my own body;" for, as the testator had no estate tail, and none could be implied, it is clear that, unless the words could be held to refer to issue *living at the decease of the testator*, according to the rule discussed in the next chapter (*b*) (in which it will be seen there was considerable difficulty, inasmuch as the testator had a son living), the devise was void (*c*).

The principle was again agitated in Jones *v.* Morgan (*d*); where A. having, on his marriage with B., settled certain estates upon himself and the sons of the marriage in tail male, with reversion in fee to himself, and having two sons of the marriage, devised the estates, in case his said sons, *or any other son or sons of his thereafter to be born, should die without issue male of their bodies*, to his brother T. The question was, whether the testator, by the mention of "sons to be born," was to be understood as * meaning after-born sons by his wife B. (who [*1317] was living), or as having in his contemplation the sons of a future marriage. If confined to sons of A.'s present marriage, it was a good devise of the reversion, as the contingency expressed by him (on which the devise was to take effect) embraced precisely the estates under the settlement, on the determination of which his own reversion would fall into possession, it being the same as if he had said, "Whereas my estate is settled upon my first and every other son in tail male by my marriage settlement; therefore, in case they all die without issue male of their body, I give it to my brother," which would clearly have been good as a devise of the reversion; and a circumstance much relied upon for this construction was, that the testator appointed B. a guardian of his children and executrix of his will, which negatived the supposition of his contemplating a future marriage (*e*). On the other hand, it was contended, that the expres-

Whether sons of an existing or future marriage were referred to.

(*a*) We are here speaking of the *old* law.

(*b*) Post, p. 1326.

(*c*) It is remarkable that Mr. Fearne, in his strictures on this case, Cont. Rem. 447, while he treats the want of the word "male" as a fatal omission in referring to the estate tail of the testator's son, seems to consider it not impossible that the words "for want of the testator's own heirs male" should be held to be referential to the son, though this hypothesis takes so much greater liberty with the testator's language.

(*d*) Butl. Fea. App. 578, 3 B. P. C. Toml. 322.

(*e*) See this principle applied to a different species of case, Wilkinson *v.* Adam, 1 V. & B. 422, ante, p. 1087.

sions used by the testator included the sons of an after-taken wife, and, as such sons could not take an estate by implication, the limitation over to the testator's brother was an executory devise void for remoteness. Lord Camden sent a case to the Court of King's Bench, the Judges of which certified their opinion that the event of a second marriage was not in the testator's contemplation, but that, if it were, the sons of that marriage took an estate tail. Lord Bathurst, who, in the mean time, had succeeded to the seal, concurred in the former branch of this certificate, and decreed accordingly; but he dissented from the opinion, that an estate tail was raised by implication, conceiving Lanesborough *v.* Fox to be a direct authority against it. The decree was affirmed in the House of Lords, on the ground that a future marriage was not in the contemplation of the testator, and that the devise to his brother was therefore good (*f*).

Words held to refer to subsisting estate tail.

But in Bankes *v.* Holme (*g*), where lands having been limited, upon the marriage of A. with B., to the use of A. for life, with remainder to trustees to preserve, with remainder to trustees for certain terms of years, with remainder to B. for life, remainder to trustees to preserve, remainder to the first and other sons of the marriage in tail male, with remainder to [*1318] the daughters as tenants * in common in tail, with cross remainders, with reversion to A., the settlor, in fee; A. made his will, by which he recited that, by the settlement in question, he was seised of or entitled to the reversion in fee simple expectant on the decease of his wife B., in case there should be no child or children of his said wife by him begotten, or there being such all of them should happen to depart this life *without issue.* The testator then, in case he should die without leaving any children or child, or there being such "all of them should happen to depart this life *without issue* lawfully begotten," devised the premises upon certain trusts. Sir J. Leach, V.-C., held that this devise, being after a general failure of issue of the children, was too remote and void; and this decree was affirmed in the House of Lords.

Words held not to refer to subsisting estates.

Lord Eldon observed in Morse *v.* Lord Ormonde (*h*) that this was a "very strong decision" (an expression which, in the mouth of this venerable Judge, always means a *wrong* decision); and it seems, indeed, to be very difficult to reconcile it with the principles of the line of cases just stated. It was manifest from the recital of the settlement that the testator had in view the reversionary estate expectant on the limitations of the set-

Bankes *v.* Holme questioned.

(*f*) In Trafford *v.* Boehm 3 Atk. 442, a devise, "after failure of issue" of the testator's wife by him, was construed as an immediate gift of the reversion, the words in question being referential to the subsisting limitations of their marriage settlement; but the will contained an express reference to the settlement (the particular limitations of which do not appear) for another purpose.

(*g*) 1 Russ. 394, n. See also Bristow *v.* Boothby, 2 S. & St. 465.

(*h*) 1 Russ. 406, Sugd. Law of Prop. 351.

tlement, whatever that reversion was; and the terms used were merely an erroneous and mistaken reference to the events on which such reversion would fall into possession. The case seems irreconcilable with Jones *v.* Morgan, which it closely resembles. It is not likely that the decision will be followed.

And this conclusion is fortified by Egerton *v.* Jones (*i*), where, in pursuance of marriage articles, an estate at C. had been conveyed to the use of A. for life, with remainder to B. his wife for life, with remainder (subject to a term of five hundred years for raising portions for younger children) to the use of the first and other sons of A. and B. successively in tail male, with remainder to the use of trustees for six hundred years, upon certain trusts in the event of there being no male issue of A. and B. who should live to attain the age of twenty-one years, with remainder to the use of A., his heirs and assigns. A. by his will devised as follows: "And as to the reversion and inheritance of the freehold estate by me already purchased at C. aforesaid, and such other estate or estates as I shall hereafter purchase in pursuance of my marriage articles, *in case of failure of issue of my body by my said* * *wife*, I give," &c. Sir L. Shadwell, V.-C., expressed a strong [*1319] opinion that this devise operated as a valid immediate gift of the reversion; but it was not necessary for him to go further than to declare that the title depending on the opposite construction was too doubtful to be forced on a purchaser.

Devise on failure of issue held to be an immediate devise of reversion.

If the V.-C. had been called upon to adjudicate on this point of construction, it is conceived his decision must have been in accordance with his expressed opinion. Jones *v.* Morgan would have more than warranted, and even Bankes *v.* Holme would not have opposed, such a conclusion; for the Court had not here (as in those cases) to supply words in order to restrict the issue spoken of in the will to the issue of a particular marriage (who were the tenants in tail under the settlement), the testator having in the will distinctly referred to the issue of that marriage.

Remark on Egerton *v.* Jones.

In this chapter the alteration in the law introduced by s. 29 of the Wills Act has been regarded in its effect only upon the *prior* estates. With respect to the *ulterior* estate, *i. e.*, the estate which is to take effect on the failure of issue, its operation is more decidedly beneficial, for it prevents such ulterior devise from being rendered void for remoteness, where the words "denoting the failure of issue" would have the effect neither of referring to the objects of the prior devises, nor of creating an estate tail by implication.

(*i*) 3 Sim. 409; and see Eno *v.* Eno, 6 Hare, 171, further confirming the view taken in the text.

* CHAPTER XLI.

WORDS "DIE WITHOUT ISSUE," ETC., WHETHER THEY REFER TO FAILURE INDEFINITELY, OR FAILURE AT THE DEATH.

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I. — General Rule — 1 Vict. c. 26, s. 29. — Another question formerly of frequent occurrence, and which may even now occasionally occur in the construction of words importing a failure of issue, is, whether they refer to issue indefinitely (*i. e.*, to a failure of issue at any time), or to a failure of issue at the death.[1] Upon this depends their operation to con-

Die without issue, &c., when restricted to a failure of issue at the death.

[1] The authorities in this country are at variance upon the construction of words of this kind. In the following cases it has been declared that prima facie they must be taken to refer to an indefinite failure of issue: Allen *v.* Ashley School Fund, 102 Mass. 262, 264; Hall *v.* Priest, 6 Gray, 18; Albee *v.* Carpenter, 12 Cush. 382 (personalty); Burrough *v.* Foster, 6 R. I. 534; Arnold *v.* Brown, 7 R. I. 188; Ladd *v.* Harvey, 21 N. H. 514, 526; Hall *v.* Chaffee, 14 N. H. 215; Davies *v.* Steele, 38 N. J. Eq. 168 (in the absence of statute); Hackney *v.* Tracy, 127 Penn. St. 53; Lawrence *v.* Lawrence, 105 Penn. St. 335; Reinoehl *v.* Shirk, 119 Penn. St. 108; Gast *v.* Baer, 62 Penn. St. 35; Ingersoll's Appeal, 86 Penn. St. 240; Smith's Appeal, 23 Penn. St. 9; Vaughan *v.* Dickes, 20 Penn. St. 509; Eichelberger *v.* Barnitz, 9 Watts, 447; Gable *v.* Ellender, 53 Md. 311; Tongue *v.* Nutwell, 13 Md. 415; Edelen *v.* Middleton, 9 Gill, 161 (personalty); Bells *v.* Gillespie, 5 Rand. 273; Addison *v.* Addison, 9 Rich. Eq. 58; Randolph *v.* Wendel, 4 Sneed, 646; Kirk *v.* Furgerson, 6 Cold. 479; Mangum *v.* Piester, 16 S. C. 316; Graham *v.* Moore, 13 S. C. 115; Rice *v.* Satterwhite, 1 Dev. & B. Eq. 69 ("without an heir"); Huxford *v.* Milligan, 50 Md. 542.

This in the case of realty will of course give the first taker an estate tail and the second devisee the remainder (Allen *v.* Ashley School Fund, supra), and in the case of personalty the fund absolutely. Hall *v.* Priest, supra; Albee *v.* Carpenter, supra; Theological Sem. *v.* Kellogg, 16 N. Y. 83, 87; Hennion *v.* Jacobus, 27 N. J. Eq. 28. A contrary construction, making the words refer to the death of the testator, and thus saving the gift over as an executory devise, has been held (in some of the cases aided by slight indications of intention) in Hall *v.* Chaffee, 14 N. H. 215; Bullock *v.* Seymour, 33 Conn. 289; Hudson *v.* Wadsworth, 8 Conn. 348, 359; Harris *v.* Smith, 16 Ga. 545 (approved in Griswold *v.* Greer, 18 Ga. 545, 550, a case of personalty); Edwards *v.* Bibb, 43 Ala. 666; *s. c.* 54 Ala. 475; Parish *v.* Ferris, 6 Ohio St. 563; Niles *v.* Gray, 12 Ohio St 320; Armstrong *v.* Armstrong, 14 B. Mon. 333; Daniel *v.* Thompson, id. 663. See Harris *v.* Berry, 7 Bush, 113. Under statutes, Tyson *v.* Blake, 22 N. Y. 558; Goodell *v.* Hibbard, 32 Mich. 47, 55, and other cases at the end of this note. The English rule as to realty has been abrogated by statute or rejected by the courts in some of the states. Davies *v.* Steele, 38 N. J. Eq. 168

It is apprehended that at the present day the construction which refers the words in question prima facie to the death of the first taker will, not only in the case of personalty (as to which see infra), but also of realty, be favored generally in this country and adopted upon slight indications of intention, in so far as the courts find themselves unfettered by binding authority. A particular reference to some of the American cases will show the course of the authorities as to words in common connection with those in question. In an early case it was held that a gift over upon the death of the prior taker without *children* to the *brothers* of the prior taker meant children living at the death of that party. Morgan *v.* Morgan, 5 Day, 517. And this decision has been followed in other cases. Couch *v.*

fer an estate tail; for it is only when the words denote an extinction of the specified issue irrespective of time or any collateral circumstance that they create such an estate.

Gorham, 1 Conn. 36; Hudson *v.* Wadsworth, 8 Conn. 348; Bullock *v.* Seymour, 33 Conn. 289; Barney *v.* Arnold, 15 R. I. 78 ("without leaving children"). So, too, it is declared to be settled law that when a fee simple or an absolute interest is given in remainder after an estate for life to the children of the first taker, followed by a gift over upon default of his (the first taker's) issue, the word "issue" is held to refer to the children mentioned. The gift over is therefore a good executory devise. Daley *v.* Koons, 90 Penn. St. 246; Sheets's Estate, 52 Penn. St. 257, 268; Powell *v.* Board of Missions, 49 Penn. St. 46, 56; ante, p. 1298. In another case the court decided that a provision that if any of the children of the first taker should die without issue *alive*, his share should go to the survivors, was a good executory devise. Den *v.* Schenck, 3 Halst. 29.

And it has elsewhere been decided generally that a gift over to the survivor of one of several devisees, the deceased dying without lawful issue, is also a good executory devise. This, it is held, does not create an estate tail in the first takers. Anderson *v.* Jackson, 16 Johns. 382; Jackson *v.* Chew, 12 Wheat. 153; Wilkes *v.* Lyon, 2 Cowen, 333; Cutter *v.* Doughty, 23 Wend. 513; *s. c.* 7 Hill, 305; Lovett *v.* Buloid, 3 Barb. Ch. 137; Waldron *v.* Gianini, 6 Hill, 601, 603; Norris *v.* Beyea, 13 N. Y. 273, 280; Miller *v.* Emans, 19 N. Y. 384; Gilman *v.* Reddington, 24 N. Y. 9; Quackenboss *v.* Kingsland, 102 N. Y. 128; Van Horne *v.* Campbell, 100 N. Y. 287; *s. c.* 101 N. Y. 608. See Allen *v.* Ashley School Fund, 102 Mass. 262, 264. But the contrary has also been held. Bells *v.* Gillespie, 5 Rand. 273; Heffner *v.* Knepper, 6 Watts, 18; Wall *v.* Maguire, 24 Penn. St. 248; Caskey *v.* Brewer, 17 Serg. & R. 441; Rapp *v.* Rapp, 6 Barr, 45. See Johnson *v.* Currin, 10 Barr, 498, where the executory devise was saved by additional words.

If an estate tail were deemed to have been created in the first taker, the survivor under the gift over (after death of the other without issue) could of course take only upon the failure of the other's posterity; a result which instead of creating an executory devise would create a remainder. Anderson *v.* Jackson, supra; Cutter *v.* Doughty, supra; Parker *v.* Parker, 5 Met. 134; Nightingale *v.* Burrill, 15 Pick. 104; Weld *v.* Williams, 13 Met. 486; Hall *v.* Priest, 6 Gray, 18. The entire decision against the creation of an estate tail in such a case has turned upon the presence of the word "survivor" (Anderson *v.* Jackson, supra); a word which Mr. Chancellor Kent thinks ought not alone to affect the meaning of the words "dying without issue." 4 Kent, 279, note (*e*).

But it is settled in New York and in many other states that that word is to be understood as qualifying the technical meaning of the words "dying without issue," so as to require them to be read "dying without issue living at the time of the prior taker's death." Cutter *v.* Doughty, 23 Wend. 513; Allen *v.* Ashley School Fund, 102 Mass. 262, 264; Brightman *v.* Brightman, 100 Mass. 238; Abbott *v.* Essex Co. 18 How. 202; *s. c.* 2 Curt. 126; Williams *v.* Graves, 17 Ala. 62; Powell *v.* Glenn, 21 Ala. 458; Williams *v.* Pearson, 38 Ala. 299; Edwards *v.* Bibb, 43 Ala. 666; *s. c.* 54 Ala. 475; Duryea *v.* Duryea, 85 Ill. 41; Groves *v.* Cox, 40 N. J. 40; Southerland *v.* Cox, 3 Dev. 394; McCorkle *v.* Black, 7 Rich. Eq. 407; Russ *v.* Russ, 9 Fla. 105; Deboe *v.* Lowen, 8 B. Mon. 616; Hart *v.* Thompson, 3 B. Mon. 486; Bedford's Appeal, 40 Penn. St. 18, 23 (personalty). So where the gift over is upon failure of issue of the first taker or upon his failing to attain a certain age, the old construction is escaped and the executory devise saved; the word "or" being evidently meant for "and." Adams *v.* Chaplin, 1 Hill, Ch. 265, 267; Doebler's Appeal, 64 Penn. St. 9; Parker *v.* Parker, 5 Met. 134; Den *v.* Taylor, 2 South. 413; Paterson *v.* Ellis, 11 Wend. 259; Norris *v.* Beyea, 13 N. Y. 273; Berg *v.* Anderson, 72 Penn. St. 87; Neal *v.* Cosden, 34 Md. 421; Carpenter *v.* Boulden, 48 Md. 122; Massie *v.* Jordan, 1 Lea (Tenn.), 646. But it is laid down in Pennsylvania that a devise over upon the devisee's dying unmarried and without issue indicates nothing definite in the period when the failure of issue is to take place, and that therefore nothing but a contingent remainder dependent upon an estate tail is created. Mattack *v.* Roberts, 54 Penn. St. 148; Vaughan *v.* Dickes, 20 Penn. St. 509; overruling an exception mentioned in Eichelberger *v.* Barnitz, 9 Watts, 447, 450. But see post, p. 1328; Downing *v.* Wherrin, 19 N. H. 9; Jones *v.* Sothoron, 10 Gill & J. 187.

In those states in which the English construction prevails, or at least in some of them, it is also held that the construction is not escaped by the use of the words "without leaving issue" or "without leaving heirs of the body," when not applied to personalty. Allen *v.* Ashley School Fund, 102 Mass. 262, 264; Paterson *v.* Ellis, 11 Wend. 259; Vaughan *v.* Dickes, 20 Penn. St. 148; Eichelberger *v.* Barnitz, 9 Watts, 450; Moody *v.* Walker, 3 Pike, 147, 198; Newton *v.* Griffith, 1 Harr. & G. 111; Torrance *v.* Torrance, 4 Md. 11; Tongue *v.* Nutwell, 13 Md. 415, 425; Biscoe *v.* Biscoe, 6 Gill & J. 232, 236; Edelen *v.* Middleton, 9 Gill, 161; Ingersoll's Appeal, 86 Penn. St. 240. Contra, Kennedy *v.* Kennedy, 5 Dutch. 185; Harris *v.* Smith, 16 Ga. 545, approved in Griswold *v.* Greer, 18 Ga. 545, 550. Very little, however, in addition to the word "leaving" will change the construction. Taylor *v.* Taylor, 63 Penn. St. 481; Edwards *v.* Bibb, 54 Ala. 575. See also Faber *v.* Police, 10 S. Car. 376. Thus, by the words "without leaving issue *behind*," the construction is changed and a good executory

Few points of testamentary construction have come more frequently under discussion than this; which has arisen, in a great degree, from the discrepancy between the popular acceptation and the legal sense of the phrase in question, and the consequent willingness to admit grounds for departing from the technical doctrine. In ordinary language, when a testator gives an estate to a person and his heirs, with a limitation over in case of his dying without issue, he means that the devisee shall retain the estate if he leaves issue surviving him, and not otherwise; and where the phrase is, in case the first taker die *before he has any issue*, or *if he have no issue*, the intention probably is that the estate shall belong absolutely to the devisee on his having issue born. But before the Wills Act the established *legal* interpretation

General rule under the old law.

devise created. Eichelberger *v.* Barnitz, 9 Watts, 447, 450. It is declared that the rule should be applied in cases of realty where the first devise is to two persons, and the devise over in case of the death of either leaving no issue is not to the survivor but to a *stranger*. Allen *v.* Ashley School Fund, supra; Irvin *v.* Dunwoody, 17 Serg. & R. 61.

The rule in England as to gifts of personalty, which makes the word "leaving" refer prima facie to the death of the prior taker, has been uniformly followed in this country. Downing *v.* Wherrin, 19 N. H. 89; Ladd *v.* Harvey, 21 N. H. 514, 527; Hall *v.* Priest, 6 Gray, 18, 22; Albee *v.* Carpenter, 12 Cush. 382, 388; Snyder's Appeal, 95 Penn. St. 175; Eachus's Appeal, 91 Penn. St. 105; Bedford's Appeal, 40 Penn. St. 18, 22; King *v.* Diehl, 6 Serg. & R. 32; Eichelberger *v.* Barnitz, 17 Serg. & R. 295; Biscoe *v.* Biscoe, 6 Gill & J. 232, 236, Tongue *v.* Newell, 13 Md. 415, 425; Edelen *v.* Middleton, 9 Gill, 161; Mazyck *v.* Vanderhorst, Bail. Eq. 48; Bethea *v.* Smith, 40 Ala. 415; 4 Kent, Com. 281–283. See Theological Sem. *v.* Kellogg, 16 N. Y. 83, 87; Newnan *v.* Miller, 7 Jones, 516.

And it should not be forgotten that the English rule as to realty was adopted at a time before the prejudices in favor of (what is now purely artificial) the ancient system of estates in land, which allowed only of interests in possession, reversion, or remainder, had died out. Executory devises, which had not been possible under the feudal tenures before the time of Henry the Eighth, were even after the Statute of Wills looked upon with disfavor; and though the courts did not assume to hold them void per se, they laid down the rule that remainders were to be preferred to them. This rule prevails generally in the United States (Hall *v.* Priest, 6 Gray, 18, 20; Wall *v.* Maguire, 24 Penn. St. 248, ante, Vol. I., p. 824, n.), though it never had the special raison d'être here which it had where it originated. It has been somewhat affected by statute in England. Ante, Vol. I., p. 832. Indeed, it is greatly to be regretted that the construction of the word "issue" itself, without qualification, should not have escaped the influences under which the English judges first declared the construction to be followed. Nothing could be more improbable than that a testator in providing for a gift over to B. on the death of A. "without issue," without more particular words, should have contemplated all the line of A.'s possible posterity as standing before B.'s accession to the bounty; not, indeed, that it might not be perfectly natural in many cases for the testator to prefer A. and his posterity to B., but that, if he really did so intend, he would have been apt to say so in language which would not require straining to give it the desired meaning. It is apprehended that the meaning of the word "issue" in the mouth of the uninstructed testator *is* strained when it is made equivalent to posterity. If the testator were to be questioned, it would doubtless generally be found that, so far as he had any definite idea at all, he had used the word in the sense of "children," living of course at the death of the first taker. See Den *v.* Taylor, 2 South. 413, 418. And comp. 2 Redf. Wills, 46 (4th ed.). But see 4 Kent, Com. 274, 275.

In case of a devise over to *children* of the testator, children living at his death are prima facie meant. Stone *v.* Nicholson, 27 Gratt. 1. The strong bias, it may be remarked, of Mr. Chancellor Kent in favor of the old (English) construction has not been very widely shared. It will be seen further on that the ancient rule, that "dying without issue" is to be interpreted, with some exceptions, as referring to an indefinite failure of issue was abolished in England by statute in 1837. So, too, in New York in still stronger terms. 4 Kent, Com 280; Norris *v.* Beyea, 13 N. Y. 273, 280. So in other states. See Stone *v.* McEckron, 57 Conn. 194 (citing Phelps *v.* Robbins, 40 Conn. 250; White *v.* White, 52 Conn. 518; Coe *v.* James, 54 Conn. 511, Phelps *v.* Phelps, 55 Conn. 359); Goddell *v.* Hibbard, 32 Mich. 47, 55; Mason *v.* Johnson, 47 Md. 347. And how ready the courts are to give heed to any, the slightest, indication of an intention to refer the words "dying without issue," to the time of the death of the testator, even where they still retain prima facie the old effect, the cases already cited abundantly show.

of these several expressions was different: for it was settled (though the rule now applies only to wills made before the year 1838), that words referring to the death of a person without issue, whether the terms be, "*if he die without issue*," "*if he have no* * *issue*," "*if he die without having issue*" (*a*), "*if he die before he has any issue*" (*b*), or "*for want*" or "*in default of issue*," unexplained by the context, and whether applied to *real* or to *personal* estate (notwithstanding the distinction taken between these two species of property in some of the early cases (*c*)), are construed to import a *general indefinite failure of issue, i. e.*, a failure or extinction of issue *at any period* (*d*). [*1321]

The rule of construction is abrogated in regard to wills made or republished since the year 1837 by the act 1 Vict. c. 26, s. 29, of which, we have seen (*e*), provides that words which may import a want or failure of issue of a person in his lifetime or at his death, or an indefinite failure of issue, which includes such words as "die without having a son" (*f*) shall be construed to import a want or failure of issue in the lifetime or at the death (*g*); but on this enactment are engrafted an exception and proviso, which exclude the operation of the statute in cases where the words in question are simply referential to the objects of a subsisting estate tail, or a prior gift. The result, then, of this enactment appears to be, that the words denoting a failure of issue refer to a failure at the death in every case, unless one of two points can be established: first, that the words are referential to the objects of a prior estate or preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity, *i. e.* where the words *may* import *either* a failure of issue in the lifetime or at the death, *or* an indefinite failure of issue. If, therefore, a testator by a will made or republished since 1837 devise real estate to A., or to A. and his heirs, and if A. shall die and his issue shall fail *at any time*, then to B., A. will take an estate tail, as he formerly would have done without these special amplifying words, which exclude, beyond all question, the application of the enacted doctrine.

1 Vict. c. 26, s. 29. Words importing a failure of issue, refer to failure at death; — except in two cases.

(*a*) Cole *v.* Goble, 13 C. B. 445.
(*b*) Newton *v.* Barnardine, Moore, 127, pl. 275. As to this expression applied to *children*, see ante, p. 1252.
(*c*) Pleydell *v.* Pleydell, 1 P. W. 748; Nichols *v.* Hooper, id. 198.
(*d*) Fitz. 68; 2 Atk. 308, 376; 1 Vern. 478; 1 Eq. Abr. 207, pl. 9; Amb. 398, 478; 2 Ed. 205, 3 B. P. C. Toml. 314; 1 B. C. C. 170, 188; 2 B. C. C. 33; 1 Ves. Jr. 286; 3 Ves. 99; 5 Ves. 440; 9 Ves. 197, 580; 17 Ves. 479; 1 Mer. 20; 1 B. & Ad. 318; 7 Bing. 226; 2 R. & My. 378; id. 390; 16 Sim. 290; 2 Jo. & Lat. 176; 13 C. B. 445; L. R., 14 Eq. 283.
(*e*) Ante, p. 1285.
(*f*) Being "words of precisely the same import," see 1 Ch. D. 410.
(*g*) See Re O'Bierne, 1 Jo. & Lat. 352, in which an attempt seems to have been made to argue that the very words "should he die without issue" indicated "the contrary intention." See also per Hall, V.-C., Meredith *v.* Treffry, 12 Ch. D. 172, and qu.

[*1322] *Nor does the act apply to the words "die without *heirs of the body*," for there is no ambiguity in them. Thus in Harris *v.* Davis (*h*), where freeholds and leaseholds were given to be divided between several persons or (read "and") their lawful heirs, and in case of there being no heir (read "heir of the body" (*i*)), then the share or shares to be devised in equal parts among the *surviving* legatees. One of the devisees having died, a bachelor, in the testator's lifetime, it was held by Sir J. K. Bruce, V.-C., that as to the freeholds the gift over of the deceased's share took effect: but that his share of the leaseholds lapsed. The V.-C. said he had doubted whether it might not be possible by means of the word "surviving" or from the joint operation of s. 29 of the Wills Act and the doctrine of Forth *v.* Chapman to hold that there was no lapse. But upon consideration he thought that such a construction of the will could not be maintained. It seemed to him that the words "there being no heir" must be held to point to an indefinite failure of issue, and that this was one of the cases in which "surviving" must be read "other" (*k*). The distinction between "die without issue," or similarly ambiguous expressions, and die without "heirs of the body," was more plainly recognized by Sir W. James, L. J., in Dawson *v.* Small (*l*).

Act does not apply to "dying without heirs of body."

Harris *v.* Davis.

It has been doubted whether the exception depending on "such person having a prior estate tail," &c., applies to a gift of personalty, or is to be confined to a devise of real estate, in which alone properly speaking there can be an estate tail. "The legislature," said Lord Campbell (*m*), "may have loosely applied these words to personalty, or may have had reasons for intending a distinction between realty, in which there may be an estate tail, to be cut off by a disentailing deed, and personalty not attended by such incidents." Harris *v.* Davis, however, did not turn on that: and in Green *v.* Green (*n*), where freehold and leasehold property was given to A. and the heirs of his body, and "in case of failure of issue," over; it was held by Sir J. K. Bruce, V.-C., that although strictly speaking there could not be a bequest of personalty in tail, yet looking to the words of s. 29, A. was entitled to the leaseholds absolutely.

Whether words "having a prior estate tail," &c., apply to personalty.

[*1323] *Again, the act does not apply where the words importing a failure of issue would, under the old law, have been construed not to refer to an indefinite failure of issue. Thus, in

(*h*) 1 Coll. 416.
(*i*) As to this, see ante, p. 1175.
(*k*) But see post, p. 1336, note (*a*).
(*l*) L. R., 9 Ch. 651.
(*m*) Greenway *v.* Greenway, 2 D. F. & J. 137.
(*n*) Green *v.* Green, 3 De G. & S. 480. See also O'Neill *v.* Montgomery, 12 Ir. Ch. R. 163.

Act does not apply where "die without issue" would not previously have been taken indefinitely.

Morris *v.* Morris (*o*), where by will made in 1839 the devise was to A., and if he should die without issue or before he should attain the age of twenty-one years, then over, it was contended that "or" was not to be read "and," and that consequently, though A. had attained twenty-one, yet the gift over would take effect if he died without leaving issue at his death; but Sir J. Romilly, M. R., held that "or" must be read "and" as it would have been before the act, and that A. having attained twenty-one took an indefeasible estate in fee. He said that s. 29 had no application where the words "die without issue," were coupled with other words which had been the subject of authority and decision, such as "dying under twenty-one," nor did it in such cases alter such a gift, so as to make it determinable upon a dying without issue living at death *or* under twenty-one (*p*).

So in Jarman *v.* Vye (*q*), Sir W. P. Wood, V.-C., held that, inasmuch as it was decided before the act by Crowder *v.* Stone that a limitation over on the death of A. without issue before some collateral event (as before the death of B.) meant death and a failure of issue both happening in the life of B., such a limitation, not being susceptible of the alternative constructions mentioned in the act, was not affected by it.

Cases in which ground is afforded by the context for excluding the operation of the statute will probably be of rare occurrence; for, as the legal and the popular signification will now coincide, it cannot be supposed that the context of the will will often furnish grounds for negativing the restrictive interpretation; and, for the same reason, there will be less anxiety on the part of the judicial expounders of wills than formerly to discover grounds for departing from the general rule — an anxiety which contributed not a little to incumber that rule with its numerous distinctions and exceptions. Where, however, the context does require that the words should be read as importing a general failure of issue, this construction must be attended with the same consequence as under wills not within the statute, whether that consequence be the raising of an estate tail by implication in the person whose issue is referred to, as in the * case already suggested (*r*), or the invalidating of the [*1324] gift over, which is dependent on the failure of issue. Hence, it is not strictly true (as some have supposed) that the recent act absolutely excludes the implication of an estate tail from words denoting a failure of issue; it merely requires that the construction on which such implication is grounded be sustained by *other* expressions found

(*o*) 17 Beav. 198.
(*p*) See cases on this subject, ante, Vol. I., p. 471.
(*q*) L. R., 2 Eq. 784, ante, p. 1329.
(*r*) *I. e.*, of issue failing at any time, see ante, p. 1323.

in the will; and, as we may confidently assume, for the reason already suggested, that such cases will be very infrequent, the act must eventually reduce to insignificance the doctrine respecting the implication of estates tail from the words in question, as well as the numerous points of construction incidentally treated of in the present chapter.

II. — The Rule under the Old Law considered: — 1. *As to the Rule generally.* — As, however, cases may, perhaps, occasionally arise in practice involving a consideration of the old law, it will be proper to notice briefly in this place some of the decisions bearing upon the rule formerly in force as regards real estate, that words referring to the death of a person without issue must be construed as importing primâ facie an indefinite failure of issue (*s*).

Exceptions to the old rule.

First, where phrase is, *leaving* no issue.

This rule admits of two exceptions: the first is, where the phrase is *leaving* no issue; with respect to which the settled distinction is that, applied to *real* estate, it means an indefinite failure of issue, but in reference to *personal* estate (and real estate directed to be converted (*t*) is for this purpose regarded as personalty (*u*)), it imports a failure of issue *at the death*. Under a devise therefore to A., or to A. and his heirs, and if he shall die *and leave no issue*, or *without leaving issue*, then over, A. would take an estate tail; but under a bequest of a term of years or other personal estate in the same language, A. would take, not the absolute interest (as he would if the indefinite construction prevailed), but the entire interest of the testator defeasible on his (A.'s) leaving no issue at his death. Forth *v.* Chapman (*v*) is the leading authority for this distinction, but it has been con- [*1325] firmed by *a long train of subsequent decisions (*x*) which

(*s*) For a fuller discussion of this doctrine, see the 4th Edition of this work, Vol. II., pp. 498, et seq.

(*t*) As to the doctrine of conversion, see Ch. XIX.

(*u*) Farthing *v.* Allen, 2 Mad. 310; but there was ground to contend that "issue" was here synonymous with *children* who were the objects of the preceding bequest. The judgment, however, is not reported, and the decree is silent as to the limitation over. The marginal note of the case omits the material word "leaving." And see Hawkins *v.* Hamerton, 16 Sim. 410.

(*v*) 1 P. W. 663.

(*x*) As to personalty, Atkinson *v.* Hutchinson, 3 P. W. 258; Sabbarton *v.* Sabbarton, Cas. t. Talb. 55, 245; Sheffield *v.* Orrery, 3 Atk. 282 (where the additional words "behind him" — as to which see post — were used); Lampley *v.* Blower, id. 396; Sheppard *v.* Lessingham, Amb. 122; Gordon *v.* Adolphus, 3 B. P. C. Toml. 306; Taylor *v.* Clarke, 2 Ed. 202; Goodtitle *v.* Pegden, 2 T. R. 720, 1 R. R. 606. Daintry *v.* Daintry, 6 T. R. 307, 2 R. R. 179; Radford *v.* Radford, 1 Kee. 486; Mansel *v.* Grove, 2 Y. & C. C. C. 484; Heather *v.* Winder, 5 L. J. N. S. Ch. 41; Daniel *v.* Warren, 2 Y. & C. C. C. 290; Hawkins *v.* Hamerton, 16 Sim. 421.

As to realty, Walter *v.* Drew, Com. Rep. 372; Denn *v.* Shenton, Cowp. 410; Tenny *v.* Agar, 12 East, 253; Dansey *v.* Griffiths, 4 M. & Sel. 61; Wollen *v.* Andrewes, 2 Bing. 126; Doe d. Cadogan *v.* Ewart, 7 Ad. & Ell. 636, 3 Nev. & P. 197 (the judgment in which contains an elaborate statement of the authorities); Doe d. Todd *v.* Dnesbury, 8 M. & Wels. 530; Bamford *v.* Lord, 14 C. B. 708; Biss *v.* Smith, 2 H. & N. 105; Feakes *v.* Standley, 24 Beav. 485.

As to deeds. A limitation to A. *his heirs and assigns* is cut down to an estate tail by a limitation over "if A. dies without issue," Morgan *v.* Morgan, L. R., 10 Eq. 99, and cases

show that it applies even where the real and personal estate are comprised in the same gift, so that in such a case the words "without *leaving* issue" import an indefinite failure of issue as regards the realty, but a failure of issue at the death as regards the personalty. Lord Kenyon, indeed, in Porter *v.* Bradley (*y*) questioned the soundness of the doctrine; but his dictum is inconsistent with a multitude of authorities, and has received the pointed reprobation of both Lord Eldon (*z*) and Sir W. Grant (*a*); the former emphatically declaring that it went "to shake settled rules to their very foundation" (*b*).

* The circumstance that the prior gift is expressly for the [*1326] life of the first taker, so that the effect of construing the word "leaving" to refer to issue *at the death* is that, in the event of there being such issue, the subject of disposition belongs to neither the prior nor the subsequent legatee, affords no ground for departing from this doctrine (*c*). Nor, on the other hand, is the restricted construction of the words in question extended to *real* estate, merely because the subject of devise is a copyhold estate, held of a manor the custom of which forbids the creation of entails, so that the effect of the contrary (*i. e.*, the indefinite) construction is that the first devisee takes a conditional fee, on which no remainder can be en-

there cited. Idle *v.* Cook, 1 P. W. 70, is not contra; though more than testamentary precision was there required in pointing out *whose* issue was meant, the words "in default of such issue" being held to fail in this respect. But in Olivant *v.* Wright, 9 Ch. D. 646, where the trust was to apply the rents of freeholds and leaseholds for the maintenance of A. and B. until the younger attained twenty-one, and on that event to pay the rents to A. and B. their heirs, executors, administrators, and assigns, provided, that if either died without *leaving* issue his share should go over; it was held by Bacon, V.-C., that this was confined to death during infancy, which not happening, the fee was absolute.

(*y*) 3 T. R. 146, 1 R. R. 675.

(*z*) 9 Ves. 203.

(*a*) 19 Ves. 77.

(*b*) The introduction of the word "leaving" being so important in reference to personalty, the question often arises in such cases whether the word may be supplied; as where the testator in one part of his will uses the phrase "without leaving issue," and in another the words "without issue." In such case, the latter expression has been made by construction to correspond with the former in several instances where the general plan of the will seemed to authorize it: Sheppard *v.* Lessingham, Amb. 122; Radford *v.* Radford, 1 Kee. 486; ante, Vol. I., pp. 452, 498; see also Greenway *v.* Greenway, 2 D. F. & J. 128. Each of these phrases, however, seems to have been allowed to retain its own peculiar force in Pye *v.* Linwood, 6 Jur. 618, where a testator gave the residue of his property to his two children, John and Elizabeth, in manner following: one moiety to John, his heirs, executors, administrators, and assigns, and in case of his decease without *leaving* lawful issue, then to Elizabeth and her heirs, executors, administrators, and assigns; and the other moiety, together with the reversion of the former moiety, the executors were directed to invest in trust for Elizabeth for life for her separate use, and at her decease to go and be equally divided among all her children lawfully begotten, and in case of her decease *without lawful issue*, then to John: Elizabeth had only one child who died in her lifetime. It was contended that the words "without lawful issue," in reference to the personalty, applied to issue living at the death, and that consequently the bequest over had taken effect; but Sir K. Bruce, V.-C., held that the deceased child acquired an absolute interest.

Here it will be observed that there was sufficient difference in the mode of disposing of the several moieties to afford a strong suspicion that the testator might really not have had the same intention in each instance, and therefore the Court seems to have been fully justified in adhering to the literal terms of the will. To divest the interest of a child who happened not to survive its parent was a result which the expounder of a will would not be disposed to strain the testator's language for the purpose of accomplishing. It does not appear whether the particular point for which the case is here cited was presented to the V.-C.

(*c*) Andrew *v.* Ward, 1 Russ. 260.

grafted, and the testator's intention, therefore, in favor of the ulterior devisee is defeated (*d*).

Second exception to general rule.

The other exception to be noticed to the general rule is, where a testator, *having no issue*, devises property in default or on failure of issue *of himself;* in which case it is considered that the evident object of the testator is simply to make the devise contingent on the event of his leaving no issue *surviving him* (*e*), and that he does not refer to an extinction of issue at *any* time (*f*). This exceptional construction à fortiori prevails where the devise over is for the purpose of paying debts and legacies (*g*).

What will restrain the words generally.

But to return to the general rule. Though it is clear that, with the exceptions before noticed, the expressions to which it relates, applied to either real or personal estate, import an indefinite failure of issue, it is equally clear that in regard to either they will yield to a *clear* manifestation of intention in the context to use them in the restricted sense of issue *living at the death*; but, as to personalty, it seems [*1327] they yield more readily to expressions * and circumstances in the will tending so to confine them, than when applied to real estate (*h*). Thus expressions which will cut down the established signification of the words, as applied to personalty, will not necessarily have that effect in reference to real estate: and, by parity of reason, where the restricted construction is adopted in relation to the latter, it applies à fortiori to the former. This diversity of construction in regard to real and personal estate appears to have originated in an anxiety to avoid an interpretation which would render any part of the will inoperative; for, as a gift of *personalty* to arise on a general failure of issue is void for remoteness (*i*), it follows that the construing of the words under consideration in their unrestricted sense is fatal to the bequest over depending on them; whereas in their application to *real* estate, they have, when so construed, the effect of creating in the prior devisee an estate tail, and the limitation which it is their office to introduce is then a remainder expectant on that estate.

II. — 2. *The Rule under the Old Law as regards Realty.* — We now proceed to inquire into the grounds upon which words import-

(*d*) Doe d. Simpson *v.* Simpson, 5 Scott, 770, 4 Bing. N. C. 333, 3 Scott, N. R. 774, 3 Man. & Gr. 929.

(*e*) See as to this, ante, Vol. I., p. 110.

(*f*) French *v.* Cadell, 3 B. P. C. Toml. 257; Wellington *v.* Wellington, 4 Burr. 2165, 1 W. Bl. 645; Lytton *v.* Lytton, 4 B. C. C. 441; Sanford *v.* Irby, 3 B. & Ald. 654. See also Doe *v.* Lucraft, 1 M. & Sc. 573, 8 Bing. 386, ante, p. 1308.

(*g*) See Re Rye's settlement, 10 Hare, 106. In all the cases cited in the preceding note there was a devise over for payment of debts, &c., but the decisions do not appear to have been influenced by this consideration.

(*h*) See Fearne, C. R. 471.

(*i*) See rule against perpetuities discussed, Vol. I., p. 213.

ing a failure of issue are restrained to such failure *at the death*, in regard to *real* estate. When restricted in regard to *realty*.

It is clear that they receive this construction where the event of dying is confined to *a definite age*. Where the dying refers *to a given age*.

Thus, a devise to a person and his heirs, with a limitation over if he shall die *under the age of twenty-one and without issue*, is construed, not as creating an estate tail, with a contingent remainder dependent on the event of the first taker dying under the specified age (as would be the effect, if the words were considered to import an indefinite failure of issue (*j*)), but as a devise *in fee simple*, subject to an executory limitation over in the event of the prior devisee's death under the given age and leaving no issue *surviving him* (*k*).

That the principle of the preceding cases applies wherever the dying without issue is restricted to (whether it be *above* or **under*) a particular age, may be inferred from Glover *v.* Monckton (*l*), where real estate was devised to trustees, [*1328] upon certain trusts until the testator's son should attain twenty-one, and, when he should arrive at that age, in trust for him, his heirs, &c.; but in case his son should not live to attain such age of twenty-one years, and the testator's daughter should be living at the time of the decease of his son, *or in case his son should live to attain such age, but should afterwards die without lawful issue*, then in trust for the daughter for life, with remainders over. The son attained twenty-one; and the Court of Common Pleas, on a case from Chancery, certified that he took an estate in fee *with an executory devise over* in the event of his dying without having issue *living at his death*.

The same principle probably would be considered as extending to every case in which a dying without issue is combined with *an event personal to the individual*, as the event of his dying without issue and unmarried or without leaving a husband or wife, — which is the meaning of "unmarried" in this situation (*m*).[1] Suggested extent of the principle.

With some aid from the context it was applied in Doe d. Johnson *v.* Johnson (*n*), where the testator devised lands to his wife for life,

(*j*) Such was the doctrine of the early authorities. See Soulle *v.* Gerrard, Cro. El. 525. Such also would still be the construction if the prior limitation were expressly to A. and the heirs of his body, Grey *v.* Pearson, 6 H. L. Ca. 61. And see Marshall *v.* Grime, 28 Beav. 375.

(*k*) Hinde *v.* Lyon, 3 Leon. 64; Price *v.* Hunt, Pollex. 645; Eastman *v.* Baker, 1 Taunt. 174; Hanbury *v.* Cockerill, 8 Vin. Ab. Dev. n. (*a*), pl. 4; Anon. Dyer, 124 a, 354 a; and see 17 Beav. 201. And in Hall *v.* Deering, Hardr. 148, the point was much discussed, but no opinion was given by the Court.

(*l*) 3 Bing. 13.

(*m*) See Vol. I., p. 487.

(*n*) 8 Ex. 81; but see O'Donohoe *v.* King, 8 Ir. Eq. Rep. 185.

[1] Downing *v.* Wherrin, 19 N. H. 9; Jones *v.* Sothoron, 10 Gill & J. 187. Contra, Mattack *v.* Roberts, 54 Penn. St. 148; ante, p. 1320, note of American editor.

with remainder to his nephew Samuel and his heirs, but in case his nephew should die before he attained the age of twenty-one, or after he should have attained such age of twenty-one should die unmarried, or having been married should die without lawful issue, then over, it was held that the nephew took an estate in fee, with an executory devise over on the happening of any of the three specified events, and that the last event was his death without leaving issue surviving him (*o*).

But it seems that the words referring to a failure of issue are not restricted to such failure at the death by the mere insertion of the contingency of the issue dying under age. Thus, if real estate be devised to A. and his heirs, with a devise over in case A. should die without issue, or such issue should die under the age of twenty-one years, A. would be tenant in tail; for it is said, that does not necessarily show that the testator is speaking of a failure of issue at the death of A. (*p*).

Devise over on *issue* dying under age, not restrictive.

[*1329] * Where the dying without issue is restricted *to some definite period collateral to the devisee* (as in the case of a devise to A. and his heirs, with a devise over in case he should die without issue *in the lifetime of B.*), it would seem that the phrase must be read as denoting the event of A. dying, and of there being an extinction of his issue, but both events happening in the lifetime of B. (*q*).

Effect of collateral event being associated.

The next species of case to be noticed is, where expressions are added to the words importing a failure of issue, showing that the testator used those words in a restricted sense.

Effect of additional expressions.

Where the testator expressly devises over the estate in the event of the preceding devisee dying without leaving issue *living at the time of his death*, the language of the will seems to exclude all controversy; and yet we have an adjudication on this simple point in Doe d. Barnfield *v.* Wetton (*r*).

Express reference to the death of the prior devisee.

The restricted construction, however, has been sometimes adopted where the intention was much less equivocally expressed.

(*o*) See also Mabaffey *v.* Rooney, 5 Ir. Jur. 245; Greated *v.* Greated, 26 Beav. 621. And compare Feakes *v.* Standley, 24 Beav. 485, observing that the event was there not "personal to the individual."

(*p*) The contingency is compounded of two events, one of such events being comprised in the other, and therefore superfluous. See Grimshaw *v.* Pickup, 9 Sim. 596.

(*q*) Crowder *v.* Stone, 3 Russ. 217. See also Jarman *v.* Vye, L. R., 2 Ex. 784 (will made in 1845). In Pells *v.* Brown, Cro. Jac. 590, however, the Court seemed inclined to read the words as applying to the contiogency of A. dying in the lifetime of B. without leaving issue living at the death of A. An alternative construction which appears to be the most consistent with the general rule which regards these words as primâ facie importing a general failure of issue, is to read them as pointing to the event of A. dying in the lifetime of B., and of there being a failure of issue at any time. This latter construction was, however, directly negatived in Pells *v.* Brown.

(*r*) 2 B. & P. 324; and see Verulam *v.* Bathurst, 13 Sim. 388. But if there is a previous *express* limitation in tail, although the restricted construction may be right, yet the nature of the previous devisee's estate is not altered; ante, pp. 445, 505 n.

Thus, in Porter *v.* Bradley (*s*), where the testator devised lands to P., his heirs *and assigns* forever; but in case P. should die *leaving no issue* BEHIND HIM, then over, it was held that the words imported a dying without issue living at the death.

"Leaving no issue *behind him*."

Another class of cases in which the restricted construction of the words under consideration has been adopted consists of those in which the arguments for that construction have been derived from the nature of the subject-matter and terms of the ulterior devise.

Implicatory grounds of restriction from nature of devise over.

Thus, in Nicholls *v.* Hooper (*t*) the circumstance of the lands * being chargeable with moneys to be paid within a de- [*1330] finite period after the decease of the first taker, was held to cut down the words in question to a dying without issue *at the death.* The devise was to M. for life, remainder to her son T. and his heirs, provided that if T. should die *without issue of his body,* then the testator gave 100*l.* apiece to A. and B., *to be paid within six months after the decease of the survivor of the said mother and son by the person who should inherit the premises;* and, in default of payment, the testator gave the land to the legatees for payment. It was held that the words here referred to a dying without issue at the death, and that the issue having survived the son, though they failed within the six months, the legacies did not arise.

Legacy to be paid within a given period after the death.

One of the grounds on which the restrictive construction has been held justified by the terms of the ulterior devise is that, on the failure of issue in question, the devise is to the then survivors of certain persons living at the testator's death. Thus, in Greenwood *v.* Verdon (*u*), where the testator gave legacies to certain persons by name, and then devised all the residue of his personal property and all his real estate to his wife and son for their lives, and after the decease of the wife, to the son, his heirs *and assigns* forever, and from and after the decease of the wife and of the son without issue, to be equally divided among the *then surviving legatees,* share and share alike; Sir W. P. Wood, V.-C., held that the failure of issue of the son was restricted by the ulterior gift, and that the son took an estate in fee, with an executory gift over if he died without issue living at the death of the last-surviving legatee; and there being issue living at that period the estate in fee became absolute (*x*)

Another ground upon which the restricted construction has been

(*s*) 3 T. R. 143, 1 R. R. 675. The words "and assigns" point to a fee, per Wood, V.-C., 1 K. & J. 81.

(*t*) 1 P. W. 198, 2 Vern. 686; and see Re Rye's settlement, 10 Hare, 106, ante, p. 1326. See also Porter *v.* Bradley, 3 T. R. 143; Blinston *v.* Warburton, 2 K. & J. 400; Gee *v.* Corporation of Manchester, 17 Q. B. 737.

(*u*) 1 K. & J. 74.

(*x*) Ante, p. 1329.

Ulterior gifts being *for life* only.

adopted is, that the ulterior devises confer estates *for life* only.

Thus, in Roe d. Sheers *v.* Jeffery (*y*), where a testator devised to his daughter A. for life, and after her death to his grandson B. and to his heirs forever; but in case B. should depart this life, *and leave no issue,* then his will was that the said premises should be and return *unto E. M. and S., or the survivors or survivor of them, equally to be divided between them.* Lord Kenyon, after citing Pells *v.* Brown (*z*) as a leading authority, said, "On looking through the whole of this [*1331] will, we have no doubt that *the testator meant that the dying without issue was confined to a failure of issue at the death of the first taker; for the persons to whom it is given over were then in existence, *and life estates are only given to them.*"

But it is clear that the doctrine of Roe *v.* Jeffery applies only where *all* the ulterior estates are merely for life; for in Barlow *v.* Salter (*a*) Sir W. Grant refused to extend it even to a bequest of personal estate where *one* of several ulterior legatees took a *life* interest and the others *absolutely.*

In two more modern cases the circumstance of the property being in the devise over charged with sums of money, to be disposed of by the will of the first devisee (though not made payable within a definite period after his death, as in Nichols *v.* Hooper (*b*)), seems to have formed the principal ground for holding the words under consideration to import a dying without issue at the death.

Property devised over charged with legacies,

Thus, in Doe d. Smith *v.* Webber (*c*), a testator devised and bequeathed real and personal estate to his niece H., her heirs, executors, administrators, and assigns, forever, and provided that in case she should happen to die and leave no child nor children, then he devised unto his niece B. his freehold lands called W. to her and her heirs forever, *paying* 1,000*l. unto the executor or executors of his said niece H., or to such person as she by her last will and testament should direct.* It was held that H. took an estate in fee, subject to an executory devise on her leaving no issue *at her death.*

— to be paid to the executors, &c., of the prior devisee.

So, in Doe d. King *v.* Frost (*d*), where a testator devised to his son W. and his heirs certain real estate, and after giving to his wife an annuity thereout, to be paid by W., provided that, if W. should have no children, child, or issue, the estate was *on the decease of W.* to become the property of the heir-

Words "on the decease of W."

(*y*) 7 T. R. 589.
(*z*) Cro. Jac. 590.
(*a*) 17 Ves. 479. See also Beauclerk *v.* Dormer, 2 Atk. 308; Doe d. Jones *v.* Owen, 1 B. & Ad. 318; Re Rye's Settlement, 10 Hare, 111; Peyton *v.* Lambert, 8 Ir. Com. L. Rep. 485.
(*b*) Ante, p. 1324.
(*c*) 1 B. & Ald. 713; and see Chamberlayne *v.* Chamberlayne, 6 Ell. & Bl. 625, 633.
(*d*) 3 B. & Ald. 546. And see Stratford *v.* Powell, 1 Ba. & Be. 1, noticed post, p. 1335.

at-law, *subject to such legacies as he (W.) might leave by will to any of the younger branches of the family;* it was held that W. took an estate in fee, with an executory devise over, in the event of his dying leaving no issue at his death, to such person as should be then and in that event heir-at-law; Abbott, C. J., observing that it was the plain intention of the testator that, at the period of the * decease of his son W., it [*1332] should be ascertained whether the estates devised to him by the will should then vest in him in fee absolutely, or pass over to some other person, subject to any such legacies as the son might by his will devise to any of the younger branches of the family.

Effect of charge of legacies to be bequeathed by prior devisee.

In this case, Holroyd, J., adverted to the words "*on* the decease of the said W.;" and it would seem that this decision and the subsequent decisions in Ex parte Davies (*e*), and Parker *v.* Birks (*f*), were considered in Coltsmann *v.* Coltsmann (*g*) to have established the rule of restrictive construction for cases in which the devise is to A. in fee, and if he dies without issue, then *at* or *on* his death, over. And the rule was applied in the case last mentioned, although the words used were "die without heirs of the body." But the words "after his death" are not quite so strong (*h*), pointing less precisely to the moment of death.

Words *on* or *at* the decease, — *after* the decease.

But of course the context may show that the recognized construction of *on* or *at* was not intended, and, if so, the words must be construed according to the intention as meaning an indefinite failure of issue (*i*).

It may be observed that in all the preceding cases in which the restrictive construction was adopted, the prior limitation on which the words under consideration were engrafted would, standing alone, have given the fee to the devisee. In such cases the convenience is all on the side of the restricted construction, which renders such fee defeasible on his not leaving issue at his death, and places the estate out of the power of the first taker, who might, if he were tenant in tail (as he would be if the words were construed to mean an indefinite failure of issue), defeat the ulterior estate. To prevent this consequence, the Courts have generally, in such cases, lent a willing ear to the arguments in favor of the restricted (and which we have seen to be the popular) interpretation of these words (*k*).

Distinction suggested where prior devise is for life only.

(*e*) 2 Sim. N. S., 114.
(*f*) 1 K. & J. 156.
(*g*) L. R., 3 H. L. 121, stated post, p. 1333. Cf. Dunk *v.* Frazer, 2 R. & My. 557.
(*h*) Per Wood, V.-C., 1 K. & J. 165. See Walter *v.* Drew, Com. Rep. 373; Jones *v.* Ryan, 9 Ir. Eq. Rep. 249; where the words "*after* the death" were held not to be restrictive.
(*i*) Peyton *v.* Lambert, 8 Ir. Com. L. Rep. 485. See also Broadhurst *v.* Morris, 2 B. & Ad. 1; but see the remarks on that decision of Kindersley, V.-C., 2 Sim. N. S. 122, and of Wood, V.-C., 1 K. & J. 166.
(*k*) See accordingly per Wood, V.-C., "In no case in which an estate in fee simple has

[*1333] *On the other hand, where the first devise would confer an estate for life only, the restricted construction imputes a very improbable intention to the testator; for as it raises no estate tail in the first devisee, nor (it should seem) an implied estate by purchase in the issue, the land goes absolutely from the devisee at his death, whether he leave issue or not; and that event is material only as bearing on the right of the ulterior devisee; for, although the property ceases to belong to the prior devisee whether he leave issue surviving him or not, yet it is to pass over to the remainderman only in case the prior devisee do *not* leave issue, which it is hard to suppose could have been really meant. And if the distinction suggested by these observations has not been a recognized principle of construction in any one of the cases, yet its influence may be traced in some of them (*l*).

But if two estates be devised to A., one in fee simple and the other for life, and if he die without issue, then, in one and the same sentence, both estates to be given over *at the death* of A., it would be difficult not to give these words in both cases the same meaning, however different their effect in the respective cases might be. Thus in Coltsmann *v.* Coltsmann (*m*), where by will a testator devised to his son J. C. his "*property*, lands, and premises" at F., with the live and dead stock and the furniture; also his "lands and premises" at D.; and by codicil directed that if J. C. should die without heirs of his body, in that case and in default of such heirs the lands of F., with the furniture; and the lands at D. should *at his son's death* descend and be transferred to A. and his heirs, charged with any provision made by J. C. for his wife with the testator's consent. Also if J. C. should die without heirs of his body, in that case and in default of such heirs the testator bequeathed 6,000*l.* to his daughter. It was held in the House of Lords that, as to the lands at F., which by the will were given to J. C. in fee, the limitation over was an executory devise to take effect in the event (which had happened) of J. C. dying without an heir of his body living at his death.

Gifts in fee and for life to A. followed by one gift over of both "at death of A." held restrictive.

If A. die without *heirs of his body*, then "at his death," held restrictive.

Another case in which the words in question bear the restricted construction is where the limitation over is preceded by a [*1334] power *implying a gift in default of appointment to the issue of the donee living at his death. This exception was

been limited by the first words has that estate been reduced to an estate tail in order to construe the words of the gift over on the death of the devisee without issue to be a remainder. It is begging the question to say that the gift over is to be taken to be a remainder; because it is necessary first to make out that the gift in fee is cut down to an estate tail." Parker *v.* Birks, 1 K. & J. 166. Jones *v.* Ryan was not cited.

(*l*) See Wyld *v.* Jervis, 1 Atk. 432; West's Cas. t. Hardw. 311. See also Simmons *v.* Simmons, 8 Sim. 22; Butt *v.* Thomas, 11 Ex. 235, 1 H. & N. 109.

(*m*) L. R., 3 H. L. 121.

first established in bequests of personal estates, and the authorities which establish it will be noticed in the next division of this section.

Prior gift to issue at death implied from power.

II. — 3. *Rule under the Old Law as regards Personalty.* — Our next inquiry is, what expressions or circumstances in the context will cut down the words under consideration, to issue *living at the death*, in regard to *personal* estate.

What will restrict in regard to *personal* estate.

1st. As to the *expressions* which have been held to have this effect.

Expressions held to be restrictive.

A gift over on death under the age of twenty-one and without issue, is held to refer to death under that age and leaving no issue surviving (*n*). This agrees with the rule respecting real estate (*o*).

Death without issue coupled with another contingency.

The effect of the words "at," "on" and "after" death, applied to gifts over of personal estate, has been the subject of frequent discussion.

In Pinbury *v.* Elkin (*p*) a testator having made his wife executrix, and given her all his goods and chattels, provided that if she should die without issue by him (*q*) then *after her decease* (*r*) 80*l.* should remain to his brother J. Lord Parker, C., held that the words imported a dying without issue at the death, for that a contrary construction would be repugnant to the words "after (*i. e.*, *immediately* after) her decease," which would be carrying the payment beyond the day, and would, he said, be as absurd as to appoint the day of payment to be to-morrow, if it shall rain this day twelvemonth.

"After his decease" held restrictive.

Sir W. Grant has (*s*) intimated a doubt whether the word "after" was properly construed *immediately after* in the last case. But Pinbury *v.* Elkin seems to have been followed in several instances (*t*). Of course, there can be no difficulty (as this dictum impliedly admits) where such is the *expression*.

"Immediately after the decease of A."

Where the words are, "at" or "on the decease" of the first taker the applicability of the doctrine of Pinbury *v.* Elkin seems
* to be still more conclusive on account of the greater defi- [*1335]
niteness of the expression (*u*).

(*n*) Martin *v.* Long, 2 Vern. 151; Pawlett *v.* Doggett, id. 86; Bradshaw *v.* Skilbeck, 2 Bing. N. S. 182, the words in this case were ambiguous, but held equivalent to the expression in the text; and see Balguy *v.* Hamilton, Mose. 186.

(*o*) Ante, p. 1327.

(*p*) 1 P. W. 563, 2 Vern. 758, 766, Pre. Ch. 483.

(*q*) See ante, p. 1224.

(*r*) As to this expression applied to *devises*, see ante, p. 1332.

(*s*) Donn *v.* Penny, 19 Ves. 548, 1 Mer. 20. See also Barlow *v.* Salter, 17 Ves. 483.

(*t*) Wilkinson *v.* South, 7 T. R. 555; Trotter *v.* Oswald, 1 Cox, 317. See Gawler *v.* Cadby, Jac. 346.

(*u*) Stratford *v.* Powell, 1 Ba. & Be. 1; Rackstraw *v.* Vile, 1 S. & St. 604.

Of course the word "then," as commonly interposed between two limitations, has no effect in restricting words importing a failure of issue to issue living at the death. Used in this way, "then" is a particle of inference, connecting the consequence with the premises, and meaning "in that event," or "if that happens." It is, therefore, a word of reasoning rather than of time (*x*).

Word "then" as interposed between two limitations.

Another ground upon which it has been said that the words in question have received a restricted construction is, that the bequest over involves a *personal* trust and confidence. To this principle Mr. Fearne (*y*) refers the case of Keily *v.* Fowler (*z*), where a testator bequeathed his worldly substance unto his daughter, in case she married with consent: in case she married without consent, she was to have only twenty cows and a horse; and, after appointing executors, he provided that in case his daughter should die without issue, his substance should return back to his executor, to be distributed as he should therefore direct; and, lastly, *in case his said daughter should* marry without consent, or *die without issue, his substance should return back to his executors to be by them distributed in manner following,* viz., to J. D. 100*l.* and several other pecuniary legacies, and to his daughter twenty cows and a horse. It was held, that the bequest over was to take effect on the death of the daughter without issue living at the death.

Bequest over involving a personal trust.

A limitation to the *survivor* of several living persons in [*1336] * default of issue of either forms another exception to the rule which construes these words to import an indefinite failure of issue; "for it will be intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest which might or might not be accompanied by actual possession" (*a*).

Where the gift over is to *survivors*.

(*x*) Per Lord Brougham, in Campbell *v.* Harding, 2 R. & My. 411. See also Stanley *v.* Lennard, 1 Ed. 87, ante; Beauclerk *v.* Dormer, 2 Atk. 308; Gill *v.* Barrett, 29 Beav. 372. The above-quoted passage in Lord Brougham's judgment was cited with commendation by Sir K. Bruce, in Pye *v.* Linwood, 6 Jur. 619, where an attempt was again made, and with no better success, to found an argument for the restrictive construction on the word "then."

(*y*) Fea. 482.

(*z*) 3 B. P. C. Toml. 299, Wilm. 298. This case and the ground for it above suggested was disapproved of by Lord Thurlow in Bigge *v.* Bensley, 1 B. C. C. 187, who observed, "that it would be better to say that in Keily *v.* Fowler there was no rule of construction than Mr. Fearne's." The fact probably was, that this very learned writer, finding the case so decided, put it upon the best ground he could discover. The ground, however, to which he has referred it does not exist; for the trust was not necessarily personal to the executors named, but might have been executed by the representatives of the survivor: and as it is clear that a transmissible *trust* raises no stronger argument against the ordinary construction than a transmissible *interest*; è consequentiâ, a personal trust (*i.* e., exclusively personal) *does* raise as strong an argument as a personal interest. The argument founded on the nature of the property given over to the daughter, namely, cows and horses, to which Mr. Fearne also alludes, appears to be not more conclusive.

(*a*) Massey *v.* Hudson, 2 Mer. 133. See Hughes *v.* Sayer, 1 P. W. 534; Ranelagh *v.* Ranelagh, 2 My. & K. 441; Turner *v.* Frampton, 2 Sim. N. S. 192; Campbell *v.* Harding, 2 R. & My. 411; Fisher *v.* Barry, 2 Hog. 153. Where "survivors" means, as it sometimes does, "others" (post, Ch. XLVII.), the gift over is clearly on an indefinite failure of issue, and void; and it was said by the Judges who decided Westwood *v.* Southey and Turner *v.* Framp-

But the presumption in favor of a limited construction of the words "in default of issue" arising from the use of the word "survivor" is repelled where words of limitation are superadded to that word. The addition excludes the presumption that it was a mere personal benefit that was intended for the survivor; for, though there should be no such failure of issue as would enable him personally to take, yet his representatives would be entitled to claim in his right whensoever the failure of issue should happen (*b*).

Presumption repelled where the gift to "survivor" contains words of limitation.

So, if the ulterior bequest which is to take effect on the failure of issue be to persons who shall be living *at the time*, the same reasoning seems to apply; but, in order to let in the force of this argument, the ulterior bequest must be so framed as to be confined to persons living at the death of the testator, and must not embrace an indefinite range of unborn persons. When, however, it is once ascertained, by the description of the ulterior legatees as living at the period of failure, that failure at the death of the party is meant, an alternative gift, to take effect if none of those legatees are then living, to others not so described, must also be valid (*c*).

Distinction where ulterior gift is to a person living at death of person whose issue is referred to.

And, of course, if the event which is made the condition precedent of the ulterior gift is not the fact of the legatee surviving the extinction of issue, but merely that of his surviving the person whose failure of issue is referred to, no ground is thereby laid for the restricted construction, as the ulterior gift might be intended to confer a *vested interest* on the death of such person, to take effect *in possession* in favor of the representatives * of the [*1337] legatee on the failure of issue at any remote period (*d*).

3dly. Another class of cases remaining to be noticed is where the words importing a failure of issue are preceded by a power implying, in default of appointment, a gift to the issue of the donee living at his decease. In this situation the words in question are evidently referential, and, as such, may seem to belong to the preceding chapter, where indeed the cases have been briefly noticed (*e*); but they suggest a few observations which will more properly find a place here.

3. Prior (implied) gift to issue at the death.

The authorities for this exception to the indefinite construction, are Target *v.* Gaunt (*f*) and Hockley *v.* Mawbey (*g*). In Target *v.* Gaunt

ton, that in ambiguous cases (which they considered them to be) the law leaned in favor of that interpretation of "survivors" which would support the bequest over. Cf. Harris *v.* Davis, 1 Coll. 416, ante, p. 1322.

(*b*) Massey *v.* Hudson, 2 Mer. 134; see also O'Donohoe *v.* King, 8 Ir. Eq. Rep. 185.

(*c*) Jones *v.* Cullimore, 3 Jur. N. S. 404. See also Gee *v.* Liddell, L. R., 2 Eq. 341.

(*d*) Garrett *v.* Cockerell, 17 Y. & C. C. C. 494.

(*e*) Ante, p. 1288.

(*f*) 1 P. W. 432, 10 Mod. 402, Gilb. Eq. Ca. 149.

(*g*) 1 Ves. Jr. 143, 3 B. C. C. 82, 1 R. R. 93; see also Leeming *v.* Sherratt, 2 Hare, 14, stated p. 1288; Keating *v.* Keating, Ll. & G. t. Plunk. 291; Eastwood *v.* Avoson, L. R., 4 Ex.

a term of years was bequeathed to H. for life, and no longer; and after his decease *to such of the issue of H. as he should by will appoint, and in case H. should die without issue,* then over. The question was, whether the bequest over was good; and Parker, L. C., decided in the affirmative, observing that it must be intended such issue as H. should, or at least might appoint the term to, which must be intended *issue then living;* and that this construction should be the more favored, in regard it supported the will, whereas the other (*i. e.* that the testator meant whenever there was a failure of issue) destroyed it.

To such of the issue of H. as he should by will appoint.

In Hockley *v.* Mawbey a testator devised freehold and leasehold estates to A. for life, and after her decease to his son *R. and his issue lawfully begotten or to be begotten, to be divided among them as he (R.) should think fit, and in case he should die without issue,* over. One question was, whether R. took an estate tail in the realty, and an absolute interest in the personalty, or a life interest only in both. Lord Thurlow was of opinion that he had only an estate *for life.* It was evident, he said, that the testator did not intend the property to go to the issue as heirs in tail; for he meant that they should take distributively, and according to the proportions to be fixed by the son, and that it had often been decided, that where the gift was in that way, the parties must take as purchasers. After some further [*1338] remarks, he intimated an opinion that the children took * an interest independently of the power, which only authorized the son to fix the proportions, and not to choose whether they were to take at all: and that the objects, whosoever they were, *must be in existence during the life of the son.*

It may be remarked, however, that if in Target *v.* Gaunt and Hockley *v.* Mawbey there had been an *express* limitation to the issue in default of appointment, it seems that such *limitation* could not, by implication, have been confined to issue living at the death because the power embraced such objects only (*h*).

141; Whitelaw *v.* Whitelaw, L. R., Ir. 5 Ch. 120. But see Simmons *v.* Simmons, 8 Sim. 22; and see Martin *v.* Swannell, 2 Beav. 249; Crozier *v.* Crozier, 2 Con. & L. 294, 3 D. & War. 373.

(*h*) See Smith *v.* Death, 5 Mad. 371, ante, Vol. I., p. 519; Seale *v.* Barter, 2 B. & P. 285; and per Wigram, V.-C., Davidson *v.* Proctor, 19 L. J. Ch. 396, 14 Jur. 32; Roddy *v.* Fitzgerald, 6 H. L. Ca. 824. See also Jesson *v.* Wright, 2 Bli. 1, ante, p. 1211.

*CHAPTER XLII.

WHAT WORDS RAISE CROSS-REMAINDERS BY IMPLICATION AMONG DEVISEES IN TAIL.

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I. — General Rule that Devise to Several as Tenants in Common with Limitation over in Default of Issue raises Cross-Remainders by Implication. — Where lands are devised to several persons as tenants in commou in tail, with remainder over, the question arises, whether, upon the determination of the entail in each share, such share devolves upon the other co-devisees in tail, or immediately goes over to the remainder-man of the entirety. Such reciprocal limitations to the tenants in common in tail, inter se, are, in professional language, denominated cross-remainders. It is settled that in wills, as distinguished from deeds (*a*), they need not be limited expressly (though in correctly drawn wills they are never omitted), but may be implied from the context.[1] To show what ex- Introductory remarks.

(*a*) Edwards *v.* Alliston, 4 Russ. 78. Doe *v.* Birkhead, 4 Exch. 110. The latter case, though not impugning the principle stated in the text, overrules the former on another ground. And see Doe *v.* Wainewright, 5 T. R. 427, 2 R. R. 427; Doe *v.* Dorvell, id. 518, 2 R. R. 475. As to marriage articles, see post, p. 1345, n.

[1] The following has been given as an example of cross-remainders in A. and B. arising by express terms: Devise of Whiteacre to A. and of Blackacre to B. in fee, and if either die without issue, the survivor to take, and if both die without issue, then over to C. in fee. The gift over to C., it may be observed, though void for remoteness as an executory devise, is good as a remainder, but it is postponed to the cross-remainders. Cross-remainders to A. and B. would be implied in the following case: Devise to A. and B. of lots to each and remainder over to C. on the death of both. 4 Kent, 201; Chadock *v.* Cowley, Croke Jac. 695; Baldrick *v.* Whity, 2 Bail. 442; Williams *v.* Kibler, 10 S. Car. 414; Picot *v.* Armistead, 2 Ired. Eq. 226; Seabrook *v.* Mikell, 1 Cheves. Eq. 80; Wall *v.* Maguire, 24 Penn. St. 248; Bamford *v.* Chadwick, 23 L. J. C. P. 172; *s. c.* 26 Eng. L. & Eq. 302; Allen *v.* Ashley School Fund, 102 Mass. 262; Parker *v.* Parker, 5 Met. 134.

It will be remembered that it is generally held that a gift over to "survivors" after a prior estate makes a good executory devise, and not a remainder. Ante, p. 1320, note 1. Though when the gift over is to a *third person*, the words "dying without issue" are generally held to create a remainder. Allen *v.* Ashley School Fund, 102 Mass. 262, 264. This will suffice to show that much of the learning upon this subject is divested of practical importance except in those states, if there

pressions have been held, in judicial construction, sufficient to raise such implication, is the object of the present chapter.

The principle has been long admitted that wherever real estate is devised to several persons in tail as tenants in common, and it appears to be the testator's intention that not any part is to go over [*1340] until the failure of the issue of all the tenants in *common, they take cross-remainders in tail among themselves. The great struggle has been to determine when the words "in default of such issue," or other expression, used to connect the devise in tail with the succeeding limitation, may be construed to demonstrate such an intention. In order to place this subject fully before the reader, it will be convenient briefly to trace the steps by which the rule has been gradually placed on, or rather restored to, its present enlarged and liberal footing; and then to state the general conclusions which the cases warrant.

General principle of the cases.

What expressions raise cross-remainders.

One of the earliest leading authorities is an anonymous case in Dyer (*b*), where a man, having five sons, and his wife enceinte, devised two thirds of his lands to his four younger sons and the child en ventre sa mère, if it was a son, and to the heirs male of their bodies begotten, *and if they all five should happen to die without issue male of their bodies, or any of their bodies, lawfully begotten,* then the testator willed that the said two parts should revert to his right heirs. It was held that four of the devisees having died without issue male, the survivor was entitled *to the whole;* it being evidently the true intent of the devisor, that, *so long as there was any issue male of his body* (qu. of the bodies of any of the five devisees?), no part should revert to the heirs.

Devise over, if *all the devisees died without issue;*

So, in Holmes *v.* Meynell (*c*), where a testator devised certain lands to his *two* daughters and their heirs, equally to be divided between them; *and in case they happen to die without issue,* then over; the daughters were held to be tenants in tail in common, *with cross-remainders in tail.*

—in case the devisees died without issue.

(*b*) 303 b, 13 Eliz., sometimes erroneously referred to as Clacha's case, as to which see below, p. 1353.

(*c*) Raym. 452, 2 Show. 136.

still be such, in which the word "survivor" is not deemed sufficient to affect the construction of words of entailment. See the note just cited. As the whole question, however, is one of actual intention, it may appear that the testator *did* contemplate an indefinite failure of issue, notwithstanding the use of the word "survivor," the result of which would be to bring into application the doctrine of cross-remainders, no executory devise being created. The definition of Mr. Chancellor Kent, given in substance supra, was doubtless framed upon some of the earlier authorities (like Bells *v.* Gillespie, 5 Rand. 273), which disregard the word "survivor" when standing alone. See 4 Kent, Com. 275, 279. But it seems that cross-limitations by way of executory devise cannot be wholly implied (that is, without language requiring the implication) among devisees in *fee*, even if among legatees. See ch. 43; Fenley *v* Johnson, 21 Md. 106, 117. The result in such a case is that upon the death of one of the devisees in the lifetime of his co-devisee, the share of the deceased will devolve upon his representatives until the event shall happen, upon which the whole gift shall go over. See post, p. 1359.

These early cases accurately represent the state of the law at this day. It will now be proper to state some more modern authorities for the general position that the words "in default of issue," or "in default of such issue," following a devise to several persons in tail (*d*), raise cross-remainders between them.

In Wright *v.* Holford (*e*), where the testatrix devised to her sons, and in default of such issue to all and every the daughter and daughters of herself and P., and to the heirs of their body and bodies, such daughters if more than one to take as tenants in common and not as joint-tenants; *and for default of such issue,* to the use of her (testatrix's) right heir; Lord Mansfield *and the other judges of the King's [*1341] Bench on a case from Chancery certified that, as there were no words intimating any intention to limit over the *respective* shares of the two daughters dying without issue (*f*), and as nothing was given to the heir-at-law whilst any of the daughters or their issue continued, they must among themselves take cross-remainders.

To daughters in tail, *and for default of such issue.*

Here the devise was to daughters as a class, a species of case of which Lord Eldon has observed (*g*), that as, if there are no objects at the death of the testator (and, if the devise be future, whether there are or not (*h*)), the shares of subsequently existing objects are liable to be diminished by the birth of additional children, the consequence of not implying cross-remainders would be, that the shares of such after-born children, which had been so taken from the existing children, would, upon their death without issue (perhaps the day after birth), go instanter to the remainder-man, which could never be the intention (*i*).

As to devises to *classes;*

In the next case, Phipard *v.* Mansfield (*k*), we find the implication of cross-remainders applied in the case of a devise to *three* persons nominatim. The testator devised to his brothers W. and J. and his sister E. and the heirs of their bodies lawfully begotten and to be begotten, as tenants in common and not as joint-tenants; *and for want of such issue,* to his own right heirs forever. On a question whether there were cross-remainders, Lord Mansfield, after stating the rule of presumption to be in favor of cross-remainders between two, and against them between more than two (*l*), and reasoning at length upon the

— to three in tail, and "*in default of such issue;*"

(*d*) As to the notion which appears at one period to have obtained that cross-remainders would not be implied between more than two persons, see post, p. 1352.

(*e*) Cowp. 31, 2 Ed. 239 nom. Wright *v.* Lord Cadogan; Amb. 468 nom. Wright *v.* Englefield.

(*f*) See post, p. 1356.

(*g*) See judgment in Green *v.* Stephens, 17 Ves. 75.

(*h*) See ante, p. 1011.

(*i*) This is the substance, though not the precise terms, of his Lordship's observations.

(*k*) Cowp. 797.

(*l*) It is certainly very extraordinary that his Lordship should have continued to propound this doctrine, when in Comber *v.* Hill and Davenport *v.* Oldis (post, p. 1356, n.), the implication had been rejected between *two* devisees, on the mere force of the word "respective;"

cases, and the terms of the will, decided in the affirmative. Want of issue (he said) meant issue of *all* of them. The rest of the Court concurred.

In Atherton *v.* Pye (*m*) a testator devised (in remainder) to all and every the daughter and daughters of his daughter, and the heirs male of the body of such daughter or daughters, equally between them if more than one as tenants in common and not as joint-tenants; *and for and in default of such issue,* the testator * gave and devised *all* his said premises unto his own right heirs forever. The daughter had four daughters. Lord Kenyon, though he adverted to the distinction between two and more, said that there was no doubt, from the words of the limitation over, that the devisor intended to raise cross-remainders between the granddaughters. Buller, J., observed that the devise over was of *all* the devisor's estates and they could not all go together but by making cross-remainders.

[*1342]

— to a class (daughters) in tail, and "*in default of such issue;*"

In the next case, Watson *v.* Foxon (*n*), the effect of the word "respective" came under consideration. The testator devised all that his farm, &c., situate at W. and H., to all and every the younger children of M. begotten or to be begotten, if more than one equally to be divided between them and to the heirs of their *respective* bodies, to hold as tenants in common; and if M. should have only one child then to such only child and to the heirs of his or her body issuing; *and for default of such issue,* the testator gave *the said premises* to C. M. had four children. On the question whether cross-remainders could be implied, Lord Kenyon recurred to Lord Mansfield's statement of the rule of presumption, observing, however, that such presumption might be overruled by plain intention. He strongly disapproved of Lord Hardwicke's reasoning in Davenport *v.* Oldis (*o*) on the word "respective," which he characterised as unworthy of his great learning and ability. He observed that in Atherton *v.* Pye (*p*) the devise over, "in default of such issue," was of all the testator's said lands, and stress was laid by some of the Judges on the word "all" for raising cross-remainders, he would not say by implication, but by what the Judges collected to be the intention of the testator. But the word "all" was not decisive of that case, and in truth made no difference in the sense; for a devise over of "the said premises," or "the premises" or "*all* the said premises," meant exactly the same thing. Admitting, therefore, the general rule, that the presumption

— to a class (children) "and the heirs of their *respective* bodies;" and for default of such issue.

and when, with those cases before him, he was himself in thie very case determining that nearly the same words *did* raise cross-remainders among three devisees.

(*m*) 4 T. R. 710, 2 R. R. 509.

(*n*) 2 East, 36. See also Staunton *v.* Peck, 2 Cox, 8, where Lord Kenyon, then M. R., had made a similar decision in regard to the word "respective," but without the same explicit denial of the doctrine respecting it.

(*o*) Post, p. 1356, n.

(*p*) Ante, p. 1341.

was not in favor of cross-remainders by implication between more than two, still *that* was upon the supposition that nothing appeared to the contrary from the apparent intention of the testator. He had no doubt that the testator intended to give cross-remainders among the issue of M., and that all the estate should go over at the same * time. He thought that Lord Mansfield's quarrel with [*1343] Davenport *v.* Oldis (*q*) was well founded, and he agreed with Wright *v.* Holford and Phipard *v.* Mansfield (*r*), from which he could not distinguish this case.

Davenport *v.* Oldis, &c., overruled.

With Watson *v.* Foxon we take leave of all direct judicial recognition of the distinction as to implying cross-remainders between two and a larger number, which subsequent Judges, except in one remarkable instance presently commented on (*s*), have rejected in expression, as well as in fact.

In the next case, Roe d. Wren *v.* Clayton (*t*), cross-remainders were implied among several *branches* of issue, by the force of expressions referring to a preceding devise to daughters in tail, among whom cross-remainders were held to be implied.

The testator devised all his real estate to his niece F. for life, remainder to her first and other sons in tail successively, and in default of such issue, to all and every the daughters of his niece and the heirs of their bodies, to take as tenants in common; *and, for default of such issue,* then to the issue of his sisters S., J., W., and B. in tail, *in such manner as he had limited the same to his said niece F.'s issue, and for default of such issue* to testator's right heirs. One question was, whether, supposing the several stocks of issue of S., J., W., and B. to take the estate in equal fourths per stirpes (and not the whole per capita, as was also contended), there were cross-remainders between such stocks. This rendered it necessary to consider whether cross-remainders would have been created between the daughters of the niece; though it was contended that, even admitting the implication in regard to *them,* it did not follow that the words, "in like manner," &c., should be construed to do more than raise cross-remainders between the issue of each sister inter se. Lord Ellenborough and the other Judges thought the implication of cross-remainders among the daughters of the niece was perfectly clear, inasmuch as it was the plain intent of the testator that no part of his estate should go over to the issue of his sisters till default of issue of his niece; and they were further of opinion, that cross-remainders were to be implied among the several *classes* of the issue of the sisters, the testator's devise being tantamount to his saying, "I mean that all my estate shall be enjoyed by the issue of my

Cross-remainders implied among several stocks of issue.

(*q*) But when did his Lordship quarrel with it? See post, p. 1356, n.
(*r*) Ante, pp. 1340, 1341.
(*s*) Livesey *v.* Harding, post, p. 1347.
(*t*) 6 East, 628; affirmed in D. P. 1 Dow. 384, Sug. Prop. 283.

four sisters, so long as there are any such, and, in default of
[*1344] such issue, all to go together * to my own right heirs." Lord Ellenborough laid some stress upon the word "all" used in the devise.

The next case, Doe d. Gorges *v.* Webb (*u*), again elicited from the bar *both* the old arguments, founded on the number of the devisees and the word "respective," and from the bench a more distinct denial of their force and authority. A testatrix devised a moiety of certain lands to particular limitations, with remainder to her three daughters, F., M., and A., and the heirs of their bodies *respectively*, as tenants in common; *and in default of such issue* she gave the same to her own right heirs; and it was held that cross-remainders were raised between the daughters by implication. Sir J. Mansfield, C. J., adverting to the distinction between two and more, observed that it was wonderful how it ever became established; and in regard to the word "respective," he remarked that it could make no difference; a devise to two as tenants in common and the heirs of their bodies, must necessarily mean to the heirs of their *respective* bodies (*x*). Lawrence, J., said that the cases which *had founded themselves on the distinction of that expression must now be considered as overruled.*

Devise to three in tail *respectively, and in default*, &c.; cross-remainders implied.

The implication-doctrine was again discussed in Green *v.* Stephens (*y*), where the testator (after certain limitations) devised to the use of all and every the daughter and daughters of his nephew A. lawfully to be begotten and to her and their heirs forever, as tenants in common; *and for want of such issue* to the use of his (the testator's) three nieces, B., C., and D., and their *several and respective* (the exact words which occurred in Davenport *v.* Oldis (*z*)) heirs forever, as tenants in common; *and for want of such issue*, to his own right heirs; and he bequeathed his personal estate to be invested in the purchase of land which he directed to be *conveyed* and *settled* to the same uses. The question was whether a sum of money which had not been laid out belonged wholly to the heir in tail of the surviving niece (the other two nieces having died without issue), or one-third only to him, and the other two-thirds to the devisee of the remainder-man; and this depended upon the question, whether the Court, in executing the trust, would have inserted cross-remainders between the nieces. Lord Eldon, after referring to the authorities, and reprobating the distinctions which had been taken in some cases in regard to the expressions, "*all* the premises," "the
[*1345] * same," &c., decided in the affirmative. He said that, con-

— to B., C., and D., and their *several and respective* heirs forever, and *in default of such issue*, over.

(*u*) 1 Taunt. 234.
(*x*) Assuming that they could not have common heirs of their bodies, as to which, vide ante, p. 1116.
(*y*) 12 Ves. 419, 17 Ves. 64.
(*z*) Post, p. 1356.

ceiving it to be the intention of the will before him to raise cross-remainders among the daughters of the nephew (respecting whom he made some observations which have been before referred to (*a*)), he could not think that the testator had not the same intention in regard to his nieces; there was nothing to distinguish them except the word "respective," which, upon the authority of Doe d. Gorges *v.* Webb (*b*), did not make a distinction upon which judicial construction should turn.

As the implication of the cross-remainders in this case was so clear upon the direct devises, it was not necessary to found the decision on the circumstance of the trust being *executory*, though it is well known that the Courts, in executing such trusts, are in the habit of dealing with them for this and other purposes with a freedom peculiar to, and derived from, the nature of such trusts (*c*). Lord Eldon, however, chose to decide the case upon the construction of the anterior devises, in reference to which it seems to be open to some observation. Much of his reasoning, it will be perceived, proceeds upon the assumption that cross-remainders would have arisen by implication between the *daughters* of the testator's nephew; but it is submitted, with deference to such authority, that if the devise be accurately stated in the report (of which there can be little doubt, as Lord Eldon twice refers to the devise in the very terms of it), *the daughters would have taken estates as tenants* IN FEE SIMPLE, on which of course no remainders, either express or implied, could have been engrafted. The limitation was to the daughters as a *class* and their *heirs*, and, in default of *such* issue, over to the nieces nominatim and their heirs, and, in default of such issue, over. Now, the authorities have clearly established, that the words "such issue," in the limitation over after the limitation to the *daughters*, are referable to the *daughters* (*d*), and not to their *heirs*, so as to give to the word "heirs" the sense of "heirs of the body;" but as to the *nieces*, who were to take as individuals named, *and who were not a class of "issue,"* the words "in default of such issue," necessarily referred to their *heirs*, and, consequently, reduced *their* estates to estates tail. The words "such issue" may be variously construed with reference to devises * differently constituted. [*1346] The case underwent considerable discussion, but the difficulty of raising estates *tail* in the daughters (which was a necessary preliminary to the admission of cross-remainders) does not appear to have attracted the attention of either the bar or the bench.

Remarks upon Green *v.* Stephens.

The point is principally important (since no daughter of A. appears

(*a*) Ante, p. 1341.
(*b*) Ante, p. 1344.
(*c*) See Marryatt *v.* Townley, 1 Ves. 102, and other cases cit. 17 Ves. 67. As to the implication of cross-remainders in marriage articles, see Duke of Richmond's case, 2 Coll. Jur. 347.
(*d*) See Hay *v.* Earl of Coventry, 3 T. R., 1 R. R. 652, and other cases cited ante, pp. 1393, 1394.

ever to have come in esse) as it would have induced the necessity of construing the devise to the nieces, in regard to the implication of cross-remainders, per se, detached from the devise to the daughters; and, even in this point of view, it would not be material, if there was sufficient upon that devise alone (as it is conceived there was) to raise the implication; for the circumstance that the words "in default of such issue" had already been operative to cut down the estate of the prior devisees to an estate tail, which is the only novel feature in the case, seems to form no valid reason for denying to them the additional effect of raising cross-remainders between those devisees (*e*). We now return to the general subject.

Cross-remainders implied from words "for want of issue males," &c.

The next case of this class is Doe d. Southouse *v.* Jenkins (*f*) where a testator, after the failure of some estates previously given, devised certain farms to his four grandsons (naming them), subject to certain annuities; adding, "they to have share and share all alike of all the aforesaid premises, and then I give to the heirs male of all my said grandsons, and then to go to my grandsons' heirs male that part that belonged to their father, and then to them, and then to the last liver, to their heirs male of my said grandsons, *and for want of issue males of my grandsons,* I give," &c. One question was, whether cross-remainders among the four grandsons could be implied. It was contended that the implication was here controlled by the testator's declaration, that he gave to the heirs male "that part which belonged to their father," by which it must be inferred that he meant to exclude the part that belonged to an uncle. The Court, however, considered that the case fell within the general rule. Best, C. J., observed that, although the words "to them, and then to the last liver" were unintelligible, it was evident that the testator meant that the estate should not go over to the ulterior devisee until the failure of issue of all the grandchildren, and therefore cross-remainders were to be implied.

[*1347] * So, in Livesey *v.* Harding (*g*), where a testator, upon the failure of issue of his eldest or only son, limited his estate in the words following: "To the use of all and every the daughter and daughters of me the said E. L., and the heirs of their bodies, to take as tenants in common if more than one equally; and if but one to the use of such only daughter of me the said E. L. and the heirs of her body forever; *and for default of such issue* to the use of my own right heirs forever." One question was, whether the daughters took cross-remainders in tail? Sir J. Leach, M. R., decided in the affirmative, on the ground that no

From words "and for default of such issue."

(*e*) See also Forrest *v.* Whiteway, post, p. 1347; also Atkinson *v.* Holtby, 10 H. L. Ca. 313, where such words first enlarged life estates to estates tail, and then supplied cross-remainders between the tenants in tail.

(*f*) 3 M. & Pay. 59, 5 Bing. 469.

(*g*) 1 R. & My. 636.

part of the estate was to go over unless there were a failure of issue of all the testator's daughters. "Where," he said, "there is a gift to two persons only and the heirs of their bodies, cross-remainders will be implied, although there is no expressed intention that no part of the estate shall go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively, and then the remainders over will be several and respective."

It could scarcely be meant that cross-remainders will arise between two devisees *without subsequent words* (*h*), — a proposition which would have the effect of reviving the exploded distinction in regard to the number of the objects, and to found on it a construction untenable, it is submitted, both on principle and authority; for the argument in favor of the implication of cross-remainders among *any* number of devisees, rests wholly on the words introducing the devise over; and, if there is no such devise, the ground for the implication is wanting. No case can be adduced in which the doctrine here propounded (and extra-judicially, for the case suggested by Sir J. Leach was purely hypothetical) has been even contended for. Possibly the observations of the learned Judge were misunderstood.

Remark upon Livesey *v.* Harding.

In Forrest *v.* Whiteway (*i*), the devise was to two sisters and their heirs and assigns forever; but, in case *both* should die without issue, then over. The Court of Exchequer held that the sisters took joint estates for life, with several inheritances in tail, with cross-remainders between them in tail.

Estates in fee cut down to estates tail with cross-remainders.

And in Powell *v.* Howells (*k*), where one moiety of land was devised to A., B., and C. as tenants in common in tail, and "in default of such issue *of any* of them," to X.; and the other moiety was devised to D. and E. as tenants in common in tail, and in default of such issue of both of them, to the said X.; cross-remainders of the first moiety were implied, notwithstanding the ambiguity of the words "any of them."

[*1348]

Cross-remainders implied from gift over "in default of issue of *any* of them."

Here closes the long line of cases establishing the operation of the words "in default of such issue," and other similar expressions, to raise cross-remainders among devisees in tail. It may seem to be extraordinary that so large an assemblage of decisions should have grown up in relation to a point which appeared to have been determined more than two centuries ago (*l*); but the reluctance evinced by some of the Judges of an early day to admit the implication be-

General observations upon the cases.

(*h*) See Cooper *v.* Jones, 3 B. & Ald. 425.
(*i*) 3 Ex. 367; and see Stanhouse *v.* Gaskell, 17 Jur. 157.
(*k*) L. R., 3 Q. B. 654.
(*l*) See Anon, Dyer, 303 b, and Holmes *v.* Meynell, ante, p. 1340.

tween more devisees than *two*, the pertinacious retention, in terms at least, of the distinction in regard to that number, by several of their successors until a much later period, and more particularly the exception to the implication-doctrine founded on the words "several" and "respective," introduced by Comber *v.* Hill, Williams *v.* Brown, and Davenport *v.* Oldis (which was too absurd to be submitted to even with such reiterated adjudication in its favor), are the sources from which the controversies have sprung that have rendered one of the simplest doctrines of testamentary construction in our books one of the most voluminous.

Lord Kenyon's attack upon Comber *v.* Hill and that line of cases in Watson *v.* Foxon was certainly bold, recognized as they had repeatedly been by his immediate predecessor (*m*); but as his decision has been since, after much consideration, confirmed in Doe *v.* Webb (*n*) and Green *v.* Stephens (*o*), we may confidently hope that the argument founded on the words "several" or "respective," or the exploded distinction in regard to the number of the devisees (which is equally untenable upon principle and authority), will never more be seriously advanced in a court of justice.

Cross-remainders have also been implied where the gift over was on failure of issue at a particular period. Thus, in Maden *v.* Taylor (*p*), where a testator devised freehold property in trust for his nieces A., B., C., and D., as tenants in common, for life, and after the death of any of them, in trust as to her part for her children and the heirs of their bodies; and in case any of the *nieces* should die *without leaving issue living at her death*, then * for the survivors or survivor of the nieces and the heirs of her and their body and bodies; and in case all the nieces but one should die without leaving lawful issue, then for such only or surviving niece and the heirs of her body; and *in case of a total failure of issue of the nieces* (which was held still to mean *at the death*), then for testator's right heirs. Sir G. Jessel, M. R., said that the true rule was laid down in Doe *v.* Webb (*q*), that you must ascertain whether the testator intended the whole estate to go over together. If you once found that to be intended, you were not to let a fraction of it descend to the heir-at-law in the mean time. You were to assume that what was to go over together, being the entire estate, was to remain subject to the prior limitations until the period when it was to go over arrived. He thought that principle applied to a case like that before him, where it was plain *in one event* the whole estate was to go over together, although it was possible that another event might happen in which that intention might be disappointed. He therefore held that cross-remainders must be im-

Cross-remainders implied from gift over on failure of issue *at death*.

[*1349]

(*m*) See ante, p. 1342.
(*n*) Ante, p. 1344.
(*o*) Id.
(*p*) 45 L. J., Ch. 569.
(*q*) Ante, p. 1344.

plied between the children of each niece; otherwise, while the particular event was still in suspense, a fraction might, by the death of one child without issue, descend to the heir-at-law.

II. — Words "Remainder," "Reversion," raise Cross-Remainders, when. As to Executory Trusts, &c. — Cross-remainders have been implied from the word "*remainder.*"

Thus, in Doe d. Burden *v.* Burville (*r*), where a testator (after limitations to his sons successively in tail) devised to the use of all and every his daughter and daughters as tenants in common, and to the heirs of her and their body and bodies, *with remainder* to the heirs of his (testator's) brother A. forever; Lord Mansfield was of opinion that cross-remainders were to be implied between the daughters. He observed that, in limiting the remainder to the singular number, the testator conceived that it could not take effect until the death of the last daughter without issue; and that, under the preceding limitations, all the female line of each son must fail before the male line of the other could take, and all must fail before the daughters could take. It would be absurd to suppose that he had a different intention as to his own daughter.

Devise to daughters in tail, with *remainder* over; cross-remainders implied.

In another case, however, the same eminent Judge held cross-remainders * *not* to be raised by a limitation of "*the* [*1350] *reversion,*" after devises somewhat differently constituted.

Thus, in Pery *v.* White (*s*), where the testator devised (in remainder) to his four sisters and a niece for their lives as tenants in common, remainder to their sons successively in tail male, remainder to their daughters in tail, *the reversion* to his own right heirs; Lord Mansfield held that there were no cross-remainders. He relied much upon the devise being in effect to the sisters and niece and their sons *respectively.* "During their lives," he observed, "there is a division: each is to have a fifth for life, to enjoy in severalty. Then follows, 'the remainder to their sons successively in tail.' What is the meaning of the expression, 'their sons'? It is impossible to construe it otherwise than 'respectively;' that is, remainder of the share of the sister dying to her sons successively; remainder to her daughters as coparceners, and then the *reversion* to the right heirs, that is, the reversion of the share of the several tenants for life and their issue *respectively.* It is absurd to say that the children of the other sisters should take the share of a deceased sister as purchasers in the lifetime of their mother."

Whether the word "reversion" will raise cross-remainders.

He seems, therefore, to have thought that if cross-remainders were raised, it must have been among *the children* only. His reasoning, it

(*r*) 2 East, 47, n., 13 Geo. 3. (*s*) Cowp. 777, 18 Geo. 3.

Remarks upon Pery *v.* White.

will be observed, proceeds upon the hypothesis now exploded (*t*), that by a devise to persons *respectively* the implication is excluded, and not upon any distinction between the words "reversion" and "remainder," the expression in the last case, which must have been in his recollection, having been decided by him only three years before. It would certainly not be impossible to construct a plausible defence of such a distinction; but it is probable that the Courts, instead of reconciling the two cases in this manner, would be inclined to go the length of saying that *any* words carrying on the limitations would raise cross-remainders between anterior devisees in tail. So far as Pery *v.* White rests upon the force of the word "respective," even if it had been actually in the will, it is now clearly overruled (*u*).

Allusion has been made to the more ready implication of cross-remainders in executory trusts (*x*) than in direct devises. It may be further remarked, in regard to such trusts, that in Horne *v.* Barton (*y*), where a testator devised his real [*1351] estate to *trustees and their heirs, upon trust for the use and benefit of all and every his children who should live to attain the age of twenty-one years or be married, which should first happen, in equal shares or proportions undivided, for their respective lives, with remainder to their issue severally and respectively in tail general, *with cross-remainders,* and the testator directed his trustees to execute a settlement accordingly; Sir W. Grant, M. R., held that cross-remainders were to be inserted, not only as between the children respectively, but also as between the families.

Executory trusts.

In a former work (*z*) the writer suggested the probability that the principles of construction upon which cross-remainders have been implied among devisees in tail would be held to apply to estates for life; and, consequently, that if a testator manifested an intention that property previously devised to several persons for life, as tenants in common, should not go over to the ulterior devisee until the decease of all the devisees for life, it would be concluded, by the same process of reasoning as had conducted to a similar conclusion in regard to devisees in tail, that the testator meant the surviving devisees or devisee for the time being to take the shares of deceased objects. Such a devise afterwards occurred in Ashley *v.* Ashley (*a*), where a testator devised real estate to the use of his daughter A. for her life, and after the deter-

Cross-remainders implied among devisees for life.

(*t*) Ante, pp. 1342, et seq.; and see post, p. 1356.
(*u*) Id.
(*x*) Ante, p. 1345.
(*y*) Coop. 257, 19 Ves. 398. But see same double implication in case of a direct devise, Roe *v.* Clayton, 6 East, 628, ante, p. 1343.
(*z*) 2 Powell on Dev, 623, n.
(*a*) 6 Sim. 358, as to which see Vol. I., p. 252, n. See also Pearce *v.* Edmeades, 3 Y. & C. 246; Walmsley *v.* Foxhall, 1 D. J. & S. 451, 605, as to the share of the child that died without issue.

mination of that estate, to the use of trustees to preserve, and after her decease, to the use of all and every the child or children lawfully begotten and to be begotten on the body of A., to take as tenants in common and not as joint-tenants; *and for want of such issue* of A., then to the use of another daughter and her children in like manner. The Master reported that the children of A. took life estates only, without cross-remainders between them; but Sir L. Shadwell, V.-C., expressed a strong opinion against the finding of the Master. He observed that but one subject was given throughout; the expression "for want of such issue" meant want of issue whenever that event might happen, either by there being no children originally, or by the children ceasing to exist. Accordingly he declared that the children of A. took estates for life as tenants in common, with cross-remainders between them for life.

*** III. — Alleged Exceptions to the Rule considered.** — At one period a notion seems to have obtained that cross-remainders could not be implied between more than two persons, on account of the uncertainty and inconvenience (*b*). [*1352]

Distinction between two and a larger number of devisees.

The alleged ground for the distinction between the favored number of two and a larger body of devisees seems to be altogether futile (*c*), for it is obvious that the uncertainty and confusion would not be greater in the case of implied than in that of express remainders; and its origin can hardly be otherwise accounted for than by attributing it to the general indisposition of our courts in early times to adopt modes of construction which were considered (though in this instance, erroneously) to have a tendency to create questions of a complex or subtle character. The doctrine, indeed, which rejected the implication between more than two devisees did not long (if *in effect* it ever did) exist, but, for a considerable period after it was virtually exploded, it was permitted to preserve a *semblance* of authority: for the Judges, not venturing altogether to discard the distinction in regard to the number of devisees, said that the presumption was in favor of cross-remainders between two, but between more than two they were rather to be presumed against, though such presumption against them might be repelled by a plain indication of intention (*d*).

Such was the language held upon this subject down to a late period. But an attentive consideration of the cases will show, that at this day

(*b*) See Gilbert *v.* Witty, Cro. Jac. 655. See also Cole *v.* Levington, 1 Ventr. 224.

(*c*) Indeed, the implication of cross-remainders is *convenient*, as preventing the subdivision of shares. In one case, the rejection of the implication doctrine would have entitled the lessor of the plaintiff to recover twenty-five undivided three-hundred-and-sixtieth parts! *i. e.*, $\frac{25}{360}$, Doe d. Gorges *v.* Webb. 1 Taunt. 234.

(*d*) See Lord Hardwicke's judgment in Marryat *v.* Townly, 1 Ves. 104. Lord Mansfield's judgments in Doe d. Burden *v.* Burville, 2 East, 48, n.; Pery *v.* White, Cowp. 780; and Phipard *v.* Mansfield, id. 800; and Sir L. Kenyon's, in Staunton *v.* Peck, 2 Cox. 8; Atherton *v.* Pye, 4 T. R. 713, 2 R. R. 409; Doe *v.* Cooper, 1 East, 236; and Watson *v.* Foxon, 2 East, 40.

at least there is no real difference with respect to the number of persons between whom cross-remainders can be implied. They will *not* be raised between two unless an intention to this effect can be collected; and, if such intention appear, they *will* be raised among a larger number.

Not the least of the absurdities flowing from the distinction in question was the impossibility of applying it to a devise *to a class* of unascertained objects, who might consist of any number of persons in esse at the testator's death, or at some subsequent [*1353] *period; a difficulty which was noticed by Lord Eldon in Green *v.* Stephens (*e*).

It was held in Clache's case (*f*), that cross-remainders could not be *implied* where there were *express* cross-limitations among the devisees in tail in certain events. A testator devised a messuage to his daughter A. and her heirs forever, and his principal messuage he gave to T. his youngest daughter and her heirs, *and if she died before the age of sixteen, A. then living*, he willed that A. should enjoy the principal messuage to her and her heirs forever; *and, if A. should die having no issue, T. living*, then he willed that T. should enjoy the share of A. to her and her heirs forever; *and if both his daughters should die having no issue*, then the testator devised *all* his said messuages over to the two daughters of H. C. T. died *having attained sixteen*, without issue, which raised the question whether cross-remainders could be implied between the daughters; and the Court held that they could not; for the testator never intended that the principal house should go to A., unless T. had died within the age of sixteen years; and *no implication of cross-remainders could arise when an express and special gift and limitation was made by the devisor himself.* Dyer thought there was no entail, but a fee simple conditional: but the other three Judges were of a contrary opinion.

Whether *express* cross-limitation excludes implication.

The doctrine of Clache's case was much canvassed in Vanderplank *v.* King (*g*), in which Sir J. Wigram, V.-C. decided, after much consideration, that the introduction of an express limitation of cross-remainders among *another* class of devisees in the same will did not repel the implication; observing, that an express gift of cross-remainders in one event did not preclude the Court from giving cross-remainders by implication in another, where either case was clearly within the scope of all the reasoning upon which Courts have proceeded in implying cross-remainders.

Vanderplank *v.* King is clearly distinguishable from Clache's case (*h*). The latter case was followed in Rabbeth *v.* Squire (*i*),

(*e*) 17 Ves. 74.
(*f*) Dy. 330 b.
(*g*) 3 Hare, 1. See also Atkinson *v.* Holtby, 10 H. L. Ca. 313.
(*h*) See per Sir E. Kay, J., in Re Hudson, Hudson *v.* Hudson, L. R., 20 Ch. D. at p. 412.
(*i*) 19 Beav. 77, 4 De G. & J. 406. As to implying cross-remainders among tenants for life, see ante, p. 1351.

where a testator devised real and personal estate in trust to pay the rents of one-fifth part to each of his five sons and daughters for life, and after the death of each to his or her children whom he or she should leave at his or her death, in equal shares (for * life, [*1354] as it was held), but *if he or she should leave none*, then in trust for the other sons and daughters for their lives and the issue of such as should be dead, as before directed, and when all his children should be dead the testator gave the whole property in trust for all the children of his five children equally in fee. A daughter of the testator died *leaving* a son, who died before the last survivor of the testator's five children. The share of the deceased daughter not being expressly disposed of in the interval after the death of her son, it was contended that cross-remainders to the other children of the testator and their children must be implied; but it was held otherwise by Sir J. Romilly, and on appeal by Lord Chelmsford, the testator having himself expressed the event in which such remainders should take effect in favor of those objects, viz. on the death of a child *without leaving* a child living at his or her death.

Again, in Atkinson *v.* Barton (*k*) the M. R. said the rule in Clache's case was that cross-remainders cannot be implied between objects where there are express cross-remainders between the same objects in different events; and he applied the rule to the case before him, refusing to imply cross-remainders between several stocks or branches of issue on the ground that there were express cross-remainders between the individuals of each stock or branch. But this was going beyond Clache's case, and involved a denial of Vanderplank *v.* King, which in Rabbeth *v.* Squire the M. R. had clearly distinguished; and his decision was reversed by the L.JJ. K. Bruce and Turner.

Sir G. Turner, indeed, went further: he denied that Clache's case (*l*) had laid down the supposed rule, and he thus stated * the result of the cases: "Cross-remainders are or are not [*1355] to be implied according to the intention, and the circumstance of such remainder having been created between *the same par-*

(*k*) 31 Beav. 277, 3 D. F. & J. 339. The decision of the L. JJ. was varied in D. P. Atkinson *v.* Holtby, 10 H. L. Ca. 313, but the particular question here discussed in the text was not affected by such variation.

(*l*) He said, that the decision in that case proceeded upon an express limitation over (not stated above), in case T. should die having no children, and not upon a cross-remainder having been before created in a different event, and that it decided "that a cross-remainder could not be implied against an express limitation." Now, the limitation here alluded to is contained in the following clause, which follows the statement in the text: "Provided always that if A. do marry I. H., then testator wills all her part to T. and to her heirs forever; provided also that if T. die having no children, then he willeth *all the premises* to the said two daughters of H. C.," *i. e.*, if the first proviso took effect, whereby T. would get "all the premises" (both houses), then both houses were to go over if she died having no children. But *A. "refused I. H. and took to husband G.,"* so that (it is submitted) the L. J.'s "express limitation" did not come into operation. Hence, doubtless, its omission from the text, and (it may be added) from the statement of Clache's case by Vaughan, C. J., Vaugh. 259.

To prevent a misconception which some of Sir G. Turner's remarks are calculated to produce, it should be added that Mr. Jarman was himself the author of the whole of Vol. II. of "Powell on Devises," and that the *present* treatise was published by him twelve years before Rabbeth *v.* Squire was heard.

Turner, L. J., on Clache's case.

ties is a circumstance to be weighed in determining the intention, but is not decisive upon it" (*m*). Atkinson *v.* Barton, however, did not raise *this* point.

There is, perhaps, no great practical difference between the rules thus stated and the rule deduced from Clache's case; for no rule of construction is decisive, the intention as shown by the context being in every case the ultimate test. Thus in Coates *v.* Hart (*n*), where a testator gave the income of one-fourth of his residuary estate to each of four individuals for life, and if either of them should die *under twenty-one and without issue*, his share of income to go to the survivors for life; and from and after the death of either of the four leaving issue, the principal, to the income whereof their deceased parent had been entitled, was given to such issue; and the testator also gave to such issue the share of the principal to the income whereof their deceased parent *would have been entitled* if he had survived any other of the four who should afterwards *die without issue* (not repeating "and under twenty-one"); and if all the four should die without either of them leaving issue, the whole residue was given to other persons. One of the four attained twenty-one and died without ever having a child. It was held that her share of the income belonged to the others by implication for their lives. The clause immediately preceding the ultimate gift over, followed as it was by the gift over only in the event of all four dying without leaving issue, appeared to Sir G. Turner, L. J., to furnish a necessary inference that the survivors were to take during their lives the income of the share to the income of which any of the four dying without leaving issue had been entitled. Sir J. K. Bruce, L. J., thought the age which the deceased legatee attained was immaterial, and that whether she died before or after twenty-one the ulterior enjoyment of the income was intended to be the same.

Implication not excluded by partial express limitation on the context.

Whichever way the rule is stated, the result in this case must on the context have been the same.

It has been long settled, that, in regard to *executory trusts* (*o*), an express direction to insert cross-remainders among an-
[*1356] other * class of objects or even an express cross-limitation among the *same* objects, does not exclude the implication.

In the case of executory trusts, express limitation not exclusive of implication.

Thus in Burnaby *v.* Griffin, (*p*), where a testatrix devised her real estate to trustees, upon trust to pay one moiety of the rents to her sister E. for life, and after her decease, the testatrix directed the trustees to *convey* and

(*m*) See also per Wood, V.-C., Re Clark's Trusts, 32 L. J. Ch. 525; and per Kay, J., Re Hudson, Hudson *v.* Hudson, 20 Ch. D. at pp. 414, 415.

(*n*) 3 D. J. & S. 504.

(*o*) As to such trusts, see ante, p. 1189.

(*p*) 3 Ves. 266, 268, 274. *I. e.*, an express limitation to E. in default of C.'s issue did not exclude an implied reciprocal limitation to C. in default of E.'s issue.

settle the said moiety unto and upon the daughters of E. as tenants in common in tail general, "*with cross-remainders* for the benefit of such daughters," remainder to the younger sons of E. successively in tail male, remainder to the eldest son in tail general; and as to the other moiety, upon trust for the testatrix's niece C. for life, "with the same limitations to her daughters and sons as to the children of E.;" and if C. should depart this life without leaving any issue of her body living at her decease, the testatrix directed that *her sister E. should receive all the rents for life; and in case E. and C. should die without issue of their respective bodies, or all such issue should die without issue,* she then gave her real estate to four cousins. Lord Hardwicke decreed that, in the settlement to be executed under this trust, cross-remainders were to be inserted not only between the children of E. and C. inter se, *but between the two families.*

Another ground upon which, at one period, it was held that the words "in default of such issue," following a devise to several persons in tail, did *not* create cross-remainders, was, that such devise was limited to the objects "*respectively;*" and it was even so determined where the devisees consisted of the favored number of two (*q*).

Word "respective" held, at one period, to negative the implication.

But the stress laid upon expressions of this nature has been disapproved of by the most distinguished modern Judges, and the cases which were founded on the doctrine are now clearly overruled (*r*).

Doctrine in regard to the word "respective" overruled.

IV. — Conclusions from the Cases. — The conclusions from the authorities on the subject are, —

* 1. That under a devise to several persons in tail, being [*1357] tenants in common, with a limitation over for want or *in default of such issue,* cross-remainders are to be implied among the devisees in tail.

2. That this rule applies whether the devise be to two persons or a larger number, though it be made to them "*respectively,*" and though in the devise over the testator have not used the words "the said premises," or "all the premises," or "the same," or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares (*s*).

3. That the rule applies though the ulterior devise is on failure of issue at a particular period.

(*q*) By Lord Hardwicke, C., in Comber *v.* Hill, 2 Stra. 969, Lee's Cas. t. Hardw. 22; Williams *v.* Brown, 2 Stra. 996; and Davenport *v.* Oddis, 1 Atk. 579; also by Lord Mansfield on several occasions and particularly in Wright *v.* Holford, Cowp. 34, ante, p. 1340; and Pery *v.* White, Cowp. 777, ante, p. 1350. See also Doe d. Burden *v.* Barville, 2 East, 48, n., ante, p. 1349; Phipard *v.* Mansfield, Cowp. 797, ante, p. 1341.

(*r*) Atherton *v.* Pye, 4 T. R. 710, 2 R. R. 409, ante, p. 1341; Watson *v.* Foxon, 2 East, 36; Doe d. Gorges *v.* Webb, 1 Taunt. 238; Green *v.* Stephens, 17 Ves. 64, ante, p. 1344. See also Staunton *v.* Peck, 2 Cox, 8.

(*s*) See the author's first and second conclusion adopted, Taaffe *v.* Conmee, 10 H. L. Ca. 81, 85; Hannaford *v.* Hannaford, L. R., 7 Q. B. 116.

4. That the rule applies, in regard to executory trusts at least, though there be an *express* direction to insert cross-remainders among *another* class of objects, or a limitation over among some of the *same* objects; and even in direct devises an express limitation of cross-remainders among *another* class of objects has been held not to repel the implication.

5. That the word "remainder" following a devise to several in tail, will raise cross-remainders among them (*t*).

6. That it is no objection to the implication of cross-remainders that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail, and others tenants for life, with remainder to their issue in tail (*u*).

7. That a devise to the children of A. *for life* and *for want and in default of such issue* then over, creates cross-remainders by implication for life among such devisees (*x*).

(*t*) As to "reversion," see ante, p. 1350.

(*u*) Vanderplank *v.* King, 3 Hare, 1. In this case the inequality was produced by the application of the cy-près doctrine in regard to the member of a class who was born after the death of the testator, and is therefore an important case in reference to that doctrine, as to which vide ante, Vol. I., p. 300. See also Lewis on the Law of Perpetuity, 426.

(*x*) The reader will probably have inferred, from the absence throughout the present chapter of any allusion to the failure of issue clause in the Stat. 1 Vict. c. 26, that the writer conceives that the enactment does not affect the implication of cross-remainders from expressions of this nature. Such undoubtedly is his opinion; in support of which it will be sufficient to observe, that s. 29 expressly excepts out of the statutory rule of construction cases in which a contrary intention appears by the will, by reason of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. Here an express estate tail is, by the prior devise, given to the person whose issue is referred to by the words "in default of such issue," &c., from which the cross-remainders are implied; and hence it is clear that this point of construction remains wholly untouched by the enacted doctrine. The whole line of limitation may, however, by the new construction, be so altered as to prevent any question as to cross-remainders arising; as, for instance, in Forrest *v.* Whiteway, 3 Ex. 367, stated ante, p. 1347, if the will in that case had been made after 1837.

WHETHER CROSS EXECUTORY LIMITATIONS CAN BE IMPLIED AMONG DEVISEES IN FEE OR LEGATEES.

THE question whether cross executory limitations can be implied among devisees *in fee* arises when real estate is devised to several persons in fee, with a limitation over in case they all die under a given age, or under any other prescribed circumstances; in which case it is by no means to be taken as a necessary consequence of the doctrine respecting the implication of cross-remainders among devisees *in tail*, discussed in the last chapter, that reciprocal executory limitations will be implied among such devisees in fee. The principal difference between the two cases seems to be this: In the case of a devise to several persons in tail, assuming the intention to be clear that the estate is not to go over to the remainderman until *all* the devisees shall have died without issue, the effect of not implying cross-remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of *all* (*a*). On the other hand, in the case of limitations in fee of the realty, and of absolute interests in personalty (both which are clearly governed by the same principle), as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event upon which it is not divested, a partial intestacy can never arise for want of a limitation over.

Cross-executory limitations not to be implied.

To introduce cross-limitations among the devisees in such a case would be to divest a clear absolute gift upon reasoning merely conjectural; for the argument, that the testator could not intend the retention of the property by the respective devisees to depend upon the prescribed event not happening to the whole however plausible, scarcely amounts to more than conjecture. * He *may* [*1359] have such an intention; and if not, the answer is, voluit sed non dixit.

If, therefore, a gift is made to several persons in fee-simple as tenants in common, with a limitation over in case they *all* die under age, the share of one of the devisees dying during minority will

(*a*) Indeed, it should seem that the doctrine against perpetuities would have presented an obstacle to its taking effect at all.

devolve upon his representatives unless and until the whole die under age.

Among the early cases, indeed, examples may be found of a different rule being applied to bequests of personalty, between which and devises in fee there seems, as before suggested, to be an intimate analogy.

Thus, in Scott *v.* Bargeman (*b*) one bequeathed personalty to his wife, upon condition that she would pay 900*l.* into the hands of S., in trust to lay out the same and pay the interest to the wife for life, if she should so long continue a widow, and after her death or marriage, in trust that S. should divide the 900*l.* among his (the testator's) three daughters at their respective ages of twenty-one or marriage, provided that *if all his three daughters should die before their legacies should become payable*, then the wife should have the whole 900*l.* paid to her. Two of the daughters died under age and unmarried, and the question was, whether the other was entitled to her sisters' shares. Lord Macclesfield decided in the affirmative, inasmuch as the mother was plainly excluded unless all the daughters died under twenty-one or marriage, and their shares did not vest absolutely in any of the three daughters under age, in regard that they might all die before twenty-one or marriage, in which case the whole was devised to the mother.

Cross executory trust implied among legatees.

This decision must be supported, if at all, on the ground that the Court was authorized to insert cross-limitations among the daughters by necessary inference from the terms of the gift over, — a conclusion which it will be found very difficult to reconcile with subsequent decisions (*c*).

Observations upon Scott *v.* Bargeman.

In Mackell *v.* Winter (*d*), the next case on this subject, personal property was bequeathed to three persons, with an express bequest over to the other or others in case of the death of *one* particularly named, or of either of two couples of the three individuals [*1360] named, under age (but not of the other couple), and * a bequest over of the entirety on the death of *all* three. Two eminent Judges differed in opinion whether a cross executory trust providing for the death of such other couple could be implied. The case was this: — A testatrix directed her household goods, &c., to be sold, and the money arising from the sale, together with the residue of her personal estate, she bequeathed to her grandsons G. and J., and to her granddaughter C., to be equally divided between them share and share alike; the shares of her grandsons, with the interest or accumulation thereof, after a deduction for their maintenance and preferment, to be paid to them

Bequest to A., B., and C., with bequest over if *one* only, or certain two, or *all* died, but not providing for the death of the other *two*.

(*b*) 2 P. W. 68.

(*c*) Schenck *v.* Legh, 5 Ves. 452, 9 id. 300; Bayard *v.* Smith, 14 id. 470; and more particularly Skey *v.* Barnes, 3 Mer. 334, 342, post, where the decision is referred to another ground.

(*d*) 3 Ves. 236, 536.

respectively on their attaining the age of twenty-one years, and the share of her granddaughter, with the interest and accumulation, at twenty-one or marriage. Then, after a direction for maintenance and preferment out of the interest, the testatrix declared, that in case her granddaughter C. should happen to die under the age of twenty-one years and unmarried, the share of the residue of her personal estate so given to her, with the accumulated interest thereon, should go and be equally divided between her two grandsons; and in case of the death of either of them, the whole should be paid to the survivor; and that in case either of her grandsons should die under the age of twenty-one, the share of her grandson so dying should go to the survivor of her two grandsons; *and in case her two grandsons should die under the age of twenty-one, and her granddaughter under twenty-one and unmarried*, the whole of their respective shares of the residue of her personal estate, with the accumulation thereon as aforesaid, should go and be paid to her nephew B. (It will be observed that the event, which happened, of the death of both the grandsons under twenty-one, and of them *only*, was not provided for.) Sir R. P. Arden, M. R., considered that there was no doubt that the grandchildren took a vested interest; *and as it was not taken out of them in the event that had happened, he conceived himself not authorized to supply the defect* in favor of the granddaughter; though he had no doubt as to the intention. But Lord Loughborough reversed this decree; thinking, on the one hand, that the shares did not vest in the grandsons until twenty-one, and, on the other, that there was a necessary implication in favor of the granddaughter, it being clear that what defeated (quære *would precede?*) the gift over to the nephew, who could only take the entirety of the fund, and that on the death of *all* the grandchildren, must be a disposition of the whole in favor of the grandchildren, the *preferable objects of [*1361] the testator's bounty, *and to avoid a partial intestacy.*

Implication of cross executory bequest rejected by Sir R. P. Arden, but his decree overruled by Lord Loughborough.

The views taken of this case by the M. R. and the L. C., it will be seen, were wholly different: the former considering the gift as vested in the grandchildren, to be divested only in the event expressly provided for; and the latter as a *contingent* bequest to them, with an express cross executory contingent bequest in a certain event, and an *implied* cross bequest in another event. There is certainly great difficulty in both branches of Lord Loughborough's hypothesis. According to the doctrine of all the authorities, the bequest clearly conferred a vested interest (*e*); and, if vested, it was impossible, consistently with sound principles of construction, to divest it, except on the happening of the pre-

Remarks upon Mackell *v.* Winter.

(*e*) See cases passim, Ch. XXV. Lord Loughborough certainly appears to have been greatly inclined to hold gifts to be contingent upon very slight grounds, as will appear by several of his decisions in that chapter.

scribed event; and the obstacle to this was the more insuperable, from the circumstance, that the express cross-limitations, so far as they went, did not establish a complete reciprocity between the legatees; for the share of the granddaughter, at her death under age, was to go to both the grandsons, but the share of one of the grandsons so dying was to belong exclusively to the other grandson. But, independently of this very material circumstance, there seems to have been no valid ground for divesting the shares in the event which had happened; nor, it is important to observe, does Lord Loughborough advance any such doctrine, for he evidently considered the holding the granddaughter to be entitled to be consequential on his holding the bequest of the whole to be *contingent*, his object being to "avoid a partial intestacy;" and it by no means follows that, if he had considered the interest as vested, he would have felt himself authorized to imply another gift in derogation of it. His reasoning does not appear to have satisfied the M. R., who in a subsequent case (*f*) expressed his conviction that his own determination was right.

In that conviction probably the reader will be disposed to join, on perusing the case of Skey *v.* Barnes (*g*), which is a leading authority on this subject and was as follows: A testator bequeathed [*1362] his personal estate to trustees for his daughter for life, * and after her decease to and among all and every the child or children of his daughter and the lawful issue of a deceased child, in such proportions as his daughter should appoint, and in default of appointment, then the same to go to and be equally divided between them, share and share alike, and if there should be but one child, then to such only child; the portion or portions of such of them as should be a son or sons, to be paid at his or their respective ages of twenty-one, and the portion or portions of such of them as should be a daughter or daughters to be paid at her or their respective ages of twenty-one or days of marriage; *but, in case there should be no such issue of the body of his daughter, or* ALL *such issue should die without issue before his or their respective portions should become payable as aforesaid,* then 1,000*l.* for his sister M. and her family, and 1,500*l.* for his niece A. and her family; and in case there should be no issue of either, for his nephew T., whom he also made his residuary legatee. The will contained a proviso, authorizing the trustees to apply the interest of the children's portions for their maintenance until they became payable. One of the children having survived her mother, and died under twenty-one and unmarried, her share was claimed by the survivors and the representatives of those who had attained their ma-

Gift to children of A., payable at twenty-one, and in case *all* should die, &c.

Cross bequest *not* implied.

(*f*) Booth *v.* Booth, 4 Ves. 402, 4 R. R. 435.
(*g*) 3 Mer. 334. See also Turner *v.* Frederick, 5 Sim. 466; Templeman *v.* Warrington, 13 id. 265; Cohen *v.* Waley, 15 id. 318; Mair *v.* Quilter, 2 Y. & C. C. C. 465; Edwards *v.* Tuck, 23 Beav. 268; Beaver *v.* Nowell, 25 Beav. 551.

jority and died, principally on the authority of Scott *v.* Bargeman (*h*). Sir W. Grant, though he thought that case to be right in its result, held that the bequests vested immediately, *and that the contingency had not happened on which they were to be divested;* consequently the share of the deceased child belonged to her representative.

So, in Baxter *v.* Losh (*i*), where residue was bequeathed to be equally divided between A. and B., their executors, administrators, and assigns absolutely forever; but in case it should happen that the said A. and B. should *neither* of them be living at a particular period, then over; A. died in the lifetime of the testatrix, and B. survived the period specified, and it was contended on behalf of B., that there was an implied gift to him of the share of A.; but Sir J. Romilly, M. R., held that there was no such implied gift, and that the event not having happened on which the gift over was to take effect, the moiety of A. had lapsed.

Gift to two, and, if neither should be living at a given period, over.

Sir W. Grant distinguished Scott *v.* Bargeman and Mackell *v.* Winter on the ground that the primary bequests in those cases * were contingent, and that nothing therefore was divested [*1363] by admitting the implication (*k*). This distinction is supported by subsequent decision in cases where the contingent nature of the primary gifts was unquestionable. Thus in Re Clark's Trusts (*l*), where a testator gave the residue of his personalty and the money to arise by sale of his real estate in trust in equal shares for A., B., C., and D. for life, and after their respective deaths for their children respectively as they should appoint, and in default of appointment for their respective children, with cross-limitations among the children of each parent inter se in the event of any dying under twenty-one; "but in case the said A., B., C., and D. should all happen to die without leaving any child, or leaving such, if such children should all happen to die under twenty-one," then over. A. died unmarried: each of the others had children or a child who attained twenty-one; and the question was whether a cross-limitation of the share of A., the remainder in which had vested in no one, was to be implied in favor of the other families. Sir W. P. Wood, V.-C., held that it was (*m*); but that none of the other shares, which had all vested, would be divested, except in the event expressly provided for of all four of the named persons dying without leaving a child.

Distinction where prior gift is contingent.

(*h*) Ante, p. 1359.

(*i*) 14 Beav. 612. See Re Hudson, Hudson *v.* Hudson, post p. 1364. In Currie *v.* Gould, 4 Beav. 117, the precise ground of the decision does not appear, but the gift seems clearly to have been a joint-tenancy to the children.

(*k*) 3 Mer. 342, 344.

(*l*) 32 L. J. Ch. 525. The distinction was denied by Lord Manners in Beauman *v.* Stock, 2 Ba. & B. 406, who there held that cross-limitations were to be implied, although the primary gift was vested; but this was before Skey *v.* Barnes, and has not been followed.

(*m*) The limitations implied were for life and in remainder (subject to a power of appointment) following exactly the limitations of the original shares. See also Re Ridge's Trusts.

Again in Re Ridge's Trusts (*n*) where a testator bequeathed residue in trust for his daughters, A., B., and C., and any other daughters he might afterwards have, equally for life; and if all, any, or either of them should die leaving issue, then to pay an equal part equally amongst the issue of each daughter that should die leaving issue; and if only one daughter should die leaving issue, then to pay the whole equally amongst the issue of such one daughter; but if all such daughters should die without leaving issue, then over. The testator left A., B., and C., his only daughters. A. died leaving issue; then B. died unmarried. It was held that a cross-limitation of the remainder in her share was to be implied in favor of the other two families.

Skey *v.* Barnes and the subsequent cases may, it is con- [*1364] ceived, * be considered to have fixed the rule of law on this important doctrine of testamentary construction.

In the recent case of Re Hudson, Hudson *v.* Hudson (*o*), the principle on which cross executory limitations are implied was fully considered. In that case a testator gave his real and personal estate to trustees upon certain trusts for the benefit of his wife, and, subject thereto, upon trusts during the lives of his four children and the survivors to divide the income into five equal parts, and to pay one-fifth to each, if living, or, if dead, to their respective children or issue, the latter taking equally between them in choses the fifth share which their parent if living would have taken; and if any of the children died without leaving children or issue, or such issue should fail during the period aforesaid, the share of such children or issue should belong to the others of the testator's children and their issue in the same way as their original shares, and this clause was to apply to accruing as well as original shares; and upon the death of the last surviving child upon trust to divide the whole property among the testator's grandchildren per stirpes. The five children were living at the testator's death in 1862; one of them died in 1863, leaving seven children, one of whom died in 1871, leaving one child, only a daughter, who died unmarried during the period. Sir E. Kay, J., after reviewing the cases, said: —

"I deduce from these authorities the following rules: —

"1. Cross executory limitations in the case of personal estate like cross-remainders of real estate, are only implied to fill up a hiatus in the limitations, which seems from the context to have been unintentional.

"2. They cannot be implied — as of course cross-remainders could not — to divest an interest given by the will.

"3. The existence of other cross-limitations between different persons does not prevent the implication.

(*n*) L. R., 7 Ch. 665. (*o*) L. R., 20 Ch. D. 406.

"4. But where such express cross-limitations are in favor of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention.

"Instances in which such a gap occurs are: —

"(*a.*) Where there is a gift to several named persons for their respective lives as tenants in common, and a gift over after the death of the survivor (*p*):

* "(*b.*) Where in a similar gift there are limitations over [*1365] of the shares of the tenant for life to their respective children or issue for limited interests, as for life or in tail, and then a gift over on failure of issue of them all:

"(*c.*) And generally where, there being such a gift over, the preceding limitations do not provide for every event except that contemplated by the gift over, but leave some gap which would occasion an intestacy as to part of the estate.

"In this case there is a cross-limitation upon failure of any stirpes to the other stirpes, but there is no cross-limitation between the individuals of the same stirpes, when the Court is asked to imply one. Therefore the difficulty which arose in Clarke's case and Rabbeth *v.* Squire does not exist here." And his lordship, after observing that where there is an ambiguity it is proper to look at the consequences of either construction, and pointing out that it was hardly possible to believe that it was intended that any part of the income should go to the legal personal representatives of deceased grandchildren, held that the great-granddaughter took only a life interest, and that the intention was, in the event which had happened of her death leaving no issue, that her share should go equally among her uncles and aunts, and the issue of deceased uncles and aunts per stirpes, and that the necessary cross-limitations to effect this must be implied.

(*p*) See Draycott *v.* Wood, 8 L. T., N. S., 304.

* CHAPTER XLIV.

RULE THAT WORDS WHICH CREATE AN ESTATE TAIL IN REAL ESTATE CONFER THE ABSOLUTE INTEREST IN PERSONALTY.

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I. — Where the Words would create an Estate Tail in Realty Expressly or by Implication. — It has been established by a long series of cases (*a*), that where personal estate (including of course terms of years of whatever duration (*b*)) is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail, and consequently devolves at his death to his personal representative (whether he leaves issue or not), and not to his heir in tail; that being the only mode in which personalty can be dealt with in order to make the interest in it analogous to an estate tail (*c*).[1]

Words which create an estate tail in realty confer the absolute interest in personalty.

This rule is not confined, as has been sometimes affirmed (*d*), to cases in which the words, if used in reference to realty, would

(*a*) Roll. Rep. 356; Bunb. 301; 2 Ch. Rep. 14; 1 Lev. 290; 2 Vern. 324; 1 P. W. 290; Pre. Ch. 421; 8 Vin. Ab. 451, pl. 25, 26; 3 B. P. C. Toml. 99. 204, 277; 7 id. 453; 1 Mad. 488; 1 Ves. 133, 154; 2 B. C. C. 127; 11 Ves. 257; 2 V. & B. 63; 1 Mer. 20, 271; 19 Ves. 73, 170, 574; 3 Mer. 176; 4 Mad. 360; 8 Sim. 22; 3 Drew. 668; 6 H. L. Ca. 1013.

(*b*) But not including a personal annuity created by will de novo and given to A. and the heirs of his body: this gives A. a conditional fee, and unless he performs the condition (*i.* e. has issue) the annuity ceases on his death, Turner *v.* Turner, Amb. 776, 1 B. C. C. 316.

(*c*) Per Wood., V.-C., L. R., 2 Eq. 280.

(*d*) Atkinson *v.* Hutchinson, 3 P. W. 259; Doe *v.* Lyde, 1 T. R. 596.

[1] See Albee *v.* Carpenter, 12 Cush. 382; Hall *v.* Priest, 6 Gray, 18; Jackson *v.* Bull, 10 Johns. 19; Paterson *v.* Ellis, 11 Wend. 259; Moody *v.* Walker, 3 Ark. 147; Pastell *v.* Pastell, Bailey, Eq. 390; Bethea *v.* Smith, 40 Ala. 415; Jones *v.* Sothoron, 10 Gill & J. 187; Fairchild *v.* Crane, 13 N. J. 105; Moffat *v.* Strong, 10 Johns. 12; Mathews *v.* Daniel, 2 Hayw. 346; Ferrand *v.* Howard, 3 Ired. Eq. 381; Henry *v.* Folder, 2 McCord, 323; Smith's Appeal, 23 Penn. St. 9; Clark *v.* Clark, 2 Head, 336; White *v.* White, 21 Vt. 250; Adshead *v.* Willetts, 9 W. R. 405; Ex parte Wyrich, 5 De G. M. & G. 188; Wilkins *v.* Taylor, 5 Call, 150; Williamson *v.* Ledbetter, 2 Munf. 521; Deane *v.* Hansford, 9 Leigh, 253; Dunn *v.* Bray, 1 Call, 338; Didlake *v.* Hooper, Gilmer, 194; Cox *v.* Marks, 5 Ired. 361; McGraw *v.* Davenport, 6 Porter, 319; Chesin *v.* Williams, 29 Mo. 288.

create an *express* estate tail; for it applies also to those in * which an estate would arise *by implication*, except in the particular case in which words expressive of a failure of issue receive a different construction in reference to real and personal estate (*e*). Thus, where by a will which was regulated by the old law personalty was bequeathed to A., or to A. and his heirs, and if he should die without issue to B. (which would clearly have made A. tenant in tail of real estate), he took the absolute interest (*f*). [*1367]

Rule applies to estates tail *by implication*;

The rule also applies to those cases in which, by the operation of the rule in Shelley's case (*g*), the terms of the bequest would, in reference to real estate, create an estate tail. Thus in Garth *v.* Baldwin (*h*), where a testator devised real and personal estate to A., in trust to pay the rents and profits to S. for life, and after her death to pay the same to E. *for life*, and afterwards to pay the same to *the heirs of his body*, and for want of such issue, over; Lord Hardwicke held that E. was tenant in tail of the real estate and entitled absolutely to the personalty.

— to cases falling within the rule in Shelley's case.

And of course it is immaterial in such a case whether the bequest itself contain the words of limitation, or refer to a devise of realty creating an estate tail. As in Brouncker *v.* Bagot (*i*), where a testator devised his real estate to B. for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the *heirs of the body* of B.; and by a codicil he bequeathed his personal estate unto the same persons, and in the same manner, as he had by his will devised his real estate. It was contended that although as to real estate this rule of law was too strong for the intention of the testator, yet that a different construction might be put upon the words as applied to personalty, to prevent the application of the rule where it went to defeat the obvious intention, as in this case; but Sir W. Grant, M. R., held that the testator having declared his * intention respecting his personal estate only by referring to the terms of the devise of the real estate, and as the law had ascertained those terms to give an estate tail in the realty, they would give the absolute interest in personalty. [*1368]

Though the bequest be referential to the devise.

(*e*) See ante, p. 1321.

(*f*) Love *v.* Windham, 2 Ch. Rep. 14, 1 Lev. 290; Chandless *v.* Price, 3 Ves. 102; Campbell *v.* Harding, 2 R. & My. 390; Dunk *v.* Fenner, 2 R. & My. 557; Simmons *v.* Simmons, 8 Sim. 22; Caulfield *v.* Maguire, 2 J. & Lat. 176; Cole *v.* Goble, 13 C. B. 445; Webster *v.* Parr, 26 Beav. 236.

(*g*) As to which, see ante, p. 1205.

(*h*) 2 Ves. 646; see also Webb *v.* Webb, 1 P. W. 132, 2 Vern. 668; Butterfield *v.* Butterfield, 1 Ves. 133, 153; Tothill *v.* Earl of Chatham, 7 B. P. C. Toml. 453, 1 Mad. 488 nom. Tothill *v.* Pitt; Earl of Verulam *v.* Bathurst, 13 Sim. 374; Ousby *v.* Harvey, 17 L. J. Ch. 160; Williams *v.* Lewis, 6 H. L. Ca. 1013. The fact of the income only, and not the property itself, being given to A. for life, is no argument against his taking the absolute interest, Butterfield *v.* Butterfield, 1 Ves. 133, 154; Glover *v.* Strothoff, 2 B. C. C. 33; Re Andrews' Will, 28 Beav. 608; and other cases overruling Smith *v.* Cleaver, 2 Vern. 38; and (on this point) Fonnereau *v.* Fonnereau, 3 Atk. 315.

(*i*) 1 Mer. 271, 19 Ves. 574; see also Douglas *v.* Congreve, 1 Beav. 59.

II. — Where Words of Distribution are superadded. — The next question is, whether words of distribution or other expressions marking a course of enjoyment inconsistent with the devolution of an estate tail, annexed to the limitation to the *heirs of the body*, are in *these* cases inoperative to vary the construction, as we have seen they are now held to be in devises of real estate (*k*). The affirmative would seem to follow from the principle of the preceding cases, though such a conclusion involves a direct contradiction of Jacobs *v.* Amyatt (*l*), where personalty was bequeathed to A. for life, and after her decease unto the heirs of her body lawfully begotten, *equally to be divided between them share and share alike;* and in default of such issue, over; and it was held by Lord Loughborough, confirming a decree of Sir R. P. Arden, M. R., that A. took a life interest only. "The construction that the whole interest vested in A. must," said Lord Loughborough, "expunge the words 'for life;' it must expunge the words which direct a division among the *children;* and it must expunge those words not for the purpose of giving it to one to take in the character of heir of the body, or in a course of descent, but to take it from all; not to let it go according to the general intent, which is the common ground, but to cross the intent. Upon that ground Doe *v.* Applin (*m*) does not apply." "Still less does King *v.* Burchell (*n*) apply."

Words of distribution, &c., annexed to the limitation to the heirs of the body, &c.

Jacobs *v.* Amyatt.

Lord Loughborough therefore decided the case upon a distinction between the nature of real estate and the nature of personalty. The one is descendible, the other is distributable (*o*): and to use "heirs of the body" regarding personalty is a misapplication of them, which has always (*p*) led the Court more readily to infer from the context an intention to use them in a secondary and confined sense, than when they are used in a devise of realty. Thus in Hodgeson *v.* Bussey (*q*), where by post-nuptial settlement a term was limited in trust [*1369] for A. the * settlor's wife during her life, and after her death for the settlor for his life, and after his death for the heirs of the body of A. by the settlor and their executors, administrators, and assigns, and for want of such issue, over; it was held by Lord Hardwicke that "heirs of the body" were not words of limitation, but of purchase, and that A. had a life interest only. The grounds of this decision are thus clearly given by Lord Hardwicke himself on a subsequent occasion: "The governing reason was that the limitation was to the heirs of the body, their executors, administrators, and assigns; which words made it a plain case, *because there was no*

(*k*) See ante, p. 120.
(*l*) 4 B. C. C. 542. See the judgment, 13 Ves. 479, n.
(*m*) 4 T. R. 82, 2 R. R. 337, ante, p. 1271.
(*n*) Amb. 379, 1 ed. 424, ante, p. 1265.
(*o*) Per Stuart, V.-C, 1 Sm. & G. 444.
(*p*) See per Lord Hardwicke, 2 Atk. 90.
(*q*) 2 Atk. 89.

eye of an estate tail (*i. e.*, no intention that it should go to issue ad infinitum); for it could not go from one heir of the body and his executors, &c., to another heir of the body and his executors, &c., and therefore must vest in the first person taking and his executors, &c.; the same as if it had been said, I give it after both their deceases in trust for the eldest son begotten, and if no son then to a daughter, their executors," &c. (*r*).

Words of distribution, &c., annexed to the limitation to the heirs of the body, &c.

So in Wilson *v.* Vansittart (*s*), where the bequest was to W. and his heirs male equally to be divided among them share and share alike; it was held by Smythe, B., and Bathurst, J. (L. Comms.), that W. took an estate for his life with remainder to his *sons*.

In this case it will be observed the gift to heirs male was not expressly by way of remainder. But this would seem to present no great obstacle to the construction which was adopted (*t*).

In Kinch *v.* Ward (*u*), where freehold and leasehold estates were devised to A. for life, and after his death to the heirs of his body, their heirs, executors, administrators, and assigns, but if A. should die without issue, over; it was assumed that A. was tenant in tail of the freeholds, but it was contended on the authority of Hodgeson *v.* Bussey that he was tenant for life only of the leaseholds. Sir J. Leach however decided that he took the leaseholds absolutely, distinguishing Hodgeson *v.* Bussey because there the gift over was in default of *such* issue, whereas here it was a general failure, and therefore too remote.

* Whatever may be thought of this distinction, the fact [* 1370] remains that Sir J. Leach dealt with the leaseholds as being subject to different considerations from the freeholds, and did not think it sufficient to dispose of the question regarding the former that, notwithstanding the superadded words, an estate tail was created in the latter.

Again in Re Jeaffreson's Trusts (*x*), already stated, Sir W. P. Wood, V.-C., said he did not question the decisions that words clearly intended to create an estate tail in realty would be taken to give an absolute interest in personalty, that being the only mode in which personalty can be dealt with to make the interest in it analogous to an estate tail. "But (he said) I think upon such a gift of personal estate as this, the question is — not whether the construction of the clause taken simply word by word would give an estate tail — but

(*r*) 2 Ves. 236, 360. Lord Chelmsford refers the decision partly to its being a settlement and thus intended as a provision for the issue of the marriage, 6 H. L. Ca. 1022; but Lord Hardwicke does not rely on that point.

(*s*) Amb. 562.

(*t*) See Chamberlayne *v.* Chamberlayne, 6 Ell. & Bl. 625, ante, p. 1173. Mr. Jarman, however, considered it "an extraordinary decision, there being not only no gift to sons, but no gift even to heirs by way of remainder."

(*u*) 2 S. & St. 409.

(*x*) L. R., 2 Eq. 276, ante, p. 926. See also Symers *v.* Jobson, 16 Sim. 267.

whether, regard being had to the whole will, considering that the property is personal and not real estate, there is an intention manifested that 'heirs of the body' should be used in its proper sense. The proposition cannot be taken absolutely in its full integrity that every form of expression which will create an estate tail in realty will give an absolute interest in personalty, which would contradict the rule established in Forth *v.* Chapman (*y*). And without pausing to consider whether the set of words used here would bring this case within the rule in Shelley's case, regard being had to the decision of the House of Lords in Jesson *v.* Wright (*z*), I think the use of words like these when accompanied with a discretionary power of education for those heirs of the body, and with an express discretion for division at twenty-one, justifies me in saying that the testator did not point to heirs successive, who are to continue proprietors of the fund in question to an extent which the law would not allow, and which the law would cut short by giving the fund to the first taker; but rather to a set of persons heirs of the body of A. who are a co-existing body and not persons taking in succession. Now although 'heirs of the body' is not so flexible a term as 'issue,' that it does not invariably create an estate tail is evident fron Hodgeson *v.* Bussey and Sands *v.* Dixwell" (*a*). He therefore held that A. did not take an absolute interest.

[*1371] * **III. — Where the bequest is to a person and his issue simply.** — A point of still greater difficulty arises in determining to what extent the rule applies to cases in which the word "issue," occurring in devises of real estate, is a word of limitation.

This, at least, is clear, that a simple bequest to A. and his issue, which, if the subject of disposition were real estate, would indisputably make A. tenant in tail (*b*), confers on him the absolute ownership in personalty.

Lord Hardwicke in Lampley *v.* Blower (*c*) admitted this propositiou, though he held that a bequest over to the survivor, in case either of the legatees died without *leaving* issue (which in legal construction means in regard to *personalty* (*d*) issue living *at the death*), explained "issue" in the body of the devise to be used in the same sense.

Whether "issue" explained to mean issue *at the death*.

This seems to be rather a strained construction, and is inconsistent with Lyon *v.* Mitchell (*e*), which is a direct authority as to the effect

(*y*) 1 P. W. 663.
(*z*) Ante, p. 1211.
(*a*) But Sands *v.* Dixwell was the case of an executory trust, and is the same as Roberts *v.* Dixwell (8 Dec. 1738), 1 Atk. 607, stated ante, p. 1192.
(*b*) See ante, p. 1258.
(*c*) 3 Atk. 397. See ante, p. 1259, n. (*l*).
(*d*) See ante, p. 1324.
(*e*) 1 Mad. 467.

of a bequest simply to A. and his issue. A testator bequeathed personalty to his four sons, share and share alike, as tenants in common, *and to the issue of their several and respective bodies lawfully begotten;* but in case of the death of any or either of them without issue lawfully begotten *living at the time of his or their respective deaths,* then the part or share of him or them so dying should go to the survivors or survivor equally, and to the issue of their several and respective bodies lawfully begotten. Sir T. Plumer, V.-C., after reviewing the authorities, held, upon the general rule, that as the words of the bequest would have made the sons tenants in tail of real estate, they *took absolute interests* in the personalty, with benefit of survivorship in case any or either of them died without issue living at their death respectively.

To four persons and the issue of their respective bodies, if any die without issue at death, over.

Again, in Parkin *v.* Knight (*f*), where the limitation was of real and personal property to the testator's nephews or (read "and") their lawful issue, his nephew A. to have Blackacre exclusive of his other share; Sir L. Shadwell, V.-C., held that they took an estate tail in the realty, and an absolute interest in the personalty. This was somewhat aided by the direction as to Blackacre. And at this day the Court would be less ready to read "or" as "and" (*g*).

Bequest to several and their lawful issue.

* This construction has been even extended to a case where [*1372] money was directed to be *settled* on A. and his issue (*h*).

To be settled on A. and his issue.

IV. — Bequest to A. for life, and after his death to his issue. — Our next inquiry is, whether a bequest to A. *for life,* and after his death to his issue, operates, by force of the same rule of construction, to vest the absolute interest in A.

Now as such a *devise* would clearly create an estate tail in A., and as it has been shown that the rule which makes the legatee absolute owner of personalty where he would be tenant in tail of real estate, applies to gifts falling within the rule in Shelley's case (*i*) where "heirs of the body" are the words of limitation, as well as to those in which an *implied* gift is raised in the *issue;* and as, lastly, as we have just seen, the rule applies where the gift to the ancestor and issue is in one clause (*k*); the same rule, if strictly followed out, would lead to the conclusion that, in the case suggested, A. would be absolutely entitled.

This conclusion, however, is encountered by Knight *v.* Ellis (*l*),

(*f*) 15 Sim. 83. See also Donn *v.* Penny, 19 Ves. 547; Beaver *v.* Nowell, 25 Beav. 551; Young *v.* Davies, 2 Dr. & Sm. 167 (offspring).
(*g*) Post, p. 1377, n. (*k*).
(*h*) Samuel *v.* Samuel, 9 Jur. 222, 14 L. J. Ch. 222, as to which see ante, p. 1192, n. (*l*).
(*i*) That the rule in Shelley's case applies, whatever be the word of limitation used, see ante, p. 1184.
(*k*) As to such cases of *devises,* see ante, p. 1258.
(*l*) 2 B. C. C. 570.

where the testator gave certain moneys to trustees, upon trust to permit his nephew T. to receive the interest *during his natural life*, and after his decease he gave the said moneys to the *issue male* of his nephew, and in default of such issue he gave the same over. The question was whether T. was entitled for life, or absolutely. Lord Thurlow decided that he had a life interest *only*. In reference to the cases establishing the rule, that words which would create an estate tail in real estate confer an absolute interest in personalty, he said, "It must have occurred to the Judges who decided those cases, that under the idea of making the rules of decision as to leasehold estates analogous to those which are applied to estates of inheritance, the intention of the testator must be much oftener disappointed than carried into effect, and then there is no wonder that the Court should try to get out of the technical rule by any means that it can. Now what do the cases come to? A man by his will devises to A. for life, there being plainly an interest only for life given; if that were all, the disposition would end there as to A., and any other gift would be effectual after his death. The testator then gives the same fund (qu. *land*) over to B. after failure of issue of A. *What is the Court to do? It is clear that a life interest only is given to A. It is clear that no benefit is given to B. while there is any issue of A. The consequence is, that as no interest springs to B., and no express estate is given after the death of A., the intermediate interest would be undisposed of, unless A. was considered as taking for the benefit of his issue as well as of himself; and as the words in this case are capable of such amplification, the Court naturally implies an intention in the testator that A. should so take, that the property might be transmissible through him to his issue, and he was therefore considered as taking an estate tail, which would descend on his issue. Now, an estate in chattels is not transmissible to the issue in the same manner as real estate, nor capable of any kind of descent, and therefore an estate in chattels so given, from the necessity of the thing, gives the whole interest to the first taker; but if the testator, without leaving it to the necessary implication, gives the fund expressly to the issue, they are not driven to the former rule; but the issue may take as purchasers, and then there is an end of the enlargement of any kind of the estate of the tenant for life; for another estate is given after his death to other persons, who are to take by purchase. It no longer rests on conjecture."

— A. held entitled for life only, Knight *v.* Ellis.

[*1373]

Again, in Heather *v.* Winder (*m*), the first gift was of leasehold to the testator's son W. for life, and after his death to his issue; but in case he should leave no lawful issue, then to the testator's daughters A. and H., conjointly, during their lives, and at their deaths to their lawful issue.

Bequest to two for their lives, and at their deaths to their issue.

(*m*) 5 L. J. Ch. N. S. 41.

The testator's three children survived him, and W. and H. died without leaving issue; A. had several children. Sir J. Leach, V.-C., held that A. became entitled on the death of W., but whether on the ground that W. took a life estate only, or by executory bequest on the principle of Lyon *v.* Mitchell (*n*), does not appear. Sir C. Pepys, M. R., however, professing to follow Sir J. Leach, decided that under the gift over A. took only for life. As she was living, it was not necessary to decide as to the rights of her issue.

The cases of Knight *v.* Ellis, and Heather *v.* Winder seem to be directly opposed to Att.-Gen. *v.* Bright (*o*), where a testator after bequeathing to two persons the interest of a sum of 500*l.* stock, gave the fund, after the decease of the survivor, to A., to * receive the interest during her life, and then *to her issue;* but in case of her death without issue, the 500*l.* stock to be divided between her father's children by his second wife; and in default of any children by his second wife living at the testator's decease, he gave the same to such second wife. It was contended, on the authority of Knight *v.* Ellis and some earlier cases, that A. had a life interest only. But Lord Langdale, M. R., held that the effect of giving the interest of the 500*l.* stock to the legatee for her life, and then the principal to her issue, was to give her an absolute interest in that sum. [*1374]

Att.-Gen. *v.* Bright opposed to Knight *v.* Ellis.

But the authority of Knight *v.* Ellis was recognized in Ex parte Wynch (*p*), where the testator bequeathed an annuity to A. "for her life and the issue from her body lawfully begotten, on failure of which to revert to my heirs." Lord Cranworth, C. (who said the will was clearly to be read as if the gift to the issue had been expressly limited after the death of A.), and Sir G. Turner, L. J., affirming the decision of Stuart, V.-C., held that A. had only a life interest, and that the issue took by purchase. They agreed with the decision in Knight *v.* Ellis, and moreover considered that it was binding upon them, and that the decision in Att.-Gen. *v.* Bright was not sustainable. The L. C., after adverting to some of the principal cases which had been cited to prove that A. was absolutely entitled, said: "In all those cases either the technical words 'heirs of the body' have occurred, or there has been nothing to show that the words 'issue,' 'children,' or the like have not been intended merely to define or explain the extent of the interest given to the first taker; and I see nothing in these decisions compelling me to hold that where technical words are not used, and where the interest of the first taker is expressly confined to a life estate, I am bound to act in the construction of the bequest of personalty on principles derived from laws

Knight *v.* Ellis followed in Ex Parte Wynch.

Att.-Gen. *v.* Bright overruled.

(*n*) Ante, p. 1371.
(*o*) 2 Kee. 57.
(*p*) 1 Sm. & G. 427, 5 D. M. & G. 188. K. Bruce, L. J., concurred in the decision on distinct grounds.

of tenure, and not resting on intention. It was on this ground that Lord Thurlow acted in Knight *v.* Ellis."

The rule is thus settled in conformity with Knight *v.* Ellis (*q*). It applies à fortiori to a bequest of personalty to A. for life, and after his death to his issue in equal shares and proportions; and it lets [*1375] in, like a corresponding gift to children (*r*), all the objects * who are living at the testator's death, and all who come in esse during the life interest (*s*).

During the argument in Knight *v.* Ellis, Lord Thurlow said that it made all the difference in gifts of this nature, whether by the will all the issue were to take or one only. "The question is," he said, "whether they are words of limitation? If it went to one son, it must be by way of limitation; if to all, it must be by purchase. If it is to go by way of limitation, then it vested in the ancestor; if by purchase, all the sons must take" (*t*). By means of this distinction, perhaps, the decision in Jordan *v.* Lowe (*u*) may be sustained. Leaseholds were there bequeathed in trust for A. for life, and, after his decease, for his issue male lawfully begotten, severally and respectively according to their respective seniorities, and for default of such issue male as aforesaid, then over; Lord Langdale, M. R., held that the words were such as would have created an estate tail, and A. was therefore absolutely entitled. "Upon what grounds Lord Langdale proceeded," said Lord Cranworth (*x*), "we were left in entire ignorance. But it may be that he thought there, that the words must be treated as words of limitation, as it was to go to them in succession forever according to their seniorities. That might have been the ground upon which he proceeded in that case: that also would not be inconsistent with Knight *v.* Ellis."

Distinction between gift to one at a time and gift to all the issue together.

It has been seen that Lord Thurlow (*y*) distinguished the case of a bequest to A. *for life*, followed (without any express gift to issue) by a limitation over in default of issue of A. This, he said, of necessity gave the absolute interest to A. It was so assumed in Ranelagh *v.* Ranelagh (*z*), and there is nothing in Ex parte Wynch to suggest that the distinction is not a sound one as regards wills that are subject to the old law. But in Procter *v.* Upton (*a*), where personalty was given to be invested for

To A. for life, and in default of issue over.

(*q*) See also Goldney *v.* Crabb, 19 Beav. 338; Waldron *v.* Boulter, 22 Beav. 284.
(*r*) Ante, p. 1010.
(*s*) Jackson *v.* Calvert, 1 J. & H. 235. See similar construction where the words "heirs of the body" are used, Jacobs *v.* Amyatt, ante, p. 1368.
(*t*) 2 B. C. C. 575.
(*u*) 6 Beav. 350. See also Harvey *v.* Towell, 7 Hare, 231, 12 Jur. 241 — Bequest to A. for life, remainder to his eldest son for life, remainder to his eldest issue male only for the time being ad infinitum forever.
(*x*) 5 D. M. & G. 212.
(*y*) Ante, p. 1372. See also his dictum, Att.-Gen. *v.* Bayley, 2 B. C. C. 557.
(*z*) 2 My. & K. 441. ante, p. 1336, n. (*a*)
(*a*) 5 D. M. & G. 199, n. See also Re Banks' Trust, 2 K. & J. 387.

the benefit of A. for life, and if he died without issue, over; and by codicil A. was forbidden to meddle with the principal; Lord Hardwicke held that A. was but tenant for life; adding, however,
* that if the case had stood singly on the will, A. would have [*1376]
been entitled to the whole.

Effect of real and personal property being included in same gift.

Again the *mere* circumstance that real and personal estate are both dealt with by the same set of words will not compel the Court to decide that the personalty is intended to go as the realty, and consequently vests absolutely in the first taker (*b*). But the circumstance of the two sorts of property being jointly dealt with may fairly be taken into account on the question whether there is "an eye to an entail" (*c*): and if the personal is clearly a mere adjunct to the real, *e. g.*, a leasehold garden to a freehold house, an intention that both should devolve as the realty may reasonably be inferred (*d*).

General conclusion.

Upon the whole the result is, that the unqualified terms in which the rule has been often laid down, pointing as they do to the conclusion, that a bequest of personalty confers the absolute interest wherever the language of the will is such as would create an estate tail of land, are not justified by the decisions. In many of them, as we have seen, the Court has refused to carry the rule to the extreme point to which the cases have gone in adjudging "issue" to be a word of limitation as to real estate (*e*); the effect of such construction, by entitling the first taker absolutely, being in general to defeat the intention of the testator. Hence also (as elsewhere hinted (*f*)), the inclination to adopt the construction which reads the word "child," "son," or any other such informal expression, as a word of limitation, is much less strong in reference to personal than real estate (*g*). * Hence, too, it has been [*1377]
finally decided that the rule in Wild's case does not apply to bequests of personalty (*h*).

(*b*) Jackson *v.* Calvert, 1 J. & H. 235. See also Re Banks' Trust, 2 K. & J. 387.

(*c*) See Tate *v.* Clarke, 1 Beav. 100 (personalty given to A. by reference to devise of realty to A. *and his issue*); Dunk *v.* Fenner, 2 R. & My. 557. The last case has been cited as laying down a rule that, where realty and personalty are blended, the personalty goes as the realty; which, said Giffard, V.-C., "is bad law," Herrick *v.* Franklin, L. R., 6 Eq. 593. Qu., however, whether in Dunk *v.* Fenner, it was intended to lay down any such rule. The case seems rather to turn on the special terms showing an intention that realty and personalty should go together, and also that there should be an entail. In Herrick *v.* Franklin real and personal estate was given to A. for life, and after his death to his heirs (*general*). This was held to give A. a life interest only. Such a gift has never been held to vest the absolute interest in personalty in A. by analogy to the rule in Shelley's case, and it lacks the essential ingredient of an intention to benefit issue ad infinitum to bring it within the rule discussed in the present chapter. Smith *v.* Butcher, 10 Ch. D. 113, is a distinct decision that the rule in Shelley's case is inapplicable to such a gift. Powell *v.* Boggis, 35 Beav. 535, and Comfort *v.* Brown, 10 Ch. D. 146, must rest on the special terms of the wills. See as to the former, ante, p. 926.

(*d*) Per Wood, V.-C., Jackson *v.* Calvert, 1 J. & H. 238. See also Douglas *v.* Congreve, 1 Beav. 59.

(*e*) Ante, pp. 1271, et seq.

(*f*) Ante, p. 1243.

(*g*) See Gawler *v.* Cadby, Jac. 346; Stone *v.* Maule, 2 Sim. 490; Malcolm *v.* Taylor, 2 R. & My. 416. But see Scott *v.* Scott, 15 Sim. 47.

(*h*) Ante, p. 1243.

In not a few cases, too, bequests to a person and his children have been read as conferring on the original legatee a life interest only, with an ulterior gift of the absolute interest in favor of the children (*i*), — a species of construction which further illustrates the disinclination of the Courts to hold ambiguous terms of this description to operate as words of limitation in reference to personal estate.

V. — Gift to issue by way of substitution. — The word "issue," under a joint gift to the ancestor and issue, has also been sometimes construed as introducing a substituted gift in favor of these objects, in the event of the failure of the original gift to the ancestor, by his death either in the lifetime of the testator or of a previous tenant for life; the ancestor, if the gift to him takes effect, becoming solely and absolutely entitled.

Thus, in Pearson *v.* Stephen (*k*), where the testator bequeathed to trustees so much stock as should be sufficient to pay thereout the yearly sum of 1,000*l.* to his wife for her widowhood, and after her decease or marriage in trust for his five sons (naming them) *and their respective issue*, if any, to be divided among them in equal shares; such issue to take per stirpes and not per capita. He also gave 4,000*l.* to be invested in stock in trust to pay the dividends to his daughter S. during her coverture, and upon the death of G. her husband to transfer the capital to her for her sole use; but in case G. should survive testator's daughter, then in trust for his said five sons *and their respective issue* (if any), to be divided among them in equal shares and proportions; such issue to take per stirpes and not per capita. The testator also gave the residue of his personal estate to his said five sons "*and their respective issue* (*if any*);" such issue to take per stirpes and not per capita, to be divided among them in equal shares and proportions; the shares of such of them as should have attained the age of twenty-one years to be paid to them respectively forthwith after the testator's decease; the shares of such of them as should be under that age to be paid to them when and as they should respectively [*1378] attain such age. The question was, *what interests the five sons (all of whom survived the testator) took under these bequests? Sir J. Leach, M. R., held that the sons took life interests only (subject, as to the 4,000*l.*, to the contingency mentioned in the will), with the ulterior interest for their children. But this decree was reversed in the House of Lords, where it was decided that under the first bequest the sons became absolutely entitled; and that, with respect to the 4,000*l.*, in the event of S. dying in the lifetime of

To five persons and their respective issue per stirpes.

(*i*) Vide cases stated ante, p. 1244.

(*k*) 2 D. & Cl. 328, 5 Bli. N. S. 203. Of course there is less difficulty in the adoption of this construction where the gift is to a person or his issue, vide ante, Vol. I., pp. 480, 481; also Price *v.* Lockley, 6 Beav. 180.

G., the sons of the testator *living at such event* would be absolutely entitled to the stock in equal shares; but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S. (*l*), would be entitled to the share or shares of the fund which their parents would have been entitled to if living, such issue to take the shares in question equally among them; and it was also adjudged that the sons, at the death of the testator, took an absolute interest in the residue. And an opinion was expressed by Lord Brougham, that, if any of the sons had died in the lifetime of the testator, his children living at the testator's death would have taken by substitution the share of the parent.

Here, it will be observed, the words "and their respective issue" were considered to raise a gift by substitution, to take effect, as to all the bequests, in the event of any of the legatees dying in the testator's lifetime leaving issue, and, as to the 4,000*l.* stock, in the further event of their dying during the suspense of the contingency leaving issue. The clause directing that the issue should take per stirpes seems to be decisive against the word being construed as a word of limitation.

Remarks on Pearson *v.* Stephen.

Pearson *v.* Stephen was referred to in Gibbs *v.* Tait (*m*), where a testator bequeathed the residue of his personal estate to his wife during her widowhood, and after her decease or marriage, he gave what should be remaining one moiety to J. the son of T., his executors and administrators, and the other moiety equally among all the daughters of T. *and their issue*, with benefit of survivorship and accruer: Sir L. Shadwell, V.-C., held that the daughters living at the distribution of the fund were absolutely entitled, and not (as had been contended) concurrently with their issue, which, he observed, was an inconvenient construction. He observed that the case was weaker than Pearson *v.* Stephen. This remark shows that the V.-C. considered the case before him to belong to the same class as the cited authority: perhaps the *clauses of accruer (which are not stated) may have [*1379] aided this interpretation.

To the daughters of T. and their issue, with benefit of survivorship.

Remark on Gibbs *v.* Tait.

The decision in Pearson *v.* Stephen was followed in Dick *v.* Lacy (*n*), where real and personal estate was bequeathed to A. for life, and after her decease to the daughters of B. *and their descendants per stirpes*, to hold to them, their heirs and assigns, forever; and it was held by Lord Langdale that the limitation to descendants per stirpes was a gift to them by way of substitution for their ancestress in case she died in the lifetime of the tenant for life.

Bequest to several and their descendants per stirpes.

(*l*) As to this, see ante, p. 1045, n. (*r*).
(*m*) 8 Sim. 132.
(*n*) 8 Beav. 214. See also Hedges *v.* Harpur, 9 Beav. 479 (issue to take only their parent's share).

Sometimes a testator, having in one instance made an express and particular substitution of issue, thereby affords a ground for applying a similar construction to a bequest in the same will to a person and his issue simply; the inference being, on a view of the entire will, that the intention is the same in the respective cases.

Thus, in Butter *v.* Ommaney (*o*), a testator bequeathed 2,000*l.* to the children of his late sister B. and their lawful issue, in case any of them should die leaving lawful issue. He also gave unto and among all and every the child and children of his late brother Jacob *and their issue* (except his nephew A.) the sum of 2,000*l.* to be equally divided among them, share and share alike, to be paid within twelve months next after his (the testator's) decease. At the date of the will, there were three children of the testator's brother, who had children, and other children were dead leaving issue. It was contended that the words "and their issue" were words of purchase, and let in the issue of the deceased children; but Sir J. Leach, M. R., held that the three children of Jacob living at the date of the will were absolutely entitled to the legacy.

Issue not entitled concurrently with ancestor.

And here it may be observed that, where (as in the two preceding cases) the original legatees are living at the death of the testator or the period of distribution (whichever may happen to be the period of ascertaining the objects), it becomes unnecessary to determine whether "issue" is a word of limitation or of substitution; the original legatees being entitled to the whole, according to either construction. Hence the only really adjudged point in the two last cases was the rejection of the claim of the issue to participate concurrently with the original legatees.

[*1380] * An instance of the admission of such concurrent claims occurs in Clay *v.* Pennington (*p*), where a testator, in a certain event, bequeathed a residuary fund to the children of his brother B. *and their lawful issue* in equal shares, or unto such of them as shall prove their right within two years after notice in the London Gazette: Sir L. Shadwell decided that all the descendents of B. who were living at the period in question were entitled to participate; which of course involved a denial of the proposition that issue was here used as a word of limitation.

Issue held entitled concurrently with ancestor.

VI. — Bequests over after such Gifts. — A necessary consequence of the rule, that words which create an estate tail in realty confer the

(*o*) 4 Russ. 70. See also Re Stanhope's Trusts, 27 Beav. 201.
(*p*) 7 Sim. 370. See also Law *v.* Thorp, 27 L. J. Ch. 649, 4 Jur. N. S. 446; and Prior on Issue, 37, 38.

absolute interest in personalty, is, that all bequests ulterior to such a gift are void (*q*); but this principle does not apply to cases in which personal estate is limited in such terms to several persons not in esse successively; in which case the successive limitations, though having the form of remainders, operate simply as substitutional or *alternative* bequests, each gift in the series being dependent upon the event of the preceding gift or gifts not taking effect.

Bequests over after gifts in question, when void.

Thus, where a term of years is limited to A. for life with remainder to his first and other sons successively in tail male, with remainder to the first and other sons of B. in tail. If A. die without having had a son, it is clear that the bequest to the *first* son of B. (for no son after the first could ever take) is good; but if A. have a son, that son becomes entitled absolutely, to the exclusion of the ulterior legatees; so that the limitation is *in effect* a bequest for life, and after his death to his first son absolutely, and if he have no son, to the first son of B.; and being necessarily to take effect within the period of a life in being is free from objection on the ground of remoteness.

To illustrate in detail a point apparently so clear upon principle might seem to be gratuitous labor, were it not that at one period the authorities (including a decision of the Supreme Court of Judicature) sanctioned a contrary doctrine.

In Brett *v.* Sawbridge (*r*), a testator, who was a mortgagee in possession of a term of years, devised it (supposing himself to *be seised of an estate of inheritance) to J., son of H., for [*1381] life, remainder to his first and other sons in tail male, remainder to two other sons of H., and their sons successively in tail in like manner, remainder to all other the sons of J. successively in tail, with remainder to the right heirs of B. and W. Though it appeared that none of the tenants in tail had come in esse, Sir J. Jekyll, M. R., held that the limitation over was void; and his decree was affirmed in the House of Lords. The reasons urged in its support were, first, that as the testator intended to dispose of the inheritance, the term did not pass; and secondly, that the limitation over being after an indefinite failure of issue, was void for remoteness. It is not stated upon which ground the House proceeded, but, most probably, as the reporter assumes, upon the latter, as the objection that the testator intended to dispose of the inheritance could not be sustained for an instant as a reason against the devise operating upon the term.

In regard to the alleged remoteness of the limitation to the heirs of B. and W., however, the case is completely overruled by Pelham

(*q*) Hoare *v.* Byng, 10 Cl. & Fin 508; Re Percy, Percy *v.* Percy, 24 Ch. D. 616.
(*r*) 3 B. P. C. Toml. 141, 1736. This case seems to have escaped the research of Mr. Fearne. See also Backhouse *v.* Bellingham, Pollex. 33. Burgis *v.* Burgis, 1 Mod. 115.

Brett *v.* Sawbridge overruled by Pelham *v.* Gregory.

v. Gregory (*s*), where the Duke of N. devised all his freehold and leasehold estates to T. for life, remainder to his first and other sons in tail male, remainder to H. for life, remainder to *his* first and other sons in tail male, with remainders over: T. was living, but had no son; H. had a son, who during the life of T. died, and it was held in the House of Lords that the administrator of such son was absolutely entitled to the leasehold estates, subject only to be defeated by the birth of a son of T., the prior tenant for life.

It is scarcely necessary to observe, that a bequest of a term for years or other personal property in the language of an estate tail, may be made defeasible on a collateral event in the same manner as any other bequest carrying the whole interest. Thus, a legacy to A. and the heirs of his body, and if he die without issue *living B.*, to C., is clearly a good executory gift to C. (*t*).

Such gifts may be made defeasible on a collateral event.

And here it occurs to remark that the enactment (*u*) restricting words denoting a failure of issue to a failure at the death (which we have seen prevents them having the effect of creating an estate tail by implication) will, when applied to personalty, operate [*1382] to * restrain such words from passing the absolute interest, and also to bring within the compass of the rule against perpetuities the ulterior bequest depending on such contingency. If, therefore, a testator by a will made or republished since 1837 bequeaths personal estate to A., and in case he shall die without issue then to B., A. will not take the absolute interest (as formerly), from the ulterior gift being void; but A. will take a vested interest in the personalty so bequeathed, defeasible in favor of B. on his (A.'s) leaving no issue at his death.

Effect of act 1 Vict. c. 26, s. 29, on this rule of construction.

Where the bequest is to A. expressly for life, and in case of his dying without issue to B., the construction seems also free from doubt. A. will, according to the newly enacted doctrine, take a life interest in *any* event, and B. will take the ulterior interest, only in the event of A.'s leaving no issue; in the converse event of A. leaving issue, the ulterior interest will be undisposed of. But if after the express gift for life the limitation over be in case of A. dying without "heirs of his body," the enactment will not apply (*v*), and A. will, it should seem, be absolutely entitled as before (*x*).

(*s*) 3 B. P. C. Toml. 204. See also Higgins *v.* Dowler, 1 P. W. 98; Stanley *v.* Leigh, 2 P. W. 686; Sabbarton *v.* Sabbarton, Cas. t. Talb. 55, 245; Gower *v.* Grosvenor, 3 Barn. 54; *s. c.* cit. in Daw *v.* Pitt, stated 1 Mad. 503; Phipps *v.* Lord Mulgrave, 3 Ves. 613; Boydell *v.* Golightly, 14 Sim. 327; Lewis *v.* Hopkins, 3 Drew. 668, 6 H. L. Ca. 1013 (Williams *v.* Lewis).

(*t*) Lamb *v.* Archer, 1 Salk. 225.

(*u*) Ante, p. 1285.

(*v*) Ante, p. 1322.

(*x*) Ante, p. 1375, as in Boden *v.* Watson (or Lord Galway), Amb. 398, 478, 2 Ed. 297.

VII. — Effect of Limitations in strict Settlement upon Personal Property, &c. — When it is intended that leasehold estates, or personal chattels in the nature of heirlooms, shall go with lands devised in strict settlement, they should not be simply subjected to the same limitations; the effect of that being to vest the personal property absolutely in the first tenant in tail, though he should happen to die within an hour after his birth (*y*);[1] and, as the freehold lands in that event pass over to the next remainderman, a separation between them and the chattels takes place; but the personal property should be limited over, in case any such tenants in tail (being the sons of persons in esse) should die under twenty-one and without inheritable issue, to the person upon whom the freehold lands will devolve in that event; or, which is the more usual mode, the personalty should be subjected to the same limitations as the freeholds, with a declaration that it shall not vest absolutely in any tenant in tail by purchase until twenty-one, or death under that age, leaving issue * inheritable [*1383] under the entail. Whether the Courts are authorized to put this construction upon a direction that the chattels shall go with the lands so long as may be, or so long as the rules of law will permit, has been vexata quæstio. Lord Hardwicke in Gower *v.* Grosvenor (*z*), expressed an opinion in the affirmative, but in Foley *v.* Burnell (*a*) and Vaughan *v.* Burslem (*b*), Lord Thurlow held that the property vested absolutely in the tenant in tail on his birth; *i. e.*, that the direction did not make the trust executory; and this, though often regretted, is now the settled doctrine (*c*). It was much canvassed in the House of Lords in Duke of Newcastle *v.* Countess of Lincoln (*d*), which arose on marriage articles containing a covenant to assign leaseholds upon the same trusts as freeholds so far as the law would allow, and the trusts being executory, it was decided that the Court had power to modify the limitations so far as to suspend the absolute vesting until twenty-one. Lord Eldon did not

As to annexing personal to real estate, devised in strict settlement.

By direct gift.

(*y*) But where a junior branch, quoad the estate, has issue before the senior, the chattels do not vest indefeasibly in such issue, Hogg *v.* Jones, 32 Beav. 45. They will not so vest until the senior branches are extinct, Re Cresswell, Parkin *v.* Cresswell, 24 Ch. D. 102.

(*z*) 3 Barnard. 54. See also Trafford *v.* Trafford, 3 Atk. 347.

(*a*) 1 B. C. C. 274.

(*b*) 3 B. C. C. 101.

(*c*) Fordyce *v.* Ford, 2 Ves. Jr. 536; Carr *v.* Lord Errol, 14 id. 478; Stratford *v.* Powell, 1 Ba. & Be. 1; Rowland *v.* Morgan, 6 Hare, 463, 2 Phil. 764; Doncaster *v.* Doncaster, 3 K. & J. 26. See the cases reviewed by Wood, V.-C., Lord Scarsdale *v.* Curzon, 1 J. & H. 40; per Lords Westbury and Cairns, L. R., 5 H. L. 101, 107. See also Re Cresswell, Parkin *v.* Cresswell, 24 Ch. D. 102; Re Johnston, Cockerell *v.* Earl of Essex, 26 Ch. D. 538 ("to be enjoyed and go with the title"). In Re Whorwood, Ogle *v.* Lord Sherborne, 34 Ch. D. 446, a testator bequeathed a silver cup to Lord S. and his heirs "for an heirloom;" the person who was Lord S. at the date of the will died in the testator's lifetime and the title devolved on another person: it was held by the Court of Appeal (affirming the decision of North, J.) that the bequest lapsed.

(*d*) 3 Ves. 387, 12 Ves. 218, 4 R. R. 31.

[1] See Hall *v.* Priest, 6 Gray, 18, 22.

concur in this decision, considering that the question was concluded by Vaughan *v.* Burslem. But in Shelley *v.* Shelley (*e*), where a testatrix, without reference to any real estate, bequeathed jewels to her nephew to be held as heirlooms by him and by his eldest son on his decease, and so on from eldest son to eldest son, as far as the rules of law would permit, and requested her nephew by his will or otherwise to give effect to her wishes, Sir W. P. Wood, V.-C., held this to be a good executory trust, and directed a settlement to be made of the jewels to the nephew for life, remainder to his eldest son E. (who was born in the testatrix's lifetime), for life, remainder to E.'s eldest son if living at E.'s death (*f*), to vest at twenty-one, with a gift over on death under twenty-one or in E.'s lifetime.

[*1384] *To return to the case of a direct trust or bequest. Notwithstanding the provisions recommended above, a separation of the chattels from the lands will nevertheless occur (whichever form is used) if the tenant in tail should die under twenty-one leaving inheritable issue; for in that case he would take the chattels absolutely, while the lands would descend to the issue. To prevent this separation, the declaration should be that the chattels shall not vest absolutely in any tenant in tail by purchase who may die under twenty-one, but shall at his death devolve as nearly as possible in the same manner as the lands (*g*). Under this (which is now the ordinary) declaration the issue will take the whole of the chattels by purchase instead of such share or interest only as he may be entitled to as of kin to the ancestor.

Ordinary form of trust for annexing chattels to settled realty.

That the words "by purchase" are necessary in this form of declaration, in order to avoid a breach of the rule against perpetuity, has already been noticed (*h*). The effect of them is well illustrated by Gosling *v.* Gosling (*i*), where freeholds were devised in strict settlement, and chattels were then given on the same trusts and for the same estates as the freeholds, or as near thereto as the law would permit, with a proviso that the chattels should not vest absolutely in *any* tenant in tail unless he attained twenty-one (without more). These

When not void for remoteness.

Gosling *v.* Gosling.

(*e*) L. R., 6 Eq. 540. The point does not appear to have been previously decided. See opinion of Sir L. Shadwell, Boydell *v.* Golightly, 14 Sim. 346; and see observations bearing on the question, 14 Ves. 487; 2 Phil. 771; 1 Ba. & Be. 25; 1 J. & W. 574, ante, p. 1197; 1 J. & H. 51; Doncaster *v.* Doncaster, 3 K. & J. 26.

(*f*) "Living at E.'s death" seems to be due to the words of the will "on his decease, and so on."

(*g*) Davidson's Common Forms, 5th Ed., p. 379; Byth. & Jarm. Conv. (4th Ed., by Robbins), Vol. VII., p. 936. The older forms (several of which are collected in Harrington *v.* Harrington, L. R., 5 H. L. 93, n.) appear not to have contained an express gift over, but to have left the chattels set free by the divesting clause to be dealt with by the prior general trust. But whether this would be as efficacious as the express gift over is questionable; see the difference of opinion, Harrington *v.* Harrington, L. R., 3 Ch. 573, 5 H. L. 102. And see 1 Powell, Dev. 732, n. by Jarman.

(*h*) Vol. I., p. 237.

(*i*) 32 Beav. 58, 1 D. J. & S. 1, and (Christie *v.* Gosling) L. R., 1 H. L. 279. See also Martelli *v.* Holloway, L. R., 5 H. L. 553; Wells *v.* Wells, W. N., 1890, p. 29.

trusts were impugned as constituting in effect a gift to such tenant in tail only as should attain twenty-one, and as therefore being too remote, — as upon that construction they clearly were (*l*); and Sir J. Romilly, M. R., adopting that construction, held the gift void. But Lord Westbury differed on the point of construction and reversed the decision. Applying the limitations of the freeholds to the personal estate (as far as the difference of tenure would admit), the effect was (he said) to give the absolute interest to the first tenant in tail by purchase: no other tenant in tail could by possibility become entitled *under the limitations*, since the first took absolutely. Then came the proviso, in which the words "tenant in tail" *must* mean tenant in tail by purchase, for it referred to one in whom the personalty * would, but for the proviso, have vested absolutely [*1385] instead of defeasibly. The L. C. therefore held the gift vested in the infant tenant in tail, liable to be divested on his death under twenty-one. And this was affirmed in the House of Lords. It turned on the question whether the proviso postponed the original vesting or qualified a previously vested gift. Lord St. Leonards held with Lord Romilly that the former was the true construction: but Lords Chelmsford and Cranworth agreed with the L. C. in preferring the latter; and (as observed in a subsequent case (*m*) by Lord Cairns) when once this construction was arrived at, all difficulty was at an end, and the bequest was in no way obnoxious to the rule against perpetuity.

But Lord Westbury observed "If the will had provided for the event of a tenant in tail by purchase dying under twenty-one, leaving a son, by declaring an express trust for such son of the personal estate, the case would have existed of a tenant in tail of the real estates *by descent* taking the personal estate by purchase; and if in that case the proviso [*i. e.*, the proviso postponing the vesting] were held to apply to and include such tenant in tail, the whole disposition of the principal of the personal estate would be void for remoteness." Here, he thought, no such trust was either express or implied (*n*). But this is, in effect, what the ordinary declaration does express. Hence the necessity for the words "by purchase." The trust in Gosling *v.* Gosling was saved from remoteness only because it led to the very separation which the ordinary declaration is designed to prevent; it being considered by Lord Westbury (*o*) that if the infant tenant in tail should die under twenty-one leaving issue, the chattels would devolve under the prior trust to the next purchaser in the series of limitations, not to the issue.

The words "so long as the rules of law will permit" though in-

(*l*) See Vol. I., p. 236.
(*m*) Harrington *v.* Harrington, L. R., 5 H. L. 103.
(*n*) 1 D. J. & S. 16.
(*o*) Id. This point was not noticed in D. P.

How far remoteness obviated by words "so long as the law permits."

effectual to make the trust executory, or to correct a gift which in terms infringes the rule against perpetuity (*p*), may, it seems, fairly be referred to where the terms are ambiguous, in aid of a construction which will not be obnoxious to that rule (*q*). And even without these words if the trust is on other grounds executory, it may be moulded [*1386] to avoid remoteness. Thus, in Miles *v.* * Harford (*r*), where freeholds were devised to A. for life, remainder to his first and other sons in tail male, with a shifting clause which provided that if A. *or his issue male* should become entitled to a certain other estate, the devised estate should go over; and leaseholds were given upon such trusts, &c., as, regard being had to the difference of tenure, would most nearly correspond with the uses, &c., of the freeholds. It was held by Sir G. Jessel, M. R., that this was an executory trust; for the testator "knew that something would not work, and has said you are to make them correspond having regard to the effect of the tenure on the limitations." If you repeated the shifting cause literally for the leaseholds, it would fail to a great extent for remoteness. It must, therefore, be modified so as to shift the leaseholds in every case (covered by the clause) in which it could lawfully be made to shift (*s*).

Other forms of trust.

Other forms seek to postpone a separation of the chattels from the land by restricting the interest in the chattels to those who come into actual possession of the land (*t*); still taking care not to postpone the ultimate vesting of them beyond the limits allowed by the rule against perpetuity (*u*).

(*p*) See Tollemache *v.* Earl of Coventry, 2 Cl. & Fin. 611, 8 Bli. 547, ante, Vol. I. p. 239.
(*q*) See Harrington *v.* Harrington, L. R., 3 Ch. 574, 5 H. L. 102, 107.
(*r*) 12 Ch. D. 691.
(*s*) As it happened. A. himself had become entitled to the other estate, and the M. R. also held that, as this event was separately expressed from that of his issue becoming so entitled, the shifting clause was good in event, as to the leaseholds, without modification. See Vol. I., p. 255.
(*t*) See Potts *v.* Potts, 2 Jo. & Lat. 353, 1 H. L. Ca. 671 ("become seised"); Scarsdale *v.* Curzon, 1 J. & H. 40 ("seised of or entitled to the *actual* freehold"); Cox *v.* Sutton, 25 L. J. Ch. 845, 2 Jur. N. S. 733 (repairing fund to be applied at request of person in possession). But on the context "entitled in possession" has been held to mean one whose personal qualifications (*e.g.*, age) entitle him to the possession subject to preceding estates, Holloway *v.* Webber, Martelli *v.* Holloway, L. R., 6 Eq. 523, 5 H. L. 532, per Stuart, V.-C., and Lords Hatherley and Westbury; see also Foley *v.* Burnell, 1 B. C. C. 274, 4 B. P. C. Toml. 319; Re Johnson's Trusts, L. R., 2 Eq. 716. And where the entail has been barred by a prior tenant for life and remainderman in tail, the words "who shall be in the actual possession" have been held to mean the person who would have come into posession if the original limitations were subsisting, Hogg *v.* Jones, 32 Beav. 45.
(*u*) See on this point, Re Viscount Exmouth, Viscount Exmouth *v.* Praed, 23 Ch. D. 158, where the clause intended to postpone the vesting was held void for uncertainty.

WHAT WORDS WILL CHARGE REAL ESTATE WITH DEBTS AND LEGACIES.

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I. — Liability of Real Estate to Simple Contract Debts. — By the common law of England the real estate of a deceased person was not liable to answer his simple contract debts, no action being maintainable against the heir in respect of descended assets, except by creditors whose debts were constituted by an instrument under seal, *i. e.*, a specialty obligation; and not even then, unless an intention to charge the heir of the debtor were distinctly indicated (*a*): and the claim of a specialty creditor did not extend to copyholds (*b*); nor did it extend to devised freeholds, until the act 3 & 4 W. & M., c. 14, gave a right of action against the devisee of the debtor, concurrently with the heir, to a certain class of specialty creditors, namely, those whose demands were recoverable by an action of debt (*c*). But even these were held to have no remedy under the act where there was no heir, the remedy provided being against the heir and devisee jointly (*d*).[1]

Sketch of the law as to real estate being assets.

(*a*) A devise to A. *on condition* that he pays the testator's debts charges the land. Re Kirk, Kirk *v.* Kirk, 21 Ch. D. 431.

(*b*) Parker *v.* Dee, 2 Ch. Cas. 201.

(*c*) Wilson *v.* Knubley, 7 East, 128; Coope *v.* Cresswell, L. R., 2 Ch. 112; extended to action of covenant by 1 Will. 4, c. 47.

(*d*) Wilson *v.* Knubley, 7 East, 128; Hunting *v.* Sheldrake, 9 M. & Wel. 256. The act 1 Will. 4, c. 47, supplied a remedy against the devisee *alone*. And the effect of s. 59 of the Conveyancing and Real Property Act, 1881 (44 & 45 Vict. c. 41), would seem to be that the right of a specialty creditor to sue the heir or devisee is continued, and extended to cases where the heir is not named. See Wolstenholme and Brinton, Conv. & S. L. Acts, 116.

[1] Upon the liability of a decedent's estate for his debts, the courts of this country are unembarrassed by the course of English authority or legislation. The rule prevails prob-

[*1388] * The first relaxation of this rigid doctrine (so adverse to the policy of a great commercial country) was the act of 47

ably throughout the United States, either by statute or by American common law, that the whole of a man's property, first his personalty and then his realty, is liable for the payment of his debts, as well after his death as during his lifetime. But the question mainly under consideration in the present chapter is (not of the rights of creditors of a testator, but) of the rights of general legatees as against devisees upon a deficiency of personal assets; out of which the legacies are, of course, primarily payable. And when it is said that legacies are primarily payable out of the testator's personalty, the inference is not to be drawn that, upon exhausting the testator's personalty, without satisfying the bequests of his will, his real estate becomes liable to make good the deficiency. In the absence of other regulation by statute, it is an established rule at common law in this country, as well as in England, that real estate devised is never to be charged with the payment of legacies or debts unless the intention of the testator so to charge it is either expressly declared, or clearly to be inferred from the language of the will. Wright *v.* Denn, 10 Wheat. 204; In re Powers, 124 N. Y. 361; Clift *v.* Moses, 116 N. Y. 144; In re Rochester, 110 N. Y. 159, Reynolds *v.* Reynolds, 16 N. Y. 257; Heslop *v* Gatton, 71 Ill. 528; Stephens *v.* Gregg, 10 Gill & J. 143; Luckett *v.* White, id. 480, Taylor *v.* Harwell, 65 Ala. 1; Tessier *v.* Wyse, 3 Bland, 28; Foster *v.* Crenshaw, 3 Munf. 514; Lewis *v.* Thornton, 6 Munf. 87; McCampbell *v.* McCampbell, 5 Litt. 97; Bugbee *v.* Sargent, 23 Me. 270; Copp *v.* Hersey, 21 N. H. 317; Wright's Appeal, 12 Penn. St. 256; Okeson's Appeal, 59 Penn. St. 99; Knotts *v.* Bailey, 54 Miss. 235. Legacies not actually charged upon the land must therefore abate in case of deficiency of personal assets. Heslop *v.* Gatton, supra.

The question in the present chapter being what will charge the testator's real estate, the only difficulty that can arise is as to whether an intention in the testator to charge his devised land can be read out of the will. Nothing is clearer than that express language is unnecessary for the purpose; but at common law no charge can exist, unless created by the will; and hence if the question is to be answered upon language alone, apart from inference based upon modes of disposition, that language, to raise a charge, should be free from doubt. Seaver *v.* Lewis, 14 Mass. 83; Cady *v.* Cady, 67 Miss. 425; Stevens *v* Flower, 46 N. J. Eq. 340; La Foy *v.* La Foy, 43 N. J. Eq. 206; Arnold *v.* Dean, 61 Texas, 249. And in a contest between a blood relation and a stranger (not being a creditor) every intendment, it is declared, is in favor of the former. Scott *v.* Stebbins, 91 N. Y. 605.

A devise on condition that the devisee shall pay a legacy is an example of language sufficient to charge the land. Brown *v.* Knapp, 79 N. Y. 143; Loder *v.* Hatfield, 71 N. Y. 92; Birdsall *v.* Hewlett, 1 Paige, 32; Harris *v.* Fly, 7 Paige, 421; Sistrunk *v.* Ware, 69 Ala. 273; Merritt *v.* Bucknam, 78 Maine, 504; *s. c.* 77 Maine, 253. See other examples in Pierce *v.* Livingston, 80 Penn. St. 99; Baker's Appeal 59 Penn. St. 313; Knotts *v.* Bailey, 54 Miss. 235.

By parity of reasoning, in order to justify the courts in decreeing a charge upon land devised, based upon the mode of disposition unaided by language, the inference of an intention to charge the land should be unmistakable. Thus, no inference of the kind arises from the fact that the gift is a general pecuniary legacy, though it is found in a residuary clause. Belcher *v.* Belcher, 16 R. I. 72 (citing Robinson *v.* McIver, 63 N. C. 645). But on the other hand an inference of intent to charge arises, according to most of the cases, when realty and personalty are blended into one mass, and legacies are then bequeathed; or when a testator gives a legacy or an annuity, and then, without creating a trust to pay it, makes a general residuary disposition of the whole estate, blending the realty and the personalty into one fund. Love *v.* Darling, 16 How. 1; Alfred *v.* Marks, 49 Conn. 473; Additon *v.* Smith, 83 Maine, 551; Thayer *v.* Finnegan, 134 Mass. 62; Smith *v.* Fellows, 131 Mass. 20; Adams *v.* Brackett, 5 Met. 280; Cady *v.* Cady, 67 Miss. 425; Heatherington *v.* Lewenberg, 61 Miss. 372 (citing Knotts *v.* Bailey, 54 Miss. 235); Stevens *v.* Flower, 46 N. J. Eq. 340; American Dramatic Assoc. *v.* Lett, 42 N. J. Eq. 43; Tichenor *v.* Tichenor, 41 N. J. Eq. 39 (annuity); Langstroth *v.* Golding, id. 49; Cook *v.* Lanning, 40 N. J. Eq. 369; Corwine *v.* Corwine, 24 N. J. Eq. 579; *s. c.* 23 N. J. Eq. 363; Robinson *v.* McIver, 63 N. C. 649; Moore *v.* Beckwith, 14 Ohio St. 135; Swope's Appeal, 27 Penn. St. 58; Mellon's Appeal, 46 Penn. St. 165; Davis's Appeal, 83 Penn. St. 348; Blake's Estate, 134 Penn. St. 240; Cook *v.* Petty, 108 Penn. St. 138; Mathewson, Petitioner, 12 R. I. 145; Hutchinson *v* Gilbert, 86 Tenn. 464; Thomas *v.* Rector, 23 W. Va. 26.

In New York the rule is not so strong in favor of the charge; other facts should be added. Briggs *v.* Carroll, 117 N. Y. 288; Brill *v.* Wright, 112 N. Y. 129; Wiltsie *v.* Shaw, 100 N. Y. 191; McCorn *v.* McCorn, id. 511; Hoyt *v.* Hoyt, 85 N. Y. 142. The mere fact that land as well as personalty is embraced in a residuary gift, as in the case of a gift of "all the residue of my real and personal estate," is nowhere enough to blend it with the personalty into one fund, or to charge it with the payment of legacies. Lupton *v* Lupton, 2 Johns. Ch. 614; Bevan *v.* Cooper, 72 N. Y. 317; Van Winkle *v.* Van Houten, 2 Green, Ch. 172; Paxson *v.* Potts, id. 313. In the last two cases it is laid down that the authorities in which a residuary gift including land have held the land to be charged with the payment of legacies proceed upon the ground that, unless there has already been a gift of realty, there cannot be a "residue" of realty; and hence a legacy could not be a charge upon the land embraced in such residuary gift. It was conceded, how-

Geo. 3, c. 74, which let in the claims of the simple contract creditors of a deceased person upon the real assets, *i. e.*, the freehold estates,

ever, that where the testator had in the prior dispositions of his will massed his real and personal estate into one fund, a gift of the residue unchanged would be a sufficient blending to charge the land embraced in the residuary gift. As to what constitutes a blending in the residuary clause, see also Bevan *v.* Cooper, 72 N. Y. 317; Reynolds *v.* Reynolds, 16 N. Y. 257, 261; Van Vliet's Appeal, 102 Penn. St. 574; post, p. 1437.

In Massachusetts, no blending would be necessary in any case (see Wilcox *v.* Wilcox, 13 Allen, 252), since it is provided by statute that the land of the testator may be applied to the payment of legacies upon a deficiency of personal assets. Gen. St. Ch. 102, § 19; Ellis *v.* Page, 7 Cush. 161. But though the statute says nothing about the testator's intention, it is hardly to be supposed that it was intended to apply against a clearly manifested intention *not* to charge the land. Clearly land specifically devised would not be charged, as seems to be admitted in Wilcox *v.* Wilcox, supra. And see Hubbell *v.* Hubbell, 9 Pick. 561. The fact, however, that the testator has provided that his debts and legacies shall be paid out of his personal estate will not prevent the lands from being liable in Massachusetts. The residuary gift is not made specific by such a direction; and upon a deficiency of personal assets the realty must bear the burden remaining. Wilcox *v.* Wilcox, supra; Blaney *v.* Blaney, 1 Cush. 107. And *quære* whether the effect of the statute is actually to create a charge upon the land, so as to bind it in the hands of purchasers? Probably not as to purchasers after administration. The statute merely declares that "the executor or administrator with the will annexed" may sell the real estate to pay the legacies.

It is also laid down (to return to the common-law authorities) that the fact that residuary donees are to have the residue only after the decease of an annuitant legatee is evidence of an intention to subject the entire estate given to such donees, the realty after the personalty is exhausted, to the payment of the annuity. Lapham *v.* Clapp, 10 R. I. 543 (citing Hassell *v.* Hassell, 2 Dickens, 527; Bench *v.* Biles, 4 Madd. 187; Cole *v.* Turner, 4 Russ. 376; Mirehouse *v.* Scaife, 2 Mylne & C. 695; Gould *v.* Winthrop, 5 R. I. 319). When a conversion of the realty and personalty is directed, out of which as a whole the legacies are to be paid, the two funds making the result are to bear the burden ratably, without reference to the rule that the personalty is primarily liable. Reynolds *v.* Reynolds, supra. Again a legacy is deemed to be charged upon land devised when the testator directs that his debts and legacies shall first be paid, and then devises land, or where he devises the remainder of his estate, real and personal, "after payment of debts and legacies," or where he merely devises land "after payment of his debts and legacies." Id.; In re Rochester, 110 N. Y. 159; Lupton *v.* Lupton, 2 Johns. Ch. 614. See also Baker's Appeal, 59 Penn. St 313. But see Starke *v.* Wilson, 65 Ala. 576.

Indeed, it is laid down that when a testator appoints a devisee his executor, and expressly directs him to pay debts and legacies, the land is charged. Id.; Thayer *v.* Finnegan, 134 Mass. 62; Brown *v.* Knapp, 79 N. Y. 136; Olmstead *v.* Brush, 27 Conn. 530; Allen *v.* Patton, 83 Va. 255; Doe d. Pratt *v.* Pratt, 6 Ad. & E. 180; Hanvell *v.* Whitaker, 3 Russ. 343. The proposition is disputed in Paxson *v.* Potts, 2 Green, Ch. 313, 322, and in Van Winkle *v.* Van Houten, id. 172, 191. But it was deemed true as to the case of a legacy to a child of the testator, as against the claim of a stranger in blood, donee under a residuary gift embracing land. See Scott *v.* Stebbins, 91 N. Y. 605, Bevan *v.* Cooper, 72 N. Y. 317, 325; Luckett *v.* White, 10 Gill & J. 480, where the question was between children of the testator, not between one of his children and a stranger.

It is also held that where, in the same sentence or clause in which land is given, the payment of money (*e. g.* an annuity) is imposed upon the devisee, the same on acceptance is a charge upon the land, unless some other provision is made for payment. Merrill *v.* Bickford, 65 Maine, 118; Thayer *v.* Finnegan, 134 Mass. 62 (citing Sands *v.* Champlin, 1 Story, 376, Bank *v.* Donaldson, 6 Barr, 179; Harris *v.* Fly, 7 Paige, 421); Sistrunk *v.* Ware, 69 Ala. 273; Porter *v.* Jackson, 95 Ind. 210; Dudgeon *v.* Dudgeon, 87 Mo. 218 (citing Clyde *v.* Stimpson, 4 Ohio St. 45); Halsted *v.* Westervelt, 41 N. J. Eq. 100. See also Luckett *v.* White, 10 Gill & J. 480, which, however, probably rests upon the ground that the legatee was the testator's son. It is clearly otherwise where the devise and legacy are given in different clauses, unconnected with each other. See *e. g.*, Okeson's Appeal, 59 Penn. St. 90. Nor will the fact that the testator declares his intention to make the legatee equal to the devisee suffice in such a case to charge the land. Id. Indeed, the Pennsylvania authorities, with clear apprehension of the significance of the rule that the testator's will must create the charge if the land is to be specifically burdened, declare that no safe inference of such an intention can arise from the mere fact that the testator (though, it seems, in one and the same clause) has required the devisee to pay a legacy. Penny's Appeal, 109 Penn. St. 323; Van Vliet's Appeal, 102 Penn. St. 574; Walter's Appeal, 95 Penn. St. 305; Cable's Appeal, 91 Penn. St. 327; Wright's Appeal, 12 Penn. St. 256; Dewitt *v.* Eldred, 4 Watts, 414. See Brandt's Appeal, 8 Watts, 198; Montgomery *v.* McElroy, 3 Watts, & S. 370.

Again, real estate is charged by inference where a legacy is given after a disposition of all the testator's personal estate, for there is nothing else out of which the legacy can be paid. Bevan *v.* Cooper, 72 N. Y. 317, 323; Goddard *v.* Pomeroy, 36 Barb. 546; Davidson *v.* Coon, 125 Ind. 479; Duncan *v.* Wallace, 114 Ind. 169 (citing Hoyt *v.* Hoyt, 85

if the debtor was at the time of his decease (*e*) subject to the bankrupt laws. This act was the fruit of the persevering exertions of Sir Samuel Romilly, whose labors in this righteous cause are well known, and was all that those

Stat. 47 Geo. 3, c. 74. See also 1 Will. 4, c. 47, s. 9.

(*e*) Hitchon *v.* Bennett, 4 Mad. 180.

N. Y. 142; McCorn *v.* McCorn, 100 N. Y. 511). See Pierce *v.* Livingston, 80 Penn. St. 99, 101; Van Winkle *v.* Van Houten, 2 Green, Ch. 172; Paxson *v.* Potts, id. 313, 321. But such a case should he made by the will itself. Bevan *v.* Cooper, supra. The fact that it finally turns out that nothing is left at the time of the testator's death but realty will not suffice to charge that, where the will shows a purpose not to charge it. Brookhart *v.* Small, 7 Watts & S. 229. See Tole *v.* Hardy, 6 Cowen, 333, 341. See, however, Perkins *v.* Caldwell, 79 N. Car. 441; Lapham *v.* Clapp, 10 R. I. 543; Van Winkle *v.* Van Houten, supra. Mere insufficiency of the personalty will not, it is clear, charge legacies on the land. Taylor *v.* Tolen, 38 N. J. Eq. 91 (citing Massaker *v.* Massaker, 2 Beasl. 264; Johnson *v.* Poulson, 32 N. J. Eq. 390); In re Rochester, 110 N. Y. 159.

It has been held that, in the absence of clearly manifested intention, it may be proper to look into the condition of the testator's family and the nature of his estate at his decease, in order to obtain light as to the testator's purpose. In re Powers, 124 N. Y. 361 (citing Briggs *v.* Carroll, 117 N. Y. 288; Hoyt *v.* Hoyt, 85 N. Y. 142); McCorn *v.* McCorn, 100 N. Y. 511; Perkins *v.* Caldwell, 79 N. C. 441; Lassiter *v.* Wood, 63 N. C. 360. See Paxson *v.* Potts, 2 Green, Ch. 313; Van Winkle *v.* Van Houten, id. 172; Lupton *v.* Lupton, 2 Johns. Ch. 414. But see Tole *v.* Hardy, 6 Cowen, 333, 341, and Heslop *v.* Gatton, 71 Ill. 528, in which it is stated, that the condition of the testator's property cannot be looked into, except as a latent ambiguity or the language of the will justifies.

The general result of the entire doctrine of charge in favor of legacies and debts may now be stated in the form of the simple test, Can the terms of the will, irrespective of the matter of deficiency, be carried out without burdening the real estate? If they can be, then the land devised is not charged; if not, the contrary is true. And though the question under consideration, thus far, has been the more common one concerning the existence of a charge upon land devised, it is apprehanded that the test just stated is equally applicable to the question of a charge upon undevised land. The expectancy of the heir cannot be defeated without the clearly manifested intention of the testator. It has elsewhere been seen that the heir cannot be deprived of his ancestor's lands except by clear gift; not even an express declaration that he shall not have them being sufficient. Ante, Vol. I., p. 589. And there is probably no difference in this country between debt and legacies as to what constitutes a charge upon land whether devised or not devised.

The devisee's acceptance, it should further be observed, of a devise charged with the payment of a legacy makes him personally liable in equity to pay the same. Redfield *v.* Redfield, 126 N. Y. 466; Clift *v.* Moses, 116 N. Y. 144; Brown *v.* Knapp, 79 N. Y. 136; Loder *v.* Hatfield, 71 N. Y. 92; Kelsey *v.* Wester, 2 Comst. 500, 508; Mason *v.* Smith, 49 Ala. 71; Hamilton *v.* Porter, 63 Penn. St. 332; Sands *v.* Champlin, 1 Story, 326; Bugbee *v.* Sargeat, 23 Maine. 269; *s. c.* 27 Maine, 338; Williams *v.* Nichols, 47 Ark. 254; Dunn *v.* Dunn, 66 Cal. 157; Porter *v.* Jackson, 95 Ind. 210; Wilson *v.* Moore, 86 Ind. 244; Lofton *v* Moore, 83 Ind. 112; Etter *v.* Greenawalt, 98 Penn. St. 422. Secus of acceptance of a devise charged with payment of debts generally. Hayes *v.* Sykes, 120 Ind. 180; Clift *v.* Moses, supra. And see Funk *v.* Eggleston, 92 Ill. 515, 534. The devisee may become personally liable of course without any charge on the land. Penny's Appeal, 109 Penn. St. 323 (citing Wright's Appeal, 2 Jones, 256; Hamilton *v.* Porter, 13 P. F. Smith, 332).

The charge upon the land devised will bind all who claim under the devisee until payment is made. Leavitt *v.* Wooster, 14 N. H. 550; Kemp *v.* McPherson, 7 Har. & J. 320; Morgan *v.* Titus, 2 Green, Ch. 201; Hallett *v.* Hallett, 2 Paige, 15; Harris *v.* Fly, 7 Paige, 421. Still, land sold in pursuance of the authority conferred by the will "in order to obtain money to pay the above legacies, or for any other purposes that he [the devisee and executor] may think advantageous to himself," is held not to be subject in the hands of the purchaser to a charge for the legacies. Turner *v.* Turner, 57 Miss. 775. But it is laid down that where legacies charged on land, and payable to the legatee at majority, are paid to the legatee's guardian before that time, the land is liable in the hands of a purchaser unless the money is actually received by the ward at majority. Cato *v.* Gentry, 28 Ga. 327, Story, Equity, § 1133.

As to charges for support, see Commons *v.* Commons, 115 Ind. 163; Zeek *v.* Reed, 69 Ind. 319; Stillwell *v.* Leary, 84 Ky. 379; Proctor *v.* Proctor, 141 Mass. 165; Slattery *v.* Wason, 151 Mass. 266; Chase *v* Ladd, 153 Mass. 126; Cram *v.* Cram, 63 N. H. 31; Patterson *v.* Read, 42 N. J. Eq. 621; Halsted *v.* Westervelt, 41 N. J. Eq. 100; Bonham *v.* Bonham, 33 N. J. Eq. 476; Stimson *v.* Vroman, 99 N. Y. 74; Misenheimer *v.* Sifford, 94 N. C. 592; Gray *v.* West, 93 N. C. 442; Taylor *v.* Elder, 39 Ohio St. 535; Gold's Estate, 133 Penn. St. 495; Markley's Estate, 132 Penn. St. 352; Haworth's Appeal, 105 Penn. St. 362; Paisley's Appeal, 70 Penn. St. 153; Turner *v.* Durham, 12 Lea, 316; Dickson *v.* Field, 77 Wis. 439.

exertions were able to wring from the legislature of that day. But what was denied to the zealous advocacy of this able and upright lawyer, was conceded, without, it is believed, a dissentient voice, by the parliament of William IV., — a striking illustration of the change which public opinion had undergone on this subject. The act 3 & 4 Will. 4, c. 104, provided that after the 29th of August, 1833, when any person should die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, which he should not by his last will have charged with or devised subject to the payment of his debts, the same should be assets, to be administered *in courts of equity*, for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir-at-law, customary heir, and devisees of such debtor should be liable to all the same suits *in equity* at the suit of any of the creditors, whether by simple contract or by specialty, as the heir-at-law or devisees were theretofore liable to in respect of freehold estates at the suit of creditors by specialty in which the heirs were bound (*f*). A proviso was added that in the administration of assets by courts of equity *under the act*, creditors by specialty in which the heirs were bound, were to be paid in full before creditors by simple contract, or by specialty in which the heirs were not bound (*g*); but these distinctions are now wholly abolished; and all creditors, whether by specialty or simple contract, of persons dying after 1869 are payable pari passu out *of his assets, whether these be legal or equitable (*h*). [*1389] The rights of secured creditors were expressly saved (*i*); but in the administration by the court of the estate of an insolvent debtor dying on or after 1st November, 1875, these rights are now subject to the rule in bankruptcy (*k*).

3 & 4 Will. 4, c. 104.

Real estates to be assets for payment of debts by simple contract.

Priority reserved to specialty creditors, — since abolished.

During the period when real estate was not liable, unless charged by its deceased owner, to pay his simple contract debts, of course it was

(*f*) The latter clause did not narrow the previous (charging) clause so as to exclude the case of a debtor dying without an heir, Evans *v.* Brown, 5 Beav. 114; Hughes *v.* Wells, 9 Hare, 749. Rents accrued after the testator's death, and received by the trustees and executors of his will are assets, Re Hyatt, Bowles *v.* Hyatt, 38 Ch. D. 609.

(*g*) Richardson *v.* Jenkins, 1 Drew. 477.

(*h*) 32 & 33 Vict. c. 46. Arrears of rent are a specialty debt within this enactment, Re Hastings, 6 Ch. D. 610. As to the distinction between legal and equitable assets, see Ch. XLVI., s. i.

(*i*) As to their rights generally, see Mason *v.* Bogg, 2 My. & Cr. 443. Right of distress for rent does not make rent in arrear a secured debt, Re Coal Consumers Association, 4 Ch. D. 625.

(*k*) 38 & 39 Vict. c. 77, s. 10; see Sherwin *v.* Selkirk, 12 Ch. D. 68; Re Hopkins, Williams *v.* Hopkins, 18 Ch. D. 370. But the section does not apply so as to make an unregistered bill of sale, which would be void as against a trustee in bankruptcy, void as against the unsecured creditors of an insolvent estate, Re D'Epineul, Tadman *v.* D'Epineul, 20 Ch. D. 217. In that case, Fry, J., said that the section is not intended to enlarge the assets to be administered, but only to vary the rights of persons entitled to the assets.

Difference of effect between enactment and actual charge.

a question of importance (and sometimes too of no small difficulty) to determine whether such charge were in point of fact created by the will of the debtor. But the combined effect of the acts of Will. 4 and Vict. being to put all creditors whether by specialty or simple contract on an equal footing (*l*) the importance of the question is much diminished; since this was always the rule of equity under a general charge; and although there are other classes of creditors (*m*) whose priorities are untouched, they rarely come in question. The executor's right of retainer is not taken away by these acts (*n*); nor is it extended so as to enable the executor to retain his debt as against a creditor of higher degree than himself (*o*); nor do the acts give to an executor a right of retainer as regards real estate (*p*). One distinction however remains, viz. that under the statutes the creditors have not (as in the case of an actual charge) any lien on the estate (*q*). If, therefore, it is parted [*1390] with by the heir or devisee before the * creditor has pursued his remedy, the estate cannot be followed (*r*); though the creditor's lien under an actual charge is of no great value to him, since it does not prevail against a bona fide purchaser for a pecuniary consideration; the well-known rule being that such purchasers are not bound to see their money applied in payment of debts under a general charge (*s*). Hence it is obvious that the inquiry whether real estate is or is not charged with debts by certain expressions in a will is not wholly precluded even in regard to the wills of testators dying since 1869.

II. Whether Debts are charged by a General Direction in a Will that Debts shall be paid. — Whether a general direction by a testator that his debts shall be paid charges the real estate with the payment, is a point which has been much agitated from an early period (*t*).

General direction that debts shall be paid.

(*l*) So that now judgment against the executor by a simple-contract creditor gives him priority over specialty creditors, Williams *v.* Williams, L. R., 15 Eq. 270, provided it be obtained before decree for administration, Parker *v.* Ringham, 33 Beav. 535. See Smith *v.* Morgan, 5 C. P. D. 337. Re Maggi, Winehouse *v.* Winehouse, 20 Ch. D. 545.

(*m*) See Wms. Exors. p. 995, seq. 8th ed. A surety paying a crown debt is entitled to the Crown's priority in an administration, Re Churchill, Manisty *v.* Churchill, 39 Ch. D. 174.

(*n*) Crowder *v.* Stewart, 16 Ch. D. 368.

(*o*) Wilson *v.* Coxwell, 23 Ch. D. 764; Re Jones, Calver *v.* Laxton, 31 Ch. D. 440. See Re Compton, Norton *v.* Compton, 30 Ch. D. 15. As to retainer by the heir-at-law or devisee against a creditor by specialty, see Re Illidge, Davidson *v.* Illidge, 27 Ch. D. 478.

(*p*) Walters *v.* Walters, 18 Ch. D. 182.

(*q*) 4 My. & Cr. 268. See also Spackman *v.* Timbrell, 8 Sim. 253; Richardson *v.* Horton, 7 Beav. 112; Pimm *v.* Insall, 1 Mac. & G. 449.

(*r*) A marriage settlement operates as an alienation. Re Hedgely, Small *v.* Hedgely, 34 Ch. D. 379.

(*s*) Sug. V. and P. 14th ed. 655. And where debts and legacies are charged, the exemption extends to both, and even, it seems, to annuities, Page *v.* Adam, 4 Beav. 269, cit. 1 D. M. & G. 650.

(*t*) Under a charge of "debts" in a will are included all liabilities to which the personal estate is liable; as, damages for a breach of covenant occurring after the testator's death; see Earl of Bath *v.* Earl of Bradford, 2 Ves. 587; Lomas *v.* Wright, 2 My. & K. 769; Willson *v.* Leonard, 3 Beav. 373; Morse *v.* Tucker, 5 Hare, 79; Eardley *v.* Owen, 10 Beav. 572; Berm-

In an anonymous case in Freeman (*u*), it was held that the land was *not* charged in such cases; "for, if that should be so, the debts of every testator would be charged upon his land, for there are but few wills but have some such expressions, whereby the testator desires his debts to be paid."[1]

Cases in which lands held *not* to be charged.

*A similar doctrine was propounded in Eyles *v.* Cary (*x*); but it seems to be irreconcilable with that of numerous other early authorities, in which a direction for the payment of debts generally, or (though this is certainly stronger) for the payment of them *out of the testator's estate*, has been held to onerate the real estate devised by the will. [*1391]

Expressions which have been held to charge.

Thus, in Newman *v.* Johnson (*y*), where the testator said, "*My debts and legacies being first deducted*,[2] I devise all my estate, both real and personal, to J. S.;" Lord Nottingham held that it amounted to a devise to sell for payment of debts.

"*My debts being first deducted*, I devise all my estate," &c.

So, in Bowdler *v.* Smith (*z*), where a testator devised as follows:— "*As to my temporal estate wherewith God hath blessed me, I give and dis-*

ingham *v.* Burke, 2 J. & Lat. 699. So, a sum covenanted to be left by *will* (which is a specialty debt), Eyre *v.* Monro, 26 L. J. Ch. 757; and the liability of an incumbent's estate for dilapidations, see Bisset *v.* Burgess, 23 Beav. 278. The act 3 & 4 Will. 4, c. 104, is equally extensive, Ex parte Hamer, 2 D. M. & G. 366. A charge of debts in an English will was held to include a debt secured by heritable bond on a Scotch estate, Maxwell *v.* Maxwell, L. R., 4 H. L. 506. As to mortgage debts, see Ch. XLVI., a. v. Debts barred by the Statute of Limitations are not included, Burke *v.* Jones, 2 V. & B. 275. See post, p. 1427. A claim though not statute-run may forfeit the benefit of a charge by laches. Harcourt *v.* White, 28 Beav. 303. But a direction to deduct from a child's share "debts" owing by her to the other children was held to include statute-run debts, the object being to make equal distribution, Poole *v.* Poole, L. R., 7 Ch. 17. If a devise for payment of debts does not provide for such payment in a practicable manner, it is within the statute of fraudulent devises, Hughes *v.* Doulbin, 2 Cox, 170. A charge of the debts of another person then deceased, includes all his debts not barred at *his* death, O'Connor *v.* Haslam, 5 H. L. Ca. 170. But qu. whether a charge of the debts of one who survives the testator would include debts contracted after the testator's death unless (as in Joel *v.* Mills, 7 Jur. N. S. 389, 30 L. J. Ch. 354) the trustees have a discretion. Whether the charge entitles creditors of the third person to interest depends on the terms of the will, Askew *v.* Thompson, 4 K. & J. 620; Poole *v.* Poole, sup. A charge of debts on one part of the *personalty* is confined to debts proper, Hawkins *v.* Hawkins, 13 Ch. D. 470.

(*u*) Freem. Ch. Ca. 192.

(*x*) 1 Vern. 457, 1 Eq. Ca. Ab. 198, pl. 3.

(*y*) 1 Vern. 45, 1 Eq. Ca. Ab. 197, pl. 1. And see Harris *v.* Ingledew, 3 P. W. 91; Davis *v.* Gardiner, 2 P. W. 187.

(*z*) Pre. Ch. 254. See also Coombes *v.* Gibson, 1 B. C. C. 273.

[1] In re Bingham, 127 N. Y. 296; In re Powers, 124 N. Y. 361; In re Rochester, 110 N. Y. 159; Starke *v.* Wilson, 65 Ala. 576; Miller *v.* Couch, 5 Houst. 540. But see Allen *v.* Patton, 83 Va. 255. Giving a power to sell land to pay legacies indicates an intention that the legacies are to be paid out of the land. Clift *v.* Moses, 116 N. Y. 144. In Staigg *v.* Atkinson, 144 Mass. 564 (see Atkinson *v.* Staigg, 13 R. I. 725) a general direction to pay debts was held not to indicate, under the facts, an intention to charge the interests passing by the will in exoneration of the widow's third under the statutes of another state where the land lay.

[2] In re Rochester, 110 N. Y. 159; Lupton *v.* Lupton, 2 Johns. Ch. 614; Hart *v.* Williams, 77 N. C. 426; Markillie *v.* Ragland, 77 Ill. 98; Gilder *v.* Gilder, 1 Del. Ch. 331. The distinction is between a general direction to pay debts, and a direction to pay them *first*. In re Rochester, supra. *E. g.*, devise of land *after* payment of debts and legacies creates a charge. Id. Secus of such language as "After all my just debts are paid I give and bequeath the," &c. Such language is only formal. Id. See also Wiltsie *v.* Shaw, 100 N. Y. 191. See further, Read *v* Cather, 18 W. Va. 263.

"First, I will that all my debts be paid," "also I devise," &c.

pose thereof as followeth: First, I will that all my debts be justly paid which I shall at my decease owe; also I devise all my estate in G. to A." This was all the real estate the testator had; and it was held that the will charged it with the debts.

And in Trott *v.* Vernon (*a*), where a testator devised in these words: "*Imprimis, I will and devise that all my debts, legacies, and funeral expenses shall be paid and satisfied in the first place:* Item, I give and devise;" and then proceeded to dispose of his real and personal estate: Lord Cowper held that, the testator having willed his debts, &c., to be satisfied in the first place, these words must be intended to give a preference to those purposes to any other whatever; and he held the real estate to be charged.

Similar expression.

"As to my worldly estate, *my debts being first satisfied,*" &c.

Again, in Harris *v.* Ingledew (*b*), where the testator said, "As to my worldly estate, *my debts being first satisfied,* I devise the same as follows," and then proceeded to devise certain freehold and leasehold lands; Sir J. Jekyll, M. R., held that nothing was devised until the debts were paid. He thought it would have been sufficient though the word "first" had been omitted.

Lands charged under general direction, though particular debts were to be paid out of the first "*money*" that was received.

So, in Hatton *v.* Nichol (*c*), where the testator commenced his will thus: "As to the worldly estate with which it hath pleased God in his abundant goodness to bless me, I give, devise, and dispose thereof as followeth: *Imprimis, I will that the charges of my funeral and all debts* [*1392] *which shall be owing by me at the time of * my death be justly paid and satisfied,* especially that due to my poor carriers, which I will shall be discharged out of the first *money* of mine that shall be received;" and then he proceeded to devise his real estate to certain uses. Lord Talbot held that the debts were well charged upon the real estate.

"In the first place, I will that all my just debts," &c., be paid.

Again, in Stangor *v.* Tryon (*d*), where the words were, "*In the first place, I will that my just debts and funeral expenses be fully paid and satisfied;*" and the testator then devised copyhold lands: Sir T. Sewell, M. R., held the copyholds liable to the debts. Kay *v.* Townsend (*e*), decided about the same period, is to the same effect.

In Legh *v.* Earl of Warrington (*f*), a testator thus commenced his will: "As to my worldly estate which it hath pleased God to bestow

(*a*) Pre. Ch. 430, 2 Vern. 708, 1 Eq. Ca. Ab. 198, pl. 6. See also Beachcroft *v.* Beachcroft, 2 Vern. 690.
(*b*) 3 P. W. 91. See also King *v.* King, id. 358.
(*c*) Cas. t. Talb. 110.
(*d*) See Mr. Raithby's note to Trott *v.* Vernon, 2 Vern. 709.
(*e*) Ibid.
(*f*) 1 B. P. C. Toml. 511.

upon me, I give and dispose thereof in manner following; that is to say, *Imprimis*, I will that all my debts which I shall owe at the time of my decease be discharged and paid *out of my estate*" (*g*); and he then proceeded to dispose of his real and personal estate, expressly charging the former with an annuity. It was contended that these were merely the usual introductory words, and did not indicate an intention to charge the real estate; but the House of Lords, affirming a decree of Lord King, held the real estate to be charged.[1]

Debts to be paid "*out of my estate.*"

This case has always been regarded as a leading authority. It was recognized by Lord Hardwicke in Earl of Godolphin *v.* Penneck (*h*), and by Lord Loughborough in Williams *v.* Chitty (*i*).

So, in Kentish *v.* Kentish (*k*), where the testator said, "*First, I will that my just debts shall in the first place be paid and satisfied.* Item — I give and bequeath;" and went on to devise his real estate; Buller, J., held it to be charged.

Simple direction that "debts be in the first place paid."

In Kightley *v.* Kightley (*l*), too, Sir R. P. Arden, M. R., assumed that debts were charged on the real estate by the words "First, I will and direct that all my legal debts, legacies, and funeral expenses shall be fully paid and satisfied," which were followed by a direction to the testator's executors about his funeral, and a devise of his lands. But the legacies (*m*) he held were not charged by these words.

Lord Alvanley's opinion of the effect of a general direction.

* So, in Shallcross *v.* Finden (*n*), where a testator began [*1393] his will thus: "*After payment of my just debts, funeral expenses, and the expenses of the probate hereof* (*o*), as likewise of my testamentary articles, I give and bequeath unto" H. 50*l.*, "and as to such expectancies in fee," &c.; and the testator then proceeded to devise his interest in certain lands; Sir R. P. Arden, M. R., held that the real estate in question was charged with the debts. The words "after payment of my debts," he said, meant that the testator would not give anything until his debts were paid.

"*After payment of my just debts,*" &c., "I bequeath," &c.

With singular inconsistency, however, the same Judge in Hartley

(*g*) These words are added from Belt's Suppl. to Ves. 361.
(*h*) 2 Ves. 271. As this case is rather loosely stated, and seemed very little to illustrate the general doctrine, it has been omitted.
(*i*) 3 Ves. 552.
(*k*) 3 B. C. C. 257.
(*l*) 2 Ves. Jr. 328.
(*m*) As to the distinction between them, see post, s. vii., ad fin.
(*n*) 3 Ves. 738, 3 R. R. 75.
(*o*) For a similar expression, see Batson *v.* Lindegreen, 2 B. C. C. 94; Kidney *v.* Coussmaker, 12 Ves. 136, post; Tompkins *v.* Tompkins, Pre. Ch. 397.

[1] Bailey *v.* Bailey, 115 Ill. 551; Worth *v.* Worth, 95 N. C. 239 (citing Bray *v.* Lamb, 2 Dev. Eq. 372; Biddle *v.* Carraway, 6 Jones, Eq. 95); Hines *v.* Hines, 95 N. C. 482; Gardner *v.* Gardner, 3 Mason, 178; Brookland *v.* Small, 7 Watts & S. 229. "Out of the rents" of certain houses. See Nudd *v.* Powers, 136 Mass. 273.

v. Hurle (*p*) assumed, in the discussion of another question, that a general direction by a testator that his debts, funeral and testamentary expenses, should be paid, was a direction *to his executors*, the persons who take the personal estate, to pay them.

In Williams *v.* Chitty (*q*), a testator ordered and directed *all his just debts and funeral expenses to be first paid;* and then proceeded to devise his real estate. Lord Loughborough's first impression was that the real estate was not charged; but he ultimately came to a different conclusion upon the authorities, which he considered had established the rule, "that wherever there is mention of debts in a will, and that will devises real estate, that shall throw the debts upon the real estate."

Mere direction that debts, &c., should be paid.

Next in chronological order is Clifford *v.* Lewis (*r*), where a testator commenced his will by saying, "I will and direct that my *just debts, funeral and testamentary expenses, be paid and satisfied.*" He then, after some recitals, bequeathed an annuity to his wife, charging his real estate in certain counties therewith; and went on to dispose of the rest of the real and personal estate. Sir J. Leach, V.-C., said, "The question is whether the expression with which he has commenced his will imports a general and primary purpose that the payment of his debts, funeral and testamentary expenses, should precede the subsequent dispositions which he has made of his property. In Finch [*1394] *v.* Hattersley (*s*), * the will began thus: '*First*, I direct that my debts, &c., be paid.' In Legh *v.* Warrington, '*Imprimis*, I direct my debts to be paid.' Both these wills must be read thus: '*In the first place*, I direct my debts to be paid.' This testator has, *in fact*, first directed his debts to be paid; and I cannot attribute to him a different intention because *in the form of the expression* he has not remarked that it was *in the first place.*"

"I will that my just debts," &c., "be paid."

Sir J. Leach here seems to have treated the question before him as lying within a very narrow compass, namely, whether a direction inserted at the commencement of the will was equivalent to an express direction to pay "in the first place;" though it is not a little singular that, on a subsequent occasion (*t*), he referred to Clifford *v.* Lewis, as distinguished from the one before him by the circumstance that the testator's debts were directed in the first place to be paid. In some of the early cases, reliance was undoubtedly placed on expressions of this nature; but

Remarks upon Clifford *v.* Lewis.

(*p*) 5 Ves. 545.
(*q*) 3 Ves. 545, 3 R. R. 71.
(*r*) 6 Mad. 33; Bradford *v.* Foley, 3 B. C. C. 351, n.
(*s*) Cit. 7 Ves. 210, stated 2 Russ. 345, n. The testator directed that his debts and funeral expenses should be paid by his executrix, and then devised his real estate to his wife for life, *whom he appointed executrix.* The circumstance of the devisee being appointed executrix was, in Powell *v.* Robins, 7 Ves. 211, considered by Sir W. Grant as the ground of the decision. See the case mentioned again, post, p. 1404.
(*t*) See Douce *v.* Lady Torrington, 2 My. & K. 600.

most of them proceeded upon the broad ground that a general direction that debts should be paid with or without such concomitant expressions, and whatever was its position in the will (*u*), charged the real estate. The words "in the first place," indeed, as here used, it is submitted, are merely introductory words of form, denoting the commencement of the testamentary act (*x*), or, if they have any meaning, only denote the order of payment, not the fund out of which payment is to be made.

Some stress certainly was laid on a phrase of this nature in the subsequent case of Ronalds *v.* Feltham (*y*); where a testator commenced his will in these words: "First, I direct all my just debts and funeral expenses to be fully paid and satisfied;" and then proceeded to dispose of all his copyhold, freehold, and leasehold estates and all his other property among his wife and children. Sir T. Plumer, M. R., held that the real estate was charged, observing, in reference to the argument upon the word "first" in this will being nothing more than the ordniary technical form of introductory words, that here it was not followed by other words denoting succession, such as secondly, thirdly, &c.

As to debts being directed to be paid "first," or in the first place.

But a more sensible view of this point was taken by Sir L. Shadwell in Graves *v.* Graves (*z*), where he said, "I do not think *that the charge is made to rest on the mere circumstance [*1395] that the testator has used the words 'imprimis' or 'in the first place;' for, if a testator directs his debts to be paid, it is not, in effect, a direction that his debts shall be paid in the first instance?"

In Irvin *v.* Ironmonger (*a*), we have another instance of real estate being held to be charged by a general direction at the commencement of the will without the words "in the first place," and that too by Sir J. Leach, whose reliance on such words has been already the subject of comment; though he certainly does not appear to have uniformly maintained the efficacy of a general direction, as appears by Douce *v.* Lady Torrington (*b*), where the testator, after directing all his just debts, funeral and other incidental expenses, to be paid with all convenient speed after his decease, and confirming his marriage settlement, devised all his real estate to trustees (whom he also appointed executors) and their heirs, upon trust to pay his wife an annuity, and upon the further trusts therein mentioned. By a codicil the testator directed that his trustees should, out of the rents arising from one of

Real estate held not to be charged by general introductory words.

(*u*) That the position of such clauses is immaterial, see Ridout *v.* Dowding, 1 Atk. 419; Clark *v.* Sewell, 3 Atk. 96.
(*x*) See Beestnn *v.* Booth, 4 Mad. 161.
(*y*) T. & R. 418.
(*z*) 8 Sim. 55.
(*a*) 2 R. & My. 531. See also King *v.* Denison, 1 V. & B. 260, 274; Walter *v.* Hardwick, 1 My. & K. 396, 402.
(*b*) 2 My. & K. 600.

his estates, pay his wife's annuity, and also an annuity to his son, and apply the surplus in discharge of the simple contract debts owing by him (the testator). One question was, whether the other estates were charged with the testator's debts by the effect of the general direction at the commencement of his will. Sir J. Leach, M. R., decided in the negative: he intimated the strong inclination of his opinion to be, that the introductory words had no such effect, but that it was unnecessary to decide the question upon that ground, as it was plain from the codicil that the testator did not intend a general charge upon his real estate, for by that codicil he directed the surplus only of a particular estate, after payment of the annuities, to be applied in payment of the simple contract debts.

Sir L. Shadwell's condemnation of Douce *v.* Lady Torrington.

Of this case, Sir L. Shadwell in Graves *v.* Graves (*c*) observed, that it seemed to have been an amicable decision and to have been made without sufficient consideration. Indeed, so far as it denied effect to general introductory words, the case directly clashes with the preceding authorities, to which may now be added several more recent cases, which preclude all hesitation in affirming the rule to be, that, subject [*1396] to the question presently * noticed, a general direction to pay debts, in whatever part of the will contained (*d*), operates to throw them on the testator's real estate.

Recent cases in which real estate held to be charged by general words of direction or desire.

Thus, in Ball *v.* Harris (*e*) a will which commenced with the following words: "First, I direct all my just debts, funeral and testamentary expenses, and the charges of the probate of this my will to be paid;" and then contained pecuniary legacies and devises of real estate, — was held by both Sir L. Shadwell and Lord Cottenham to charge the testator's real estate.

So, in Harding *v.* Grady (*f*), a similar construction was given by Sir E. Sugden to the following concluding passage in a will: "I desire that all my just debts be paid as soon as conveniently after my

(*c*) 8 Sim. 56.

(*d*) Ante, p. 1394, n. (*u*).

(*e*) 8 Sim. 485, 4 My. & Cr. 264. In this case, and in Shaw *v.* Borrer, 1 Kee. 559, the doctrine that a general direction to pay debts charged them on the real estate was treated as too clear for discussion, the only contest being whether such a charge conferred an implied authority to sell on the person taking the legal estate subject to certain trusts, which was decided in the affirmative. See also Gosling *v.* Carter, 1 Coll. 644; Mather *v.* Norton, 17 Jur. 309, 21 L. J. Ch. 15; Doe d. Jones *v.* Hughes, 6 Ex. 223. In this last case it was decided at law that a simple charge of debts did not give the executor not taking the legal estate a power of sale. Robinson *v.* Lowater, 17 Beav. 592, 5 D. M. & G. 272 (where, however, the legal estate was obtained by the purchaser aliunde); and Wrigley *v.* Sykes, 21 Beav. 337, are contra; and see Colyer *v.* Finch, 5 H. L. Ca. 905; Corser *v.* Cartwright, L. R., 7 H. L. 737; Sug. V. & P. 662, n., 14th ed.; Hayes and Jarman Conc. Wills, 564, 8th ed., and 2 Jur. N. S., Part 2, 68. But see now 22 & 23 Vict. c. 35, ss. 14 to 18; this question has lost much of its importance owing to the statutory power, implied from a charge of debts, given to trustees and executors by this statute. See also Sankey *v.* Clark, W. N., 1889, p. 79; the act does not enable an administrator to sell, Re Clay and Tetley, 16 Ch. D. 3. As to sales by executors independently of the act, see Byth. & Jarm. Conv. (4th ed. by Robbins), sub. tit. "Purchase Deeds," Vol. V., p. 35.

(*f*) 1 D. & War. 430.

decease."[1] In this case there was a peculiarity that the will embraced real estate only, but the Chancellor's remarks render it probable that his adjudication would have been the same if the will had included personalty.

So, in Parker *v.* Marchant (*g*), Sir K. Bruce, V.-C., treated it as clear that real estate was charged by the following words: "I direct, in the first place, all my debts to be paid;" the will then proceeding to dispose of personal, and ultimately of real estate.

Secus, where mere authority.

But in Re Head's Trustees and Macdonald (*h*) it was held by the Court of Appeal affirming the decision of Sir J. Chitty, J., that where a testator "authorized" his trustees "to adjust and pay all claims on his estate," this mere authority, there being * no direction to pay debts, did not charge the [*1397] testator's debts on the real estate.

General observations upon the cases.

Such, then, is the long line of cases in which it has been held that a general direction by a testator that his debts shall be paid charges them upon his real estate. Though certainly in some of the wills there were expressions which might fairly be considered to sustain the construction independently of any such doctrine, it seems to be generally admitted that the Courts have allowed their anxiety to prevent moral injustice by the exclusion of creditors, "and that men should not sin in their graves," to carry them beyond the limits prescribed by established general principles of construction; though Lord Alvanley's observation in Shallcross *v.* Finden (*i*), that the restricting the direction to pay to personalty renders it nugatory, that being before liable, is not without weight.

Absence of any devise or mention of realty.

The only doubt which the preceding authorities admit of is, whether a general direction that debts shall be paid will throw them on real estate when contained in a will the dispositions of which are otherwise confined to personalty; for it is observable that in all the cases which have yet occurred the will appears to have embraced real estate. The total absence of any devise or mention of realty would certainly be a new feature; though, considering the strong tendency of the recent cases in favor of such charges, it seems unlikely that any distinction of this nature will be established. So long ago as Shallcross *v.* Finden (*i*) we have

(*g*) 1 Y. & C. C. C. 290; Shaw *v.* Borrer, 1 Kee. 559. See also Price *v.* North, 1 Phil. 85; per Lord Cairns, Corser *v.* Cartwright, L. R., 7 H. L. 734.
(*h*) 45 Ch. D. 310.
(*i*) 3 Ves. 739, 3 R. R. 75.

[1] See Lewis *v.* Ford, 67 Ala. 143. Such words would not charge the land, in this country. Id. (citing Carrington *v.* Manning, 13 Ala. 611; Steele *v.* Steele, 64 Ala. 438); Starke *v.* Wilson, 65 Ala. 576; White *v.* Kauffman, 66 Md. 89 (citing Cornish *v.* Willson, 6 Gill, 35; Piper *v.* Hamilton, 26 Md. 220); Brands *v.* Hartung, 38 N. J. Eq. 42; Clift *v.* Moses, 116 N. Y. 144 (citing In re Rochester, 110 N. Y. 159). But see Sanborn *v.* Clough, 64 N. H. 315.

a dictum of Sir R. P. Arden which seems to bear upon the point under consideration: "I am very clearly of opinion," said this able Judge, "that whenever a testator says that his debts shall be paid, that will ride over every disposition, either against his *heir-at-law* or devisee."

III. — Exception where a specific Fund is appropriated. — The rule, however, seems to be subject to two material exceptions. First, where the testator, after generally directing his debts to be paid, has provided a specific fund for the purpose.

Exceptions to the general rule.

Where testator has appropriated a specific fund to pay the debts, &c.

Thus in Thomas *v.* Britnell (*k*), where the testator first ordered all his debts to be honorably paid immediately after his decease; and in a subsequent part of his will devised certain hereditaments, *excepting H. and R.*, to trustees, upon trust out of the money arising by the [*1398] sale to pay and discharge his *debts*, * funeral expenses, and all legacies given by that will or any other writing under his hand. He afterwards directed that H. and R. should be in the first place for payment of the *legacies* mentioned in his will. Sir J. Strange, M. R., held that H. and R. were not subject to the payment of debts. Though on the first part, he said, the Court might take the whole real estate to be charged with debts, yet as there was no *express* lien on the real by these general words, and afterwards the testator appropriated certain part of his real for debts (*and legacies*), and other parts for legacies, it was too much to lay hold of the general words to say that the whole should be charged with payment of debts. It could be done only by implication on the general words, which might be explained afterwards, and that implication destroyed.

So, in Palmer *v.* Graves (*l*), where the testator commenced his will with the following words: "In the first place I direct my just debts, funeral expenses, and the charges of proving this my will to be duly paid;" and then proceeded to dispose specifically of certain freehold and leasehold property. The testator gave to his son A., his heirs, executors, administrators, and assigns, all the residue of his real and personal estate, with the rents and profits of his freehold and leasehold hereditaments up to the quarter day next ensuing after his decease, *which rents and profits he charged with the payment of his debts, funeral expenses, and the charges of proving his will;* and the testator appointed A. executor. Lord Langdale, M. R., held that the real estate was not charged by the introductory words, as the general charge by implication was controlled by the specific charge in the subsequent part of the will.

And in Corser *v.* Cartwright (*m*), where a testator first devised all

(*k*) 2 Ves. 313.
(*l*) 1 Kee. 545. See also Douce *v.* Lady Torrington, 2 My. & K. 600, ante, p. 1395; Legh *v.* Earl of Warrington, 1 B. P. C. Toml. 511, cit. 2 Ves. 272, and Belt's Suppl. 361.
(*m*) L. R., 8 Ch. 971. Affirmed in D. P. on independent grounds, L. R., 7 H. L. 731.

his debts, funeral, and testamentary expenses to be paid as soon as conveniently might be; then made numerous bequests and specific devises; and as to certain freehold estates therein mentioned, including the B. estate, and all the residue of his real and personal estate, subject to and chargeable with his just debts, funeral and testamentary expenses and legacies, he devised the same to J., and appointed J. and S. his executors; it was * held by James [*1399] and Mellish, L. JJ., that the implied charge was inconsistent with and must give way to the specific charge, according to the maxim expressum facit cessare tacitum, and *consequently* that J., the devisee of the specifically charged estates and one of the executors, was the proper person to raise money to pay the debts, and not the two executors under the implied charge.

However, it is clear that a charge created by general introductory words is not controlled by a subsequent passage furnishing conjecture only of a contrary intention, and not actually inconsistent with such charge. As where (*n*) a testator, after willing all his just debts, funeral expenses, and the charges of proving his will to be paid, devised real estate, and gave some legacies, and then proceeded to bequeath all the residue of his personal estate, *after and subject to the payment of all his just debts, funeral and testamentary expenses, and the legacies thereinbefore bequeathed.* Lord Lyndhurst, C., held that the latter words were not inconsistent with an intention to charge the real estate as an auxiliary fund; observing, that courts of equity had always been desirous of sustaining such charges for the benefit of creditors; and the presumption in favor of them was not to be repelled by anything short of a clear and manifest evidence of a contrary intention.

Not affected by express charge on residuary *personal* estate,

And Sir L. Shadwell, V.-C., came to a similar conclusion on a special and very inaccurately framed will, in Graves *v.* Graves (*o*).

Again, in Taylor *v.* Taylor (*p*), Sir L. Shadwell decided that a direction that all the testator's just debts and funeral expenses should be fully paid and satisfied, was not cut down by a subsequent charge of specific sums on particular estates. And in Forster *v.* Thompson (*q*) it was held that no such result followed from a subsequent charge of a specific debt on a specified estate which appeared in fact to be the testator's only real estate.

— nor by charge of specific sums either on particular lands,

— or on all the real estates.

Note that Lord Cairns there (p. 740) says the estates not specifically charged were devised apparently in strict settlement. See per Fry, J., W. of England & S. Wales District Bank *v.* Murch. 23 Ch D. 138, 152.

(*n*) Price *v.* North. 1 Phil. 85, reversing 4 Y. & C. 509. "The direction as to the personal estate, which is by law liable to those burdens, is mere redundancy, affording no inference of any definite purpose;" Per Plumer, V.-C., Noel *v.* Weston, 2 V. & B. 272.

(*o*) 8 Sim. 43.

(*p*) 6 Sim. 246. See also Clifford *v.* Lewis, 6 Mad. 33, ante, p. 1394.

(*q*) 4 D. & War. 303; see also Cross *v.* Kennington, 9 Beav. 150; Dormay *v.* Borradaile, 10 Beav. 263.

And in Jones *v.* Williams (*r*), where a testator began by directing his debts, funeral and testamentary expenses, to be paid, and provided that in aid thereof the purchase-money of an estate [*1400] which he had lately sold and a debt due to him from *A. should be applied for that purpose; and he devised his property called T. to his wife and her heirs, in trust to sell and apply the proceeds in further aid and discharge of his debts, and then specifically devised other lands and personalty to his wife and daughter, and directed certain articles to be kept as heirlooms; Sir J. K. Bruce said that, without intimating either assent or dissent as to the cases of Douce *v.* Lady Torrington and Palmer *v.* Graves, he was of opinion upon that will that there was at the commencement of it, plainly expressed, an intention to charge all the property with all the debts, and that the following parts of the will did not contain any sufficient indication of a contrary intention; and therefore that, whatever might be the order of precedence in which the testator considered the property chargeable, all the property was charged. The point, however, was not open to his decision.

Whether express particular charge controls previous general charge depends on the whole tenor of will.

And here it should be observed, that the doctrine of the preceding exception extends only to charges on real estate created by general and ambiguous expressions; for, of course, a clear and explicit charge on real estate is not liable to be controlled by an express appropriation of particular lands to the purpose (*s*), or a qualified charge of the real estate in the same will (*t*).

First exception inapplicable to express charge.

IV. — Exception where Direction is to Executors. — The second exception to the general rule under discussion occurs where the debts are directed to be paid by *executors*, in which case, unless land be devised to them, it will be presumed that payment is to be made exclusively out of funds which, by law, devolve to the executors in their representative character.[1]

Second exception, where the payment is to be made by the executors.

Thus, in Brydges *v.* Landen (*u*), where the testator commenced his will as follows: "Imprimis that all my debts and funeral charges and expenses be, in the first place, paid *by my executrix* hereinafter named: then as to my real and personal estate, I dispose of as follows;" and, after making such disposition, he charged and made liable all his real and personal estate with two sums of 150*l.* to each of his daughters. All the cases were considered by Lord Thurlow, who was clearly of opinion that the real estate was not charged.

(*r*) 1 Coll. 156, 8 Jur. 373.
(*s*) Ellison *v.* Airey, 2 Ves. 568; Coxe *v.* Bassett, 3 Ves. 155; Noel *v.* Weston, 2 V. & B. 269; Wrigley *v.* Sykes, 21 Beav. 337.
(*t*) Crallan *v.* Oulton, 3 Beav. 1.
(*u*) 3 Russ. 346, n., cited 3 Ves. 550, where it is said that the circumstance that the debts were to be paid by the executrix was considered very important.

[1] Allen *v.* Patton, 83 Va. 255.

*It is remarkable that this decision did not in some degree [*1401] abate the confidence with which Sir R. P. Arden and Lord Loughborough, the former in Kightley *v.* Kightley (*x*) and Shallcross *v.* Finden (*y*), and the latter in Williams *v.* Chitty (*z*), insisted that a general direction that debts should be paid charged the real estate, inasmuch as it seems to have been decided by Lord Thurlow, without allusion to the circumstance that the direction to pay was *to the executors.* The case was afterwards followed, however (but with the same apparent disregard of this peculiarity), by Sir R. P. Arden himself.

Thus, in Keeling *v.* Brown (*a*) the words were, "Imprimis, I will and direct that all my just debts and funeral expenses be paid and discharged as soon as conveniently may be after my decease *by my executrix and executors hereinafter named.* Item, I give, devise, and bequeath unto J. all that my messuage," &c.; and, after other devises, and giving his wife an estate for life in part of the real estate, the testator appointed his wife and two other persons (who took *no* interest in the real estate) executrix and executors. Sir R. P. Arden, M. R., said he could not, with all the disposition he always felt to give such a construction to wills as should make testators honest, construe this into a charge upon the real estate; it would be a violence to all language, and making a will for the testator.

Direction to *executors* to pay debts held not to charge real estate.

Again in Powell *v.* Robins (*b*), where a testator first *devised* that all his just debts and funeral expenses might be satisfied and paid *by his executors therein named* as soon after his decease as might be, and then gave certain leasehold premises to his wife, and afterwards devised a freehold estate to his son D., and appointed W. and G. executors. Sir W. Grant, M. R., upon the authority of Brydges *v.* Landen (*c*), Williams *v.* Chitty (*d*), and Keeling *v.* Brown (*e*), held that this estate was not charged, inasmuch as no real estate passed *to the executors who were directed to pay.*

Again, in Willan *v.* Lancaster (*f*), where a testator directed * that his debts should be paid by his executors, and "*then*" devised his lands, it was contended that the word "then" [*1402]

(*x*) Ante, p. 1392.
(*y*) Ante, p. 1393.
(*z*) Ibid.
(*a*) 5 Ves. 359.
(*b*) 7 Ves. 209.
(*c*) Ante, p. 1400.
(*d*) Ante, p. 1393. But this was a determination the other way, the direction being general, and not expressly to the executors. Lord Loughborough's argument at the hearing, indeed, pointed to the conclusion that it was not a charge; but he afterwards decided the contrary, upon the authorities.
(*e*) Supra.
(*f*) At the Rolls, 14th Nov. 1826, MS., 3 Russ. 108. See also Braithwaite *v.* Britain, 1 Kee. 206 (but where it is observable that the direction *to the executors* to pay the debts, on which Lord Langdale relied in his judgment, does not occur in the will, as reported); and Wisden *v.* Wisden, 2 Sm. & Gif. 396.

was equivalent to *after payment of the debts* (*g*); but Sir J. S. Copley, M. R., held that it was merely used in the sense of *further*, and that the debts were not charges on the real estate.

In Re Cameron, Nixon *v.* Cameron (*h*), a testator empowered his executors to realize such part of his "estate" as they should think right, to pay certain legacies; but the will did not contain any devise of real estate except a gift of a particular house, it was held that the legacies were not charged on the real estate, the direction to the executors being satisfied by holding the word "estate" to apply only to property which they took as executors, *i. e.*, the personalty.

Direction to pay legacies out of "estate" held not to charge realty.

V. — Distinction where Executors are Devisees of Real Estate.— Where, however, the executor is devisee of real estate, a direction even *to him* to pay debts or legacies will cast them upon the realty so devised. Thus, in the early case of Awbrey *v.* Middleton (*i*) where a testator gave several legacies and annuities, to be paid *by his executor*, and then devised all the rest and residue of his goods and chattels *and estate* (*j*) to his nephew (who was his heir-at-law), *and appointed him executor of his will;* the will also contained an express devise of some lands to another person; Lord Cowper held the real estate devised to the executor was chargeable with the legacies and annuities in aid of the personal estate.

So, in Alcock *v.* Sparhawk (*k*), the testator devised certain lands to A. (his heir-at-law) and his heirs; he then gave a legacy to B. to be paid *by his executor* within five years after his decease; and appointed A. sole *executor* of his will, desiring him to see the will performed; it was held that the legacy was charged upon the land devised to A.

[*1403] *So, in Barker *v.* Duke of Devonshire (*l*), where a testator devised all his real and personal estate unto and to the use of several persons, their heirs, &c., in trust by sale or mortgage thereof to pay *whatsoever he should thereafter by will or codicil appoint.* He then appointed these persons his executors, and proceeded to direct that *his just debts, funeral expenses, &c., should be paid by his executors,* and devised the residue of his estate (after giving several specific legacies) to his son. Sir W. Grant held that this authorized a sale for the payment of debts, though

Direction to trustees for sale (also executors) to pay what testator should appoint, held to extend to debts directed to be paid *by his executors.*

(*g*) As to this expression, see ante, p. 1393, and Vol. I., p. 777. The argument founded on the word "then," in this case, very much resembles that which lays stress on the words "imprimis," "in the first place," as to which see ante, p. 1394.

(*h*) 26 Ch. D. 19.

(*i*) 2 Eq. Ca. Ab. 497, pl. 16, Vin. Ab. Charge (D), pl. 15; see 7 H. L. Ca. 701.

(*j*) As to the operation of this word to carry the real estate, and as to the controlling effect on words primâ facie including realty of appointing the devisee executor, see ante, Ch. XXII.

(*k*) 2 Vern. 228, 1 Eq. Ca. Ab. 198, pl. 4. See also Goodright d. Phipps *v.* Allen, 2 W. Bl. 1041; Doe d. Pratt *v.* Pratt, 6 Ad. & Ell. 180; Elliott *v.* Hancock, 2 Vern. 143; and of course the construction is not varied by renunciation of probate by the person named executor, Lypet *v.* Carter, 1 Ves. 499; and per Lord Thurlow, 1 Ves. Jr. 446.

(*l*) 3 Mer. 310.

it was contended that the direction being *to the executors* showed the intention of the testator to confine it to personal estate.

Again, in Henvell *v.* Whitaker (*m*), where a testator directed that all his just debts and funeral expenses should be paid by his executors thereinafter named, and then gave all his real and personal estate to his nephew A., his heirs, executors, administrators, and assigns, and appointed him executor; Sir J. Leach, M. R., decided that the direction to the nephew to pay the debts operated to charge all the property, both real and personal, which he derived under the will.

And even where the land is devised to the executors upon trust for other persons, the effect is the same. Having the estate, and being charged with the payment of the debts, they are to consider the creditors as having the first claim upon the trust. Thus, in Dormay *v.* Borradaile (*n*), where a testator commenced by giving all his property to his wife: he next appointed her and two others executors, and "to them his executors" gave certain real estates in trust for his wife and children, and concluded thus, "my executors are charged with the payment of my just debts," Lord Langdale, M. R., held that the real estates were charged with the debts.

Same rule where executor is devisee *in trust*.

It is difficult to reconcile with this line of authorities the case of Parker *v.* Fearnley (*o*), where, a testatrix having directed legacies to be paid by her executor, to whom she devised all her real estates in fee, and also the residue of her personalty, after payment of her debts and funeral expenses, Sir J. Leach, V.-C., *held [*1404] that the pecuniary legacies were not charged on the real estate devised to the executor.

As this case was prior to, it must be considered as overruled by, Henvell *v.* Whitaker and the subsequent cases cited above, with which it is clearly inconsistent. Neither Awbrey *v.* Middleton nor Alcock *v.* Sparhawk was cited to, or noticed by, the V.-C.

Remark on Parker *v.* Fearnley.

And the circumstances that the estate given to the devisee is an *estate tail*, and the direction to pay the debts is connected by juxtaposition with the bequest of the personalty and the appointment of executor, and separated by several intervening sentences from the devise of the lands, are, it seems, immaterial.

Effect where debts are to be paid by tenant in tail, &c.

Thus, in Clowdsley *v.* Pelham (*p*), where a testator devised land to *A. and the heirs of his body*, remainder over; and in another part of his will gave to A. all the personal estate, and appointed him execu-

(*m*) 3 Russ. 343. See also Dover *v.* Gregory, 10 Sim. 393; Harris *v.* Watkins, Kay, 438; Cross *v.* Kennington, 9 Beav. 150 (aided probably by gift of "residue," see post. p. 1410).
(*n*) 10 Beav. 263. See also Hartland *v.* Murrell, 27 Beav. 204; Re Tanqueray, Willaume and Landan, L. R., 20 Ch. D. 465; Re De Burgh Lawson, L. R., 41 Ch. D. 568.
(*o*) 2 S. & St. 592.
(*p*) 1 Vern. 411, 1 Eq. Ca. Ab. 198, pl. 2.

tor *willing him to pay the testator's debts;* it was held that the real estate was charged.

It is not equally clear, however, that a direction to an executor to pay debts would have the effect of charging lands devised to him *for life* only. Undoubtedly in Finch *v.* Hattersley (*q*) the real estate was held to be charged under circumstances of this nature; but it does not appear that the fact of the executrix being a devisee for life of the real estate had any influence upon the Court; and as the case was decided when a general direction to an executor to pay debts might possibly have been considered sufficient to charge them upon real estate *not devised to the executor* (the doctrine upon the subject being more lax and the distinctions less defined than at present), the case cannot be relied on as an authority on the point above suggested. Doe d. Ashby *v.* Baines (*r*), in which it was decided upon a similar will that the real estate was *not* charged with debts, is not more satisfactory as an authority on the point; the Court of Exchequer appearing to deny the efficacy in any case of a direction to the executor to pay debts for the purpose of charging the real estate devised to him. None of the cases in Chancery noticed above were cited. However, in Harris *v.* Watkins (*s*), Sir W. P. Wood, V.-C., though he said it might be argued that it was not a probable intention of the testator to effect a charge on a life estate by such a direction; yet as the exec- [*1405] utor had an absolute * interest in the residuary real estate, as well as a life interest in a specific portion, decided that both were charged with debts, the residuary estate being first liable. And in Cook *v.* Dawson (*t*), under a direction to the executrix to pay the debts, followed by a devise to her for life, with remainder over, Sir J. Romilly, M. R., while holding that the fee was not charged, expressed a clear opinion that the life estate was.

Where by tenant for life.

It is quite clear, however, that a limited estate devised to *one* of several executors in the testator's lands will not be charged with debts, under a direction to the executors to pay them (*u*). Indeed, such is clearly the rule even where an estate *in fee* is devised to *one* of several executors.

Effect where devise is to *one* of several executors.

Thus, in Warren *v.* Davies (*x*), where a testator directed that his debts and legacies, funeral expenses and testamentary charges, should be paid by his executors thereinafter named; and, after directing certain real estates to be sold by his executors on the decease of his wife, he devised certain messuages and lands to his son Thomas

(*q*) 3 Russ. 345, n.
(*r*) 2 C. M. & R. 23.
(*s*) Kay, 438, 447.
(*t*) 7 Jur. N. S. 130; also reported 29 Beav. 123, where the opinion above referred to does not appear. Affirmed as to the fee, 3 D. F. & J. 127.
(*u*) See Keeling *v.* Brown, 5 Ves. 359.
(*x*) 2 My. & K. 49.

Davies in fee, and gave him the residue of his real and personal estate. The testator appointed Thomas Davies *and another* executors. Sir J. Leach, M. R., held that the estate devised to Thomas Davies was not to be considered as charged with the debts and legacies directed to be paid by the executors, merely because the devisee happened to be one of the executors. And the same rule seems to have been again acted upon by the same Judge, though without any distinct recognition of this ground of decision, in Wasse *v.* Heslington (*y*).

In the case last named some real estate was given to each of the executors, but more to one than to the other. This inequality has been thought to afford an argument against their being intended to bear the debts in equal proportions (*z*), as they would do under a charge. Indeed, the rule has never been applied to separate gifts to several executors. And though the gift to the executors is one and undivided, the implied charge may be rebutted by the context; as, if part only of the real estate is given to them, and other parts to other persons; in such * a case the distribution of the estate may be such as [*1406] to make it very improbable that the testator intended that the former part should be charged, and the latter not (*a*); especially if the part given to the executors is not for them beneficially, but in trust for other persons. Thus, in Re Bailey (*b*), where a testator directed his debts, funeral and testamentary expenses, to be paid by his executors thereinafter named, and appointed A. and B. trustees and executors of his will; he then gave a specific part of his real and leasehold property for the benefit of each of his six children, the sons' portions being devised to them directly, and the portion of each daughter being devised to the trustees upon trusts for the daughter and her children. (The portion of one daughter consisted of leaseholds only, but this attracted no attention.) And the residue of his estate real and personal he gave to the trustees, in trust to sell and hold the proceeds for his widow during her life, and afterwards for his said six children in equal shares. Fry, J., said, "The conclusion that the real estate settled upon the daughters and their children is charged with the payment of the testator's debts, while that which is devised to the testator's sons beneficially is not so charged, would not be in accordance with the equality which one would expect to find when a man is making a provision for all the members of his family. Looking at the residuary clause, it appears to have been the intention of this tes-

Effect where distinct devises to several executors;

— where part only of the realty is given to the executors.

(*y*) 3 My. & K. 495.

(*z*) Per Wood, V.-C., Kay, 448, misquoted as "*unequal* proportions," 12 Ch. D. 273. If the legal estate is devised to executors jointly, the fact that they take unequal beneficial interests does not prevent the charge, Re Tanqueray-Willaume and Landan, 20 Ch. D. 465.

(*a*) Symons *v.* James, 2 Y. & C. C. C. 301. See the case.

(*b*) 12 Ch. D. 268.

tator to divide his property equally among his children." He added, that in all the cases where the real property given to the executors was held to be charged, they were devisees of the whole real estate, so that the entirety of the liability was thrown on the entirety of the estate. He therefore held that neither the estates specifically devised to the sons, nor those which were specifically devised on trust for the daughters, were charged with the debts; but that the residuary real estate was charged by force of the word "residue" (*c*), coupled with the direction to pay the debts.

Where direction to executors to pay debts is followed by a devise to one of them, "subject as aforesaid."

But if a testator begins with a direction that his debts and legacies shall be paid by his executors, and then, without any intermediate gift, says, "*and subject as aforesaid* I give all the residue of my real estate to A." (who is a stranger or one of several executors), the real estate will be charged with debts [*1407] and * legacies; since there is no other way of giving a sense to the words "subject as aforesaid" (*d*).

VI. — Whether a Devise of Real and also Personal Estate after Payment of Debts, &c., charges the Realty. — Where a testator gives his real and also his personal estate, after payment of debts, &c., it is sometimes a question whether these words extend to charge both the preceding subjects of gift, or apply only to the immediate antecedent, namely, the personal estate.[1]

Whether charge extends to several preceding subjects of disposition.

Thus, in Withers *v.* Kennedy (*e*), where a testator, after bequeathing to his wife certain effects, gave, devised, and bequeathed all his freehold, copyhold, and leasehold estates whatsoever and wheresoever, and all the residue of his personal estate and effects, *after payment of his just debts and funeral expenses and the charges of proving his will and of carrying the trusts thereof into execution*, to trustees, their heirs, executors, and administrators, upon trust for his wife for life, with other limitations over; it was contended that the personal estate being the natural fund for the payment of debts, it was a more obvious and natural construction to refer these words to the immediate rather than the more remote antecedent; that more remote antecedent being a species of property not legally liable to debts; but Sir J. Leach, M. R., though he admitted that the expression in the will afforded

(*c*) Post, p. 1410.
(*d*) Dowling *v.* Hudson, 17 Beav. 248.
(*e*) 2 My. & K. 607. See Clarke *v.* Brereton, 1 Jones, 165 (an Irish Exchequer case), where the charge was confined to personalty by force of the context.

1 Where a testator gives direction to pay his debts, and then gives the residue of his real and personal estate, the debts are to be paid out of the real as well as of the personal estate; and they are charged upon the residue. Lafferty *v.* People's Bank, 76 Mich. 35 (citing Cole *v.* Turner, 4 Russ. 376; Greville *v.* Browne, 7 H. L. Cas. 589).

some color to this argument, considered that, in plain construction, the words in question were to be referred to the freehold, copyhold, and leasehold property, as well as to the personal estate. He considered it to be an objection to the opposite construction, that it imputed to the testator the intention of exempting his leaseholds from the payment of his debts, &c., which species of property was by law subject to them.

So, in Moores *v.* Whittle (*f*), which perhaps admitted of less doubt, in which a testator gave to his daughter C. as long as she continued unmarried, all his copyhold estates at P., and also all his live and dead stock, household furniture, moneys, and securities for money, and farming gear of every description, *after payment of his *just debts, funeral expenses, and the costs of proving his* [*1408] *will*; and if C. should marry, then the whole of the estates above described, together with the live and dead stock, household furniture, farming implements, and goods, to be sold, and the proceeds divided as therein mentioned: Sir J. Parker, V.-C., considering that the rule of the Court was to enlarge rather than to narrow a charge of debts, and that the testator had in the subsequent parts of his will dealt with the whole property as one mass, held the copyholds to be charged with the debts.

In Kidney *v.* Coussmaker (*g*), the question was much contested, whether, where a testator devises lands in trust to be sold, declaring that the produce shall go in the same manner as the personal estate, and then bequeaths the personalty "after payment of his debts," the produce of the real estate was by these words (which were clearly inoperative in regard to the *personalty*) charged with the debts. It was not necessary to decide the point; which, however, has since been decided in the affirmative (*h*).

Here it may be observed, that, in construing provisions for payment of debts, the Courts are averse to an interpretation which would restrict the provision to debts subsisting at a given period during the life of the testator; and, therefore, although words expressly pointing to the present time generally refer to the time of making the will (*i*), yet it has been held that a charge of all the debts "I *have* contracted since 1735" extended to future debts (*k*). On the same principle where a testator

Charge of debts "I *have* contracted."

(*f*) 22 L. J. Ch. 207. How much of what precedes shall be held affected by referential expressions is a frequently recurring question. See *e. g.*, Baker *v.* Baker, 6 Hare, 269; Fisher *v.* Brierley, 30 Beav. 265; Makings *v.* Makings, 1 D. F. & J. 355 (question whether charge affected life estate as well as remainder). See also Re Cameron, Nixon *v.* Cameron, 26 Ch. D. 19, 26; Leader *v.* Duffey, 13 App. Ca. 294.

(*g*) 1 Ves. Jr. 436, 7 B. P. C. Toml. 573. See also 2 Ves. Jr. 267.

(*h*) Soames *v.* Robinson, 1 My. & K. 500; Shakels *v.* Richardson, 2 Coll. 31; Re Woollard's Trust, 18 Jur. 1012; Bright *v.* Larcher, 3 De G. & J. 148; Field *v.* Peckett, 29 Beav. 568.

(*i*) Ante, Vol. I., pp. 289, 297, 298.

(*k*) Bridgman *v.* Dove, 2 Atk. 201. A fortiori future debts are included where the charge is simply of "all my debts," Maxwell *v.* Maxwell, L. R., 4 H. L. 506.

charged his real estate with his debts "of which he should leave an account," and left an account omitting some, all were held to be charged (*l*).

VII. — Whether Legacies are chargeable by the same words as Debts, &c. — It has sometimes been made a question, whether the same words which will charge real estate with *debts* will suffice to onerate it with legacies; or whether, in order to throw legacies upon the land, a clearer manifestation of intention is not requisite.[1] Sir R. P. Arden and Lord [*1409] Loughborough were long *at issue upon the point; the former maintaining and the latter denying the distinction (*m*), which, however, did not originate with Sir R. P. Arden; for it is to be traced in the early case of Davis *v.* Gardiner (*n*), where the testator commenced his will thus: "As to my worldly estate, I dispose of the same as follows, *after my debts and legacies paid;*" and then gave several legacies, adding, "After all my legacies paid, I give the residue of my *personal* estate to my son," and then devised his lands; and Lord Macclesfield held that the legacies were not a charge upon the realty; observing that "as plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate of an heir, which is a disinherison pro tanto." In a note to this case, the reporter adds, that, if there had been a want of assets for the payment of debts, it seems that the land would have been charged therewith.

Whether same words will charge legacies as debts.

"As to my worldly estate, *after my debts and legacies paid.*"

The distinction in question appears to have been a natural consequence of the extreme length which the Courts had gone in holding *debts* to be charged by loose and equivocal expressions, the unfairness of which, when applied to legacies, became apparent, "there being no reason (as Sir R. P. Arden has observed) why a specific devise should not take effect as much as a pecuniary one" (*o*).

As to distinction between debts and legacies.

In Trott *v.* Vernon (*p*), however, and several of the other cases before stated, in which debts and legacies were coupled in one clause, there is no mention of any such distinction; and instances may certainly be adduced from the later cases in which legacies have been

(*l*) Dormay *v.* Borradaile, 10 Beav. 263.
(*m*) Kightley *v.* Kightley, 2 Ves. Jr. 328; Williams *v.* Chitty, 3 Ves. 551; Keeling *v.* Brown, 5 Ves. 361.
(*n*) 2 P. W. 187.
(*o*) 3 Ves. 739.
(*p*) Ante, p. 1391. See also Tompkins *v.* Tompkins, Pr. Ch. 397; Alcock *v.* Sparhawk, 2 Vern. 228.

[1] Gift of land to pay an annuity, under penalty of loss of the gift, charges the land. Canal Bank *v.* Hudson, 111 U. S. 66.

held to be charged upon land by expressions of a character scarcely more decisive than those which have this operation in regard to debts.

Thus in Preston *v.* Preston (*q*), where a testator devised real estate in fee to his son, who, it is stated, was his executor. Also he gave him his stock of cows, rest, residue, and remainder of his effects; and that he should pay to the testator's grandson 300*l.*; it was held by Sir J. Stuart, V.-C. (*r*), that the real estate was charged with the grandson's legacy. Parker *v.* Fearnley (*s*) he said was overruled by Henvell *v.* Whitaker (*t*).

Words sufficient to charge legacies.

* So in Gallemore *v.* Gill (*u*) where a testatrix bequeathed her wearing apparel and furniture to her niece, and gave all her real and the residue of her personal estate to trustees, in trust to pay her debts and funeral expenses *and a legacy* of 10*l.* to her servant *out of her personal estate*, and to pay out of her real estate so much of her *debts and funeral expenses* as her personal estate should be insufficient to satisfy, and subject thereto as to the entire residue of her estate and effects in trust for her three grandchildren. By codicil the testatrix directed the trustees acting under her will (who it appears were also her executors) to pay to her servant 40*l.* in addition to the 10*l.*, and in addition to the bequest above mentioned to pay a life annuity to her niece; it was held by Sir J. Stuart, V.-C., and on appeal by K. Bruce and Turner, L. JJ., that the legacies given by the codicil were charged on the real estate. Turner, L. J., said: "The will vested in the trustees the residue of the personal estate and the whole of the real estate, and the presumption is that it was out of the funds thus vested in the trustees that the payments directed by the codicil were to be made." No doubt "additional" legacies were generally payable out of the same funds as original legacies: "but the codicil may not only add to the legacy but extend the fund out of which it is to be paid; and in this will and codicil I think there is no doubt that this is the case. The codicil contains a direction that the trustees shall pay the legacy, and the testatrix by her will has blended real and personal funds in the hands of the trustees for the payment."

[*1410]

Words sufficient to charge legacies

It is clear that the rule in Kidney *v.* Coussmaker (*x*) applies to legacies as well as to debts (*y*); although the personalty is not in terms charged with the payment of them (*z*).

(*q*) 2 Jur. N. S. 1040.
(*r*) Citing Alcock *v.* Sparhawk, 2 Vern. 228, 1 Eq. Ca. Ab. 198, pl. 4, ante, p. 1402.
(*s*) Ante, p. 1403.
(*t*) Ibid.
(*u*) 2 Sm. & G. 158, 8 D. M. & G. 567. See also Peacock *v.* Peacock, 34 L. J. Ch. 315; Re Cameron, Nixon *v.* Cameron, 26 Ch. D. 19.
(*x*) Ante, p. 1408.
(*y*) Bright *v.* Larcher, 3 D. F. & J. 148.
(*z*) Field *v.* Peckett, 29 Beav. 568; see also Re Woollard's Trust, 18 Jur. 1012.

Giving legacies, and then *the rest* of the real and personal estate, charges the legacies.

It is also clear that where legacies are given and then "all the residue of the real and personal estate," the legacies are charged on the realty. Thus, in Hassel *v.* Hassel (*a*), where the testator devised and bequeathed certain legacies, and then gave, devised, and bequeathed all his real and personal estate *not thereinbefore disposed of;* Lord Bathurst held that the legacies were charged upon the real estate.

[*1411] *And Lord Hardwicke in Brudenell *v.* Boughton (*b*) seems to have thought that where a testator gave certain legacies, and then the *rest* of his estate, *real* and personal, to A., whom he appointed executor, the legacies were charged upon the land; but the case was not decided on this point.

So, in Bench *v.* Biles (*c*), where the testator gave all his real and personal estate to his wife for life, and after her decease gave various legacies, and all the *rest, residue, and remainder* of his *real and personal* estate he gave, devised, and bequeathed to his nephews, P. and W., share and share alike, their heirs, executors, administrators, or assigns forever. Awbrey *v.* Middleton (*d*) was cited as an authority that the legacies were charged: and Sir J. Leach, V.-C., decided accordingly, considering the intention in favor of the legatees to be clearer than in the cited case. "The testator," he said, "here gives all his real and personal estate to his wife for life, blending them together as one fund for her use, and, after her death, he gives several pecuniary legacies, and then the rest, residue, and remainder of his real and personal estate to his nephews. He plainly continues after his death to treat them as one fund, 'the rest, residue, and remainder' of which, after payment of his legacies, is to go to his nephews."

Blending real and personal estate together.

It should be remarked, however, that in Awbrey *v.* Middleton, the executor, *being the devisee of the real estate,* was expressly directed to pay the legacies and annuities, which has always been held sufficient to charge the real estate.

Remarks upon Bench *v.* Biles.

The case of Hassel *v.* Hassel (*e*), though not cited, more closely resembles Bench *v.* Biles; but even that was rather stronger in favor of the charge, from the circumstance of there being no precedent gift affecting the real estate (unless the legacies were so considered), to which the words "not hereinbefore disposed of" could be referred, though this expression might have been taken to apply exclusively to the personalty, referendo singula singulis. In Bench *v.* Biles, on the other hand, the words "rest and residue" might have had reference to the precedent devise of the real estate to the wife for life (*f*).

Hassel *v.* Hassel.

(*a*) 2 Dick. 527. See also Smith *v.* Butler, 1 Jo. & Lat. 692.
(*b*) 2 Atk. 268.
(*c*) 4 Mad. 187.
(*d*) Ante, p. 1402.
(*e*) Ante, p. 1410.
(*f*) See also Francis *v.* Clemow, Kay, 435, post, p. 1412.

That a bequest of legacies, followed by a gift of all the *residue* of the testator's real and personal estates, operates to charge *the entire property with the legacies, was again [*1412] decided by Sir J. Leach in Cole *v.* Turner (*g*); to which may be added Mirehouse *v.* Scaife (*h*), where a testator, after bequeathing certain pecuniary legacies, declared his will to be, that all his debts and all the above legacies should be paid within six months after his decease; and all the *residue* of his estate, both real and personal, lands, messuages, and tenements, the testator gave to A., by her to be freely possessed at his decease. It was held by Lord Cottenham that by these words the real estate was charged as well with the legacies as the debts. He observed that the blending of the real and personal estate, and the gift of the residue of both following a direction to pay debts and legacies, relieved the case from the question discussed by Lord Rosslyn and Lord Alvanley in Williams *v.* Chitty and Keeling *v.* Brown, as to whether words admitted to be sufficient to charge lands with debts, ought to be held sufficient to charge them with legacies.

Gift of "residue" after bequeathing legacies charges lands;

It is worthy of remark, that neither in this case, nor in Cole *v.* Turner, was there any specific devise of real estate to which the term "residue" might be referred (*i*): but in Francis *v.* Clemow (*k*), where a testator, and after directing payment of his debts, bequeathed certain legacies, and then gave certain interests in part of his real estate, and gave "all the rest, residue, and remainder of his estate and effects both real and personal" to A., whom he appointed executor. Sir W. P. Wood, V.-C., on the authority of Bench *v.* Biles, held that, notwithstanding the previous devises, the legacies were charged on the real estate by force of the residuary gift.

—notwithstanding prior specific devise.

Finally, in Greville *v.* Browne (*l*), where a testator after bequeathing an annuity and some pecuniary legacies, gave "all the rest, residue, and remainder of any property he might die possessed of or entitled to, of what nature soever," to his son, it was held in the House of Lords that the legacies were charged on the real estate. There was no previous devise of real estate; but it was laid down in the most general terms, that where there is a *bequest of legacies followed by a gift of the residue of the [*1413]

Greville *v.* Browne.

(*g*) 4 Russ. 376.
(*h*) 2 My. & Cr. 695.
(*i*) In Mirehouse *v.* Scaife there was a devise of a field called Gillfoot; but it did not appear whether it was freehold or leasehold.
(*k*) Kay, 435. See also Wheeler *v.* Howell, 3 K. & J. 198 (where the V.-C. appears to treat the fact of the devisee being executor as material: sed qu.).
(*l*) 7 H. L. Ca. 689, dub. Lord Wensleydale. See also Jones *v.* Price, 11 Sim. 557; Re Bellis's Trusts, 5 Ch. D. 504 (where the charge excluded trust estates from the general devise); Gainsford *v.* Dunn, L. R., 17 Eq. 405 (where on this principle pecuniary legacies were held to be appointments out of a fund the residue of which and of the personal estate were afterwards given).

testator's property, real and personal, the legacies are charged on the realty; and, as had previously been held by Sir W. P. Wood (*m*), that the principle of these decisions was the same in the case of legacies as in that of debts. "It is considered," said Lord Campbell, "that the whole is one mass; that part of that mass is represented by legacies; and that what is afterwards given is given minus what has been before given, and therefore given subject to the prior gift." And Lord Cranworth, treating the distinction between real and personal property as purely artificial, said, "In reading *a devise of real estate* to one person, and of personal legacies to another, and of the residue of the real and personal property to a third person, we may see that there *might* be a mode of interpreting it reddendo singula singulis, as meaning to give the rest of the personal property to one person, and the rest of the realty to another. *But that is not the natural meaning of the words.*"

Gift of legacies, and then of "Blackacre and all the residue," &c.

And it would seem that the specific mention in the residuary gift of some of the particulars included in the residue, although such mention precedes the words "and all the residue," &c., will not vary the construction; the specifically-mentioned particulars being still but part of the residue, and the mention of them not being inconsistent with the view that the whole estate, real and personal, is treated as one mass. Thus, in Bray *v.* Stevens (*n*), where a testator bequeathed certain legacies, and then devised and bequeathed "all his freehold estates in the parishes of B., L., and R. and elsewhere in the county of C., and all the residue of his real and personal estate, money, mine shares, chattels and effects of whatsoever kind and wheresoever situate" to trustees on certain trusts applying to the whole, it was held by Sir J. Bacon, V.-C., that the legacies were charged on the freehold estates in the parishes of B., L., and R. He dissented from the decision in Castle *v.* Gillett (*o*); in which Sir R. Malins, V.-C., had in a similar case come to a contrary conclusion on the ground that when one thing was specifically mentioned, and the residue was afterwards [*1414] referred to, it was evident that the testator did * not intend to treat what was specifically mentioned as part of the residue; adding, nevertheless: "The residuary real estate is put on the same footing, and it follows that it is also not charged."

But a gift (after legacies) of "all my real estate and all the residue of my personal estate" plainly treats the different species of estates as

(*m*) Wheeler *v.* Howell, 3 K. & J. 198; and see Cross *v.* Kennington, 9 Beav. 150, 15 L. J. Ch. 167.

(*n*) 12 Ch. D. 162. The testator also directed that in a certain event one of the legacies should not be paid, but should "fall into his residuary estate." This, the V.-C. observed, was a strong intimation out of what the legacies were to come, but he did not rest his decision upon it. See also Thorman *v.* Hilhouse, 5 Jur. N. S. 563; Re Green, Baldock *v.* Green, 40 Ch. D 610.

(*o*) L. R., 16 Eq. 530.

two masses, and does not bring the case within Greville *v.* Browne (*p*). Limits of the rule.

Of course the rule is not excluded by a direction to the executors (to whom there is no devise of real estate) to pay debts and legacies: such a direction is mere surplusage (*q*). But the rule is not applicable to a case where the testator first dealing exclusively with his personal estate allots certain portions of it to several objects, and then disposes of the residue of his real and personal estate. Thus, in Gyett *v.* Williams (*r*), where a testator bequeathed his personal estate in trust to lay out a sum, "part thereof," as therein mentioned, and to invest the residue and stand possessed thereof as to one sum, "part of it," in one way, and of other sums, "other parts of it," in other ways; he then gave some small pecuniary legacies simpliciter, and concluded with a gift of all the residue of his estate and effects whatsoever and wheresoever. It was held by Sir W. P. Wood, V.-C., that the several sums described as parts of the personal estate were not charged on the realty. This, he thought, would have been clear, but for the pecuniary legacies. It would have been equally clear that these legacies, if they had stood alone, would be charged on the realty. It was said that it was incredible, that the testator should have intended to provide for the smaller legacies better than for the larger. But the answer was that one set of legacies was given in a form to which the principle of Greville *v.* Browne directly applied, while the others were not so: and the V.-C. decided that he could not alter the construction on any mere conjecture as to what the testator was likely to do.

And the mere joining in one devise or bequest of the real and personal estate is not of itself enough to charge legacies on real estate. In all the cases some other circumstance has been * involved leading to that conclusion (*s*). And where a testator gave his whole real and personal estate to trustees and executors for the maintenance and education of his infant son and daughters, and directed that as they attained majority, his property, real and personal, should be divided as follows, viz., a pecuniary legacy to his son, and his property at T. amongst his daughters, it was held that the legacy was not charged on the property at T. (*t*). [*1415]

Legacies not charged on realty by joining realty and personalty in same gift.

VIII. — Whether a General Charge extends to Lands specifically devised. — Where a testator has manifested an intention to charge

(*p*) Wells *v.* Row, 48 L. J. Ch. 476.
(*q*) Re Brooke, 3 Ch. D. 630. A mere direction that debts shall be paid is sufficient, without any direction as to legacies, to rebut the presumption that a legacy to a creditor of an amount equal to or exceeding the debt is a satisfaction of the debt, Re Huish, Bradshaw *v.* Huish, 43 Ch. D. 260.
(*r*) 2 J. & H. 429.
(*s*) See Nyssen *v.* Gretton, 2 Y. & C. 222.
(*t*) Bentley *v.* Oldfield, 19 Beav. 225.

his real estate with the payment of either debts or legacies, the question sometimes arises, whether such charge extends to the specific as well as the residuary lands, or is confined to the latter.

And first as to legacies. In Spong *v.* Spong (*u*), where a testator, after specifically devising certain lands to A. and other persons, and charging his real and personal estate with his legacies, and then bequeathing some pecuniary legacies, gave the residue of his real and personal estate to A.; it was held in the House of Lords that the legacies were not charged upon the lands specifically devised; for that, in construing charges of this nature, specific and residuary devises, though for many purposes governed by a common principle, were to be distinguished; especially as in the case under consideration the testator had shown such a distinction to be in his view by devising particular lands to the person whom he made residuary devisee. "By specifically devising or specifically bequeathing any part of his property," said Lord Manners, "the testator intends, as between the objects of his bounty, to separate that part of his property from the rest, and that it should not be subject to the provisions and operation of his will." [1]

Rule in case of legacies;

So in Conron *v.* Conron (*x*), where the testator by will dated in 1836, after making certain specific devises and bequests, gave some pecuniary legacies, and charged "all his real and chattel estates and property of every description," with payment thereof; and subsequently devised "all the residue of all his real and freehold [*1416] estates, goods, and effects of every kind" to A. in fee; * it was held in the House of Lords that the charge of legacies did not extend to the specifically devised estates. "The true rule," said Lord Cranworth, "deducible from Spong *v.* Spong, is that a mere charge of legacies on the real and personal estate (and 'on *all* the real and personal estate' must mean exactly the same thing) does not of itself create a charge on any specific devise or bequest. I think that the rule is a very reasonable one, and is likely to be in general conformable to the intentions of testators."

Both these cases occurred under the old law. The statute 1 Vict. c. 26 has not diminished the distinction between specific and residuary devises.

But in both cases legacies only were charged. The reason of the rule as stated by Lord Manners is inapplicable to a charge of

(*u*) 1 Y. & J. 300, 3 Bli. N. S. 84, 1 D. & Cl. 365. But see the observations of Lord Cottenham, C., on this decision, Mirehouse *v.* Scaife, 2 My. & Cr. at pp. 704, 705.
(*x*) 7 H. L. Ca. 168.

[1] Hubbell *v.* Hubbell, 9 Pick. 561; In re Neistrath, 66 Cal. 330; Kitchell *v.* Young, 46 N. J. Eq. 506 (citing Leigh *v.* Savidge, 1 McCart. 125, and the cases in the text above); Hill *v.* Toms, 87 N. C. 492. See Scott *v.* Stebbins, 91 N. Y. 605; Davenport *v.* Sargent, 63 N. H. 538.

debts (*y*); and where debts and legacies are charged together, the legacies, being placed by the will on an equal footing with the debts, get the benefit of the charge on the specifically devised estates (*z*). *in case of debts.*

Where a charge of legacies is effected under the rule in Greville *v.* Browne (*a*), and there is also a specific devise of realty, the latter is not charged with the legacies, but only the residuary realty (*b*). On the same principle (it may be presumed), where a testator made several devises and bequests; and, "charged with his debts and legacies," he devised "all other" his hereditaments to his nephews and nieces; he then by codicil specifically devised a house to his daughter, "it being his wish that she should reside therein if she should think fit;" it was held that the house was exempted from the charge of debts and legacies (*c*).

Annuities usually included in a charge of legacies.

It may here be observed, that, under a charge of legacies, annuities will generally be included (*d*), unless the testator manifests an intention to distinguish them (*e*), as by sometimes using both words (*f*).

*** IX. — Whether a Direction to raise Money out of Rents and Profits authorizes a Sale.** [*1417] — It is clear that a devise of the *rents and profits* of land is equivalent to a devise of the land itself, and will carry the legal as well as beneficial interest therein (*g*);[1] but the question which has chiefly given rise

(*y*) See e. *g.* Harris *v.* Watkins, Kay, 438; Mannox *v.* Greener, L. R., 14 Eq. 456.
(*z*) Maskell *v.* Farrington, 3 D. J. & S. 338; and see Rowley *v.* Eyton, 2 Mer. 128.
(*a*) Ante, p. 1412.
(*b*) Per Bacon, V.-C., 12 Ch. D. 169. Francis *v.* Clemow, Kay, 435, is not contra; the plaintiff (legatee) claimed only against residue.
(*c*) Wheeler *v.* Claydon, 16 Beav. 169.
(*d*) Duke of Bolton *v.* Williams, 2 Ves. Jr. 216, cit.; Sibley *v.* Perry, 7 Ves. 522; Bromley *v.* Wright, 7 Hare, 334; Ward *v.* Grey, 26 Beav. 485; Mullins *v.* Smith, 1 Dr. & Sm. 204; Nicholson *v.* Patrickson, 3 Gif. 209. So "pecuniary legacy," per Wood, V.-C., Gaskin *v.* Rogers, L. R., 2 Eq. 284.
(*e*) Shipperdson *v.* Tower, 1 Y. & C. C. C. 441; Cunningham *v.* Foot, 3 App. Ca. 989 (claim to charge remainder in land whereof annuitant was herself tenant for life).
(*f*) See Nannock *v.* Horton, 7 Ves. 391; Woodhead *v.* Turner, 4 De G. & S. 429; Gaskin *v.* Rogers, L. R., 2 Eq. 284. But see Heath *v.* Weston, 3 D. M. & G. 601; Ward *v.* Grey, 26 Beav. 485.
(*g*) Johnson *v.* Arnold, 1 Ves. 171; Baines *v.* Dixon, id. 42; Doe *v.* Lakeman, 2 B. & Ad. 42; and see ante, Ch. XXIV. ad fin.

[1] Zimmer *v.* Sennott, 134 Ill. 505; Thompson *v.* Schenck, 17 Ind. 194; Earl *v.* Rowe, 35 Maine, 414; Reed *v.* Reed, 9 Mass. 372; Wells *v.* Wells, 88 N. Y. 323; Delaney *v.* Van Aulen, 84 N. Y. 16; Fox *v.* Phelps, 17 Wend. 393; Post *v.* Rivers, 40 N. J. Eq. 21; Cooper *v.* Pogue, 92 Penn. St. 254; Greene *v.* Wilbur, 15 R. I. 251 (citing Sammis *v.* Sammis, 14 R. I. 123, 128). See Ayer *v.* Ayer, 128 Mass. 575: Dacomb *v.* Marston, 80 Maine, 223. A devise of the *income* of land to the use of the devisee during his life confers upon him a life-estate in the land. Butterfield *v.* Haskins, 33 Maine, 392; Andrews *v.* Boyd, 5 Greenl. 199; Monarque *v.* Monarque, 80 N. Y. 320. An unqualified gift of income and improvement, or income alone, carries the corpus. Chase *v* Chase, 132 Mass. 473 (citing Blann *v.* Bell, 5 De G. & S. 658; Hatch *v.* Bassett, 52 N. Y. 359): Post *v.* Rivers, supra; Kline's Appeal. 117 Penn. St. 139; Sproule's Appeal, 105 Penn. St. 438; Cooper *v.* Pogue, 92 Penn. St. 254. So the words "use and improvement." Fay *v.* Fay, 1 Cush. 93. A devise of the net profits of land is a devise of the land itself, by legal intendment. Earl *v.* Rowe, 35 Maine, 414. So a direction by the testator that A. B. shall

Direction to raise moneys out of the rents and profits.

to perplexity in reference to these words is, whether a direction or power to raise money out of the *rents and profits* authorizes a sale (*h*),[1] the doubt being, whether, in such cases, the testator or settlor, by the words "rents and profits," means the *annual* income only, according to their ordinary and popular signification, or uses the phrase in a more comprehensive sense, as designating the proceeds or "profits" of the inheritance, and, therefore, as impliedly conferring a power to dispose of such inheritance.

From the earliest times a sale has been admitted where the purpose was to pay debts and legacies (*i*), or to raise a portion by a definite period, within which it could not be raised out of the annual rents (*k*); and this rule was extended by Lord Hardwicke to a case in which the portions, being payable in such manner as a third person should appoint, *might* have become payable within a definite time (*l*).

Where it authorizes a sale: where definite time is fixed for payment.

And notwithstanding the dicta of Lord Macclesfield to the contrary (*m*), the authorities, including a decision by Lord Macclesfield himself, have always inclined, even where no time was specified for payment, to treat a direction to raise a gross sum out of rents and profits as authorizing a sale or mortgage.[2] * Thus, in Heycock *v.* Heycock (*n*), Lord Keeper North declared he took it to be the law of the Court, that where there was a devise of a sum certain to be raised out of the profits of lands; if the profits would not amount to raise the sum in a convenient time the Court would decree a sale. And in Sheldon *v.* Dormer (*o*) Lord Somers remarked that a time being there fixed for

Where no time is fixed.

[*1418]

(*h*) An express prohibition against a sale would generally include a mortgage or other virtual alienation of the estate. See Bennett *v.* Wyndham, 23 Beav. 521. A sale is of course excluded where the expression is "*annual* rents and profits," Marsh *v.* Marsh, 2 Jur. N. S. 348; Forbes *v.* Richardson, 11 Hare, 354; Scott *v.* Clements, 8 Ir. Ch. Rep. 1; Collier *v.* Walters, L. R., 17 Eq. 252, 258 ("rents, issues, and yearly profits"); Re Green, Baldock *v.* Green, 40 Ch. D. 610 ("rents, dividends, and annual produce").

(*i*) Lingon *v.* Foley, 2 Ch. Cas. 205; Anon., 1 Vern. 104; Berry *v.* Askham, 2 Vern. 26; Rawlings *v.* Brotherson, Ex. 1733, cit. 2 Ves. Jr. 480 (as to which qu., the expression there being "*annual* rents and profits"). See also Talbot *v.* Earl of Shrewsbury, Pre. Ch. 394; Metcalfe *v.* Hutchinson, 1 Ch. D. 590.

(*k*) Sheldon *v.* Dormer, 2 Vern. 310; Warburton *v.* Warburton, id. 420; Jackson *v.* Farrand, id. 424; Gibson *v.* Lord Montford, 1 Ves. 491; Okeden *v.* Okeden, 1 Atk. 550. Some parts of Lord Hardwicke's judgment in this case are irreconcilable. He is made in one place to assume that the portion was to be raised at the period of vesting, and in another to state the contrary. It seems difficult to support the latter hypothesis. And see Hall *v.* Carter, 2 Atk. 354; Backhouse *v.* Middleton, 1 Ch. Ca. 173, 176.

(*l*) Green *v.* Belcher, 1 Atk. 505. See also Allan *v.* Backhouse, 2 V. & B. 65, stated post, p. 1424.

(*m*) Ivy *v.* Gilbert, Pre. Ch. 583, 2 P. W. 13; Mills *v.* Banks, 3 P. W. 1.

(*n*) 1 Vern. 256.

(*o*) 2 Vern. 311.

receive for his support the net profits of the land, is a devise of the land itself. Earl *v.* Rowe, *supra*. But the rule stated in the text does not apply where the rents and profits are given only for a limited period. Fox *v.* Phelps, 17 Wend. 393, 402; Earl *v.* Grim, 1 Johns. Ch. 494.

[1] Delaney *v.* Van Aulen, 84 N. Y. 16; Schermerhorne *v.* Schermerhorne, 6 Johns. Ch 70.

[2] See Delaney *v.* Van Aulen, 84 N. Y. 16.

payment made the case stronger than those in which without that circumstance, the Court had frequently decreed a sale to raise a sum of money charged by the will on the rents and profits.

So, in Stanhope *v.* Thacker (*p*), where by settlement a remainder was limited to the daughters of the marriage till they should out of the rents, issues, and profits have raised and received the sum of 3,000*l.*; Lord Cowper, after deciding that this remainder was in the nature of a security for the money, said that, if the ordinary or annual rents and profits of the land would not raise the money in a convenient time to answer the intent of the settlement, which was to provide portions for the daughters, the same might be decreed in a Court of Equity to be raised by a sale or mortgage thereof, which were the extraordinary profits of the same lands.

Again, in Trafford *v.* Ashton (*q*), the trust of a term limited by a marriage settlement was declared to be out of the rents and profits to raise 8,000*l.* for the daughters of the marriage, to be paid them as soon as conveniently could be (without appointing a definite time for payment); and Lord Macclesfield decreed that they should be raised by sale or mortgage.

And succeeding Judges, looking at the inconvenience of raising a large sum of money by a gradual accumulation of the annual profits as they arise, have acquiesced in and acted upon the doctrine of these early cases. Thus, in Green *v.* Belcher (*r*) Lord Hardwicke stated the rule to be, that, "where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell; and, as a devise of the * rents and profits [*1419] will at law pass the lands (*s*), the raising by rents and profits is the same as raising by sale."[1] Lord Hardwicke's dicta.

So, in Baines *v.* Dixon (*t*) the same eminent Judge observes that "the Court has gone by several gradations. When any particular time is mentioned within which the estate would not afford the charge, the Court directed a sale, and then went farther, till a sale was directed on the words 'rents and profits' alone, when there was nothing to exclude or express a sale;" though he admitted that there was not one case in ten where it had been agreeable to the testator's intention. Lord Hardwicke held, however, that, in the case before him, where legacies were to be paid with all convenience as

(*p*) Pre. Ch. 435.
(*r*) 1 Atk. 505.
(*t*) 1 Ves. 42.
(*q*) 1 P. W. 415.
(*s*) See ante, p. 1417.

[1] Schermerhorne *v.* Schermerhorne, 6 Johns. Ch. 70.

the profits of the estate should advance the money, the word "advance" limited it to annual profits (*u*).

The same opinion, too, seems to have been entertained by Lord Thurlow, who in Countess of Shrewsbury *v.* Earl of Shrewsbury (*x*) said: "If a term was created to raise by the rents and profits, I should say it might be done by sale or mortgage." Lord Eldon, also, in Bootle *v.* Blundell (*y*) observed, that he had understood it to be "a settled rule, that where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression 'rents and profits' will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage." These quotations controvert the position advanced by some respectable writers, that annual rents is the primary meaning of rents and profits; they show the rule of construction to be rather [*1420] the reverse (*z*), and that * these words are to be taken in their widest sense, namely, as authorizing a sale, unless restrained by the context; but perhaps it more accords with the principle of the authorities to say, that the signification of the phrase is governed wholly by the nature of the purpose for which the money is to be raised, and the general tenor of the will.

Lord Thurlow's and Lord Eldon's opinion. Position of text writers. General doctrine of the authorities.

If the testator or settlor manifests by the context of the instrument that he contemplates the identical subject, out of whose "rents and profits" the money shall have been raised, being afterwards enjoyed by the devisees, or remaining otherwise available for the purposes of the will, it is evident that he intends the current annual income only to be applied; for by such means alone can the raising of the

Exception where estate is treated as existing entire after raising of debts.

(*u*) See also Okeden *v.* Okeden, 1 Atk. 550; Ridout *v.* Earl of Plymouth, 2 Atk. 104; and Gibson *v.* Lord Montfort, 1 Ves. 490.

(*x*) 1 Ves. Jr. 234, 2 R. R. 101.

(*y*) 1 Mer. 233.

(*z*) Vide Cox's note to Trafford *v.* Ashton, 1 P. W. 418; Raithby's note to Anon., 1 Vern. 104; and Belt's Suppl. to Ves. 221. Mr. Belt's observation, that Lord Hardwicke, in Conyngham *v.* Conyngham, 1 Ves. 522 (more fully stated Suppl. 221), seems to have thought that his predecessors had gone too far in holding that money to be raised out of rents and profits might be raised by a sale, is quite at variance with the general tenor of his Lordship's judgments, which are as much in favor of a sale as those of any of his predecessors, and may be considered to have established the present doctrine upon the subject. In the particular case referred to, it is true, he held the charge to effect the annual income only; but the will was so clear on this point, that, with all his partiality to the opposite construction, it was impossible that he could come to any other conclusion. The testator devised his plantation and lands to trustees and their heirs, in trust for payment of his funeral expenses, debts, and legacies, and to keep the plantation in good repair, and to keep the negroes, with their increase, and the stock thereon, in as good a condition as they were at his death, out of the rents and profits; and he directed that the produce of his estate should be from time to time shipped as C., one of his two trustees, should direct, until his (testator's) funeral charges, debts, and legacies should be paid; and he gave C. power out of the said produce, as the same should be remitted, to pay his debts and legacies. And the better to secure such consignments, he directed all who should inherit his plantation to send an account every year of the produce thereof. Lord Hardwicke thought himself not warranted to decree a sale: it happened, he said, to be sometimes attended with inconvenience, as in Ivy *v.* Gilbert, 2 P. W. 13; but he could not go further unless there was some other right of incumbrance.

money be made consistent with the preservation of the entire subject of disposition (*a*).

So, if the testator treats the raising of the money as a process requiring time, and defers a devisee's perception of the rents or an annuitant's receipt of his annuity out of them until such purpose shall have been accomplished, the irresistible inference is, that the testator intends the money to be raised by a gradual appropriation of the rents and profits as they arise, and not in a mass by sale or mortgage.

Thus, in Small *v.* Wing (*b*), where a testator devised to his eldest son certain premises held for a short term, and directed him to pay his executors 250*l.* per annum during the term. The testator devised to his executors the rents, issues, and profits of his other lands, in trust that they should therewith, and with the annuity, raise and pay all the testator's debts; but if the trustees should neglect to receive the rents or apply them towards the payment of the testator's debts, then the power to cease; and then he appointed A., B., and C. to be his trustees to receive the annuity and the profits of the premises for the payment of his debts, until the same and certain legacies should be raised and satisfied: and the testator devised all his lands in M. (subject to an annuity) to testator's wife during her life, to commence after the payment of the testator's debts. He gave other lands to his *son John and his heirs, and [*1421] declared it to be his will, that neither of his sons should enter on or receive to his own use the rents of the premises to them respectively devised until all his (the testator's) debts should be paid, and that until they should be paid his trustees should let and set the premises for the best rents for raising and paying the debts (*c*); but that either of his sons might pay off his proportion and thereupon enter. Lord Macclesfield held that the debts should be raised out of the yearly rents without a sale; and the decree was affirmed in the House of Lords.

Rents and profits confined to annual profits by the effect of particular expressions.

Such also is the effect when the testator proceeds to direct that the *residue* of the rents and profits (after answering the charge) shall be paid over to the devisee *for life;* especially if he has included annuities in the charge, these being, from their nature, evidently intended to come out of the annual income (*d*). The latter circumstance, however, was by Lord Hardwicke considered to be inconclusive in Okeden *v.* Okeden (*e*),

Effect where "residue" of rents and profits is given.

(*a*) See Wilson *v.* Halliley, 1 R. & My. 590.
(*b*) 5 B. P. C. Toml. 66.
(*c*) As to the direction to raise by lease, see infra, p. 1423.
(*d*) Heneage *v.* Lord Andover, 3 Y. & J. 360, cited by Wood, V.-C., in Forbes *v.* Richardson, 11 Hare, 354. See also Taylor *v.* Emerson, 2 Con. & Law. 558, where however the words were "out of the interest, proceeds, or annual rents." And that annuities are charges on income, see Scholefield *v.* Redfern, 2 Dr. & Sm. 173.
(*e*) 1 Atk. 550.

where the trustee of a term for years was to receive the rents and profits, and apply part thereof for raising 5,000*l.* for A., if he should live to attain twenty-five, and other part in paying certain charges; and though the other charges were clearly of a nature which must have been intended to come out of the annual profits (being for the maintenance of A. and his elder brother (the devisee of the land) until twenty-five (*f*), and making repairs, and to pay an annuity), yet his Lordship was strongly inclined that the estate should be sold for raising the portion, if the rents during the minority of the devisee did not amount to the sum. The point, however, was not decided (*g*).

Where some of the purposes for which the money is to be raised require a sale, and others do not, there might seem to be ground to contend, that, as the testator has not drawn any line of distinction between them in regard to the mode of raising the money, the whole is raisable in one manner. In Wilson *v.* Halliley (*h*), how-
[*1422] ever, where debts and legacies were to be raised * out of rents and profits, Sir J. Leach, M. R., treated it as clear, that, though a sale might have been effected if necessary for the purpose of liquidating the debts, the conclusion from the whole will (which was very long) was, that the legacies, though payable at definite periods, were raisable out of the annual rents only. He relied much on the circumstance that the estates (the rents and profits of which were made applicable to this purpose) were afterwards devised "subject to the receipt of the rents and profits thereof by my said trustees and executors for the purposes aforesaid."

Rule where some of the prescribed purposes require a sale, and some not.

Referring to this case, Sir G. Jessel, M. R., said (*i*), "Sir J. Leach read the words 'rents and profits' differently as applied to the debts and as applied to a gross sum which the testator directed to be raised by way of bounty, meaning that as the debts must be paid the testator never could intend that the creditors were to wait." And this distinction in regard to debts he thought would be stronger in the case of a modern will, where the creditors can resort to the real estate as a matter of right, and that it would be a very strange intention to impute to a testator that he should by his will intend to delay the creditor, having no legal right so to do. The context might show that he did so intend; but, considering the absurdity of the intention, the context must be plain.

Clear context required to negative sale for debts.

In Metcalfe *v.* Hutchinson (*k*), the testator directed his debts to be

(*f*) But in Torre *v.* Brown, 5 H. L. Ca. 555, where a term was limited to provide 200*l.* annually for the maintenance of the testator's children, it was held that the whole interest in the term was charged.
(*g*) 1 Atk. 552, n. (3), by Sanders.
(*h*) 1 R. & My. 590
(*i*) Metcalfe *v.* Hutchinson, 1 Ch. D. 591.
(*k*) 1 Ch. D. 591.

paid out of the rents and profits of his real and personal estate, and after the debts were paid that the *remainder* of the rents and profits should be paid for life, with remainder over in fee; and it was held by Sir G. Jessel that the words directing payment of the remainder were not sufficient to exclude the general rule that a direction to pay out of rents and profits meant primâ facie out of the estate. Here "rents and profits" necessarily meant the corpus in the gift of the remainder.

Sale notwithstanding gift of "remainder of rents and profits."

To exclude the rule where, subject to a charge of debts or of gross sums, the estate is devised for life, with remainder over, involves another improbability, viz. that the testator intended to throw the whole burden on the tenant for life. This point was glanced at in Harper *v.* Munday (*l*). But aggrandizement of the estate is not unfrequently the primary object of a testator to * which [*1423] the interests of the immediate devisee are postponed (*m*). This is strongly indicated where accumulation of the rents is ordered as the mode of raising the debts (*n*).

Where the direction is to raise out of the rents and profits, *or* by sale or mortgage, it is obvious that these words (being evidently used in contradistinction) cannot mean the same thing; rents and profits, therefore, must import annual rents and profits;[1] and if, in such a case, the charges to be raised by these respective modes are of two kinds, one annual, and the other in gross, the words will be distributed, the annual charges being raisable out of the annual rents, and the sums in gross by sale or mortgage (*o*).

Direction to raise out of the rents and profits, *or* by sale or mortgage.

Of course, where the direction is to raise a sum of money by leases for lives or years *at the old rent*, the intention to confine the charge to annual rents is beyond all doubt (*p*). So where portions are to be raised by making a lease, which is directed to cease as soon as the portions are raised; since, if they were raised by sale or mortgage, the term must continue for the benefit of the purchaser or mortgagee (*q*). And in a settlement which contained a charge in these terms, and another to be effected

Directions to raise by lease.

(*l*) 7 D. M. & G. 369, 373, 375. See also Lord Londesborough *v.* Somerville, 19 Beav. 295, where the charge was of legacies, to be paid within three months.

(*m*) As, where the testator has no immediate descendants, and the first takers are collaterals, Lord Lovat *v.* Duchess of Leeds, 2 Dr. & Sm. 62: the intention was express, "by rents and profits, but not by sale or mortgage," and it was held that timber-money was not charged, id. 75.

(*n*) See Tewart *v.* Lawson, L. R., 18 Eq. 490, 494, But if the debts are in fact paid out of the corpus, the tenant for life is not bound to recoup the corpus, Re Green, Baldock *v.* Green, 40 Ch. D. 610.

(*o*) Playters *v.* Abbott, 2 My. & K. 97; see also Ridout *v.* Earl of Plymouth, 2 Atk. 104, where debts and legacies were to be raised "by perception of the rents, or by leasing or mortgaging." See also Re Marquis of Bute, Marquis of Bute *v.* Rider, 27 Ch. D. 196, 218.

(*p*) Ivy *v.* Gilbert, 2 P. W. 63, Pre. Ch. 583. See also Ridout *v.* Earl of Plymouth, 2 Atk. 104; Mills *v.* Banks, 3 P. W. 1.

(*q*) Evelyn *v.* Evelyn, 2 P. W. 659, 670.

[1] Delaney *v.* Van Aulen, 84 N. Y. 16.

by "lease, mortgage, or otherwise," a third clause giving a power to raise portions by lease (without more) was held to be confined by the context to annual rents (*r*).

Provisions for the renewal of leases out of the rents and profits often give rise to the point under consideration. In such cases, if the terms of renewal are such that the fine may be called for suddenly, so as to render the raising of it out of the annual rents impossible or inconvenient, a strong argument is afforded for holding the words to authorize a sale or mortgage. Indeed, this construction prevailed in a modern case, in spite of some expressions in the context rather strongly pointing the other way.

As to raising fines for renewal of leases.

[*1424] * Thus, in Allan *v.* Backhouse (*s*), where the testator, after devising certain leasehold estates *held upon bishop's leases for lives*, and all other his real estate, to certain uses, directed the renewal of the leaseholds, and that the expenses should be raised *out of the rents and profits* of the leasehold premises, or of any part of the freehold estates; and he declared that the renewed leases should be held upon the same trusts as were declared of the freehold and copyhold estates, *to the end that they might be enjoyed therewith so long as might be;* Sir T. Plumer, V.-C., held that, as the purpose for which the money was to be raised out of the rents and profits might require it suddenly (for the lessor could not be expected to wait for the gradual payment out of the rents), and as there was nothing in the will to give to these words the abridged sense of annual rents and profits, except the purpose to preserve the estate entire (which his Honor thought warranted the sacrificing of part for the preservation of the remainder), the money might be raised by sale or mortgage (*t*). This decision was affirmed by Lord Eldon (*u*).[1]

Expenses of renewed lease to be paid out of rents and profits.

Sale decreed.

(*r*) Evelyn *v.* Evelyn, 2 P. W. 659, 670.

(*s*) 2 V. & B. 65. See Garmstone *v.* Gaunt, 1 Coll. 577.

(*t*) This is a very compressed statement of the grounds of his Honor's judgment, in which he reviewed the principal authorities.

As to the mode of contribution towards renewal-fines by tenant for life and remainderman, see 6 Byth. & Jarm. Conv. (4th Ed. by Robbins), 405. In Shaftesbury *v.* Duke of Marlborough, 2 My. & K. 111, the fact of the testator having made a provision for raising the fine was allowed an influence upon the question of contribution to which it has not commonly been considered as entitled. See also Hudleston *v.* Whelpdale, 9 Hare, 775; Greenwood *v.* Evans, 4 Beav. 44; Mortimer *v.* Watts, 14 Beav. 616.

(*u*) Jac. 631.

[1] See Delaney *v.* Van Aulen, 84 N. Y. 16.

* CHAPTER XLVI. [*1425]

ADMINISTRATION OF ASSETS, EXONERATION OF DEVISED LANDS, EXEMPTION OF PERSONALTY, MARSHALLING OF ASSETS, &c.

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I. — Several Species of Property liable to Creditors. — Where a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, or not having made any disposition, it often becomes material to consider the order, and sometimes the proportions and mode, in which the several subjects of property are applicable to the liquidation of the debts; for every description of property is (we have seen) now constituted assets (*a*).

What funds liable to creditors.

* And the same question may arise in regard to pecuniary [*1426] legacies, where the testator has thrown them upon the land or some specific fund which would be either not liable or not exclusively liable to them; for otherwise they are payable out of but one fund, namely, the general personal estate (*b*).

As to legacies.

(*a*) Vide ante, p. 1388.
(*b*) Greaves *v.* Powell, 2 Vern. 248. The distinction taken in Walker *v.* Meager, 2 P. W. 550, has long been overruled.

Under a trust for the payment of debts they are paid, not in the order of their legal priority (*c*), but according to the rule of a Court of Equity, which, regarding "equality as equity," places the creditors of every class on an equal footing (*d*); and this rule is now established to apply, in opposition to the old doctrine, to mere charges by which the descent is not broken (*e*), and to devises in trust for the payment of debts, though made to the same persons as are constituted executors (*f*). In all such cases, therefore, specialty and simple contract creditors always came in pari passu; and it was held that specialty creditors, claiming the benefit of such a trust or charge, must admit the simple contract creditors to an equal participation even of the personal estate (*g*), as equity will not allow a creditor to share in the equitable assets, or, in other words, in that portion of the property which is distributable according to the maxims of a Court of Equity, without relinquishing his legal priority in regard to that portion of the property which constitutes legal assets. The practical importance of these distinctions is, however, greatly reduced by the act 32 & 33 Vict. c. 46, which abolishes the legal priority of specialty over simple contract creditors; for it is between these two classes that questions of priority have generally arisen.

Creditors admitted pari passu under trusts and charges.

It is clear that a trust to pay, or a charge of, debts, does not make simple contract debts carry interest (*h*), or revive a [*1427] * debt which has been barred by the statutes of limitation (*i*); though the contrary of both these propositions has been here-

(*c*) As to the legal order of paying debts, see Wms. Exors. p. 995, 8th ed.; Ram on Assets, 1.

(*d*) But a testator may give priority under such a trust to simple contract creditors, Millar *v.* Horton, Coop. 45.

(*e*) Burt *v.* Thomas, cit. 7 Ves. 323; Batson *v.* Lindegreen, 2 B. C. C. 94; Bailey *v.* Ekins, 7 Ves. 319; Shippard *v.* Lutwidge, 8 Ves. 26; Barker *v.* May, 9 B. & Cr. 489; overruling Freemoult *v.* Dedire, 1 P. W. 430; Plunket *v.* Penson, 2 Atk. 290.

(*f*) Newton *v.* Bennett, 1 B. C. C. 135, and cases cited id. 138, 140, n.; Chambers *v.* Harvest, Mose. 123. See also Prowse *v.* Abingdon, 1 Atk. 484; Lewin *v.* Okeley, 2 Atk. 50; Clay *v.* Willis, 1 B. & Cr. 364; overruling Girling *v.* Lee, 1 Vern. 63, and several other early cases.

(*g*) Wride *v.* Clarke, 1 Dick. 382; Deg *v.* Deg, 2 P. W. 412; Haslewood *v.* Pope, 3 P. W. 323; Morrice *v.* Bank of England, Cas. t. Talb. 220, 2 B. P. C. Toml. 465, 3 Sw. 573. See also Sheppard *v.* Kent, 2 Vern. 435, 1 Eq. Ca. Ab. 142, pl. 6.

(*h*) Lloyd *v.* Williams, 2 Atk. 110; Barwell *v.* Parker, 2 Ves. 363; Earl of Bath *v.* Earl of Bradford, id. 587; Shirley *v.* Earl Ferrers, 1 B. C. C. 41. Whether a charge of another's debts carries interest on interest-bearing debts depends on the terms of the will, Askew *v.* Thompson, 4 K. & J. 620.

(*i*) See Burke *v.* Jones, 2 V. & B. 275. Formerly, if the statute had not run at the testator's death, a charge of a debt on the testator's real estate prevented the debt being barred by the statute, a charge being a trust to be executed by the devisee or heir, Hargreaves *v.* Michell, 6 Mad. 326; Moore *v.* Petchell, 22 Beav. 172; secus if the debt was charged on leaseholds or other personalty, Scott *v.* Jones, 4 Cl. & Fin. 382; Freake *v.* Cranefeldt, 3 My. & Cr. 499. But now by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10, it is enacted that, "after the commencement of this Act, no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." See Fearnside *v.* Flint, 22 Ch. D. 579.

tofore maintained (*k*). And in Tait *v.* Lord Northwick (*l*), Lord Loughborough held that a direction to pay such debts as the testator should at the time of his death owe by mortgage bond or other specialty, or by simple contract or otherwise however, *and all interest thereof*, was confined, in respect of the interest, to debts which carried interest.

Direction to pay interest confined to debts carrying interest.

But it should be observed that property which the testator has not subjected to debts is not distributable as equitable assets merely because it is an object of equitable jurisdiction. The true principle is that whatever the executor will be charged with as assets in an action at law against him by a creditor, whether it be recoverable by the executor as against a third person in a court of law or only in a court of equity, provided he so recover it merely virtute officii as executor, is legal assets (*n*). And therefore the trust of all chattels, real as well as personal (*o*), is legal assets, though recoverable only in equity. Formerly an equity of redemption of leaseholds was supposed to be equitable and not legal assets (*p*): but this apparently rested on the precarious nature in former times of the mortgagor's interest in the property (*q*), and would be otherwise determined now that * the mortgagor is looked upon as the real owner of [*1428] mortgaged property, subject only to the security in the mortgagee (*r*).

Equitable interests not necessarily distributable as equitable assets.

Trust of chattels is legal assets,

—including equity of redemption of leaseholds.

As to freehold lands, we have already seen that these were assets in the hands of the heir to answer those specialty debts in which the heir was expressly bound; but no further (*s*). Freehold lands held upon a simple trust for the debtor, which but for the Statute of Frauds (*t*) would have been equitable assets, were by that statute made liable at law in the hands of the heir, executor, or administrator (*u*), and by subsequent statutes were also made liable at law in the hands of the

Simple trust of freeholds made legal assets by Statute of Frauds;

(*k*) Carr *v.* Countess of Burlington, 1 P. W. 228; Blakeway *v.* Earl of Strafford, 2 P. W. 373, 6 B. P. C. Toml. 630.

(*l*) 4 Ves. 816.

(*n*) Cook *v.* Gregson, 3 Drew. 547; Shee *v.* French, id. 716; Att.-Gen. *v.* Brunning, 8 H. L. Ca. 243, where held that purchase-money due to the testator for land contracted to be sold but not conveyed by him are legal assets. The separate estate of a married woman was necessarily distributable as equitable assets, since she was incapable of binding herself by specialty, Anon., Mose. 328. In this case, it was held that a mortgagee had no preference, since a feme coverte by law could not make a mortgage. A married woman can now enter into any contract so as to bind her separate property. See the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75) s. 1, (2), (3).

(*o*) See cases cited by Cox, 3 P. W. 344, n. (2).

(*p*) Case of Sir C. Cox's Creditors, 3 P. W. 342; Hartwell *v.* Chitters, Amb. 308.

(*q*) Not because it was the subject of equitable jurisdiction, for in the same case Sir J. Jekyll said that the trust of a bond or of a term was legal assets, 3 P. W. 342.

(*r*) Cook *v.* Gregson, 3 Drew. 547.

(*s*) Ante, p. 1387.

(*t*) 29 Car. 2, c. 3, ss. 10, 12.

(*u*) Plunket *v.* Penson, 2 Atk. 293; King *v.* Ballett, 2 Vern. 248.

devisee (*x*), for payment of the specialty debts of the cestui que trust which bound his heirs. But the case was otherwise where there was no clear and simple trust (*y*): thus an equity of redemption of freeholds was equitable assets (*z*). Here the creditor was compelled to come into equity for relief, and was therefore obliged to submit to the rule of that Court with regard to assets.

– but not an equity of redemption.

But by stat. 3 & 4 Will. 4, c. 104 (*a*), an equity of redemption of freehold (*b*) or copyhold (*c*) land was made liable to specialty and simple contract debts in the same order as legal assets. The statute does not, however, say that land *shall be legal assets;* and, consequently, it has been held that the executor has no right of retainer against land (*d*).

Contra since 3 & 4 Will. 4, c. 104.

In Sharpe *v.* Earl of Scarborough (*e*) judgment creditors were held entitled to have their debts paid out of the produce of the sale of mortgaged estates in priority to the claims of other creditors by bond and simple contract; but this was on the ground that the judgment creditors had a right to *redeem* and not on account of the nature of the assets; and since a judgment upon which execution has been issued now operates as a charge on every interest (*f*) in land, creditors having such judgments are * entitled to payment out of such interest in priority to all other creditors.

Judgment creditors have a right to redeem, and therefore priority, though assets equitable.

[*1429]

It may be further premised that the order in which the several funds liable to debts are to be applied, regulates the administration of the assets only among the testator's own representatives, devisees, and legatees, and does not affect the right of the creditors themselves to resort in the first instance to all or any of the funds to which their claim extends, though, as we shall presently see, equity takes effectual steps to prevent the established order of application from being eventually deranged by the capricious exercise of this right.

Right of the creditor to take property out of its proper order.

The apportionment between the several species of property of the liability to a charge imposed on them by the testator operates only

(*x*) 3 & 4 Will. & M. c. 14, and 11 Geo. 4 & 1 Will. 4, c. 47; Coope *v.* Cresswell, L. R., 2 Ch. 112.
(*y*) See Sugd. V. & P. 654, 657. 11th Ed.
(*z*) Plunket *v.* Penson, 2 Atk. 394; Plucknett *v.* Kirk, 1 Vern. 411; Solley *v.* Gower, 2 Vern. 61; Clay *v.* Willis, 1 B. & Cr. 374.
(*a*) Ante, p. 1388.
(*b*) Foster *v.* Handley, 1 Sim. N. S. 200, better reported 15 Jur. 73; Lovegrove *v.* Cooper, 2 Sm. & Gif. 271. In the latter case it is not directly stated, but would appear from the third paragraph, p. 271, that the real estate was mortgaged; the grounds of the decision could not have been applied to the moneys arising from the sale of this real estate, see ante, p. 1426, note (*f*).
(*c*) Burrell *v.* Smith, L. R., 9 Eq. 443.
(*d*) Walters *v.* Walters, 18 Ch. D. 182.
(*e*) 4 Ves. 538.
(*f*) See 27 & 28 Vict. c. 112.

as between the respective devisees of the properties charged, and does not affect the person entitled to the charge; thus if real and personal property are blended and charged with a legacy, and by codicil the real property is given freed from the charge, the personalty remains subject to the whole charge (*g*).

Apportionment of charge does not affect person entitled to charge.

It should also be stated that real or personal property over which the testator has a general power of appointment only (and in which he takes no transmissible interest in default of appointment), is assets for the payment of creditors (*h*), provided the power be exercised (*i*), but not otherwise (*k*); except in the case *of judgment creditors [*1430] since the act 1 & 2 Vict. c. 110 (*l*), who have issued execution upon their judgments (*m*) whereby lands over which the debtor has a disposing power, which he might without the assent of any other person exercise for his own benefit, are bound in favor of such creditors, whether the power be exercised or not: and, it will be remembered that, in wills made or republished since 1837, every general or residuary devise or bequest operates as a testamentary appointment, unless a contrary intention appear.

Effect of exercising power of appointment.

II. — Order of Application of Several Species of Property. — The order of the application of the several funds liable to the payment of debts, then, is as follows: [1] —

Order in which funds to be applied.

(*g*) Tatlock *v.* Jenkins, Kay, 654, where Wood, V.-C., said, "Suppose there had been a devastavit, could not the person interested in the charge raise the whole charge out of the realty?" As to the effect of a devastavit where debts are charged on the real estate, "if the personal estate should be insufficient," see Richardson *v.* Morton, L. R., 13 Eq. 123, and cases cit. id. 125. If a creditor neglects to claim against the personalty (upon a statutory advertisement), which is then distributed, he cannot go on the realty under such a charge, Trousdale *v.* Hayes, W. N., 1883, p. 13. Where a legacy is charged on realty, and the estate proves insufficient, the legatee is not entitled to back rents received by the devisee of the realty. Garfitt *v.* Allen, 37 Ch. D. 48; cf. Re Hyatt, W. N., 1888, p. 89.

(*h*) Including simple contract creditors, under stat. 3 & 4 Will. 4, c. 104. Fleming *v.* Buchanan, 3 D. M. & G. 976.

(*i*) Lascelles *v.* Lord Cornwallis, 2 Vern. 465, Pre. Ch. 232; Troughton *v.* Troughton, 3 Atk. 656; Lord Townsend *v.* Windham, 2 Ves. 8; Jenney *v.* Andrews, 6 Mad. 264; Fleming *v.* Buchanan, 3 D. M. & G. 976; Williams *v.* Lomas, 16 Beav. 1. And before the Married Women's Property Act, 1882, it was held that property which f. c. had general power to appoint by deed or will (London Chartered Bank of Australia *v.* Lempriere, L. R., 4 P. C. 572; Mayd *v.* Field, 3 Ch. D. 587. See also Griffiths-Boscawen *v.* Scott, 26 Ch. D. 358), or by will only (Re Harvey's Estate, Godfrey *v.* Harden, 13 Ch. D. 216; Hodges *v.* Hodges, 20 Ch. D. 749; but see per Cotton, L. J., Pike *v.* Fitzgibbon, 17 Ch. D. 466, and per Kay, J., Re Roper, Roper *v.* Doncaster, 39 Ch. D. 482, 488), was assets to answer her "general engagements" to the same extent as her separate property. By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 4, it is enacted that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this act." This section does not apply to contracts made before the commencement of the act, Re Roper, Roper *v.* Doncaster, supra.

(*k*) Holmes *v.* Coghill, 7 Ves. 499, 12 Ves. 206.

(*l*) Sects. 11, 13.

(*m*) 27 & 28 Vict. c. 112.

[1] 1 Story, Eq. §§ 558-577. According to the general rule in this country, personal estate, as in England, is first to be exhausted in the discharge of the debts, even to the

1. The general personal estate (*n*) not expressly or by implication exempted (*o*).

(*n*) Sir Peter Soames' case, cit. 1 P. W. 694; Lord Gray *v.* Lady Gray, 1 Ch. Cas. 296; White *v.* White, 2 Vern. 43; Johnson *v.* Milksop, id. 112; Evelyn *v.* Evelyn, 2 P. W. 664. See also Milnes *v.* Slater, 8 Ves. 304.

(o) See post, s. vi. of this Ch.

payment of debts with which the real estate is charged by mortgage. McCampbell *v.* McCampbell, 5 Litt. 95; Hanna's Appeal, 31 Penn. St. 53, Wyse *v.* Smith, 4 Gill & J. 295; McDowell *v.* Lawless, 6 T. B. Mon. 141, Haleyburton *v.* Kershaw, 3 Desaus. 105, 115, Dunlap *v.* Dunlap, 4 Desaus. 305, 329, Stuart *v.* Carson, 1 Desaus. 500, 513; Garnet *v.* Macon, 6 Call, 608; *s. c.* 2 Brock. 185; Rogers *v.* Rogers, 1 Paige, 188; Livingston *v.* Livingston, 3 Johns. Ch. 148, 153; Hoye *v.* Brewer, 3 Gill & J. 153; Stevens *v.* Gregg, 10 Gill & J. 143; Tessier *v.* Wyse, 3 Bland, 185, Lewis *v.* Thornton, 6 Munf. 87, Hawley *v.* James, 5 Paige, 318, Mackay *v.* Green, 3 Johns. Ch. 56; Livingston *v.* Newkirk, 3 Johns. Ch. 312, Stroud *v.* Burnett, 3 Dana, 394; Schermerhorn *v.* Barhydt, 9 Paige, 29, 49, Chase *v.* Lockerman, 11 Gill & J. 185; Seaver *v.* Lewis, 14 Mass. 83, Adams *v.* Brackett, 5 Met. 280, Plimpton *v.* Fuller, 11 Allen, 139, Hewes *v* Dehon, 3 Gray, 205; Hanson *v.* Hanson, 70 Maine, 508; 4 Kent, 420, 421 But this rule applies only in the absence of a different provision in the will. The English common-law rule which exempted real estate from liability for the simple contract debts of the ancestor or testator, and even for specialty debts except as to heirs expressly named, probably prevails nowhere in the United States.

On failure of personal assets, real estate in the hands of heirs and devisees is everywhere liable for the debts of the ancestor or testator. This has been made so by statute in many states (4 Kent, 420–422), but it is probably equally true without the aid of statute. The order of marshalling, so far as it has not been otherwise regulated by statute, is, it is apprehended, substantially the same in this country as in England. 4 Kent, 421. See Schermerhorn *v.* Barhydt, 9 Paige, 29; Chase *v.* Lockerman, 11 Gill & J. 185; Livingston *v.* Newkirk, 3 Johns. Ch. 319; Livingston *v.* Livingston, id. 153; Adams *v.* Brackett, 5 Met. 280; McCampbell *v.* McCampbell, 5 Lit. 95; McDowell *v.* Lawless, 6 T B. Mon. 141; Haleyburton *v.* Kershaw, 3 Desaus. 105. But perhaps a different rule may prevail as to *contribution* (see rule 6 of the text) between specific devises and legacies in favor of legacies in case of deficiency of other funds, when the legacies are not charged upon the specific gifts. Hayes *v.* Seaver, 7 Greenl. 237. See Hubbell *v.* Hubbell, 9 Pick 561; Hume *v.* Wood, 8 Pick 478. It is clear that, in the absence of statute or of authority in the will, lands specifically devised cannot be sold for the purpose of paying even specific legacies not charged thereon. Hubbell *v.* Hubbell, supra; Kitchell *v.* Young, 46 N. J. Eq. 506; ante, p. 1415.

The English common-law rule that, in marshalling for the payment of debts, specific devises were considered as intended to be preferred over specific legacies, was based upon the ground that in England land was not regarded as general assets for the payment of debts. The rule never applied to specialty debts, because land might be liable for them; and hence as to these, devises and specific legacies contributed ratably. So, too, in those states in which no distinction exists between simple contract debts and debts by specialty, no preference of specific devises over specific legacies is made; both abate alike. Brant *v.* Brant, 40 Mo. 266. See Grim's Appeal, 89 Penn. St. 333; Loomis's Appeal, 10 Barr, 387, Teas's Appeal, 23 Penn. St. 223; Armstrong's Appeal, 63 Penn. St. 312, Knecht's Appeal, 71 Penn. St. 333; Snyder's Appeal, 75 Penn. St. 191. As between the different kinds of legacies, the general rule is that residuary legacies are to be taken, in the first instance, for the payment of debts; then general or pecuniary legacies; then specific legacies. Alsop *v.* Bowers, 76 N. Car. 168.

Again, other considerations besides the nature of the bounty may, in the absence of direction in the will, help to determine the mode of abatement; such as the claims of a particular devisee or legatee upon the testator. Thus, when either legacies or devises must fail to some extent, the courts in most of the states will consider the situation of the several beneficiaries, and will accord a preference to those who are not pure beneficiaries, but who, in consideration of the bounty, are to relinquish, or have relinquished, some important right. Security Co. *v.* Bryant, 52 Conn. 311, Moore *v.* Alden, 80 Maine, 301; Duncan *v.* Franklin, 43 N. J. Eq. 143; Harper's Appeal, 111 Penn. St. 243. See Steele *v.* Steele, 64 Ala. 438. Such legatees or devisees are treated as purchasers, and if there must be an abatement of the legacies, they are not, even if their legacies be general, compelled to submit to such abatement until the general legacies of those who are pure beneficiaries are exhausted. Id. An example is found in the case of a legacy to the testator's widow in lieu of dower; which in case of deficiency is preferred over a gift to a child of the testator. Security Co. *v.* Bryant, supra (citing Lord *v.* Lord, 23 Conn. 327); Additon *v.* Smith, 83 Maine, 551; Moore *v.* Alden, 80 Maine, 301; Borden *v.* Jenks, 140 Mass. 562; Farnum *v.* Bascom, 122 Mass. 282; Pollard *v.* Pollard, 1 Allen, 490; Towle *v.* Swasey, 106 Mass. 100; In re Gotzian, 34 Minn. 159 (citing Lord *v.* Lord, 23 Conn. 327, 338; Williamson *v.* Williamson, 6 Paige, 298, 305; Warren *v.* Morris, 4 Del.

2. Lands expressly devised to pay debts, whether the inheritance, or a term carved out of it, be so limited (*p*).

3. Estates which descend to the heir (*q*), whether acquired before or after the making of the will (*r*).

4. General pecuniary legacies pro ratâ (*s*).[1]

(*p*) Anon., 2 Vent. 349; Bateman *v.* Bateman, 1 Atk. 421; Lanoy *v.* Duke of Athol, 2 Atk. 444; Powis *v.* Corbet, 3 Atk. 556, 3 Ves. 116, n.; Ellison *v.* Airey, 2 Ves. 569; Tweedale *v.* Coventry, 1 B. C. C. 240; Coxe *v.* Bassett, 3 Ves. 155; Phillips *v.* Parry, 22 Beav. 279.

(*q*) Chaplin *v.* Chaplin, 3 P. W. 368; Galton *v.* Hancock, 2 Atk. 424 et seq.; Bainton *v.* Ward, 2 Atk. by Sanders, 172, n. (2), Manning *v.* Spooner, 3 Ves. 117, 3 R. R. 67; Barnewall *v.* Lord Cawdor, 3 Mad. 453.

(*r*) See Milnes *v.* Slater, 8 Ves. 295.

(*s*) Clifton *v.* Burt, 1 P. W. 680. In the former editions the funds here numbered four and five, respectively, were transposed. But Kay, J., in Re Bate, Bate *v.* Bate, 43 Ch. D. 600, has held that all personal estate not specifically bequeathed, not excepting general pecuniary legacies, must be applied in payment of debts, &c., before resorting to real estate though charged with debts. The devisee of lands which the testator had contracted to purchase, and which he directed his executors to pay for, was in Headley *v.* Readhead, Coop. 50, Ch. 289). See Steele *v* Steele, 64 Ala. 438. But see In re Brant, 40 Mo. 266; Chambers *v.* Davis, 15 B. Mon. 522. Nor is the rule different when all the legacies are specific, at least if the gift to the widow be specific. Indeed, even where, when the will was made, the person was not entitled to dower (the will being ante-nuptial), if the will was made in contemplation of marriage, the donee will be treated as a purchaser, being entitled to dower when the will becomes operative. Farnum *v.* Bascom, supra; Towle *v.* Swasey, supra. Nor will the fact that the widow has property of her own affect her rights, as it seems. Compare Conant *v.* Stratton, 107 Mass. 474. See also, as to gifts to the widow, Pierrepont *v.* Edwards, 25 N. Y. 128. So, too, a legacy given to the testator's widow, to be paid to her before the proceeds of his property are invested, will not abate in favor of legacies not payable till two years after the death of the widow. Dey *v.* Dey, 19 N. J. Eq. 137.

And it may be stated in broader terms that the circumstance of near relationship or of dependence, though not alone sufficient, may be regarded as affording some reason for allowing priority when the language of the will fairly permits. Lewin *v.* Lewin, 2 Ves. Sen. 415; Richardson *v.* Hall, 127 Mass. 64, 66; *s. c.* 124 Mass. 233; Towle *v.* Swasey, 106 Mass. 100; In re Chauncey, 119 N. Y. 77 (legacies for support of wife and children do not abate with general legacies), Bliven *v.* Seymour, 88 N. Y. 469. How far, between persons of the same relation to the testator, will the fact, *e. g.*, that one is an only son of the testator, bearing the testator's name, and that his daughters are married, have the effect to suggest a preference of the son, quære? See King *v.* Gridley, 46 Conn 555, where such fact was deemed of significance in determining the destination of the testator's homestead, not clearly disposed of by the will. Quære also how far the assumption can be considered (when nothing opposed to it appears), that the first taker is the favorite of the testator? Grim's Appeal, 89 Penn St. 333; McFarland's Appeal, 37 Penn. St. 300; Wilson *v.* McKeehan, 53 Penn. St. 79.

Such circumstance could not alone, it is apprehended, suffice to give priority to one of several similarly related donees; for in a contest between legatees as to priority upon a deficiency, it is considered that the burden lies on the party seeking priority to show that it was intended by the testator that he should have priority, and that the proof of this should be clear and conclusive. Duncan *v.* Franklin, 43 N. J. Eq. 143 (citing Titus *v.* Titus, 11 C. E. Green, 111, 117; Shepherd *v.* Guernsey, 7 Paige, 357). In the absence of evidence to the contrary, the testator must be deemed to have considered his estate sufficient to pay all legacies. Additon *v.* Smith, 83 Maine, 551; Richardson *v.* Hall, 128 Mass. 64, 66. See Pennsylvania Ins. Co.'s Appeal, 109 Penn. St. 479. The latter case was deemed not to come within the rule, by reason of the fact that the will indicated an apprehension on the part of the testator that there might be a deficiency. It follows from this, and also from the maxim that equality is equity, that when distribution is to be made among two or more, without any indication of the proportions in which they are to take, they will take equally. Lewis's Appeal, 89 Penn. St. 509. See Salisbury *v.* Denton, 3 Kay & J. 529.

[1] In order to overcome the presumption that the testator intended that general legacies should abate ratably, in case of deficiency, there must be something more than ambiguous indications; the intention must clearly appear. Titus *v.* Titus, 26 N. J. Eq. 111; Shepherd *v.* Guernsey, 9 Paige, 357. Neither relationship nor a provision against lapse, nor a direction that all the legacies shall be paid "in the order in which they are stated in the will, and out of the first moneys that shall come into the executor's hands," where the testator contemplated that there would be a residue after payment of all legacies in full, will be sufficient to overturn the presumption. Titus *v.* Titus, supra.

5. Real or personal property devised or bequeathed, either to the heir or a stranger, charged with debts, and disposed of, subject to such charge (*t*).

[*1431] * 6. Specific legacies (*u*) [1] and real estate devised, whether in terms specific or residuary (*x*), are liable to contribute pro ratâ (*y*).

treated as a pecuniary legatee in respect of the purchase-money, and therefore, the estate not being sufficient to pay the legacies and complete the contract, the legatees and devisee were held to contribute ratably. And see Herne *v.* Meyrick, 2 Salk. 416, 1 P. W. 201; Collins *v.* Lewis, L. R., 8 Eq. 708; Dugdale *v.* Dugdale, L. R., 14 Eq. 234; Tomkins *v.* Colthurst, 1 Ch. D. 626; Farquharson *v.* Floyer, 3 Ch. D. 109. Residuary devisees are not liable to contribute, the decision of Lord Chelmsford that they are so liable is a mere mistake.

(*t*) Wride *v.* Clarke, 2 B. C. C. 261, n.; Davies *v.* Topp, id. 259, n.; Donne *v.* Lewis, id. 257; Manning *v.* Spooner, 3 Ves. 117, 3 R. R. 67; Harmood *v.* Oglander, 8 Ves. 124; Milnes *v.* Slater, id. 306; Watson *v.* Brickwood, 9 Ves. 447; Irwin *v.* Ironmonger, 2 R. & My. 531.

(*u*) As to what legacies are pecuniary or general, and what specific, see 1 P. W. 539; 2 P. W. 328; Amb. 566 (but see 2 B. C. C. 111); 2 B. C. C. 18; 2 Ves. Jr. 639; 4 Ves. 150, 555, 568; 5 Ves. 199, 461; 11 Ves. 607; 15 Ves. 384; 1 Mer. 178; 5 Sim. 530; 1 De G. & J. 438; L. R., 20 Eq. 312; 6 Ch. D. 603; 7 Ch. D. 339; 8 App. Ca. 812; 40 Ch. D. 610; 61 L. T. 497.

(*x*) Hensman *v.* Fryer, L. R., 3 Ch. 420; Lancefield *v.* Iggulden, L. R., 10 Ch. 136. Under the old law every devise, however general in terms, was virtually specific, Forrester *v.* Lord Leigh, Amb. 173; Scott *v.* Scott, 1 Ed. 459; Keeling *v.* Brown, 5 Ves. 359; Milnes *v.* Slater, 8 id. 303, overruling Gower *v.* Mead, Pre. Ch. 3. And see particularly Mirehouse *v.* Scaife, 2 My. & Cr. 695, where Lord Cottenham took a general view of the authorities for the proposition that pecuniary legatees are not entitled to have the assets marshalled as against a residuary devisee of lands, the principle applicable to specific and residuary devises being identical. The ground for this doctrine was, that, as the testator could dispose only of the lands actually belonging to him when he made his will, any devise therein, however general in terms, amounted in reality to nothing but a gift of the lands he then had. Thus, if a testator having lands called Blackacre and Whiteacre, before the year 1838, devised Blackacre to A. and the residue of his real estate to B., the devise to B., though residuary in expression, was in

(*y*) Long *v.* Short, 1 P. W. 403, 2 Vern. 756; Tombs *v.* Roch, 2 Coll. 490; Gervis *v.* Gervis, 14 Sim. 665 (where Sir L. Shadwell overruled his own previous decision in Cornewall *v.* Cornewall, 12 Sim. 298); Young *v.* Hassard, 1 Jo. & Lat. 472; Jackson *v.* Hamilton, 3 Jo. & Lat. 711; compare Bateman *v.* Hotchkin, 10 Beav. 426; and see Fielding *v.* Preston, 1 De G. & J. 438. Specialty and simple contract creditors being now on an equal footing, the specific legatee has, it would seem, as good a right to compel the devisees to contribute towards payment of the latter as (according to the cases here cited) he had with regard to the former.

[1] What legacies are specific, general, or demonstrative, see among recent authorities, Maybury *v.* Grady, 67 Ala. 147; Hutchinson *v.* Fuller, 75 Ga. 88; Morton *v.* Murrell, 68 Ga. 141 (gift of money payable out of a specified fund is general, by statute); Roquet *v.* Eldridge, 118 Ind. 147; Addington *v.* Smith, 83 Maine, 551; England *v.* Prince George Parish, 53 Md. 466; Harvard Unitarian Soc. *v.* Tufts, 151 Mass. 76 ("To the trustess of the Unitarian Society of Harvard ten shares of stock of the Worcester and Nashua Railroad Co.," held specific); Bradford *v.* Brinley, 145 Mass. 81, Tomlinson *v.* Bury, id. 346 ("all the mill stock and bank stock remaining in my name," &c., held specific); Stevens *v.* Fisher, 144 Mass. 114; Boston Safe Deposit Co. *v.* Plum, 142 Mass. 257; Smith *v.* Fellows, 131 Mass. 20; Metcalf *v.* Framingham Parish, 128 Mass. 370; Johnson *v.* Goss, id. 433 ("the bank stock I hold in the First National Bank of Clinton" is specific, citing Towle *v.* Swasey, 106 Mass. 100); Le Roux-getel *v.* Mann, 63 N. H. 472; Hayes *v.* Haves, 45 N. J. Eq. 461 (gift of a particular debt is specific, citing Wyckoff *v.* Perrine, 37 N. J. Eq. 118); Tichenor *v.* Tichenor, 41 N. J. Eq. 39; Langstroth *v.* Golding, 41 N. J. Eq. 49; Glass *v.* Dunn, 17 Ohio St. 413; Sponsler's Appeal, 107 Penn St. 95 ("fifteen shares of 2d preferred C. V. R. R. stock" is general); Cone's Appeal, 103 Penn. St. 571 (gift of all one's personal estate is general, citing Walker's Estate, 3 Rawle, 229; secus, "all my household furniture and personal property," citing McGlaughlin *v.* McGlaughlin, 24 Penn. St. 20); Bowen *v.* Dorrance, 12 R. I. 269; McFadden *v.* Hefley, 28; S. C. 317 ("all the horses, mules, cows, hogs, wagon, farming implements," &c., is specific); Witherspoon *v.* Watts, 18 S. C. 396; Martin *v.* Osborne, 85 Tenn. 420; Hood *v.* Haden, 82 Va. 588 ("$5,000 of *my* Virginia registered State bonds" is specific); Morriss *v.* Garland, 78 Va. 215.

7. Real and personal property over which the testator has a * general power of appointment, and which he has appointed by his will (*z*). [*1432]

In fixing these several gradations of liability, the great struggle for a long period was to determine whether the descended assets were applicable before or after devised lands which the testator had simply charged with (not particularly selected and appropriated for the payment of) his debts (*i. e.*, between the third and fourth classes in the preceding series), and the question was finally settled in favor of the prior liability of the heir (though with disapprobation of the rule), by Lord Thurlow in Donne *v.* Lewis (*a*), and by Lord Alvanley in Manning *v.* Spooner (*b*). And in Harmood *v.* Oglander (*c*), Lord Eldon recognizes the distinction between a mere charge of debts and a devise directing the mode in which the debts are to be paid, which he characterizes as "thin," but considers as too firmly established by authority to be disturbed. A devise to the heir, though inoperative according to the old law (*d*) to break the descent, was held to demonstrate an intention to place, and to have the effect of placing, the heir on an equal footing with the devisees, properly so called, in this respect (*e*).

Point as to descended assets.

The order in which the descended estates are liable, is not generally varied in favor of the heir by their being included with the de-

point of fact a mere devise of Whiteacre, and was so regarded for all purposes. Therefore, if in such a case the testator owed specialty debts, which were to be satisfied out of his real estate, Whiteacre, the property of B., was not first applicable (as would be the case if the respective subjects of disposition were personal estate), but A. and B. stood upon an equal footing, both estates being applied pro ratâ.

The ground of the doctrine does not apply to wills which are subject to the present law, as a general or residuary devise is, by 1 Vict. c. 26, made to extend to all the real estate belonging to a testator at the time of his decease, thereby abolishing all distinction between real and personal estate in this particular: and analogy might seem to require the adoption of a uniform rule in regard to real and personal estate; and it was so decided by Kindersley, V.-C., who held that the order of liability was (1) real estate devised as residue, (2) pecuniary legacies, (3) real estate specifically devised, Hensman *v.* Fryer, L. R., 2 Eq. 627, and cases there cited. Similar decisions, so far as concerned the two sorts of realty, were made by Romilly, M. R., Rotheram *v.* Rotheram, 26 Beav. 465; Bethell *v.* Green, 34 Beav. 202. But the old rule had obtained so firm a footing that the struggle anticipated in the first edition of this work ensued. Stuart, V.-C., held that the old rule depended on the essentially specific character of a devise of real estate, and that the act had made no difference, Pearmain *v.* Twiss, 2 Gif. 130; Clark *v.* Clark, 34 L. J. Ch. 477, and other cases; and this view was adopted by Lord Chelmsford, L. C., who reversed the decision of Kindersley, V.-C., in Hensmen *v.* Fryer, L. R., 3 Ch. 420. The point was again contested as between specific and residuary devisees in Lancefield *v.* Iggulden, L. R., 17 Eq. 556, 10 Ch. 136, where Bacon, V.-C., held that specifically devised realty was not liable until residuary realty had proved insufficient; but this was reversed by Lord Cairns, L. C., and James, L. J., and it is now settled that the old rule remains unchanged. It is remarkable, however, that to arrive at this conclusion Lord Cairns inverted the account usually given of the rule, and said that the non-devisability of after-acquired real estate was the *result* of treating a residuary devise as specific.

(*z*) Fleming *v.* Buchanan, 3 D. M. & G. 976; Hawthorn *v.* Shedden, 3 Sm. & Gif. 305. See also Troughton *v.* Troughton, 3 Atk. 660, 661; Bainton *v.* Ward, 2 Atk. 172, n., by Sanders.

(*a*) 2 B. C. C. 257.

(*b*) 3 Ves. 114, 3 R. R. 67.

(*c*) 8 Ves. 125.

(*d*) But now see stat. 3 & 4 Wills. 4, c. 106, s. 3: ante, Vol. I., p. 74.

(*e*) Biederman *v.* Seymour, 3 Beav. 368. And since 3 & 4 Will. 4, c. 106, see Strickland *v.* Strickland, 10 Sim. 374.

Land descending subject to charge or trust to pay.

vised estates in the charge of debts (*f*), nor by the circumstance that they come to the heir by lapse, and not as simply undisposed of (*g*), nor by both of these circumstances together (*h*). And where the real estate is expressly devised to pay debts, and subject thereto, part is devised beneficially and part not, the order is not varied against the heir so as to charge the descended part before the devised part, but both parts are liable pari passu (*i*).

As to lapsed undivided share.

But if, subject to a previous trust to pay, or charge of, debts (for here the form of charge is immaterial) the real and personal estate is given to several as tenants in common, and one share lapses; the lapsed share is liable pari [*1433] passu with the shares * effectually devised. Thus in Fisher *v.* Fisher (*k*), where a testator devised his freehold estates amongst his seven children, and empowered his executors, notwithstanding the preceding devises, to sell so much of the freehold estates as should be necessary for payment of his debts, funeral and testamentary expenses, and directed the money so raised to be applied in payment of such debts, &c., accordingly, and that the surplus money should go according to the preceding devise of the freehold estates. The testator then gave his leaseholds amongst his seven children, and bequeathed his personal estate (except leaseholds) to his daughter E., exonerated from his debts, &c., and charged his freeholds as the primary fund, and his leaseholds as the second fund, for payment of his debts, &c. One share of the freeholds and leaseholds lapsed by the death of a child; and it was held by Lord Langdale that the testator had appropriated first his freeholds, and secondly his leaseholds, as the special fund for payment of his debts, that the interest which the deceased child would have taken if he had lived was a share of so much only as remained after deducting debts, and therefore that his share of so much only lapsed. In other words, the lapsed share was liable pari passu with the shares well devised.

In what order lapsed interests descending to the heir contribute.

So, in Wood *v.* Ordish (*l*), where a testator by will dated in 1832 devised all his real and personal estate subject to the payment of his debts to one for life, with remainder to three persons as tenants in common, and afterwards purchased other lands which were of course unaffected by the will: one of the shares in remainder lapsed, and it was held by Sir J. Stuart, V.-C., that the simply descended lands must first be exhausted, and that the lapsed share of the devised estate was then applicable for payment of debts pari passu with the other shares; observing

(*f*) Williams *v.* Chitty, 3 Ves. 545, 3 R. R. 71; Barber *v.* Wood, 4 Ch. D. 885.
(*g*) Williams *v.* Chitty, sup.; per Kindersley, V.-C., Dady *v.* Hartridge, 1 Dr. & Sm. 241.
(*h*) Williams *v.* Chitty, sup.
(*i*) Stead *v.* Hardaker, L. R., 15 Eq. 175.
(*k*) 2 Kee. 610.
(*l*) 3 Sm. & Gif. 125.

that if the descended estates were sufficient, the life estate and the remainder in the entirety, including the lapsed share, would be freed; but that if the descended estates were not sufficient, then a part of the devised estates must be taken before any enjoyment could be had of the life estate, because the charge was upon the entirety of the fee simple. For the same reason none of the rights in remainder, whether by lapse or by the devise, could accrue till the charge of debts was provided for; the share of the heir was thus, as to the liability to the charge, on the same footing as the other shares.

* These two cases were treated by Sir W. P. Wood without [*1434] any distinction as laying down the principle that, as between the heir-at-law, the next of kin, and the residuary devisees and legatees, a lapsed *share* of real and personal estate ought to be applied in the same order as if the legatee had survived; and they were followed by him accordingly (*m*).

III. — Contribution to Charges and particularly when thrown on a Mixed Fund. — Where several distinct properties, subject to a common charge, are disposed of among several persons, recourse is had, by an obvious rule of justice, to the principle of contribution. Thus, if the testator, after subjecting his real estate to the payment of his debts or legacies, devise Blackacre to A. and Whiteacre (*n*), or the residue of his real estate (*o*), to B., and these estates in the administration of the assets become applicable, the charge will be thrown upon the devisees in proportion to the value of their respective portions of the property. And, by parity of reason, where several estates, subject to a common charge, devolve by descent upon different persons (which happens where they descended to the last owner from opposite lines of ancestry, and his own paternal and maternal heirs are different persons, or they are held by several tenures, involving different courses of descent), the same principle of contribution obtains (*p*).

Principle of contribution, when applied.

(*m*) Peacock *v.* Peacock, 34 L. J. Ch. 315. See also Ryves *v.* Ryves, L. R., 11 Eq. 539. The rule had long before been established with regard to residue of personal estate, see Eyre *v.* Marsden, 4 My. & C. 231; Trethewy *v.* Helyar, 4 Ch. D. 53. It does not appear what, if any, weight was attributed to the personalty being given with the realty in laying down the rule as to the realty. As to the liability to costs of an administration action of real estate, which had devolved on the heir by reason of forfeiture under the provisions of a will, see Hurst *v.* Hurst, 28 Ch. D. 159.

(*n*) See Heveningham *v.* Heveningham, 2 Vern. 355, 1 Eq. Ca. Ab. 117; Growcock *v.* Smith, 2 Cox, 397; Carter *v.* Barnardiston, 1 P. W. 504; Johnson *v.* Child, 4 Hare, 87. See also 3 P. W. 98.

(*o*) Gibbins *v.* Eyden, L. R., 7 Eq. 371.

(*p*) See Lord Eldon's judgment in Aldrich *v.* Cooper, 8 Ves. 390. See this case and Leonino *v.* Leonino, 10 Ch. D. 460, as to the question whether a mortgage equally affects both subjects comprised in it, or the one was to be *first* applied. See also Re Athill, Athill *v.* Athill, 16 Ch. D. 211. The doctrine of contribution applies only where two properties are equally charged, and not so as to render property subject only to a general lien liable to contribute in exoneration of property specifically charged. Re Dunlop, Dunlop *v.* Dunlop, 21 Ch. D. 583.

Immaterial that part of the property charged is real and part personal.

And the rule is the same where the property charged is partly real and partly personal. Thus, if a testator, after commencing his will with a general direction that his debts shall be paid, proceeds to dispose specifically of his real and personal estate among different persons; as the charge would, we have seen, affect the whole property so given, [*1435] real as well as personal, the * devisees and legatees will bear their respective shares of the burden pro ratâ (*q*).

It should seem, then, that although personalty not expressly charged with debts is applicable before real estate not so charged, yet when both species of property are expressly onerated and the personalty is specifically bequeathed, no distinction of this nature is admitted, but the whole stands on an equal footing.

Effect where real and personal estate constitute a mixed fund to answer charges.

In precise accordance with this principle, too, where a testator creates out of real and personal estates a mixed fund to answer certain charges, he is considered as intending, not that the personalty shall be the primary and the realty the auxiliary fund for those charges, but that each shall contribute ratably to the common burden. And it is immaterial that the combined fund comprises the whole of the testator's real and personal estate.

Thus, in Roberts *v.* Walker (*r*), where a testatrix gave to trustees certain freehold, copyhold, and leasehold estates and shares in certain companies, and all other real and personal estate, upon trust to sell and convert the same, and as to the moneys arising therefrom, and the rents and profits in the mean time, upon trust in the first place to pay all her debts, funeral and testamentary expenses, and in the next place to pay certain legacies with interest and the duty thereon, and to apply the residue in such manner as the testatrix by any codicil should direct. The testatrix died without making any codicil. The question being, whether the debts and legacies were to be paid out of the personalty so far as it would go, in exoneration of the real estate and for the benefit of the heir, or whether they were to be borne by the real and personal estate proportionally; Sir J. Leach, M. R., decided in favor of the latter construction, observing, "When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estate which have been converted into that fund shall answer the stated purposes and every of them pro ratâ, according to their respective

Real and personal estate made a mixed fund to answer certain charges.

(*q*) Irvin *v.* Ironmonger, 2 R. & My. 531.

(*r*) 1 R. & My. 752; see also Dunk *v.* Fenner, 2 R. & My. 557; Fourdrin *v.* Gowdey, 3 My. & K. 383; West *v.* Cole, 4 Y. & C. 460; Cradock *v.* Owen, 2 Sm. & Gif. 241; Young *v.* Hassard, 1 Jo. & Lat. 466; Robinson *v.* London Hospital, 10 Hare, 19; Simmons *v.* Rose, 6 D. M. & G. 411; Bedford *v.* Bedford, 35 Beav. 584.

values. If any of those purposes fail, then the part of the fund which, according to the intention of the testator, would otherwise have been applicable to those * purposes, is undisposed of. As [*1436] far as this part of the fund has been composed of real estate, the heir is to have the benefit of it as so much real estate undisposed of; and as far as this part of the fund has been composed of personal estate, I am of opinion that it is personal estate undisposed of for the benefit of the next of kin; and in order to ascertain the proportions which will thus belong to the heir and next of kin respectively, it must be referred to the Master to compute the respective values of the real and personal estate, which are thus blended by the testator into one common fund."

So, in Stocker *v.* Harbin (*s*), where a testator gave all his real and personal estate to A., B., and C., upon trust to sell all his real estate and convert into money his personal estate; and he directed his trustees to stand possessed of the moneys to arise by virtue of his will, in trust to pay all his just debts and funeral and testamentary expenses, and then to appropriate and take out of his said *trust moneys* the sum of 1,000*l.*, and invest the same in manner therein mentioned for the benefit of his son D., which sum, in a certain contingency, was to revert to and become part of his *residuary moneys and estate;* and the testator then proceeded to give certain directions concerning his residuary moneys and estate. The testator by an unattested codicil revoked the legacy of 1,000*l.*; and Lord Langdale, M. R., held that, as the codicil was inoperative in regard to the freehold estate, the legacy remained in force as to such proportion of it as was payable out of the produce of the freeholds, for the legacy, being given out of a mixed fund constituted of both real and personal estate, would have been payable out of both in proportion to their respective amounts (*t*).

Charges thrown on real and personal estate as a mixed fund.

Again, in Salt *v.* Chattaway (*u*), where a testator devised and bequeathed his real and personal estate in trust to sell, and out of the proceeds and out of the ready money he might die possessed of, to pay to J. 100*l.*, and to divide one-third of the residue of the moneys to arise as aforesaid among J. and five other persons; J. died in the testator's lifetime. It was held that the next of kin and the heir were entitled to their proportionate parts of the lapsed share of the residue, and that the legacy of * 100*l.* fell into the [*1437] residue and passed by the gift thereof (*x*). Lord Langdale observed, that, the two sorts of estate being blended, each contributing

(*s*) 3 Beav. 479; Shallcross *v.* Wright, 12 Beav. 505.

(*t*) But if the gift out of the real estate had been of a *legal* rent-charge, a court of law would have given effect to the whole charge out of the real estate, Locke *v.* James, 11 M & Wels. 912, where it is suggested that there might be a remedy in a court of equity, sed qu.

(*u*) 3 Beav. 576. See also Att.-Gen. *v.* Southgate, 12 Sim. 77, 83, 12 L. J. Ch. 147; Shallcross *v.* Wright, 12 Beav. 505.

(*x*) As to this, vide ante, Vol. I. p. 606.

in proportion to fulfil the purposes which could be accomplished, the share of residue which had lapsed must be deemed to consist of proportionate parts of the two sorts of estate.

How a mixed fund is created.

Whether this blending has been effected is a frequent question. As it concerns the partial exoneration of the personal estate from its regular burdens, it depends on principles presently to be discussed (*y*). It may, however, be observed here that the mere fact that the real and personal estate are given together, upon trust out of the issues, dividends, interests, and profits thereof to pay debts, legacies, or annuities, has been often held insufficient to exempt the personal estate from its primary liability (*z*). And it was said by Sir G. Turner, L. J., in Tench *v.* Cheese (*a*), that "in order to effect that purpose there must be a direction for the sale of the real estate, — so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will."

Allan *v.* Gott.

But this dictum was criticised in Allan *v.* Gott (*b*), where a testator directed his debts and funeral and testamentary expenses to be paid out of his personal estate; and after various legacies (not in question) and a specific devise, he devised and bequeathed all other his real estate and all his moneys and securities and all other his personal estate to trustees on the trusts thereinafter declared; and he *empowered* his trustees, in case and as often as they should think fit to sell, call in, and convert into money all and every his said real and personal estate; and he directed that they should stand possessed of the residue of his said real and personal estate and of the moneys arising from the sale thereof or of any part thereof if and when sold upon trust, after payment of his debts, funeral and testamentary expenses, and the legacies thereinbefore bequeathed, to invest the residue of the same trust moneys, and out of the interest, dividends, and annual proceeds thereof to pay a life annuity to his wife in satisfaction of her claims on a certain settled sum, which she was to release to his trustees, and he directed them to apply [*1438] that *sum in augmentation and "as part of *the fund to arise from* the residue of his real and personal estate." He then directed his trustees, by and out of the said trust estates, moneys, and premises, to raise six large legacies, and gave the residue of his said real and personal estate to A., his heirs, executors, administrators, and assigns. A. died before the testator. It was held by Sir W. James, L. J., that, as between the heir and next of kin, the annuity and the six legacies were charged on the real and personal estate pro ratâ.

(*y*) Infra, s. vi.
(*z*) Boughton *v.* Boughton, 1 H. L. Ca. 406, reversing 1 Coll. 26; Blann *v.* Bell, 5 De G. & S. 665; Tidd *v.* Lister, 3 D. M. & G. 857; Bentley *v.* Oldfield, 19 Beav. 225; Tench *v.* Cheese, 6 D. M. & G. 453; Ellis *v.* Bartrum, 25 Beav. 110.
(*a*) 6 D. M. & G. 467.
(*b*) L. R., 7 Ch. 439.

Referring to Sir G. Turner's dictum, he said, it had been argued from it that Tench *v.* Cheese established as a rule of law that there must be conversion out and out, but that that was not really necessary for the decision of that case, and that the distinction between an absolute direction and a discretionary power to sell was not there before the Court; that there must be other modes of ascertaining an intention to exonerate the personal estate besides an absolute direction to sell, otherwise the rule would exclude a case in which a testator said expressly that he meant his real estate to be the primary fund (*c*). Here the L. J. thought there was strong evidence of intention to create a mixed fund. The testator "has, in fact, put the whole property into the hands of the trustees as one mixed estate, with a full discretion in them to sell aud apply, if and as they think fit, the whole of the realty *before* they touch a single portion of the personalty;" and "by way of evidencing" the mixed and special character of the fund he had created, he had directed that the settled money should be added to that which he had himself called *the fund to arise from* the residue of his real and personal estate.

Where pecuniary legacies are given, and afterwards "the residue of the real and personal estate," so that under the rule in Greville *v.* Browne (*d*), the legacies are charged on the realty, the realty is liable only in aid of the personalty; unless the testator has directed the payments to be made out of the mixed fund, in which case the realty and personalty are liable pari passu (*e*).

In Falkner *v.* Grace (*f*), a testator gave his real and personal estate in trust to pay one moiety of the rents, dividends, &c., to * A., and out of the other moiety to pay an annuity [*1439] to B., and it was held by Sir G. Turner, V.-C. ("distinguishing the case from Boughton *v.* Boughton"), that the annuity was payable pro ratâ out of the real and personal estates. The ground of this judgment is not reported; but as there are no burdens regularly incident to a *share* of personalty, there was here no primâ facie liability to be negatived. Once divided into shares, the estate is assumed to be no longer assets, but the property of the devisees, subject to the burdens imposed by the will on their respective shares.

Payments directed out of aliquot shares of real and personal estate.

The order in which a testator directs his estate to be administered may be such as impliedly to show that one of two devisees or legatees

(*c*) But of course Turner, L. J., was speaking only of cases where the intention was not express.

(*d*) 7 H. L. Ca. 689, ante, p. 1412. The rule that, in such a case, the legacies are charged on the realty, apparently applies to a gift of legacies, followed by a gift of all the residue of the testator's property and over which he has a power of appointment, Gainsford *v.* Dunn, L. R., 17 Eq. 405; but not where the gift is of *all* the realty and the residue of the personalty, Wells *v.* Row, 48 L. J. Ch. 476.

(*e*) Elliott *v.* Dearaley, 16 Ch. D. 322. See also Re Ovey, Ovey *v.* Broadbent, 31 Ch. D. 113.

(*f*) 9 Hare, 281.

Implied exoneration of a legatee from order of administration directed.

is to have priority over the other, though under the gift simply to them they would have contributed ratably to payment of debts. Thus, in Legh *v.* Legh (*g*) a testator devised his B. estate to certain uses, and he devised his M. estate to trustees upon trust to sell and raise portions for his younger children, *and from and after the complete performance and satisfaction of all and every the trusts, powers, and authorities thereby given and declared, and subject thereto in the first instance*, and also subject to the payment of debts and other legacies, he directed the trustees to stand possessed of the M. estate in trust for his eldest son absolutely. The M. estate was only sufficient to pay the portions and some of the debts, and it was contended that the portions and the B. estate ought to contribute ratably towards remaining debts; but Sir L. Shadwell, V.-C., held that the B. estate was alone liable in the first instance. That this was the true construction is evident from the fact that the testator directed the portions to be paid in priority to the debts, while he must be considered to have known that the law ranked the debts in priority to the devisees of the B. estate, which latter priority he had not disturbed; the order of priority contemplated by him therefore was, (1) portions, (2) debts, (3) devisees of the B. estate; and the property being insufficient for all three classes, the deficiency fell on the devisees in exoneration of the portions.

IV. — Charges, &c., on Estates, when to be paid out of other Funds. — As to the general right of a devisee, in cases not affected by the statute 17 & 18 Vict. c. 113, hereafter stated, to be [*1440] *exonerated from an incumbrance to which the testator, either before or after the making of his will, has subjected the devised estate, there cannot, at this day, be any doubt or controversy. And it is clear that the legatee of any chattel, specially bequeathed, has the same right.

Legatee of an incumbered chattel entitled to claim exoneration.

Thus where a testator holding lands for which he received rent and paid a head-rent, died leaving arrears of rent due to him, which he specifically bequeathed, and also arrears of head-rent due from him, it was held that the latter must be paid out of the general personal estate in exoneration of the specific legatee (*h*).

Arrears of rent not primarily payable by donee of lease.

So a sum due from the testator to his lessor, in respect of a renewal

(*g*) 15 Sim. 125. See also Raikes *v.* Boulton, 29 Beav. 41; Earl of Portarlington *v.* Damer, 4 D. J. & S. 161. Portions or annuities payable out of real estate only, must as a general rule be exonerated from debts out of the estate charged, though, subject to the charge, the estate be specifically devised, Re Saunders-Davies, Saunders-Davies *v.* Saunders-Davies, 34 Ch. D. 482.

(*h*) Barry *v.* Harding, 1 Jo. & Lat. 489; but not so rent falling due after testator's death, see Hawkins *v.* Hawkins, 13 Ch. D. 470, and per Jessel, M. R., L. R., 20 Eq. 316.

granted during the testator's lifetime, is payable out of the general personal estate, in exoneration of a specific legatee of the leasehold (*i*). And the specific legatee of leaseholds, on which the testator had covenanted to build, has been held (*j*) entitled to have the covenant performed at the expense of the general personal estate, although the time for performing the covenant has not expired. But where a lessee was liable for dilapidations at the time of his death, it was held that his specific legatee must himself bear the cost of repairs (*k*).

Nor renewal fines fallen due in testator's lifetime.

Nor the cost of performing a covenant to build.

Secus, as to dilapidations.

Under a gift of leaseholds "free from all outgoings and payments except the annual and other rent," it was held that the legatee was entitled to have only all outgoings up to the time of his taking possession cleared out of the general estate (*l*).

Again, if a testator bequeaths a watch or a painting, and it turns out that at his decease the watch or painting is in pawn, the legatee is entitled to have it redeemed. And by parity of reason if a testator specifically bequeaths a legacy to which he is entitled under a will, and afterwards assigns such legacy by way of mortgage, the legatee may claim to have the mortgage debt liquidated in exoneration of the subject of gift; and it would be immaterial that the mortgage deed contained a power of sale, by * virtue of which the mortgagee might have [*1441] absolutely disposed of the property and thereby have defeated the bequest (*m*); for in all these cases, the mortgage being considered to have been created by the testator for his own convenience, and not for the purpose of subtracting so much from the bequest, the act is not, as between the parties claiming under the will, an ademption pro tanto, and cannot, without at least equal impropriety, be termed a partial revocation, though the latter designation has been commonly applied to it. If, therefore, the testator's right of redemption remain unbarred at his decease, the devisee or legatee is entitled to require that it shall be exercised for his benefit. And if the executor fails to perform this duty the legatee is entitled to compensation (*n*).

Chattel must be redeemed for specific legatee.

Upon the same principle, it has been held that the specific legatee

(*i*) Fitzwilliams *v.* Kelly, 10 Hare, 266. But not fines falling due on renewals effected upon deaths happening after the testator's death, id.

(*j*) Marshall *v.* Holloway, 5 Sim. 196. This case was referred by Turner, V.-C., in Fitzwilliams *v.* Kelly, 10 Hare, 277, to the particular provisions of the will, and not to any general rule of law.

(*k*) Hickling *v.* Bowyer, 3 Mac. & G. 643; and see Hawkins *v.* Hawkins, 13 Ch. D. 470. Cf. Harris *v.* Poyner, 1 Drew. 174, 182.

(*l*) Re Taher, Arnold *v.* Kayess, W. N., 1882, p. 107, 46 L. T. 805; 30 W. R., 883. As to what are included in the term "ordinary outgoings" in a gift of rents, &c., after deducting such, see Re Crawley, Acton *v.* Crawley, 28 Ch. D. 431.

(*m*) Knight *v.* Davis, 3 My. & K. 358. In this case the mortgage was created for the benefit of the legatee himself.

(*n*) Bothamley *v.* Sherson, L. R., 20 Eq. 304.

of shares in a railway company or any other such adventure, on which at the testator's death the whole amount subscribed has not been paid, is entitled to have the future calls paid out of the general personal estate, or any other fund on which the testator may have thrown the burden of his debts (*o*). But this is now considered to have carried the doctrine too far (*p*) Assets would be tied up indefinitely until all possible calls were paid up. It is difficult to suppose that a testator ever intended that: it was therefore held by Sir J. Romilly that the liability of the general estate depended on the question whether the calls were made before or after the testator's death (*q*). And this was followed by Sir R. T. Kindersley, who said the right principle was that if any payment was necessary at the testator's death to constitute him a complete shareholder, it must be made out of his estate; but if he was then a complete shareholder, whether the concern had advanced to working order or not, all calls made after his death must be borne by the specific legatee (*r*). These are incident to the chattel bequeathed like rent to leaseholds (*s*).

Specific legatee, when entitled to have subscription on shares paid up,

— when not.

Sir W. P. Wood, indeed, drew a distinction in Re Box (*t*), where the whole of a testator's personalty, including shares, was [*1442] * given to be enjoyed in specie by one for life, and the shares were given over after her death; in this case he held that calls made during the life of the tenant for life were payable out of the general assets, since the distribution of them was not thereby delayed beyond the time indicated by the testator. He also held that the tenant for life, being entitled to the specific enjoyment of the whole estate, was entitled to say that the shares should not be touched for the purpose of paying calls, and that the payment must be made out of some part not producing so good an income. But this decision is not easily reconcilable with Fitzwilliams *v.* Kelly (*u*), where, under similar circumstances, except that the property was leasehold, and the payment a fine on renewal, it was held by Sir G. Turner, V.-C., that the fine must be borne by the leaseholds alone, the tenant for life (*v*) keeping down the interest. "I do not know," said the V.-C., "how I can hold that the devisee of an estate liable to be defeated (*i. e.*, by the non-payment), has a right against the general estate of his devisor to have that defeasible estate turned into an in-

(*o*) Blount *v.* Hipkins, 7 Sim. 51; Jacques *v.* Chambers, 4 Railw. Cas. 499, 11 Jur. 295, reversing 2 Coll. 435; Wright *v.* Warren, 4 De G. & S. 367; Clive *v.* Clive, Kay, 600.
(*p*) By Sir E. Sugden, 1 Jo. & Lat. 490.
(*q*) Armstrong *v.* Burnet, 20 Beav. 424; Addams *v.* Ferick, 26 Beav. 384.
(*r*) Day *v.* Day, 1 Dr. & Sm. 261.
(*s*) Per Jessel, M. R., L. R., 20 Eq. 316.
(*t*) 1 H. & M. 552.
(*u*) 10 Hare, 266, 276, not cited in Re Box.
(*v*) See also, as to the proportionate liability of tenant for life and remainderman, Harris *v.* Poyner, 1 Drew. 174, 182. But see inf. n. (*z*).

defeasible one, or to be indemnified against the consequences of his own neglect in suffering it to be defeated. The payment of this fine is an element necessarily incident to the preservation of the lease, and the person taking the benefit of the lease must take its burdens also."

Where a testator gave to his partner notice of his intention to exercise an option given to him by the articles of partnership, to purchase the partner's share in the business, but died before completion of the purchase, having by his will bequeathed all his estate and interest in the partnership business in trust for L., it was held by Sir F. North, J., that L. was entitled to the share which the testator was bound to purchase, and to have the same paid for out of the testator's general estate (*x*).

— to payment for share in partnership business which testator was bound to purchase.

Where the person named as legatee repudiates the legacy, he cannot of course be subjected to any of the liabilities attaching to the testator's interest (*y*).

Legatee may escape the burden by declining the legacy.

V. — Exoneration of Mortgaged Property. — 1. *General Rules.* — The points which in cases not falling within the statute 17 & 18 *Vict. c. 113, have been chiefly in controversy and are [*1443] here to be considered, are —

1st, Whether the will indicates an intention that the devisee or legatee shall take cum onere (*z*); and, if not, then, 2dly, Out of what funds he is entitled to claim exoneration (*a*). The courts require very clear expressions in order to fasten the incumbrance on the devisee or legatee of the property in question.

Mortgaged estate, when to be exonerated.

Thus it is settled that a devise of lands, *subject to the mortgage or incumbrance thereupon*, does not so throw the charge on the estate, as to exempt the funds which by law are preferably liable (*b*); the testator being considered to use the terms merely as descriptive of the incumbered condition of the property, and not for the purpose of subjecting his devisee to the burden, — a construction which, though well established, it is probable generally defeats the intention.

Devise *subject to the mortgage.*

(*x*) Re Stevens, Stevens *v.* Keily, W. N., 1888, p. 110.
(*y*) Moffett *v.* Bates, 3 Sm. & Gif. 468.
(*z*) It may happen that a devisee for life is to take cum onere, while a remainderman is entitled to exoneration, see Sargent *v.* Roberts, 12 Jur. 429, 17 L. J. Ch. 117; and vice versa, Whieldon *v.* Spode, 15 Beav. 537.
(*a*) As to the right to exoneration being barred by lapse of time, see Newhouse *v.* Smith, 2 Sm. & Gif. 344.
(*b*) Serle *v.* St. Eloy, 2 P. W. 386; Duke of Ancaster *v.* Mayer, 1 B. C. C. 454; Astley *v.* Earl of Tankerville, 3 B. C. C. 545, 1 Cox, 82; Barnewell *v.* Lord Cawdor, 3 Mad. 453; Phillips *v.* Parker, Taml. 136; Bickham *v.* Crutwell, 3 M. & Cr. 763; Townshend *v.* Mostyn, 26 Beav. 72. See also Lord Eldon's judgments in Milnes *v.* Slater, 8 Ves. 306; Bootle *v.* Blundell, 1 Mer. 227, and Noel *v.* Lord Henley, in D. P., 1 Dan. 336, 12 Pri. 213.

So where a testator having two estates subject to one mortgage devised one estate to A. subject to the payment of part of the debt, and the other to B. subject to the payment of the residue, it was held that this only fixed the proportions in which the estates inter se were to bear the charge, and did not imply that the devisees were to take them cum onere (*c*).

Devise subject to specified part of mortgage.

And even where lands were devised upon trust for sale, and the proceeds were to be applied in the first place to pay off a mortgage debt of 6,000*l.* charged on another estate (*d*), and in the next place to pay off all other mortgages charged on the lands devised, Sir J. Leach, M. R., held that, as it appeared on the whole will that the testator did not intend to exonerate his personal estate from the mortgage debts, the devisees of the residue of the proceeds of the fund were entitled, under the general rule, to have the personalty applied in exoneration of the lands devised (*e*).

Devise upon trust to sell and pay mortgages does not make mortgaged lands primarily liable.

[*1444] * Where an estate in mortgage was devised to A., "he paying the mortgage thereon," Lord Langdale held, that this imposed a condition on the devisee and exonerated the personal estate (*f*); but the decision is directly opposed to two uncited cases (*g*), in which it was held that similar words applied to debts and legacies did not impose a condition.

Effect of words "he paying the mortgage thereon."

Suppose, then, that the will contains no intimation of an intention to the contrary, the devisee of a mortgaged estate is entitled to have the incumbrance discharged out of the following funds: 1st, *The general personal estate* (*h*); 2dly, *Lands expressly devised for payment of debts* (*i*); 3dly, *Lands descended to the heir* (*k*); and 4thly, *Lands devised charged with debts* (*l*): and if

Funds liable to exonerate mortgaged estate.

(*c*) Goodwin *v.* Lee, 1 K. & J. 377.

(*d*) The payment of this mortgage debt was by a codicil expressly thrown on the mortgaged estate in exoneration of the personal estate, and it is presumed, though the report is not clear on the subject, that the personalty was not, in direct contravention of the codicil, held liable to the discharge of this debt.

(*e*) Wythe *v.* Henniker, 2 My. & K. 635. But according to Webb *v.* Jones, post, the decision should have been otherwise, for another reason.

(*f*) Lockhart *v.* Hardy, 9 Beav. 379. See Hatch *v.* Skelton, 20 Beav. 453. See also Re Kirk. Kirk *v.* Kirk, 21 Ch. D. 431, ante, p. 1387, n. (*a*).

(*g*) Bridgman *v.* Dove, 3 Atk. 201; Mead *v.* Hyde, 2 Vern. 120, noticed post.

(*h*) Phillips *v.* Phillips, 2 B. C. C. 273, and cases cited.

(*i*) Serle *v.* St. Eloy, 2 P. W. 386; Lomax *v.* Lomax, 12 Beav. 285; and other cases cited ante, p. 1430.

(*k*) Galton *v.* Hancock, 2 Atk. 424, 427, 430; Davies *v.* Topp, 2 B. C. C. 259, n.; and other cases cited ante, p. 1430.

(*l*) Bartholomew *v.* May, 1 Atk. 487, 1 West, 255; Middleton *v.* Middleton, 15 Beav. 450.

[1] Plimpton *v.* Fuller, 11 Allen, 139; ante, p. 1430, note 1. Under a will directing the payment of all the testator's debts out of his estate, bequeathing the residue of his personal estate to his wife absolutely, and devising his real estate also to her during widowhood, with remainder to his children, a note given by the testator in payment for real estate, and secured by a mortgage thereon, is to be paid out of his personal estate, unless the creditor elects to resort to the real estate. Hewes *v.* Dehon, 3 Gray, 205.

the charge happened to reach the last class of estates, and if the devised mortgaged estate were included therein (as it of course would be if the charge were general), the devisee in question would be liable to contribute ratably with the other devisees (*m*).

But the devisee of a mortgaged estate is not entitled to have it exonerated out of *personalty specifically bequeathed*, — a point which was determined in O'Neal *v.* Mead (*n*), where a testator having devised lands, which he had mortgaged to his eldest son in fee, and bequeathed a leasehold estate to his wife, it was held that the leasehold premises, being specifically bequeathed, were not liable to pay off the mortgage. Not specific legacies;

And à fortiori a specific legatee of incumbered leaseholds cannot call upon a specific legatee of unincumbered leaseholds to contribute towards the liquidation of the mortgage debt affecting the former exclusively; and a direction that the mortgage money shall be paid out of the general personal estate would not confer such right (*o*).

It is clear, also, that the devisee of a mortgaged estate cannot * claim exoneration as against pecuniary legatees. [*1445] Thus, in Lutkins *v.* Leigh (*p*), where the testator, having mortgaged certain lands, devised them to his wife for life, with remainder over, and gave her a legacy of 1,500*l.*, and bequeathed the residue of his personal estate to other persons. The personal estate not being sufficient to pay the 1,500*l.* and liquidate the mortgage, Lord Talbot held that the devisees must take the devised estate cum onere. nor pecuniary legacies;

And, of course, such a devisee is not entitled to call upon the devisees of other lands, not charged by the testator with debts, for contribution, although such other estates were liable to the *creditor* (*q*). It is true that a devisee of incumbered land can only claim exoneration out of property which the creditor of the testator can reach, but the converse of the proposition is not true. nor other devised lands.

The application of descended estates in exoneration of a devised estate has generally been thought to be a hardship upon the heir; but such an opinion can only be maintained on a ground which would go to prove that the estate ought not to be exonerated at all, namely, that the devisee was intended to take cum onere, which is probably in general the case; for if it be admitted that the testator meant the incumbrance to be liquidated, it would seem to follow that the devisee As to descended estates exonerating devised estates.

(*m*) Carter *v.* Barnardiston, 1 P. W. 505; Middleton *v.* Middleton, 15 Beav. 450; Harper *v.* Munday, 7 D. M. & G. 369.

(*n*) 1 P. W. 693; Emuss *v.* Smith, 2 De G. & S. 737, 738.

(*o*) Halliwell *v.* Tanner, 1 R. & My. 633.

(*p*) Cas. t. Talb. 53. See also Lucy *v* Gardner, Bunb. 137; and Lord Loughborough's judgment in Hamilton *v.* Worley, 2 Ves. Jr. 65; Johnson *v.* Child, 4 Hare, 87.

(*q*) Lord Hardwicke's judgment in Galton *v.* Hancock, 2 Atk. 438; Emuss *v.* Smith, 2 De G. & S. 722. In the former case the debt was secured by bond, a circumstance not now a necessary ingredient in the case. Vide ante, p. 1388.

should be placed in the same position as if the mortgage were a debt not affecting the estate, and should only be liable to contribute to or pay it precisely to the same extent as any other claim upon the *general* assets; though the Courts, it will be observed, have not carried the rule quite so far. The extent of the devisee's claim to exoneration seems now to be well defined by the cited cases.

So when an estate *descends* subject to a mortgage, the heir is entitled to exoneration out of those funds which in the established order of application (*r*) are anterior to the descended assets, namely, the general personal estate, and realty expressly devised for the payment of debts (*s*).

Heir entitled to exoneration.

[*1446] * V. — 2. *Exception to the General Rule as to Exoneration, where the Mortgage was created not by the Testator, but by a Prior Owner.* — The principle of the preceding cases, however, extends only to incumbrances created by the testator or ancestor himself; for the claim to exoneration is founded on the notion that the personal estate of the testator who made the mortgage had the benefit of its creation, and therefore shall be the fund to liquidate it; and cases which do not fall within the reason are excluded from the operation of the rule. Thus it is clear that where the estate has come to the last owner, either by devise or descent, incumbered with a mortgage, and he has done no act in his lifetime evincing an intention to make the debt his own, the personal estate (not having had the benefit of the mortgage) will not be liable to pay it; but the devisee or heir of the last owner will take the estate cum onere; nor, it seems, will the act of such last owner, rendering himself personally liable to the debt, even though he be also residuary legatee of the first mortgagor's personal estate, in every instance transfer it to himself as between *his own* representatives, unless such appears upon the whole transaction to have been his deliberate intention (*t*).[1]

Exoneration doctrine does not extend to estates which came to the testator cum onere.

Unless he manifest an intention to adopt the debt.

(*r*) See ante, p. 1430.

(*s*) Hill *v.* Bishop of London, 1 Atk. 621; Chester *v.* Powell, 7 Jur. 389; Yonge *v.* Furse, 20 Beav. 380. The first case is a peculiar one. The mortgaged lands were copyholds (which were not then assets either at law or in equity), and the copyhold heir was held entitled to be exonerated out of lands specifically devised, though merely *charged* with debts. If he had been heir of fee-simple lands, the lands descended would have been liable before the lands charged, see order of liability, ante, p. 1430.

(*t*) Scott *v.* Beecher, 5 Mad. 96; Earl of Ilchester *v.* Earl of Carnarvon, 1 Beav. 209; Earl of Clarendon *v.* Barham, 1 Y. & C. C. C. 688; Swainson *v.* Swainson, 6 D. M. & G. 648. In Bond *v.* England, 2 K. & J. 44, Wood, V.-C., said these decisions (other than Swainson *v.* Swainson, which was a later case), proceeded on the ground that the same party had both funds under his control. This is not easily to be collected from the reports. However, the V.-C. held them not applicable to the case then before him, where the testator had never administered at all to the estate of the original mortgagor, and so could not be said to have ever had his personal estate under his control. This decision, may, however, apparently be regarded as overruled by Swainson *v.* Swainson.

[1] See Hewes *v.* Dehon, 3 Gray, 205, 208.

Thus it has been held that the giving a bond or covenant on the transfer of the mortgage has no such effect (*u*), even though the conveyance on transfer be made free from the old equity of redemption and subject to a new proviso, and include an agreement to pay a higher rate of interest (*x*), or a further sum * be advanced to pay an arrear of [* 1447] interest on such mortgage (*y*), in which case the effect is merely to convert interest into principal; and in Duke of Ancaster *v.* Mayer (*z*) it was so decided, though a small further principal sum was advanced, and a further real security given for the whole.

Acts *not* amounting to adoption.

Nor in such a case is the personal estate of the last owner rendered primarily liable by a covenant or bond given for particular purposes, as upon the apportionment of the debt among several persons entitled to different parts of the property subject to the charge (*a*). Nor where the equity of redemption has become divided among several persons does a new proviso for redemption, providing for reconveyance to each person of his own share, throw the debt upon such persons personally, since it only expresses what the law would imply (*b*).

But in Barham *v.* Earl of Thanet (*c*) *part* of the mortgage debt and *part* of the lands only were transferred, the transferor (or last owner) covenanted to pay the tranferred portion of the debt with interest at a different rate, and there was a new proviso for redemption on payment of that portion with interest at the end of *five* years, the remainder of the debt continuing on the remainder of the old security; and Sir J. Leach held that the last owner had taken the debt upon himself, and that in substance the transaction was not an assignment of part of the original mortgage debt, but a *release* of part of the security and a new mortgage. It is presumed that he considered that nothing could be considered as mere assignment which did not leave

Where debt or security divided into two parts, held a new mortgage.

(*u*) Bagot *v.* Oughton, 1 P. W. 347; Evelyn *v.* Evelyn, 2 id. 664; Leman *v.* Newnham, 1 Ves. 51; Lacam *v.* Mertins, id. 312. See also Robinson *v.* Gee, id. 251; Duke of Ancaster *v.* Mayer, 1 B. C. C. 454; Earl of Tankerville *v.* Fawcett, 1 Cox, 237, 2 B. C. C. 57.

(*x*) Shafto *v.* Shafto, 1 Cox, 207, 2 Cox's P. W. 664, n. This case seems to overrule Donisthorpe *v.* Porter, 2 Ed. 162, where it was held that a bond and covenant and reservation of a new equity of redemption made the personal estate of the heir primarily liable, but the exact nature of the transaction is not stated; it seems to have been a mortgage to a person already entitled to a charge raisable under the trusts of a term.

(*y*) Earl of Tankerville *v.* Fawcett, 1 Cox, 237, 2 B. C. C. 57; and see Shafto *v.* Shafto, supra, where it was held that an arrear of interest due on the death of the devisee in fee was a charge on the mortgaged property, in exoneration of his personal estate; contra as to a devisee for life, or an infant devisee in tail, who must keep down the interest so far at least as the rents and profits will go, Burgis *v.* Mawbey, T. & R. 167. A further sum, advanced for the owner's own personal benefit, will of course remain his own personal debt, Lacam *v.* Mertins, 1 Ves. 312.

(*z*) 1 B. C. C. 454; but see Woods *v.* Huntingford, 3 Ves. 128; and Lushington *v.* Sewell, 1 Sim. 435.

(*a*) Forrester *v.* Leigh, Amb. 171, 2 Cox's P. W. 664, n.; Billinghurst *v.* Walker, 2 B. C. C. 604, as to which see Sir W. Grant's judgment in Earl of Oxford *v.* Rodney, 14 Ves. 425.

(*b*) Hedges *v.* Hedges, 5 De G. & S. 330.

(*c*) 3 My. & K. 607.

the *whole* lands subject to the *whole* debt. Here the equities were certainly altered, for the mortgagor might, as he in fact did, redeem one mortgage without the other.

Again, in Bruce *v.* Morice (*d*) a mortgaged estate was devised to the testator's eldest son in tail, and other lands were de-
[*1448] vised *to trustees, upon trust to sell and pay debts, and pay the surplus to his said son; but if the son should satisfy the creditors, the trustees should desist from the sale. The trustees never acted, and the son entered on both estates, never paid the mortgage debt, but joined in a transfer with a new proviso for redemption and a covenant for payment, with interest at a different rate. It was held by Sir J. K. Bruce, V.-C., that the son's personal estate was primarily liable, on the ground that he must be presumed to have acted as he did in pursuance of the will, which gave him the option of preventing a sale by taking the debts on himself.

Case where held that heir had elected to make debt his own.

In Townshend *v.* Mostyn (*e*) there was at the testator's death a debt of 20,000*l.* secured by mortgage on an estate which had come to him from his father subject to a portion of the debt, the testator having himself created the residue of the debt and covenanted for payment of the whole. Sir J. Romilly, M. R., held that the whole 20,000*l.* had become the debt of the testator, and that the devisee must be exonerated.

Where a testator charges his estate with the payment of his debts, an incumbrance on a real estate devised or descended to him will not be considered as his debt, so as to bring it within the operation of the charge.

Charge of debts confined to testator's own debts.

Thus, in Lawson *v.* Lawson (*f*), where A., being the devisee of real estate which was subject to certain incumbrances, died, leaving the estate so subject, and having by his will charged his real and personal estate with the payment of his debts, and devised the real estate to B., and appointed his wife executrix. The wife having in the administration of the assets paid off the charge on the real estate devised by the first testator, it was held that she was entitled to satisfaction from B., whose estate was thus exonerated; for that A., in charging his estate with his debts, could not intend to incumber it with debts which were not his in contemplation of law.

Acts not amounting to adoption of debt.

And where a person, to whom lands are devised or descend subject to the payment of debts or legacies, executes a bond or promissory note or a mortgage of the devisor's or ancestor's estate to raise money for payment of the

(*d*) 2 De G. & S. 389. The son was also residuary legatee; but as to that see Earl of Clarendon *v.* Barham, 1 Y. & C. C. C. 688; he was also from the first surety for the debt, but the ratio decidendi was that stated in the text.

(*e*) 26 Beav. 72.

(*f*) 3 B. C. Toml. 424. See also Lawson *v.* Hudson, 1 B. C. C. 58; Hamilton *v.* Worley, 2 Ves. Jr. 62, 4 B. C. C. 199.

debts (*g*), or to a legatee to secure his legacy (*h*), he has not by these acts primarily subjected * his personal estate. [*1449] Such also was adjudged to be the result where the heir mortgaged an estate to pay simple contract debts owing by his ancestor to which the real estate was not liable (*i*).

The same doctrine, to a certain extent at least, applies to cases in which the estate was *purchased* by the testator subject to the charge[1] for it has been held that "where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to show an intention to transfer the debt from the estate to himself, as between his heir and executor, but merely that which he must do if he pays a less price for it in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally" (*k*); but at his death the person upon whom the estate devolves, takes it cum onere (*l*).

Rule where testator purchases cum onere.

And it is immaterial whether the covenant with the vendor be to pay the debt or to indemnify him against it (*m*).[2]

Covenant with the *vendor*:

But if the *mortgagee* be a party to the transaction, the vendee covenanting with *him* to pay the debt, and the estate be subjected to a fresh proviso for redemption, it will be considered, with respect to the purchaser's representatives, as a purchase of the whole estate, not of the equity of redemption merely (*n*).

— with the *mortgagee*: this amounts to adoption of debt.

(*g*) Perkyns *v.* Baynton, 2 Cox's P. W. 664, n.; Bassett *v.* Percival, 1 Cox, 268; Noel *v.* Lord Henley, 7 Pri. 241, Dan. 211, 322, 12 Pri. 213.
(*h*) Hamilton *v.* Worley, 2 Ves. Jr. 62, 4 B. C. C. 199; Matheson *v.* Hardwicke, 2 Cox's P. W. 665, n.
(*i*) Earl of Tankerville *v.* Fawcett, 1 Cox, 237, 2 B. C. C. 57.
(*k*) Per Sir R. P. Arden, M. R., in Woods *v.* Huntingford, 3 Ves. 128.
(*l*) Cornish *v.* Shaw, Ch. Cas. 271; Pockley *v.* Pockley, 1 Vern. 36; Duke of Ancaster *v.* Mayer, 1 B. C. C. 454.
(*m*) Tweddell *v.* Tweddell, 2 B. C. C. 101, 152; Butler *v.* Butler, 5 Ves. 534.
(*n*) Parsons *v.* Freeman, 2 Cox's P. W. 664, n., Amb. 115, n., by Blunt, where it appears that there was a separate agreement by the purchaser with the mortgagee, so that the case is not opposed to the authorities cited in the last note, as to which see per Sugden, C., in Barry *v.* Harding, 1 Jo. & Lat. 485, 486. Earl of Oxford *v.* Lady Rodney, 14 Ves. 417; Waring *v.* Ward, 5 Ves. 670, 7 Ves. 332.

[1] But see Thompson *v.* Thompson, 4 Ohio St. 333.

[2] The same is true although the purchaser has paid off part of the incumbrance; and, although the purchaser has even rendered himself liable at law to the mortgagee or creditor for the payment of the mortgage debt, this circumstance will not be sufficient to change the natural course of assets. There must, in addition to all this, be strong evidence of intention to subject the personal estate to the charge; as by an express direction in the will of the purchaser, or by disposition, or by language equivalent to an express direction. Cumberland *v.* Codrington, 3 Johns. Ch. 229. See also McLearn *v.* McLellan, 10 Peters, 625; 1 Story, Eq. Jur. § 576; 2 Story, Eq. Jur. § 1248; Billinghurst *v.* Walker, 2 Bro. C. C. (Perkins's ed.) 604, note (1), 608 609, notes; Fonbl. Eq. b. 3, c. 2, § 1, note (*b*); Keyzey's Case, 9 Serg. & R. 73; Tweddell *v.* Tweddell, 2 Bro. C. C. (Perkins's ed.) 101, 108, and notes; *s. c.* id. 154, note; Ancaster *v* Mayer, 1 Bro. C. C. 454, 467, notes; 4 Kent, 420; Graves *v.* Hicks, 6 Sim. 398; Hamilton *v.* Worley, 4 Bro. C. C. 199; *s. c.* 2 Ves. 62, note (*a*); Gibson *v.* McCormick, 10 Gill & J. 66.

And the same principle of course applies where, upon the purchase the mortgage is transferred to a new mortgagee, who advances a further sum of money.

Thus, in Woods *v.* Huntingford (*o*), where the deceased ancestor, having purchased the equity of redemption in consideration of his agreeing to take upon himself the mortgage debt, afterwards obtained a further sum from the mortgagee, and executed to him a mortgage for the whole; Sir R. P. Arden held that he had made the [*1450] mortgage debt his own, so as to entitle the heir * upon whom the land had descended to have it exonerated out of the personal estate.

From the observations of the M. R. in this case, it is to be inferred that he thought that almost any dealing by a *purchaser* of an equity of redemption with the mortgagee, by which he had rendered himself liable to him to pay the debt, would amount to an adoption of the debt, as between his own representatives. He observed, that in most of the cases collected by Mr. Cox, in his note to Evelyn *v.* Evelyn (*p*), (on which he pronounced a high encomium), the estate had come to the owner *by descent or devise* (*q*).[1]

Distinction between purchaser of equity of redemption and heir or devisee.

But it is clear that an actual dealing with the mortgagee is not essential to render the debt personal to the purchaser, for the same effect will be produced if the transaction between the vendor and vendee is such as to show that the purchase was inclusive of the mortgagee's interest in the land, not of the equity of redemption only, the mortgage *debt forming part of the price of the estate* (*r*).

Debt belongs to purchaser *where it forms part of the price.*

This doctrine was distinctly recognized by Lord Thurlow in Billinghurst *v.* Walker (*s*); but it is difficult to reconcile with that recognition his decision in Tweddell *v.* Tweddell (*t*), that the debt had not been adopted by the purchaser, where the purchase-money, as stated in the recital of the conveyance, included the mortgage debt, although in the testatum clause the consideration was stated to be the

(*o*) 3 Ves. 128. Compare this case with Duke of Ancaster *v.* Mayer, 1 B. C. C. 454, noticed ante, p. 1447, which it is remarkable was not cited by the M. R.

(*p*) 2 P. W. 664, n.

(*q*) The principal exception is Forrester *v.* Leigh, 1753, 2 Cox's P. W. 664 n., Amb. 171, where the testator had purchased several estates subject to mortgages, with regard to one of which he entered into a covenant for payment of the mortgage money, for the purpose *of indemnifying a trustee;* and as to another, which was part only of an estate subject to a mortgage, upon splitting the incumbrance, both parties reciprocally covenanted to pay their respective shares and indemnify each other. Lord Hardwicke thought that these covenants would not have the effect of making the mortgages personal debts of the testator, being entered into for *particular purposes* only.

(*r*) Cope *v.* Cope, 2 Salk. 449; Earl of Belvidere *v.* Rochfort, 5 B. P. C. Toml. 299, but as to which see post, p. 1452.

(*s*) 2 B. C. C. 608.

(*t*) 2 B. C. C. 101, 151. See Sir W. Grant's observations upon this case, in Earl of Oxford *v.* Lady Rodney, 14 Ves. 423.

[1] See 4 Kent, 421; 1 Story, Eq. § 76.

amount of the mortgagor's proportion exclusive of that debt, and the covenant thereinafter contained; and the vendee then covenanted to indemnify the vendor against the payment of the mortgage debt.

Case of Earl of Belvidere *v.* Rochfort.

Still more difficult is it to reconcile with the rule in question, Lord Thurlow's disapproval of Earl of Belvidere *v.* Rochfort (*u*), which was as follows: A. mortgaged to B. for 450*l.* and interest. * A. afterwards agreed [*1451] with C. for the sale of the premises for 900*l.*, and subsequently, in consideration of 900*l.*, conveyed the premises to C. and his heirs. In the covenant against incumbrances the mortgage made to B. was accepted, and it was added, "which said principal money of 450*l.* with interest thereof from the 10th day of February last, past before the date hereof, is to be paid and discharged by the said C. (the purchaser), his heirs and assigns, *out of the consideration money in this present deed expressed*" (*x*). And indorsed on the conveyance was a receipt, signed by A. (the vendor), acknowledging the receipt of the 900*l.* thus, "450*l.* sterling in money on the perfection of the deed, and 450*l. allowed on account of the mortgage.*" C. did not pay off the mortgage debt in his lifetime, and devised the premises to D. in fee, whom he made his residuary legatee and executor. D. also died without paying off the mortgage debt, and by his will devised the estate in question to E. in fee, and bequeathed the residue of his personal estate to F., whom with another he made executors. Lord Lifford decreed that the mortgage was to be considered as the debt of C. (the original purchaser), and that his personal estate, which came to the hands of D., his executor, and since to the hands of F. (the residuary legatee and one of the executors of D.), was liable to its liquidation (*y*). Against this decree F. appealed to the House of Lords, contending that the mortgage was not the debt of C., and, if it were, that E., as the devisee of D., the devisee of C., was not entitled to have it exonerated out of the assets of C., the original testator. On the other side it was insisted that the transaction of C. with A. was upon the face of it a contract, not for the purchase of the equity of redemption only, but of the land itself. The plain intent of the deed was to put the purchaser in the place of the vendor, who was to be no longer liable (*z*), and, that he might not be so, a sufficient part of the purchase-money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage, as fully as if he had himself cove-

Mortgage money held to form part of the price.

(*u*) 5 B. P. C. Toml. 299.

(*x*) It appears from the answer of the defendant in the original cause, that there was a covenant to indemnify the vendor from the debt, but it is not stated in the case, and according to the view in which that circumstance is now regarded, was certainly not material.

(*y*) Wallis, by Lyne, 45.

(*z*) *I. e.*, as between the vendor and vendee, for it is clear they could not affect the right of the mortgagee to resort to the vendor, his original debtor.

nanted to pay it off, and either the vendor or mortgagee might upon that contract have compelled him to pay it off. The decree was affirmed.

[*1452] * Of this case Lord Thurlow has observed (*a*), "The House of Lords were of a different opinion to what I entertain upon this case: the personal estate never was liable, and the party never was liable to an action of covenant. In that case George (*i. e.*, D. in the preceding statement) had a fee simple in the estate; he was capable of giving it after the charges were extinguished; however it was held, *contrary to my opinion*, that the personal estate was liable."

Earl of Belvidere *v.* Rochfort disapproved of by Lord Thurlow.

It is true that the purchaser was not liable to an action of COVENANT *at the suit of the mortgagee* (to whom his Lordship must have referred), who was not a party to the deed. If this be considered necessary, in order to transfer the debt to the purchaser as between his own representatives, it is idle to say that the mortgage money *may* form part of the price between the mortgagor and his vendee. But surely there can be no doubt that the purchaser would be liable to an action *for money had and received*, at the suit of the mortgagee, where, as in Belvidere *v.* Rochfort, the mortgage debt constitutes part of the purchase-money, and is retained by him expressly on account of the mortgagee. To affirm that the mortgage debt does not form part of the price in such a case, is virtually to declare that it never can.

Observations.

Lord Thurlow's disapproval of this case is rendered more extraordinary by the circumstance of his having been the leading counsel *for the respondent* in the appeal, and, it is probable, contributed greatly by the force of his arguments (which are unanswerable) to the result. But the writer cannot help distrusting his own impressions upon the subject, strong as they certainly are, when he finds that the opinion of Lord Thurlow (himself a high authority) has been acquiesced in by Lord Alvanley, who in Woods *v.* Huntingford (*b*) said, "Lord Thurlow intimates his doubt of Lord Belvidere *v.* Rochfort, upon which therefore I shall not rely, *as there are many difficulties occurring against that judgment, though by so high an authority.*"

Observations on Earl of Belvidere *v.* Rochfort.

In Barry *v.* Harding (*c*) the conveyance of the estate to the testator was expressed to be made by the mortgagor and mortgagee, in consideration of the amount of the mortgage money paid to the latter, and of a further sum (stated to be the price of the equity of redemption) paid to the former; but in fact the mortgage money was [*1453] never paid, and the mortgagee never executed * the deed.

Conveyance in consideration of mortgage money and another sum, but mortgagee does not execute.

(*a*) See Tweddell *v.* Tweddell, 2 B. C. C. 107.
(*b*) 3 Ves. 131.
(*c*) 1 Jo. & Lat. 475.

Under these circumstances Sir E. Sugden held that there was no contract between the vendor and purchaser to make the mortgage money the debt of the latter, the only contract was that it should be immediately paid, and he held that this did not throw the debt personally on the purchaser.

It were much to be wished, that instead of adopting a rule out of which have grown so many distinctions, the Courts originally had said, that, wherever a man purchases an equity of redemption, since he is liable in equity, whether he makes an express stipulation or not (*d*), to indemnify the vendor from the payment of the mortgage debt, and his own personal estate has in effect had the benefit of the reduced price of the estate, the debt has become for all purposes his own. But whatever be the purchaser's intention on the subject, such intention should, in order to avoid dispute, be distinctly expressed in the deed by which the equity of redemption is conveyed to him.

General remark on the doctrine.

The statute 17 & 18 Vict. c. 113 has rendered these distinctions comparatively unimportant. For even assuming the purchaser to have made the debt his own, it seems that the statute interposes, and, unless a contrary intention is signified by some further act of the deceased, makes the mortgaged land the primary fund for payment of the charge upon it (*e*).

V. — 3. *Exception to the General Rule as to Exoneration, where the Mortgage Money never went to augment the Mortgagor's Personal Estate.* — Another exception to the general rule is where the mortgage money never was strictly a debt but merely money agreed to be settled, even though the security comprise a covenant for payment. In such cases the mortgaged property is primarily charged. Thus where a testator on the marriage of his daughter agreed to secure to trustees 6,000*l.* for her marriage portion, to be paid at the end of twelve months after his death, and for that purpose devised certain lands to the trustees for a term of years by way of mortgage for securing the principal sum and interest, for the payment of which he also bound himself personally by covenant, and then devised the lands subject to the charges and incumbrances existing thereon, Sir L. Shadwell, V.-C., said the covenant was a mere matter of form and only auxiliary, and that at the time the charge was created it was not the personal debt of the party, but merely a provision by settlement * which must be satisfied out of the property on [*1454] which it was secured (*f*).

Money settled and secured by mortgage held primarily a charge on the land.

(*d*) See Lord Eldon's judgment in Waring *v.* Ward, 7 Ves. 337.
(*e*) Per Romilly, M. R., in Hepworth *v.* Hill, 30 Beav. 483.
(*f*) Graves *v.* Hicks, 6 Sim. 398; and Coventry *v.* Coventry, 2 P. W. 222, 1 Stra. 596; Edwards *v.* Freeman, 2 P. W. 437; Lanoy *v.* Duke of Athol, 2 Atk. 444; Lechemere *v.* Charlton, 15 Ves. 193; Loosemore *v.* Knapman, Kay, 123.

Money raised under power by tenant for life not his personal debt; nor money previously charged, and to which the settlement is made subject. Contra, where a covenant to pay the charge.

Again, where a tenant for life of settled property raises by mortgage under a power a sum of money for his own use, and covenants for payment of it, his personal estate is not primarily liable, though it received the benefit (*g*); and the same holds with respect to a debt incurred and secured on the property by the settlor himself, prior to the settlement, which is afterwards made expressly subject to the charge (*h*), and if the settlor subsequently pays off any of the charges he becomes himself an incumbrancer to that extent (*i*). On the other hand where the settlement contains a covenant for payment of the charge by the settlor his personal estate is primarily liable (*j*).

Whether failure of limitations in lifetime of tenant for life affects primary liability of land, and vice versa.

Where a tenant for life with a power to charge and (after intermediate limitations) the remainder in fee to himself creates a charge, and afterwards by failure of the intermediate limitations becomes entitled in fee, it does not seem certain whether his personal estate would be primarily liable; clearly if he had died tenant for life it would not (*k*), and perhaps even the devolution upon him during his life of the fee simple in possession would not be held to change the order of liability (*l*). In the converse case, namely, where a settlor with reversion in fee to himself covenants to discharge the settled estate from an incumbrance primarily charged thereon, and afterwards by failure of the limitations in his lifetime becomes again entitled to the inheritance, it seems less open to question that his personal liability ceases, since the money would be at home in the hands of the covenantor (*m*).

[*1455] * II. — 4. *Locke King's Act and the Amending Acts.* — By statute 17 & 18 Vict. c. 113, it was enacted, that "When any person shall, after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall

Stat. 17 & 18 Vict. c. 113, making mortgage debts primarily chargeable on land.

(*g*) Jenkinson *v.* Harcourt, Kay, 688; in this case the power was an absolute power over the whole estate, which makes it stronger, as more nearly approaching a mortgage by an owner in fee.

(*h*) Vandeleur *v.* Vandeleur, 9 Bli. N. S. 157, 3 Cl. & Fin. 82; Ibbetson *v.* Ibbetson, 12 Sim. 206; and see Lewis *v.* Nangle, 1 Cox, 240; Alen *v.* Hogan, Ll. & Go. t. Sugd. 231.

(*i*) Id.; Redington *v.* Redington, 1 Ba. & Be. 131; per Lord Eldon, Ex parte Digby, Jac. 235; Jameson *v.* Stein, 21 Beav. 5: in Vandeleur *v.* Vandeleur, the settlor paid off some of the charges, and declared such payment to be in ease of the estate, and the remainder only continued on the estate.

(*j*) Barham *v.* Earl of Clarendon, 10 Hare, 126; the covenant need not, it is conceived, be an express covenant for payment of the charge, the ordinary covenants for title would have the same effect.

(*k*) See per Lord Redesdale, Noel *v.* Lord Henley, Dan. 331, 332; Lady Langdale *v.* Briggs, 8 D. M. & G. 391.

(*l*) See Scott *v.* Beecher, 5 Mad. 96; Lord Ilchester *v.* Lord Carnarvon, 1 Beav. 209. But see per K. Bruce, V.-C., 1 Y. & C. C. C. 711.

(*m*) Per Turner, V.-C., Barham *v.* Earl of Clarendon, 10 Hare, 133.

not by his will or deed or other document have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person (*n*), but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the 1st of January, 1855."

Copyholds are within this act (*o*), but the words "heir or devisee to whom such lands or hereditaments shall descend or be devised," had the effect of excluding leaseholds (*p*), and a share of money to arise by sale of land previously settled on trust to sell (*q*), although the preceding words "interest in land or hereditaments" would have included them.

Includes copyholds.

The act applies to an equitable mortgage by deposit of title deeds (*r*); but it appeared doubtful whether the words "charged by way of mortgage" covered a charge under which foreclosure was * not the remedy, *e. g.*, a conveyance on trust for sale. A vendor's lien for unpaid purchase-money, though an incumbrance (*s*), or charge (*t*), was clearly not within those words (*u*). And land charged by will generally with debts and legacies, and so devised, is not, in the hands of the devisee, land charged with a sum by way of mortgage, within the act, unless and until the amount is ascertained and the devisee has "expressly taken the estate subject to such ascertained charge" (*v*).

Equitable mortgage.

[*1456]

Trust for sale.

Vendor's lien.

General charge of debts.

(*n*) *I.* e., other than that so descended or devised, per Jessel, M. R. 9 Ch. D. 17.
(*o*) Piper *v.* Piper, 1 J. & H. 91.
(*p*) Solomon *v.* Solomon, 33 L. J. Ch. 473; Gall *v.* Fenwick, 43 L. J. Ch. 178; Hill *v.* Wormsley, 4 Ch. D. 665.
(*q*) Lewis *v.* Lewis, L. R., 13 Eq. 218.
(*r*) Pembroke *v.* Friend. 1 J. & H. 132; Coleby *v.* Coleby, L. R., 2 Eq. 803 (though in terms as "collateral security" for money lent on promissory note); Davis *v.* Davis, W. N. 1876, p. 242. Foreclosure is the regular remedy under an equitable mortgage, whether the deposit is or is not accompanied by an agreement to execute a legal mortgage, Pryce *v.* Bury, L. R., 16 Eq. 153 n.; Lees *v.* Fisher, 22 Ch. D. 283.
(*s*) Barnwell *v.* Iremonger, 1 Dr. & Sm. 255.
(*t*) Landowners W. of England & S. Wales Land Drainage, &c., Company *v.* Ashford, 16 Ch. D. 411.
(*u*) Hood *v.* Hood, 26 L. J. Ch. 616.
(*v*) Hepworth *v.* Hill, 30 Beav. 476. And see Re Dunlop, Dunlop *v.* Dunlop, 21 Ch. D. 583, 590. The point here decided seems not to be touched by the subsequent acts.

The contrary or other intention required to exclude the operation of this act was held to be signified if a testator gave the residue of his real and personal estate (*x*), or his personal estate (*y*), upon trust for, or charged with, the payment of his debts, without express reference to mortgage debts.

What words will exclude the statute.

But the stat. 30 & 31 Vict. c. 69, after reciting that doubts might exist upon the construction of the former act, and that it was desirable that such doubts should for the future be removed, enacts (s. 1) that in the construction of the will of any person dying after 31st December, 1867, "a general direction that the debts or that all the debts of the testator shall be paid out of his *personal* estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate;" and (s. 2) that "in the construction of the said act and of this act the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a *testator*."

Explanatory stat. 30 & 31 Vict. c. 69.

Vendor's lien.

"The meaning of sect. 1 (said Sir G. Giffard, V.-C.), though not so happily expressed as it might be, appears to be this, that if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary [*1457] to the rule laid down by * L. King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to or describe them" (*z*). And although the act speaks only of the insufficiency of a direction to pay debts out of *personal* estate, it has been decided that a direction to pay out of real estate, or out of real and personal estate, is also insufficient to exonerate the mortgaged property, unless mortgage debts are expressly or impliedly referred to (*a*). It has also been held that such a reference cannot be implied from a direction to pay the debts "in aid of the personal and in exoneration of the real estate" (*b*), or simply "in exoneration of the real estate" (*c*). But where a testator

What words exclude the statutes.

(*x*) Stone *v.* Parker, 1 Dr. & Sm. 212; Allen *v.* Allen, 30 Beav. 395; Newman *v.* Wilson, 31 Beav. 33, Re Nevill, Robinson *v.* Nevill, W. N., 1890, p. 125.

(*y*) Smith *v.* Smith, 3 Gif. 263; Mellish *v.* Vallins, 2 J. & H. 194; Eno *v.* Tatham, 3 D. J. & S. 451; Moore *v.* Moore, 1 D. J. & S. 602; overruling Rawson *v.* Harrison, 31 Beav. 207. But not by a mere direction that his debts should be paid as soon as might be, Pembroke *v.* Friend, 1 J. & H. 132; Coote *v.* Lowndes, L. R., 10 Eq. 376; or should be paid out of his estate, Woolstencroft *v.* Woolstencroft, 2 D. F. & J. 347; Brownson *v.* Lawrance, L. R., 6 Eq. 1.

(*z*) Nelson *v.* Page, L. R., 7 Eq. 25.

(*a*) Re Newmarch, 9 Ch. D. 12, Gall *v.* Fenwick, 43 L. J. Ch. 178; Re Rossiter, 13 Ch. D. 355. See also Sackville *v.* Smyth, L. R., 17 Eq. 153 (better reported on this point 43 L. J. Ch. 494), where however the will drew a distinction between incumbrances on real estate and other debts; and per Malins, V.-C., Lewis *v.* Lewis, L. R., 13 Eq. 227. And see now 40 & 41 Vict. c. 34, stated post.

(*b*) Re Newmarch, 9 Ch. D. 12, dub. Baggallay, L. J.

(*c*) Re Rossiter, 13 Ch. D. 355.

bequeathed the residue of his personal estate subject to the payment of his "trade debts," and died, having after the date of his will deposited with his bankers the title deeds of real estate to secure an overdrawn trade account, it was held by Sir F. North, J., that there was a sufficient declaration of contrary intention, so as to exonerate the real estate from the banker's lien (*d*).

The word "testator" as used in sect. 2 was another of the "unhappy" expressions occurring in these acts. Its effect was to exclude a lien for purchase-money where the purchaser died intestate (*e*). Moreover, this act omitted to provide for the case of leaseholds excluded from the first.

Where a testator having contracted to purchase certain land specifically devised it, and died without having completed the purchase, and an action was brought by the vendor for specific performance but was compromised, upon the terms that the vendor should have the deposit and his costs, and that the contract should be rescinded; in an action for the administration of the testator's estate, the devisees contended that they were entitled to a sum out of the personal estate equivalent to the unpaid purchase-money; but Sir E. Kay, J., held that there was a vendor's lien, and accordingly that this act applied, so that all to which the devisees were entitled (irrespective of the compromise, * which was of itself [*1458] fatal to their claim), would have been the land charged with the purchase-money, and therefore, on the facts, to nothing (*f*).

Devise of land contracted to be purchased where contract is rescinded after testator's death.

By yet another act, therefore, it is provided (*g*) that the former acts "shall, as to any testator or intestate dying after 31st December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure (*h*) which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, including any lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said acts have signified a contrary intention (*i*); and such contrary intention shall not be

Amending act 40 & 41 Vict. c. 34.

Includes leaseholds;

— any equitable charge.

(*d*) Re Fleck, Colston *v.* Roberts, 37 Ch. D. 677.

(*e*) Harding *v.* Harding, L. R., 13 Eq. 493.

(*f*) Re Cockroft, Broadbent *v.* Groves, 24 Ch. D. 94. As to the expression of "contrary intention" being restricted to *testators* in the case of a vendor's lien, see id. at p. 100.

(*g*) 40 & 41 Vict. c. 34.

(*h*) By virtue of this amending act, Locke King's Act extends to leaseholds, Re Kersbaw, Drake *v.* Kershaw, 37 Ch. D. 674.

(*i*) It is to be observed that under the principal act, the contrary intention may in the case of a mortgage be signified by "will, deed, or other document." But this act seems to limit the exception of the expression of a contrary intention to a *testator*, so that such expression

deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate."

Where the contrary intention is shown by the substitution of another fund, the question arises, is the act ousted altogether, so that exoneration may be claimed generally out of the other assets in the order appointed by the old law; or is the act excluded only to the extent of the substituted fund, so that if this proves insufficient the right to exoneration is exhausted and the burden comes back at once to the mortgaged land? In Allen *v.* Alleu (*k*) Sir J. Romilly, without deciding the question, took pains to show that his opinion was in favor of the former view. But in Rodhouse *v.* Mold (*l*), Sir R. Kindersley decided that the latter was the correct view; and, having regard to the course taken by recent decisions on the acts, this view seems likely to prevail; for if there was once a desire [*1459] to give as little effect to them as possible (*m*), * those decisions show that the desire has now been removed, if not reversed.

The acts do not prescribe any particular means for signifying an intention to exclude the new rule. To ascertain whether such an intention is shown, the whole will (or other document) must, as in other cases, be taken into consideration; and herein the mode in which the mortgaged estate is disposed of is material. Limitations in strict settlement per se are inconclusive (*n*); a trust for sale at a future time, with a detailed disposition of the proceeds after deducting costs (but not alluding to the mortgage), possesses more weight (*o*).

How charge apportioned between the different parts of the land charged;

The first of the three acts directs that every part of the mortgaged hereditament, according to its value, shall bear a proportionate part of the mortgage debts charged on the whole thereof; subject, however, with the other provision of the act, to a contrary or other intention appearing by the will or deed or other document of the person creating the charge (*p*). In Brownson *v.* Lawrance (*q*), it was held by Lord Romilly that the fact of the mortgagor having specifically de-

by *deed or* other document by an *intestate*, would apparently be inoperative in the case of a vendor's lien. See per Kay, J., Re Cockroft, Broadbent *v.* Groves, 24 Ch. D. at p. 100.

(*k*) 30 Beav. 403.

(*l*) 35 L. J. Ch. 67. If the terms used import simply and directly an intention to exonerate the mortgaged land, and do not merely leave that intention to be inferred from the substitution of another fund, there would seem to be less difficulty in holding the act to be wholly excluded.

(*m*) See per Jessel, M. R., Gall *v.* Fenwick, 43 L. J. Ch. 179.

(*n*) See per Wood, V.-C., Pembrooke *v.* Friend, 1 J. & H. 134; Coote *v.* Lowndes, L. R., 10 Eq. 376.

(o) Eno *v.* Tatham, 3 D. J. & S. 443.

(*p*) On the construction of directions for apportionment of the charge between the different estates charged, see Woodward *v.* Woodward, 5 Jur. N. S. 1281.

(*q*) L. R., 6 Eq. 1.

vised part of the mortgaged estate, and left the other part to pass by a residuary devise, was of itself an expression of his intention that the part which passed by the residuary devise should be primarily liable to the whole debt. But it is difficult to maintain this since Hensman *v.* Fryer (*r*); and in Sackville *v.* Smyth (*s*), where the mortgagor devised all his real estate to A. subject to a life estate in a specific portion, it was held by Sir G. Jessel, M. R., that the life estate was subject to a proportionate share of the burden, viz., to keep down the interest on the specifically devised portion. He did not agree with Brownson *v.* Lawrance. In Stringer *v.* Harper (*t*), where a testator mortgaged estate A. for 800*l.*, and on the same day created an equitable mortgage on estate B. by way of further security to the extent of 200*l.*, and afterwards by will dated in 1855 devised B. specifically, but made no disposition of A.; it was held by Sir J. Romilly, M. R., that the case depended on the construction of the two written instruments of *even date, and not on the act; that A. was primarily charged, and B. only in aid, for part of the debt. [*1460]

The acts do not expressly provide for the common case of a mortgage including both land and personal chattels. But it has been held that the debt must in such a case be apportioned between the land and the chattels (*u*). The words in the first act which make the mortgaged *land* as between the different persons claiming through or under the deceased person primarily liable to *all* mortgage debts charged thereon, and which by themselves might seem to require exoneration of the chattels by the land, must, it should seem, on a fair interpretation, be controlled by the preceding clause, which defeats the old right of the heir or devisee to exoneration, and which is the governing clause.

—where real and personal property are mortgaged together.

Considering that the clause last referred to was the substantial part of the enactment, Sir R. Kindersley held that, notwithstanding the words "as between the persons claiming *through or under* the deceased," the act applied in favor of the Crown taking the personalty for want of next of kin (*x*).

Acts apply in favor of the Crown, where no next of kin.

The concluding proviso of the first act declares that nothing contained in the act shall affect the rights of persons claiming under

(*r*) L. R., 3 Ch. 420, ante, p. 1431, n. (*x*).

(*s*) L. R., 17 Eq. 153, 43 L. J. Ch. 494; and see per Malins, V.-C., Gibbins *v.* Eyden, L. R., 7 Eq. 375; See also Re Smith, Hannington *v.* True, 33 Ch. D. 195.

(*t*) 26 Beav. 33.

(*u*) Trestrail *v.* Mason, 7 Ch. D. 655; Leonino *v.* Leonino, 10 Ch. D. 460. See also Lipscomb *v.* Lipscomb, L. R., 7 Eq. 501; Evans *v.* Wyatt, 31 Beav. 217; Gall *v.* Fenwick, 43 L. J. Ch. 178; the last two being cases of freeholds and leaseholds before the latter were brought within the Acts. In Lipscomb *v.* Lipscomb, and Leonino *v.* Leonino, there was also a question whether on the construction of the mortgages themselves the several mortgaged properties were made liable in any particular order. And see ante, p. 1434, n. (*p*).

(*x*) Dacre *v.* Patrickson, 1 Dr. & Sm. 186.

To what cases the second proviso in the first act applies.

any will, deed, or document made before January 1st, 1855. The new rule therefore cannot apply to any case where a testator dying after 1854 has by will dated before 1855 disposed of the mortgaged property specifically or has made a general residuary devise of his real estate. And a will made before 1855 is not the less within the proviso for having been republished by codicil dated since 1854 (*y*). But the new rule does not apply as against the heir if the mortgagor dies intestate, although the property was purchased and mortgaged by the latter before 1855; for on the true construction of the act the heir claims immediately by descent, and not under the deed of convey-
[*1461] ance (*z*). The new *rule has also been held to apply, as against the heir, to the case of a testator dying after 1854 and having by will made before 1855 made a general residuary bequest of his personal estate, but died intestate as to his mortgaged estate, although the rights of the residuary legatee were thus "affected" by the act. "Affect," it was said, must mean prejudicially affect; otherwise the proviso would defeat the plain object of the legislature (*a*). But primâ facie "affect" is neutral (*b*), and it does not seem that in this particular proviso the object of the legislature is so very plain.

There is no corresponding proviso in either of the amending or explanatory acts. Scotland is excepted from all. And the new rule does not apply to chattels personal, which therefore, if pledged or mortgaged by the testator, must still be redeemed for a specific legatee at the expense of the general personal estate (*c*). The law therefore is certainly not simplified.

Statutes do not apply to Scotland; — nor to personal chattels.

VI. — What is a sufficient Indication of a Testator's Intention to exempt the Personal Estate from its primary Liability to Debts, &c. — 1. *Addition of Fund: Mere Charge on Land, &c.* — The next subject of inquiry is as to what will exempt the general personal estate from its primary liability to debts and other charges, for which the testator has provided another fund; in other words, what demonstrates an intention that such primary liability shall be transferred to the fund in question; a point which, it will be seen, has been a prolific source of litigation.

What will exempt personal estate.

That the making a provision for debts or legacies out of the real estate does not discharge the personalty, is implied in the very terms

(*y*) Rolfe *v.* Perry, 3 D. J. & S. 481.
(*z*) Piper *v.* Piper, 1 J. & H. 91; what was the precise meaning of "deed or document" in this proviso was not thought an easy question. See also Nelson *v.* Page, L. R., 7 Eq. 25, where the mortgaged estate was purchased in 1842, and had not *lapsed*, as would appear by the head-note, since the will was made in 1835.
(*a*) Power *v.* Power, 8 Ir. Ch. Rep. 340.
(*b*) See ante, Vol. I., p. 44, n. (*f*).
(*c*) Lewis *v.* Lewis, L. R., 13 Eq. 218.

of this question. There must be an intention not only to onerate the realty, but to exonerate the personalty; not merely to supply another fund, but to substitute that fund for the property antecedently liable.

Addition of another fund does *not*.

Thus in numerous cases it has been held that neither a charge of debts on the testator's lands generally, or on a specific portion of them (*d*), nor a devise upon trust for sale, however formally * or anxiously framed (*e*), nor [*1462] the creation of a term of years for the purpose of such charge (*f*), will exonerate the personalty.[1]

Mere charge on land does not exonerate personalty.

Nor is it material that the charge is imposed on the devisee in the terms of a condition, as where real estate is devised to A., he paying the debts and legacies (*g*).

In order to exonerate the personal estate, the very early cases required express words (*h*); but this rule was subsequently relaxed, not only by the admission of implication, but that implication was held to be raised by circumstances of a very slight and equivocal character, affording little more than conjecture (*i*). Judges of a later period, however, feeling the evils to which this latitude of interpretation had given rise, and proceeding upon sounder principles of construction, have, without rejecting implication, required that it should be supported by such evidence, collected from the will, as ought fairly to satisfy a judicial mind of the testator's intention. A wish has been sometimes intimated, that the old rule had been restored, but this was impracticable in the state of the authorities, and perhaps would have been hardly consistent with right principles of construction for it is difficult to perceive any solid ground for excluding implication in this more than in any other species of case. The evil seems to have consisted in the extreme laxity with which the implication doctrine was at one period applied, which tended in effect to subvert altogether the rule establishing the primary liability of the personal estate; but this has been so far cor-

History of the implication doctrine.

(*d*) White *v.* White, 2 Vern. 43; French *v.* Chichester, id. 568; Bridgman *v.* Dove, 3 Atk. 201; Walker *v.* Hardwick, 1 My. & K. 396, Ouseley *v.* Anstruther, 10 Beav. 453; Quennell *v.* Turner, 13 id. 240. See also Kilford *v.* Blaney, 31 Ch. D. 56.

(*e*) Lord Inchiquin *v.* French, 1 Cox. 1, 1 Wils. 82, Amb. 33; Samwell *v.* Wake, 1 B. C. C. 144; Hancox *v.* Abbey, 11 Ves. 186; Collis *v.* Robins, 1 De G. & S. 131. The rule that a charge of debts on real estate does not of itself exonerate the personal estate applies where a charge for payment of debts after the grantor's death is created by deed, Trott *v.* Buchanan, 28 Ch. D. 446.

(*f*) Tower *v.* Lord Rous, 18 Ves. 132.

(*g*) Bridgman *v.* Dove, 3 Atk. 201; Mead *v.* Hide, 2 Vern. 120; Watson *v.* Brickwood, 9 Ves. 447; but see Lockhart *v.* Hardy, 9 Beav. 379, ante, p. 1444.

(*h*) Fereyes *v.* Robinson, Bunb. 301.

(*i*) Adams *v.* Meyrick, 1 Eq. Ca. Ab. 271, as to which, see 2 Atk. 626; 3 Ves. 110; Walker *v.* Jackson, 2 Atk. 624, and the other cases referred to post.

[1] See Hanna's Appeal, 31 Penn. St. 53; Plimpton *v.* Fuller, 11 Allen, 139; Hewes *v.* Dehon, 3 Gray, 205; Ancaster *v.* Mayer, 1 Bro. C. C. (Perkins's ed.) 454, and Mr. Belt's note (2); Ram on Assets, c. 3, § 5, pp. 41, 42; Kidney *v.* Coussmaker, 1 Ves. (Sumner's ed.) 436, note (*a*); ante, p. 1430, note 1.

rected by later adjudications, as greatly to diminish the uncertainty which the numerous cases occurring on the subject indicate to have prevailed half a century ago (*k*). From the nature of the question, however, which is ever presenting itself under new combinations of circumstances, it is even now often attended with no little perplexity.

It is well settled that the intent is to be collected from [*1463] the * whole will (*l*), and must appear by "evident demonstration," "plain intention," or "necessary implication;" though it must be confessed, that such propositions rather change the terms than afford a solution of the question; for upon being told that the implication must be necessary, or must amount to evident demonstration, we are inevitably led to inquire what in judicial construction has been held to constitute such "necessary implication," or "evident demonstration;" the answer to which must be an appeal to the cases.[1]

Rule now established.

It has also long been established, in opposition to some early decisions (*m*), that in order to exonerate the personalty parol evidence is not admissible (*n*), and that no inference of intention can be drawn from the relative amount of the personal estate and debts, or of the personal and real estate (*o*); for the fact that the charges will exhaust the whole subject-matter of the residuary bequest does not vary the construction.

Parol evidence inadmissible.

This was decided in Tait *v.* Lord Northwick (*p*), which is a leading authority on the general doctrine. The testator appointed cer-

(*k*) This was written in 1827, 2 Powell Dev. by Jarm. p. 683.

(*l*) Though this has been frequently stated as a rule peculiarly applicable to particular classes of cases, yet the student should be reminded that it is not confined to *any* class of cases, for it would not be possible to specify any point of testamentary construction which is excluded from its operation; nor is it of novel or recent introduction, for the old authorities never denied the effect of the context to express a particular intention, or control particular expressions. One cannot help, therefore, feeling some surprise that Lord Eldon should treat the applicability of this rule to the cases under consideration as a discovery of Sir W. Grant. "We have," said his Lordship in Gittins *v.* Steele, 1 Sw. 28, "now reached the sound rule, that for the purpose of collecting the intention every part of the will must be considered. That rule was first established by the great judge whom we have just lost, the late Master of the Rolls."

(*m*) Gainsborough *v.* Gainsborough, 2 Vern. 252. In Granville *v.* Beaufort, id. 648, the evidence was admitted only to rebut an equitable presumption, which was allowable, see ante, Vol. I., p. 391.

(*n*) Inchiquin *v.* French, 1 Cox, 1, 1 Wils. 82, Amb. 33; Stephenson *v.* Heathcote, 1 Ed. 39.

(*o*) Cro. El. 205; Cowp. 833; 1 Cox, 9; 2 B. C. C. 273, 297; 2 Ves. Jr. 593; 3 Ves. 299; 1 Ed. 43; 1 Ba & Be. 315, 542; 1 Mer. 222, which overruled Pre. Ch. 101; Cas. t. Talb. 202; 1 B. C. C. 457, n.

(*p*) 4 Ves. 618.

[1] See among the cases, Watson *v.* Brickwood, 9 Ves. (Sumner's ed.) 447; Hartley *v.* Hurle, 5 Ves. (Sumner's ed.) 540. note (*a*), and cases cited; Howe *v.* Dartmouth, 7 Ves. (Sumner's ed.) 137, note (*c*); 4 Kent, 421; Milnes *v.* Slater. 8 Ves. 295; Stevens *v.* Gregg, 10 Gill & J. 143; Tessier *v.* Wyse, 3 Bland. 28; Garnett *v.* Macon, 2 Brock. 185; *s. c.* 6 Call, 208; McCampbell, *v.* McCampbell, 5 Litt. 97; 1 Story, Eq. Jur. § 571; Rogers *v.* Rogers, 1 Paige, 188; Hoye *v.* Brewer, 3 Gill & J. 153; Lupton *v.* Lupton, 2 Johns. Ch. 614; McKay *v.* Green, 3 Johns. Ch. 66; Livingstone *v.* Newkirk, 3 Johns. Ch. 312; Stroud *v.* Barnett, 3 Dana, 394; Schermerhorn *v.* Barhydt, 9 Paige, 29, 49; Chase *v.* Lockerman, 11 Gill & J. 185; Kidney *v.* Coussmaker, 1 Ves. Jr. 436, note (*a*); Hancock *v.* Minot, 8 Pick. 29, 37, 38.

tain estates to trustees, upon trust by sale or mortgage thereof or by sale of timber thereon *to pay his debts*, and directed the trustees to convey the lands not so applied to certain uses. He gave 100*l.* to each of his trustees, and all the residue of his personal estate whatsoever between his two sisters, and appointed two of the trustees executors. Lord Loughborough held that the personal estate was first to be applied, as far as it would go, to pay the debts.

Relative amount of debts and personalty not to be considered.

But in Gray *v.* Minnethorp (*q*), the same Judge thought that where the purchase-money of an estate, devised in trust to be * sold to pay debts and certain pecuniary legacies, was [*1464] inadequate to pay the debts alone, this circumstance furnished an argument *against* exempting the personal estate. Such an argument, however, seems to be obnoxious to the reasoning which applies against making the amount of the personal estate a ground *for* the exemption; since the adequacy of the fund to pay debts must depend upon the amount of those debts at the death of the testator, and their amount at that period can afford no indication of his intention when he made his will.

VI.—2. *Extension of Charge to Funeral and Testamentary Expenses.* — It is clear that the charging the land with (in addition to debts) *funeral* or *testamentary* expenses or both, will not per se exempt the personalty; for although it seems improbable that the testator should mean to create an *auxiliary* fund to answer expenses which are payable out of the personal estate in priority to all other claims, and which it could hardly be insufficient to liquidate, yet such an argument amounts only to conjecture, and falls short of that necessary implication which is now held to be requisite to transfer the primary onus to the new fund.

Mere extension of the charge to funeral and testamentary expenses not sufficient.

Many opinions have been expressed on this point. Thus Lord Hardwicke in Walker *v.* Jackson (*r*) remarked that the words "debts, legacies, and funeral expenses" were only words of style, an observation in which Sir W. Grant in Brydges *v.* Phillips (*s*) seems to have concurred. The circumstance of funeral expenses being included in the charge was also disregarded by Lord Northington in Stephenson *v.* Heathcote (*t*), and by Lord Kenyon in Williams *v.* Bishop of Llandaff (*u*) (though the latter Judge decided in favor of the exemption, on grounds perhaps not less equivocal), and by Lord Manners in Aldridge *v.* Wallscourt (*x*). On the other hand, Sir R. P. Arden in Burton *v.* Knowlton (*y*) thought a direction to pay funeral expenses a strong

As to funeral expenses, &c., being included.

(*q*) 3 Ves. 103.
(*s*) 6 Ves. 570.
(*u*) 1 Cox, 254.
(*y*) 3 Ves. 108.
(*r*) 2 Atk. 624.
(*t*) 1 Ed. 38.
(*x*) 1 Ba. & Be. 312; post, p. 1472.

circumstance in favor of the exemption where the trustees of the fund, on whom the direction was imposed, were not the executors, to whose duty it naturally belonged. This case, however, has been commented upon both by Lord Loughborough (*z*) and Lord [*1465] Eldon (*a*) in terms which throw great doubt upon its * authority; and, if it rest on this ground (and it is difficult to find one more solid), the decision is clearly overruled by the cases already referred to and those which remain to be stated.

Thus, in Gray *v.* Minnethorpe (*b*), where the testator devised certain lands to W. and J. and their heirs, in trust to sell, and out of the moneys arising therefrom to pay all his just debts and *funeral expenses*, and the residue over, and appointed his brother G. sole executor; Lord Loughborough held that the executor did not take the personal estate exempt from debts.

So, in Hartley *v.* Hurle (*c*), where the testator directed that all his just debts *and funeral and testamentary expenses* be in the first place fully paid and satisfied, and then, after making a certain bequest, devised all his lands and hereditaments and moneys in the funds to A. and B., upon trust out of the rents of his lands and the dividends of his moneys to pay all his *just debts*, FUNERAL AND TESTAMENTARY EXPENSES, *and certain legacies* (*d*), and the residue over. After other bequests, the testator devised and bequeathed all the residue of his real and personal estate not by him otherwise given and disposed to C. his daughter, and he appointed A., B., and C., executors. Sir R. P. Arden, M. R., held that the residuary personal estate was not exempt from the payment of debts.

The M. R. distinguished this case from Burton *v.* Knowlton (*e*), on the ground of the general introductory words, which he said were a direction to *the executors* to pay the debts, &c., and therefore favored the non-exemption (*f*); but we have seen that a direction in such terms, followed by the appropriation of a particular fund for the purpose, has reference to the provision so made (*g*). Such a distinction is clearly untenable.

Remark on Hartley *v.* Hurle.

So, in M'Leland *v.* Shaw (*h*), where a testatrix devised certain lands to trustees to sell, and out of the money arising from such sale "in the first place" desired her FUNERAL EXPENSES *and the debts which she should owe at her death, to be paid;* secondly, she directed the payment of several sums to persons who were creditors of her late husband.

Personalty held not exempt, though charge extended to funeral expenses.

(*z*) See Tait *v.* Lord Northwick, 4 Ves. 823, 4 R. R. 358.
(*a*) Bootle *v.* Blundell, 1 Mer. 229. See also Kilford *v.* Blaney, 31 Ch. D. 56, 63.
(*b*) 3 Ves. 103.
(*c*) 5 Ves. 540.
(*d*) The legacies were held to be payable out of the real estate *only*, see post.
(*e*) 3 Ves. 107. See post.
(*f*) See an observation upon this, supra.
(*g*) Ante, p. 1397.
(*h*) 2 Sch. & L. 538.

She then gave several legacies, including one to her executors for their trouble, adding, "the said several sums to be paid by my said executors and trustees out of the money arising from the sale of my said lands, which I do *order to be sold with all con- [*1466] venient speed after my decease, and such of the said purchase-money as shall remain after paying the said legacies, and the execution of this my will, I bequeath in the following manner." The testatrix then disposed of such residue. There was no disposition of the personal estate, otherwise than by the appointment of executors, who, having legacies for their trouble, could not take beneficially (*i*). The next of kin claimed to take it exempt from debts, legacies, and funeral expenses; but Lord Redesdale held that there were not sufficient words to raise an implication of intent to exempt the personalty from these charges. He thought, however, that the sums to be paid to the creditors of the husband were to be satisfied out of the real estate *only* (*k*).

Trust to pay legacies, funeral and testamentary expenses.

It is not denied, indeed, that the subjecting of the real estate to *all* the charges which belong to the personalty, as legacies, funeral and testamentary expenses, favors the supposition that the personalty is intended to be given as a specific legacy, and consequently to be exempt (*l*); but no case which rests on this simple circumstance is now to be relied on. Such seems to be the situation of Gaskell *v.* Gough, cited by Sir R. P. Arden in Burton *v.* Knowlton (*m*), which, however, is too loosely stated to enable us to form a satisfactory opinion of the grounds of it. It does not appear who was the executor, or in what terms the personalty was given.

Effect of testamentary charges being thrown on real estate.

In the much considered case of Bootle *v.* Blundell (*n*), the extension of the charge to funeral and testamentary expenses seems to have been treated by Lord Eldon as having much weight, though it was there aided by the circumstance, that some particular charge incident to the administration of the estate, namely, that of supporting the will against any attempt to invalidate it, was, by a codicil, imposed *exclusively* on the real estate. "On looking through the precedents," said his Lordship, "it is impossible to deny that this is a circumstance on which great stress has always been laid; namely, where the real estate is made liable to such expenses as exclusively regard the administration of the personal estate, such as the costs of probate, and other costs sustained in the execution of the will."

(*i*) But now see 1 Will. 4, c. 40.
(*k*) As to this, see cases cited post.
(*l*) See Sir W. Grant's judgment in Tower *v.* Lord Rous, 18 Ves. 139. Also Greene *v.* Greene, 4 Mad. 148; Michell *v.* Michell, 5 Mad. 69; Driver *v.* Ferrand, 1 R. & My. 681.
(*m*) 3 Ves. 111. See also Kynaston *v.* Kynaston, 1 B. C. C. 457, n., post, p. 1472, n.
(*n*) 1 Mer. 193.

[*1467] * The result of the cases seems to be that a charge of debts, funeral and testamentary expenses, cannot now be relied on as in itself sufficient to exonerate the personal estate. It must appear, not necessarily by express words but by plain and necessary inference from the context of the will, that the testator intended not merely to onerate the real estate, but to exonerate and discharge the personal estate (*o*).

VI. — 3. *Effect of expressly subjecting Personalty to Charges other than Debts, &c.* — It has been decided that the *expressly* subjecting the personal estate to certain charges, to which it was before liable, does not, by force of the principle expressio unius est exclusio alterius, raise a necessary implication that it is not to bear other charges *not* so expressly directed to be payable out of it, but which are thrown upon the land.

Where personalty is *expressly* subjected to *other* charges.

Thus, in Brydges *v.* Phillips (*p*), where the testator devised certain real estate upon trust for sale, and out of the money arising thereby *to pay his debts* and certain legacies, and devised over the lands which should remain unsold. The testator then gave certain other legacies, *and directed the last-mentioned legacies to be paid out of his* PERSONAL *estate*, and bequeathed the residue of his said personal estate, except as aforesaid, to his wife, whom, with two other persons, he appointed his executrix and executors. Sir W. Grant, M. R., held that though there was room for conjecture that the testator did mean to throw his debts primarily upon the real estate, yet that this did not appear with a sufficient degree of certainty to enable him judicially to collect such an intention. He said that, by directing the legacies to be paid out of the personal estate, the testator might merely have intended to distinguish those legacies from the others which were to be paid out of the real estate. His Honor also adverted to the circumstance that the trustees and executors were not wholly the same persons.

Provision as to the manner in which the charge on the realty is to be borne.

This principle, too, was strongly recognized by the same Judge in Watson *v.* Brickwood (*q*), which also establishes that an intimation, however anxiously made, as to the proportions and mode in which the charge is to be borne among the devisees of the real estate, will not have the effect of onerating it primarily; such a clause being [*1468] considered only as providing for the effect, *in case* * *the land does become chargeable*, and not as charging it at all events (*r*). The case was as follows: A testator devised all his free-

(*o*) Kilford *v.* Blaney, 31 Ch. D. 56.
(*p*) 6 Ves. 567; and see Davies *v.* Ashford, 15 Sim. 42.
(*q*) 9 Ves. 447; and see 1 Jo. & Lat. 363.
(*r*) But see Anderton *v.* Cooke, cit. 1 B. C. C. 456; Williams *v.* Bishop of Llandaff, 1 Cox, 254, where an estate was charged *in case another estate devised upon trust to pay debts should be insufficient*; and the personal estate was held to be exempt. Such a case seems to fall di-

hold lands to the use of his nephews W. and R. and their sons successively in strict settlement, with remainder to G. for life, and such son as he should by will appoint, with remainder to N. and his first and other sons in tail male; he then gave to several nieces legacies in blank, and proceeded thus: "And I direct the same legacies to be paid at the end of twelve months next after my decease by my executor hereinafter named. I give and bequeath all and singular *my goods, chattels, personal estate, and effects whatsoever and wheresoever, not hereinbefore disposed of*, unto my said nephew W., his executors, administrators, and assigns, forever, he paying thereout all and singular legacies, *and all my funeral expenses and* SIMPLE CONTRACT *debts*. And whereas I have at different times borrowed on mortgage and bond divers sums of money of different persons, to enable me to make purchases of part of the said estates hereinbefore limited; and being minded that the whole should be discharged in equal proportions by the said W., R., G., and such his son so to be appointed as aforesaid, as they respectively shall become entitled to the possession of my said estates. Now I hereby will, order, and direct, that all such sum or sums of money as the said W., R., G., or his son so to be appointed as hereinbefore mentioned, or the said N. shall pay off and discharge during the time each of them shall be in possession of my said estates under this my will, and also all such sum or sums of money as any of them shall expend, or be put to in the Court of Chancery, or elsewhere, in protecting or defending my said leasehold estate, and a due proportion of any of the two last fines, to be paid from time to time for the renewal of the leases thereof, shall be a debt and charge against the whole of such estates in favor of the person or persons, his and their executors, administrators, and assigns, so paying off and discharging such sum or sums, for so much money as shall be actually so paid and expended; and I direct the next taker of all my said estates under this my will to repay such sum and sums of money as his predecessor from time to time * shall have so paid off and expended to such person or [*1469] persons, and in such manner as his predecessor shall direct by any deed or will, to be by him duly executed, and for want thereof to the executor or administrator of such predecessor from time to time, deducting from time to time the due share or proportion thereof of such preceding taker, until the whole of such sum or sums of money shall be paid off; and I direct the same course to be used by each of the takers in succession until the full payment thereof, before such next taker or takers can have any benefit under this my will: it being my will and desire that no part of my estates be sold or

Watson *v.* Brickwood.

Personalty held not to be exempt though land charged.

rectly within the principle stated in the text. It does not appear, however, whether the decisions rested on the words in question. See another case of this kind, Dawes *v.* Scott, 5 Russ. 32, post, p. 1479.

parted with, and that all possible care be taken and observed in regard to such leasehold estates, as well with respect to the renewal of leases from time to time as with respect to any dispute that may at any time hereafter arise in consequence thereof." *And the testator appointed W. his executor.* By a codicil, reciting the disposition of his estates to T. (the trustee), he gave the same to J., revoked the former devise, and gave to J. the powers and authorities given by the will to T.; and he further willed that J. and his heirs should and might, in order to raise money *for the payment of all and singular his debts and legacies,* from time to time *mortgage,* with the approbation of the taker for the time being of the said estates, according to his said will, a competent part of *his said freehold estates* for so much money as should be necessary for the purpose, and he directed his trustees for the time being to keep down the interest. By another codicil, the testator appointed another trustee, and gave other legacies. It was contended that the personal estate was discharged from the debts, or at least subject only to the *simple contract* debts; but Sir W. Grant was of a different opinion. He admitted that there was some indication of an intention to exonerate the personalty; but thought *that it was not so conclusive as to come up to the requisition of the rule laid down by Lord Thurlow, in Duke of Ancaster* v. *Mayer* (*s*), *that is, a plain intention;* and that by directing the executor, to whom he gave all his personal estate, to pay thereout all the legacies, funeral expenses, and simple contract debts, primâ facie there was some appearance of an intention that he did not mean the personal estate to be liable to debts *by specialty,* but that alone upon the authorities was not sufficient; [*1470] there must be a charge clearly and distinctly * upon the real estate (*t*) to make it liable. When he declared his intention as to the real estate, it did not appear he had any fixed and distinct resolution by any act of his own to throw the specialty debts on the real estate; but he seemed to suppose either that the personal estate would not be sufficient both for the simple contract and specialty debts, or that the latter would of course fall upon the real estate, and any act by him to throw them upon the real estate was not necessary; for he had not in direct terms made any charge upon the real estate, but he took it for granted that the real estate would be called upon for bond debts, and mortgages, and his object was to secure an equal distribution of the burden among the devisees, who were to take the real estate in succession, and no other object whatsoever. His intention was not to favor the executor taking the personal estate against those taking the real estate, *but to take care that those who were to take*

Sir W. Grant's judgment in Watson *v.* Brickwood.

(*s*) 1 B. C. C. 454. This case was decided by Lord Thurlow principally upon another point (see ante), but the positions laid down by him on the doctrine in discussion have been much referred to.

(*t*) And that *only.* See the sequel of the judgment.

the real estate as against each other should bear the burden in equal proportions. It was contended, his Honor said, that the codicil operated as a total exoneration both from debts and legacies: the codicil contained as complete a provision for all debts and legacies as could be; but that was nothing more than there was in Tait *v.* Northwick (*u*). This case was hardly so strong in that respect, for in that case there were more circumstances from which it might have been argued that the testator could not have had it in contemplation to burden his real estate merely in aid of the personal. At most this was but the same case, and could not be contended higher than as equivalent to that; and there Lord Rosslyn, adhering to Lord Thurlow's rule, said expressly that the most anxious provision for payment of debts out of the real estate would not be sufficient to exonerate the personal estate. His Honor was therefore of opinion that there was no exoneration of the personal estate.

Of this case Lord Eldon has said (*x*), that he thought it was rightly decided, taking the will and codicil together; "but if," he said, "the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do not occur either in the judgment or in the argument; *still I repeat that I think that case was rightly decided.*"

Watson *v.* Brickwood approved by Lord Eldon.

Watson *v.* Brickwood is an important authority on the general * doctrine, since no case better exemplifies the species [*1471] of evidence which is necessary to exonerate the personal estate, as distinguished from mere conjecture. It would have been well if this principle had been steadily adhered to.

VI. — 4. *Effect of Gift of all the Personalty to the Executor.* — Another question which has much divided the opinions of Judges is, whether the circumstances of the bequest being of *all* the personal estate (with or without an enumeration of particulars), not a gift of *the residue*, demonstrates an intention to exempt it from the charges to which the general personal estate is primarily liable. The negative appears to have been decided in several instances where the legatee was appointed executor, a circumstance which has always been considered to favor the non-exemption, by raising the inference that the legatee was to take the personalty subject to the charges devolving upon him in the character of executor. French *v.* Chichester (*y*) has generally been treated as a case of this kind. The testator there directed that the trustees of a certain real estate which he had con-

Effect where the gift is of *all* the personal estate to person made executor.

(*u*) 4 Ves. 816; ante, p. 1463.
(*x*) In Bootle *v.* Blundell, 1 Mer. 230.
(*y*) 2 Vern. 568, 1 B. P. C. Toml. 192: see the facts of this case more fully stated, and observed upon by Pearson, J., Trott *v.* Buchanan, 28 Ch. D. 446, 450 n.; but see Cas. t. Talb. 209. And see Harewood *v.* Child, and Bromhale *v.* Wilbraham, cit. Cas. t. Talb. 204.

veyed by deed should out of the trust estate pay his debts, legacies, and funerals, and devised to his wife, whom he made executrix, *all his personal estate not otherwise disposed of*, intending thereby a provision for her, she having been prevailed upon to sell away part of her own inheritance. Lord Keeper Wright, and afterwards Lord Cowper, held that the devise being in the same clause in which she was named executrix, and not said exempt from the payment of debts, she must therefore take it as executrix, and the same must be applied in payment of debts.

Bequest of *all* the personal estate *not otherwise disposed of* to executrix.

But in this case the words "not otherwise disposed of" render it scarcely distinguishable from that of a residuary bequest. A similar remark applies to Watson *v.* Brickwood (*z*) and Bootle *v.* Blundell (*a*); but as in both these cases there were anterior specific bequests, to which the words "hereinbefore disposed of" might relate, no argument against the exemption could be drawn from them. It is only where the will contains no other disposition than the charges which are to come out of the personal estate, that such an argument applies; and it would seem, by parity of reason, that it is then only [*1472] that even the circumstance of the gift * being *residuary* raises any very strong inference *against* the exemption, though in every case the fact of the bequest *not* being residuary in its terms may afford an argument *in favor of* the exemption.

The case of Brummel *v.* Prothero (*b*), however, seems more directly to support the doctrine in question; and it is observable, that in this case the land was devised in trust to pay *all* the testator's debts. The testator devised all his real estate to A. and his heirs, in trust, in the first place, to pay *all* his just debts, and then to other limitations. Lastly, he gave and bequeathed unto his brother E. all his *moneys, goods, chattels, rights, credits, personal estate and effects*, whatsoever and wheresoever, *and appointed him executor.* Sir R. P. Arden, M. R., at first expressed an opinion that a direction to pay *all* the debts would, according to the authorities, throw them upon the land only; but he afterwards came to a contrary conclusion, observing that the case was stripped of every circumstance to exonerate the personal estate, except that of a devise to a trustee for payment of debts, and a general bequest of the personal estate to the executor: and that there was no one case since French *v.* Chichester, the first upon the subject, in which such words as these had been held alone sufficient to exempt the personal estate (*c*).

Trust to pay *all* the debts and bequest of *all* moneys, &c. to executor.

(*z*) 9 Ves. 447.
(*a*) 1 Mer. 193.
(*b*) 3 Ves. 111.
(*c*) This is not quite correct. There are several cases in which a contrary decision has occurred under circumstances hardly distinguishable. Thus, in Kynaston *v.* Kynaston, 1 B.

So, in Aldridge *v.* Lord Wallscourt (*d*), where A. devised all his lands to trustees (subject to the payment of his just debts, funeral expenses, and several portions afterwards charged for his daughters) to certain limitations, and directed his trustees to raise * certain portions for his daughters. He appointed T., his [*1473] son, executor, and bequeathed him *all* his personal estate in trust for such persons as he (the testator) should appoint. By a codicil reciting that bequest, he directed his executor to hold the personal estate in trust for his daughter M. Lord Manners thought there was nothing to exempt the personal estate from its primary liabilities to debts.

Devise subject to debts, &c., and bequest of *all* the personalty to executors upon trust.

In this case the legatee herself was not the executrix, but as the subject of gift was to flow to her through the executor as trustee, it might be considered as subject to charges attaching to him in that character, and consequently as falling under the same principle.

Remark on Aldridge *v.* Lord Wallscourt.

But the personal estate has been held not to be exonerated, even where the legatee of all the personalty was not made executor. Thus, in Collins *v.* Robins (*e*) the testator devised his real estate to trustees, upon trust to sell and out of the produce to pay the testator's debts, and the costs, charges, and expenses of the trustees (who were also executors), and certain legacies; and he bequeathed *all* his ready money and securities for money, and *all* other his personal estate, to his godson who was not an executor. Sir J. K. Bruce, V.-C. (observing that it was admitted that the funeral and testamentary expenses did not come under the description of the trustees' costs, charges, and expenses), decided that the personal estate was not exonerated.

Trust to sell realty and pay debts and bequest of all personalty to person not executor.

So, in Ouseley *v.* Anstruther (*f*) the testator devised his real property to trustees, upon trust, in the first place, subject to the payment

C. C. 457, n., a testator charged his whole estate with the payment of all his debts, legacies, and funeral expenses, and for that purpose devised particular lands to trustees, upon trust to sell the same and pay his debts, legacies, and funeral expenses; and he gave to his wife *all* his personal estate whatsoever, and substituted her sole executrix. The debts exceeded the personal estate (a circumstance which is now immaterial). Lord Bathurst determined the personal estate to be exempt.

So, in Holliday *v.* Bowman, cit. 1 B. C. C. 145, A. devised a manor to trustees, in trust to sell, and directed the moneys to be raised thereby to be paid in discharge of all his debts; and after payment thereof, in the first place to invest the residue, and pay the interest to his wife for life, and the principal after her decease to B.; and after several specific and pecuniary legacies, gave to his wife *all* his goods and chattels, and appointed her executrix. It was held, upon the authority of Kynaston *v.* Kynaston, that the personalty was exempt from the debts. Bamfield *v.* Wyndham, Pre. Ch. 101, is a case of the same kind, but is much weakened as an authority by the stress that was laid upon the inadequacy of the personalty to pay the debts. How far Lord Bathurst was influenced by this circumstance in Kynaston *v.* Kynaston does not appear; but it is evident that both this case and Holliday *v.* Bowman are overruled by Brummel *v.* Prothero. It would have been more satisfactory if they had been noticed in that case.

(*d*) 1 Ba. & Be. 312.
(*e*) 1 De G. & S. 131.
(*f*) 10 Beav. 453.

Charge of debts on realty and bequest of all personalty to person not executor.

of his funeral expenses, of any debts unpaid at his death, of his wife's jointure, and the annuities and legacies bequeathed by him, in trust for his son for life, with remainders over; and he bequeathed to his son, who was not executor, all his personal property for his absolute use after his (the testator's) wife's death, except a piece of plate which was to be an heirloom. Lord Langdale, M. R., held that the personalty was not exonerated from payment of the debts.

But though these cases may seem to authorize the conclusion that, whether the legatee is appointed executor or not and notwithstanding the funeral expenses are thrown upon the land, the personalty is not exempted by the mere circumstance of the bequest being of *all* the personal estate, with or without an enumeration of particular species of property, yet in several instances the * distinction between such a bequest and a gift of the *residue* has been treated as having weight.

Conclusion from preceding cases.

[*1474]

Thus, in Tower *v.* Lord Rous (*g*) Sir W. Grant, M. R., observed that there was nothing except the common residuary clause, not "all my personal estate," not "all which I have not hereinbefore disposed of," or any other of those forms *which in several cases have been held to denote an intention to give the personal estate as a specific bequest.* And Lord Eldon in Bootle *v.* Blundell (*h*) observed in reference to Duke of Ancaster *v.* Mayer (*i*), that a great deal of argument might have been raised as to the distinction between a gift of residue, as residue, and a bequest of enumerated particulars followed by the words "and personal estate whatsoever," not "and all *the residue of* my personal estate;" though he admitted that the argument in this case was excluded by a subsequent clause, in which the testator referred to the bequest as a gift of "the residue." It should be observed, too, that in Duke of Ancaster *v.* Mayer there were circumstances which operated quite as strongly against the exemption as in Brummel *v.* Prothero. The same persons were appointed *trustees* of the term to raise money to pay the debts and funeral charges *and executors* (which has been generally considered to favor the non-exemption (*k*)); and there was even a direction to them as "executors" to pay the funeral charges, debts, and legacies; and they were to reimburse themselves the expenses attending the execution of the will out of the

Distinction between a residuary bequest and gift of *all* the personalty.

(*g*) 18 Ves. 139.
(*h*) 1 Mer. 228.
(*i*) 1 B. C. C. 454.
(*k*) See Lord Northington's judgment in Stephenson *v.* Heathcote, 1 Ed. 38; Lord Thurlow's in Duke of Ancaster *v.* Mayer, 1 B. C. C. 454 (see also 1 Mer. 223); Lord Alvanley's in Burton *v.* Knowlton, 3 Ves. 108. But see Lord Hardwicke's judgment in Walker *v.* Jackson, 2 Atk. 624; and Lord Eldon's judgment in Bootle *v.* Blundell, 1 Mer. 227; where, though he seems to have treated this circumstance as adverse to the exemption, yet he admitted that there might be such a cautious discrimination of the two characters of trustee and executor as not only to render their union in the same person unimportant, but afford an inference in favor of the exemption.

personal estate or moneys to be raised by the term; and yet, under these circumstances, all tending to oppose the exemption, Lord Eldon thought the distinction between a gift of enumerated particulars followed by a bequest of the *residue*, and of *all* the personal estate, entitled to some weight. It is unfortunate that Brummel *v.* Prothero was not among the numerous decisions cited by him in Bootle *v.* Blundell.

In several subsequent cases, indeed, one main ground of exemption was, the fact of the personalty being given, not as a residue, but as *all* the personal estate, accompanied by an * enumera- [*1475] tion of articles, notwithstanding that in one of them it may be inferred that the trustees of the real estate were executors; but it is observable that in all these cases the real estate was onerated with all the charges to which the personal estate is liable, namely, the debts, funeral expenses, and costs of proving the will. The first is Greene *v.* Greene (*l*), where the testator, in the first place, gave and bequeathed unto his wife all his *ready money, securities for money, goods, chattels, and other personal estate and effects whatsoever*, which he should be possessed of or entitled to at the time of his decease, except such part or parts thereof which by that his will, or by any codicil or codicils thereto, he should dispose of specifically to and for her own sole and absolute use; he also devised his real estate to A., B., and C., upon trust for sale, directing them, out of the moneys arising from such sale, to pay *his debts, funeral expenses, and the costs of proving his will;*[1] and, after payment thereof, to invest the residue upon certain trusts for his wife for life, and then for his children; and he appointed his wife and A., B., and C. executrix and executors. Sir J. Leach, V.-C., held the personal estate to be exempt, observing that the direction that the trustees, "who formed only a part of the executorship," should, out of the produce by sale of the real estate, pay all debts and expenses, and after payment thereof invest the surplus for the benefit of the wife for life, with remainder to the children, when coupled with the circumstance that the devise to the trustees was expressly made subject to the payment of debts and funeral expenses, and with the gift to the wife for her own sole and absolute use of all the testator's ready money, securities for money, goods, chattels, and other personal estate and effects whatsoever, which the testator should be possessed of at the time of his death, did appear to him to convey a clear intimation of intention,

Bequest of *all* the ready money, &c., and personal estate.

Devise of real estate upon trust to pay debts, funeral and testamentary expenses, and gift of *all* personal estate.

(*l*) 4 Mad. 148.

[1] See 1 Story, Eq. § 574; Dunlap *v.* Dunlap, 4 Desaus. 305, 329; McCampbell *v.* McCampbell, 5 Litt. 95; Wyse *v.* Smith, 4 Gill & J. 295; Rogers *v.* Rogers, 1 Paige, 188.

Personalty held to be exempt.

not that this real estate should be auxiliary only, to be applied in case the personal estate should prove deficient, but that the real estate should directly and at all events be applied as the primary fund for the payment of the debts, funeral expenses, and the expenses of the probate, and that the wife should take the personal estate exempt from those charges. He distinguished the case from Duke of Ancaster *v.* Mayer (*m*), Stephenson *v.* Heathcote (*n*), Inchiquin *v.* O'Brien (*o*), Tait *v.* Northwick (*p*), and Watson *v.* Brickwood (*q*), on the ground *that in those cases the bequest was of a residue; and observed that in the last it was given expressly after payment of debts, funeral expenses, and legacies. He relied upon Burton *v.* Knowlton (*r*) and Kynaston *v.* Kynaston (*s*). But in reference to Watson *v.* Brickwood, it is to be observed that the clause expressly subjecting the personalty to the payment of legacies, funeral expenses, and debts, referred to simple contract debts only; whereas the only argument in favor of the exemption much insisted on was in relation to specialty debts, the exclusion of which from the clause in question favored their being thrown exclusively on the real estate.

[*1476]

The principal circumstances in which Greene *v.* Greene differs from Brummel *v.* Prothero (*t*), are, that in the latter case the legatees of the personalty were also the executors, whereas in Greene *v.* Greene the legatee was only *one* of the executors, and the land was onerated with *all* the charges which would otherwise have come out of the personal estate, namely, the debts and funeral *and testamentary* expenses (*u*); but in Brummel *v.* Prothero with the debts only.

Remarks upon Greene *v.* Greene.

So, in Michell *v.* Michell (*x*), where a testator bequeathed to his daughters E. and M. all and singular his *plate, linen, china, household goods, and furniture and effects,* which he should die possessed of; and devised his real estate to trustees, upon trust to pay his funeral expenses, costs of proving his will, and in the next place to retain all

(*m*) 1 B. C. C. 454.
(*n*) 1 Ed. 38.
(*o*) Amb. 33.
(*p*) 4 Ves. 816.
(*q*) 9 Ves. 447.
(*r*) 3 Ves. 107; but this case has been noticed with disapprobation both by Lord Loughborough in Tait *v.* Northwick, 4 Ves. 803, and by Lord Eldon in Bootle *v.* Blundell, 1 Mer. 229. Besides, it was a bequest of *the residue,* which increases the surprise that it should be cited by Sir J. Leach, who rested the exemption mainly on the circumstance of the bequest being of the whole, as distinguished from the residue, of the personal estate.
(*s*) Cit. 1 B. C. C. 457. The authority of this case is considerably weakened by the stress laid on the inadequacy of the personal estate to pay the debts. It is clearly irreconcilable with the current of authorities, particularly French *v.* Chichester, ante, p. 1471, Brummel *v.* Prothero, ante, p. 1472, and Aldridge *v.* Lord Wallscourt, ante, p. 1472, being nothing more than a charge upon the land of all the debts, and a gift of all the personal estate to the individual who was appointed executrix. According to those cases, therefore, the personalty was not exempt.
(*t*) Ante, p. 1472.
(*u*) See an observation upon this, ante, p. 1475.
(*x*) 5 Mad. 69.

sum and sums of money then due or thereafter to grow due from him to them respectively on mortgage bond or memorandum, and the interest thereof, and also to pay all such other debts as should be owing from him at the time of his decease, and divide the residue among his children; Sir J. Leach, on the authority of the last case, held that the real estate was made the primary fund for these charges. The executors * appear to have been the trustees of the real estate, as they proved the will. It is evident, therefore, that the V.-C. did not consider the union of the two characters of trustees and executors sufficient to negative the exemption in such a case.

Gift of *all* the personalty and charge extending to funeral and testamentary expenses.

[*1477]

The same remark applies to Driver *v.* Ferrand (*y*), decided by the same Judge, where a similar construction prevailed; the charge on the real estate extended to debts, legacies, funeral and testamentary expenses, and the bequest of personalty was not residuary in its terms, but the legatee was one of the executors. A difficulty in the way of the construction was that the legacies were directed to be paid by the executors, but Sir J. Leach considered this to be inconclusive, as they were also trustees; and that the testator in such direction had in view the real estate was, he thought, shown by a clause which immediately followed, authorizing the trustees to deduct their expenses out of the real estate.

So, in Blount *v.* Hipkins (*z*), where a testator gave to his wife M. all his household goods, plate, linen, china, pictures, farming stock, ready money, debts, personal estate, and effects of every kind which he should happen to die possessed of, except certain articles which he bequeathed to another person. The testator devised certain real estate to his wife M. He then gave all other his real estate to trustees upon trust for sale, and out of the proceeds to pay his funeral expenses, the costs of proving his will, and all his debts (including a mortgage on the estate devised to M.), and certain legacies and the residue of the proceeds to G. Sir L. Shadwell, V.-C., considered it to be clear that the personal estate bequeathed to the wife was intended to be exonerated from his debts.

Gift of *all* the personalty, and charge of realty with debts, and funeral and testamentary expenses, *and exemption of personal estate therefrom*; and gift of legacies without such exemption.

So in Jones *v.* Bruce (*a*), where a testator gave to his wife absolutely all his goods, chattels, and personal estate whatsoever and wheresoever, and charged his real estate in D. and S. with the payment of his funeral and testamentary expenses and debts, and he exempted, so far as he was able, his personal estate from the payment thereof. He then gave certain legacies to children, and

(*y*) 1 R. & My. 681.
(*z*) 7 Sim. 43. See also Plenty *v.* West, 16 Beav. 173; where, however, undue weight appears to have been allowed to the phrase "in the first place:" see Newbegin *v.* Bell, 23 Beav. 386.
(*a*) 11 Sim. 221; and see Coote *v.* Coote, 3 Jo. & Lat. 175.

charged all his real estate with the payment thereof, and directed that until the legacies were payable the trustees should raise out [*1478] of the rents any annual sums by way of maintenance * not exceeding 4*l.* per cent. The testator then gave his real estate, subject as to such portions thereof as were situate in D. and S. to the charges thereinbefore mentioned, and subject also to such charges as they were then liable to, to his wife for life, with remainders over. Sir L. Shadwell, V.-C., held the real estate to be the primary fund for payment of the legacies, adverting much to the terms in which the personalty was bequeathed, and the gift of interest out of the rents of the real estate.

Latter held also charged on land primarily.

And in Lance *v.* Aglionby (*b*), where the testator gave all his real and the residue of his personal estate to trustees to be converted, and to form a mixed fund for payment of his debts, funeral and testamentary expenses, and legacies, and gave the rents of the real estate and the income of the residue of the personal estate to his wife for life, with remainder over. By a codicil the testator gave "all his personal estate whatsoever and wheresoever" to his wife. Sir J. Romilly, M. R., held that the wife took the personalty free from the funeral and testamentary expenses, debts, and legacies.

Will creating mixed fund for payment of debts, funeral expenses, &c., and codicil giving *all* personal estate: the latter held exempted.

These cases, then, seem to authorize the proposition, that wherever the personal estate is bequeathed in terms as a whole and not as a residue, and the debts, funeral and testamentary charges are thrown on the real estate, or on any particular fund, this constitutes the primary fund for their liquidation, provided the intention to charge exclusively the particular property appears from the terms of the will (*c*). In Jones *v.* Bruce, the principle was applied to legacies, where the funeral and testamentary charges and debts were thrown on the realty expressly as the primary fund. But where the personal estate is bequeathed expressly subject to debts, funeral and testamentary expenses, the principle of these cases is of course inapplicable (*d*).

General conclusion from preceding cases.

That Sir J. Leach did not mean by his preceding adjudications to deny the general rule appears from the subsequent case of

(*b*) 27 Beav. 65. See also Gilbertson *v.* Gilbertson, 34 Beav. 354; Powell *v.* Riley, L. R., 12 Eq. 175.

(*c*) Robertson *v.* Broadbent, 8 App. Ca. 812, 816. In that case the testator, after directing his executors to pay his debts, &c., and giving certain pecuniary legacies, gave all his personal estate except money or securities for money to A. absolutely, and gave and devised all the residue of his real and personal estate to his executors upon certain trusts; it was held that there was no sufficient indication of intention to exonerate the personalty bequeathed to A., and that the same was not exempt from the payment of the legacies. See also Re Hamilton, Woodward *v.* Simpson, W. N. 1892, p. 74.

(*d*) Paterson *v.* Scott, 1 D. M. & G. 531, 21 L. J. Ch. 346. The bequest was of the personal estate "not thereinbefore otherwise disposed of;" as to which, see ante, p. 1471.

Rhodes *v.* Rudge (*e*), where a testator gave all his real and * personal estate to A. and B. upon trust, in the first place, [*1479] to sell and dispose of the living of C., and the money to arise from the sale thereof to go in discharge of his debts and legacies and the charges of the trusts thereby created, and if such money were not sufficient to discharge the said debts and legacies, upon trust to cause timber to be felled on his real estates to the amount of 500*l.*, to be applied in discharge thereof; and if that should not be sufficient, then upon trust by mortgage or sale to raise such deficiency out of his real estates; and the testator then proceeded to give certain legacies, and appointed A. and B. executors of his will. Sir J. Leach, V.-C., thought that there was nothing in this will to change the usual order of application, and therefore that the personalty was primarily to be applied.

Non-exemption from mere charging of real estate.

No case could well be stronger against the exemption than this; the same persons who were trustees of the real and personal estate were also executors, and there was no other bequest of the personal estate than to these trustees.

Remark on Rhodes *v.* Rudge.

VI. — 5. *Various Expressions indicating an Intention to Exempt Personalty from Primary Liability to Debts, &c.* — The personal estate is of course held to be exempt from debts where real estate is devised to be sold to pay debts, with a direction that the residue shall *be added to the testator's personal estate* (*f*), which is obviously incompatible with the primary application of the personalty. So, where the testator declares that he has charged his lands with the payment of his debts in order that the personal estate may *come clear to the legatee* (*g*): or where he has directed the proceeds of his real estate to be applied "in part payment" of certain legacies; which is equivalent to "in payment as far as the proceeds will extend" (*h*).

Residue of real fund *to be added to personalty.*

Personalty to "come clear" to the legatee.

Realty to go "in part payment."

Again, where the testator charges his debts, funeral and testamentary expenses, and legacies, on estate A. "as a primary fund," and in case that should be deficient, he charges estate B. with the deficiency, he thereby conclusively shows that the latter estate is the secondary

Estate made *secondary* fund in exoneration of personalty.

(*e*) 1 Sim. 79.

(*f*) Webb *v.* Jones, 2 B. C. C. 60, 1 Cox, 245, 1 R. R. 29. And see 1 Jo. & Lat. 365, 366; Shallcross *v.* Wright, 12 Beav. 505. But see Wythe *v.* Henniker, 2 My. & K. 635, ante, p. 1443.

(*g*) March *v.* Fowkes, Finch, 414.

(*h*) Bunting *v.* Marriott, 19 Beav. 163. The direction referred to "freehold, copyhold, and leasehold estate, and any other interest in land;" and though there was in fact nothing but leaseholds, yet that circumstance does not appear to make, and was not treated as making, any difference.

fund in exoneration of the personal estate (*i*). So, a direc-
[*1480] tion to pay out of the personal estate so * much of the debts as the realty previously given for payment of them would not extend to pay, would seem to make the realty primarily liable (*k*). And where a testator gave his real estate in moieties to his two daughters M. and S. and their families, and by codicil directed a particular debt which he had incurred on behalf of M.'s husband to be "exclusively and in the first instance" paid out of the M. moiety, the testator's "intention being that the S. moiety should be exempt from payment of it," it was held by Sir R. Malins, V.-C., that the personal estate was exonerated, adopting (it would seem) the argument of counsel that the generality of the exclusive charge was not cut down by the statement of *a* motive (*l*).

Personalty to pay in aid of realty.

In the much-considered case of Bootle *v.* Blundell (*m*), the testator first directed his funeral expenses to be paid. He then gave to his son R., and his daughters S. and J., 3,000*l.* each, with a substitution of their children in a certain event. The testator then directed that his said funeral expenses and legacies should be paid out of such moneys as he should have by him, moneys due to him from C., and out of rents and fines which should be due to him; and gave the surplus unto his son and daughters. The testator then devised all his manors of Lostock, &c. to A., B., and C., for five hundred years, in trust out of the rents *to pay* HIS DEBTS, and also all such annuities or legacies as were thereinafter mentioned, or which he might thereafter specify in any codicil or instrument in writing. He then bequeathed certain legacies, including one of 300*l.* to each of his trustees for their trouble, and several annuities, among the rest one to his housekeeper M. The testator then declared that his trustees and executors should not be answerable for any losses, and that if they were called to such account, or sustained any expenses in respect thereof, the same, and also at all events all other their costs and expenses, should stand charged upon his said hereditaments, and be paid out of the rents and profits thereof; and that so soon as the trusts of the term should have been satisfied, and all the expenses incident thereto discharged, the remainder of the term should thence-
[*1481] forth cease; and, subject thereto, he devised his said manors, &c., in undivided moieties to his two * daughters and their issue, in strict settlement. The testator then appointed a certain person to be steward and agent, to have the management of the estates comprised in the said term of five hundred years, so long

Bootle *v.* Blundell.

(*i*) Dawes *v.* Scott, 5 Russ, 32. See also Bateman *v.* Earl of Roden, 1 Jo. & Lat. 366; Evans *v.* Evans, 17 Sim. 106; Bessant *v.* Noble, 26 L. J. Ch. 236.
(*k*) Semb., see Wills *v.* Bourne, L. R., 16 Eq. 487.
(*l*) Forrest *v.* Prescott, L. R., 10 Eq. 545. No point was made of its being the case of a *particular* debt, as to which see post, p. 1485.
(*m*) 1 Mer. 193, 19 Ves. 494.

as the same should remain in the hands of his trustees, with particular directions as to his salary and conduct, and afterwards proceeded as follows: "And it is my will that as soon as the debts hereby charged on my said estate, and the legacies or sums of money hereby given, are paid and satisfied, and as soon as such satisfactory security shall have been given by my said trustees for the due payment of the said annuities and all expenses as shall satisfy the said annuitants, and when all expenses incurred in the execution of the said trusts respecting the said term and of this will shall be fully paid, then the person or persons who shall at that time be next entitled to the same estates under and by virtue of the limitations in this my will contained, shall be let into the possession thereof" (*n*). The testator then provided for the appointment of new trustees in certain events, who were to be allowed out of the rents and profits of the estates comprised in the term of five hundred years the sum of 300*l*. He also devised one-half of the manor of Lydiate, and all the lands purchased by him in Ince, &c., not thereinbefore disposed of, to the use of his son C. for life, with remainders over; and directed that all his pictures, drawing-books, prints, statues, and marbles, should be enjoyed by his son during his life, and after his decease he gave the same to the first son of his body who should attain twenty-one; his intention being that they should go along with the capital messuage called Ince Hall. After devising to J. certain lead mines, and to M., his housekeeper, several articles of furniture and other things, which he directed should be removed by his executors at the expense of his personal estate, the testator bequeathed to his said son the furniture of his house, his wines, horses, cattle, and carriages, plate, *and other his goods, chattels, and personal estate not thereinbefore specifically disposed of*, or which might thereafter be disposed of by him; and appointed the said A., B., and C. executors of his will, providing that immediately after his decease his executors should enter into his dwelling-house, and take into their custody all moneys and papers there found. By a codicil * the [*1482] testator, after noticing the devise to his son of his estate at Lydiate, and that attempts might be made to invalidate some of the dispositions of his will or codicil, and the trustees and executors, or other devisees, might incur expenses in supporting the same, which expenses it was his will should be paid out of the said lands, and not be a charge upon any other part of his property, he thereby devised the said Hall, manor, &c., unto the said A., B., and C., trustees and executors named in his said will, their executors, administrators, and assigns for the term of one thousand years, in trust by sale, lease, or mortgage, or out of the rents and

Bootle *v.* Blundell.

Bootle *v.* Blundell.

(*n*) This clause is very important, for the testator could hardly intend that the devisees should be kept out of possession until the whole personal estate was administered, which would be the consequence of holding it to be not exempt from the debts.

profits, to raise such moneys as should be sufficient to pay all expenses which should be so incurred.

The question was, whether the estates comprised in the term of 500 years were liable, in the first place, to the payment of the testator's debts in exoneration of the personal estate. Lord Eldon, after much consideration, and reviewing most of the authorities, held that it was: he adverted to the circumstance, that though the same persons were trustees and executors, the two characters were anxiously kept distinct; the testator never using the word "executors" but with reference to the personal estate, nor the word "trustees" but with reference to the real estate; that the clause charging the expenses on the estates devised, having blended together the costs attending the real and personal estate, made it impossible to say that the testator could have meant that the costs of the real estate should be paid out of the real estate, but that the costs of the personal estate should not be paid in the same manner except in the case of a deficiency of the personal estate; that the proviso for cesser amounted to a direction that his funeral expenses should not be paid out of his general personal estate; that the costs of the real and personal estate should be paid in the same manner; and that the persons respectively entitled under his will should not be let into possession of the devised estates until security given for payment of the annuities, and until payment of the expenses of the administration not only of the real estate but of the personal estate also; that the new trustee of the term to be appointed should receive the sum of 300*l.* out of the rents and profits of the estates comprised in the term; that the purpose of keeping together, as objects of public curiosity the pictures, &c., sufficiently accounted for their being set aside from the rest of the personal estate given to his son, without resorting to the supposition that it was merely to exempt * them from the debts and legacies to which the remainder was meant to be liable; that because the testator had charged his personal estate with the cost of removing the specific articles given to Mrs. M., it did not follow (as had been insisted) that it should also be liable to the payment of his debts and legacies; that the words "not hereinbefore specifically disposed of" might be taken to mean specifically to dispose to his son of what was not specifically disposed of *to others*, and not as referring to the application of the personalty to debts, &c.; and, lastly (on which his Lordship laid much stress), that the costs incurred by the litigation of the will were to be paid exclusively out of the real estate; though he doubted whether, if there were no circumstances in the *will* that afforded a ground for saying the personal estate should be exempted, this provision alone in the codicil would have been a sufficient manifestation of the intention to exempt it. He nevertheless thought that it deserved great consideration.

Lord Eldon's judgment.

[*1483]

VI. — 6. *Effect of Lapse.* — Here it may be observed that the exemption of the personalty in favor of the *legatee* does not necessarily extend to the *next of kin*, in case of the failure of the bequest thereof by lapse or otherwise. Thus it was laid down by Sir R. P. Arden in Waring *v.* Ward (*o*), that if an estate be given to A., subject to debts, and the personal estate to B. exempt from debts, that exemption is to be considered as intended only for the benefit of B. and not as a general exemption of the personal estate.

Effect where bequest of exempted personalty lapses,

On the other hand, if the testator without bequeathing the personal estate, directed that it should not be applied in payment of mortgages, and gave the mortgaged estates to different persons, *they paying out of them the mortgages*, the devisees would take cum onere even as against the next of kin (*p*).

— where personalty originally undisposed of.

The distinction is that in the one case there was an absolute bequest of the personal estate, while in the other there was none. The principle is this: there being no particular bequest of the * personal estate, and yet the testator intended to exonerate [*1484] the personal estate, it was impossible to say that he intended that exoneration for the benefit of any particular person or object, and he must be taken to have intended that the exoneration should enure for the benefit of the persons, whoever they might be, upon whom the personal estate might devolve (*q*).

Where a testator devised land on the express condition that the devisee should release a debt of 3,400*l.* due to him from the testator, and he bequeathed his residuary personal estate to trustees upon trust for conversion, and out of the proceeds pay his debts, except the debt of 3,400*l.*, and to hold the surplus upon certain trusts; the devisee died before the testator; it was held by the Court of Appeal (affirming the decision of Sir E. Fry, J.,) that, notwithstanding the lapse of the devise, the land was bound in exoneration of the personalty to discharge the debt of 3,400*l.* (*r*).

Lapse of devise on condition that devisee releases debt due from testator.

VI. — 7. *Charges and Trusts distinguished.* — It has been already stated that under a general charge of or a trust to pay *legacies*, the

(*o*) 5 Ves. 676. See Hale *v.* Cox, 3 B. C. C. 322; Noel *v.* Lord Henley, 7 Price, 240, Dan. 211; Dacre *v.* Patrickson, 1 Dr. & Sim. 186; Kilford *v.* Blaney, 31 Ch. D. 56. See also Coventry *v.* Coventry, 2 Dr. & Sm. 470, where specific parts of the personalty were expressly exempted, and bequeathed to one for life, and afterwards "to fall into the residue" which was also bequeathed. But the report is obscure. The V.-C. is made to rely on Webb *v.* De Beauvoisin, 31 Beav. 573, where the question of charging real estate did not arise. Compare Fisher *v.* Fisher, 2 Keen, 610.

(*p*) Milnes *v.* Slater, 8 Ves. 305.

(*q*) Per Kindersley, V.-C., in Dacre *v.* Patrickson, 1 Dr. & Sm. 186, 189.

(*r*) Re Kirk, Kirk *v.* Kirk, 21 Ch. D. 431.

Distinction between a general charge of *legacies* and a trust to pay certain sums.

several funds liable to their liquidation are applied in the same order as in the case of *debts*, and therefore the general personal estate, if not exempted, is first applicable (*s*); but such cases are carefully to be distinguished from those in which the trust is to pay certain specified sums, *as the only gift is in the direction to pay them out of the land*, that fund alone is liable (*t*).

Thus where a testator devises his estate to trustees, upon trust to sell, and out of the proceeds to pay legacies generally, and afterwards gives to A. a legacy of 100*l.*, that legacy will be charged upon the land in aid of the personalty only; but if the devise be upon trust to sell, and out of the produce to pay to A. 100*l.*, the sum so given will be considered as a portion of the real estate, and will in [*1485] no event be payable out of the personalty, * and if the testator sell the estate in his lifetime, the legacy will be adeemed (*u*).

Sums directed to be paid out of specific fund.

And in Spurway *v.* Glynn (*x*), Sir W. Grant thought that a direction at the end of the will, that the personal estate should be applied in payment of *legacies* in exoneration of the real estate, did not apply to a sum given out of a particular estate of which there was no other gift than the trust so to pay it.

Charge of specified legacies on realty, and gift of personalty subject to debts.

Again, in Ion *v.* Ashton (*y*), the testator bequeathed certain legacies and annuities, and charged some of them on his lands at H., and the rest on his lands at O., and devised the estates so subject, one to A., and the other to B. He then gave all his personal estate to trustees on trust to convert and pay debts and funeral and testamentary expenses, and the expenses of proving his will and the costs of converting his personal estate, and to pay the residue to a charity. Sir J. Romilly, M. R., held that the effect was to lay upon the real estate certain charges which were specified, and then to give it subject thereto, and on the personal estate to lay other charges, and then give it subject thereto, and therefore that the annuities and legacies were charged exclusively on the real estate.

(*s*) Roberts *v.* Roberts, 13 Sim. 349; Ouseley *v.* Anstruther, 10 Beav. 453; Davies *v.* Ashford, 15 Sim. 42; Boughton *v.* Boughton, 1 H. L. Ca. 406, reversing 1 Coll. 35; Whieldon *v.* Spode, 15 Beav. 537; Patching *v.* Barnett, W. N. 1880, p. 135.

(*t*) Whaley *v.* Cox, 2 Eq. Ca. Ab. 549, pl. 29; Amesbury *v.* Brown, 1 Ves. 482; Phipps *v.* Annesley, 2 Atk. 57; Ward *v.* Dudley, 2 B. C. C. 316, 1 Cox, 438, 7 B. P. C. Toml. 566; Reade *v.* Litchfield, 3 Ves. 475; Hartley *v.* Hurle, 5 Ves. 545; Brydges *v.* Phillips, 6 Ves. 571; Spurway *v.* Glynn, 9 Ves. 483; Hancox *v.* Abbey, 11 Ves. 179; Aldridge *v.* Wallscourt, 1 Ba. & Be. 312; Noel *v.* Lord Henley, 7 Pri. 241, 12 Pri. 213, Dan. 211. 322; Ricketts *v.* Ladley, 3 Russ. 418; Jones *v.* Bruce, 11 Sim. 22; Ashby *v.* Ashby, 1 Coll. 549; Roberts *v.* Roberts, 13 Sim. 345; Evans *v.* Evans, 17 Id. 102; Dickin *v.* Edwards, 4 Hare, 273; Bessant *v.* Noble, 26 L. J. Ch. 236. But see Holford *v.* Wood, 4 Ves. 78; Colvile *v.* Middleton, 3 Beav. 570.

(*u*) Newbold *v.* Roadknight, 1 R. & My. 677.

(*x*) 9 Ves. 483.

(*y*) 28 Beav. 397. See also Lomax *v.* Lomax, 12 Beav. 290; Woodhead *v.* Turner, 4 De G. & S. 429; Sinnett *v.* Herbert, L. R., 12 Eq. 201.

Legacy duty, out of what fund payable.

It seems that, in these cases, if the sums in question are bequeathed free from the legacy duty, the duty will be payable out of the same fund as the legacy (*z*).

Trust to pay particular *debts*.

It does not, however, necessarily follow that the principle above stated applies to trusts for the payment of particular *debts* to which the personal estate was antecedently liable, and with respect to which therefore the charging the land would seem to be merely for the purpose of providing an auxiliary fund for those debts, not in order to discharge the personalty.

The contrary indeed seems to have been assumed by Sir W. Grant in Hancox *v.* Abbey (*a*), for he held that a devise of real estate to trustees, upon trust to sell, and to pay a mortgage due on some part of the testator's property, subjected the land in the first instance, although the personalty was given "after payment of debts, legacies, and funeral expenses," but which his Honor * thought [*1486] might be construed, after payment of debts not before provided for.

Noel *v.* Lord Henley.

This doctrine and decision, however, are inconsistent with the principle upon which the more recent case of Noel *v.* Lord Henley (*b*) was professedly decided. The testator devised lands upon trust for sale, and directed the trustees to stand possessed of the moneys arising therefrom upon trust to pay a mortgage debt of 2,000*l.* affecting one of his estates; and in the next place to pay all costs, &c.; and then to pay a sum of 20,000*l.* due on mortgage of certain parts of the testator's other estates thereinbefore devised; and upon further trust to pay 5,000*l.* to his wife (which lapsed), and the sum of 3,000*l.* to T., both which last-mentioned sums the testator directed to be paid as soon as sufficient moneys should arise by such sale or sales after the other payments thereinbefore directed to be made thereout, and that the same should carry interest from his death. The testator then directed his trustees out of the moneys to arise from the sale to pay so much of his *other just debts*, and of the pecuniary legacies thereinafter by him bequeathed, as his own personal estate or the personal estate of his uncle R. should not extend to pay; and after such payments to invest the residue of the said moneys upon trust for certain persons; and then, after giving several legacies, he declared that all his legacies should be paid without any deduction of the legacy duty; and he bequeathed all the residue of his personal estate, after payment of such of his debts as were not therein otherwise provided for, and of his legacies, &c., to his wife, with her heirs, executors, administrators, and assigns, and appointed his said wife and two other persons executrix and executors. One question was

(*z*) Noel *v.* Lord Henley, 7 Pri. 241, Dan. 211. See also Stow *v.* Davenport, 5 B. & Ad. 359. But generally a gift of legacy duty is a mere pecuniary legacy, Farrer *v.* St. Catharine's College, L. R., 16 Eq. 25.

(*a*) 11 Ves. 179. See as to legacies, Dickin *v.* Edwards, 4 Hare, 273.

(*b*) 7 Pri. 241, Dan. 211.

whether the sums of 2,000*l.*, 20,000*l.*, and 3,000*l.*, were payable out of the land exclusively, or only in aid of the personal estate. Richards, C. B., thought there was not sufficient evidence of an intention to exonerate the personalty from these sums; for though he admitted that there was no doubt that the testator, in giving the residue of his personal estate after payment of such of his debts as were not therein otherwise provided for, intended to exonerate some part of his personal estate from its liability to pay some of his debts, yet it did not appear what debts, and there was no intimation that he meant the sums particularized as distinguished from the rest of his [*1487] debts. He thought it was the ordinary case * of a testator giving his personal estate to A., and his real estate to B. subject to the payment of his debts, and that the circumstance of his having enumerated particular debts made no difference. He could not make any distinction between a direction that real estate should be chargeable with a *particular* debt of 20,000*l.* and a devise of real estate subject to *all* the testator's debts; for the 20,000*l.* was only part of these debts. But he thought that legacies stood upon a very different footing; debts (he said) were primâ facie to be paid out of the personal estate, legacies might be paid out of the personal or out of the real estate according to the intention of the testator; therefore such *legacies* as were not thrown upon the personal estate were not to be paid out of it. The Court accordingly held that the mortgage of 2,000*l.* (which it appeared was not the testator's own debt but was created by a prior owner from whom the lands had descended to him (*c*)), with the 3,000*l.* and the legacy duty on both these sums, were to be paid out of the real estate exclusively; but that the testator's mortgage debt of 20,000*l.* and duty were to be raised out of it only in aid of the personal estate.

No distinction between direction to pay particular debts and debts generally.

As to the 20,000*l.* the decree was reversed in the House of Lords (*d*), but merely on the ground that the mortgage was the debt of the estate, not of the devisor, having been made for the purpose of liquidating incumbrances created by the preceding owner (*e*).

If there had been nothing more than a general provision for debts, as the C. B. appears from some of his observations to have thought, the case is not an adjudication upon the point in question; but considering the testator's anxious discrimination between the enumerated debts and the others (*f*), and his subsequent reference to the debts as consisting of two classes, there was perhaps some difficulty in so treating it. Lord Eldon in the House of Lords laid great stress on the distinction thus drawn

Remarks on Noel *v.* Lord Henley.

(*c*) As to this, see p. 1445.
(*d*) Dan. 322, 12 Pri. 213.
(*e*) See this treated of, ante, p. 1446.
(*f*) But in general the charging of a particular debt or legacy expressly gives it no priority over debts or legacies subsequently charged in general terms, Clark *v.* Sewell, 3 Atk. 96.

by the testator (*g*), and Lord St. Leonards drew from it the conclusion that, even if the 20,000*l.* had been a debt of the testator, the decree in the Exchequer was erroneous (*h*). At all events the doctrine in the judgment is in direct opposition to that of Sir W. Grant's determination in Hancox *v.* Abbey. Upon principle the distinction taken by that learned judge, between a trust to pay particular debts and debts generally, seems to be hardly tenable. * There is no apparent reason why a testator who [*1488] provides an additional fund should intend to discharge the fund primarily liable, more in the one case than in the other; or why debts, which before subsist as a charge upon the personal estate independently of the will, should necessarily be considered as governed by the same rule as legacies, which owe their existence to the trust to pay them.

It must be observed that Hancox *v.* Abbey did not depend wholly on the trust being to pay a particular debt, but partly on the fact that the debt in question was already charged on real estate, so that the trust for payment of it was either intended to make the trust fund primarily liable, or was altogether purposeless. After adverting to the general rule that a devise to sell for payment of all debts would not exonerate the personal estate, Sir W. Grant continued: "But a direction to apply a particular portion of the real estate for the payment of one particular debt affords a very different inference. Why should the testator direct exclusively a particular debt to be paid out of his real estate? It is not generally from an apprehension that the personal estate may not be sufficient for all debts, for no precaution is taken except for this particular debt; and this debt was already a charge upon the real estate. Therefore, for the security of the debt, there was no reason to direct a sale. It is no additional security to the mortgagee. For what purpose, then, could he so specially direct a portion of the real estate to be sold, and the produce applied to that particular debt, if he intended that debt to stand just in the same predicament as any other debt, except only that it was to be charged on the real estate as it already was? Putting that aside, nothing is done by all this particularity of expression, for then this debt stands upon the same footing as all other debts" (*i*).

Charge of particular debt *previously* secured on real estate.

So, in Evans *v.* Cockeram (*k*), where a testator, after devising an estate which he had mortgaged, and giving a power to raise thereout

(*g*) 12 Pri. 319, 321, 322.
(*h*) Law of Prop. 366.
(*i*) The M. R. also adverted to the form of the gift to B., being of the "residue" of the sale moneys. How, he asked, could B. claim more than was given to him? (But that argument would be equally good if the trust were to pay all debts.) Or could the heir be intended to take the benefit as so much undisposed of? (as to which see Ch. XIX., s. vii.)
(*k*) 1 Coll. 428. But see Johnson *v.* Milksop, 2 Vern. 112. Since L. King's Acts (ante, p. 1445) the express charge is, in a case like Evans *v.* Cockeram, as little needed for the one purpose as for the other.

200*l.* for each of his two daughters, proceeded thus: "And I hereby charge and make liable my said estate for the repayment of [*1489] the said sums of 200*l.* to each of my said daughters * as aforesaid, and also for the payment of any sum or sums of money on the security of my said estate at my death;" Sir J. K. Bruce, V.-C., held that the mortgaged estate was primarily charged with the payment of the debt; observing that in favor of the creditor the testator could not charge the estate, or make it more liable than before.

Charge of a particular debt with a personal obligation on devisee.

In Welby *v.* Rockcliffe (*l*), where the testator, after devising an estate at W. to A. in fee, and reciting a marriage annuity bond given by him, charged the estate, and also A., his heirs, executors, and administrators, with the payment of the annuity, and then disposed of the personal estate, the residuary personal estate was held to be exempt, though there was no pre-existing charge on the real estate; the annuity not being merely charged on the estate, but the payment being imposed on A. as a personal obligation.

Charge of particular debt *without* such personal obligation.

But in Quennell *v.* Quennell (*m*), where a testator, having on his marriage executed a bond and settlement to secure an annuity to his wife, by his will confirmed the settlement, and charged the annuity on certain real estate and stock, and subject thereto gave the estate and stock to A., and then gave the residue of his real and personal estate, subject as to his personal estate to his debts, funeral and testamentary expenses, and legacies, to his wife; it was held by Lord Langdale that the testator had only created a charge without affecting the primary liability of the personal estate.

Demonstrative legacies.

But besides the two classes of legacies already mentioned there is a third or intermediate class, where there is a separate and independent gift of the legacy, and then a particular fund or estate is pointed out as that which is to be primarily liable (*n*).[1] This class would seem to afford a closer analogy to

(*l*) 1 R. & My. 571. See also Re Kirk, Kirk *v.* Kirk, 21 Ch. D. 431, ante, p. 1484.

(*m*) 13 Beav. 240.

(*n*) Per Wood, V.-C., 1 H. & M. 668. Whether, if the particular fund fails by an act of the testator in his lifetime, the legacy is payable out of the general assets, in other words, whether the legacy is demonstrative or specific, is often a question of some nicety. As to this, see Savile *v.* Blacket, 1 P. W. 778; Att-Gen. *v.* Parkin, Amb. 566; Cartwright *v.* Cartwright, 2 B. C. C. 114 (see two last cases cited 3 Beav. 575); Roberts *v.* Pocock, 4 Ves. 150; M'Leland *v.* Shaw, 2 Sch. & Lef. 538; Smith *v.* Fitzgerald, 3 V. & B. 2; Mann *v.* Copland, 2 Mad. 223; Fowler *v.* Willoughby, 2 S. & St. 354; Wilcox *v.* Rhodes, 2 Russ. 452; Colville *v.* Middleton, 3 Beav. 570; Sidebotham *v.* Watson, 11 Hare, 170; Fream *v.* Dowling, 20 Beav. 631, L. R., 4 Eq. 145, n.; Paget *v.* Huish, 1 H. & M. 663.

[1] See Wilcox *v.* Wilcox, 13 Allen, 252, 256, where it is laid down that if a legacy be given with reference to a particular fund, only as pointing out a convenient mode of payment, it is to be construed as demonstrative, and the legatee will not be disappointed though the fund wholly fail. Walls *v.* Stewart, 16 Penn. St. 275; Chaworth *v.* Beech, 4 Ves. 455; Pierrepont *v.* Edwards, 25 N. Y. 128; Creed *v.* Creed, 11 Clark & F. 491; Dickin *v.* Edwards, 4 Hare, 273.

charges of particular debts than legacies that are only specific. Thus in Lamphier *v.* Despard (*o*), where a testator directed his debts and legacies to be paid by his brother, and gave to him the woods growing on * his estate F. to pay his debts and legacies; [*1490] then he bequeathed two legacies, which were not to be paid until five years after his death, as it was his wish that the woods should not be cut down until then; he then bequeathed the timber-money after payment of the two legacies, and then gave another legacy, and appointed his brother his executor and residuary legatee: it was held by Sir E. Sugden, C. Ir., that the two legacies were payable primarily out of the produce of the timber, and that the residuary personal estate was the secondary fund for payment of them. He said, "This is not a general fund provided for payment of all the legacies, but a fund only for two; and whenever there is a direction to apply a particular fund for the payment of some of the legacies, that is the primary fund for this purpose, Hancox *v.* Abbey."

Sir E. Sugden appears indeed to have invariably referred Sir W. Grant's decision to the distinction between a particular and a general charge (*p*). On the other hand there appears to be no decision on that bare point except Quennell *v.* Quennell, which would seem to involve a denial of any such distinction in the case of debts.

The charging of an estate with a definite sum for payment of debts points more directly to making that estate the primary fund. Personal estate fluctuates, and debts fluctuate, and in no certain ratio to each other. By what amount therefore (if any) the personalty will fail to satisfy the debts is until the testator's death quite uncertain; and to devote a fixed amount to answer this uncertain deficiency is an improbable thing to intend. In Clutterbuck *v.* Clutterbuck (*q*), where a testator devised lands upon trust to raise a sum of 2,000*l.* for payment of certain specified debts, and all such other debts as he should owe at his decease; and on further trust out of his rents, &c., to pay divers life annuities, and "subject to the several trusts aforesaid" in trust for his wife for life, remainder to a nephew in fee; it was held by Sir J. Leach, M. R., that the sum of 2,000*l.* was the primary fund.

Charge of a particular sum towards payment of debts.

VI. — 8. *Effect of charging a Specific Fund with Debts, &c.* — It should seem, that where a specific portion of *personal* estate is appropriated to charges to which the general personalty is * liable, such fund is not, as in the case [*1491] of land, subsidiary only, but is primarily applicable.

Where *personal* fund is subjected to certain charges.

(*o*) 2 D. & War. 59.

(*p*) Bateman *v.* Earl of Roden, 1 Jo. & Lat. 369; Coote *v.* Coote, 3 id. 178. In the former case the personalty was held exonerated from a debt on the ground that it was consolidated with another sum which was clearly charged on the real estate only.

(*q*) 1 My. & K. 15.

Thus, in Browne *v.* Groombridge (*r*), where a testator gave to his executors his Exchequer bills, money at the banker's, and due to him on policies of insurance, money in the funds, and debts, upon trust thereout to pay his wife 200*l.*, and then *to pay his debts, funeral and testamentary expenses*, and, after making the said payments, to pay certain legacies, and then to stand possessed of the moneys upon certain trusts; it was contended, on the authority of Waring *v.* Ward, and Noel *v.* Lord Henley, that the specific fund was charged with the debts and legacies only in aid of the personal estate; but Sir J. Leach, V.-C., held that the fund was immediately liable, observing that Waring *v.* Ward was the case of a devisee of *real* estate, who was entitled to the aid of the personal estate.

General personalty held to be exempt.

So, in Choat *v.* Yeates (*s*), where a testatrix gave the residue of her *funded property*, after payment of her *just debts, legacies, funeral and testamentary expenses*, to A., and all the residue of her personal estate upon certain trusts; it was held that the funded property was primarily liable, though the effect was to leave nothing for the legatee.

Again, in Bootle *v.* Blundell (*t*), we have seen that the direction to pay the funeral expenses and certain legacies out of a specified fund was treated by Lord Eldon as tantamount to a declaration that they should not be paid out of the general personal estate.

The doctrine of these authorities seems upon the whole to be reasonable; for, although, where a testator subjects real estate to charges to which the personal estate, and most frequently that only, was before liable, there is no reason why the added fund should be [*1492] applied before the original one, yet in regard to * personal property, the whole of which was antecedently applicable to debts, as additional security to the creditor could not be the object of the provision, the natural inference is, that the testator, in appropriating for this purpose a particular portion of that estate, intended that it should be primarily applied.

But the doctrine does not apply where the residue remains undis-

(*r*) 4 Mad. 495. In this case "testamentary expenses" was held not to include the costs of an administration suit. But this has been otherwise determined, Harlne *v.* Harlne, L. R., 20 Eq. 471, and cases there cited; and Alsop *v.* Bell, 24 Beav. 469, Penny *v.* Penny, 11 Ch. D. 440. In the absence of a charge of such expenses, the costs, so far as incurred by administration of the real estate, will fall on the real estate, see Re Middleton, Thompson *v.* Harris, 19 Ch. D. 552. The expression will also include heirs, costs of a probate action in disputing a will, Brown *v.* Burdett (No. 2), 58 L. T. 753, 31 W. R. 854; W. N., 1883, p. 110, and "executorship expenses" is synonymous, Sharp *v.* Lush, 10 Ch. D. 468. So also the expressions "funeral and other expenses" and "legal expenses," see Webb *v.* De Beauvoisin, 31 Beav. 573; Coventry *v.* Coventry, 2 Dr. & Sm. 470. But such costs are not included in "debts and charges of proving the will," Stringer *v.* Harper, 26 Beav. 585.

(*s*) 1 J. & W. 102; and see Evans *v.* Evans, 17 Sim. 106; Phillips *v* Eastwood, 1 Ll. & G. 294; Webb *v.* De Beauvoisin, 31 Beav. 573; Vernon *v.* Earl Manvers, id. 623; Trott *v.* Buchanan, 28 Ch. D. 446.

(*t*) 1 Mer. 193, ante, p. 1480.

posed of, in which case it will be primarily liable (*u*). Nor does it apply to any part of the personal residue which becomes undisposed of by lapse, as where leaseholds are included in a gift of the residuary personal estate which is given to a charity (*x*).

Different rule where residue not disposed of.

Where one particular fund is appropriated for payment of debts and the testator's other property is exempted, such other property still remains liable in its proper order for any deficiency, the exemption not having the effect of altering the liabilities of the several species of exempted property inter se. Thus, in Lord Brooke *v.* Earl of Warwick (*y*), the testator devised real estates in mortgage and bequeathed specific parts of his personal estate and also the residue of his personal estate "freed and discharged from debts, &c.," and devised an estate to be sold and the money to be applied to pay his debts, &c. The money arising from the sale proving insufficient for the purpose, it was contended that the gift of the residue was in the nature of a specific gift, and there being the same expressed intention to exonerate the residue, as to exonerate the mortgaged estates, from debts, the devises of the latter ought to take cum onere; but Lord Cottenham, C., affirming the decision of Sir J. K. Bruce, V.-C., held that the residue was primarily liable. The V.-C. said he could conceive a case in which a residuary bequest might stand on an equal footing with particular or specific legacies; but here he thought the testator meant no more than that the property expressly given in trust for payment of the debts should be the only fund or the first fund for their payment. The L. C. approved of the V.-C.'s construction, and said both the mortgaged estate and the residue were intended by the testator to be freed from the debts (referring particularly to the passage cited above); but that he could not give the residue discharged from debts unless he provided for them out of some other fund.

Charge on a particular fund, and exemption of the others, do not alter liability of others inter se.

But where all the personalty is bequeathed in terms expressly * exempting it from payment of the usual charges [*1493] affecting it, this exemption throws those charges on all other property not expressly exempted, so that, for instance, in case of a deficiency in the produce of lands devised to answer such charges, they would fall upon other lands specifically devised (*z*). And in Powell *v.* Riley (*a*), where the exemption of the personal estate was not express, but was inferred from its being given as a specific legacy, and where the prop-

Secus, where part only of the others is exempted.

(*u*) Holford *v.* Wood, 4 Ves. 78; Hewett *v.* Snare, 1 De G. & S. 333; Newbegin *v.* Bell, 23 Beav. 386. And see ante, p. 1483.
(*x*) Kilford *v.* Blaney, 31 Ch. D. 56.
(*y*) 2 De G. & S. 425, affirmed 1 H. & Tw. 142. See also Colville *v.* Middleton, 3 Beav. 570.
(*z*) Morrow *v.* Bush, 1 Cox, 185; Young *v.* Young, 26 Beav. 522.
(*a*) L. R., 12 Eq. 175.

erty expressly given for payment of the debts, funeral and testamentary expenses proved insufficient, the personal estate was held liable to pay only a proportion of the deficit pari passu with specifically devised lands. This is the case contemplated by Sir K. Bruce in Lord Brooke *v.* Earl of Warwick, which, however, was not cited.

Marshalling of assets.

VII. — As to Marshalling Assets in favor of Creditors and Legatees. — It remains to consider in what cases assets are marshalled in favor of legatees or creditors.

On this subject it may be stated as a general rule, that, wherever a creditor, having more than one fund, resorts to that which, as between the debtor's own representatives, it is not primarily liable, the person whose fund is so taken out of its proper order is entitled to be placed in the same situation as if the assets had been applied in a due course of administration — in other words, to occupy the position of the creditor in respect of that fund or those funds which ought to have been applied, to the extent to which his own has been exhausted.[1]

General rule as to marshalling assets.

Thus, if the specialty creditors of a testator who died before the 29th of August, 1833 (*b*), or the simple contract creditors of any other testator, choose to enforce payment from the personal representatives of their debtor, instead of suing (as they may do) the heir in respect of any real estate which may have descended to him, and thereby withdraw the personalty from the claim of specific or pecuniary legatees, the Courts will marshal the assets in favor of such legatees, by placing them in the room of the creditors, as it respects their claim on the descended lands; such descended assets, according to the order of application before stated, being liable before personalty specifically bequeathed, or even pecuniary legacies (*c*).

In favor of legatees against the heir.

But pecuniary legatees are not entitled to have the assets [*1494] * marshalled against the *devisees* of real estate either specific or residuary (*d*), for to throw the debts upon the devisees in such a case would be to apply devised *real* estate before personal estate not specifically bequeathed, and thereby break in upon the established order of application before stated (*e*). It is not correct in such cases to account for the non-interference of the Court, by saying that the parties have *equal equi-*

But not against devisees.

(*b*) See stat. 3 & 4 Will. 4, c. 104, ante, p. 1388.
(*c*) See ante, p. 1430.
(*d*) Mirehouse *v.* Scaife, 2 My. & Cr. 695; Forrester *v.* Leigh, Amb. 171; Scott *v.* Scott, Amb. 383; 1 Ed. 4. 58; Hamly *v.* Fisher, Dick. 105, Amb. 127, (Hanby *v.* Roberts); Keeling *v.* Brown, 5 Ves. 359. Mr Roper has treated this case as if the specialty debts had been charged upon the land by the testator, 1 Treat. on Leg. 463; although Lord Alvanley *distinctly* determined that none of the debts were charged (see ante), and grounded his refusal to marshal the assets on this circumstance.
(*e*) Ante, p. 1430.

[1] See 1 Story, Equity, § 633.

ties (*f*), which would seem to imply that there exists such an equality between them in the consideration of a Court of Equity, as to entitle neither party to its interposition against the other; whereas it is clear that if the *devised* lands had been resorted to by any creditor, having no specific lien thereon, instead of the personal estate, the devisee would have been entitled to be reimbursed out of the pecuniary legacies. The reason, therefore, and the only reason, why assets are not marshalled in the case under consideration is, that the creditor having resorted to the fund *in the proper order*, no ground exists for disturbing it.

But if the lands devised are *charged with debts*, it is clear, upon the same principle, that the assets will be marshalled in favor of pecuniary and specific legatees; lands so charged being applicable before pecuniary or specific legacies (*g*). Thus, in Foster *v.* Cook (*h*) (where a testator had charged his real estate with his *debts*, and given legacies not so charged), the creditors having been paid out of the personal estate, which was not sufficient to pay both them and the legatees, the latter were allowed to come upon the real estate so far as it had been applied in payment of debts; and this decision has been recognized in latter times (*i*).

Unless lands are charged with debts.

So, if the mortgagee of a devised or descended estate resort *in the first instance (as he clearly may) to the personal estate of the deceased mortgagor,[1] to the prejudice of specific or even of general pecuniary legatees (who, it will be remembered, are not liable to exonerate a devised or descended mortgaged estate (*k*)), equity will give those legatees a claim on the estate to the extent to which their funds may have been applied in its exoneration (*l*). [*1495]

Assets marshalled against devisees, &c., of mortgaged lands.

In Wythe *v.* Henniker (*m*), an attempt was made, by impugning the authority of Forrester *v.* Leigh, to shake this doctrine in regard to pecuniary legatees; but Sir J. Leach, M. R., adhered to it, observing that since that case he had always considered it to be a settled rule of Courts of Equity, that a pecuniary legatee is entitled to stand upon the devised estate in the place of the mortgagee, to the extent

(*f*) See 1 Rop. on Leg. 469.
(*g*) Ante, p. 1430.
(*h*) 3 B. C. C. 347. See also Bradford *v.* Foley, Rolls, 14 Aug. 1791, 3 B. C. C. 351, n.; Webster *v.* Alsop, Rolls, 12 July, 1791, 3 B. C. C. 352, n.; Fenhoulett *v.* Passavant, Dick. 253; Lord Hardwicke's judgment in Arnold *v.* Chapman, 1 Ves. 110; Norman *v.* Morrell, 4 Ves. 769, 4 R. R. 347; Aldrich *v.* Cooper, 8 Ves. 396; from which last case it also appears that the rule as to the widow's paraphernalia is the same. Probert *v.* Clifford, Amb. 6, as corrected in note by Blunt, is not contra; and see Snelson *v.* Corbet, 3 Atk. 368.
(*i*) Paterson *v.* Scott, 1 D. M. & G. 531. Here was a trust to sell and pay debts; but a mere charge is equivalent, Rickard *v.* Barrett, 3 K. & J. 289; Surtees *v.* Parkin, 19 Beav. 406.
(*k*) Vide ante, p. 1444.
(*l*) Lutkins *v.* Leigh, Cas. t. Talb. 53; Forrester *v.* Lord Leigh, Amb. 171; Johnson *v.* Child, 4 Hare 87.
(*m*) 2 My. & K. 635.

[1] Plimpton *v.* Fuller, 11 Allen, 139; Hewes *v.* Dehon, 3 Gray, 205.

to which the mortgage has been satisfied out of the personal estate. That doctrine proceeded upon the assumption, that the devise of the mortgaged estate is a devise of the equity of redemption only, and that the testator intended that the devisee should take the estate cum onere. That doctrine, his Honor, however, observed, has not been universally approved, because in all other cases the devisee of a mortgaged estate does not take it cum onere, but has a right to have the mortgage satisfied out of the personal estate, even where the devise is made expressly subject to the mortgage.

Rule as to vendor's lien for purchase-money.

It has been much debated whether, where a vendor, who has an equitable lien for his purchase-money on the property, as well as a claim on the personal estate of the deceased purchaser, resorts to the latter, to the prejudice of specific or pecuniary legatees, the legatees are entitled to have the assets marshalled against the heir or devisee of such property.

Question between legatees and heir.

In regard to the heir, it would seem clear upon principle, and by analogy to the case of a descended mortgaged estate, that in such a case the Courts would marshal the assets in favor of the legatees; descended assets being, according to the order before stated, applicable before specific or pecuniary legacies to the payment of all charges affecting them both.

And this view of the case seems to agree with Lord Eldon's observation in Austen *v.* Halsey (*n*), where, however, the land was devised, and his opinion upon another question rendered it unneces- [*1496] sary to decide the point. A contrary determination, * indeed, was made in Coppin *v.* Coppin (*o*), where a person, who was both heir and executor of his brother, was held to be entitled to retain out of the personal assets the purchase-money of an estate which his brother had purchased from him, against the legatees of the brother. This case has been questioned by Lord Eldon (*p*), and seems to have been overturned by Trimmer *v.* Bayne (*q*), where Sir W. Grant decided that the heir who had paid the purchase-money for an estate contracted for by his ancestor was not entitled, as against the legatees of such ancestor, to be reimbursed out of his personal estate. It is not distinctly stated, however, whether the legatees out of whose bequests the heir unsuccessfully claimed to be reimbursed were specific or pecuniary legatees.

The right of a pecuniary legatee to have the assets marshalled as against the heir of a testator who purchased, but died without having paid for, an estate, is placed beyond all doubt by Sproule *v.* Prior (*r*).

Where the purchased estate is *devised*, the question is somewhat

(*n*) 6 Ves. 484.
(*o*) Sel. Ch. Cas. 28, 2 P. W. 291.
(*p*) See his judgment in Mackreth *v* Symmons, 15 Ves. 339.
(*q*) 9 Ves. 209, 4 Russ. 339, n.
(*r*) 8 Sim. 189.

different; but as the established rule is, we have seen, that the devisee of a mortgaged estate is not entitled to exoneration out of personal estate specifically bequeathed, and not expressly made subject to debts, there seemed ground to contend that in the present case the estate must, by parity of reasoning, also bear its own burden against such legatees, and accordingly, that if their funds have been taken by the vendor, they are entitled to have the assets marshalled against the devisee.

Question between legatees and devisee of contracted-for estate.

And Pollexfen *v.* Moore (*s*) was considered to lend some countenance to this doctrine; but it appears to have been decided upon different, though it should seem untenable, grounds. Sir W. Grant, in Trimmer *v.* Bayne (*t*), intimated that the case had greatly perplexed him, and the eminent author of the "Treatise of Vendors and Purchasers" has taken some pains to show the inapplicability of the decision to the doctrine which it has been advanced to support, and the unsoundness of that doctrine; and his high authority may have had some weight in procuring its overthrow in Wythe *v.* Henniker (*u*), where Sir J. Leach, M. R., * held that a per- [*1497] son having devised an estate which he had purchased, and the vendor having after his decease been paid a part of the purchase-money, which remained unpaid at the testator's death, out of the deceased's personal estate, the pecuniary legatees had no right to stand in the place of the vendor in respect of his lien upon the purchased estate, to the extent of the sum so received. His Honor, however, appears to have contented himself with showing that Pollexfen *v.* Moore (which had been cited on behalf of the legatees) was not applicable to the point, and we look in vain throughout his judgment for an explanation of the principle of his decision, or an answer to the plausible, if not convincing, arguments founded upon analogical reasoning from the cases by which the claim of the legatees was attempted to be sustained. In Lord Lilford *v.* Powys-Keck (*x*) it was held by Sir J. Romilly that the distinction between a mortgage and a vendor's lien was untenable, and that pecuniary legatees were entitled to marshal against the devisee in the one case as well as in the other. And since land in mortgage or subject to a vendor's lien is now primarily liable to the satisfaction of those charges, residuary legatees and next of kin have in both cases a similar right (*y*).

Pecuniary legatees not entitled to marshal, as against devisee of contracted-for estate, in respect of unpaid purchase-money.

Effect of L. King's acts.

(*s*) 3 Atk. 272, stated from R. L. Sugd. V. & P. 874, 11th ed., and see 679, n., 14th ed. Some of the doctrine advanced in this case is at variance with the decision. See 9 Ves. 211; 15 Ves. 339.

(*t*) 9 Ves. 211.

(*u*) 2 My. & K 635. But before 3 & 4 Will. 4, c. 104, assets were marshalled against the devisee, in favor of simple contract creditors, Selby *v.* Selby, 4 Russ. 336.

(*x*) L. R., 1 Eq. 347. See also Birds *v.* Askey, 24 Beav. 618.

(*y*) See L. King's acts, sup. pp. 1455, et seq.

Sir W. Grant decided that, even where the testator expressly directed his executors to pay the purchase-money of the devised estate, and the personal estate was inadequate to pay both the purchase-money and the pecuniary legacies, the devisee was liable to contribute ratably with the legatees (*z*).

It may be observed that Lord Eldon in Austen *v.* Halsey (*a*) thought that a clause, giving the executors "power" to pay the purchase-money out of the personal estate, was not necessarily to be construed as an absolute direction.

The preceding cases, however, in which equity interferes to prevent an eventual derangement, by the act of third persons, of the order of applying the assets, do not completely exemplify an important principle by which the Courts, in marshalling assets, are governed, and which forms the peculiar feature of the doctrine; it is this, — that wherever a party has a claim upon one fund only, and another upon more than one, the party having several funds must resort, in the [*1498] first instance, to that on which *the other has no claim; or, in other words, the Court will so arrange the funds as to let in as large a number of claims as possible (*b*), and if the person having the several funds should, in violation of this rule, have resorted to the fund common to himself and the person having no other fund, the Court will place that person in his room, to the extent to which the common fund has been so applied (*c*).

Marshalling, where one party has several funds, and another one only.

This principle is so applied in favor of both creditors and legatees (*d*).

In regard to the former, however, it is to be remembered that the statute of 3 & 4 Will. 4, c. 104 (*e*), renders all real estate, including copyholds, liable to the claims of creditors of every class, and that stat. 32 & 33 Vict. c. 46, places specialty and simple contract creditors on an equal footing.

Effect of stats. 3 & 4 Will. 4, c. 104, and 32 & 33 Vict. c. 46, upon the doctrine.

The doctrine will therefore seldom be called into operation in reference to creditors. But it is observable, that the former statute, by widening the range of the claims of creditors, has given greater scope to the application of the doctrine among legatees. Thus, as it was formerly the rule that, where a specialty creditor resorted to the

(*z*) Headley *v.* Readhead, Coop. 50, noticed ante, p. 1430, n. (*s*).

(*a*) 6 Ves. 478.

(*b*) "The interest of the debtor shall not be regarded," per Lord Eldon, Aldrich *v.* Cooper, 8 Ves. 391. But the principle will not be applied to the prejudice of third persons, Dolphin *v.* Aylward, L. R., 4 H. L. 486.

(*c*) See this doctrine referred to as formerly excluding in regard to charities, ante, Vol. I., p. 195.

(*d*) In Chapman *v.* Esgar, 1 Sm. & G. 575, a testator made his will before 1838, charging his real estate with debts, then purchased other real estate and died, and it was held that specialty creditors claiming the benefit of the charge in the will must allow the descended estates to be brought into hotchpot.

(*e*) Ante, p. 1388.

personal estate, and thereby rendered it inadequate to the payment of pecuniary legacies the legatees might claim to stand in his place in respect of his demand upon the realty, which had descended or was charged with debts; so it is equally clear that, under the existing law, the same consequence would follow in the case of a simple contract creditor taking such a course (*f*).

Upon the same principle, it is settled that, where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both, the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate for those who have no other fund.

Marshalling among legatees.

*Thus, in Hanby *v.* Roberts (*g*), where the testator by his will gave several legacies (not charging them upon the real estate), and by codicil bequeathed a legacy of 3,000*l.*, *with the payment of which he charged his real estate;* the personal estate having been exhausted in the payment of the 3,000*l.* legacy, Lord Hardwicke held that the other pecuniary legatees should stand in the place of the satisfied legatee to this extent. [*1499]

But in Prowse *v.* Abingdon (*h*), Lord Hardwicke refused to marshal assets in favor of a legatee whose legacy had been originally charged upon the land, but had failed in respect of the real estate, by his death before the time of payment (*i*); his Lordship observing, that the rule as to marshalling would hold only where it was proper to be done at the time the legacy first took place, and not where it was owing to a fact which happened subsequently to the death of the testator (*k*); and this has been since followed in Pearce *v.* Loman (*l*).

Exception where legacy, as a charge upon the land, failed.

(*f*) Where there was delay in payment of the simple contract creditors, they were held not entitled to stand in the place of the specialty creditors to the extent of the interest which would have accrued due on the specialty debts, but only to the extent of the principal, Cradock *v.* Piper, 15 Sim. 301.

(*g*) Amb. 127, 2 Coll. 512, Dick. 104. See also Masters *v.* Masters, 1 P. W. 421; Bligh *v.* Earl of Darnley, 2 P. W. 620; Norman *v.* Morrell, 4 Ves. 769, 4 R. R. 347; Bonner *v.* Bonner, 13 Ves. 383; Scales *v.* Collins, 9 Hare, 656.

(*h*) 1 Atk. 482.

(*i*) As to this doctrine, see ante, Vol. I., p. 792; but see also Pearce *v.* Loman, 3 Ves. 135, where Lord Loughborough doubted whether in such a case the legacy was payable even out of the personal estate. It is not easy, however, to perceive upon what sound principle the circumstance of its having been charged upon the real estate as the auxiliary fund, and having failed as to that, should vary the construction of it as a personal legacy.

(*k*) But is it not always the fact of some legatee or creditor resorting to a particular fund *after the death of the testator* that occasions the requisition to marshal?

(*l*) 3 Ves. 135.

* CHAPTER XLVII.

LIMITATIONS TO SURVIVORS.

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I. — On construing Survivor as synonymous with Other. — 1. *Survivor if unexplained is construed strictly.* — Whether the word "survivor" is to receive a construction accordant with its strict and proper acceptation, or is, by a liberal interpretation, to be changed into *other*, is a point which has been often discussed and variously decided. On more than one occasion expressions have fallen from eminent judges calculated to create an impression that the term "survivor" might by its own inherent force, and without one single ray of light from the surrounding context, be read as synonymous with *other* (*a*). But we are now taught by a series of decisions, which outweigh any opposing dicta or opinions, that the word "survivor," like every other term, when unexplained by other parts of the will, is to be interpreted according to its strict and literal meaning.[1]

"Survivor" when construed *other*.

(*a*) See in particular, Barlow *v.* Salter, 17 Ves. 479, where Sir W. Grant seems to have assumed this point. This construction has much to recommend it as carrying into effect the probable intention of testators, and as supplying a defect or inaccuracy of expression very commonly to be found in testamentary instruments.

[1] See Bayless *v.* Prescott, 79 Ky. 252. The language of the will may be such as to cut off all who are not in esse at the coming of the event upon which distribution is to be made. Inasmuch as a purpose to limit the testator's bounty in this way is perfectly legal, there can be no difficulty when the language used is free from doubt. But as the language of testators is often obscure in this as in other particulars, the adoption of an artificial basis of interpretation of the term "survivors" and its equivalents has been found necessary.

* Thus, in Ferguson *v.* Dunbar (*b*), where a testator gave [*1501] to his executors so much of his personal estate as would

(*b*) 3 B. C. C. 468, n.

Unfortunately the courts have not always agreed upon the probable meaning of such language. Thus, in the case of a gift to A. for life, and afterwards to his surviving children, it has been held by many of the courts that in the absence of explanatory language, the term "surviving" is to be deemed as referring to the death of the testator, the persons surviving that event thus taking vested estates. Moore *v.* Lyons, 25 Wend. 119; Livingston *v.* Greene, 52 N. Y. 118, Embury *v.* Sheldon, 68 N. Y. 227; Stevenson *v.* Lesley, 70 N. Y. 512; Kelso *v.* Lorillard, 85 N. Y. 177; Vanderzer *v.* Slingerland, 109 N. Y. 47; Ross *v.* Drake, 37 Penn. St. 373; Hansford *v.* Elliott, 9 Leigh, 79; Blanchard *v.* Blanchard, 1 Allen, 223; Pike *v.* Stephenson, 99 Mass. 188; Porter *v.* Porter, 50 Mich. 456; Rood *v.* Hovey, id. 395; Eberts *v.* Eberts, 42 Mich. 404; Stevenson *v.* Fox, 125 Penn. St. 568; Stone *v.* Lewis, 85 Va. 474; Jameson *v.* Jameson, 86 Va. 51; Randolph *v.* Wright, 81 Va. 611. See also Shutt *v.* Rambo, 57 Penn. St. 149; Schoonmaker *v.* Stockton, 37 Penn. St. 461. On the other hand, courts of several of the states, following, as it seems, a more natural construction, hold that the word is to be treated as referring to those who survive at the termination of the preceding estate. Reiff's Appeal, 124 Penn. St. 145; Coggins's Appeal, id. 10; Denny *v.* Kettell, 135 Mass. 138 (distinguishing Blanchard *v.* Blanchard, supra); Branson *v.* Hill, 31 Md. 181; Vantilburgh *v.* Hollinshead, 1 McCart. 35; Slack *v.* Bird, 8 C. E. Green, 238; Swinton *v.* Legare, 2 McCord, Ch. 440; Cole *v.* Creyon, 1 Hill, Ch. 213; the last two, however, being cases of legacies, as to which see infra.

The first of these positions rests upon the ground that, though there is doubt as to the meaning of the term "survivors," that doubt may be solved by the rule, admitted by general consent, that the law favors the vesting of estates; Byrnes *v.* Stilwell, 103 N. Y. 453; and it is probable that even in those states in which the prima facie import of the word is deemed to look to the termination of the particular estate, such construction will give way to slight indications of an intention at variance with it. It is equally true that in those states in which the presumed import of the word is different, the presumptive meaning will readily yield to language suggesting another meaning. See Olney *v.* Hull, 21 Pick. 311; Hulbert *v.* Emerson, 16 Mass. 241 (doubted, apparently, in Blanchard *v.* Blanchard, 1 Allen, 223, 228); Thomson *v.* Ludington, 104 Mass. 193, Denny *v.* Kettell, 135 Mass. 138. For other cases of construction of this term or equivalents, see Clanton *v.* Estes, 77 Ga. 352; Darnell *v.* Barton, 75 Ga. 377. Brooks *v.* Carter, 118 Mass. 407; Howland *v.* Howland, 11 Gray, 469; Haskins *v.* Tate, 25 Penn. St. 249; Carroll *v.* Hancock, 3 Jones, 471; Schoppert *v.* Gillam, 6 Rich. Eq. 83; Stevenson *v.* Evans, 10 Ohio St. 307; Smith *v.* Block, 29 Ohio St. 488; Satterfield *v.* Mayes, 11 Humph. 58; Rogers *v.* Rogers, 2 Head, 661; McLean *v.* Freeman, 70 N. Y. 81; Provost *v.* Provost, id. 141; Buel *v.* Southwick, id. 581; Smith *v.* Scholtz, 68 N. Y. 41; Brewster *v.* Striker, 2 Comst. 19; Striker *v.* Mott, 28 N. Y. 82; Scott *v.* Guernsey, 48 N. Y. 106; Colton *v.* Fox, 67 N. Y. 348.

The conflict of authority in regard to the rule of interpretation to be given to the word "survivors" might be supposed from some of the cases to be confined to gifts of realty. In the case of a chattel, it has been said that there can be no remainder which shall presently vest, subject to opening, in favor of after-born children; and that the estate must be deemed contingent until the time for distribution arrives. Parsons, C. J., in Dingley *v.* Dingley, 5 Mass. 535, 537; Shaw, C. J., in Emerson *v.* Cutter, 14 Pick. 108. Compare Jenkins *v.* Freyer, 4 Paige, 47; Cole *v.* Creyon, 1 Hill, Ch. 322; Swinton *v.* Legare, 2 McCord, Ch. 440; Simms *v.* Garrot, 1 Dev. & B. Eq. 393; Walters *v.* Crutcher, 15 B. Mon. 2; all to the effect that a legacy (Simms *v.* Garrot and Walters *v.* Crutcher were gifts of slaves which the law termed a devise) given to a class of individuals will prima facie include all who answer the description at the time of distribution. But the doctrine of Parsons, C. J., in Dingley *v.* Dingley, above referred to, may have been based upon the early common-law rule, now discarded even as to money (Smith *v.* Van Ostrand, 64 N. Y. 278), that no *remainder* could be created in a chattel after the gift of a life-estate, such a gift carrying the absolute estate. Welsch *v.* Belleville Bank, 94 Ill. 191; 2 Kent, Com. 352, 353; 4 Kent, Com. 269. Inasmuch as it is now established that there may be such a remainder, there seems to be no reason why the remainder may not be liable to open and let in after-born persons as in cases of realty, the result of which would be to leave the conflict of authority as to "survivors" standing as to personalty as well as to realty. The distinction suggested has not elsewhere been taken.

A question somewhat similar to that of the survivorship in a class, it may by anticipation be here observed, often arises when, instead of a class, the death of only a single individual is concerned. There may, for example, be a gift in fee to A., "and in case of his decease" to B.; and the question then arises as to the interpretation to be put upon the quoted words. Does the testator, in the absence of explanatory language in the will, mean that B. is to take in the event of the death of A. at any time, or does he mean that he is only to take in the event of A.'s death in his (the testator's) lifetime? The absurdity, however, of imputing to the tes-

purchase an annuity of 550*l.*, which he gave to his wife for life, and he directed the principal after her decease to be paid to his children, that is to say, one-half to his son G., and one-half to his daughters E. and C., if living at the death of their mother; and if any of them should die in the lifetime of their mother, leaving issue, he gave that share to the issue of such child or children equally, at the age of twenty-one years or day of marriage; but if any of them should die before the age of twenty-one years without issue, he gave that share to the *survivors;* and if all of them should die without leaving children, the same was to fall into the residue. The mother died: then C. died leaving children. E. afterwards died under twenty-one, and without issue. The question was, whether the children of C. were entitled to any part of the share of E. Lord Thurlow said that this was one of those cases in which he had the mortification to see that what was most probably the testator's intention could not be executed, for want of his having been properly advised, and having sufficiently explained himself; that he thought the testator meant the children should take the share which would have accrued to the parent if living; but not having said so, but limited such share to the survivors or survivor, he must declare G. as the only surviving child, entitled to the whole of E.'s share, and decreed accordingly.

Word "survivors" construed strictly, not as *others*.

So, in Milsom *v.* Awdry (*c*), where a testator bequeathed the residue of his personal estate to trustees, upon trust to pay and apply the same to and among his nephews and nieces (the sons and daughters of his late brothers and sister M., D., and H.) equally between them for their lives, the children of such of them his said brothers and sister to have only their father's or mother's share; and after the death of either of the testator's said nephews and nieces, in trust to call in the share of the principal money out of which the said interest was to be paid, and pay it equally unto and among the children of such of his said nephews and nieces as should happen to die; and if any of his (the testator's) said nephews and nieces should die without leaving any child or children, then the share or shares of him, her, or [*1502] them so dying should go to and among *the survivors and* * *survivor* of them in manner aforesaid. One nephew died without leaving issue; then another died leaving issue; a third then died

Gift to *survivors and survivor* confined to persons in existence.

(*c*) 5 Ves. 465. See also Wollen *v.* Andrewes, 9 J. B. Moo. 248, 2 Bing. 126.

tator a suggestion of uncertainty, implied by the words "in case of" or the like, of what all men know to be certain, has led the courts to adopt the view that his intention was to substitute B. to the place of A. if the gift to A. should fail by A.'s death before the will should go into effect. Briggs *v.* Shaw, 9 Allen, 516; Crossman *v.* Field, 119 Mass. 170; Cambridge *v.* Rous, 8 Ves. 21; Home *v.* Pillans, 2 My. & K. 20; Schenck *v.* Agnew, 4 Kay & J. 406; Kelly *v.* Kelly, 61 N. Y. 47. Compare Barton *v.* Conigland, 22 N. Car. 99; Davis *v.* Parker, 69 N. Car. 271; Hilliard *v.* Kearney, Busb. Eq. 221. See post, Ch. XLVIII.

without issue, leaving a sole survivor. Sir R. P. Arden, M. R., after much hesitation, decided that the share of the third belonged exclusively to the survivor, and was not divisible (as had been contended by the issue of the second) between him and such issue.

So, in Davidson *v.* Dallas (*d*), where a testator bequeathed to the children of his brother R. D. 3,000*l.*, to be equally divided among them, and if either of them should die before the age of twenty-one years their shares to go to the *survivors*. Lord Eldon, after referring to rule for construing "survivors" as importing *others*, observed that there was nothing in this will indicating a general intention upon which the forced construction of the term "survivors" had been adopted. The words must therefore have their natural meaning.

Here the contention was that "survivors" should be read "others," not as in the former (which are the more common) cases, in order to include children who had previously died; but in order to include children who were not born when the original gift took effect (*e*).

Remark on Davidson *v.* Dallas.

Again in Crowder *v.* Stone (*f*), where a testator bequeathed certain stock in the funds to his executors, in trust for his wife and brother for their respective lives, and after the decease of the survivor to be divided equally between his nephew and four nieces; and in case of the death of his said nephew or of any or either of his said nieces without lawful issue before their respective parts or shares should become due and payable to them, then the part or share of him, her, or them so dying without issue as aforesaid should go and be equally divided between them and amongst the *survivor and survivors* of them, share and share alike. Lord Lyndhurst said, "It was contended that the words 'survivor and survivors of them' were to be construed 'other and others.' That is a construction which the Court has, in some cases, put upon those or similar words; but it is what Lord Eldon in Davidson *v.* Dallas (*g*) calls a 'forced construction of *the term [*1503] survivor,' and he contrasts it with what he calls its 'natural meaning.' It is a construction which the Court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will; and in Wilmot *v.* Wilmot (*h*) it was scarcely possible to put any other meaning on the words. But, in looking at the language and the provisions of this will, I do not find any such necessity: and it seems to me that the words 'survivor and

"Survivor" construed strictly, not as importing *other*.

Lord Lyndhurst's judgment in Crowder *v.* Stone.

(*d*) 14 Ves. 576. R. D. survived the testator.
(*e*) See also Mann *v.* Thompson, Kay, 644, 645. Whether a gift, not to several persons or the survivors of them, but simply to "children who *survive* A.," includes any not born before A.'s death, was decided in the affirmatives in Re Clark's Estate, 3 D. J. & S. 111; but in the negative in Gee *v.* Liddell, L. R., 2 Eq. 341; also Trickey *v.* Trickey, post, p. 1530.
(*f*) 3 Russ. 217.
(*g*) 14 Ves. 578.
(*h*) 8 Ves. 10, post, p. 1510.

survivors' are here to be taken in their natural meaning. The shares which became subject to the operation of the bequest to the survivor and survivors, will be divisible among such only of the five legatees as were living at the time when the events happened on which the shares were to go over respectively."

Recent authorities for construing "survivors" strictly.

Again, in Ranelagh *v.* Ranelagh (*i*), where a testator, after bequeathing certain pecuniary legacies to his children for life, added, "in case of the demise of any of the above parties without legitimate issue, their, his, or her proportions to be divided among the *survivors;*" Lord Brougham, C., treated it as clear (though it was not necessary to decide the point) that the word "survivors" was used in its plain and obvious sense, as meaning such of the individuals named as should be living when any of them happened to die.

And lastly, the same construction prevailed in Cromek *v.* Lumb (*k*) as to a clause providing that, in case any of the testator's grandchildren (who were the objects of a prior gift) should die, being a son under the age of twenty-three and without lawful issue, or being a daughter under that age and unmarried, then the share or shares of him, her, or them so dying should go to the *survivor and survivors*, and the lawful issue of such as might be dead.

Effect of "other" being elsewhere associated with "survivor."

And the mere circumstance that there occurs in the same will, in reference to another subject or other subjects, an instance of the words "survivor" and "other" being used conjunctively and as if synonymous (*l*), is not considered to imply an intention that "survivor," standing alone, shall have the same force or signification as the term with which, in other instances, the testator has associated it.

[*1504] * Thus, in Winterton *v.* Crawfurd (*m*), where a testator devised the residue of his real estate to trustees, upon trust as to one-third to pay the rents to the separate use of his daughter Harriet during her life, and after her decease, in trust for all her children, in equal shares, and the respective heirs of their bodies; and in case one or more of such children should die without issue, then as to his, her, or their share or shares, in trust for the survivors or survivor *and others or other of them*, and after giving the other two-thirds by similar limitations to his daughters Louisa and Fanny, with remainder to their children, the testator proceeded to declare that, in case one or more of his said daughters should die without issue of her or their body or bodies, then the share or shares of her or them so dying should be in

Words "survivors or survivor" construed strictly.

(*i*) 2 My. & K. 441.
(*k*) 3 Y. & C. 565.
(*l*) So, the words "survivors and survivor *and* others and *other*" were held to be governed by "others" in Slade *v* Parr, 7 Jur. 102. But "other surviving" is synonymous with "surviving," Beckwith *v.* Beckwith, 46 L. J. Ch. 97, post, p. 1513.
(*m*) 1 R. & My. 407.

trust for the *survivors or survivor* of them for the lives or life of such *survivors or survivor*, to be held and enjoyed by the trustees for the joint natural lives of such *survivors* of the testator's said daughters, in trust for them as tenants in common, and the rents and profits of the accruing share or shares to be for their separate use, and after the decease of the *survivor* of his said daughters, in trust for the child and children *of the survivors or survivor* of his said daughters per stirpes, and the heirs of the bodies of such child and children; and in case any one or more of such children should die without issue, then as to the shares of him, her, or them so dying, in trust for the *survivors or survivor*, *others or other* of them, and the heirs of the body of such survivors or survivor, others or other of them; and if all such children but one should die without issue, in trust for such surviving or only child and the heirs of his or her body; and in default of such issue, in trust for testator's nephews. Fanny died, leaving children. Louisa afterwards died without children, and the share of Louisa was claimed by and was now held to belong to Harriet, the only surviving daughter, to the exclusion of the children of Fanny. Sir J. Leach, M. R., said: "In order to effectuate the intention of the testator, the Court sometimes gives to the word 'survivors' the sense of 'others.' Here the expressions of the testator are too precise to impute to him such an intention; and the survivors are to take as tenants in common for life for their separate use, which is wholly inconsistent with the notion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent. It is true that, * in [*1505] the gift over after the death of the surviving daughter to the children of the survivors or survivor, the words 'survivors or survivor' may receive a more enlarged meaning. The intention of the testator appears to have been, that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters; and this intention would be defeated if, upon the death of Lady Winterton (*n*) without issue, which is stated to be a probable event, the children of the deceased sister were excluded. The question cannot, however, be decided during Lady Winterton's life; and all that can now be done is to declare that Lady Winterton is entitled for life, to her separate use, to the one-third share of the real estate, which by the will was given to her sister Louisa."

Sir J. Leach's observation in regard to the inconsistency of the devise *for life* to the survivors with the supposition that the children of the deceased devisees were to stand in their place is inconclusive, because though the estate for life could not take effect as to any deceased child, the devise in re-

Remarks upon Winterton *v.* Crawfurd.

(*n*) This lady was the survivor of the three daughters.

mainder to the issue of such child might. Indeed, if he was right in the opinion expressed by him, that after the death of the last surviving daughter the property would go over to the children of the deceased daughter, and not to the ulterior devisees, there seems to be great difficulty in maintaining the soundness of his decision, as it has the effect of reading words occurring in different parts of the same will in various senses. The case too would then be in direct opposition to Doe *v.* Wainewright (*o*), where, *even in a deed*, the limitation of cross-remainders in tail to *surviving* children was held to take effect in favor of the issue of a deceased child, on the sole ground of its appearing, by the terms of the ultimate limitation, that the estate was not to go over, unless the issue of *all* the children failed.

In Aiton *v.* Brooks (*p*), however, it was considered that, where the gift to the survivors was to take effect in the event of the decease of any of the prior objects of gift *combined with some collateral event*, the rule of construction adopted in the preceding cases did not apply, but that the word "survivor" might be construed *other*, on the ground, it should seem, that, as in such cases the ulterior or substituted gift is not to take effect absolutely and simply on the decease of [*1506] the prior objects, it is the * less likely that the testator should intend survivorship to be an essential ingredient in the qualification of the ulterior or substituted legatees.

Effect where gift over is combined with a collateral event.

In that case, a testator bequeathed 1,500*l.* stock to A. and B. during their lives, in equal shares, and immediately on the death of either he directed his trustees to pay the share of such deceasing legatee to her children who should be living at their mother's decease, and who should attain the age of twenty-one years, the interest in the mean time to be applied for maintenance; *but in case any of such children should die before they should attain the age of twenty-one years*, the testator gave the share of such deceasing child to the *survivor*; provided always, that *in case either of them the said A. or B. should leave any child living at their respective deceases but which should all die before they attained the age of twenty-one years*, then the trustees were to assign the share of such legatee so dying unto the *survivor* of them the said A. and B., her executors or administrators. A. died in the lifetime of B., leaving a child who attained twenty-one; B. afterwards died without issue. Sir L. Shadwell, V.-C., held A. to be entitled to B.'s moiety, observing, "the word 'survivor' must of necessity be taken to mean 'other,' for the testator contemplated the event, not of one of the legatees dying in the lifetime of the other, *but of one of them dying childless.*"

Word "survivor" construed *other*.

There appears to be much good sense in the distinction here sug-

(*o*) 5 T. R. 427, 2 R. R. 634, stated post, p. 1509.
(*p*) 7 Sim. 204.

gested by his Honor, and had it originally obtained, a large amount of litigation would probably have been prevented; but the authorities seem now to present an insuperable obstacle to its adoption, for, in almost every instance in which the strict construction of the word "survivor" has prevailed, the gift to the survivors was to take effect in the event of the death of the predeceasing objects without issue, or combined with some other contingency. In Ferguson *v.* Dunbar, Milsom *v.* Awdry, Davidson *v.* Dallas, and lastly in Crowder *v.* Stone (which is a recent and leading case), the gift over was to take effect on any of the objects dying, either without issue or under age, and yet it was held to apply only to the persons actually living at the period in question. Seeing, therefore, that Aiton *v.* Brooks was professedly grounded on a circumstance which is common to nearly all the authorities, and that some of those authorities were not cited to or present to the mind of the learned and able Judge who decided it, the case can hardly be relied on as a general authority. In fact a different rule prevailed in the subsequent * case of Leeming *v.* Sherratt (*q*), which may be added to the authorities for giving to the word "survivor" a strict construction. A testator bequeathed 1,000*l.* to each of his six children, to be paid at twenty-one, except as to girls, one half of whose shares was to be invested and the interest to be paid to them for life, and the principal to be disposed of in such manner as they should direct among their issue; and in case they should die without issue, he gave the principal among the survivors of his children in equal proportions. The testator then gave his freehold property and the residue of his personalty to trustees, the proceeds to be divided among his children when the youngest should attain twenty-one, one half of the daughters' shares to be invested, the interest to be paid to such daughters, and the principal to be disposed of in such manner as they should direct among their children; but if there were no children, then such shares to be divided equally among the *survivors* of the testator's children; and in case of the death of any of his children, leaving lawful issue, the testator gave to such issue the share the parent so dying would have been entitled to have. One question was, whether the words "survivors of my children" were to be construed *others*. Sir J. Wigram held that the strict construction must prevail. He said, "In Davidson *v.* Dallas (*r*), Lord Eldon's language obviously imports that the word 'survivors' is to be construed in its natural sense, unless the will itself shows that it was used by the testator in a different sense; and Crowder *v.* Stone (*s*) is to the same effect. In

Remark on doctrine advanced in Aiton *v.* Brooks.

[*1507]

Word "survivor" construed strictly.

Sir J. Wigram's judgment in Leeming *v.* Sherratt.

(*q*) 2 Hare, 14. See also Willetts *v.* Willetts, 7 Hare, 38; Moate *v.* Moate, 16 Jur. 1010.
(*r*) 14 Ves. 576.
(*s*) 3 Russ. 217.

Barlow *v.* Salter (*t*) the dictum of the Court tends rather to treat the word as having a technical meaning (that of 'others') impressed upon it in practice. According to Davidson *v.* Dallas, one reason for construing 'survivors' to mean 'others' has been to take in all persons who should be born before the period of distribution. In other cases the object suggested has been to prevent a family losing the provision intended for it by the death of a parent, leaving children. The reason of the former of these cases could not occur here, in the case of the residue, because the testator's own children are the legatees of that residue. And, according to the construction that I feel myself at liberty to put upon that clause in the will which, in certain cases, substitutes the issue for the parents, I think the testator [*1508] * has guarded against the second inconvenience; and, so far at least as the residue is concerned, I think that, in the residuary clause, the word 'survivor' must be construed in its natural sense, and that this construction of the word in one part of the will must, in this will, determine its construction in the other part also."

And, in Lee *v.* Stone (*u*), where a testator devised a distinct estate to each of his three daughters for life, with remainder to her children as tenants in common in fee; and provided, that if either of his daughters should happen to die without having issue, the estate devised to her should go to the survivors or survivor of the daughters, and their or her heirs as tenants in common; and if all the daughters but one should die without issue, their shares should go to the survivor in fee; it was held, that the word "survivor" must be construed according to its natural import.

In De Garagnol *v.* Liardet (*v*) a testator gave the residue of his personal estate in unequal shares among his two sons and three daughters, the shares of the daughters to be held in trust for them for life, and afterwards for their respective children; but if one or more of the daughters should die without children the shares of the daughters were to be divided "amongst the survivors of them his said sons and daughters." It was held by Sir J. Romilly, M. R., that "survivors" must be construed strictly: it could not here be read "others," because the gift over was to a different class, and "others," he said, was confined to the others of the same class, *i. e.*, of those whose shares were to go over.

Gift over to survivors of a different class.

I. — 2. *Effect of Gift over following a Gift to Survivors.* — But where a gift to the "survivors" of several legatees, limited to

(*t*) 17 Ves. 479.

(*u*) 1 Ex. 674. See also Stead *v.* Platt, 18 Beav. 50; Parsons *v.* Coke, 4 Drew. 296; Greenwood *v.* Percy, 26 Beav. 572; Re Corbett's Trusts, Joh. 591; Blundell *v.* Chapman, 33 Beav. 648; but as to the last case qu., for the strict interpretation made the substitutionary words ("or their children") inoperative. However, it was dictum only.

(*v*) 32 Beav. 608. See also Re Usticke, 35 Beav. 338; Taylor *v.* Beverley, 1 Coll. 108 (gift to one child for life, and if she die without issue, to testator's surviving children).

take effect on a certain event (as the death of any of them under age or without issue), is followed by a gift over, not if there should be no survivor at the time the event happens, but if that event should happen to every one of the legatees (as if all die under age, or without issue), "survivors" is read "others." * From the contingent gift over of the whole in a mass it is inferred that the testator meant the legatees to take it amongst them in every other contingency, which can only be secured by means of cross-limitations between them. [*1509]

Effect of gift over on death of *all* in a given manner.

Thus, in Doe d. Watts *v.* Wainewright (*x*), where by deed lands were limited, after previous life estates, to the use of the child or children of A. as tenants in common, and the heirs of their several bodies; and in case any such child or children should die without issue, then the shares of such as so died should remain to the use of the *surviving* child or children of A., and the heirs of their respective bodies; *and in case all the said children should die without issue,* or if A. should have no issue, then over; it was held that the fair construction of the word "surviving" standing in this context was that on the death of one child without issue that portion should go to the surviving line of heirs, and not merely to one child surviving, — to the surviving children in their own persons if living, or if dead to their issues; and that this was not proceeding on conjecture, for effect could not be given to the word "all" in the last sentence without determining that there must be cross-remainders not only as long as the individual children but as long as the several lines of those children existed.

"Survivors" construed "others" by force of gift over.

Doe *v.* Wainewright.

So in Cole *v.* Sewell (*y*), where by deed lands were limited to the settlor's three daughters A., B., and C. as tenants in common for their lives, with several remainders to their first and other sons in tail male; provided that "if any one or two" of the daughters should die without issue male the same should stand limited to "the survivor or survivors," as tenants in common in case of two survivors, for the lives or life of such survivors or survivor, remainder to the first and other sons of such survivors or survivor in tail male. And in case the said A., B., and C. should die without issue male, then as to the share of each to her daughters as tenants in common in tail. And in case "one or two" of the said A., B., and C. should die without issue, then, as to the share or shares of her or them so dying, to the daughters of such survivors or survivor in tail, as tenants in common in case

Cole *v.* Sewell.

(*x*) 5 T. R. 427, 2 R. R. 634. Note that cross-remainders were not *implied;* that cannot be done in a deed (ante, p 1339); the gift to *surviving* children was held to create them expressly, though inaccurately.

(*y*) 4 D. & War. 1, 2 H. L. Ca. 186. See also Smith *v.* Osborne, 6 H. L. Ca. 375; Re Tharp, 1 D. J. & S. 453; Cooper *v.* Macdonald, L. R., 20 Eq. 258. It makes no difference whether the expression used is "survivors," or "such as shall survive," Re Tharp.

of two survivors, and in case A., B., and C. should die without
[*1510] * issue, then over; it was held by Sir E. Sugden, C. Ir., following Doe *v.* Wainewright, that survivors meant others. "Taking the whole together," he said, "the settlor was looking to *the event upon which the estate was to go over*, but he certainly did not mean that the circumstance of one of his daughters being actually alive at the time of the death of another without issue should be the event upon which was to depend the taking effect of the limitation in words to the survivor and her issue."

The same rule was applied to a gift of personalty in Wilmot *v.* Wilmot (*z*), where a testator bequeathed one-third part of his property to each of his three children, payable at a certain age, and if either of them died before that age his share to be divided between the two surviving children; and in case of two dying before attaining the said age respectively, then the whole to go to the *surviving* child; but if all his children should die before they should attain their said respective ages, then over. One child attained the age and died; then another died under age; and the personal representative of the first was held by Lord Eldon to be entitled to share with the survivor the portion which went over on the death of the second. The L. C. said: "It must be argued that the word 'survivors' means the same as 'others,' or 'living at the age aforesaid.' In the clause in which the gift over is made it was never meant that any portion should be taken; it was to be either the whole or none."

Wilmot *v.* Wilmot.

The words of gift, in case of the death of either to the *two* surviving children, and in case of the death of *two* to the surviving *child*, were undoubtedly favorable to this construction; and have since been held sufficient of themselves to show that by "surviving" the testator meant "other," his assumption obviously being that the others would survive (*a*). But Lord Eldon rested Wilmot *v.* Wilmot on the ground indicated above, viz., the manifest intention to keep the whole together. Cole *v.* Sewell admits of a similar observation.

More nearly resembling Doe *v.* Wainewright, in the circumstance that a "line of heirs" or issue is designated by the will, is the common case of a gift of real or personal estate to several persons for life, with several remainders to their children, and if any of them die without
[*1511] children, then to the survivors for life, * and afterwards to their children. Here it is very improbable that a testator should intend to make the interest of the children depend on the accident of whether their parent (whose interest ceases on his death) dies first or second; and if to this is added a gift over in the event of all dying without children, the conclusion is irresistible that what the

"Survivors" construed "others" by force of gift over.

(*z*) 8 Ves. 10. See also Lucena *v.* Lucena, 7 Ch. D. 255, 269, stated post, p. 1514.
(*a*) Re Beck's Trusts, 37 L. J. Ch. 233, 16 W. R. 189. See an opposite inference drawn from a gift over, on the death of any one or more of *three* persons, to the survivors or *survivor*, Northen *v.* Carnegie, 28 L. J. Ch. 930.

testator meant was that as long as there were descendants of any to take they should take the whole: and the only mode by which effect can be given to this intention is by holding that cross-remainders are created between the stocks, irrespective of the periods at which the parents die, by reading "survivors" as "others" (*b*). The authorities from Lord Thurlow's time downwards are almost uniformly in favor of reading "survivors" as "others" in such a case (*c*).[1]

And the fact that the ultimate gift over is to the "survivor" of the class (in the literal sense of longest liver) makes no difference. To whomsoever it is given an intention is equally manifested to make a complete disposition of the property, and that all should go over in one mass (*d*). And the gift over is equally efficacious though limited to take effect only in a particular event; for in the given event the testator had a clear intention of how the whole should go over, and if the parents die, the first leaving children, and the next one or two without leaving children, there would be an intestacy (*e*).

What is a sufficient gift over.

But if property is given to several as tenants in common for life, with several remainders to their children, and if any of the tenants for life die without children, to the "survivors" absolutely, or in tail, "survivors" will not be construed "others," even though there is also an ultimate gift over in case of all so dying (*f*). Here, at least, the argument that the literal construction *imputes a capricious [*1512] intention has no weight, for the children even of those who literally survive take nothing (as purchasers) by accruer; and the intention to keep the property together, which would otherwise be implied from the gift over, is disproved by the testator having by express intermediate limitations broken it up. Intestacy in a possible

Gift over inoperative on the context.

(*b*) See per James, V.-C., Badger *v.* Gregory, L. R., 8 Eq. 84, 85.

(*c*) Harman *v.* Dickinson, 1 B. C. C. 91, 5th ed. (where the original report is corrected from R. L.); Lowe *v.* Land, 1 Jur. 377; Re Keep's Will, 32 Beav. 122; Badger *v.* Gregory, L. R., 8 Eq. 78; Waite *v.* Littlewood, L. R., 8 Ch. 70; Re Palmer's Settlement, L. R., 19 Eq. 320; Wake *v.* Varah, 2 Ch. D. 348. See also Davidson *v.* Kimpton, 18 Ch. D. 213. In Holland *v.* Allsop, 29 Beav. 498, a gift over was by construction imported from another bequest. Note, that in Ferguson *v.* Dunbar, 3 B. C. C. 468, n., ante, p. 1501, where survivors was construed strictly, the events upon which the gift to issue, the gift to survivors, and the gift over, depended, were all three different; moreover the gift to survivors was absolute and not defeasible, like the original shares, in favor of issue.

(*d*) Wake *v.* Varah, 2 Ch. D. 357.

(*e*) Hurry *v.* Morgan, L. R., 3 Eq. 152. The trust was executory, with a direction to "insert clauses necessary to protect the entail:" but, although this was noticed as strengthening the case, the sufficiency of the gift over appears not to have been doubted by Wood, V.-C., Re Hayes's Trusts, 9 Jur. N. S. 1068 (V.-C. S.), appears to be contra. See an analogous point in implying cross-remainders, Maden *v.* Taylor, 45 L. J. Ch. 573, ante, p. 1348.

(*f*) Maden *v.* Taylor, supra; see also Davidson *v.* Kimpton, 18 Ch. D. 213; Re Roper's Estate, Morrell *v.* Gissing, 41 Ch. D. 409; see also King *v.* Frost, 15 App. Ca. 548; and distinguish Cooper *v.* Macdonald, L. R., 16 Eq. 269, where real estate was devised *in tail*, and the personalty upon which the question arose was directed to go along with it. See also Askew *v.* Askew, W. N. 1888, p. 26, where the devise was in tail.

[1] See Shepard *v.* Shepard, 60 Vt. 109.

event is insufficient ground for reading the word otherwise than literally.

Residuary gift not equivalent to gift over.

And a mere residuary gift, which only prevents intestacy but shows no intention to dispose completely and in a mass of the particular property, will not supply the place of an ultimate gift over (*g*).

But in Re Arnold's Trusts (*h*), it was held by Sir R. Malins, V.-C., that the ultimate gift over was not indispensable in these cases to the construing of "survivors" as others; and in his opinion Milsom *v.* Awdry (*i*), deciding the contrary was erroneous. This, however, is at variance with the judgment of the Court of Appeal in Wake *v.* Varah (*k*). Baggallay, L. J., laid it down that although the literal interpretation of "survivor" might involve the imputation of a capricious intention and might lead to intestacy, this alone would not justify the Court in interpreting the word otherwise: it was the ultimate gift over which supplied the necessary evidence of such an intention as could only be effectuated by construing the word as "other." And Sir W. James, L. J., was careful to show that the particular gift over in that case (viz. to the longest liver) was sufficient. "A whole category of cases (he said) has now settled that 'survivor' may be read 'other,' or 'surviving stirps' (*l*), and has settled with reasonable clearness under what circumstances it may be so read."

As to construing "survivor" as "other" without aid of gift over.

That a gift to "survivors" for life and afterwards to their children, or to the "survivors in the same manner" as the original shares, without more, will not be construed a gift to [*1513] *"others" appears to have been expressly decided in Beckwith *v.* Beckwith (*m*), where there was a bequest of residue to such of the testator's five daughters (named) as should be living at his death, the share of each such daughter to be held in trust for her during her life, and after her death for her children at twenty-one; and if there should be no child of such his daughter who should attain that age, then the testator declared that after the death of such daughter and such default of children, the original share and any accruing share of such daughter (subject to a general power for her to appoint a portion) should accrue *to his other daughters or other daughter surviving*, in equal shares if more than

Beckwith *v.* Beckwith.

(*g*) Semb., see Maden *v.* Taylor, 45 L. J. Ch. 569, 575.

(*h*) L. R., 10 Eq. 252. The expression was "*other* surviving children." But no notice was taken of this peculiarity, as to which see ante, p. 1503, n. See also Crosse *v.* Maltby, L. R., 20 Eq. 378 : Hodge *v.* Foot, 34 Beav. 349; Re Beck's Trusts, 37 L. J. Ch. 233, 16 W. R. 189.

(*i*) 5 Ves. 465, ante, p. 1501. See also Re Corbett's Trusts, Joh. 591; Re Usticke, 35 Beav. 338.

(*k*) 2 Ch. D. 348, 355, 357, 358. It would seem from the report that the attention of the Court of Appeal was not called to any of the cases cited in note (*h*), supra.

(*l*) As to this phrase, see post, p. 1514.

(*m*) 46 L. J. Ch. 97.

one, and that the accruing share or shares should be held upon the trusts, &c. therein contained concerning her original share. All the daughters survived the testator. Then A., one of them, died leaving a child; and afterwards another, C., died without having been married. It was held by Sir C. Hall, V.-C., that "surviving" meant "surviving the testator," and that the child of A. was entitled to participate with the three other daughters in the share of C. But on appeal this was reversed by the L. JJ. who held that "surviving" meant surviving at the period of accruer (*n*). The question then arose whether, assuming that to be so, "surviving" might not be construed "other," and the Court rejected that construction on the ground that there was no ultimate gift over. Sir W. James referred to the misapprehension which once prevailed, that "whenever there was a gift to daughters and their families, and a gift over to the survivors, the word 'survivors' ex vi termini must mean 'others.' We had occasion (he said) to consider this very fully in Wake *v.* Varah, which followed Waite *v.* Littlewood (*o*), and Badger *v.* Gregory (*p*), and there Lord Justice Baggallay in going through the cases found the clue which was to be considered as the ratio decidendi which was supplied by Waite *v.* Littlewood and Badger *v.* Gregory," viz. the ultimate gift over. He had himself (he added) endeavored to explain it in Badger *v.* Gregory (*p*), in which case he had held that the ultimate gift over showed an intention to create cross-limitations among the children. "But in the absence of any such ground for raising the implication, I am of opinion that we must leave the words
* to bear their ordinary natural and grammatical interpre- [*1514]
tation." Baggallay, L. J., expressed a similar opinion.
"The cases (he said) which have been mainly relied upon on the part of the respondents differ very materially from what we have before us. There is not in the present case a gift over in default of issue of all the daughters or children, as there was in Waite *v.* Littlewood, Badger *v.* Gregory, and Wake *v.* Varah."

It may therefore apparently be taken as settled, with regard to the class of cases now under consideration, that in order to read the expression "survivors" as meaning "others," there must be a gift over, or some other indication of manifest intention to oust the ordinary and natural interpretation (*q*).

(*n*) See a similar point in Nevill *v.* Boddam, 28 Beav. 554 ; and generally as to the period to which survivorship is to be referred, post, s. iii.
(*o*) L. R., 8 Ch. 70.
(*p*) L. R., 8 Eq. 78.
(*q*) The decision to the contrary in Re Walker's Estate, Church *v.* Tyacke, 12 Ch. D. 205, and the remarks of Hall, V.-C., in that case as to the effect of the decision in Beckwith *v.* Beckwith, were adversely criticised in the last Edition of this work (Vol. II., p. 703); and the learned V.-C., in Re Horner's Estate, Pomphret *v.* Graham, 19 Ch. D. at p. 191, admitted that he had not in Re Walker's estate given so much force as he ought to have done to Beckwith *v.* Beckwith, and that a gift over or other sufficient evidence of intention was necessary. As to what are sufficient indications of intention to the children of a predeceased tenant for life to

I.—3. *The so-called "Stirpital" Construction.* — In Waite *v.* Littlewood (*r*), Lord Selborne said he thought there was a strong probability that any one using the word "survivor" did not precisely mean "other" by it, but had in his mind some idea of survivorship, though it was imperfectly expressed; and that simply to read the word as "other" was an unwarrantable alteration of a testator's language and meaning. He therefore preferred to read "survivors" or "surviving children," as meaning those who survive actually in person, or figuratively in their descendants taking an interest under the primary gift, which he appeared to consider a less violent change.

This construction (which was probably suggested by a figure of speech used by the Court in Doe *v.* Wainewright (*s*), when describing the operation in that case of cross-remainders in tail), was tested in Lucena *v.* Lucena (*t*), where a testator gave the residue of his estate in trust for his three sons and three daughters equally, the shares of sons to be paid at the age of twenty-five if they should conduct themselves with propriety (as they did), if not, to be settled like the shares of daughters, which were to be held in trust for them during their lives, and [*1515] *after their death, as to the shares of such as should die leaving issue, in trust for such issue equally, to be paid at the age of twenty-five. Then (1), as to any daughter who should die without leaving a child who should attain twenty-five; and (2) as regards any son absolutely entitled on attaining twenty-five, if he should die before that age; or (3) if the direction to settle any son's share came into operation, if such son should die without issue (*u*), then the testator directed his or her share "to be divided equally among his (testator's) surviving children, in the same manner as his or their original shares;" and in the event of a failure of all the testator's children and their issue who were objects of the prior gifts, then over. All the sons attained twenty-five; then two of them died, one of them leaving issue; after which two of the daughters died, each leaving issue; and then the third daughter died without issue. Sir G. Jessel, M. R., held that, if all the shares had been settled, the words "surviving children" must, according to Lord Selborne's doctrine, have been construed "surviving stock," and that the fact of some only of the shares being settled did not make that construction less applicable. The effect of this was to give the third daughter's share wholly to the surviving son and the issue of the pre-

Lucena *v.* Lucena.

participate in the share of one who dies without children, see Re Benn, Benn *v.* Benn, 29 Ch. D. 839; Re Bowman, Whytehead *v.* Boulton, 41 Ch. D. 525; but see Re Blantern, Lowe *v.* Cooke, W. N., 1891, p. 54.

(*r*) L. R., 8 Ch. 73.

(*s*) 5 T. R. 427, 2 R. R. 634, ante, p. 1509.

(*t*) 7 Ch. D. 255.

(*u*) The events on which the gift to surviving children was to take effect, and the ultimate gift over, were obscurely expressed; they are here stated as they were construed by the Court of Appeal.

deceased daughters, to the exclusion of both the predeceased sons. But, on appeal, it was held by the L. JJ. James, Baggallay and Cotton, that "surviving" must be construed "other," and that the representatives of the two predeceased sons were entitled to share. The judgment of the Court was delivered by Cotton, L. J., who said: "The shares of sons who conduct themselves with propriety are indefeasibly vested at the age of twenty-five, and in our opinion it would be more reasonable to say that the idea in the testator's mind as regards sons, using the word 'surviving,' had reference to those who survived the period when their shares became indefeasibly vested (*v*), than to attribute to the word a construction which would give to the children of a son who did not conduct himself with propriety an interest under the gift to surviving childreu, while it gives no interest to a deceased son who had conducted himself with propriety. The fact of shares being settled, and the fact of the ultimate gift over being to arise in the event of a * failure [*1516] of all children and issue who are objects of the testator's bounty, are circumstances each of which may properly be relied upon as showing that 'survivors' is not to receive its strict construction. Each of these circumstances exists in the present case. If, with the gift overstanding as it does, there had been no settlement of the daughter's shares, we are of opinion that the word 'surviving' would not have received its strict construction, and must have been construed 'other;' and our opinion is that the circumstance of the shares of some of the children named in the will being settled is not sufficient to give to the word 'surviving,' as a matter of construction, the meaning of survivors in person or in issue taking an interest under the will, though that would have been the effect of the gift to survivors if the shares of all the children and not of some only had been settled. We are of opinion that the decision of the M. R. was correct so far as he held that 'surviving' could not receive its strict construction, but that he was wrong in attributing to this word the meaning which he has given to it."

And where all the shares are settled, this so-called stirpital construction will often fail to preserve the interests of children; since a member of a stirps which is extinguished before the period of accruer, will not participate in the accruing share, although he may have fulfilled the conditions required for the vesting of his original share (as, by attaining twenty-one), and although accruing shares may be directed to be held on the same trusts as original shares. This indeed appears from the decision of the M. R. in Lucena *v.* Lucena, which excluded the deceased sons, treating them as non-surviving stirps or stocks. Where the cross-limitations are *remainders* in tail, as in Doe *v.* Wainewright, "surviving stirps" is synonymous with "other," because the interest

Consequences of the "stirpital" construction.

(*v*) As in Wilmot *v.* Wilmot, 8 Ves. 10, sup.

given cannot outlast the stirps; in that case the new doctrine is equally harmless and inoperative. In other cases it appears to be misleading.

I. — 4. *As to construing "Survivor" as "Other" after an Estate Tail.* — Again, it was said by Sir W. P. Wood, V.-C., in Re Corbett's Trusts (*x*), that where the primary devise confers an estate tail, and on the death of any without issue, his share is given to the survivors or survivor, the words "survivors or survivor" are almost [*1517] of necessity construed "others or other" on account of * the great improbability of the testator contemplating the members of the original class as likely to be in existence at the time of an indefinite failure of issue of any of them. In Tufnell *v.* Borrell (*y*), where the devise was to "grandchildren their heirs male and the heirs male of the survivors and survivor forever," it appears that in a previous stage of the case it had been decided that this gave the grandchildren joint estates for life with several estates of inheritance in tail male (*z*) *with cross-remainders* in tail male; and the case now proceeding on that footing, Sir G. Jessel said it was settled that in cases of this class the term "survivors" must be read "others." It is also to be observed that the case in which (as already noted) Sir W. Grant assumed this to be the proper general meaning of the word was of the same class (*a*).

In Smith *v.* Osborne (*b*), where a testator devised land to his two daughters as tenants in common in tail, and if either should die without issue, then to the surviving daughter in tail, and in default of such issue over. Lord Cranworth relied on the particular language and circumstances, and on the ultimate gift over. He said, "This is not a gift to a class, and on the death of one or more, to the survivors or survivor, but a gift to two designated devisees as tenants in common in tail, and if *either* should die without issue, then to the surviving daughter and the heirs of her body. Unless the word 'surviving' is to be taken to mean 'other,' the intention cannot be carried into effect, for he means his gift over to come into operation if either (*c*) of his daughters should die without issue, that

Smith *v.* Osborne.

(*x*) Joh. 597.
(*y*) L. R., 20 Eq. 194.
(*z*) As to this see ante, p. 1116.
(*a*) Barlow *v.* Salter, 17 Ves. 479, ante, p. 1500, n. See also Williams *v.* James, 20 W. R. 1010, presently stated, which turned on its special language.
(*b*) 6 H. L. Ca. 375, 393. Though the rule was not noticed as such in this case, it will be observed that the reasons given for the decision were those on which the rule is founded. See also Wollen *v.* Andrewes, 2 Bing. 26.
(*c*) Lord Selborne thought the same argument applied, "though with rather less force," to a case where the primary gift is to a class for life with remainder to children, and the corresponding word in the gift over is "any," Waite *v.* Littlewood, L. R., 8 Ch. 74. And in Cole *v.* Sewell, sup., Sir E. Sugden adverted to "the event upon which the estate was to go over" as a ground for putting the more liberal construction on "survivors or survivor": *i. e.* he collected the intent without resorting to the description of the donee.

is, on the death of the daughter who dies first, or of the daughter who dies last, and the latter object cannot be accomplished unless the word 'surviving' shall be so read as to be rendered capable of being applied to the predeceasing daughter. Add to which the gift over to the testator's right heirs is only 'in default of such issue,' that is all such issue which includes the issue of both daughters."

* But, of course, such ultimate gift over is not the only means of showing an intention in cases of this class to use the word "surviving" in the sense of "other." Thus, in Williams *v.* James (*d*), where a testator devised a separate freehold property to each of five named children of his son O. in tail general: and proceeded thus, "in case if either of all the within-named children of O. shall happen to die leaving no lawful issue, or if they leave lawful issue, if such issue die leaving no lawful issue, in any of such cases the property of him, her, or them so dying, shall be equally transferred to the use and uses of the surviving child or children of O. *that are herein named*" in tail general; it was held by the Court of Exchequer that "surviving" meant "other" on two grounds. 1. On account of the phrase "that are herein named," by which the testator undertook to name the children who would be surviving at the future epoch; which was impossible. Some alteration was therefore necessary to make the phrase sensible. Either the words "of those" might be prefixed to it, or "other" might be substituted for "surviving." By the former alteration, the testator's bounty to issue would still remain dependent on the accident of their parent surviving the child whose share was given over; by the latter this risk would be removed: and it was allowable to prefer a reasonable and probable sense to an unreasonable and improbable one. 2. On account of the general improbability observed by Sir W. P. Wood of survivorship being in such a case literally intended. [*1518]

In Eyre *v.* Marsden (*e*), "survivor" was construed "other" in order to give effect to the intention, manifested by the will, that issue of deceased legatees should take by substitution every interest, accruing (*f*) as well as original, which their parents would have been entitled to if living at the period of distribution. The testator gave his real and personal estate to trustees, upon trust out of the rents and annual produce to pay certain life annuities to his three children, and to accumulate the surplus for the benefit of his grandchildren; and after the death of his said children and the longest liver of them, to sell and distribute the whole among his grandchildren living at his decease, in equal shares, except the share of F., the son of a deceased daughter, half of whose share in the testator's estate and effects, * in consideration of the benefit taken by F. un- [*1519]

"Survivors" read "others" to effect intention that children should stand in their parents' place.

(*d*) 20 W. R. 1010.
(*e*) 4 My. & C. 231, affirming 2 Kee. 564.
(*f*) See s. ii.

der his uncle's will, the testator gave to his brother G.; and if any of his grandchildren should die before his, her, or their share or shares became payable, leaving issue, such issue to be entitled to the share or shares which his, her, or their deceased parent *would have been entitled to if then living;* but in case of the death of any of the grandchildren without leaving issue, before he or she or they should become entitled to receive his, her, or their share or respective shares in manner aforesaid, then his or her share or shares were given among the testator's *surviving* grandchildren, *to be paid at the same time and in the same manner as before mentioned touching the original share or shares of his said grandchildren.* It was held by Lord Cottenham that the issue were to stand in the place of the parent as to both the original and accruing shares. He thought the description of what was given to the issue amply sufficient to carry accruing shares; but those shares were given to *surviving* grandchildren, and there would be much difficulty in the construction if it were necessary to consider the word "surviving" as meaning "living at the time of the accruer taking place." "But [he said] it is not necessary to give it that meaning. The word 'surviving' has been construed 'other' to give effect to the apparent intention. Lord Eldon so lays down the rule in Wilmot *v.* Wilmot. If 'surviving' were to be construed 'living at the time when the accruer takes place,' the grandchildren then living would take absolute interests, unless the words 'in the same manner,' &c., introduce into this gift the provision for the children, and the gift over upon death without children; and if it do so, why is it not also to introduce into this gift the provision for children, in the event of the parent's death before the happening of the accruer? If this construction be not adopted, upon the death of all the grandchildren but one during the life of the surviving annuitant, the share of that one, afterwards dying in the lifetime of the annuitant, would be undisposed of, although all the other grandchildren might have left children. I think the intention is sufficiently expressed, and there is ample authority for construing the words so as to give effect to such intention."

Again, in Hawkin *v.* Hamerton (*g*), where a testator bequeathed a leasehold estate to his son; but in case he should die without issue, to be considered as part of the residue, and to be divided [*1520] * amongst the children of his (testator's) three daughters as thereinafter mentioned. And he bequeathed the residue to his said son, and three daughters, or such of them as should be living at his wife's death, for life, remainder to the children of his said son and daughters in equal shares; and if any of his said son and daughters should die without leaving issue, his or her share to go amongst the survivor or survivors of his said children and their issue in the like equal

"Survivor" in gift of residue explained by another clause referring to it.

(*g*) 16 Sim. 410, 13 Jur. 2.

shares; Sir L. Shadwell, V.-C., thought that when the testator used the words "survivors or survivor," the order in which his children might die, successively, was not present to his mind; but, taking that clause in connection with the gift over of the leasehold, which showed that the testator intended the residue to be divided among the children of his three daughters, the V.-C.'s opinion was that the testator meant others or other.

But a strong argument against reading the word as "other," is supplied by the fact that by so doing the will would become ineffectual; as in the case of Turner *v.* Frampton (*h*), where a testator bequeathed his residuary estate between his children A. and B., and if either died without issue, to the *survivor*; by allowing the word its proper sense, the failure of issue was confined to failure at the death of the prior legatee, whereas by reading it as "other," such failure would have been indefinite; Sir J. K. Bruce, V.-C., therefore refused to adopt the latter construction.

"Survivors" not read "others" if the gift thereby becomes too remote.

The result then would seem to be that the word "survivor" when unexplained by the context must be interpreted according to its literal import; but the conviction that this construction most commonly defeats the actual intention of testators, and that the word is one peculiarly liable to misuse, has induced a readiness in the Courts to yield to the slightest indication in the context of an intention to use the word in the sense of "other." Some progress has been made in ascertaining when this may be done. But the present state of the authorities seem hardly to justify the hope that litigation has reached its limits on this often-occurring slip, and should teach so framers of wills the necessity of increased attention to its avoidance.

General conclusion from the cases, and practical suggestion.

II. —As to Clauses of Accruer. — 1. *Whether Accruing Shares are subject to Clauses of Accruer.* — It has long been an established * rule, that clauses disposing of the shares of devi- [*1521] sees and legatees dying before a given period, do not, without a positive and distinct indication of intention, extend to shares accruing under the clauses in question. "As where a man gives a sum of money to be divided amongst four persons as tenants in common, and declares that if one (qu. any) of them die before twenty-one or marriage, it shall survive to the others. If one dies, and three are living, the share of that one so dying will survive to the other three, but if a second dies, nothing will survive to the remainder but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship"(*i*).

Whether clauses of accruer extend to accruing shares.

(*h*) 2 Coll. 331.
(*i*) Per Lord Hardwicke in Pain *v.* Benson, 3 Atk. 80. See also Perkins *v.* Micklethwaite,

Thus, in Ex parte West (*k*), where a testator bequeathed to A., B., and C., the three sons of S., 1,000*l.* each, the interest to be added to the principal yearly, until they should respectively attain the age of twenty-one years; *and in case any of them should die before that age, then to the survivors.* A. and B. died under twenty-one; and the question (which was raised upon petition) was, whether that part of the share of B., which accrued to him on the death of A., went over to C. on the death of B. Lord Thurlow thought that he was bound by the authorities (which he hesitated to overrule upon petition) to decide that it did not survive again; but gave the parties leave to file a bill, which was done, and the cause came to a hearing before Sir Ll. Kenyon, M. R., who decided against the survivorship of such accrued share.

This doctrine, though it has been much disapproved of, is now well established; but the question sometimes arises as to the effect of particular expressions to carry the accrued as well as the original share.

The word "share" from an earlier period (*l*) has been held *not* to have this operation, though the contrary was decided by [*1522] Lord *Hardwicke in Pain *v.* Benson (*m*); but the authority of this case has been repeatedly denied (*n*), and the point has long ceased to be the subject of controversy. One example of the construction, therefore, will suffice. In Rickett *v.* Guillemard (*o*) a testator bequeathed 300*l.* to four persons, to be divided into equal shares, to be paid at twenty-one; and in case of the death of either before twenty-one, *such share* to survive to the others. Two of the legatees died during minority in the testator's lifetime. Sir L. Shadwell, V.-C., held that on the death of the first his fourth devolved to the other three; on the death of the second his original fourth devolved to the two survivors; but the third of the first-mentioned fourth, which he would have been entitled to absolutely if he had survived the testator, lapsed.

Word "*share*" does not carry accruing share.

And the word "portion," which is evidently synonymous with "share," has also been held not to comprise an accrued share.

Word "*portion*" does not carry accuing share;

2 Ch. Rep. 171, 1 P. W. 274; Rudge *v.* Barker, Cas. t. Talb. 124; Barnes *v.* Ballard, before Lord King, cit. 2 Atk. 78.

(*k*) 1 B. C. C. 575. See also Crowder *v.* Stone, 3 Russ. 217. It is remarkable that in Perkins *v.* Micklethwaite, Barnes *v.* Ballard, and Ex parte West, although the clause of survivorship was in terms which created a joint-tenancy between the survivors in the share of the deceased legatee (see Jones *v.* Hall, 16 Sim. 500, Leigh *v.* Mosley, 14 Beav. 605), this fact was not mentioned in support of the argument for survivorship of accrued shares. The same consideration would have rendered much of the argument against the decision in Worlidge *v.* Churchill (stated post) unnecessary.

(*l*) Woodward *v.* Glasshrook, 2 Vern. 388; Crowder *v.* Stone, 3 Russ. 217; Jones *v.* Hall, 16 Sim. 500; Goodwin *v.* Finlayson, 25 Beav. 65; Evans *v.* Evans, id. 81; Maddison *v.* Chapman, 4 K. & J. 716; Cambridge *v.* Rous, 25 Beav. 416.

(*m*) 3 Atk. 78.

(*n*) See 1 B. C. C. 575; 2 Ves. Jr. 534.

(*o*) 12 Sim. 88.

Thus, in Bright *v.* Rowe (*p*), where a testatrix, by virtue of a power, appointed the reversion of a sum of 2,000*l.* (in which herself and her husband had life interests) to trustees, upon trust for her daughter M., or any other children she might thereafter have by her husband J., to be equally divided between them; but it was her will, that in case the 2,000*l.* should become payable before M. should attain twenty-one or day of marriage, or before any other of her children being a son should attain twenty-one, or being a daughter the same age or marry, then the trustees were to invest the same and apply the interest of each child's share for maintenance, and when any such children being sons should attain twenty-one, or being daughters the like age or day of marriage, upon trust to pay them their respective shares of the principal with the unapplied interest. And in case her said daughter M., or any other child she might have by her husband, should happen to die before his, her, or their *portion* or *portions* of the said sum of 2,000*l.* should become payable, then the same should respectively go and belong to the survivors or survivor of them. The testatrix left three children, one of whom died in 1826, and another in 1829, before the period of payment. It was held by Sir J. Leach, M. R., that the share which accrued to the latter on the decease of the former did not pass with the original share to the surviving child.

*But although the word "share" or "portion" will not proprio vigore carry the accruing share, yet if the testator manifest an intention that the entire property, which is the subject of disposition, shall pass over to the ultimate objects of distribution in one mass, and that all the shares, original and accruing, shall be distributed among one and the same class of objects, the accruing shares will be carried over together with the original shares to those objects. Thus, in Worlidge *v.* Churchill (*q*), where a testator devised his real and personal estate to trustees, upon trust to sell, and gave the moneys arising therefrom in trust for his four children, R., E., W., and J., to be equally divided among them on their attaining twenty-one; *but if any of them died under that age, then such deceased child's* SHARE *to go to the survivors or survivor*; and he directed the trustees to apply the interest of such trust money during their minority for their maintenance and education; but if the interest should be more than sufficient for such purpose, he directed the trustees to lay out the same for the children's mutual benefit; but [*1523]

unless aided by the context.

Accrued shares held to pass under the denomination of "share" by force of context.

(*p*) 3 My. & K. 316; Perkins *v.* Micklethwaite, 1 P. W. 274.

(*q*) 3 B. C. C. 465. See also Barker *v.* Lea, T. & R. 413, where Plumer, M. R., also reasoned upon the intention apparent in the will, that the fund should go over among the legatees in one mass, as excluding the doctrine in the text; but the point did not arise, as the deceased person (whose alleged share was the subject of dispute) had not attained the vesting age, and therefore had no share upon which the limitation over could operate. This, indeed, was admitted by his Honor in his judgment, but the terms of the decree are contrary. The case abounds in inaccuracies.

if *all* the four children should happen to die before twenty-one, and leave M. living, then he directed the trustees to pay M. the interest of such *trust money* from time to time, as it should grow due; and after the decease of *all*, he bequeathed the said *trust money* to the children of his late uncle F. J. died in the testator's lifetime. R. and W. survived the testator, but afterwards died under twenty-one. The question was, whether E., the last survivor, was entitled to the accrued shares of the two deceased survivors. Buller, J., sitting for Lord Thurlow, said, "If this were res nova, and there was a limitation to survivors and survivor, no one could collect the intent to be otherwise than that the survivor should take the whole: but if the case had rested there, I should have thought it difficult to get over the objections. But the strong part of the present case is the testator's intention to keep it as an aggregate fund: he has made use in two different parts of the will of the words 'trust money'; that expression does not apply to the share of each child, but to the whole [*1524] fund in the trustees' hands, and takes in *the whole fund that is to be distributed under the will. The second place where he uses the expression '*trust money*,' is in the gift over to the children of his uncle; and though the expressions, 'the whole,' or 'all,' are not used, the words 'trust money' are tantamount to them."

So, in Eyre *v.* Marsden (*r*), one question was, whether that portion of the shares of grandchildren dying without issue, which had previously accrued to them by the predecease of other objects, passed over with the original shares to the survivors, or belonged to their representatives. Lord Langdale, M. R., while he admitted the general rule, considered that here the testator had manifested an intention that the accrued and original shares should, at the decease of his surviving child, be distributed together among one and the same class of objects. He observed that the testator meant that an aggregate and previously undivided fund should be then, for the first time, divided among a class in whom the fund vested from the time of the testator's death, subject to a provision for divestment, which was meant to be applied to every interest — to the interests which accrued in the grandchildren, and to the interests which accrued in the children (*s*) of grandchildren.

Word "share" held to comprise accrued as well as original share.

Again, in Sillick *v.* Booth (*t*), where a testator devised and bequeathed all his real estate and his convertible personal estate to trustees, upon trust to convert the same into money, and thereout to pay his debts, funeral expenses, and a weekly sum to his wife, and to divide the residue of

Accrued shares held to pass under gift of "the whole."

(*r*) 2 Kee. 564, affirmed, 4 My. & C. 231, stated ante, p. 1518.
(*s*) As to this see ante, p. 1043.
(*t*) 1 Y. & C. C. C. 121, 739. See also Leeming *v.* Sherratt, 2 Hare, 14, stated ante, p. 1507, where the words "the *part or share* the parent so dying would have been entitled to have" were held to comprise accruing shares.

his said estate and effects equally between and among his children J., M., and C., and his grandson R., share and share alike, the share of M. to be paid her as soon after his decease as conveniently might be; the share of C. to be paid him at the age of twenty-two, and the share of R. at the age of twenty-one; and in case any of his children or grandchildren should die before his or her said share should become so *vested* (which was construed to mean *payable*) as aforesaid, then the share or shares of him, her, or them so dying should go and be equally divided among the survivors and survivor of them in equal shares and proportions if more than one, and if but one, then *the whole to and for the use and benefit of such survivor*. J. and C. died in the testator's lifetime, the * latter being under twenty-two. R. [*1525] survived the testator, but died under twenty-one. Sir J. K. Bruce, V.-C., held that the word "whole" meant the entire residue, not the whole share merely, and consequently that the accrued as well as the original shares devolved to M. as the sole survivor of the four residuary legatees.

The effect of this construction of "share" is to create cross-remainders or cross-limitations which operate toties quoties upon the death of every devisee or legatee in the manner described, and carry over his whole interest, accrued as well as original (*u*).

Effect of ultimate gift over extends to intermediate accruer.

There is a difference between a gift over of the shares of any prior legatees to the survivors, and a gift to several "with benefit of survivorship." The latter expression is very general, and may without impropriety be held to pervade the whole fund, so as to carry accrued as well as original shares (*x*). It seems also that "share and interest" will carry accrued shares proprio vigore (*y*). And where, after a gift to sons and daughters, there was a gift over, on the death of any one or more, of *his or her* share or *shares*, it was held by Sir W. P. Wood, V.-C., that this implied a plurality of shares in one person, and therefore that it included accrued shares. If the words had been "his or their share or shares," they might have been read reddendo singula singulis (*z*).

"Benefit of survivorship" held to carry accrued shares.

"Interest."

"His or her share or *shares*."

In Vandergucht *v.* Blake (*a*), it was contended that an accrued share went over, although under the circumstances the original share could not. There a testatrix bequeathed a long Exchequer annuity to each of her three children, A., B., and C., for life, with remainders

(*u*) Doe d. Clift *v.* Birkhead, 4 Ex. 110, expressly overruling Edwards *v.* Alliston, 4 Russ. 78; Douglas *v.* Andrews, 14 Beav. 347. See also Dutton *v.* Crowdy, 33 Beav. 272; Re Henriques' Trusts, W. N., 1875, p. 187 (settlement).

(*x*) See Re Crawhall's Trusts, 8 D. M. & G. 480. See however Vorley *v.* Richardson, Id. 126.

(*y*) Per Romilly, M. R., Douglas *v.* Andrews, 14 Beav. 347: and see Re Henrique's Trusts, W. N., 1875, p. 187; also Goodman *v.* Goodman, 1 De G. & S. 695, 12 Jur. 258.

(*z*) Wilmot *v.* Flewitt, 11 Jur. N. S. 820. See also Re Jarman's Trusts, L. R., 1 Eq. 71, post, p. 1529.

(*a*) 2 Ves. Jr. 534.

to their respective children; but if either should die without issue, then the annuity of him or her so dying to go to the survivors or survivor equally; and if all should die without issue, the three annuities were given over. A. died without leaving children, and then B. died *leaving children;* and it was contended that, although, as B. left children, his original share could not go over, yet that his portion of the share which accrued to him on the death of A. went over [*1526] to C., the last survivor: * but Sir R. P. Arden, M. R., decided that such portion belonged to B.'s administrator.

II.—2. *Whether Qualifications affecting original Shares extend to accruing Shares.* — It may be observed, that upon a principle very similar to that which governs the preceding cases, if original shares are given expressly for life, and accruing shares indefinitely (which of course carries the absolute interest), the latter are not considered as impliedly subject to the restriction in point of interest imposed on the original shares (*b*); for although it is highly probable that the testator had the same intention in regard to the accruing and the original shares, yet this is not so clear as to amount to what the law deems a necessary implication (*c*).

Accruing shares not necessarily subject as the original.

So, where a testator limits an estate to three or more objects, subject to many provisions, with a devise over of the whole in case of the death of any one to the survivors, expressly *subject to the provisions contained in the original gift,* and goes on to limit the property in case of the death of any of such survivors to the remaining survivors or survivor, *but does not repeat the qualifying words,* it has been held that a similarity of intention is not to be implied in regard to the last limitation.

Thus, in Georges *v.* Georges (*d*), where the testator gave the residue of his estate, both real and personal, to trustees, in trust to keep the same together till 1 Jan. 1804, and till that period to dispose of the profits for the benefit of his daughter and granddaughters as therein directed; and then as to the final disposition of the rest and residue of the estate, he declared that all such parts thereof as consisted of real estates, slaves, &c., should be upon further trust, that his said trustees should immediately after the arrival of the period aforementioned divide the same into three equal parts or shares, to and for the separate use and benefit of his daughter F., his granddaughter R., and his

Express provision in one limitation to survivors not extended by implication to an ulterior similar limitation of the same subject to part of the former objects.

(*b*) Vandergucht *v.* Blake, 2 Ves. Jr. 534; Ranelagh *v.* Ranelagh, 4 Beav. 419; Ware *v.* Watson, 7 D. M. & G. 248. See also Milsom *v.* Awdry, 5 Ves. 465. But in Doe d. Gigg *v.* Bradley, 16 East, 399, Lord Ellenborough cut down the gift of a leasehold house to survivors indefinitely to an interest for life, on no other ground, it would seem, than that words of limitation were used in the original gift, not in the gift to survivors, which has not in general been considered as affording more than conjecture. The will certainly was very obscure.

(*c*) As to what is and is not such, see also ante, Vol. I., p. 491.

(*d*) Hayes's Inquiry, 52.

granddaughter S., whom he thereby willed and ordained to be his residuary devisees and legatees in manner and form following * (that is to say), &c. The testator then proceeded [*1527] to declare the trusts of the respective thirds in favor of his daughter and granddaughters respectively, and their respective children, with a proviso that if one of his three residuary devisees should die before the period should arrive for making the division without issue, or leaving issue and such issue should die before that period, then the division should be made between the survivors of his said residuary devisees aforenamed, agreeable to the same directions, and *subject to the same terms, limitations, and restrictions as were thereinbefore expressed and declared,* and that in the same manner as if all three of his said residuary legatees and devisees were then alive; and if two of them should depart this life before the arrival of such period without issue then living as aforesaid, then he declared it to be his further will and desire that the whole should be *in trust, and to and for the use of the survivor or her issue living at the period aforesaid.* F. and S. died before 1 Jan. 1804, without issue then living; but R. was living at that period. The question was, whether the will was to be read as if the qualifying words, "agreeable to the same directions, and subject to the same terms, limitations," &c., which occurred after the gift to the *two* surviving, had also been inserted after the gift to the *one* surviving. It was contended that necessary implication does not mean only what arises from force of language or plain logical conclusion, but that in a moral sense, and not in a grammatical sense, it is when there exists so strong a probability of intent that it would be irrational to draw a contrary inference. But Lord Eldon, after great consideration, held that the words of the will did not raise a necessary inference that the gift of the whole to the one surviving was intended to be subject to the same limitations as the share which that survivor would have taken on a division between the three, or the two, would, by the express words of the will, have been subject to, and that such a construction would be mainly founded on conjecture.

The principle that restrictions or qualifications applied to original shares are not, by necessary inference, to be extended to accruing shares, is further illustrated by the case of Gibbons *v.* Langdon (*e*), where a testator bequeathed 2,800*l.* stock, in trust for his wife for life, and at her decease to be equally divided between his three sons and daughter, the interest of his daughter's * share to [*1528] be paid to her for life, and at her decease the said share to be equally divided among the children living at the testator's decease at the ages therein mentioned. If his daughter had no children living at her decease, her share to be equally divided among such of his sons who were then living, or their issue; *but if any of his said sons*

Qualifications expressly applied to original shares not extended by implication to accruing shares.

(*e*) 6 Sim. 260.

and daughter should die before his said wife and without leaving any issue, such share or shares to be equally divided among his other children; but if all his children should die without issue before the said wife, then to his next of kin. One of his sons died in the lifetime of the wife and without issue, and the question was, whether the share of the daughter in her deceased brother's share was subject to the trusts affecting her original share. Sir L. Shadwell, V.-C., decided in the negative, observing that it would be nothing but conjecture if he were to say that the testator meant his daughter to take her accruing share with the same limitations over to her children as her original share was subject to.

Upon the same principle it is clear that, where the subject of gift is disposed of among the original objects in unequal shares, there is no necessary inference, in the absence of any declared intimation of intention to assimilate the accruing to the original shares, that the survivors are to take accruing shares in the same relative proportions (*f*). Neither will words creating a tenancy in common in a gift of original shares be extended by implication to accrued shares (*g*). But in Eyre *v.* Marsden (*h*), it followed from the construction put on the will by Lord Langdale, M. R., that the interest of F. in the accrued shares must be in proportion to his interest in the original shares.

Unequal division.

Survivorship clauses are not often so split up as in Georges *v.* Georges; where as more commonly happens there is one general survivorship clause, the words "in manner aforesaid," or similar terms of reference occurring therein, will have the effect of subjecting all the accrued shares to the same terms, restrictions, and limitations over as the original shares (*i*). And where a declaration, that accruing shares should be subject to the same trusts as original shares, was followed (in a settlement) by a clause which gave to each cestui que trust who should die without children power to appoint an aliquot part of her "share;" [*1529] it was * held by Sir J. Parker, V.-C., that the deed had so consolidated the accruing and original shares in the first place as to render it unnecessary to carry on separate accounts of them; and that the word "share," in the subsequent provision, might thus be held to include the whole fund which, under the previous trusts, belonged to either of the beneficiaries and her children (*k*). And in Re Jarman's Trusts (*l*) where, after a life estate in the whole to his wife, a testator bequeathed a sum of money to his

Gift of accrued shares "in the same manner" as original.

"Shares" held to include original and accrued shares consolidated by previous provision.

(*f*) Walker *v.* Main, 1 J. & W. 1, stated post.
(*g*) Jones *v.* Hall, 16 Sim. 500; Leigh *v.* Mosley, 14 Beav. 605.
(*h*) 2 Kee. 564, ante, p. 1518; not appealed on this point, 4 My. & C. 231.
(*i*) Milsom *v.* Awdry, 5 Ves. Jr. 465, stated ante, p. 1501; Giles *v* Melsom, L. R., 5 C. P. 614, 6 C. P. 532, 6 H. L. 24.
(*k*) Re Hutchinson's Settlement, 5 De G. & S. 681. See Moore *v.* Godfrey, 2 Vern. 620.
(*l*) L. R., 1 Eq. 71.

three daughters in equal shares, and gave the residue amongst them in certain proportions, adding "the share or shares of my said daughters under my will to be for their sole and separate use;" and if any of them died without issue before the wife, her or their share or shares, accruing as well as original, were given to the survivors or survivor; it was held by Sir W. P. Wood, V.-C., that the words of the separate use clause were large enough to affect the accrued as well as the original shares. Though not distinctly assigned by the Court as the reason for this decision, there would seem in fact to have been a sufficient consolidation of shares within Sir J. Parker's principle. That the consolidating clause followed, instead of preceding, the clause in dispute was of course immaterial.

Survivorship amongst a more extensive class than the original donees.

Again, if there be a gift to several (but not all) of a class (as children) with a gift over in case of the death of any to "the surviving children" all the children will be included in the latter gift and not those only who partake of the original gift; although those who do not so partake are otherwise provided for (*m*).

At what period class entitled to accruing shares is to be ascertained.

If the bequest is to several as tenants in common for life, and after the death of each his share is given to his children, but if he has no children then to the survivors for their respective lives and afterwards to their respective children; here the class of children to take an original share is fixed at the death of their parent; but a share accruing to the children of the same parent on the subsequent death without children of another tenant for life will, if treated strictly as a new legacy, vest in a class to be fixed at the death of such other tenant for life. If, however, it should appear that the accruing shares are intended to go over with the original shares and to be consolidated therewith, it seems reasonable to hold that the accretions vest in the same * class as the original shares. A point [*1530] of this kind occurred in Re Ridge's Trusts (*n*). In that case (which has already been stated) one tenant for life died leaving issue, then another leaving none; and in the interval other issue of the first were born. The Court having supplied cross-limitations between the stocks, which of course carried over accruing as well as original shares, held that the class of issue to take the accrued share must be ascertained at the same time as the class to take the original share, viz., the death of their own ancestor; otherwise a cardinal rule of construction would be contravened, viz., the rule that interests are to be vested as soon as they can be consistently with what the testator has said (*o*); and, moreover, the gift of the whole to the issue of one

(*m*) Carver *v.* Burgess, 18 Beav. 541.

(*n*) L. R., 7 Ch. 665, stated ante, p. 1363. See also Heasman *v.* Pearse, id. 285, where the words "then living" were got over on much the same principle.

(*o*) But the accruing share cannot be *vested*, though it may be transmissible before the contingency happens upon which the accruer takes place.

tenant for life if only one left issue, would be contradicted. "Under this gift," said Sir W. James, L. J., "if one dies leaving issue and the others die afterwards without issue, the issue of the first take the whole; but if they are ascertained at the death of the survivor, it must be held that the interests which the class of issue ascertained at the first daughter's death take in her share are liable to be divested so as to let in other issue, a construction which the Court would not readily be induced to adopt." It is submitted, however, that the decision rests more securely on the consolidation of the shares; for whatever construction is adopted with regard to the vesting of additional shares, it by no means of necessity governs the construction with regard to the divesting of that which is already vested.

Here it is proper to observe, that though a departure from the ordinary rules of construction, for the purpose of bringing a devise or bequest within due limits, is not an acknowledged principle of construction, indeed, is always professedly discarded; yet it is impossible to deny that, where the bequest of the accruing shares would be void for remoteness, unless the qualifications applied in terms to the original shares are extended to such accruing shares, the Courts have lent a more willing ear to such construction than the preceding cases prepare us to expect. An example of this occurs in Trickey *v.* Trickey (*p*), where a testator bequeathed the residue of his personal estate to trustees in trust for his daughter, and after her [*1531] decease for all and every the * child or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the mean time; and in case any of the said children should die under twenty-one, and leave one or more child or children *who should survive the testator's daughter* and live to attain twenty-one, such child or children to be entitled to his or their parent's share; provided also, that in case any child or children of his daughter should die before attaining twenty-one, the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one, to be equally divided between them, if more than one; the issue of any deceased child or children to stand in the place of the parent or parents, with a limitation over, *provided there should be no child of his daughter, or there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age.*

Effect where qualification is necessary to validity of gift of accruing shares.

Gift of accrued shares supported by engrafting thereon a qualification expressly applied to original shares.

By a codicil the testator willed that, on failure of children and grandchildren of his daughter, as in his will was expressed, his bank stock, &c., should be transferred to certain relations. It was con-

(*p*) 3 My. & K. 560.

tended that the testator's intention was that all such grandchildren of his daughter as should attain twenty-one should take a vested interest, and that the limitation over, which was to take effect only upon failure of such grandchildren, was too remote; but Sir J. Leach, M. R., observed that it was reasonable to intend that the testator meant that the same grandchildren, who, by the former clause, were to take their parent's original share, should take that portion of the share which accrued by the death of another child of the daughter without leaving issue, and which their deceased parent, if living, would have taken, namely, the grandchildren only *who should survive the daughter*. If the prior gifts were only in favor of grandchildren who should survive the daughter, the gift over must be intended to take effect upon the failure of the former gifts.

III. — Words of Survivorship, to what Period referable. — I. *Where the Gift is immediate.* — Another question which arises under gifts to survivors is, whether they mean survivors indefinitely or survivors at some specific point of time. Where the objects are tenants in common, it was for a long period considered that indefinite survivorship being inconsistent with a tenancy in common, some period was to be found to which the words of survivorship could be referred. This reasoning, however, is *obviously inconclusive; for [*1532] although survivorship is not incident to a tenancy in common, yet there is no inconsistency between a tenancy in common and an *express* limitation to survivors (*q*). The testator's intention that the property shall devolve to the survivors is better effected by an express gift to them than by a joint-tenancy, the survivorship which is incidental to the latter being liable to be defeated by a severance of the tenancy.

To what period survivorship referable.

In seeking for a period to which the words of survivorship could be referred, the obvious rule where the gift took effect in possession, immediately on the testator's decease, was to treat these words as intended to provide against the death of the objects in the lifetime of the testator, the devise affording no other point of time to which they could be referred; accordingly we find this to be the established construction.[1]

When the gift is *immediate*.

Thus, in Lord Bindon *v.* Earl of Suffolk (*r*), where a testator be-

(*q*) See judgment in Doe d. Borwell *v.* Ahey, 1 M. & Sel. 428; Taaffe *v.* Conmee, 10 H. L. Ca. 78. Sometimes a gift to survivors, accompanying a joint tenancy, is considered as merely expressive of the jus accrescendi which is incident to such a devise. See Doe *v.* Sotheron, 2 B. & Ad. 628.

(*r*) 1 P. W. 96. But see Hawes *v.* Hawes, 1 Wils. 165, 3 Atk. 523, where the testator devised an estate to his four younger children in fee as tenants in common, and not as joint tenants, *with benefit of survivorship*; and Lord Hardwicke held, that inasmuch as personal estate was bequeathed to them, with a limitation to the survivor, if any of them died *under age and unmarried*, the devise of the real estate was to receive the same construction.

[1] See Eberts *v.* Eberts, 42 Mich. 404.

queathed 20,000*l.* (due to him from the Crown) to his five grandchildren, share and share alike, equally to be divided between them, *and if any of them died, to the survivors and survivor of them;* Lord Cowper said, that by the first words it was very plain that the legatees were tenants in common, and by the subsequent words it must be intended, if any of them should die *in the lifetime of the testator.* This decree, however, was reversed in D. P., on the ground that the words in question referred not to the death of the testator, but to the time of receiving the money, which was a debt due from the Crown of rather a desperate nature; but the principle of Lord Cowper's decision has since been repeatedly recognized (*s*).

Survivorship referred to *death of testator.*

The more recent case of Smith *v.* Horlock (*t*) presents an instance of a similar construction in reference to real estate. A testator gave all his real and personal property to be equally divided between his two children in common *and to the longest liver,* in fee [*1533] simple (there were some intervening words, which *are immaterial to the point in question); and it was held that one child who alone survived the testator took the whole.

And the charging of a general fund with the payment of certain life annuities, subject to which the fund is bequeathed to the "surviving" children of A., would probably be held not to vary the construction, *i. e.*, the fund would vest in possession in such children as survived the testator, subject only to the particular charges (*u*).

Notwithstanding prior gifts of annuities.

III. — 2. *Words of Survivorship where Gift is not immediate; Rule in Cripps* v. *Wolcott.* — Where, however, the gift was not immediate, (*i. e.*, in possession), there being a prior life or other particular interest carved out, so that there *was* another period to which the words in question could be referred, the point was one of greater difficulty. In *these* cases, indeed, as well as in those of the other class, the Courts for a long period uniformly applied the words of survivorship to the death of the testator, on the notion (as already observed) that there was no other mode of reconciling them with the words of severance creating a tenancy in common. The weight ascribed to this argument, however, was still more extraordinary in these than in the former cases; for, even if *indefinite* survivorship were inconsistent with a tenancy in common (but which it clearly was not), yet surely there could be no incongruity between such an interest and a limitation to the survivors *at a given period;* nevertheless, decision rapidly followed decision, in which, on reason-

Where gift *not immediate.*

(*s*) See Roebuck *v.* Dean, 2 Ves. Jr. 267; Russell *v.* Long, 4 Ves. 553; Bass *v.* Russell, Taml. 18; Clark *v.* Lubbock, 1 Y. & C. C. C. 492; Ashford *v.* Haines, 21 L. J. Ch. 496.

(*t*) 7 Taunt. 129; but see Barker *v.* Giles, 2 P. W. 280, post; Blisset *v.* Cranwell, 1 Salk. 226; Doe d. Borwell *v.* Abey, 1 M. & Sel. 428, post.

(*u*) See Lill *v.* Lill, 23 Beav. 446; and an analogous point, ante, p. 1013.

ing of this kind, survivorship was held, in cases of this sort, to refer to the period of the testator's decease.[1]

One of the first of these cases is Stringer *v.* Phillips (*x*), where 100*l.* was bequeathed to five persons at the decease of testator's sisters L. and C. (*y*), equally to be divided between them, *and the survivors and survivor of them;* and if A., one of the five, died before marriage, her share to go over to another; and it was decreed that they took this 100*l.* as tenants in common, and that the limitation to the survivors must be construed to be inserted to give it to such as were the survivors *at the death of the testator,* and to prevent a lapse.

Survivorship referred to the death of the testator.

* So, in Rose d. Vere *v.* Hill (*z*), where the testator devised his lands to his wife for life, and after her decease to his five children (naming them), *and the survivors and survivor of them,* and the executors and administrators of such survivor, *share and share alike, as tenants in common and not as joint tenants;* Lord Mansfield and the other Judges of K. B., held that these words were inserted to carry the property to the survivors, in case of the death of any of the devisees in the devisor's lifetime, and that they took as tenants in common. [*1534]

Survivorship referred to the death of the testator;

Again, in Wilson *v.* Bayly (*a*), where a testator bequeathed certain leasehold estates, in the event of his two sons dying unmarried, and in case neither of them should have issue, to his three daughters *and the survivors and survivor of them* and their assigns, as tenants in common and not as joint tenants. It was contended, on the one hand, that the words of survivorship were intended to give estates to such of them as should be living when the contingency happened, who were then to take as tenants in common; but the House of Lords adjudged that each of the daughters surviving the testator took a vested interest in one-third share, which on her death before the contingency happened was transmissible to her representatives. It is evident, therefore, that the House considered the words of survivorship to refer to the death of the testator.

—to the death of the testator;

So, in Roebuck *v.* Dean (*b*), where a testatrix bequeathed certain stock in the funds in trust for her niece for life, and after her decease

(*x*) 1 Eq. Ca. Ab. 293; but see 1 Cox's P. W. 97, n.
(*y*) It is probable these persons were legatees for life, but it does not appear in the note extracted by Mr. Cox. In Eq. Ca. Ab. the legacy is inaccurately stated as given immediately to the five legatees. Note, however, that they all survived testator's sisters.
(*z*) 3 Burr. 1881.
(*a*) 3 B. P. C. Toml. 195, reversing decree in the Irish Chancery; see the will more fully stated, ante, Vol. I., p. 484.
(*b*) 2 Ves. Jr. 265. As to this case, see Sir W. Grant's judgment in Halifax *v.* Wilson, 16 Ves. 171; and Sir J. Leach's in Cripps *v.* Wolcott, 4 Mad. 15, post, p. 1544.

[1] See Hoover *v.* Hoover, 116 Ind. 498; 146 Mass. 501; McDaniel *v.* Allen, 64 Miss. Harris *v.* Carpenter, 109 Ind. 540; Nicoll *v.* 417.
Scott, 99 Ill. 529; Cummings *v.* Cummings,

— to the death of the testatrix.

directed that it should be equally divided among her (testatrix's) brother and four sisters, "and in like manner *to the survivors or survivor of them;*" Lord Loughborough held that these words referred to survivors *at the death of the testatrix* (being introduced to prevent a lapse), and not to the death of the niece.

Down to this period the decisions are uniform in referring survivorship to the death of the testator. In the interval, however, between the last and the next case, a doctrine was broached in Brograve *v.* Winder (*c*), also decided by Lord Loughborough, which made a considerable inroad upon this rule of construction; but as it will [*1535] be more convenient to reserve these cases for future * consideration as a separate class, we now proceed with the decisions on the general rule.

Of these cases the next is Perry *v.* Woods (*d*), where a testator gave 1,500*l.* S. S. Anns. upon trust to pay the dividends to A. for life, and after her decease to B. for life, and after his decease to transfer the principal to C., D., and E., in equal shares and proportions, and to the survivor or survivors of them who should be living at their decease. He gave another sum of stock to a different person for life, with a similar ulterior gift among these persons and the survivors. He then gave another sum of 1,500*l.* S. S. Anns. to E. for life, and after her decease to and among her children, to be paid them at twenty-one; and in case E. should die and leave no child or children, he directed his executors to pay the principal unto C. and D., *share and share alike, or to the survivor of them.* Sir R. P. Arden, M. R., held that C. and D. *surviving the testator* were entitled to the last 1,500*l.* as tenants in common. He thought that he was precluded from adopting any other construction by Stringer *v.* Phillips (*e*), there being no single circumstance of distinction, except that in some particular cases, as to other legacies, the testator had referred survivorship to the time of division.

Survivorship referred to the death of the testator.

Circumstance of there being an *express* bequest to survivors at the division.

Sir W. Grant, however, seems to have considered that this circumstance favored the construction adopted; for (*f*), in allusion to Perry *v.* Woods, he said, "Where the testator meant the survivorship to refer to the death of the tenant for life, he expressly declared that intention in two instances, and the omission of that reference in another instance *is an indication of a different intention*" (*g*).

Again, in Maberly *v.* Strode (*h*), the words, "with benefit of sur-

(*c*) 2 Ves. Jr. 634, post, p. 1539.
(*d*) 3 Ves. 204.
(*e*) Ante, p. 1533.
(*f*) See Newton *v.* Ayscough, 19 Ves. 537.
(*g*) But see Daniell *v.* Daniell, 6 Ves. 297, post, p. 1541.
(*h*) 3 Ves. 450, 4 R. R. 61.

vivorship," were held to contemplate the death of any of the objects in the lifetime of the testator. A testator devised his real estate to trustees, to sell and invest the produce with his personal estate, in trust for his son S. for life and after his decease for his children. But in case his son should die unmarried and without issue, or they should die, being sons before twenty-one, or being daughters before twenty-one or marriage, then in trust to transfer such funds unto his (testator's) nephews W. and J., and unto his niece C., in equal proportions share and share alike, his, her, and * their issue or the [*1536] issue of either of them to take their parent's share, *with benefit of survivorship* to his nephews and niece. The question was, whether these words referred to survivorship at the death of the testator or of the son. Sir R. P. Arden, M. R., held that they referred to survivorship at the death of the testator, being introduced to prevent a lapse (*i*).

"With benefit of survivorship," referred to death of testator.

It is remarkable, however, that the same learned Judge in Russell *v.* Long (*k*) inclined to hold words of survivorship to refer to the death of the tenant for life, not to that of the testator, observing that the latter construction was unnatural, and was not to be adopted if any other could be, — a doctrine which it is difficult to reconcile with Perry *v.* Woods.

The next case in the series is Brown *v.* Bigg (*l*), where a testator bequeathed the interest of his stock in the funds to his wife for life, provided that if she married again she should be entitled to one moiety only of the interest, the other to be applied to the use of the testator's nephews and nieces "after mentioned, in manner and proportions therein expressed;" and, as to the residue of his personal estate, and the produce of some real, he gave the interest to his wife for life, under the like restrictions as before in case of a second marriage, and after the decease of his said wife without issue by him, the testator left the whole of his personal estate to his several nephews and nieces after named, viz. A., B., and C., and the four children of D., *to be divided amongst them and the survivors of them, share and share alike.* A. having died in the lifetime of the widow, her personal representatives claimed her share as vested at the decease of the testator; and Sir W. Grant so decreed, though during the argument he observed that the general leaning of the Court is against construing the words of survivorship to relate to the death of the testator, if any other period can be fixed upon, the testator generally supposing the legatee will survive him. If he intended his wife to have the whole for life, the probable conclusion was that he meant the time of division.

Survivorship referred to death of testator.

(*i*) But see Gibbs *v.* Tait, 8 Sim. 132, where a different construction was given to a similar expression.
(*k*) 4 Ves. 551.
(*l*) 7 Ves. 279.

Sir W. Grant's remark on Brown *v.* Bigg.

In explanation of the seeming inconsistency between his remarks during the argument and his decree, his Honor observed, on a subsequent occasion (*m*), that he "found the result of the authorities *contrary to what had fallen from the Court during the argument* founded upon [*1537] what Lord Alvanley had said in one of the * cases; *and that in a great majority of them survivorship had been referred to the period of the testator's death.*"

Survivorship referred to death of testator — real estate;

This seems to be the latest case in which the construction which reads words of survivorship as referring to the period of the testator's death, has been applied to bequests of personal estate. Examples, however, of its application to devises of real estate occur in several subsequent cases: as in Garland *v.* Thomas (*n*), where the devise was to R. C. for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to the testator's niece S., and his two nieces E. and A. *and the survivor and survivors of them*, and the heirs of the body of such survivor or survivors, as tenants in common and not as joint-tenants; and for want of such issue over; and Sir J. Mansfield and the Court of C. P., on the authority of Bindon *v.* Suffolk (*o*), Stringer *v.* Phillips (*p*), and Rose *v.* Hill (*q*), held that the limitation to the survivors was intended to provide for the event of the death of any of the devisees *in the testator's lifetime*, and that all surviving the testator took as tenants in common. However, the only point decided was that the testator did not intend an indefinite survivorship; for all the three nieces survived R. C., who died without issue; so that whether the death of the testator, or of R. C. so dying, was the period to which survivorship was referable, was immaterial to the determination of the case.

— to the death of the testator.

So, in Edwards *v.* Symons (*r*), where a testator devised certain lands which he was entitled to on the death of his mother to trustees, upon trust to receive and apply the rents for the maintenance, education, and advancement of his six children (naming them), and immediately on E. (the youngest of the children) attaining twenty-one years, then he devised the said premises to his said six children *and the survivors and survivor of them*, their heirs and assigns forever, to hold as tenants in common and not as joint tenants. By a codicil the testator extended the devise to another child. Five of the children survived the testator, of whom one died before E. attained twenty-one; and it was held that one-fifth share descended to his heir-at-law, the Court being of opinion that the words of survivorship referred to *the death of the testator*, and not to the period of E.'s attainment to twenty-one.

(*m*) Shergold *v.* Boone, 13 Ves. 375.
(*o*) Ante, p. 1532.
(*q*) Ante, p. 1534.
(*n*) 1 B. & P. N. R. 82.
(*p*) Ante, p. 1533.
(*r*) 6 Taunt. 213.

* In both the preceding cases it will be observed, the devise was to individuals nominatim. But in Doe d. Long *v.* Prigg (*s*), the applicability of the construction to a devise *to a class* came under consideration. The testator devised real estate to his mother *for life*, and after her death to his wife for life, and from and after the decease of his mother and wife, he gave and bequeathed all the above-mentioned premises unto the *surviving* children of J. and W., and to their heirs forever; the rents and profits to be divided between them in equal proportions. The question was, to what period the words "surviving children" referred; Bayley, J. (who delivered the judgment of the Court), said, "The testator's death is in this case so much the more rational period, so much the more likely to have been intended, and falling in, as it does, with the rule of law for vesting estates as soon as they may, instead of leaving them contingent, that we are of opinion that the estate here vested in remainder immediately upon the testator's death, in the then children of J. and W." [*1538]

Applicability of the rule to a devise to a *class*.

This case closes the long series of authorities in favor of the construction in question, which might seem to have established, if reiterated adjudication could settle any point, that a gift to several objects as tenants in common, and the survivors and survivor of them, vested the subject of gift absolutely in the objects living at the death of the testator, the words of survivorship being referable to that period. The sequel will serve to shew that no rule of construction, however sanctioned by repeated adoption, is secure of permanence, unless founded in principle; for to the inadequacy of the grounds upon which the rule was established may, it is conceived, be ascribed, not only the frequent agitation of the question evinced by the multitude of cases just stated, but the sweeping and, as we shall see, sometimes groundless exceptions ingrafted upon it, which at length rendered it doubtful whether such a rule of construction any longer existed, or rather occasioned its total subversion, in reference at least to personal estate. For the reader, on a perusal of the cases which remain to be stated, will probably find himself impelled to the conclusion, that where there is a gift of personal estate to a person for life or any other limited interest, and after the determination of such interest to certain persons nominatim, or to a class of persons as tenants in common, *and the survivors of them*, these words are construed as intended to carry the subject of gift *to the objects* * *who are living at the period of distribution.*[1] This result, however, was not at- [*1539]

Remarks upon the preceding cases.

(*s*) 8 B. & Cr. 231.

[1] Mather *v.* Mather, 103 Ill. 607; Summers *v.* Smith, 127 Ill. 645; Coveney *v.* McLaughlin, 148 Mass. 576; Delaney *v.* McCormack, 88 N. Y. 174; Vincent *v.* Newhouse, 83 N. Y. 505; Teed *v.* Morton, 60 N. Y. 502. See Nicoll *v.* Scott, 99 Ill. 529; Blatchford *v.* Newberry, id. 11; Morrill *v.* Phillips, 142 Mass. 240; Denny *v.* Kettell, 135 Mass. 138;

tained until after many gradations. In the first instance survivorship was held to relate to the period of distribution and not to the death of the testator, on the ground that the subject of gift (being the produce of lands devised to be sold) was not in esse until this period.

Survivorship referred to *period of distribution.*

Thus, in Brograve *v.* Winder (*t*), where a testator devised his real estates to A. for life, with remainder to his first and other sons in tail male, and, in default of sons of A., gave his estates to trustees to sell, and willed that the money arising by such sale or sales should be equally distributed among the three sons and daughter of W., *or the survivors or survivor of them*, and that such fourth or other part as the daughter should become entitled to should be settled in a certain manner; Lord Loughborough admitted that in general it was perfectly true that these words would not prevent the vesting at the death of the testator, but the circumstances of this will, he said, gave it a very different effect. "In this will (he observed), the penning of which is very particular, when once you fix the intention that they shall take it as money, which is clearly the sense of this will, there is no gift till the distribution; the object of the distribution is pointed out to be among the persons named, 'or the survivors or survivor;' that excludes the possibility of taking in, as objects of the distribution, persons who are dead."

Subject of gift being the produce of a future sale.

So, in Newton *v.* Ayscough (*u*), where a testator gave to A. 400*l.* consols, for her to receive the interest during her life, and after her decease the 400*l.* to be sold and divided among his residuary legatees, *or the survivor of them, share and share alike;* and he appointed B., C., and D. residuary legatees of his will, share and share alike. On a question whether one of the legatees dying in the lifetime of A. was entitled, Sir W. Grant said, "To what period survivorship is to relate, depends not upon any technical words, but upon the apparent intention of the testator, collected either from the particular disposition or the general context of the will." "Here is a direction to trustees at the death of the tenant for life to sell the fund, and divide the produce among his residuary legatees, 'or the survivor of them, share and share alike.' That naturally points to the period of sale as the period to ascertain who are the persons to take, and brings this case much nearer [*1540] Brograve *v.* Winder (*x*) * than Perry *v.* Woods (*y*). In Brograve *v.* Winder, Lord Loughborough's opinion was that the

Survivorship referred to the period of distribution.

Sir W. Grant's judgment in Newton *v.* Ayscough.

(*t*) 2 Ves. Jr. 634.
(*u*) 19 Ves. 534.
(*x*) Supra.
(*y*) Ante, p. 1535.

In re Crawford, 113 N. Y. 366; Jenkins *v.* Freyer, 4 Paige, 47; Cole *v.* Crayon, 1 Hill, Ch. 322; Swinton *v.* Legare, 2 McCord, Ch. 440; Walters *v.* Crutcher, 15 B. Mon. 2; Cripps *v.* Wolcott, 4 Madd. 12.

survivor at the time of the sale, not at the death of the testator, was intended. In Perry *v.* Woods the testator had by his will furnished evidence of his own intention with regard to the meaning of the word 'survivor.'" "The case of Russell *v.* Long (*z*), decided by Lord Alvanley soon afterwards, shows that he did not conceive there was any rule requiring survivorship to be generally referable to the death of the testator, but thought it might refer either to that period or the death of the tenant for life, according to the apparent intention of the testator."

The inconsistency between the expressions of Lord Alvanley in Russell *v.* Long, and his decisions in Perry *v.* Woods (*a*) and Maberly *v.* Strode (*b*), has been already pointed out. The latter show that he *did* consider survivorship in these cases to be generally referable to the death of the testator, as the only mode of reconciling it with the tenancy in common; and even Sir W. Grant himself in Shergold *v.* Boone (*c*) stated this to be the result of the authorities; which opinion accords with his decision in Brown *v.* Bigg.

It is a circumstance worthy of remark, that, down to this period, in all the cases where survivorship had been referred to the time of division, the expression was "*or* the survivor, although no attempt was made to found a distinction on this particular phraseology.

Another instance in which Brograve *v.* Winder has been followed is Hoghton *v.* Whitgreave (*d*), where a testator gave his real and the residue of his personal estate to his wife for life, and after her decease to trustees, upon trust to sell the real estate; and directed that the money arising from the sale, as also the rents from the death of his wife until the sale, as well as the residue of his personal estate, should be paid and equally divided among his nephews and nieces after mentioned, *and the survivors or survivor of them*, viz., A. M. &c.; and he thereby bequeathed the same to them, *and to the survivors or survivor of them*, after the decease of his wife, and in manner aforesaid. The question was, whether the nephews and nieces surviving the widow were entitled, to the exclusion of those who died in her lifetime. Sir T. Plumer, V.-C., held that the former *were* entitled, * considering the case as not distinguishable from [*1541] Brograve *v.* Winder (*e*). "The subject-matter," said his Honor, "is not to be converted into money till after the death of the tenant for life; it is then that for the first time anything is given to the trustees. It is given upon trust to be converted into money, and then to be divided. Thus, not only was there no bequest till the widow's death, but the subject-matter did not until then exist in the shape and form in which it is given. It is given to those per-

Survivorship referred to the period of distribution on special grounds.

(*z*) Ante, p. 1536.
(*b*) Ante, p. 1535.
(*d*) 1 J. & W. 146.
(*a*) Ante, p. 1535.
(*c*) 13 Ves. 375.
(*e*) Ante, p. 1539.

sons and the survivors or survivor of them, and seems to fall under the general rule, that legacies given to a class of persons vest in those who are capable of taking at the time of distribution (*f*). Here he mentions them nominatim, but he then takes off the effect of that by adding the words, 'and to the survivors or survivor.' He cannot mean such as survive him, for the governing clause, that containing the gift, refers to the death of his wife as the period when it is to operate." And he afterwards adverted to the subsequent gift, "in manner aforesaid," as precluding the argument that it was to go to those who survived him after the death of his wife.

As to there being another bequest *expressly* to survivors *at distributions.*

Another ground upon which a gift to survivors has been held to refer to survivors at the period of distribution, and not at the death of the testator, is that some other subject-matter given to the same objects is *expressly* limited in that manner.

Thus, in Daniell *v.* Daniell (*g*), where the testator bequeathed certain stock in trust for his wife for life, and after her decease to his children, but in case his wife should have no child of his at her decease living, then as to 1,000*l.*, part thereof, to pay the interest to his sister J. D. during her life, and at her decease the 1,000*l.* to be paid equally between *her said two sons J. and F., or the whole to the survivor of them.* In the preceding part of the will another sum of 1,000*l.* was given to trustees, in trust, after the decease of his wife without issue by him, to pay his said sister the interest for life, and after her decease the principal to be paid to the said J. and F., share and share alike, in *case they should be living at their mother's death;* but in case either of them should die before her, then the whole to be paid to the survivor. F. died in the lifetime of the testator's widow; at her death, the testator's sister J. D. being also dead, a bill was filed by J. for the first-mentioned 1,000*l.*, as the survivor at the death of the last surviving tenant for life, which was resisted by [*1542] *the representatives of F., claiming as one of the survivors at the death of the testator. Sir W. Grant said, "It is clear the testator meant the survivor at the time of the division. He did not conceive that would take place till both his wife and Mrs. D. (*i. e.*, J. D.) were dead; he conceived the deaths would happen in the order of the limitation. *The mode in which he disposed of the other two sums confirms, instead of opposing, this construction,* showing that the period of division was the period at which he intended it to vest. *He had the same meaning as to this fund:* he who is alive when the division takes place takes the whole of the capital."

The reasoning of this case agrees with that of Lord Hardwicke in Hawes *v.* Hawes (*h*), and it would seem with Lord Alvanley's in

(*f*) This is a mistake; see ante, p. 1010.
(*g*) 6 Ves. 297.
(*h*) Ante, p. 1532, n.

Perry *v.* Woods (*i*); but stands singularly contrasted with Sir W. Grant's own observations upon the latter case in Newton *v.* Ayscough already noticed, where h considered that survivorship, being expressly made referable to the death of the tenant for life in another bequest, raised an argument in favor of a *different* construction in the bequest in question, where such expressions were omitted (*k*). The only circumstance of distinction is, that in Perry *v.* Woods the other bequest was to different objects.

Remarks upon Daniell *v.* Daniell.

The doctrine of Daniell *v.* Daniell was referred to with approbation and adopted in Wordsworth *v.* Wood (*l*), where a testator gave certain real and personal property to his wife for life, and after her decease to his *then* surviving children, share and share alike, independently of the rental of his said estates, which he gave to *his surviving female children.* Lord Langdale, M. R., held that a daughter who died in the lifetime of the widow was excluded from the rents, and one of the grounds of this construction he considered to be, that such a daughter was not an object of the immediately preceding devise of the estates, the testator's apparent intention being by the second gift merely to exclude the sons, and not to introduce a new class of daughters. He said, "The rule is, that where an interest is given to a person for life, and after his death to his surviving children, those only can take who are alive when the distribution takes place." Upon appeal, Lord Cottenham also considered that, independently of the general rule, there was sufficient ground for * holding the deceased daughters to be excluded, according to [*1543] Brograve *v.* Winder, Newton *v.* Ayscough, Hoghton *v.* Whitgreave, and Daniell *v.* Daniell; more particularly expressing his concurrence in the line of argument pursued by Sir W. Grant in the last-mentioned case. The decision was affirmed in D. P. on the same grounds.

Survivorship referred to period of distribution, there being another gift *expressly* to survivors at that period.

The general rule referring survivorship to the death of the testator was, it will be observed, departed from in the preceding cases only upon particular grounds; and these cases, by resting the construction on the special circumstances, might seem indirectly to afford a confirmation of that rule. Their effect, however, in consequence of the indefinite and questionable nature of the exceptions which they went to establish, evidently was to strike at the root of the rule itself, and to prepare the way for its abandonment in cases where such circumstances did not exist.

Remarks upon Brograve *v.* Winder, Newton *v.* Ayscough, Hoghton *v.* Whitgreave, and Daniell *v.* Daniell.

It is curious to observe, in the history of this rule of construction, the steps by which an established doctrine is overturned. Lord

(*i*) See ante, p. 1535. See also Sheppard *v.* Lessingham, Amb. 122, ante, Vol I., p. 452.
(*k*) See also Campbell *v.* Campbell, 4 B. C. C. 15.
(*l*) 2 Beav. 25, 4 My. & Cr. 641, 1 H. L. Ca. 129.

History of the present doctrine.

Loughborough, we have seen, first departed from it, founding that departure upon a circumstance which furnished no real distinction, but at the same time with an anxious recognition of its authority (*m*). Sir W. Grant in Daniell *v.* Daniell (*n*), probably disapproving of the reasoning which led to the adoption of the rule, as well as of the distinction which had been engrafted on it, applied the principle of the exception to a case not warranted by the terms of the former decision; and although he did not treat the established rule with the same professions of reverence and submission as Lord Loughborough, yet, by placing his own case upon special grounds, impliedly bowed to its authority. In Newton *v.* Ayscough (*o*), however, he went a step further, and while he applied Lord Loughborough's construction in Brograve *v.* Winder to an exactly similar case, boldly denied the existence of any contrary rule of interpretation. Its overthrow, we shall find, was completed in a subsequent case, remaining to be stated, in which another learned Judge not only disavowed the rule, the foundation of which had been thus gradually sapped, but confidently laid down an opposite doctrine.

The case here referred to is Cripps *v.* Wolcott (*p*), where [*1544] the *testatrix gave and appointed her real and personal estate, in trust for her husband for life, and after his decease directed that her personal estate should be equally divided between her two sons A. and B., and C. her daughter, *and the survivors or survivor of them, share and share alike.* A. died in the lifetime of the husband; B. and C., as the survivors at his death, claimed the whole. Sir J. Leach said, "It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, *the survivorship is to be referred to the period of division.* If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of Stringer *v.* Phillips (*q*). *But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy.* This is the principle of the cited cases of Russell *v.* Long (*r*), Daniell *v.* Daniell (*s*), and Jenour *v.* Jenour (*t*). In Bindon *v.* Lord Suffolk (*u*), the House of Lords found a special intent in the will,

Survivorship referred to the time of distribution.

General rule as stated by Sir J. Leach.

(*m*) See Brograve *v.* Winder, ante, p. 1539.
(*n*) Ante, p. 1541.
(*o*) Ante, p. 1539.
(*p*) 4 Mad. 11. See also Browne *v.* Lord Kenyon, 3 Mad. 410.
(*q*) This is not correct; see ante, p. 1533.
(*r*) Ante, p. 1536.
(*s*) Ante, p. 1541.
(*t*) Post, p. 1549.
(*u*) Ante, p. 1532.

that the period of division should be suspended until the debts were recovered from the Crown, and they referred the survivorship to that period. The two cases of Roebuck *v.* Dean and Perry *v.* Woods, before Lord Rosslyn (*x*), do not square with the other authorities. *Here there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband who took a previous estate for life.*" [1]

Although this seems to have been at the time a very bold decision, involving as it did direct opposition to no less than nine cases (one decided by the House of Lords (*y*)), and although it is to be regretted, that the actual state of the authorities was not brought to the attention of the learned Judge, yet the rule of construction which he propounded seems to be so reasonable and convenient for general application, that it is not surprising that subsequent Judges have been favorably disposed to its adoption, as will appear by the cases about to be stated.

Remarks on Cripps *v.* Wolcott.

* Thus, in Blewitt *v.* Roberts (*z*), where a testator gave an annuity to his wife for life, and directed that after her death the annuity should be equally divided between his children (naming six) *or the survivors or survivor.* Sir L. Shadwell held that such of the legatees as survived the widow were entitled in equal shares (*a*). [*1545]

Survivorship referred to period of distribution.

The construction adopted in this case seems to agree with and to be supported in its full extent by the earlier case of Pope *v.* Whitcombe (*b*), which is another important authority for the general rule which refers survivorship to the period of distribution. The testatrix gave the interest of the residue to her brother, during his life, and after his death she gave the residue to her executors, in trust for four persons by name *and the survivors and survivor of them,* share and share alike, to be paid to them respectively when they should attain twenty-one, with interest in the mean time. Of these four persons, two died during the life of the brother: Lord Eldon held that they did not take vested interests in any part of the

(*x*) Perry *v.* Woods was decided by Lord Alvanley.
(*y*) Wilson *v.* Bayly, 3 B. P. C. Toml. 195.
(*z*) 10 Sim. 491, 4 Jur. 501, 9 L. J. Ch. 209; affirmed by Lord Cottenham, Cr. & Ph. 274; but as he held the children entitled for life only (as to which see Bent *v.* Cullen, L. R., 6 Ch. 235), was not the survivorship indefinite? See post.
(*a*) See also Gibbs *v.* Tait, 8 Sim. 32, which however was based on the authority of Brograve *v.* Winder, and that class of cases; Wordsworth *v.* Wood, ante, p. 1542.
(*b*) 3 Russ. 124.

[1] Mather *v.* Mather, 103 Ill. 607; Nicoll *v.* Scott, 99 Ill. 529: Miller *v.* McBlain, 98 N. Y. 517: O'Brien *v.* O'Leary, 64 N. H. 332 (citing Hill *v.* Rockingham Bank, 45 N. H. 270; Kimball *v.* Penhallow, 60 N. H. 448; Sinton *v.* Boyd, 19 Ohio St. 30); Dutton *v.* Pugh, 45 N. J. Eq. 426; Slack *v.* Bird, 23 N. J. Eq. 238; Branson *v.* Hill, 31 Md. 181; McClung *v.* McMillan, 1 Heisk. 655; Olney *v.* Hull, 21 Pick. 311; Hulburt *v.* Emerson, 16 Mass. 241; Wren *v.* Hynes, 2 Met. (Ky.) 129. Contra, Hansford *v.* Elliott, 9 Leigh, 79; Drayton *v.* Drayton, 1 Desaus. 324; Embury *v.* Sheldon, 68 N. Y. 227; Moore *v.* Lyons, 25 Wend. 119; Ross *v.* Drake, 37 Penn. St. 373. See Whitney *v.* Whitney, 45 N. H. 311.

residue, but that the whole belonged to the two survivors; such being, in his opinion, the intention of the testatrix.

So in Neathway *v.* Reed (*c*), where a testator bequeathed the interest of his funded property to his sister for her life, and after her decease such property to be equally divided between her *surviving* children: in another part of his will he had, amongst other legacies, made an immediate bequest to his sister's surviving children of 30*l.* each. Lord Cranworth with K. Bruce and Turner, L. JJ., decided that the word "surviving" in the former bequest referred to the sister's death. The L. C. said, "According to the old principles of law the rule was that the period of vesting should be at the moment of the testator's death. Now, however, in putting a construction on the word 'surviving' reference is had to the *intention* of the testator as discoverable from the whole will. In my opinion when an estate is given to a person for life, and after his death to his [*1546] * surviving children, those only of the children who survive the tenant for life will take." And Sir G. Turner observes that if the gift had been to the sister for life and after her decease to "her children" without the word "surviving," the children living at the testator's death would have taken: that some effect must be given to the word "surviving," and that it must mean surviving the sister (*d*). The Court also thought their decision could not be influenced by the fact that in the immediate bequest the same word must have a different meaning; for in that place there was no other meaning which it could have (*e*).

Survivorship referred to period of distribution.

Sir G. Turner's observation is applicable only where the gift is to a class, or to individuals as joint-tenants. But it is not to be understood as confining the rule to such cases. In Cripps *v.* Wolcott itself and other cases already noticed the gifts were to individuals as tenants in common; and in Hearn *v.* Baker (*f*), where a testator gave all his estate and effects to his wife for life, and after her death bequeathed a sum of stock to his five cousins (naming them) *or the survivors of them* as tenants in common; it was held by Sir W. P. Wood, V.-C., that "survivors" had reference to the death of the widow, and that one cousin who alone survived her was entitled to the whole fund. So in Vorley *v.* Richardson (*g*), where there was a

(*c*) 3 D. M. & G. 18. See also Williams *v.* Tartt, 2 Coll. 85; Eaton *v.* Barker, id. 124; Buckle *v.* Fawcett, 4 Hare, 536; Hesketh *v.* Magennis, 27 Beav. 395; Young *v.* Davies, 2 Dr. & Sm. 167; Thompson *v.* Thompson, 29 Beav. 654; Whitton *v.* Field, 9 Beav. 368; Taylor *v.* Beverley, 1 Coll. 108; Re Pritchard's Trusts, 3 Drew. 163. The three last cases were aided by context. See also Shaw *v.* Shaw, 25 L. R., Ir. 30.

(*d*) See also Re Crawhall's Trusts, 8 D M. & G. 480.

(*e*) See also Young *v.* Davies, 2 Dr. & Sm. 167, 170, and more fully 32 L. J. Ch. 372, also Salisbury *v.* Petty, 3 Hare, 86, 93; and cf. Gooch *v.* Slater, 3 Jur. N. S. 881, where the phrase "with benefit of survivorship" used with reference to four different gifts, some immediate and others not, but all vested, was referred to testator's death in every instance.

(*f*) 2 K. & J. 383.

(*g*) 8 D. M. & G. 126; also Naylor *v.* Rohson, 34 Beav. 571.

general bequest in trust for the testator's wife until his youngest child should attain twenty-one, and on that event happening to be divided amongst his said wife and all his children (naming them) as tenants in common, *with benefit of survivorship;* it was held that the words of survivorship being connected with the period of division must primâ facie be taken to refer to that period.

So where the income of personal property is bequeathed to several persons for life, and after the death of all to their surviving children, those children alone take who are living at the death of the last surviving tenant for life (*h*). And where *the gift is [*1547] to A. for life, and at his death to B. for life, and at his death to the surviving children of C., only those children are entitled who are living at the actual period of distribution, whether A. or B. dies last (*i*).

In this state of the authorities one scarcely need hesitate to affirm, that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator, is confined to those cases in which there is no other period to which survivorship can be referred; and that where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only.[1]

Result of the cases as to personalty.

If the tenant for life dies before the testator, the death of the latter, as the period of actual distribution, will also be regarded as the period of survivorship (*k*).

If tenant for life dies before testator, death of the latter is the period.

The same principle is clearly applicable where there is no prior particular bequest, but the gift to the legatees among whom the survivorship is to take place includes all of the prescribed class who may come into existence before a stated period. Thus, if a testator make a bequest to all the children of A. who shall be born in their father's lifetime or within nine months after his death, as tenants in common, with benefit of survivorship; those only who survive their father or the nine months named are entitled to a share (*l*).

(*h*) Stevenson *v.* Gullan, 18 Beav. 590. See also per Wood, V.-C., Re Hopkins' Trusts, 2 H. & M. 411. Gummoe *v.* Howes, 23 Beav. 184, 192, is not inconsistent with the rule. The gift was to A. and B. for their lives as tenants in common; and in case of the death of either without issue, to the survivor; but if either should die leaving issue, her share was given to her children; and *after the death of both* the whole was to be conveyed, transferred, or paid to the heirs of their bodies (construed children) share and share alike, or to the survivors or survivor of them; but if A. and B. should die without children, then over. It was held that a child of A., which survived its parent but died before B. was entitled to a share. In fact, the gift over after the death of both which, standing alone, might have given B. a life interest in the share of A. after her death, and have pointed out the death of B. as the period of survivorship for all the children, was explained by the previous gift over, on the death of each parent, of her share to her children; so that survivorship in the several families was referred to a different period for each family.

(*i*) Knight *v.* Poole, 32 Beav. 548; Re Fox's Will, 35 Beav. 163; Howard *v.* Collins, L. R., 5 Eq. 349. But see Drakeford *v.* Drakeford, 33 Beav. 43.

(*k*) Spurrell *v.* Spurrell, 11 Hare, 154.

(*l*) Hodson *v.* Micklethwaite, 2 Drew. 294. See also Blewitt *v.* Roberts, Cr. & Ph. 274, 283 (as to the 100*l.* annuity); Davies *v.* Thorns, 3 De G. & S. 347.

[1] See Den *v.* Sayre, 2 Penn. 598.

But the cases of Garland *v.* Thomas, Edwards *v.* Symons, and Doe *v.* Prigg (the last decided after Cripps *v.* Wolcott), made it doubtful whether this rule applied to devises of real estate. It is difficult to discover any ground for making them the subject of a different rule, unless a reason can be found in the greater tendency in devises of real estate towards a vesting of the interests of the devisees. The distinction was repeatedly pronounced to be unsound (*m*); and at length, in [*1548] Re Gregson's *Trusts (*n*), it was held by K. Bruce and Turner, L. JJ., to be untenable. There a testator devised real estate to his wife for life, and on her death "to be shared share and share alike amongst the following persons, or the survivors of them, viz." (naming them); and it was decided that the question being one of construction, and of the testator's intention, a forced interpretation could not be put on the words in order that the remainder might by early vesting escape the liability to destruction and other inconveniences of tenure incident to contingent remainders; and that here, no less than in the case of personal estate, survivorship must be referred to the death of the tenant for life.

Distinction in regard to real estate rejected.

The rule in Cripps *v.* Wolcott is not only settled, but is one which the Court never seeks to evade by slight distinctions. But, of course, it must yield to a context clearly indicating a contrary intention (*o*). Thus, in Shailer *v.* Groves (*p*), where a testator bequeathed 1,000*l.* stock to his wife for her life, at her decease one-half of the produce to be received and divided amongst his *surviving* brothers and sister or (*q*) *their* issue, share and share alike, Sir J. Wigram decided that the word "surviving" had reference to the testator's death. He said: "It is clear that the testator must have intended a period of distribution later in point of time than the gift of the subject of distribution, and that he intended to substitute for the primary objects of his gift the issue of such of them as should die between the time of the gift and the time of the distribution." — "The fund must be divided in equal parts among the brothers and sisters surviving at the death of the testator. The issue of those

Rule in Cripps *v.* Wolcott yields a contrary intention.

To surviving brothers or (by substitution) to their issue.

(*m*) Wordsworth *v.* Wood, 1 H. L. Ca. 129; Buckle *v.* Fawcett, 4 Hare, 536.

(*n*) 2 D. J. & S 428, reversing Wood, V.-C., who yielded to the authorities, 33 L. J Ch. 531. Sir E. Sugden also had treated Doe *v.* Prigg as a binding authority, see 1 D. & War. 499.

(*o*) See per Wood, V.-C., 2 H. & M. 414.

(*p*) 6 Hare, 162.

(*q*) The report 6 Hare gives "*and* their issue." But 11 Jur. 485 and 16 L. J. Ch. 367 give "or," and the briefs of counsel in the cause (which have been examined) agree with them. These latter reports however differ from 6 Hare in a still more remarkable manner: for they represent the decision to have been, that the word "surviving" referred to the period of distribution; and the decree is drawn up in accordance with this latter view. But Mr. Hare's report of the judgment is probably correct, the word "their" being of equal force with the word "them" in Tytherleigh *v.* Harbin, 6 Sim. 329, and Gray *v.* Garman, 2 Hare, 268. See also Sir J. K. Bruce's judgment in Kidd *v.* North, 3 D. M. & G. 951, 2d paragraph.

who died in the lifetime of the tenant for life leaving issue will take the shares of the parents for whom they are substituted" (*r*).

* So in Rogers *v.* Towsey (*s*), where a testator bequeathed [*1549] to each of his two sisters the interest of 5,000*l.* stock for her life, and as each died the said stock to be equally divided between the testator's nieces A., B., C., D., and E., *or the survivors of them;* he bequeathed one moiety of the residue to A., and the other moiety equally between B. and C. "In case his niece C. should not *survive him*, her children" to stand in her place, "and the same of any other of his nieces who might marry and leave children." The same Judge, assuming the general rule to be as stated in Cripps *v.* Wolcott, held that the last clause showed a special intent on the testator's part to refer the word "survivors" to his own death.

III. — 3. *Gifts to Survivors upon a Contingency.* — It is to be observed, that where the gift to survivors is to take effect *upon a contingency*, none of the reasoning (infirm as that reasoning is) upon which it was held to refer to survivors at the death of the testator applies; for it cannot for an instant be contended that a tenancy in common is inconsistent with such a qualified survivorship. The only question, therefore, in such a case is, whether the gift was meant to extend to survivors indefinitely (*i. e.*, whenever the contingency should happen), or is restricted to survivorship within a given period after the testator's decease.

Rule where gift to survivors is contingent.

Thus, in Jenour *v.* Jenour (*t*), where a testator bequeathed 400*l.* long anns. to his sister for life, and declared that 200*l.* should be his brother's for life if he survived his sister, and after his decease should be equally divided between his two nephews J. and M., *and go to the survivor of them in case his brother should leave no lawful issue;* if he should, such issue should be in place of their father with regard to the said annuities. The sister and brother having both died in the lifetime of J. and M., M. claimed to be absolutely entitled to a moiety. The question seems to have been whether survivorship was indefinite, or referable to the death of the surviving legatee for life. Sir W. Grant, observing that he was always indisposed to indefinite survivorship, adopted the latter construction; that is, that the legatees should take absolutely if living at the death of the tenant for life; if then dead leaving issue, then the issue to be entitled in * the place of their parent. On appeal Lord Eldon was [*1550] of the same opinion.

Survivorship confined to the death of the tenant for life.

(*r*) See also Re Hopkins' Trust, 2 H. & M. 411; Evans *v.* Evans, 25 Beav. 81. As to the assumption in the latter case that "death without issue" meant death *in the lifetime of the tenant for life*, see Olivant *v.* Wright, 1 Ch. D. 346, post, Ch. XLIX. And see and consider Blackmore *v.* Snee, 1 De G. & J. 455.

(*s*) 9 Jur. 575: cf. Bouverie *v.* Bouverie, 2 Phil. 349.

(*t*) 10 Ves. 562. See also Bird *v.* Swales, 2 Jur. N. S. 273.

In Roe d. Sheers *v.* Jeffery (*u*) it seems to have been taken for granted that an executory limitation for life, to certain persons or the survivors, was not confined to survivors at the happening of the contingency; but, as the devise had not at the death of the object fallen into possession, it does not appear whether survivorship was considered as indefinite, or as restricted to this period. The devise was to A. for life, remainder to B. in fee; but in case B. should depart this life and leave no issue, then that the premises should return unto E., M., and S., *or the survivors or survivor of them, equally to be divided between them.* E., M., and S. survived the testator, but one of them died in the lifetime of A., but *after* the contingency had happened by the death of B. without issue.

Executory devise to A., B., and C., *or the survivors.*

The two surviving tenants for life recovered the property, on a different point of construction (*x*); and no objection seems to have been made to their claim to the entirety, on the ground that the limitation to survivors was restricted to survivors at the death of the testator, or at the happening of the contingency. Indeed, considering that the estates in the first instance devised to E., M., and S. were for life only, it is probable, even if the question had been raised, that the survivorship would have been held indefinite, so that whenever either of them died the survivors would take his share as a *remainder; i. e.*, "survivor" would have been read not as referring to any particular event, but in its natural sense (*y*) of that individual who, out of several individuals named, should turn out to be the longest liver.

So in Maden *v.* Taylor (*z*), a testator gave real and personal estate to trustees upon trust for four nieces for their respective lives as tenants in common, and if any of them should die without issue, he directed that the share or shares of her or them so dying should go to the survivor or survivors of them and their heirs. Two of the nieces died leaving children, and a third died unmarried. The fourth was unmarried and had attained more than sixty years of age. It [*1551] was held by Sir G. Jessel, M. R., * that the niece who had outlived her sisters was absolutely entitled to her own share.

This decision was approved and followed by Sir E. Fry in Davidson *v.* Kimpton (*a*). In that case a testator bequeathed the dividends of a sum of stock unto and equally between his four daughters, and after their several and respective deceases he bequeathed the stock to their children respectively, that is to say, one fourth part or share to the children of each daughter. And in case any one or more

(*u*) 7 T. R. 589.
(*x*) Ante, p. 1330.
(*y*) See per Lord Westbury, Taaffe *v.* Conmee, 10 H. L. Ca. 78.
(*z*) 45 L. J. Ch. 572; see Nevill *v.* Boddam, 28 Beav. 554; Haddelsey *v.* Adams, 22 Beav. 266, and analogous cases, Smart *v.* Clark, 3 Russ. 365; Tilson *v.* Jones, 1 R. & My. 553; Bowen *v.* Scowcroft, 2 Y. & C. 640; all stated post, Ch. XLVIII., ad fin.
(*a*) 18 Ch. D. 213; followed in Re Roper's Estate, Morrell *v.* Gissing, 41 Ch. D. 409. See also King *v.* Frost, 15 App. Ca. 548, 553.

of the daughters should die without leaving issue her or them surviving, he bequeathed the share or shares so bequeathed and intended for the issue (had there been such) "unto the survivors or survivor" of the four daughters, equally if more than one, and if but one then to such one absolutely. Three of the daughters married and died leaving children. The fourth had never married and was in the fifty-fifth year of her age. His lordship held that the unmarried daughter, being the longest liver of the class, though she had not survived the class, would be entitled to her own share of the stock absolutely if she should die without leaving issue, and that, as by reason of her age it might be assumed that she never could have any children, her share might at once be transferred to her.

Executory devise to survivor referred to death of testator.

In Doe d. Lifford *v.* Sparrow (*b*), an executory limitation to survivors was held to refer to the death of the testator (the devise being to A. and B. in fee as tenants in common, and in case of the death of either without children to the survivor); but this construction was aided by the context, particularly by a gift over of the entire property, in case *both* the devisees were dead *at the time of the decease of the testator* without children, from which the Court inferred, that in the clause in question, he contemplated death at the same period.

Contingent gift to survivors, when not restricted to period of distribution.

But where the original remainder is in terms limited upon the happening of an event (as attaining twenty-one), the non-happening of which occasions the gift over, survivorship is almost necessarily referable to that event, whenever it happens (*c*).

And generally if there is no special ground for restricting it, a gift to survivors on a contingency would seem to extend to survivors indefinitely, *i. e.*, whenever the contingency happens. It will appear in the next chapter (*d*) that if there be a gift to A. for life, remainder to B., and if B. dies without children then to C., the gift over primâ facie takes effect whether the contingency happens before or after the death of A.: and although, where the remainder is to several, with a gift over to survivors, words are frequently used which import a final division of the property and a closing of the trust at the death of the tenant for life, so as to restrict the operation of the gift over to that period (*f*), yet if there are no restrictive words, it would seem to follow from the rule referred to that "survivors" in this gift over means living when the contingency happens, whenever that may be (*g*).

[*1552]

(*b*) 13 East, 359.
(*c*) Carver *v.* Burgess, 18 Beav. 541, 7 D. M. & G. 97.
(*d*) O'Mahoney *v.* Burdett, L. R., 7 H. L. 388.
(*f*) Olivant *v.* Wright, 1 Ch. D. 346.
(*g*) This would seem to be the rule where the original gift is immediate, see per Lord Hatherley, Bowers *v.* Bowers, L. R., 5 Ch. 244, 247. In Clark *v.* Henry, L. R., 11 Eq. 222, 6 Ch. 588. the prior legatees were "to have the control" of their shares at twenty-five, survivorship was therefore referred to that age.

Survivorship referred to time when contingency happens, though gift restricted.

Even assuming that a gift to survivors upon an express contingency is to be restricted to the period of the prior estate, so that those who survive that period take indefeasibly, the question still remains whether they *need* so survive, or whether it is sufficient that they are living when the contingency happens. The cases will be found to favor the latter position.

Thus, in Crowder *v.* Stone (*h*), already stated, Lord Lyndhurst decided that the shares which became subject to the operation of the bequest to the survivor and survivors were divisible among such of the legatees as were living at the time *when the events happened* on which the shares were to go over respectively.

So, in Bright *v.* Rowe (*i*), also stated above, it must have been assumed that the survivorship intended was a survivorship at the time when the several contingencies happened; since otherwise the M. R. could not have decided (as he did) that the personal representative of the child who died without issue in 1829, before the shares became payable, was entitled under the gift to "survivors" to an interest in the share of the child who died in 1826.

And in Ive *v.* King (*k*), where a testator devised and bequeathed property to his wife for life, remainder to trustees in [*1553] *trust to sell, and gave one moiety of the proceeds to his wife's sister and brothers (naming them), as tenants in common; "and in case of the death of any or either of them (which was held to mean death before the wife, as expressed in the gift of the other moiety), then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike." A., one of the brothers, died a bachelor before the testator in the wife's lifetime; and it was held by Sir J. Romilly, M. R., that another brother, who survived A. and the testator, though he afterwards died in the wife's lifetime, was entitled under the gift to survivors to participate in the share of A.

It seems also that where the remainder is, not to several or the survivors (as in Cripps *v.* Wolcott), but to several, and *if any of them die* before the tenant for life, to the survivors, it will be held to mean survivorship inter se and not at the death of the tenant for life. Thus in White *v.* Baker (*l*), a sum was given in trust for A. for her life, and after her

Survivorship held to refer to the event.

White *v.* Baker.

(*h*) 3 Russ. 217, ante, p. 1502. Marriott *v.* Abell, L. R., 7 Eq. 478, is contra, sed qu.

(*i*) 3 My. & K. 316, ante, p. 1522. See also Ranelagh *v.* Ranelagh, 3 My. & K. 441, ante, p. 1503, Fletcher *v.* Ashburner, 1 B. C. C. 497 (where the point appears to have been assumed).

(*k*) 16 Beav. 46, 57. Note that the alternative gift to children, not being "in case any brother should *leave* children," did not assist the construction. Note also that "survivors" was held to denote a *class*, *i. e.*, to include none who did not also survive the testator, 16 Jur. 491; but see Willetts *v.* Willetts, 7 Hare, 38.

(*l*) 2 D. F. & J. 55, reversing Romilly, M. R., 29 L. J. Ch. 577, 6 Jur. N. S. 209, whose previous decision in Cambridge *v.* Rous, 25 Beav. 409 ("the share of each who shall die to be divided among the survivors") appears to be discredited by this reversal.

death in trust to pay the sum to B. and C. in equal shares, and in case of the death of either of them in the lifetime of A., then in trust to pay the whole to the survivor of them the said B. and C., his executors, administrators, and assigns. It was held by Lord Campbell, with K. Bruce and Turner, L. JJ., that on the death of B. in the lifetime of A. the whole vested absolutely in C., not liable to be divested if he afterwards died in the lifetime of A. Sir G. Turner said, "Where there is a bequest to A. for life, and after his death to B. and C. or the survivor of them, some meaning must of course be attached to the words 'the survivor.' They may refer to any one of three events: to one of the persons named surviving the other; to one of them only surviving the testator; or to one of them only surviving the tenant for life: and in the absence of any indication to the contrary they are taken to refer to the last event, as being the most probable one to have been referred to. But where, as in the present case, the bequest is to A. for life and after his death to B. and C., and in case either of them dies in the lifetime of A., the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other; and the question is not to which of the events above mentioned the * testator intended to refer, but whether there is any context to alter the ordinary meaning of the words which he has used." He also thought the case was made stronger by the words "his executors," &c. being added to the gift in favor of the survivor (*m*); in which he agreed with Lord Campbell. But he added that the case needed no such support, and he "preferred deciding it upon the more general ground." [*1554]

Both Judges pointedly approved of Scurfield *v.* Howes (*n*), and treated it as directly in favor of their decision. There the bequest was to A. for life, and after her decease to her two children share and share alike, but if either of them should die before the decease of their mother, the whole to the survivor of them (*o*). Both died in A.'s lifetime, and it was held that the legacy belonged to the personal representatives of the survivor. It seems, therefore, that White *v.* Baker cannot fairly be said to have turned on the particular language of the will (*p*). Scurfield *v.* Howes.

(*m*) As contrasted (it may be presumed) with their absence from the original gift to the two.

(*n*) 3 B. C. C. 90. See also per Shadwell, V.-C., Antrobus *v.* Hodgson, 16 Sim. 450. But this was heard as a short cause, and the successful party being legal representative of both B. & C. was entitled quacunque via.

(*o*) The words "of them" are supplied from R. L., 6 Jur. N. S. 592. But Lord Campbell stated the case without them, and in other cases they appear not to have weighed in favor of survivorship inter se.

(*p*) See, however, per Wood, V.-C., L. R., 1 Eq. 298. Upon the question discussed in the text frequent reference is made to a Scotch case of Young *v.* Robertson, 4 Macq. 314, 337, 8 Jur. N. S. 825, where the testator (or truster) gave the residue of his estate in trust for his wife for life, and "to pay the same after the death of the longest liver of me and my said wife, to and among" six persons (named), "declaring that if any of them should die without leaving issue before his or her share vest in the party or parties so deceasing, the same shall belong to and be divided equally among the survivors of" the six. A., one of the six, died without issue; afterwards B., another of them, died leaving issue; then the wife

The construction which reads survivors as those who are living when the contingency happens is confirmed if the gift to them is in the alternative with another which clearly points to that time; as, where the shares of any of the original legatees in remainder are given over in case of their death *leaving* issue to such issue, but if they leave no issue, then to the survivors (*q*).

There is perhaps some difference between a gift to survivors of the whole fund and a gift to survivors of the share of the [*1555] * deceased legatee. In the former case the point of new departure is the death of the tenant for life, in the latter the death of the legatee. The former is therefore more favorable than the latter to reading "survivor" as "living at the death of the tenant for life." But in Scurfield *v.* Howes and White *v.* Baker, although the gift was of the whole, and not of the share, "survivor" was held to mean him who outlived the other legatee. In fact no such distinction has ever been judicially noticed; and the ratio decidendi in White *v.* Baker would seem to leave it little room to operate. It is therefore doubtful how far Watson *v.* England (*r*) can now be regarded as an authority. In that case a testatrix having a power to appoint a sum of 1,500*l.* appointed it to her husband for life, and after his death to be equally divided among the five daughters of her sister: if any of the said daughters should die in the husband's lifetime leaving issue, such issue to take their mother's share; but in case any of them should die during the husband's lifetime without issue, then "the said sum of 1,500*l.* shall be divided, share and share alike, amongst the *surviving* said daughters." It was held by Sir L. Shadwell, V.-C., after some fluctuation of opinion, that the husband's death was the time to which survivorship was to be referred.

Distinction between gift over of "share" of deceased legatee, and gift over of whole fund.

The sense of survivorship inter se is excluded where the vesting of the remainder or other future gift is originally postponed to the death of the tenant for life (*s*), or other future event (*t*). So, where there was a gift for life, with remainder in fee to three persons by name, and "in the event of the death of either in the lifetime of" the tenant for life, his share was to "be transferred to the survivors, and *if only one should be living*, then to him or her so surviving;" it was held that this was not a sur-

What excludes the sense of survivorship inter se.

died. It was held in D. P. that B. took no part of A's share. But none of the English cases in point were cited, nor was the question decided in them alluded to, the only contest being whether "survivors" meant living at the death of the testator (as had been decided in Scotland) or at the death of the wife, and no third construction being suggested. Strictly the decision bears only upon Scotch law; and although the Scotch and English rules on the subject were treated as identical, it is submitted that the case ought not to be considered as having sub silentio overruled the English decisions.

(*q*) Wilmot *v.* Flewitt, 11 Jur. N. S. 820. Qu. whether Cambridge *v.* Rous, 25 Beav. 409, ante, p. 1553, n. (*l*), is not inconsistent with this case also.

(*r*) 15 Sim. 1.

(*s*) See Essex *v.* Clement, 30 Beav. 525.

(*t*) Re Hunter's Trusts, L. R., 1 Eq. 295.

vivorship among the remaindermen, but had reference to the death of the tenant for life (*u*). In this case the concluding words seem to point clearly to one fixed period. And a similar consideration may probably explain another case (*x*) where, after a life interest, the gift was to three persons by name, in equal shares, "or in case of the demise of each or either of them, to be divided between the survivors or survivor *or* their representatives." It was held that survivors meant living at the * death of the tenant for life, and [*1556] that as all three were dead, the original gift was not defeated. The words appear to mean "to the survivors or survivor, if any, but *if none*, then to the representatives of the original legatees;" which must necessarily have reference to one fixed point. So if there be a gift over of the whole in case all the legatees (amongst whom survivorship is to take place) should die before the tenant for life, those only who survive him will take, since the final gift over explains what is meant by the indefinite terms of survivorship previously used (*y*).

It is inevitable that the meaning of a word which is so absolutely dependent on the context for any meaning at all should sometimes have to be spelt out from ambiguous expressions. Thus in Maddison *v.* Chapman (*z*), where a testator gave all his property in trust, upon his younger daughter attaining twenty-one, to be valued and divided into three equal parts without selling the land; one part to be for his wife and another for each of his two daughters; and at the death of his wife, her share to be divided between the daughters; with a proviso that if either daughter should die *before a division of the property* should have been made as directed, leaving no surviving issue, then the part of the deceased should be given *to her surviving sister;* but if either of them should die and leave surviving issue, then her part should be equally divided amongst her surviving children; and until the younger daughter attained twenty-one the income was to be applied for the benefit of the wife and daughters. Both daughters died unmarried before the widow, the younger under age; and it was held by Sir W. Wood, V.-C., that there was no survivor within the proviso, and that the original gift to the daughters, which he held to be vested, remained intact. Where there is a gift to A. for life, he observed, and after the death of A. to B. and C., and the survivor of them, the testator must, in the survivorship clause, be conceived as contemplating personal enjoyment by the person indicated; survivorship is therefore referred to the period of possession. In the event of both dying before the period of division, the testator could have no reason for preferring the one who happened to be the longer

(*u*) Littlejohns *v.* Household, 21 Beav. 29.
(*x*) Page *v.* May, 24 Beav. 323; But as the successful claimant was legal personal representative of all three, the point here considered did not require decision.
(*y*) Daniel *v.* Gossett, 19 Beav. 478. Compare Bouverie *v.* Bouverie, 2 Phil. 349.
(*z*) 1 J. & H. 478.

liver (*a*), for he did not know which it would be: there was
[*1557] no * assignable motive for his giving the whole to that one, except the improbable wish that the interest should be vested at the earliest possible period. In White *v.* Baker the L. J. had considered that the express words, "if either of them die in the lifetime of A.," made a sufficient distinction. That decision had created some difficulty in his (the V.-C.'s) mind when coupled with the line of cases down to Wagstaff *v.* Crosby (*b*), before K. Bruce, V.-C. (one of the judges who decided White *v.* Baker), and Page *v.* May (*c*). In the case before him, he added, there was no third person tenant for life: the mother and daughters were the objects both of the original gift and the gift over. Until the younger daughter attained twenty-one the benefit was given in one way, afterwards in another to the same persons. There was, therefore, no question of vesting the interest at the earliest time, so as to make it independent of a collateral event, such as the death of a third person (*d*). Throughout, and particularly in the expression "the part of the deceased shall be given to her surviving sister," the testator was looking at what was to be done when the younger child attained twenty-one; if at that time either daughter was dead, her share was to be handed over to her issue, if any then surviving; if none, then to the other sister, if then surviving.

Special gift to survivors explanatory of prior general one.

It sometimes happens that a testator, after giving to several persons and the survivors generally, goes on to make an express gift to survivors to take effect in a particular event, thereby explaining the sense in which he used the word in the former instance. As in Weedon *v.* Fell (*e*), where A. bequeathed a sum of money in trust for his wife for life, and after her decease to divide the whole among his four children, share and share alike, *and the survivors*, but not before they should have respectively attained twenty-one or days of marriage; for his intent was that, *if any one of his four children should die before twenty-one or days of marriage*, then his, her, or their share so dying should go and be equally divided *among the survivors*. It was held that a child attaining twenty-one was entitled though she died in the lifetime of her mother.

[*1558] * **III.** — 4. *Rule where the Period of Distribution depends on Two Events, one Personal, the other not.* — Where the time of distribution depends upon the happening of two events, one of which is personal, and the other is not personal, to the legatees (as where the gift is to children attaining twenty-one, and the distribu-

(*a*) But here it was "if either die leaving no issue."
(*b*) 2 Coll. 746, ante, Vol. I., p. 787. The bequest was in the form first put by Sir G. Turner, viz. to several "and the survivors or survivor of them."
(*c*) 24 Beav. 323, as to which vide sup.
(*d*) But White *v.* Baker turned wholly on the "natural import" of the words used.
(*e*) 2 Atk. 123. See also Rogers *v.* Towsey, ante, p. 1549.

tion is postponed until the youngest object attains that age, or until the death of a previous legatee for life), the Court strongly inclines to construe a gift to the survivors as referring to the former event exclusively, in order to arrive at what is considered to be a more reasonable scheme of disposition than that of rendering the interests of the legatees liable to be defeated by the event of their dying before the time to which, for some reason irrespective of the personal qualifications of the legatees, the distribution was postponed.

Survivorship referred to majority in preference to another event.

Thus, where (*f*), a testator devised certain leasehold property to his wife for life, then to his daughter for life, and at her death to her husband for life, and at his decease to a trustee upon trust to receive the rents for the benefit of all the children of the daughter. The testator then proceeded thus.—"And my further will is, that my said trustee shall from time to time, as the rents become due, pay unto such child or children a just proportion of such interest as they shall arrive at their age of twenty-one years, and to place the interest of the infants' shares in consols, for their own sole use and benefit, and so on alternately till the youngest child shall arrive at his or her age of twenty-one years, and then all the said children *or the survivors* of them to be let into full possession of all the said estates, share and share alike." The question was, at what time the interest of the children vested. Sir J. Leach, M. R., observed that the Court would not, unless forced by the plainest words, adopt a construction by which the interest of a child of full age, and settled in life, would be divested, if he happened to die before the youngest child attained twenty-one: that here the word "survivor" admitted of another and more rational meaning, namely, surviving so as to attain twenty-one; that, therefore, every child attaining twenty-one acquired a vested interest in his proportion of the capital; and that the children who died before attaining twenty-one took, during their lives, a vested interest in that proportion of the rents and profits which *corresponded to their presumptive shares; [*1559] but that such interest determined on their deaths.

And in Tribe *v.* Newland (*g*), where a testator gave 3,000*l.* to his daughter for life, and after her decease in trust for her children, share and share alike, to be paid to such of them as should be sons at their ages of twenty-one years, and to such of them as should be daughters at their ages of twenty-one years, or respective days of marriage, with interest in the mean time for their maintenance, and with benefit of survivorship in the event of any of the said children dying without issue: it was held by Sir J. Parker, V.-C., that the words of

Survivorship referred to majority in preference to death of tenant for life;

(*f*) Crozier *v.* Fisher, 4 Russ. 398.
(*g*) 5 De G. & S. 236; see also Knight *v.* Knight, 25 Beav. 111; Berry *v.* Briant, 2 Dr. & Sm. 1; Re Johnson's Trusts, 10 L. T., N S. 455; Corneck *v.* Wadman, L. R., 7 Eq. 80.

survivorship referred to the time of payment mentioned just before. He thought they formed a part of a sentence providing for what was to be done *in the mean time*, until the shares became payable; and that the Court would not, without a much more clear indication of intention than was to be found in that will, adopt a construction which made the provision for children depend on the contingency of their surviving their parent; more especially where the testator had pointed out a period when the shares were to be paid.

Indeed, in Crozier *v.* Fisher, it was held that the children who survived the tenant for life were not entitled unless they attained the age of twenty-one; a decision which, as it might exclude some of the children, may be considered a pointed one.

The case is plainer where, after a previous life interest, the gift in remainder is in the first instance to such children as shall attain a given age; and there then follows a direction to pay at that age "with benefit of survivorship:" since the prior words being clear are not to be controlled by an ambiguity in the subsequent expressions (*h*).

In Salisbury *v.* Lambe (*i*), where there was a gift over if no child attained twenty-one, this construction prevailed although there was no previous mention of that age. A testator gave a sum of money in trust for his five daughters, equally among them, and their respective children, to be placed out at interest with the approbation of each daughter as to her share; and he directed that if any of the five should die, [*1560] her share should be * in trust for her daughters and younger sons *and the survivors and survivor of them;* and if there should be no such daughter or younger son, *or all should die before twenty-one or marriage*, then over; Lord Northington held that the words "survivors and survivor" could only mean to give cross-remainders to the children before the devise over took place, *i. e.*, before they attained twenty-one, and that after that age their shares were not divested by death in the mother's lifetime.

—by force of gift over on death of all under age.

On the other hand, if the prior bequest is followed by a gift over on the death of all the previous legatees (among whom the survivorship is to take place) in the lifetime of the tenant for life, the death of the tenant for life is the period to which survivorship is to be referred (*k*).

Contrary effect of gift over on death of all before tenant for life.

Again, in Turing *v.* Turing (*l*), where a testator gave a sum of money to trustees for his wife for life, and after her death, in trust, as to one-fifth of that sum, for his daughter for life, and upon her demise the interest to be appropriated for the use of any her child or children until they reached the age of twenty-one, and *then* the principal sum *to be paid*

Gift to survivors of a class, without previous gift to the class.

(*h*) Reid *v.* Worsley, 14 Jur. 325. See also Hodson *v.* Micklethwaite, 2 Drew. 294.
(*i*) 1 Ed. 465, Amb. 383. See also Bouverie *v.* Bouverie, 2 Phil. 349. Alty *v.* Moss, 34 L. T., N. S. 312.
(*k*) Daniel *v.* Gosset, 19 Beav. 478; Fisher *v.* Moore, 1 Jur. N. S. 1011.
(*l*) 15 Sim. 139.

to the survivor or survivors of the children of his said daughter, share and share alike : it was held by Sir L. Shadwell, V.-C., that the word "survivors" related to the daughter's death, and not to the children's majority. He distinguished Crozier *v.* Fisher, on the ground that there was in that case a clearly vested interest given at twenty-one, which the word "survivors" (rather ambiguously used) was not sufficient to divest.

And in some other cases where the words of survivorship have not been distinctly connected with majority, they have been referred to the death of the tenant for life, or the time when the youngest child attained majority, as the case required.

Thus, in Huffam *v.* Hubbard (*m*), where the gift was "to A. for life, and at her decease to her surviving children when they should have attained their twenty-one years, share and share alike." Sir J. Romilly, M. R., said that Crozier *v.* Fisher was a peculiar case, and different from the one before him; and he held that only the children surviving A. took, according to the rule in Cripps *v.* Wolcott, that survivorship has reference to the period of distribution.

Or under a gift to A. for life, and at her decease to her surviving children at twenty-one.

* III. — 5. *Words amounting to an express Gift to the Survivor.* — Where a gift is made to several persons as tenants in common for life, and the survivor, with a limitation over after the death of the survivor, indicating therefore unequivocally that the survivor is to take *at all events*, the testator is considered to refer to survivorship indefinitely, and not to survivorship at his own death. [*1561]

To several as tenants in common *for life*, and to survivor, with gift over *after death of survivor*.

Thus, in Doe d. Borwell *v.* Abey (*n*), where the testator devised to his three sisters, for and during their joint natural lives, *and the natural life of the survivor of them, to take as tenants in common and not as joint-tenants ;* and after the determination of their respective estates, then to trustees during the lives of his said sisters, and the life of the survivor of them, to preserve contingent estates ; and after the respective deceases of his said three sisters, *and the decease of the survivor* of them, then over ; Lord Ellenborough observed that, to take as tenants in common is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean that they were to take it as tenants in common, which they might do with benefit of survivorship, then the only repugnance seemed to be in the words "and not as joint-tenants" (*o*).

Survivorship held to be indefinite.

(*m*) 16 Beav. 579. See also Pope *v.* Whitcombe, 3 Russ. 124, ante, p. 1545; Dorville *v.* Wolff, 15 Sim. 510; Hind *v.* Selby, 22 Beav. 373.

(*n*) 1 M. & Sel. 428.

(*o*) But are not these words susceptible of the same explanation? They were not to enjoy as joint-tenants, with a right of accruer, but as tenants in common, with an *express* or implied limitation to survivors.

"I would," he said, "preserve the words 'to take as tenants in common.' The words 'tenants in common' are of a flexible meaning, and may be understood, that although they should take by survivorship as joint-tenants, yet the enjoyment was to be regulated amongst them as tenants in common. The prevailing intention of the testator seems to have been, that the estate should not go over until the death of the survivor." And Bayley, J., observed with great truth, "A tenancy in common, with benefit of survivorship, is a case which may exist without being a joint-tenancy, because survivorship is not only characteristic of a joint-tenancy."

It is evident, that, by "benefit of survivorship," the learned Judge meant *a gift to the survivor;* and his observation goes to this: that although survivorship is not an *incident* to a tenancy in common, yet an express gift to survivors is consistent with it. It is observable, however, that there was no express gift to the survivor, but the Court seems to have implied one (*p*). The principle, however, is the same.

Remarks on Doe *v.* Abey.

[*1562] * It remains to be observed, that, in devises of estates of inheritance, for the avowed purpose of reconciling words of division or severance with a gift to the survivor, the devisees have been held to be joint-tenants for life, and tenants in common of the inheritance in remainder.

Words of severance confined to the inheritance.

Thus, in Barker *v.* Giles (*q*), where the testator devised his real estate to be sold to pay debts and legacies, and the surplus of the money arising from the sale to be laid out in lands, to be settled to the use of J. and R., *and the survivor of them*, their heirs and assigns forever, *equally to be divided between them, share and share alike:* it was held that they were joint-tenants for life, with several inheritances, so that by the death of J. in the lifetime of the testator, R. took the whole for his life, and the devise of the moiety of the inheritance lapsed.

But in Blisset *v.* Cranwell (*r*), where the testator devised to his two sons and their heirs, *and the longest liver of them, equally to be divided between them and their heirs*, after the death of his wife; it was held that though it was given to them and the survivor, yet that the last words (namely, the words of division) explained what the testator meant by the word "survivor," that the survivor should have an equal division with the heirs of him who should die first.

Limitation to survivor disregarded.

In Stones *v.* Heurtley (*s*), Lord Hardwicke recognized the authority of this case, and applied the same construction to a devise of the res-

(*p*) This case may therefore be added to those cited ante, Vol. I., p. 509.
(*q*) 2 P. W. 280, 9 Mod. 157, 14 Vin. 487, 2 Eq. Ca. Ab. 536, affirmed on appeal, 3 B. P. C. Toml. 104. See also Folkes *v.* Western, 9 Ves. 456; Haddelsey *v.* Adams, 22 Beav. 266.
(*r*) 1 Salk. 226, 3 Lev. 373.
(*s*) 1 Ves. 165.

idue of the testator's estate "to be equally divided among his three younger children, D., F., and M., *and the survivor of them*, and their heirs forever."

The objection to the construction adopted in the two last cases is, that it renders the gift to the survivor wholly inoperative. It is probable that the Courts at this day would incline to construe such gift as intended to provide for the event of any of the objects dying in the lifetime of the testator, as in Smith *v.* Horlock (*t*); at any rate in such a case as Stones *v.* Heurtley, where there was no other period to which it could be referred. The other case, Blisset *v.* Cranwell, would raise the question (to which so considerable a portion of the present chapter has been devoted) whether it meant survivorship at the time or the period of division. Barker *v.* Giles is distinguishable, inasmuch as the words * of severance were not, as in other cases, *necessarily* applied to the estate for life. The authority of this case was recognized in Doe d. Littlewood *v.* Green (*u*). [*1563]

Observations on the two last cases.

This chapter may, like the first section of it, be concluded with a caution. "This word 'survivor,'" said Sir W. P. Wood, V.-C., "is certainly one that ought to be avoided by any person who is not a consummate master of the art of conveyancing, for I suppose no word has occasioned more difficulty" (*x*).

(*t*) 7 Taunt. 129. (*u*) 4 M. & Wels. 229.
(*x*) Re Gregson's Trusts, 33 L. J. Ch. 532.

* CHAPTER XLVIII.

WORDS REFERRING TO DEATH SIMPLY, WHETHER THEY RELATE TO DEATH IN THE LIFETIME OF THE TESTATOR.

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I. Rule where the Gift is immediate	1564	III. Effect where the Gift is for life only	1571
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I. — Rule where the Gift is immediate. — Where a bequest is made to a person, with a gift over *in case of his death*, a question arises whether the testator uses the words "in case of," in the sense of *at* or *from*, and thereby as restrictive of the prior bequest to a life interest, *i. e.*, as introducing a gift to take effect on the decease of the prior legatee under all circumstances, or with a view to create a bequest in defeasance of or in substitution for the prior one, in the event of the death of the legatee in some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent; that circumstance naturally is the time of its happening; and such time, where the bequest is immediate (*i. e.*, in possession), necessarily is the death of the testator, there being no other period to which the words can be referred.

"*In case of the death*," &c., to what period referred.

Where the bequest is *immediate*.

Hence it has become an established rule, that where the bequest is simply to A., and *in case of his death*, or *if he die*, to B., A. surviving the testator takes absolutely (*a*).[1]

(*a*) Lowfield *v.* Stoneham, 2 Stra. 1261; Northey *v.* Burbage, Pre. Ch. 471; Hinckley *v.* Simmons, 4 Ves. 160; King *v.* Taylor, 5 Ves. 806; Turner *v.* Moor, 6 Ves. 556; Cambridge *v.* Rous, 8 Ves. 12; Webster *v.* Hale, id. 410; Ommaney *v.* Bevan, 18 Ves. 291; Wright *v.* Stephens, 4 B. & Ald. 574. But see Billings *v.* Sandom, 1 B. C. C. 393; Nowlan *v.* Nelligan, id. 489; Lord Douglas *v.* Chalmer, 2 Ves. Jr. 503; also Chalmers *v.* Storil. 2 V. & B. 222. As to a similar question arising on the word *or*, as in a gift to A. "or his children," see post, p. 1571; also 1 Russ. 165.

[1] Britton *v.* Thornton, 112 U. S. 526; Fowler *v.* Ingersoll, 127 N. Y. 472; In re New York Ry. Co., 105 N. Y. 89; Vanderzee *v.* Slingerland, 103 N. Y. 47 (citing Moore *v.* Lyons, 25 Wend. 119; Kelly *v.* Kelly, 61 N. Y. 47; Whitney *v.* Whitney, 45 N. H. 311); Burdge *v.* Walling, 45 N. J. Eq. 10; Bishop *v.* McClelland, 44 N. J. Eq. 450; Baldwin *v.* Taylor, 37 N. J. Eq. 78; Jones *v.* Beers, 57 Conn. 295; Briggs *v.* Shaw, 9 Allen, 516; Crossman *v.* Field, 119 Mass. 170; Hilliard *v.* Kearney, Busb. Eq. 221; Burton *v.* Conigland, 82 N. Car. 99; Davis *v.* Parker, 69 N. Car. 271; Ewing *v.* Winters, 34 W. Va. 23. The principle applies alike to realty and to personalty. Burton *v.* Conigland and Davis *v.* Parker. See ante, p. 1500, note.

* The case of Trotter *v.* Williams (*b*) appears to have carried this construction to a great length. J. S. bequeathed to A. 500*l.*, to B. 500*l.*, and in like manner gave 500*l.* apiece to five others, and *if any died*, then her legacy, and also the residue of her personal estate, to go to such of them as should be *then* living, equally to be divided betwixt them all. The Court held that these words referred to a dying before the testator, so that the death of any of the legatees after would not carry it to the survivors. [*1565]

"If any die," held to mean in the lifetime of the testator.

The word "then" seemed to present some difficulty in the way of the construction adopted in this case. It followed immediately after the reference to the death of the legatees, and might with great plausibility have been held to refer to that event whenever it should happen; for a testator could hardly intend to make existence at a period anterior to his own death a necessary qualification of a legatee. This case exhibits the extreme point to which the construction in question has been carried.

Where a testator gave legacies to three persons in specified shares and directed that, if any of the three should die, his share should go to the others; the testator and one of the legatees were drowned in a collision of two steamships, and there was nothing to show which was the survivor: it was held by Fry, J., that according to the rule in question "die" must mean die in the testator's lifetime, and that the gift over of his share failed (*c*).

The rule has with less difficulty been held to apply where, after a gift to several, there was a bequest over "in case of the death of either *in the lifetime of the others or other;*" on the ground that the additional words did not make the event of death more contingent: it being a certainty, unless in the case of shipwreck or other accident, that one must die in the lifetime of the other (*d*).

"In case of the death of either before the other."

There are, however, a few cases of immediate bequests in which the words under consideration have been construed to refer to death at *any* time, and not to the contingent event of death in the lifetime of the testator; but in each there seems to have been some circumstance evincing an intention to use the words in that rather than in the ordinary sense. Thus, the circumstance of the testator having bequeathed other property to * the same person, to be "at her own disposal," has been considered to indicate that the testator had a different intention in the instance in question. [*1566]

Cases of contrary construction.

In Billings *v.* Sandom (*e*) the testator, being at Gibraltar, bequeathed

(*b*) Pre. Ch. 78, 2 Eq. Ca. Ab. 344, pl. 2. See also Taylor *v.* Stainton, 2 Jur. N. S. 634.
(*c*) Elliott *v.* Smith, 22 Ch. D. 236.
(*d*) Howard *v.* Howard, 21 Beav. 550. See Underwood *v.* Wing, 4 D. M. & G. 659, 8 H. L. Ca. 199 (Wing *v.* Angrave).
(*e*) 1 B. C. C. 393.

to his sister A. (who was in England), 1,000*l.*, and *in case of her demise* he gave to B. 800*l.*, and to C. 200*l.* And he bequeathed unto A., whom he left executrix, whatever goods, chattels, and money should be due to him at the time of his decease, "*to be disposed of as she should think proper.*" Lord Thurlow said the testator intended to give a share of his bounty to his sister, and also to the others. The word "and" implied this; therefore she should take it for life, and then they should take it. As to the residuary devise, he meant that she should take that unfettered, at her own disposal, *but the other fettered by the gift over.* This case has been referred to by Sir W. Grant (*f*) as decided upon the contrast afforded by the residuary clause.

"*In case of* her demise," construed *at* her death.

In Nowlan *v.* Nelligan (*g*), the bequest was in these words: "I give and devise unto my beloved wife H. N. all my real and personal estate: I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; *but in case of death happening to my said wife*, in that case I hereby request my friends S. and H. to take care of and manage to the best advantage for my daughter H. all and whatsoever I may die possessed of." Lord Thurlow said it was impossible to tell with precision what was the testator's meaning, but he thought it too much to determine that "in case of death happening" meant dying in the husband's (*i. e.*, the testator's) lifetime; that therefore the meaning must be supposed to be in the event of her death *whenever it should happen.*

"In case of death happening," &c. not confined to death *in lifetime of the testator.*

Of this case Sir W. Grant (*h*), has said, "it was evident that some benefit was intended for the daughter, but it was doubtful, as the extent was not clearly expressed, whether it could be made effectual by imposing a trust upon the will (*quære* wife?). Some benefit, however, was evidently intended for the daughter, and none could be assured to her except by limiting her mother to an interest for life."

Sir W. Grant's remark on Nowlan *v.* Nelligan.

These cases show that, in the opinion of Lord Thurlow, very slight circumstances suffice to make the words under consideration [*1567] *refer to death at any period; but no case has perhaps gone so far in adopting this construction as Lord Douglas *v.* Chalmer (*i*),[1] where a testatrix bequeathed her residuary personal estate for and to the use and behoof of her daughter Frances Lady D.,

(*f*) 8 Ves. 22.
(*h*) 8 Ves. 22.
(*g*) 1 B. C. C. 489.
(*i*) 2 Ves. Jr. 501.

[1] As to this case see Briggs *v.* Shaw, 9 Allen, 516; Home *v.* Pillans, 2 Mylne & K. 20, 28; Schenk *v.* Agnew, 4 Kay & J. 406. In the last-named case it is said that Douglas *v.* Chalmer is never cited but to be distinguished; a remark quoted with approval in Briggs *v.* Shaw, supra.

and *in case of her decease* to the use and behoof of her (Lady D.'s) children, share and share alike, to whom her said trustees and executors were to account for and pay over and assign the said residue. By a codicil the testatrix gave a ring to her daughter Lady D., and her wearing apparel to A., *or if A. should be dead before her*, then over. Lord Loughborough treated the notion, that the testatrix intended to provide for the event of Lady D. dying in her lifetime as contrary to the natural import of the words, and the distinction between the expression used, and *at* or *from* her decease, as too subtle. He also relied upon the bequest of the ring in the codicil, which he observed was inconsistent with the supposition of her taking the whole interest in the residue; but, if she took it for life only, was very natural. And he observed that, under the circumstances which had happened, there was no other way by which the testatrix's bounty could reach the children but by giving to Lady D. for life, and the capital to the children.

"*In case of*," construed *at*, death.

The reliance which was placed on these circumstances shows that Lord Loughborough did not intend to controvert the general rule, which is still more apparent from his subsequent decision in Hinckley *v.* Simmons (*j*), where a bequest of all the testatrix's "fortune" to A., and "*in case of* her death" to B., was held to confer an absolute interest on A. surviving the testatrix. And this has been followed by several other decisions (*k*).

Remark on Lord Douglas *v.* Chalmer.

It might seem, perhaps, that Lord Douglas *v.* Chalmer goes to establish an exception to the construction in question, where the first gift is to the parent and the second to the children; but this hypothesis is not only unsound in principle, but is contradicted by subsequent authority.

No distinction in gifts to children.

Thus, in Webster *v.* Hale (*l*), where the testator bequeathed certain stock for the use, exclusive right, and property of his sister C., *but should she happen to die* then to her children: and the testator also bequeathed to his sister H. certain stock, *and in case of her death* to be divided among her children. Sir W. Grant held that C. surviving the testator was entitled to her legacy *absolutely: he remarked [*1568] that the word "but" strengthened this construction, being disjunctive, and implying that the children were to take in an event different from that on which the parent was to take. The other bequest to H., he observed, was in the very terms of Lord Douglas *v.* Chalmer, and, if that stood alone, he should be bound to the same construction; but he thought it sufficiently clear that C. was to take absolutely, and he could not from the very slight variation collect a different intention as to the other sister. It seems, therefore, that

"But should she happen to die," held *not* to be restrictive.

(*j*) 4 Ves. 160.
(*l*) 8 Ves. 411.
(*k*) See cases cited ante, p. 1564.

the M. R. did not think the gift of the ring in Lord Douglas *v.* Chalmer made any real difference.

"In case of her death" applied to testator's lifetime.

The absence of any distinction where the respective bequests are to parent and children is still further evident from Slade *v.* Milner (*m*), where, under a bequest to A., "*and in case of her death*" to be equally divided between her children, Sir J. Leach held that A., having survived the testatrix, took an absolute interest.

And it is of course equally immaterial that the substituted gift confers a life interest only on the first taker, and the ulterior interest on a third person (*n*).

"In the event of the death of either" similarly construed.

Another case exemplifying the construction now under consideration is Clarke *v.* Lubbock (*o*), where a testator bequeathed the residue of his property to A. and B., the interest to be paid for their support; *but in the event of the death of either*, the whole of the interest to be paid to the survivor; and on his or her demise, should they leave no children, then over: Sir J. K. Bruce held that, both A. and B. having survived the testator and left children, each was entitled to one moiety, the words in question being construed to refer to death in the testator's lifetime.

Secus, where testator referred to the death of his *widow*.

Where, however, a testator left all his property to his son charged with an annuity to his widow; but should the hand of death fall on my *widow* and son, then over; Lord Cranworth held that the use of the word "widow" showed that the gift over could not have been intended to take effect on an event which was to happen in the testator's own lifetime (*p*).

II.—Rule where the Gift is future.—But although in the case of an *immediate* gift it is generally true that a bequest over, in the [*1569] *event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made ex necessitate rei, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty; and consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease), the words in question are considered as extending to the event of

Where bequest is *future*, the words are extended to the event of legatee dying between death of testator and period of vesting.

(*m*) 4 Mad. 144; and Schenk *v.* Agnew, 4 K. & J. 405.
(*n*) Crigan *v.* Baines, 7 Sim. 40.
(*o*) 1 Y. & C. C. C. 492. See also Arthur *v.* Hughes, 4 Beav. 506; Duhamel *v.* Ardovin, 2 Ves. 163.
(*p*) Randfield *v.* Randfield, 2 De G. & J. 57. Compare Taylor *v.* Stainton, 2 Jur. N. S. 634, 635.

the legatee dying in the interval between the testator's decease and the period of vesting in possession.[1]

Thus, in Hervey *v.* McLauchlin (*q*), where a testatrix bequeathed two several sums of stock to a trustee, in trust to pay the dividends to T. for life, and after her death she gave the said two sums to G., E., and E., the three children of T., in equal shares, *and in case of the death of either of them*, the share of such as might die to go to and belong to the children, or child if but one, of the persons so dying. G. survived the testatrix, and died in the lifetime of the mother, the legatee for life; and it was contended that the words "in case of the death" of the legatees referred to a dying in the lifetime of the testatrix, and therefore that the children were not entitled. But the Court considered that the intention of the testatrix was to substitute the children of those dying in the lifetime of the *legatee for life* in the place of their parents, and that therefore the parents took vested interests on the death of the testator, subject to be divested in the event specified.

"In case of the death" referred to period *of possession.*

On this principle, too, it should seem that in the case of a bequest to A. at the age of twenty-one years, *and in the event of his death* then over to another, the words would be construed to mean, in the event of his dying under twenty-one at any time (*r*).

And the same construction has obtained where payment only, and not vesting, was postponed to a stated period (*s*).

But such words are not confined to the event of death happening in the interval between the testator's decease and the period of vesting in possession; they apply also to the case of [*1570] death happening before the testator's decease, which is, indeed, within the literal meaning of the words. Thus, in Le Jeune *v.* Le Jeune (*t*), where a testator gave all his estates to his wife for life, and at her death to be sold, if necessary, and divided into five equal shares, one of which he directed to be paid to each of his four sons that should be living at her death; and in case of either of their deaths his share to be paid to his issue; if no issue to be divided among the survivors. One of the sons died before the testator, leaving a child, and Lord Langdale, M. R., held that this child was entitled to the share which its parent would have been entitled to if he had been living at the wife's death.

"In case of death" includes death in testator's lifetime.

(*q*) 1 Pri. 264. See also Moon d. Fagge *v.* Heaseman, Willes, 138; Galland *v.* Leonard, 1 Sw. 161; Girdlestone *v.* Doe, 2 Sim. 225, stated ante, Vol. I., p. 482; Bolitho *v.* Hillyar, 34 Beav. 180; Re Nott's Trusts, W. N. 1875, p. 244.
(*r*) See Home *v.* Pillans, My. & K. 24, post, p. 1611.
(*s*) James *v.* Baker, 8 Jur. 750. And see Monteith *v.* Nicholson, 2 Kee. 719, post.
(*t*) 2 Kee. 701; Cambridge *v.* Rous, 25 Beav. 417, 418; and see analogous cases (Walker *v.* Main, &c), cited Ch. XLIX. s. i.

[1] See Hilliard *v.* Kearney, Busb. Eq. 221; Burton *v.* Conigland, 82 N. C. 99; Davis *v.* Parker, 69 N. C. 271.

In Green *v.* Barrow (*u*), a testator gave 1,000*l.* in trust for one for life, and after his decease gave 400*l.*, part of it, to A. and B. (who were two of his executors), "part and part alike, that is to say, 200*l.* to A. and 200*l.* to B., for the trouble they may have in execution of this my will; but in case of either of their death, I give to the survivor, and in case of both their deaths to the heirs, executors, and administrators of such survivor, 200*l.* only." Sir W. P. Wood, V.-C., thought that, if the will had ended with the gift to the survivor, death in the lifetime of the testator would have been the better construction, on account of the reason expressly given for the bequest being the trouble of executing the will, which the executor would incur immediately upon the testator's death; but the difficulty was on the subsequent words "in case of both their deaths," &c: the testator must be taken to refer to the same time when he spoke of the death of both as when he spoke of the death of either; and if the words were referred to death in the lifetime of the testator, the effect would be that the testator gave a legacy to the representative of the survivor, though that survivor died in his lifetime; and the reason assigned for the gift altogether failed. He therefore held, though he confessed he did not feel clear upon the point, that on the death of one between the deaths of the testator and the tenant for life, the survivor became entitled to 200*l.*

Construction of words "in case of death" influenced by reason assigned for prior bequest.

And here it may be observed, that those cases in which the word "or" has been construed as introductory to a substitutional bequest (in which sense it seems to be tantamount to the words "in case of the death" present a distinction between immediate [*1571] * and future gifts similar to that which has been just pointed out. Thus, a legacy to A. or to his children, or to A. or his heirs, is construed as letting in the children or next of kin ("heirs" being in reference to such a gift of personal estate construed as synonymous with *next of kin*) in the event of A. dying in the lifetime of the testator; while, on the other hand, a bequest to A. for life, and after his decease to B. or his children, is held to create a substitutional gift in favor of the children of B., in the event of B. dying in the lifetime of A. (*x*). And where two legacies are given by the same will to A. or his issue, one immediate, the other after a life estate, the words of substitution refer in the former case to the death of the testator, and in the latter to the death of the tenant for life (*y*). The same words thus *operate* differently according as they are applied to the one legacy or the other.

"Or" used synonymously with *in case of.*

(*u*) 10 Hare, 459.

(*x*) Vide cases cited Vol. I., p. 482; also Burrell *v.* Baskerfield, 11 Beav 525, which was brought within the rule by reading "and" as "or." Re Dawes's Trusts, 4 Ch. D. 210, seems contra, sed qu.

(*y*) Salisbury *v.* Petty, 3 Hare, 86; and see Re Mores' Trusts, 10 Hare, 178; and a different species of case, Malcolm *v.* Taylor, 2 R. & My. 416, ante, p. 1252, n.

III. — Effect where Gift is for Life only. — It should be noticed that the construction of the words, "in case of the death," which makes them provide against the event of the legatee dying in the testator's lifetime, applies only when the prior gift is absolute and unrestricted, and not where such legatee takes a life interest only;[1] for, if a testator bequeaths the interest of a sum of money to A. expressly for life, "and in case of his death" to B., the irresistible inference is, that these words are intended to refer to the event on which the prior life interest will determine, and that the bequest to B. is meant to be, not a substituted but an ulterior gift, to take effect on the death of A. *whenever that event may happen.*

Distinction where prior gift is expressly for life.

Thus, in Smart *v.* Clark (*z*), where a testator gave to his son E., who was then at sea, the interest of 500*l.* stock during his life, if he came to claim the same within five years after the testator's decease; but *if he should die*, or not come to claim the same within the time limited, then he gave the said stock to the children of his daughter A., with the interest that might be due thereon. E. claimed within the five years, and received the dividends until his death, when the children of A. filed a bill to * obtain a transfer; [*1572] and Sir J. S. Copley, M. R., on the authority of Billings *v.* Sandom (*a*), held that they were entitled.

It is singular that the M. R. did not advert to the circumstance of the prior bequest being expressly for life, which distinguished the case before him from all that had been cited, including Billings *v.* Sandom; which case stands upon its special circumstances, and is only to be reconciled with subsequent authorities on the ground that the context warranted the construing the words "and in case of her demise" to mean *at* her demise.

Remarks on Smart *v* Clark.

Where the prior gift, though not expressly for life, comprises the annual income only of the fund which is the subject of the bequest, the same construction seems to prevail as where the prior gift is expressly for life.

Where prior gift comprises the income only.

Thus, in Tilson *v.* Jones, (*b*), where a testatrix directed the interest of certain stock and a canal share to be equally divided between her son and daughter, exclusive of any husband; *and in case of the death of either*, then the whole of the interest to the survivor; and if her son should not be in England at the time of her decease, then the execution of the trusts so far as they related to him should be post-

(*z*) 3 Russ. 365. See also Haddelsey *v.* Adams, 22 Beav. 266.
(*a*) But as to which, vide ante, p. 1566.
(*b*) 1 R. & My. 553. As to the effect of the words following an indefinite devise of land in a will subject to the old law, see Fortescue *v.* Abbott, Pollex. 479, T. Jones, 79; Bowen *v.* Scowcroft, 2 Y. & C. 640.

[1] Fowler *v.* Ingersoll, 127 N. Y. 472.

poned until his return; *but in case of his death*, then the trustees should pay the whole of such interest to her daughter; *and in case of her death*, the testatrix gave the whole of such principal and interest between her niece and nephew; and in case of her death before her son and daughter, then she gave the principal and interest at the deaths of the son and daughter to C. M. The daughter survived the son, and claimed to be absolutely entitled; but Sir J. Leach, M. R., said that the testatrix must be understood as if she had expressed herself thus: "I give the principal and interest to my niece and nephew, if they shall survive my son and daughter; and if they shall not survive them, then to C. M." She could not refer here to the death of her son and daughter in her lifetime; the daughter therefore took for life only. *Besides this, the testatrix in her gift to her son and daughter spoke of the interest only, but in the gift over she spoke of the principal and interest.*

— following estate tail.

It seems that, where a testator devises an estate *tail* to a person, and "if he die," then over to another, the words [*1573] "without * issue" are supplied to render it consistent with that estate (*c*).

Where a testatrix bequeathed her property to A. and B., and in case of the demise of either of them bequeathed the same "to the survivor for her sole use and benefit during her or their natural lifetime;" it was held that the residue was not disposed of and that the gift to the survivor was for her life only (*d*).

(*c*) Anon., 1 And. 33, ante, Vol. I., p. 451.
(*d*) Watson *v.* Watson, 7 P. D. 10, where Hannen, J., cited with approval the rule expressed in the first paragraph of this Chapter, ante, p. 1564.

*CHAPTER XLIX. [*1574]

WORDS REFERRING TO DEATH COUPLED WITH A CONTINGENCY — TO WHAT PERIOD THEY RELATE.

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THE distinction between the cases which form the subject of the present inquiry and those discussed in the last chapter is obvious. There it was necessary either to do violence to the testator's language by reading the words providing against the event of death as applying to the occurrence of death at any time (in which sense death is not a contingent event), or else to give effect to the words of contingency by construing them as intended to provide against death within a given period.

Distinction between the cases discussed in the last and in the present chapter.

In the cases now to be considered, however, the expositor of the will is placed in no such dilemma; for the testator having himself associated the event of death with a collateral circumstance, full scope may be given to his expressions of contingency without seeking for any restriction in regard to time; and accordingly there seems to be no reason (unless it be found in the context of the will) why the gift over should not take effect in the event of the prior legatee's dying under the circumstances described at *any* period.[1] Cases of this kind, however, will be found to prevent many distinctions which require *particular attention. The cases are di- [*1575] visible into two classes: 1. Where the question is, whether

[1] Buchanan *v.* Buchanan, 99. N. C. 308. Not followed in New Jersey. Burdge *v.* Walling, 45 N. J. Eq. 10 (citing Baldwin *v.* Taylor, 37 N. J. Eq. 78 and 38 N. J. Eq. 657; Denise *v.* Denise, 37 N. J. Eq. 163; Yawger *v.* Yawger, id. 216; Barrell *v.* Barrell, 38 N. J. Eq. 60; Lefoy *v.* Campbell, 43 N. J. Eq. 34).

Classification of the cases.

the substituted gift takes effect in the event of the prior legatee dying under the circumstances described in the testator's lifetime. 2. Where the question is, whether the substituted gift takes effect in the event of the prior legatee surviving the testator, and *afterwards* dying under the circumstances described; and, if so, whether at *any* time subsequently.

I. — Death of Object of Prior Gift in Testator's Lifetime. — 1. *General Rule.* — It may be stated as a general rule, that where the gift is to a designated individual, with a gift over in the event of his dying without having attained a certain age, or under any other prescribed circumstances (*a*), and the event happens accordingly in the testator's lifetime, the ulterior gift takes effect immediately on the testator's decease, as a simple absolute gift.[1]

Ulterior gift takes effect on testator's death.

In the early case of Darrel *v.* Molesworth (*b*), where a legacy of 50*l*, was given to D. T. at twenty-one or marriage, and at the close of his will (which contained several pecuniary bequests) the testator added, that *if any legatee died before his legacy was payable*, the same should go to the brothers or sisters of such legatee. D. T. died in the lifetime of the testator (it is presumed under twenty-one (*c*), though the fact is not stated), and it was adjudged that it was no lapsed legacy, but went to the sister of the legatee.

Ulterior legatees held to be entitled.

So, in Willing *v.* Baine (*d*), where a testator bequeathed 200*l.* apiece to his children, by name, payable at their respective ages of twenty-one, *and if any of them died before their age of twenty-one*, then the legacy given to the person so dying to go to the surviving children. One of the children died in the testator's lifetime (a minor, it is presumed, though the fact is not stated), and it was held that the children living at the death of the testator were entitled to his legacy.

The construction is not varied, though the gift over be of the

(*a*) As to a bequest to A., with a gift over in case he dies *intestate*, see ante, p. 856.
(*b*) 2 Vern. 378. See also Ledsome *v.* Hickman, id. 611; Bretton *v.* Lethulier, id. 653; but see Miller *v* Warren, id. 207, n., Raithby's Ed.
(*c*) But see n (e), infra.
(*d*) Kel. 12, 2 Eq. Ca. Ab. 545, pl. 22. The report, 3 P. W. 113, omits to state that the children were named. See further Benn *v.* Dixon, 16 Sim. 21; Willetts *v.* Willetts, 7 Hare, 38; Ive *v.* King, 16 Beav. 46; Re Donvile's Trust, 22 L. J. Ch. 947; Hues *v.* Jackson, 23 L. J. Ch. 51.

[1] See Grimball *v.* Patton, 70 Ala. 626; Stone *v.* McEckron, 57 Conn. 194; Lunt *v.* Lunt, 108 Ill. 307; Clough *v.* Clough, 64 N. H. 509; Nellis *v.* Nellis, 99 N. Y. 505, King *v.* Frick, 135 Penn. St. 575 (citing Mickley's Appeal, 92 Penn. St. 514); McCormick *v.* Elligott, 127 Penn. 230; Bell *v.* Towell, 18 S. C. 94; Harwell *v.* Benson, 8 Lea, 344. Where the event named does *not* happen, a question may arise of the effect of the conditional gift over upon the prior estate, where that is not given in definite terms of description. In Coe *v.* James, 54 Conn. 511, it was urged that the effect of a gift over in case of the death of the first taker without issue was to cut down the prior gift from an absolute to a life estate; but the contrary was held. See also White *v.* White, 52 Conn. 518; Phelps *v.* Robbins, 40 Conn. 250; Lunt *v.* Lunt, 108 Ill. 307; Illinois Land Co. *v.* Bonner, 75 Ill. 315.

"legacy" or "share" of the deceased object, — terms which *might seem in strictness to apply only to persons who, by surviving the testator, had become actual objects of gift, in contradistinction to those who, dying before him, could in point of fact have no "share" or "legacy" under the will. [*1576]

— though gift over be of the "share" of the deceased.

Thus, in Walker *v.* Main (*e*), where a testator devised real estate to his wife for life, remainder to a trustee in trust for sale, and to pay the produce among his children and grandchildren in manner following: he then gave 20*l.* each to several of his grandchildren nominatim, to be paid at twenty-one or marriage; and to his four children, A., B., C., and D., all the residue to be divided amongst them equally at the age of twenty-one or marriage; *but if any of his children or grandchildren should happen to die before the time of such legacy becoming due and payable,* then he bequeathed the *part or share* of the child or children or grandchildren so dying unto and amongst those that should be then living, share and share alike. B. and C. died in the testator's lifetime, and it was held that their shares devolved to the survivors.

Again, in Humphreys *v.* Howes (*f*), where a testator bequeathed the residue of his personal estate to trustees upon trust for A., B., and C., for their lives, and to the survivor for life, and after their decease upon trust to transfer and pay the same to E. (son of B.) and F. (son of C.), share and share alike; *and in case E. or F. should happen to die before his share of the trust-money should become payable without leaving issue of his body,* then his *share* to go to the survivor; and in case both should die before their shares should become payable without leaving issue, then over. E. died in the testator's lifetime without issue. It was contended that the event intended to be provided against was the death of the legatees after the testator's decease, until which event they could not with propriety be said to have any "shares" in the property; but Sir J. Leach, M. R., held that Willing *v.* Baine was applicable, and accordingly that the ulterior bequest took effect notwithstanding the death of the legatee in the testator's lifetime.

So in Mackinnon *v.* Peach (*g*), where a testator directed certain

(*e*) 1 J. & W. 1. It appears that B. had attained twenty-one, R. L. 1818, B. 2051. "The time of becoming payable" was therefore held not to arrive until both events had happened, viz., majority (or marriage) and the death of the testator. See also Re Gaitskell's Trust, L. R., 15 Eq. 386, and post, s. ii.

(*f*) 1 R. & My. 639.

(*g*) 2 Kee. 555. See also Ashling *v.* Knowles, 3 Drew. 593; Re Green's Estate, 1 Dr. & Sm. 68. But compare these cases with Rider *v.* Wager, 2 P. W. 331, where a testator bequeathed part of a sum due to him from A. to the second son of A., and the rest of the money to the other younger children of A., the same to remain in A.'s hands until the children should be capable of receiving it, *and the legacy or share of any of them dying before such time* to go to the survivors and survivor of them; A.'s second son died in the testator's lifetime, but the other younger children survived the testator, and claimed the second son's share; but it was considered that the gift to survivors must be intended if the legatee should have survived the testator; but that where the legatee died in the lifetime of the testator, as nothing could ever vest in the legatee, so neither could it survive from him. Lord Langdale also

[*1577] *chattels to be divided between his two daughters, share and share alike, and that *upon the demise of either of them without lawful issue*, then the *share of her so dying* should go to her sister; it was held that one of the legatees having died unmarried in the testator's lifetime, her surviving sister was entitled to the whole.

And this construction prevailed (in spite of some apparently opposing expressions) in Rheeder *v.* Ower (*h*), where a testator bequeathed the interest of the residue of his property to his five sisters for life, *and in case any of them should die leaving issue*, then the trustees were to pay and transfer the share *to which his sister so deceasing was entitled at or before the time of her decease to receive the interests and dividends thereon*, unto and amongst all and every such child or children of such deceased sister equally between them, share and share alike at their respective ages of twenty-one years. One of the sisters died in the testator's lifetime, leaving children, and it was objected to the claim of such children that the trust was confined to the children of those sisters who had become entitled to receive the interest; but Lord Thurlow decided in favor of their claim, observing that, in a will so loosely drawn, it was more probable that that was the testator's intent than the contrary.

And in Varley *v.* Winn (*i*), where a testator gave to each of his five daughters, 6,000*l.*, to be invested within seven years after his decease in trust for them or their children; but if any of his said daughters should die leaving no issue, then *the share or portion so invested* should be divided among those who had issue. One daughter died without issue in the testator's lifetime, and it was held that the legacy bequeathed to her passed under the gift over.

Distinction where gift is to a class;

Where, however, the gift is to a class, the objects of which are not, according to the general rules of construction, ascertainable until the decease of the testator (as in [*1578] the case of a * gift to children generally), the application of the words providing against the event of death to children dying in the testator's lifetime becomes rather more questionable, they not being, in event, actual objects of the gift, and therefore not within the clause in question if that clause is to be construed strictly as a clause of substitution. There are not wanting cases, however, in which even under such circumstances the words have been held to apply to death in the testator's lifetime, though the gift over, being of the share of the deceased object, seemed to afford a plausible argument, as already noticed, in favor of the contrary construction.

Thus, in Jones *v.* Frewin (*k*), where a testator made a general bequest

gave effect to a similar argument in Bastin *v.* Watts, 3 Beav. 97, and Smith *v.* Oliver, 11 Beav. 494; as to which however, see per Kindersley, V.-C., 1 Dr. & Sm. 73.

(*h*) 3 B. C. C. 240. See also Rackham *v.* Delamare, 2 D. J. & S. 74.

(*i*) 2 K. & J. 700.

(*k*) 12 W. R. 369, 3 N. R. 415.

to his wife for life, and at her death to be paid and divided unto and between his nephews and nieces, children of his brother S. (then living) and his late sister E., and also unto and between the brothers and sister of his wife, in equal shares; provided that if any of his nephews or nieces, or the brothers or sister of his wife, should die in the lifetime of his wife, leaving a child or children, such child or children should be entitled to a father's or mother's share. One of the wife's brothers died in the testator's lifetime (and before the wife), leaving a daughter; and it was held by Sir W. P. Wood, V.-C., that she was entitled to a share; for that, although the class of nephews and nieces was capable of increase, such increase was not intended to take away from the individuals in esse the benefit of the proviso in favor of their children in case they should die.

— but ulterior gift still held to operate.

"I think," said Sir W. James, V.-C., speaking of an immediate gift to "cousins" (*l*), "a fallacy arises from applying to the construction of these instruments that rule which says that the class is to be ascertained at the death of the testator; because primâ facie a testator must be supposed to have had in view living persons subject to the contingency of such persons living up to the time of his death. The gift is 'unto my first cousins.' That means the first cousins who shall answer both requirements. If I were to complete the will by introducing into it strictly legal language, the meaning of the clause would be this, 'I give . . . to my first cousins who are now living and who shall continue to live up to the time of my death.'"

And in Habergham *v.* Ridehalgh (*m*), where a testator devised * real estate in trust for his brother-in-law H. and all [*1579] and every the testator's brothers and sisters, in equal shares, for their lives, with benefit of survivorship where any of them died without leaving children; but where any of them died leaving children, then upon trust to let such children have their parent's share until the longest liver of testator's said brother-in-law, brothers, and sisters, should die; and so soon as all should be dead, in trust to convey the property unto and equally among the children of the brother-in-law, brothers, and sisters, in equal shares per stirpes; but if any of them died without leaving a child, then to convey the shares of such as should so die to the survivors in equal shares. H. and a brother and sister died between the date of the will and the testator's death, and the question was, whether their children were entitled to shares of the rents during the continuance of the life estate. It was held by Sir W. James, V.-C., that they were. He thought he must come to the conclusion that the children of H. were objects of the testator's

(*l*) Re Hotchkiss' Trusts, L. R. 8 Eq. 649. There were here no first cousins born between the date of the will and of the testator's death

(*m*) L. R., 9 Eq. 395. See also Smith *v.* Smith, 8 Sim. 353, post, p. 1587; Re Hayward, Creery *v.* Lingwood, L. R., 19 Ch. D. 470.

bounty, and it seemed to him also that the other children of the testator's brothers and sisters were also intended to be objects of his bounty.

It is proper to state that Sir J. Romilly uniformly expressed an opinion that where the original gift was to a class the gift over did not operate if the deceased object died before the testator, because such object could not himself have taken (*n*). He never had occasion, however, to decide accordingly, and it is conceived that the weight of authority and opinion is against him.

Opinion of Romilly, M. R., contra.

If the gift to the class is immediate, and no time is specified for the vesting or for the distribution of it, a gift over in case of death before the legacy is payable is necessarily confined to the case of a child dying in the testator's lifetime. Thus, in Cort *v.* Winder (*o*), where a testator bequeathed the residue of his estate in trust for all and every of his first cousins german, share and share alike; and in case any of his *said* cousins should die *before their respective shares should become due or payable*, leaving issue him or them surviving, the testator directed that such issue should have the same share or shares as his or their parent or parents would have been entitled to if living (*p*). One [*1580] * of the cousins died before the testator, leaving issue, and it was held by Sir J. K. Bruce, V.-C., that the words "due or payable" were referable to the time of the testator's death, and that the share intended for the deceased cousin belonged to his issue, "although it had been said to be difficult or apparently difficult to reconcile with that construction the sort of interpretation adopted in Viner *v.* Francis (*q*), and other cases of that kind, which attribute this class-description to persons who represent the class at the time of the death."

Construction where possession is immediate.

To this property of a class-description, however, the decision in Stuart *v.* Jones (*r*) must, it would seem, be mainly ascribed. In that case a testator bequeathed his residuary estate in trust for all and every his children and child then born and thereafter to be born, who being sons should attain twenty-one, &c., as tenants in common; "provided always that the share in the trust moneys to which each of his daughters on attaining twenty-one or marrying under that age *should become entitled* under the trusts aforesaid, should be held" in trust

Settlement of share to which daughters "should become entitled;"

(*n*) 16 Beav. 53, 26 Beav. 32.
(*o*) 1 Coll. 320.
(*p*) No reliance appears to have been placed on the words "would have been entitled to *if living*;" any such reliance being excluded by the word "said" (cousins); as to this see Loring *v.* Thomas, 1 Dr. & Sm. 479, post, p. 1594.
(*q*) Ante, p. 1010.
(*r*) 3 De G. & J. 532. See Wordsworth *v.* Wood, 4 My. & Cr. 641. Cf. Varley *v.* Winn, 2 K. & J. 700, and Rheeder *v.* Ower, 3 B. C. C. 240. both stated ante, p. 1577. See also Re Roberts, Tarleton *v.* Bruton, 30 Ch. D. 234; Re Clark, Clark *v.* Randall, 31 Ch. D. 72.

for the daughters for life and afterwards for their children. It was held by Sir W. P. Wood, V.-C., and on appeal by Lord Chelmsford, that the children of a daughter who died before the testator were not entitled to a share. Stopping at the proviso, the L. C. observed that it was admitted that there could have been no share but those of children living at the testator's death; and "the proviso," he added, "merely settled the shares of daughters who would take under the preceding gift. For what did the testator dispose of in this proviso? Why the shares to which his daughters should become entitled under the trusts aforesaid."

This construction was not of the kind called benignant. It was strongly disapproved of by Sir R. Malins, V.-C., in Re Speakman (*s*), where a testator gave the proceeds to arise from the sale of his real and personal estate in trust for all his children who being sons should attain twenty-one or being daughters should attain that age or be married; as to the "share" of each of his daughters he directed it to be held in trust for her separate use during her life, and after her death for her children at twenty-one; if any of his daughters should die without having a child who should acquire a vested interest *in their respective shares, then the share of each [*1581] daughter (including accruing shares), was to go to the testator's other children, the share of each daughter to be held on the same trusts as her original share; if any of the sons should die in the testator's lifetime leaving children, such children were to take the share which the parent would have taken if he had survived and attained twenty-one (*t*). One of the daughters died in the testator's lifetime leaving children, and it was held that they were entitled to the share which their mother, if she had survived him, would have taken for life. "It is true," said the V.-C., "that it was called her share; and it was her share for the purposes of division, and of ascertaining into how many shares the property was to be divided." He thought Stewart *v.* Jones contrary to sound principle.

If the original gift be, not to the class generally, but to such of them only as survive the testator, a contingent gift engrafted thereon in case of the death of any of them can only mean death happening after the death of the testator. Thus in Shergold *v.* Boone (*u*), where a bequest was made to the children of S. who should be living at the time of the testator's decease; and in case any of them should die without leaving issue, his share to go to the survivors or survivor of them; but in case they should leave issue, such issue to be entitled to the share of their

— where gift is *expressly* to children living at testator's death.

(*s*) 4 Ch. D. 620.

(*t*) This clause seems to distinguish Re Speakman, from Stewart *v.* Jones, which, it will be observed, was not a case of a gift over or of a modification of the bequest in case of *death*. If the children of the deceased daughter, in Stewart *v.* Jones, had been held to be entitled, they would have been put on a better footing than the children of a deceased son.

(*u*) 13 Ves. 370. See also Crook *v.* Whitley, 7 D. M. & G. 490 (distinct legacies "to each of the present nieces of A.").

deceased parent. Sir W. Grant, M. R., held that the case provided for was the death of any of the children who were the objects of the former bequest, and no children who died before the testator were objects. "The bequest," he said, "is not to all the children generally, but to such only who shall be living at the testator's decease." [1]

Gift over in case of death to executors or administrators, or personal representatives.

I. —2. *Gift over to Executors, &c., of deceased Legatee.* — It seems that where the objects of gift in the clause in question are the executors or administrators, or personal representatives, of the deceased legatee, such clause is considered as merely showing that the legacy is to be vested immediately on the testator's decease, notwithstanding the subsequent death of the legatee before the period of dis- [*1582] tribution or payment, and not as indicating * an intention to substitute as objects of gift the representatives of those who die in the testator's lifetime.

Thus, in Bone *v.* Cook (*v*), where a testator bequeathed the residue of his estate, at the death of his wife, equally between four persons and then provided, that in case of the death of any of the legatees before their legacies should become payable, then that the legacy of each so dying should go to his, her, or their children; and *in case of such decease of any of the said legatees without having a child or children,* the legacy of him or her so dying *should go to his or her executors or administrators, as part of his, her, or their personal estate.* It was held that the share of one of the legatees who died in the testator's lifetime unmarried lapsed, though it was admitted that, if she had left a child, such child would have been entitled under the previous clause.

And the same rule holds where there is no express contingency coupled with the event of death. Thus, in Corbyn *v.* French (*x*), where a testator bequeathed the residue of his estate to his wife for life, and at her decease gave (among other legacies) one to each of the children of E., *or their representatives or representative;* Sir R. P. Arden, M. R., was of opinion that by the death of one of the children in the testator's lifetime the legacy lapsed, on the ground that a testator must be supposed to contemplate that his legatees will survive him.

Gift to personal representatives not substitutional.

Again, in Tidwell *v.* Ariel (*y*), where a testator, after bequeathing several legacies, directed that they should be paid "in one whole

(*v*) M'Clel. 168, 13 Pri. 332. See Re Devenish, Devenish *v.* Hoppus, W. N. 1889, p. 204.
(*x*) 4 Ves. 418.
(*y*) 3 Mad. 403. And see Tate *v.* Clarke, 1 Beav. 100; Thompson *v.* Whitelock, 4 De G. & J. 490.

[1] See Outcalt *v.* Outcalt, 42 N. J. Eq. 500. In this case the following rule is laid down: Wherever there is a gift to a class, with a gift by substitution to the issue or children of those who shall die, the children take what their parents would have taken if living at the testator's death (whether the parents died before or after the date of the will), unless a different intention appears.

year after his decease, *or to their several and respective heirs.*" Sir J. Leach, V.-C., held that one of the legacies failed by the death of the legatee in the testator's lifetime, the intention being that the legacies should be paid to the representatives if they died within the year.

It is proper to remind the reader, in connection with the three last cases, that in several instances the words "representatives" and "heirs," when applied to personalty, have been held to be synonymous with *next of kin* (*z*); but perhaps this does not much weaken the special ground to which these cases have been referred.

* But where the gift to the primary legatee or his repre- [*1583] sentatives is immediate, without a prior life estate and without postponement of payment, a gift in the alternative to the "heirs" can only refer to the event of death in the testator's lifetime, and is held to import not simply payment to the representatives of the legatee, but substitution of his statutory next of kin (*a*).

Unless the prior gift be immediate.

I. — 3. *Gift over to Next of Kin of a Married Woman.* — It has been elsewhere noticed, that if property be given by will to one for life with remainder over, and the tenant for life dies in the lifetime of the testator, the remainder takes effect on his death as an immediate gift. But it was made a question, where the tenant for life was a married woman, and the remainder was limited to her next of kin, in the event of her dying in the lifetime of her husband, whether the latter gift was not to be viewed in the same light as a bequest to heirs or executors and administrators; namely, as being intended merely to apply to the event of the legatee dying in the lifetime of her husband, after having survived the testator, and not to prevent lapse in the event of the legatee dying under similar circumstances in the testator's lifetime.

Gift over of interest of married woman, in case of death, to her next of kin.

Thus, where (*b*) a testator bequeathed to trustees 10,000*l.*, to be invested in stock, in trust for A., a married woman, during the joint lives of herself and her husband, and in case she survived him, to her absolutely; but, if she did not survive him, to such person as she should by will appoint, and in default of appointment, to her next of kin, exclusive of her husband: A. died in the lifetime of her husband and of the testator; and it was held by Sir J. Leach, V.-C., and on appeal by Lord Lyndhurst, that the legacy lapsed.

But in Hardwick *v.* Thurston (*c*), where a testatrix bequeathed a sum of money in trust for such person as her daughter A. (who was

(*z*) Ante, pp. 923, 957. And see Re Porter's Trust, 4 K. & J. 188 (where "heirs" was construed next of kin, and Tidwell *v.* Ariel was discussed); King *v.* Cleaveland, 26 Beav. 26, 166, 4 De G. & J. 477.
(*a*) Gittings *v.* McDermott, 2 My. & K. 69. See ante, p. 962.
(*b*) Baker *v.* Hanbury, 3 Russ. 340.
(*c*) 4 Russ. 380.

at that time unmarried) should appoint, and in default of appointment for A. for her separate use for her life; and after her death for her next of kin, according to the statute, exclusive of her husband; A. having married and died in her mother's lifetime, Sir J. Leach, V.-C., held that her next of kin were entitled.

[*1584] * And in Edwards *v.* Saloway (*d*), where a testator gave the residue of his estate in trust for his wife for life, for her separate use, and after her death in trust for such persons as she should by deed or will appoint, and in default of appointment for her next of kin: the testator's wife died before him, and it was contended on the authority of Baker *v.* Hanbury that the next of kin took nothing under the will; but Sir J. K. Bruce, V.-C., and on appeal Lord Cottenham, held otherwise. The V.-C. distinguished Baker *v.* Hanbury on the ground that there Lord Lyndhurst inferred an intention that the bequest to A. should be absolute, and that the words used were only to protect the absolute interest; but Lord Cottenham considered it to be inconsistent with Hardwick *v.* Thurston, which he had no hesitation in preferring: so that Baker *v.* Hanbury must be considered as overruled.

I. — 4. *Whether Issue of a Legatee dead at the date of the Will take by Substitution.* — Where there is a devise or bequest to a class of objects who are to be ascertained at the testator's death, or at some period subsequent to it, with a substitution of the children of objects who should happen to be deceased at the period of distribution, and it happens that some individual of the class was dead when the will was made, it is not too readily to be concluded from the preceding authorities that the clause in question lets in the children of such predeceased person; for in several such cases it has been construed strictly as a clause of substitution, and therefore as not comprehending the children of any who could not in any possible event have been objects of the original gift.

Whether children of objects dead at date of will can have the benefit of clause of substitution.

Thus, in Christopherson *v.* Naylor (*e*), where a testator bequeathed to "each and every of the child and children of my brother and sisters, A., B., C. and D., which shall be living at the time of my decease, except my nephew F." (for whom he had already provided); "*but if any child or children of my said brother and sisters, or any of them* (besides the said F. my nephew), *shall happen to die in my lifetime" and leave issue at his or their decease,* "then and in such case the legacy or legacies hereby intended for such child or children so dying shall be upon trust for, and

Christopherson *v.* Naylor.

[*1585] I give and bequeath the same to, his, her, or * their issue, such issue taking only the legacy or legacies which his, her, or their parents or parent would have been entitled to if living at my

(*d*) 2 De G. & S. 248, 2 Phil. 625; and see Nichols *v.* Haviland, 1 K. & J. 504.
(*e*) 1 Mer. 320.

decease." It was contended that the expression "*shall* die in my lifetime," though literally applicable only to *future* death, might be held to embrace the children who were dead at the time of making the will, by analogy to those cases in which a gift to children "*to be* begotten" had been held to include children previously born (*f*); but Sir W. Grant, M. R., observed that the question did not depend upon these words, which, though according to strict construction importing futurity, might have been understood as speaking of the event at whatever time it might happen (*g*). "The nephews and nieces," he said, "are here the primary legatees; nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But, of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can consequently show no object of substitution; and to give them original legacies would be, in effect, to make a new will for the testator."[1]

Children of objects dead at date of will excluded.

So, in Butter *v.* Ommaney (*h*), where a testator bequeathed the residue of his estate after the death of his wife and brother Joseph, to be equally divided between the children of his said brother and his late sister Betty and late brother Jacob, who should be then living, in equal shares; *and as to such of them as should be then dead,* leaving a child or children, such child or children were to be and stand in the place or places of his, her, or their parent or parents; Sir L. Shadwell, V.-C., held that the children of such children of the testator's brother Jacob who died in the testator's lifetime (*and who were also dead at the date of the will*) were not entitled to any share of the residue.

Children of objects dead at date of will excluded.

So, in Peel *v.* Catlow (*i*), where a testator bequeathed one-sixth of his residuary estate to the children of his late sister Jane equally, and in case any such child or children should die *under twenty-one leaving issue, their shares to be paid to such issue; and if any such child or children should die under twenty-one and leave no issue, then the share of him or her so dying to go to the survivors and the issue of such of the deceased children as should have died so leaving issue as aforesaid (such issue to take no greater share than his, her, or their parent or respective parents would have been entitled to if living); and as to one other sixth, in trust for the testator's sister Mary C. for life, and after her decease, in trust for [*1586]

(*f*) Ante, p. 1037.

(*g*) See also Hannam *v.* Sims, 2 De G. & J. 151; Loring *v.* Thomas, 1 Dr. & Sm. 497; Re Chapman's Will 32 Beav. 382; Re Woolrich, 11 Ch. D. 667; Re Barker's Estate, W. N. 1882. p. 121; Re Webster's Estate, 23 Ch. D. 737; Re Chinery, Chinery *v.* Hill, 39 Ch D. 614; Re Musther, Groves *v.* Musther, 43 Ch. D. 569. Compare Gibson *v.* Gibson, 6 App. Ca. 471.

(*h*) 4 Russ. 73.

(*i*) 9 Sim. 372.

[1] See In re Crawford, 113 N. Y. 366.

her *issue*, to be payable at the like times and with the like benefit of survivorship and in like manner as was thereinbefore expressed concerning the sixth part thereinbefore given to the children of the testator's sister Jane; and in case the testator's sister Mary should depart this life without leaving issue of her body, or leaving any they should die under twenty-one and should leave no issue, then over. A child of Mary C. was dead at the date of the will (*k*), leaving a child; and Sir L. Shadwell, V.-C., held that this grandchild of Mary C. was not entitled; for that, under the trusts declared of the share of the testator's sister Jane (to which reference was here made), no grandchild could take except by way of substitution for its parent, and as the grandchild's mother never could have become entitled to take, her claim could not be sustained.

So, in Gray *v.* Garman (*l*), where the testator gave the residue of his real and personal estate to his wife E. for life, and at her decease to be equally divided between the brothers and sisters of his wife E.; and in case any or either of them should be dead at the time of the decease of E., leaving issue, then such issue to stand in the place of their respective parent or parents. The question was, whether the issue of a brother of E., who was dead at the date of the will, were entitled. Sir J. Wigram, V.-C., after a full examination of the cases, held that they were not; considering that the word "them" in the second clause referred to the brothers and sisters described [*1587] in the first, which * clearly did not extend to a brother or sister previously dead (*m*).

It will be observed, that, in the four preceding cases, the person whose children it was attempted to bring within the compass of the clause in question was dead at the date of the will, and could not possibly have been an object of the primary bequest; and it does not follow that the same construction would have obtained, if such person had been then living, and had *subsequently* died in the testator's lifetime. There is, however, not wanting a case even of this kind. Thus, in Thornhill *v.* Thornhill (*n*), where a testator directed that a certain estate, which by his marriage settlement he had settled on his wife for life, and another estate, which he had devised to her for her life, should be sold at

Suggested distinction where decease is after will.

(*k*) It does not appear whether the deceased child had attained majority.

(*l*) 2 Hare, 268. See also Smith *v* Pepper, 27 Beav. 86; Re Ann Wood's Will, 31 Beav. 323; Re Hotchkiss' Trusts, L. R., 8 Eq. 643, Hahergham *v.* Ridehalgh, L. R., 9 Eq. 395 (share of Silvanus); Hunter *v.* Cheshire, L. R., 8 Ch. 751; West *v.* Orr, 8 Ch. D. 60; Re Riddell, W. N. 1880, p. 94, Re Webster's Estate, Widgen *v.* Mello, 23 Ch. D. 737; Re Chinery, Chinery *v.* Hill, 39 Ch. D. 614; Re Musther, Groves *v.* Musther, 43 Ch. D. 569, 572. These cases show that Christopherson *v.* Naylor is a binding authority, notwithstanding the disapproval of Malins, V.-C., L. R., 8 Eq 57, 14 Eq. 250, and of Stuart, V.-C., 10 Jur. N. S. 231, 1174, and notwithstanding the apparently contrary decision of Jessel, M. R., in Re Smith's Trusts, 5 Ch. D. 497.

(*m*) It was also held that the children of such of the brothers and sisters of E. as survived the testator, and afterwards died in the lifetime of E., were entitled; as to which indeed there could be no doubt.

(*n*) 4 Mad. 377. Whether the nephews and nieces were in existence at the date of the will is not stated.

her decease, and the money arising therefrom equally divided among his nephews and nieces, *the children of such of them as should be then dead standing in the place of their father and mother deceased.* The question was, whether the children of such of the nephews and nieces as died in the testator's lifetime were entitled. Sir J. Leach, V.-C., decided in the negative; being of opinion, that the latter clause applied to the children of such of the nephews and nieces only as died after the testator, and before the wife.

The case of Thornhill *v.* Thornhill, however, has been much disapproved of, as applying a very harsh and rigid rule of construction to testamentary provisions for children; and its authority was unequivocally denied in Smith *v.* Smith (*o*), where a testator gave his residuary estate to trustees, in trust for his wife for life, and after her death to divide it amongst all his *children who might be *then* living: the [*1588] shares of such of them as should then have attained twenty-one, to be paid to them within three months after his wife's death, and the shares of others on their attaining twenty-one, or to the survivors of them in case of the death of any of them in his wife's lifetime and without leaving issue. *Provided that if any of his children who should die in his wife's lifetime should have left issue,* such issue should have such share or shares as his, her, or their parent or parents would have been entitled to if living. The testator's wife survived him. One of his children who was living at the date of his will died in his lifetime, leaving issue who survived the testator and his widow; and it was held that such issue were entitled to a share of the residue. Sir L. Shadwell, V.-C., said, "I think that the decision in Thornhill *v.* Thornhill is wrong."[1]

Thornhill *v.* Thornhill overruled.

Where, however, the children of the deceased person found their claim not on a mere class of substitution, but on a substantive, independent, original gift, comprehending them concurrently with another class of objects, the doctrine of the preceding cases does not apply, and the gift will extend to the children of persons who were dead when the will was made.

Distinction where children of deceased claim under original gift.

(*o*) 8 Sim. 353. Thornhill *v.* Thornhill is said to have been overruled by Pepys, M. R., in the previous case of Collins *v.* Johnson, 8 Sim. 356 n.; but as the bequest in that case was to the nephews and nieces nominatim, and not as a class, its authority on the point is much less conclusive than Smith *v.* Smith, stated in the text. The writer, however, distrusts his own impressions on this point; as, since the preceding remark was written, he finds the case referred to by Sir L. Shadwell, 9 Sim. 550, as one which presented much greater difficulty than the case then before the court (Jarvis *v.* Pond, post, p. 1590); though on what ground his Honor arrived at this conclusion does not appear. In Olney *v.* Bates, 3 Drew. 319, the point did not arise; for though the child, whose issue claimed (and failed in their claim), survived the making of the will, yet as she also survived the widow (who predeceased the testator), the event on which the substitutionary gift was expressly limited did not happen. The case was also influenced by a codicil, whereby the testator had himself put an interpretation on the substitutionary clause. Note, however, that Smith *v.* Smith was classed by Romilly, M. R., as an original gift to the issue, 26 Beav. 31; and see Loring *v.* Thomas, 1 Dr. & Sm. 497, post, p. 1594.

[1] See Outcalt *v.* Outcalt, 42 N. J. Eq. 500; ante, p. 1581, note.

Thus, in Tytherleigh *v.* Harbin (*p*), where a testator devised a certain estate to trustees in trust for R. T. for life, and after his decease in trust to convey the same "unto or amongst all and every and such one or more of the child or children of the said R. T. who shall be living at the time of his decease, *and the issue of such of them as shall be then dead leaving issue*, such issue to take equally between them the share only which their parent would have been entitled to if then living." The question was, whether the issue of a child of R. T., who was dead at the date of the will, were included in the devise. It was contended, on the authority of Christopherson *v.* Naylor, Thornhill *v.* Thornhill, and Waugh *v.* Waugh (*q*), that they were not entitled; but Sir L. Shadwell, V.-C., decided that the gift included these objects. "In this case," he said, "there is an original substantive gift to the child or children of R. T. living at the time of his decease, and the issue of such of them as should be then dead leaving issue; and I [*1589] think that the word 'them' means nothing more *than 'child or children.' This case, therefore, differs from the first three cases cited for the plaintiffs. The testator then says: 'Such issue to take, between or amongst them, the share only which their parent or parents would have been entitled to, if then living.' These words were necessary, in order to show what share the issue of a deceased child were to take amongst them; for, if there had been two surviving children, and ten children of a deceased child, and those words had not been used, there might have been a question whether each of the ten grandchildren was not entitled to an equal share with the two surviving children."

Children of deceased objects allowed to participate.

So, in Clay *v.* Pennington (*r*), where a testator in a certain event bequeathed a residuary fund unto the children of his brother B. *and their lawful issue*, in equal shares and proportions, or unto such of them as should prove their right, to the satisfaction of the trustees, within two years after notice thereof, to be inserted in the London Gazette. Some of the children of B. were dead at the date of the will; and it was held that the issue of such children were entitled to participate with the other children and their issue, it being considered that the gift included all the descendants of the brother, without distinction, who were living at the period in question.

Again, in Rust *v.* Baker (*s*), where a testator gave one fifth part of his residuary personal estate to A., B., and C., and all and every other the children of D., and *the issue of such of his children as should have departed this life*. Long before the date of the will, D. had had a child, who went abroad, and had not

Children of deceased objects let in.

(*p*) 6 Sim. 329.
(*q*) 2 My. & K. 41. This case, however, though professedly decided on the same principle as Christopherson *v.* Naylor, must be considered as overruled by the cases now under consideration. See 1 Dr. & Sm. 521.
(*r*) 7 Sim. 370.
(*s*) 8 Sim. 443.

been heard of for twenty years. It was held that he must be presumed to have been dead at the date of the will; but nevertheless that his children were entitled under the bequest.

So, in Bebb *v.* Beckwith (*t*), where the trust was for all and every the children of J. B., deceased, to be divided equally amongst them and the *issue of such of them as should be deceased share and share alike, such issue to be entitled to the share of his, her, or their deceased parents* equally amongst them; Lord Langdale, M. R., held that the bequest included a grandchild of J. B., whose parent was dead when the will was made; considering that the effect of the latter words was merely to limit the * amount of the share to which the [*1590] issue was entitled, not to show that they were to take only by way of substitution.

And even where there is no original and independent gift to the issue, but their claim is founded on a clause apparently of mere substitution, the Court anxiously lays hold of slight expressions as a ground for avoiding a construction, which in all probability defeats the actual intention, by excluding the issue of a deceased child from participation in a general family provision.

Disinclination of Court to exclude children of deceased.

Thus, in Giles *v.* Giles (*u*), where a testator bequeathed the general residue to trustees, in trust for all his children living at the decease of his wife (to whom a life interest had been given) as tenants in common; and *if any such children or child should be deceased before his wife, and should leave issue,* then the children of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife, upon their attaining the age of twenty-one years; with a proviso, that, until the portions thereby provided for any of the said children of his said *sons or daughters* who might have died before their mother should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child. The testator at the date of his will had four sons and one daughter, and he had had another daughter, who was then dead, leaving children who survived the testator.

Children of deceased objects let in.

The question was, whether these children were objects of the bequest; and Sir L. Shadwell, V.-C., decided that they were, considering that the special language of the will authorized this conclusion, without infringing the authority of the general cases before stated, which had been pressed upon him. He relied particularly on the expression "sons and *daughters*," which he considered to indicate that the testator had the issue of the deceased daughter in his view, he having but one daughter living at the date of the will; the learned Judge

(*t*) 2 Beav. 308. See also Gaskell *v.* Holmes, 3 Hare, 438; Coulthurst *v.* Carter, 15 Beav. 421; Etches *v.* Etches, 3 Drew. 447.
(*u*) 8 Sim. 360.

deeming it more probable that the plural word was used in remembrance of the child that had been born and died, than in anticipation of a future child to be born, and be a daughter.

So, in Jarvis *v.* Pond (*x*), where the testatrix bequeathed the residue of her property to her daughter M. during her life, [*1591] and *after her decease to be divided among such of the testatrix's sons and daughters as should be living at the time of the decease of M.; *and in case of the decease of any of the testatrix's said sons and daughters, the surviving children of any of her sons and daughters to have their father's or mother's part,* to be equally divided among them. At the date of the will a daughter (B.) and two sons of the testatrix were dead, B. and one of the sons leaving issue; and there was only one daughter besides M. living. The testatrix gave legacies to the surviving husband and widow of two of her deceased children, but not to the children of those who left issue. Sir L. Shadwell held that they were entitled to participate in the residue. The words "in case of the decease" meant only this: — "In case any child or children shall be then alive who are the issue of any of my children who are then dead;" though he admitted that there was some violence in assigning a share to the father or mother, when they never would have taken any.

"To my brothers and sisters or their issue," testator having no brother living.

So, in Gowling *v.* Thompson (*y*), where a testator, having two sisters but no brother living at the date of the will, gave his residuary real and personal estate to all and every "his brothers and sisters or their issue" in equal shares "and to their respective heirs, executors," &c.: it was held by Wood and Selwyn, L. JJ., that the issue of three brothers and of a sister, who had died before the date of the will, were entitled to share; for that if a testator spoke of his brothers and sisters at a time when he must be taken to have known (*z*) that all his brothers and one of his sisters were dead, the only rational inference was that he named the brothers and sisters for the purpose of showing how the property was to be divided.[1]

"To *all and every* the children of my uncle R. or their issue," R. being long dead leaving only two children surviving.

The anxiety of the Court that all who are possessed of equal family claims should be included, was strongly manifested in Re Sibley's Trusts (*a*), where a testator gave the residue of his personal estate in trust for all and every the children of his uncle R. or their issue in equal shares; and devised all his real estate in trust for A. for life, and after her death to sell the same and hold the proceeds upon trust for all and every the children of the said R. or their

(*x*) 9 Sim. 549.
(*y*) L. R., 11 Eq. 366, n. See also Re Jordan's Trusts, 2 N. R. 57; Barnaby *v.* Tassell, L. R., 11 Eq. 363.
(*z*) The testator's knowledge of these circumstances can seldom be assumed beyond those affecting his own immediate family, 7 D. M. & G. 496, 8 Ch. D. 63, 5 Ch. D. 501.
(*a*) 5 Ch. D. 494.

[1] See Huntress *v.* Place, 137 Mass. 409.

issue in equal shares per capita. At the date of the will the facts, as known to the testator, were these: *R. had long been [*1592] dead: he had had six children, two only of whom were living; four were dead, each leaving issue. It was held by Sir G. Jessel, M. R., that these issue were entitled to participate in the proceeds of the real estate. He relied on the words "*all and every* the children," twice used, as indicating more than two (the two known to be living), and on the improbability of an intention to prefer the issue of the two to the issue of the four, the relationship of all six to the testator being the same and furnishing the common and only apparent motive for the gift.

Again a gift is not unfrequently made to such of a class as shall be living at a stated time "*or their* issue." This is in form substitution; but, taken literally, substitution in the place of the same persons as will themselves take; which is contradictory and would be inoperative. It is therefore construed as introducing the issue of such of the class as at the time stated shall be dead; and this, of course, by way of addition and not of substitution; thus assimilating the case to Tytherleigh *v.* Harbin, and admitting issue of persons dead at the date of the will (*b*).

To a class living at a stated time, or their issue.

But if the gift be to such of a class as are living at one time *or* the issue of such as shall die before another time, the latter words may by possibility have some operation by way of substitution, and will, it seems, be construed in that their natural sense. Thus, in West *v.* Orr (*c*), where a testator gave the residue of his estate to his wife for life, and after her death to be divided equally amongst such of the children of his late sisters A. and B. as should survive his wife and attain twenty-one: "but in case any of such children shall be dead at my decease leaving issue, then such issue shall take the share of their deceased parent." A daughter of A. had died before the date of the will, leaving issue who claimed a share, arguing that "such" could not mean children of the sisters who should survive, but merely meant children of the sisters, and that the gift was to the children who should survive the sisters, and the issue of children who *should be dead at the testator's decease. [*1593] But it was held by Sir J. Bacon, V.-C., and on appeal by the L. JJ., that the claim could not be maintained. The V.-C. said, "One

Distinction where gift is to such as are living at one time or the issue of such as are living at another.

West *v.* Orr.

(*b*) Re Philps' Will, L. R., 7 Eq. 151; Burt *v.* Hellyar, L. R., 14 Eq. 160; Wingfield *v.* Wingfield, 9 Ch. D. 658; Penston *v.* Penston, W. N., 1880, p. 113. And see cases where the death was after the will, King *v.* Cleaveland, 26 Beav. 26, 4 De G. & J. 477; Shand *v.* Kidd, 19 Beav. 310; Attwood *v.* Alford, L. R., 2 Eq. 479. See also, Keny *v.* Boulton, 25 Ch. D. 212. In Congreve *v.* Palmer, 16 Beav. 435, the gift was, after the death of A., "to her sisters or their children living at her decease;" and children of a sister dead at the date of the will were excluded: it was probably considered that the sole antecedent to "their" was "children" unaffected, or not yet affected, by the *subsequent* words "living at her decease."

(*c*) 8 Ch. D. 60. See also Miller *v.* Chapman, 24 L. J. Ch. 409.

must first ascertain the class referred to, and that class I find to be — children of the testator's two sisters who should survive his widow and attain twenty-one. The testator says, 'in case any of such children' — still referring back to the children whom he had before defined — shall be dead at his decease leaving issue, such issue shall take. As I cannot find in this will any share or interest which would have been taken by the parent of this infant plaintiff, I cannot find that the plaintiff is entitled to any share at all under the will."

According to this construction of the words "such children," it is obvious that issue could never take by way of substitution unless the testator's wife (to whom he gave a life interest) died in his lifetime; and then only in the event of a child dying in the interval between her death and his. Perhaps it was to widen the extremely narrow scope thus given for the operation of the clause that Sir W. James, L. J., propounded another view. He said, "If the words had been 'among such of the children of my late sisters as shall survive me, but if any of such children shall be dead at my decease leaving lawful issue,' then possibly it might have been considered that we could have said that this was not a substitutional class (qu. clause). But here the words seem to me to prevent that. . . . And seeing that ordinarily speaking the gift to a class is a gift to a class of persons living, it appears to me, putting the two sentences together, that the plain grammatical construction of the will is this, — 'equally amongst such of the children now living of my late sisters A. and B. as shall survive my said wife, but in case any of such children,' — that is any of the said children now living (*d*) — 'shall be dead at my decease leaving lawful issue, then I direct that such issue shall take the share of their deceased parent.' He is dealing with the class who are living at the date of his will, but who might possibly die between the date of his will and of his own death, and then the whole gift taken grammatically is consistent." This construction would still (as the L. J. observed) exclude issue of children dying between the testa-
[*1594] tor's death and * the death of his wife, if (as happened) she survived him. Either construction defeated the plaintiff's claim; and considering that by interpolating the words "now living," and using them as the sole antecedent to the word "such," to the exclusion of the very words of the will "as shall survive my wife," the grammatical meaning of the will was essentially changed, the V.-C.'s construction will perhaps be preferred.

The leading authority on another frequent form of gift is Loring *v.* Thomas (*e*), where a testatrix devised real estate in trust (after suc-

(*d*) If this interpolation is right here, ought it not also to be made in the hypothetical case put by the L. J., "Such of the children of my late sisters as shall survive me"? Compare the same learned judge's view of the grammatical effect of "such" in Heasman *v.* Pearse, L. R., 7 Ch. 285.

(*e*) 4 Dr. & Sm. 497. See also Re Chapman's Will, 32 Beav. 382; Adams *v.* Adams, L. R., 14 Eq. 246; Re Woolrich, 11 Ch. D. 663; Gibbons *v.* Gibbons, 6 App. Ca. 471.

cessive life estates) to sell, and to pay and divide one-fourth of the proceeds equally between all and every the children of her late aunt D., and the other shares between the children of her late aunts E. and M. and her uncle F.; provided that if "any child or children of the said" D., E., M., and F., "shall die in my lifetime" leaving children who should survive her and attain twenty-one, then "the child or children of each such child so dying in my lifetime shall represent and stand in the place of his, her, or their deceased parent or respective parents, and shall be entitled to the same share or shares which his, her, or their deceased parent or parents would have been entitled to if living at my decease." Some of the children of the aunts and uncle had died before the date of the will leaving children who survived the testatrix and attained twenty-one. It was held by Sir R. Kindersley, V.-C., that these children of predeceased children were entitled to shares. He observed that the words were not "if any of the *said* children," or "any *such* child," but generally "any child or children," and ("shall die" being, on the authority of Christopherson *v.* Naylor, construed "shall have died") the predeceased children of an aunt answered the hypothetical description of children who *would have been entitled* if living at the testatrix's decease as literally as children who died between the date of the will and the testatrix's death.

Issue to take what their parent would have been entitled to if living.

But it seems that (as hinted by Sir R. Kindersley) this construction is not admissible if the words are "if any of the *said* children shall die." The additional word was in Re Thompson's Trusts (*f*) held to confine the word "children," to which it was * annexed, strictly to such children as were before designated [*1595] as legatees, and, therefore, to exclude the issue of such as were dead at the date of the will; although the gift to issue was not even in form substitutionary, but "to my children then (*i. e.* at the expiration of a previous interest) living, and the child or children of such of my *said* children as shall then be dead, the grandchildren to take such shares as their parents would have been entitled to in case they had been then living." Sir W. Wood, V.-C., thought that "said" could not be explained like "their" or "them" in Tytherleigh *v.* Harbin and Gaskell *v.* Holmes, and he could not strike it out.

Distinction where the gift is to children or the issue of the *said* children.

And in Re Riddell (*g*), where a testator after his wife's death bequeathed "to the brothers of my said wife or the children *of the same* if they be dead when this portion of my will comes into force, they

(*f*) 2 W. R. 218, 5 D. M. & G. 280 (see 2 De G. & J. 157); and see per Wood, V.-C., Re Jordan's Trusts, 2 N. R. 58. The distinction was rejected by Malins, V.-C., Re Potter's Trust, L. R., 8 Eq. 52, and Re Lucas's Will, 17 Ch. D. 788, but qu.

(*g*) W. N., 1880, p. 94. But see the restrictive effect of the word "such" in a similar position got rid of, to suit "the general scheme" of a specially-worded will, Heasman *v.* Pearse, L. R., 7 Ch. 275, 285.

only taking the share which would have been their parent's portion had they been living at the decease of my wife;" it was held by the L. JJ., that the case was within Christopherson *v.* Naylor, and that the children of a brother who was dead at the date of the will were not entitled to participate.

Brother dead before testator's birth.

In a case where the gift was to "my brothers and sisters or their heirs," it was held by Sir C. Hall, V.-C., that the "heirs" of a brother who was dead before the testatrix was born was not included (*h*).

And it has been suggested that the gift to issue in this form (*i. e.* to a class living at a particular time or their issue) may be intended to take effect only in case all the parents are dead at the time referred to (*i*): a view which the Court would probably be slow to adopt.

The rule which excludes from a substitutionary gift children of objects dead at the date of the will, does not apply where the original gift is not to a *class*, but to designated individuals. The distinction is clear: the latter case comes within the principle of Darrel *v.* Molesworth; for there can be no difference between the case of a gift to a person known by the testator to be alive, and in the event of his death to his children, and a gift to a person whom the testator may suppose or believe to be living, but who is in fact dead, with a gift over [*1596] to his children in case of his *death (*k*). But where the gift is to a class, the testator is always supposed to include only living objects, unless a different intention appears by the will (*l*).

Children of persona designata dead at date of will entitled under clause of substitution.

Distinction when primary gift is to such as are living at the date of the will.

Where, however, the bequest to the primary legatees, though not a class-gift, is expressly limited to those living at the date of the will, a merely substitutionary clause cannot operate in favor of the children of any then dead (*m*).

These cases, it is conceived, fully warrant the position that, in the absence of an explanatory context, a gift over, to take effect in the event of the prior devisee or legatee dying under certain circumstances, applies to the event happening in the lifetime of the testator; the prevention of lapse being, it is considered, one of the purposes of such substituted gift.

General conclusion from preceding cases.

II. — Death of Object of prior Gift after the Testator's Death. — 1. *Rule where there is no previous Interest.* — We now proceed to

(*h*) Wingfield *v.* Wingfield, 9 Ch. D. 658, 666.
(*i*) Per Romilly, M. R., Attwood *v.* Alford, L. R., 2 Eq. 479.
(*k*) Ive *v.* King, 16 Beav. 46; Hannam *v.* Sims, 2 Da G. & J. 151; Re Sheppard's Trust, 1 K. & J. 269.
(*l*) Parker *v.* Tootal, 11 H. L. Ca. 164, 166.
(*m*) See Crook *v.* Whitley, 26 L. J. Ch. 350; the report in 7 D. M. & G. 490, omits this point, except in the marginal nota.

examine the second class of cases before referred to, namely, those in which the question has been — whether the substituted gift takes effect in the event of the prior legatee dying *subsequently to the testator's decease*, under the circumstances prescribed; and if so, then, whether at any time subsequently (*n*).

Whether gift over takes effect on happening of event subsequent to death of testator.

The general rule is that where the context is silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well *after* as before the death of the testator.[1]

Thus, in Allen *v.* Farthing (*o*), where a testator, after directing that a sum of 200*l.*, recently paid to his daughter, should be deducted from the amount of any moneys, or any share of his personal estate, thereinafter bequeathed to her, or to which she should be entitled under and by virtue of that his will, proceeded to devise all his real estate to trustees upon trust for sale, and to apply the moneys to arise therefrom upon the trusts * thereinafter declared concerning his personal estate. The testator then bequeathed his personalty to the same persons, upon trust to get in and recover the same, and to pay and divide the same moneys, estate, and effects unto and between his son John Allen and his daughter Ann Smith, in equal moieties, share and share alike, the share of the daughter to be for her separate use; *and, in case of the death of either of them, the said John Allen and Ann Smith leaving any child or children him or her surviving*, upon trust that the said trustees should stand possessed of the said moiety of the said estate so given to him or her the said J. Allen and A. Smith as aforesaid, in trust for such child or children, as and when they should attain twenty-one, and in the mean time to apply the income for maintenance; and in case of the *death of either of them the said John Allen and Ann Smith leaving no issue lawfully begotten*, then upon trust, as to the moiety of him or her so dying, for the survivor of them. The son and daughter having survived the testator claimed absolute interests in the residue, contending that the several gifts in favor of the children and the survivor respectively were intended to provide only for the event of the legatee's dying in the testator's lifetime; and that the terms in which

Allen *v.* Farthing.

[*1597]

(*n*) In connection with this question must be borne in mind the provisions of s. 10 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), which enacts that "where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and so soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect." This section is not retrospective.

(*o*) M. S. 12th Nov. 1816. This case and the decree thereon are atated 2 Mad. 310, but without the arguments and judgment.

[1] In Vanderzee *v.* Slingerland, 103 N. Y. 47, it is said that this proposition applies only to personalty, and that as to realty the words refer to death without issue in the lifetime of the testator, so that if the primary devisee survive the testator he takes a fee.

the testator had directed the 200*l.* to be deducted out of his daughter's share aided this construction. Sir J. Leach, V.-C., however, held that the testator's children took life-interests only. He observed that where a testator refers to death simply, the words are necessarily held to mean death in his (the testator's) lifetime, the language expressing a contingency, and death generally being not a contingent event (though even then slight circumstances would vary the construction); but in the present instance it was not necessary to resort to such a construction, the event described being not death simply, but death *leaving children*, so that there was a clear contingency expressed, and nothing to prevent the words from having full scope. Although the trustees were directed to "pay" and "divide" the property between the son and daughter, yet these words were to be taken in connection with the subsequent limitations, which cut down and qualified them (*p*): and his Honor thought that the argument founded on the manner in which the advance of 200*l.* was directed to be deducted out of the daughter's share was too weak and inconclusive to control the words.

The event of death, leaving children, held to apply to period after testator's death.

[*1598] * So, in Child *v.* Giblett (*q*), where a testator bequeathed the residue of his estate to trustees, upon trust, after payment of his debts, to divide the same between his two daughters, A. and B., share and share alike, to whom he bequeathed the same; and in case of the death of either, the testator gave the whole to the survivor, *and in the event of their marrying and having children*, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years, but if not, then among the children of C., share and share alike; and if only one child, then the whole thereof to that one child. A. and B. both survived the testator; and the question was, whether they were entitled to the property absolutely, or for life only. Sir J. Leach, M. R., held that they took life interests only. "The rule is," he said, "that where there is a bequest to two persons, and in case of the death of one of them, to the survivor, the words 'in case of the death' are to be restricted to the life of the testator: but the question is, whether the first expression used by this testator, to which this rule would apply, is not qualified by the subsequent words of the will. The testator cannot possibly have intended that the children of C. should take, in the event of a marriage of his daughters, and their death without children in his lifetime, and that they should not take in the event of a marriage of his daughters, and their dying without children after his decease. That would not be a rational distinction. I am of opinion, therefore,

Gift over, on A. marrying and having children, extended to event *after* death of testator.

(*p*) See also Bowers *v.* Bowers, L. R. 5 Ch. 244, 251. But cf. Ware *v.* Watson, 7 D. M. & G. 248.

(*q*) 3 My. & K. 71.

that the general rule is here qualified by the subsequent words used by the testator, and that in the event of A. dying without children, or if she should have children and none of them live to attain the age of twenty-one, the children of C. will be entitled to the residuary property of the testator."

And in Smith *v.* Stewart (*r*), where a testator devised and bequeathed the residue of his real and personal estate in different shares amongst several persons, and directed that the whole of the said legatees should have the benefit of survivorship between them in the event of any one or more of them dying without leaving issue: the question was, whether the legatees acquired an indefeasible interest by surviving the testator; and Sir J. K. Bruce, V.-C., decided that they did not.

* Sometimes, however, it happens that a devise in fee-simple is followed by alternative limitations over which collectively provide for the event of the death of the devisee under all possible circumstances. In such a case, the words of contingency are read as applying exclusively to the happening of the event in the testator's lifetime, in order to avoid repugnancy, inasmuch as the alternative limitations, if not so qualified and restricted in construction, would reduce the prior devise in fee to an estate for life. Thus, in Clayton *v.* Lowe (*s*), where a testator gave his residuary real and personal estate to be equally divided between his three grandchildren, A., B., and C., share and share alike, *forever; and if either of them should happen to die without child or children lawfully begotten*, then he directed that such part or share of the one so dying should be equally divided amongst the surviving brothers or sister; *but if any of his grandchildren should die and leave child or children lawfully begotten*, that such child or children should have their parent's share equally divided amongst them, share and share alike. All the grandchildren survived the testator, and on a case from Chancery it was held in the Court of King's Bench that in the events which had happened they took estates in fee-simple as tenants in common. [*1599]

Gifts over, comprising every possible event, confined to testator's lifetime.

The reasons for this conclusion do not appear, but we may presume them to be in consistency with the argument (already noticed) which was strongly urged by the very able counsel for the plaintiffs, namely, that the several alternative limitations would, unless confined to the happening of the event in the testator's lifetime, operate to cut down the fee previously devised to an estate for life (*t*); and on this ground the case was fol-

Remarks on Clayton *v.* Lowe.

(*r*) 4 De G. & S. 252. See also Gawler *v.* Cadby, Jac. 346; Gosling *v.* Townshend, 17 Beav. 245, affirmed on distinct grounds, 2 W. R. 23; Johnston *v.* Antrobus, 21 Beav. 556 (as to the pecuniary legacy); Randfield *v.* Randfield, 8 H. L. Ca. 225, 236 (real estate); Bowers *v.* Bowers, L. R., 5 Ch. 244.

(*s*) 5 B. & Ald. 636.

(*t*) However, the devise in Clayton *v.* Lowe, of the shares of grandchildren who should die

Clayton *v.* Lowe confirmed.

lowed, with express approbation of the doctrine contained in it, in Gee *v.* Mayor of Manchester (*u*), where a testator gave his freehold, leasehold, and personal property among his children in manner following: to his son A. one-seventh share of his property, to *his heirs, executors, and administrators.* And he gave one-seventh share to each of his other six children in similar terms; and provided, that in case any of his sons or daughters died without issue, that their share returned to his sons [*1600] and daughters equally; and * in case any of his sons and daughters died and leaving issue, that they should take their deceased parent's share. On a case from Chancery it was held in Q. B. that each child who survived the testator took an indefeasible estate in fee in the real estate and an absolute interest in the leaseholds.

So, in Woodburne *v.* Woodburne (*x*), where a testator gave all his real and personal estate upon trust for his brothers and sisters (naming them), their heirs, executors, administrators, and assigns; and declared that if any of his said brothers and sisters should die without leaving issue, his or her share should go to the survivors, and that if any of his brothers and sisters should have left issue, such issue should be entitled to their parent's shares: it was held by Sir J. Stuart, V.-C., that the brothers and sisters, having survived the testator, were absolutely entitled to the estate.

Where, however, the gift, which precedes the alternative gifts over, is not (as in the preceding cases) absolute and unqualified, but is so framed as to admit of its being, without inconsistency or violence, restricted to a life interest, the ground for the construction adopted in these cases failing, the gift in question is held to confer a life interest only, there being no reason why the fullest scope should not be given to the several alternative gifts over.

Distinction where prior gift may be regarded as a mere life interest.

As where (*y*) a testatrix bequeathed to A. the sum of 400*l.*, to be vested in the public funds, the interest whereof she should receive when she attained twenty-one. *In the event of her decease at, before, or after the said period,* the sum so bequeathed to be divided between B. and C. Lord Langdale, M. R., said that the words "at, before, or after" involved all time present, past, and future, and that the only construction to be put on these words, therefore, was, "in the event of her decease, whenever that event might happen."

It was scarcely possible, indeed, to put any other construction on

without children, would not apply to, and would therefore leave the fee in, the last survivor, who might die without children; and this makes a solid difference between such a devise and a mere estate for life; L. R., 5 Ch. 250.

(*u*) 17 Q. B. 737; K. Bruce, V.-C., expressed a different opinion upon the same case, 19 L. J. Ch. 151, 14 Jur. 825.

(*x*) 23 L. J. Ch. 336.

(*y*) Miles *v.* Clark, 1 Kee, 92; see Tilson *v.* Jones, 1 R. & My. 553, ante, p. 1572.

this will. The reference was expressly to the age of twenty-one years; and therefore no room was left to imply a reference to any other or additional period, as the death of the testator. The case differs, therefore, from the two preceding, in which the manner and not the period of death was the circumstance to which express reference was made.

* A clearer illustration of the distinction is afforded by [*1601] Cooper *v.* Cooper (*z*), in which a testator bequeathed the residue of his personal estate equally between his four children (naming them), and in case of the death of either of them leaving issue, then the issue of such child to take the parent's share; but in the event of their dying without leaving issue, then the share of the one so dying to become part of the residue of his personal estate. There being no words in the primary bequest expressly giving an absolute interest (as there were in Clayton *v.* Lowe and Gee *v.* Mayor of Manchester), there was no danger of imputing two inconsistent intentions to the testator in refusing to hold the bequest absolute upon the testator's death; and it was therefore held by Sir W. P. Wood, V.-C., that the children took life interests only (*a*).

The general rule which permits the gift over to take effect upon the happening of the contingency at any time after the testator's death is of course excluded by any context which shows that the testator did not intend it so to operate. Thus in Re Anstice (*b*), where a testatrix gave the residue of her personal estate to trustees in trust to pay and divide the same in equal shares between her two cousins A. and B.; and "in case either of them should be married *at the time of her said legacy becoming payable, then* the same shall be paid or disposed of for her separate use, *and her receipt alone for the same shall be a sufficient discharge;*" and in case either of them should die without leaving issue, then her share to go to her sister; and in case both should die without leaving issue, then over; it was held by Sir J. Romilly, M. R., that this meant death in the testatrix's lifetime, for the legatees (if married) were to be competent to give a full discharge for their legacies when they became payable, which was inconsistent with a gift over upon an event to happen at any time during their lives.

The event restricted to the testator's death by the context.

So where the gift was to several as tenants in common, and in case any of them should die without leaving issue, the shares of them so dying were to go to the others and to the issue of such of them as should die leaving issue in equal shares, such issue to take the shares which their respective parents

The event restricted by the context.

(*z*) 1 K. & J. 658.
(*a*) See also Bowers *v.* Bowers, L. R., 5 Ch. 244; Gosling *v.* Townshend, 2 W. R. 23. Rogers *v.* Waterhouse, 4 Drew. 329, and Rogers *v.* Rogers, 7 W. R. 541, cannot be relied on contra.
(*b*) 23 Beav. 135.

would have taken *if living;* it was clear that the interest of the original legatees was not to be defeasible during their whole [*1602] lives (*c*). And the *circumstance that one of several alternative gifts over is expressly confined to death without issue under twenty-one is a strong argument that the other, though in terms indefinite, was intended to be so confined too (*d*).

Again in Clark *v.* Henry (*e*), where a testator gave all he possessed to be equally divided between his sisters A. and S. for their sole use and benefit independent of any one they might marry; and directed his personal property consisting of clothes, plate, wines, stores, musical instruments, cabin furniture, &c., to be sold and the proceeds invested in his sisters' names as they should direct, his sister A. (who had attained the age of twenty-five) to have the immediate control of her share of his personal property, and his sister S. on attaining the age of twenty-five, until which time her uncle W. would hold it in trust for her; and in case of the death of either sister before the testator *or* before marrying and having children, the whole of the property he might die possessed of to go to the survivor. It was held that A. on attaining twenty-five, although she had not married, was absolutely entitled to a moiety. There might be some difficulty, it was observed, in applying the words of the gift over to both sisters; but they must be construed with reference to the former words: whatever else the testator may have meant, he certainly meant that when either sister attained twenty-five she should have her share.

And in Ware *v.* Watson (*f*) where a testator gave his residuary estate "to be divided into six equal shares, being as many as I have children now living, one of the said shares to be for the benefit of each of my said children in manner hereinafter mentioned, the share of each of my sons W., H., and J., to be paid, assigned, and transferred to him as soon as convenient after my decease, and the shares of daughters E., A., and S. to be vested interests for their benefits in manner hereinafter mentioned:" provided that if any of his said sons *should die without issue living at his decease* his share (accruing as well as original) should go to the survivors equally: [*1603] the trustees were then directed to stand *possessed of the shares of the daughters in trust for them for life and afterwards for their children, and in default of children, for the survivors or survivor of the sons and daughters: it was held by K. Bruce and Turner, L. JJ., that the shares of the sons vested in

(*c*) Johnston *v.* Antrobus, 21 Beav. 556 (the share of residue). There was also a gift over on death leaving issue; but the decision was based on the clause in the text. See also Re Hayward, 19 Ch. D. 470, where the clause was similar but without the words "if living." See also Cross *v.* Coltart, W. N., 1884, p. 123.

(*d*) Brotherton *v.* Bury, 18 Beav. 65.

(*e*) L. R., 11 Eq. 222, 6 Ch. 588.

(*f*) 7 D. M. & G. 248. See also Lloyd *v.* Davies, 15 C. B. 76 (devise to three in common, with gift over on marriage of one to the other two, they paying her 500*l.* within one year from testator's death); Vulliamy *v.* Huskisson, 3 Y. & C. 80 (direction to settle legacy in case of marriage).

them indefeasibly on the testator's death, the gift over of those shares operating only in case of death in his lifetime; the marked distinction made between the shares of the sons and those of the daughters being considered to show that, whatever effect the words "pay and divide" might have had if they had stood alone, the testator meant something different from a direction that the shares should be vested when he used the words "pay and transfer."

II. — 2. *Rule where there is a prior life or other interest.* — In all the preceding cases it will be observed that the gift to the person on whose death, under the circumstances described, the substituted gift was to arise, was immediate, *i. e.*, to take effect in possession; so that the Court was placed in the alternative of construing the words either as applying exclusively to death in the lifetime of the testator, or as extending to death at any time, the will supplying no other period to which the words could be referred; but where the two concurrent or alternative gifts are preceded by a life or other partial interest, or the enjoyment under them is otherwise postponed, the way is open to a third construction, namely, that of applying the words in question to the event of death occurring before the period of possession or distribution, so that the original legatee, surviving that period, would become absolutely entitled.

It is settled, however, that in this case, as well as where the original gift is immediate, the substituted gift will primâ facie take effect whenever the death under the circumstances described occurs. Thus, in Mahoney *v.* Burdett (*g*), where a testatrix bequeathed 1,000*l.* to her sister A. for life, and after her death to A.'s daughter B.: "if my said niece should die unmarried or without children the 1,000*l.* I here will to revert to" C. A. died; then the testatrix; and afterwards B. died without children; and it was held in D. P. that the legacy went over to C., on the ground that this was the natural and proper meaning of the words, and that there was no context which rendered a different meaning necessary or proper. The inconvenience of suspending * the absolute vesting of the gift during the [*1604] whole lifetime of the legatee could not control the natural meaning of the terms of the bequest.

Gift over on death without leaving issue not generally confined to prior interest.

So, in Ingram *v.* Soutten (*h*), where a testator gave a mixed residue in trust for his wife for life, and after her death or second marriage in trust in moieties for his two daughters for their lives, and afterwards for their children respectively; if either daughter should have no child her moiety to go to the other daughter and her children; and if neither daughter should have a child to attain twenty-one, then

(*g*) L. R., 7 H. L. 386.
(*h*) L. R., 7 H. L. 408, reversing Re Heathcote's Trusts, L. R., 9 Ch. 45, and restoring decision of Malins, V.-C., id. 47, n. See also Benn *v.* Dixon, 16 Sim. 21.

the whole to be in trust for his two sons as tenants in common and their respective executors, &c.; but if either sons should die without leaving issue living at the time of his decease, then the whole to devolve and be in trust for the other, his executors, &c. But if both sons should die without leaving issue living at their respective deaths, then in trust for M., a granddaughter of the testator, her executors, &c.; but if she should die without leaving issue living at the time of her death, then in trust for such one or more of the daughters of P. and G. as should be living when the trusts thereinbefore declared should determine, their executors, &c.; and if there should be no such daughter of either of them at that time living, then in trust for C., his executors, &c. First, the wife died; then the sons; and afterwards the daughters; neither of the sons nor daughters had any issue. M. survived them, and afterwards died without ever having issue. At that time there was living only one daughter of P. and no daughter of G. It was held by James, L. J. (Mellish, L. J., concurring), that M., having survived the tenants for life, took an indefeasible interest. The general rule, he said, was, as laid down in Edwards *v.* Edwards (*i*), that, where there was an absolute gift to vest in possession at a future time, and a gift over if the legatee should die without issue living at his death, this primâ facie meant if he should so die before he was entitled to call for delivery, as it would be very inconvenient that after delivery the subject should be liable to go over; and there was nothing in the present case to take it out of the general rule. But this was reversed in the House of Lords and the alleged rule was denied, as unwarrantably altering the [*1605] natural meaning of the words, which clearly expressed * a dying without issue living at the death, at whatever time that death might take place.

The rule being as thus laid down in the House of Lords, it is to be considered what species of context will exclude it and confine the operation of the gift over to death occurring before the period of possession. An example of such a context is afforded by Da Costa *v.* Keir (*k*), where a testator gave the residue of his estate to trustees, upon trust to pay the interest to his wife for life, and after her decease, *he gave the principal to A. for her own use and benefit, to be at her own disposal;* but if the said A. should die leaving any child or children living at her decease, then he gave the residue to her children; but if she should die without any child living at her decease, then he gave the same to B. and C. equally; but if either of them should die before they should become entitled to receive the said residue, then he gave the whole to the survivor; *and if both should die in the lifetime of his wife,* then he gave the said residue to his wife. A. survived the testator and his

Contingency restricted by context.

(*i*) 15 Beav. 364, 365.

(*k*) 3 Russ. 360.

widow, and therefore claimed to be entitled absolutely. The legatees over resisted this claim on the ground that the residue was given to them in the event of A. dying without leaving a child, *whenever that event should happen.* Sir J. Leach, M. R., considered this construction objectionable, as it simply revoked the prior gift to A. (*l*), since, by parity of reasoning, the children, if any, living at her decease, would also have been entitled, without regard to the period of death; whereas the testator intended the subsequent gift to operate only by way of qualification or exception in particular events; and he thought that the ultimate gift to the wife in the event of B. and C. dying in her lifetime, plainly indicated that the life of the widow was to be the period to which the event of A. dying with or without children was to be referred (*m*), and consequently that A., having survived the widow, was absolutely entitled.

So, in Barker *v.* Cocks (*n*), where a testator bequeathed a fund after the decease of his wife (who had a life interest therein) to A., B., and C., equally to be divided between them, share and share alike; but in case of the death of C. without * leaving lawful issue, [*1606] he gave her third part to A. and B. equally; it was held by Lord Langdale, M. R., that, having survived the wife, C. had acquired an absolute interest. The testator's first object, he observed, was that each of the three should have an equal advantage with the others; but as to C.'s share there was a gift over to the others in case of C. dying without leaving lawful issue. If you made this event refer to the period anterior to the death of the tenant for life, you carried into effect the primary intention of the testator to divide the fund amongst the three, share and share alike.

A question of this nature arose in Galland *v.* Leonard (*o*), where a testator gave the residue of his personal estate to trustees, upon trust to place the same out at interest during the life of his wife, and pay her a certain annuity, and upon her death to pay and divide the said trust moneys unto and equally between his two daughters, H. and A. *And in case of the death of them his said daughters, or either of them, leaving a child or children living*, upon trust for the children in manner therein mentioned; and the testator declared that the children of each of his daughters should be entitled to the same share his, her, or their mother would be entitled to if then living; and in case of the death of his said two daughters without leaving issue living, then over. Sir T. Plumer, M. R., held that the testator intended only to substitute the

Contingency restricted to period of distribution.

(*l*) *I. e.*, ultra the life interest. See also Davenport *v.* Bishopp, 2 Y. & C. C. C. 463

(*m*) See also Re Hayes, 9 Jur. N. S. 1068. So if one of several alternative gifts over be expressly confined to a definite period, it is an argument for confining the others also, Wood *v.* Wood, 35 Beav. 587. And see Whiting *v.* Force, 2 Beav. 571; King *v.* Cullen, 2 De G. & S. 252.

(*n*) 6 Beav. 82.

(*o*) 1 Sw. 161.

children for the mother, in the event of the decease of the latter *during the widow's life*, and that the daughters who survived her (the widow) became absolutely entitled. In this case the frame and terms of the bequest showed that the testator contemplated the death of the widow as the period of distribution, and any doubt which his previous expressions may have left on this point is dispelled by the clause entitling the children to the shares which their parents, *if living*, would have taken.

Remark on Galland *v.* Leonard.

"It is manifest," said Lord Selborne (*p*), "that when a testator (as in Galland *v.* Leonard) has directed payment or distribution to be made at a certain time so that a trust intended by him to continue up to that time shall then come to an end, and has proceeded to substitute other devisees or legatees, through the medium of the same trustees and the same trust, in case of the death without leaving issue of any of the persons to whom * such payment or distribution was first directed to be made; there is strong primâ facie reason for holding that the contingency must be intended to happen if at all before the period of distribution. And a rule so limited (subject of course to exceptions) would seem to be in harmony with sound principle and with the general current of authority."

Contingency restricted to period of distribution by express direction to distribute.

[*1607]

Edwards *v.* Edwards (*q*) was itself a case of that kind. The testator there devised freeholds and leaseholds in trust for his wife during her life or widowhood. He then devised part of the property to his eldest son "for him and his heirs to possess immediately after his mother's death or marriage." He then made similar devises to a daughter and to another son; and continued: "If my said wife shall remain my widow my trustees shall assign and transfer to each of my children their shares immediately after her death, and as soon as they arrive at twenty-one. . . . Further, if one of my three children shall die and leaving no children, his or her share shall be divided between the other two and for their heirs forever; and if two of my children shall die and leaving no children, their shares shall go to the surviving one and his or her heirs forever." It was held by Sir J. Romilly, M. R., that the contingency of death leaving no children was to be confined to the life of the tenant for life. His decision was, indeed, based on the supposed general rule cited and relied on by Sir W. James in Ingram *v.* Soutten, but denied on appeal of that case. But in O'Mahoney *v.* Burdett, Lord Selborne said: "Edwards *v.* Edwards was a case in which a distribution by assignment or transfer was expressly directed to be made after the death of the tenant for life, *thereby* primâ facie terminating a trust,

Edwards *v.* Edwards.

(*p*) In O'Mahoney *v.* Burdett, L. R., 7 H. L. 406. An express direction is here meant, not merely such a disposition of the property as involves distribution, id. 407.
(*q*) 15 Beav. 357.

which down to that time was to continue." Lord Hatherley spoke to the like effect; and Lord Cairns said: "The direction for assignment and transfer coupled with immediate and absolute possession may well have justified the decision" (*r*).

Another case of the same kind, prior to O'Mahoney *v.* Burdett, was Dean *v.* Handley (*s*), where a testator devised his real estate to trustees upon the trusts afterwards declared, and gave to the trustees his business in trust to carry it on; and gave them the residue of his personal estate in trust for sale; and to stand possessed of the proceeds and of the real estate in * trust out of the income [*1608] and the profits of the business to pay a life annuity to his wife for the support of herself and his son, and after her death to pay and make over, and he thereby devised and bequeathed all the said real and personal estate, including all accumulations and the business, unto his said son, his heirs, executors, administrators, and assigns: "And my will further is that in case my said son shall happen to depart this life without leaving lawful issue him surviving, then I direct my trustees and the survivors of them," &c., to sell all the real and personal estate, and to hold the proceeds upon the trusts therein mentioned. It was held by Sir W. P. Wood, V.-C., that the son, having survived the widow, was absolutely entitled to the whole estate. His decision, as reported, proceeded on the supposed general rule in Edwards *v.* Edwards; but in O'Mahoney *v.* Burdett (*t*), he said: "It was a trade which was directed to be carried on by the executors until the son attained a certain age, when the trade (and not the trade only but other property as well) was to be handed over to him. . . . I held in that case, and I should be disposed to hold the same again in a similar case, that the time was evidently pointed out when the final and complete distribution was to be made, and that the executory devise must be held to be referred to that time, because it was impossible to call the property back again, and hold that the executory devise was then to take effect after there had been that full and complete distribution of the funds."

Contingency restricted to period of distribution by express direction to distribute.

Dean *v.* Handley.

A question of the same kind afterwards arose in Olivant *v.* Wright (*u*), where a testatrix, having separate real and personal estate, gave it to

(*r*) L. R., 7 H. L. 394, 400, 405.
(*s*) 2 H. & M. 635.
(*t*) L. R., 7 H. L. 403. The following cases were decided before O'Mahoney *v.* Burdett on the supposed general rule in Edwards *v.* Edwards. Most if not all of them might perhaps be supported on special grounds; and it may be observed that none of them were bare cases of successive trusts like the two cases in D. P. See Re Allen's Estate, 3 Drew. 380; Johnson *v.* Cope, 17 Beav. 561; Beckton *v.* Barton, 27 Beav. 99; Slaney *v.* Slaney, 33 Beav. 631; Re Hill's Trusts, L. R., 12 Eq. 312. On special grounds the contingency was held in Milner *v.* Milner, 34 Beav. 276 (settlement), and Witham *v.* Witham, 3 D. F. & J. 758 (direction to settle shares of daughters if they should marry) not to be confined to the life of the tenant for life; and in Smith *v.* Colman, 25 Beav. 216 (similar direction to settle), to be confined to the death of the testator.
(*u*) L. R., 20 Eq. 220, 1 Ch. D. 346.

Olivant v. Wright.

her husband for life; "and after his decease to be divided amongst my five children, share and share alike; and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die [*1609] leaving issue, then that child (if only one) shall *take its parent's share, and if more than one, to be divided equally amongst them, share and share alike." It was held by Sir J. Bacon, V.-C., that the case was within the rule laid down in D. P.; that the share of a child who survived the tenant for life leaving issue passed to the issue; and that the share of another child who afterwards died without issue passed to the three children *then* surviving. On appeal, this was reversed on the ground that the testatrix clearly intended an actual and final division to be made at the death of the tenant for life. Sir W. James observed that all was consistent with that intention, and that any other construction would lead to so many absurdities and contradictions that he could not bring himself to entertain a doubt. He said the natural meaning of "then" would be the time of division which had before been spoken of as to be made at the death of the tenant for life. Sir G. Mellish said that, according to the respondent, there might be several periods of division, and what was to happen if all the five children, one after the other, died without issue, did not exactly appear. Sir G. Bramwell observed that, according to the respondent, the surviving children took the shares of the child dying without issue to the exclusion of the issue of the child who died with issue, which certainly was unreasonable; and further, that a grandchild dying during the life of the tenant for life, would take that which a child dying during the life of the tenant for life would not take, which also seemed unreasonable.

The difficulties here suggested do not appear to be very formidable (*x*). That they were considered to be so in Olivant *v.* Wright,

Contingency restricted to avoid inconsistency in gift over.

may probably be taken as evidence that an express direction to distribute needs little assistance from the context to exclude the general rule which reads death without issue as meaning death at any time. If, indeed, absurdity or contradiction is really produced in the ulterior trusts by so reading the will, but is avoided by confining the contingency to the limited period, there is stroug ground for adopting the latter construction, even although the will contains no express direction to distribute, and no trust (*y*).

The effect of an express direction to convey at a particular

(*x*) See ante p. 1599, n. (*t*), and Lord Hatherley's judgment, Bowers *v.* Bowers, L. R., 5 Ch. 250; also ante, pp. 1044, 1045.

(*y*) See Besant *v.* Cox, 6 Ch. D. 604. But the report does nnt make it clear how in this particular case the words ("that shall leave such lawful issue") which caused the difficulty upon one construction, were made intelligible by adopting the other.

* time is further shown by Wheable *v.* Wither (*z*), where a [*1610] testator gave real and personal estate to trustees, in trust for his wife for life, and after her death *to convey and assure, pay, and divide* the same unto and amongst all his children in equal shares *on their respectively attaining twenty-one;* and in case of the death of any of them without issue under that age, or before acquiring a vested interest (*a*), then to *convey*, &c., his part to the survivors; but in case any of the testator's children *should die at any time either before or after him* having issue, then *to convey*, &c., his part to such issue. All the children having attained twenty-one, it was held by Sir L. Shadwell, V.-C., that they had become indefeasibly entitled. He thought the words "under twenty-one" must of necessity be implied in the gift over to issue, since the trustees, having under the first trust executed an absolute conveyance to the children at twenty-one, would have nothing left in them to enable them to execute the last trust as it stood in the will.

Contingency restricted by express direction to convey.

In the last case, it appears that the wife was dead, but not when she died; nor was it suggested that the time of her death furnished a limit to the contingency. That it is not the time of eventual distribution, but the time pointed out by the express direction to distribute, that fixes that limit, is more distinctly shown by Re Johnson's Trusts (*b*), where a testator devised real estate to his wife for life, remainder to trustees in trust to sell, to invest the proceeds, and to apply the income in bringing up his nephews and nieces, the children of his sister S., during their respective minorities; and upon further trust to pay his nephews and nieces their respective shares when and as they should respectively attain twenty-one; if any of them should die without leaving issue, their shares to be paid to the survivors when their original shares were payable as aforesaid; if any of them should be of age at the time of sale, their shares to be paid immediately after the sale. All the nephews and nieces but two died before the wife, some under age, others after attaining twenty-one, and some leaving issue others not. It was held by Sir W. P. Wood, V.-C., that a nephew or niece became indefeasibly entitled on attaining twenty-one. He observed that the Court * always leaned towards the construction which vested a pro- [*1611] vision for children at the time when it was most likely to be required. He thought the testator had plainly expressed his intention that the original shares should vest at twenty-one, and that the

Contingency restricted to minority of legatees rather than to life-time of tenant for life.

(*z*) 16 Sim. 505. See also Whiting *v.* Force, 2 Beav. 571; Glyn *v.* Glyn, 26 L. J. Ch. 409 (distribution directed at twenty-five, with gift over of the share of the eldest if he came into settled estates); Re Luddy, Peard *v.* Morton, 25 Ch. D. 394; Lewin *v.* Kelly, 13 App. Ca. (P. C.) 783.

(*a*) These last words were held to be merely tautologous.

(*b*) 10 L. T., N. S. 455.

period of survivorship as to the accruing shares was to be the period of the vesting of original shares.

The restricted construction prevailed, partly on the authority of Galland *v.* Leonard, in the more doubtful case of Home *v.* Pillans (*c*), where a testator bequeathed to his nieces, C. and M., the sum of 2,000*l.* each, when and if they should attain their ages of twenty-one years; and which said legacies he gave to them for their sole and separate use, free from the debts or control of their or either of their husbands: *and in case of the death of his said nieces or either of them leaving children or a child*, the testator bequeathed the share or shares of each of his said nieces so dying unto their or her respective children or child. Sir J. Leach, M. R., held that the nieces did not take absolute interests at majority; but that the bequest to them continued to be liable to the executory gift, on their dying leaving children. Lord Brougham, C., reversed the decree, on the ground that the construction adopted by the Court below was irreconcilable with the authorities, especially those cases in which words referring to death generally had been held to be restricted to death occurring in the lifetime of the prior legatee for life (*d*), and he adduced Galland *v.* Leonard as an authority precisely in point. He also dwelt on the inconvenience of holding the absolute vesting to be suspended during the life of the legatee, which was a construction the Court would never adopt but from necessity; and he considered that, in the present instance, such a construction would have the effect of defeating the testator's intention, which evidently was, that at the age of twenty-one the legacies should become absolutely vested.

Contingency restricted to period of vesting.

It is observable that Lord Brougham, in his remarks on Hervey *v.* McLauchlin (*e*), and that class of cases, but very faintly adverts to the fact, that in them the gift over was in case of death simpliciter, and in the will before him it was in case of death *in connection with a collateral event* (*i. e.*, leaving children), which forms a most material distinction, and excludes from the latter case much of the reasoning adopted by him from the cited authorities. The point which [*1612] he had to decide was certainly * one of great difficulty. But the decision has frequently been recognized as correct. Thus in Randfield *v.* Randfield (*f*), where a testator devised real estate to his son when he attained twenty-one, with a gift over if he should die leaving no issue, but where under the circumstances the words "when he attained twenty-one" were taken pro non scriptis, Lord Kingsdown said

Remark on Lord Brougham's judgment in Home *v.* Pillans.

Home *v.* Pillans, approved by Lord Kingsdown.

(*c*) 2 My. & K. 15.
(*d*) Vide ante, p. 1568.
(*e*) 1 Pri. 264.
(*f*) 8 H. L. Ca. 225, 240, 231. See and consider the explanation of this case given by Lord Cairns, L. R., 7 H. L. 397.

that he thought the rule laid down in Home *v.* Pillans was a perfectly sound one, and that it ought not to be disturbed, though it could not apply there. "If," he added with reference to the case before him, "there had been two contingencies to which the words might have been applicable they would I think have been properly applicable to the first, the dying under twenty-one; but that contingency did not exist when the will was executed, and they can be applicable therefore only to the other." As was said in the argument of that case, it is highly improbable that the testator could mean to give the estate absolutely to his son upon his attaining twenty-one, and then take it away again after the son had attained that age.

Contingency restricted to period of vesting.

Again, in Monteith *v.* Nicholson (*g*), where a testator gave his personal estate to his brothers and sisters living at his decease, their executors, administrators, and assigns, as tenants in common, and declared that *if any of them should die in his lifetime or afterwards without leaving lawful issue*, the share or shares of him, her, or them so dying should go to and be equally divided amongst the survivor or survivors of them; *and if any of them should die in his lifetime or afterwards leaving issue*, the share or shares of him, her, or them so dying should go to and be equally divided amongst such issue, such child or children taking their parent's share. "And, moreover, I declare it to be my will, that none of the legatees under this my will shall be entitled to any bequest until they severally attain the age of twenty-one years." It was held by Lord Langdale, M. R., that each of the brothers and sisters took an absolute vested interest on attaining the age of twenty-one years.

On the same principle, if the gift after a life estate is contingent on the legatee surviving the tenant for life, a gift over if he dies without leaving issue will, it seems, be restricted to death in the lifetime of the tenant for life (*h*).

*This construction, however, may be excluded if, besides [*1613] the gift over in question, there is another gift over of the same legacy expressly in case of death before the time of vesting (*i*). Nor has it been generally extended to cases of immediate gift, vested in point of interest, but where possession is directed to be given or payment made at a specified time (*k*).

II. — 3. *Death before a Legacy is "payable."* — And here it will be convenient to notice the frequently occurring point of construction

(*g*) 2 Kee. 719. See also Re Dowling's Trusts, L. R., 14 Eq. 463.
(*h*) Andrews *v.* Lord, 6 Jur. N. S. 865; Re Sarjeant, 11 W. R. 203. And see judgment in Garey *v.* Whittingham, 5 Beav. 270.
(*i*) Martineau *v.* Rogers, 8 D. M. & G. 328.
(*k*) Smith *v.* Spencer, 6 D. M. & G. 631, explained 2 H & M. 639; Cotton *v.* Cotton, 23 L. J. Ch. 489; Else *v.* Else, L. R., 13 Eq. 196.

Word "payable" occurring in gift over, whether it refers to majority or the period of distribution.

arising on the word "payable," in such a case as the following: A money fund is given to a person for life, and, after his decease, to his children at majority or marriage, with a gift over in the event of any of the objects dying before their shares become *payable*.[1] In such cases it becomes a question whether the word "payable" is to be considered as referring to the age or marriage (or any other such circumstances affecting the personal situation of the legatee), on the arrival or happening of which the shares are made "payable," or to the actual period of distribution; in other words, whether the shares vest absolutely at the majority or marriage of the legatees, in the lifetime of the legatee for life; or whether the vesting is postponed to the period of such majority or marriage, *and the death of the legatee for life*. As the latter construction exposes the legatees to the risk of losing the testator's provision in the event of their dying in the lifetime of the legatee for life, although they may have reached adult or even advanced age, and may have left descendants, however numerous, the Courts have strongly inclined to hold the word "payable" to refer to the majority or marriage of the legatees, especially if the testator stood towards the legatees in the parental relation (*l*).

And where (as often happens) the question has arisen under marriage settlements (*m*), the leaning to this construction is [*1614] *strongly aided by the occasion and design of the instrument, whose primary object obviously is, to secure a provision for the issue of the marriage. In wills, the point, like all others, depends solely upon the intention to be collected from the context;

(*l*) As to confining the doctrine to cases where the testator is the parent of or stands in loco parentis to the legatees, see the observations of Cotton, L. J., in Re Hamlet, Stephen *v.* Cunningham, 39 Ch. D. at p. 433.

(*m*) Emperor *v.* Rolfe, 1 Ves. 208; Woodcock *v.* Duke of Dorset, 3 B. C. C. 569; Hope *v.* Lord Clifden, 6 Ves. 499; Schenck *v.* Legh (which is a leading case), 9 Ves. 300; Powis *v.* Burdett, id. 428; Howgrave *v.* Cartier, 3 V. & B. 79; Perfect *v.* Lord Curzon, 5 Mad. 442; Evans *v.* Scott, 1 H. L. Ca. 43, 11 Jur. 291; Re Williams, 11 Beav. 317; Mount *v.* Mount, 13 id. 333; Bailie *v.* Jackson, 1 Sm. & Gif. 175; Swallow *v.* Binns, 1 K. & J. 417; Walker *v.* Simpson, id. 713 (will); Moor *v.* Abbott, 26 L. J. Ch. 787, 3 Jur. N. S. 551; Remnant *v.* Hood, 27 Beav. 74, 2 D. F. & J. 396; Currie *v.* Larkins, 4 D. J. & S. 245; Wakefield *v.* Muffet, 10 App. Ca. 422. But see Whatford *v.* Moore, 7 Sim. 574, 3 My. & C. 289; Lloyd *v.* Cocker, 19 Beav. 140; Jeyes *v.* Savage, L. R., 10 Ch. 555.

[1] Where the time specified is annexed to the payment only, as when a legacy is given payable when the legatee reaches a certain age, the legacy vests immediately on the testator's death. But where the time is annexed to the gift itself, as where the legacy is given at twenty-one, "if" the legatee reach that age, the legacy is contingent till that time. Acken *v.* Osborn, 45 N. J. Eq. 377; Neilson *v.* Bishop, id. 473; Smith *v.* Edwards, 88 N. Y. 92; Reed's Appeal, 118 Penn. St. 215. See also Dryer *v.* Crawford, 90 Ala. 131; Fisher *v.* Johnson, 38 N. J. Eq. 46; Shipman *v.* Rollins, 98 N. Y. 311; In re Mahan, 98 N. Y. 372; Robert *v.* Corning, 89 N. Y. 225; Warner *v.* Durant, 76 N. Y. 133; Fields *v.* Whitfield, 101 N. C. 305; Price *v.* Johnson, 90 N. C. 592; Pleasanton's Appeal, 99 Penn. St. 362; Pond *v.* Allen, 15 R. I. 171; Burnham *v.* Burnham, 79 Wis. 557. Where there is no gift except by a direction to pay or divide at a time stated, the vesting will not take place until that time arrives, unless a different intention appears. Shipman *v.* Rollins, 98 N. Y. 311 (citing Warner *v.* Durant, 76 N. Y. 133); Smith *v.* Edwards, 88 N. Y. 92; Acken *v.* Osborn, 45 N. J. Eq. 377 (citing Post *v.* Herbert, 12 C. E. Green, 540); Reed's Appeal, 118 Penn. St. 215 (citing McClure's Appeal, 72 Penn. St. 414; Little's Appeal, 117 Penn. St. 14). As to the qualification "unless a different intention appears," see Smith *v.* Edwards, supra.

and the cases will be found to present instances of the vesting being held to take place at majority, or at majority or marriage (as the case may be), in the lifetime of the legatee for life, or to be further suspended until the period of actual distribution, according as the language of the will was deemed to admit or to exclude the more eligible and convenient construction.

Thus, in Salisbury *v.* Lambe (*n*), where a testator by his will appointed 2,000*l.*, in trust for the separate use of his daughter S., and afterwards in trust for her daughters and younger sons as she should appoint; in default of appointment, in trust for her daughters and younger sons equally, to be paid at twenty-one or marriage; in case any of them should die or become heir male of S. before his, her, or their share become *payable*, such share to go to the survivor; if all should die before their shares became *payable*, then to S.; S. survived all her children; but Lord Northington held that they took transmissible interests on attaining twenty-one or marriage.

Word "payable" referred to majority, not to period of distribution.

So, in Hallifax *v.* Wilson (*o*), where a testator gave to trustees all his estate and effects, upon trust to lay out the proceeds thereof, after payments of debts, upon security, and pay the interest to his mother, R. M., for life; and, after her decease, upon trust to pay and transfer the said trust moneys unto and among his nephew and nieces; their respective shares, with the accumulated interest, to be paid or transferred to them at their respective ages of twenty-one years; and in case any of his said nephew and nieces should happen to die before his, her, or their share or shares in the said trust moneys and premises should become *payable*, then the testator directed that the share or shares of him or them so dying should go or be paid to the survivors or survivor; and in case of the death of all his said nephew and nieces before the said trust moneys should become **payable*, the testator gave the same to his trustees, [*1615] share and share alike. The question was, as to the destination of the share of the nephew who attained twenty-one and died in the lifetime of the testator's mother. Sir W. Grant, M. R., held that the share in question vested absolutely at majority. "The testator," he observed, "has used the word 'payable,' a word of ambiguous import; in one sense, and with reference to the capacity of the person to take, he had just before declared that the age of twenty-one was the period at which their shares were to be payable; in another sense, with reference to the interest of the tenant for life, they would not be payable until her death; but then it is with the direction to pay at the age of twenty-one that the bequest over is immediately connected;

(*n*) 1 Ed. 465. See also Jackson *v.* Dover, 2 H. & M. 209, and Re Knowles, Nottage *v.* Buxton, L. R., 21 Ch. D. 806, in both of which cases it is expressly laid down that the rule is not confined to settlements, but extends to wills. See also Partridge *v.* Baylis, 17 Ch. D. 835.

(*o*) 16 Ves. 168.

and it is to that period of payment, as it seems to me, that the subsequent words are most naturally to be referred. The declaration, that the shares should be paid at the age of twenty-one, naturally led the testator to consider, what was to become of the shares of those who should not live to attain that age; and there he adds the direction, that the shares should go over. I think it is no strain to understand him as adverting merely to the age of twenty-one, which he had just before appointed as the period of payment."

So, in Walker *v.* Main (*p*), where a testator devised real estate to his wife for life, and after her decease to a trustee upon trust for sale, and directed the produce to be distributed among his children and grandchildren in the following manner: He first gave to several of his grandchildren 20*l.* each, to be paid on their attaining the age of twenty-one years or marrying; and, after bequeathing other legacies, gave to his four children the residue of the money arising from the sale, to be equally divided between them by his trustee as soon as each of them should attain to their respective age or ages of twenty-one years; but upon marriage, whether of age or not, each of their receipts should be a sufficient discharge. But if any or either of his said children or grandchildren should happen to die before the time of such legacy becoming *due and payable*, then the testator gave the share of such child or children or grandchildren, so dying, unto and among those that should be then living. Two of the grandchildren attained twenty-one, and married, and died in the lifetime [*1616] of the widow; and Sir *T. Plumer, M. R., on the authority of the cited cases, and especially of Sir W. Grant's decision in Schenck *v.* Legh (*q*), held that the shares vested absolutely at twenty-one or marriage, in the lifetime of the prior cestui que trust.

On the other hand, in Bright *v.* Rowe (*r*), where a testatrix by virtue of a power appointed the reversion of a sum of 2,000*l.*, in which she and her husband had life interests, to trustees, upon trust for her daughter M., or any other children she might thereafter have by her husband J., to be equally divided between them: but it was her will that, in case the 2,000*l.* should become *payable before M. should attain twenty-one* or day of marriage, or before any other of her children, being a son, should attain twenty-one, or being a daughter, the same age, or marry, then the trustees to invest the same, and apply the interest of each child's share for maintenance; and when any such children, being sons, should attain twenty-one, or being daughters the like age or day of marriage, upon trust to pay them their respective shares of the principal with the unapplied interest; and in case her said daughter M., or any other child she might have by her husband, should happen to die before his, her, or their portion or

Word "payable" referred to period of distribution.

(*p*) 1 J. & W. 1. (*q*) 9 Ves. 300. (*r*) 3 My. & K. 316.

portions of the said sum of 2,000*l.* should become *payable*, then the same should respectively go and belong to the survivors or survivor of them. The testatrix left three children, two of whom died in the lifetime of her husband (who, it will be remembered, had a life interest under the settlement) after having attained twenty-one. Sir J. Leach, M. R., while he admitted the presumption in favor of the vesting of children's shares where the will was ambiguously expressed, yet considered that there was no ambiguity here; and that, by dying before the portions became payable, the testatrix meant dying in the lifetime of her husband, and consequently that the shares of the deceased children had devolved to the survivors.

Word "payable" referred to period of majority.

It was probably considered in this case that the testator had so contrasted the time when the legacy should become payable with the time of attaining twenty-one as to exclude the notion that they were identical. That it was not considered to impair the authority of the previous cases appears by Jones *v.* Jones (*s*), where a testator bequeathed 10,000*l.* to trustees, upon trust for A. for life, and from and after his decease, then to pay it to the * children of A., when and [*1617] as they should severally attain the age of twenty-one years; and in case any of the said children should die before his, her, or their shares should become *payable* leaving issue, then the share or shares of him, her, or them so dying to go and be paid unto his, her, or their respective issue equally; and in case any of the said children should die before his, her, or their share or shares should become *payable* leaving no issue, then the share or shares of him or them so dying to go to and amongst the survivors or survivor; but in case A. should have no child, or his children, if any, should all die *under age* and without issue, then over. A son of A. attained twenty-one, but died in A.'s lifetime; Sir L. Shadwell, V.-C., held that his personal representative was entitled to an aliquot share. His Honor adverted to the ultimate gift over if all should die *under age*, and was of opinion that the word "payable" meant *attain twenty-one.*

Word "payable" implied and referred to majority.

Again, in Woodburne *v.* Woodburne (*t*), where a testatrix gave a legacy to trustees in trust to pay the interest for the maintenance of A., and when he should attain the age of twenty-one to pay him the principal; if he should die before his legacy became *due and payable* leaving issue, such issue to be entitled to the legacy in the same manner as the parent would have been entitled if living. As to the residue, she directed her trustees to pay one moiety of the interest to B. for life, and that after B.'s death one moiety of the principal should be paid

(*s*) 13 Sim. 561. See also Butterworth *v.* Harvey, 9 Beav. 130.
(*t*) 3 De G. & S. 643.

to A., at the time when his other legacy became due and payable, for his own absolute use and benefit: and in case of his death without leaving issue, then over. A. attained twenty-one and died without issue in the lifetime of B. (who, it appears, was still living). Sir K. Bruce, V.-C., remarked that the will gave the issue a contingent interest in the particular legacy, but not in the share of residue; and that this contingent interest was only given if A. died under twenty-one. Looking at the whole will, he thought that the legatee, having attained his majority did not lose his share of the residue, although he died without leaving any issue.

Sir L. Shadwell took no notice of the point which was pressed upon him in Jones *v.* Jones, and which was perhaps glanced at by Sir K. Bruce in Woodburne *v.* Woodburne, that as the will made express provision for the issue of children there was no reason for adopting a construction the chief or only ob-
[*1618] ject of *which was indirectly to provide for such issue. He probably considered that the terms of the ultimate gift over made that construction inevitable. The same construction, however, notwithstanding a similar argument, was adopted by the same judge in the previous case of Mocatta *v.* Lindo (*u*), where the trusts of a marriage settlement, after the deaths of husband and wife, were for all and every the children of the marriage, share and share alike, *to be paid and payable* to them at twenty-one or on marriage, and to the children or issue of such children of the marriage as should die leaving children before their respective shares should become payable *as before mentioned;* but if any such children should die before their shares should become payable without leaving any issue, then over. So, in Mendham *v.* Williams (*x*), where after the death of the tenant for life the trust was to divide the fund equally between the testator's children, their shares to be *vested* in them as and when they should attain twenty-one or (as to daughters) be married; and to apply the income during minority for maintenance (*y*); with a gift over to the issue of any of the children who should die leaving issue before their respective shares should *become due and payable;* Sir W. P. Wood, V.-C., thought it was too thin a distinction to rely upon for him to say that there was here a gift over to the issue; and he held that the share of a child who attained twenty-one was not divested by her death in the lifetime of the tenant for life leaving issue.

Distinction where the issue of the legatee are expressly provided for.

But, in Re Willmott's Trusts (*z*), where by marriage settlement stock

(*u*) 9 Sim. 56. See Partridge *v.* Baylis, 17 Ch. D. 835. See also Wakefield *v.* Moffet, 10 App. Ca. 422 (a settlement case).

(*x*) L. R., 2 Eq. 396. Jones *v.* Jones was relied on, but without noticing the ultimate gift over in that case. See also West *v.* Miller, L. R., 6 Eq. 59, where however the point was not alluded to; Re Thompson's Trust, 5 De G. & S. 667.

(*y*) As to the effect of this clause on the vesting in such a case, see Vol. I., p. 809.

(*z*) L. R., 7 Eq. 532.

was settled in trust for husband and wife successively for life and after the death of the survivor in trust to assign, transfer, and dispose of the fund unto and amongst the children of the marriage "and the issue of such of them in case any of them shall be *then* dead" as husband and wife should appoint, and in default of appointment unto and amongst the children of the marriage in equal shares; and in case any of them should happen to be dead leaving issue, unto the issue of such one or more as should be then dead (per stirpes) equally to be divided amongst the children or their issue, to each being a son at his *age of twenty-one, and [*1619] to each being a daughter at her age of twenty-one or day of marriage; and in the mean time until their shares should become payable as aforesaid, to pay the income for maintenance; and in case any or either of the children should die without issue before his, her, or their share or shares should become *due and payable*, in trust to pay such share or shares to the survivors of the children and the issue of any one or more who should be dead leaving issue, in equal shares, and when and as the original shares should become due and payable; and in case, at the death of the survivor of the husband and wife, there should be no child of the marriage, nor any issue of such child living, or if there should be any such then living, yet if all of them should die before his, her, or their share or shares were payable, then over. A son attained twenty-one and died without issue in the lifetime of the surviving tenant for life. It was held by Sir W. M. James, V.-C., that as provision was made for the issue of any child dying before the tenant for life, the rule of construction founded on Emperor *v.* Rolfe did not apply, and that the share of the deceased son went over to the surviving children of the marriage. He said that in Mocatta *v.* Lindo, it was held that "payable" there meant vested (*a*). "I am bound to say (he added) I do not think I should have held upon that instrument that 'payable' meant 'vested.' In this case (he continued) there is no question about vesting at all. The question is one of divesting. The gift to the issue of a child dying does not depend upon the death of the child under twenty-one, as in Mocatta *v.* Lindo and Mendham *v.* Williams; but the gift to the issue of a child dying is to take effect upon the death of that child at any time during the life of the tenant for life."

Re Willmott's Trusts

Distinction where the issue of the legatee are expressly provided for.

Observations of James, V.-C., on Mocatta *v.* Lindo, and Mendham *v.* Williams.

It will have been observed that in the cases referred to by the V.-C., the gift over to issue was to take effect on the death of a child before his share "became payable," and that it was only by construc-

(*a*) Qu. The interests of the children were clearly vested at birth. The question was (as in Re Willmott's Trusts,) one of divesting, and was not treated *by the Court* as one of vesting. But much of the phraseology of these cases was borrowed from those on portions charged on realty.

tion that the gift depended on the death of a child under twenty-one. The distinction, however (whether it exactly answers those cases or not), appears to have this basis, — that where the gift to issue is unequivocally intended to depend upon the death of a child under twenty-one, "payable" (occurring in a gift over upon the [*1620] death of a child without issue) may properly *be held also to refer to the age of the child, since that is the period clearly indicated by the alternative clause, and if the word were held to refer to the death of the tenant for life (either specifically, or as being the period of actual distribution), it would follow that a child attaining twenty-one, and afterwards dying without issue in the lifetime of the tenant for life, would himself lose the share, while the issue would not get it.

Distinction where the issue of the legatee are expressly provided for.

The effect of an express provision for the issue of the legatee was again discussed in Haydon *v.* Rose (*b*), where a testator gave real and personal estate to his son A. for life, and after his death to be sold and the proceeds *to be paid and divided* among the testator's eleven grandchildren *as and when* they should respectively attain twenty-one, with the gift of the income of each share for maintenance; the share (accruing and original) of any grandchild who should die before such share should become *payable* without leaving a child was then given to the survivors; and the share of any grandchild who should die before such share should become payable leaving children was given to the children: notwithstanding Re Willmott's Trusts, it was held by Lord Romilly, M. R., that the share of a grandchild who attained twenty-one was not divested by his death in the lifetime of the tenant for life.

On the other hand, in Day *v.* Radcliffe (*c*), where money was settled in trust for A. and her husband successively for life, and after their several deaths in trust to pay, divide, transfer, or assign the fund to the children of A. and the issue of such children, *to be paid* to such as should be sons *at twenty-one* and to such as should be daughters at twenty-one *or marriage*, the issue of any child dying before his or her share should become *payable* to be entitled to the share which the parent would have been entitled to *if living;* but in case A. should die without leaving any issue as aforesaid, then to pay, transfer, or assign the fund as A. should by deed or will appoint. A son of A. attained twenty-one, and afterwards died in the lifetime of A. leaving issue. It was held by Sir G. Jessel, M. R., that independently of authority there could be no doubt that "before his share becomes payable" meant before the period of distribution, and that the representative of the deceased son was therefore not entitled to a share.

(*b*) L. R., 10 Eq. 224. The gift of income for maintenance appears to have made this an immediately vested interest.
(*c*) 3 Ch. D. 654. Cf. Re Thompson's Trust, 5 De G. & S. 667.

"One remark (he said) which strongly tends to show this to be the meaning is that, if you read 'payable' as 'vested,' the * provision in favor of issue can never take effect as regards [*1621] daughters, for a daughter cannot have children until she is married, and if she marries her share becomes vested" (*d*).

Again in Chell *v.* Chell (*e*), where a testator gave his real and personal estate to trustees in trust for his wife for life, and after her death for all and every of his children share and share alike until the youngest attained twenty-one, and on that event happening, in trust for all and every of his children share and share alike, and for their respective heirs and assigns; provided that if any of his children should die before their shares became transferable and *payable* without leaving issue, their shares should be transferred and paid equally among the survivors at such time as their original shares were made payable; but if any of his children should die before their shares became *payable* leaving issue, then the trustees were to transfer and pay the shares of such deceased children to their issue when they attained twenty-one. One of the children, who was living when the youngest attained twenty-one, died in the lifetime of the wife leaving issue; and it was held by Sir C. Hall, V.-C., on the authority of Re Willmott's Trusts, that the share of the deceased child was divested by the substitutionary gift. He said that the gift in Haydon *v.* Rose was to children at twenty-one (*f*), and that was quite sufficient to distinguish it.

Distinction where the issue of the legatee are expressly provided for.

It is not stated whether the distinction here intended is between a vested and a contingent gift, or between a time named for payment which is, and one which is not, personal to the legatee. Probably the latter, since the word "payable" seems to be as properly referable to the time of actual distribution (*g*) where the gift is contingent as where it is vested; since in either case the legatee must outlive the age or time named to acquire an indefeasible interest.

In this state of the authorities, it seems not to be too much to say that the word "payable" occurring in the executory bequests under consideration, is held to apply to the age or marriage of the legatee, and not to the period of the death of the legatee for life, unless the latter is shown by the context to be intended by the testator: but that, according to the * great [*1622] preponderance of present judicial opinion, an intention in favor of the latter will be inferred where, in the event of the legatee

Result of the cases.

(*d*) See, however, Mendham *v.* Williams, L. R., 2 Eq. 396.
(*e*) 23 W. R. 253, W. N. 1875, p. 6.
(*f*) But see ante, p. 1620, n. (*b*).
(*g*) As distinguished from the specific period of the death of the tenant for life. If *this* period were taken, then, in the event of the legatee outliving the tenant for life but dying under age, both the contingent gift to himself and the gift over to his issue would fail.

dying at any time during the life of the tenant for life leaving issue, the legacy or share is given to the legatee's issue (*h*); and similarly that an intention in favor of the actual period of distribution will be inferred where the legacy or share is given to the issue in the event of the legatee dying before the legacy or share becomes payable (*i*). This is said to be the natural meaning of the words, and to satisfy them and acquire an absolute interest the legatee must both attain twenty-one and survive the tenant for life.

Construction not varied by tenant for life dying before majority of legatee.

It is presumed that if upon the true construction of the will "payable" applies to the age or marriage of the legatee, the construction will not be varied by the accident of the legatee for life dying before the majority or marriage of the legatee in remainder; but that the interest of the latter will remain liable to defeasance during minority or until marriage (*k*).

Where no time fixed for payment, "payable" refers to period of distribution.

But if no time is specified for payment, the word "payable" in the gift over will be held to refer to the death of the tenant for life, and the legatee in remainder must survive him in order to take (*l*). The only alternative would be to consider that it was intended to prevent a lapse, — a construction which, as we have seen, the Courts do not readily adopt.

So under gift to such as survive tenant for life, notwithstanding time fixed for payment.

Again, if the original bequest be to such children only as survive the tenant for life, to be paid at twenty-one, with a gift over if all the legatees die before their shares become payable, the word "payable" will, as it would seem (*m*), bear its ordinary meaning, and the gift over will take effect if none of the legatees survive the tenant for life, although they have attained the age of twenty-one; otherwise, both the original gift and the gift over would fail; since by no construction could the word "payable" be held to enlarge the class entitled under the original bequest.

If an immediate legacy is given without specifying a time [*1623] * for payment, and is given over in case the legatee dies before it becomes payable, the word "payable" can only have reference to the death of the testator (*n*). And even where

(*h*) Re Willmott's Trusts, L. R., 7 Eq. 532.

(*i*) Day *v.* Radcliffe, 3 Ch. D. 654; Chell *v.* Chell, 23 W. R. 252. If it be real estate which is thus given over to the issue, there is this additional reason against applying "payable" to the age of the legatee, viz. that a rule of construction which was designed to let in the issue ought not thus to be used to exclude all but one of them, viz the heir-at-law, see per Hall, V.-C., 25 W. R. 789.

(*k*) See Williams *v.* Clark, 4 De G. & S. 475.

(*l*) Creswick *v.* Gaskell, 16 Beav. 577. See also Crowder *v.* Stone, 3 Russ. 217, ante p. 152, where the point seems to have been assumed.

(*m*) See per Shadwell, V.-C., Bielefield *v.* Record, 2 Sim. 354. See also Jeffery *v.* Jeffery, 17 Sim. 26 (deed); Hind *v.* Selby, 22 Beav. 373. And see Farrer *v.* Barker, 9 Hare, 737.

(*n*) Cort *v.* Winder, 1 Coll. 320. See also Whitman *v.* Aitken, L. R., 2 Eq. 414.

a legacy (whether immediate or after a prior life estate) is directed to be paid at a particular age, as twenty-one, and is given over in case the legatee dies before it becomes "payable," the gift over takes effect if the legatee dies before the testator, although he may have attained the age. The legacy has not become payable in fact, and the only effect of holding "payable" in this case to mean "attain twenty-one" would be to cause a lapse (*o*). The legatee must survive both events, the time appointed for payment (*p*) as well as the death of the testator.

Where no prior life estate, and no time fixed for payment.

Where time fixed but legatee predeceases testator.

Although the very word "payable" is the most apt to connect itself with a previous direction to "pay," a similar construction has obtained in cases where the gift over was on death before becoming "entitled in possession" (*q*), or "entitled to the payment" (*r*), or "to the receipt" (*s*), or before the legacy is "received" — read "receivable" (*t*).

"Entitled in possession," &c.

II. — 4. *Death before a Legacy is "vested."* — The proper legal meaning of the word "vested" is vested in point of interest (*u*). But its natural and etymological meaning is said to be vested in possession (*x*); and there are many cases of gifts over on the death of the legatee before his legacy has become "vested," where upon the context the word has been held to bear the latter sense. Thus where an immediate legacy, vested at the testator's death, with a direction for payment at twenty-one, was followed by a gift over in case the legatee should die before it became *vested as aforesaid*, this was held to mean die before twenty-one (*y*).

Gift over on death before "vesting" of immediate legacy.

So where a vested remainder to children was followed, — in one case by a gift over "if any die *before or after me* and before their shares become *vested* interests" (*z*), and in another by distinct * gifts over, "if any die *before me*" leaving issue, [*1624] and, if any die "before their shares become *vested*" leaving no issue (*a*), — in both these cases "vested" was held to mean vest in possession by the death of the tenant for life. A similar decision was made where the remainder was to and among several, and "if any die without leav-

— of legacy possession of which is deferred.

(*o*) Walker *v.* Main, 1 J. & W. 1, as explained ante, p. 1576, n. (*e*); Re Gaitskell's Trust, L. R., 15 Eq. 386 (direction to vest at twenty-one, with gift over on death before attaining a vested interest).
(*p*) Jenkins *v.* Jenkins, Belt, Supp. Ves. 264.
(*q*) Re Yates's Trust, 21 L. J. Ch. 281, 16 Jur. 78.
(*r*) Re Williams, 12 Beav. 317 (settlement).
(*s*) Hayward *v.* James, 28 Beav. 523.
(*t*) West *v.* Miller, L. R., 6 Eq. 59. As to reading "received" as "receivable," see post, p. 1627.
(*u*) Richardson *v.* Power, 19 C. B., N. S. 780.
(*x*) Young *v.* Robertson, 4 Macq. 314, 8 Jur., N. S. 825.
(*y*) Sillick *v.* Booth, 1 Y. & C. C. C. 121.
(*z*) King *v.* Cullen, 2 De G. & S. 252.
(*a*) Re Morris, 26 L. J. Ch. 688.

ing issue before his share vests in him then to be equally divided among the *survivors*," "survivors" per se being considered to be referable to the death of the tenant for life (*b*) : and again where a remainder to children was followed by a gift over, if all died before attaining a *vested* interest, to the *then* next of kin of the testator and the *then* next of kin of his wife *the tenant for life* (*c*).

The simple case, unaffected by context, of a gift, vested in interest at the testator's death, but postponed in point of possession, does not appear to have presented itself for interpretation. And it seems doubtful whether, in a divesting clause, a departure from the proper technical sense would be justified merely because that sense imputes to the testator an intention to provide only for death in his own lifetime, and to do so, not by the obvious and simple words "die before me," but by "a circumlocution which is at least of ambiguous import" (*d*).

In Parkin *v.* Hodgkinson (*e*), a testator, after giving a house and an annuity to his sister for life, gave the residue of his real and personal estate to his nephews A., B., and C., the children of his deceased brother, their heirs, executors, &c., as tenants in common, "with cross-remainders between them as to my real estate and with benefit of survivorship as to my personal estate in case any of them should die before their shares in the trust property should become vested in them respectively, which I desire may not be shared till the decease of my said sister and my youngest nephew arrive at twenty-four." The only question was whether the gift to the nephews (one of whom was still an infant) was originally vested, or, as contended by the next of kin, wholly contingent until the time appointed for sharing. Sir L. Shadwell, V.-C., said, "There is first of all an absolute gift to the nephews, their heirs, executors, &c., as tenants in common. Then comes the clause [*1625] 'with cross-remainders . . . vested in * them.' It seems to me that that clause is wholly void. If any meaning is to be attributed to it, it is, 'if any of them shall die in my lifetime.' Then follows the clause 'which I desire may not be shared,' &c. That is a direction solely as to the sharing, and not as to the vesting of the property. Declare that on the testator's decease his residuary real and personal estate vested absolutely in his nephews."

The next of kin could of course take nothing under a *divesting* clause in favor of survivors. The nephews, who alone were interested in the construction of the clause, did not raise the question, and the suggestion of the V.-C. that "vested" referred to the death of the testator was extrajudicial, though probably warranted by the particular mode in which it stood contrasted with "sharing."

(*b*) Young *v.* Robertson, 4 Macq. 314, 8 Jur. N. S. 825. But see ante, p. 1554, note (*p*).
(*c*) Greenhalgh *v.* Bates, L. R., 2 P. & D. 47.
(*d*) See Lord Cranworth's remarks on this circumlocution, Young *v.* Roberston, sup.
(*e*) 15 Sim. 293.

In Richardson *v.* Power (*f*), where two estates were differently devised; one to H. and her issue successively, with remainder to A. in fee; the other to trustees until A. should attain twenty-five, and then to him in fee; and it was declared that if A. should die without issue, living at his death and before the said several estates should become vested in him by virtue of the limitations aforesaid, they should go over to such of the testator's daughters as should then be living. A. survived the testator and died before H. without leaving issue living at his death. It was held that "vested" must be construed in "its usually received and recognized technical sense," and that the gift over of the *former* of the two estates failed. Here were two estates, it was observed, one of them so devised that it might be doubted (*g*) whether it vested in A. before he attained twenty-five, and although, to make a gift over of the other estate alone, it would have been simpler to say, "before my death," it would not have been so, if the testator had intended the gift over to take effect as to some of the estates comprised in it on A. dying before himself, but as to others (*h*) on his dying before twenty-five.

Construction of gift over on death before "vesting" of two estates differently devised.

The word "entitled," like "vested," points primâ facie to the right, and not to the possession. But it appears to have no technical meaning, and in most cases will depend on the context for its effect. In a case (*i*) where a testator appointed that certain * property, representing a settled fund in which [*1626] his wife had a life estate, should immediately after her death go to his younger sons in certain shares, and if any of them should die before being entitled thereto, their shares should go to the survivors in equal shares, it was held by Sir E. Sugden that the only event provided for was death in the testator's lifetime. This decision was reluctantly followed by Sir K. Bruce, V.-C. (*k*), in a case where the gift was to one for life, and after her death to several, as their own proper goods from thenceforth and forever, share and share alike, and if any of them should die before they became entitled to their shares, such shares to go to their issue. "But for the cases cited," said the V.-C., "I should probably have decided otherwise." It is to be observed that Sir E. Sugden's decision was based on Doe *v.* Prigg (*l*), and the doctrine there maintained, that in a gift

Death before "entitled."

Held to refer to the interest.

(*f*) 19 C. B., N. S. 789, in Ex. Ch.; see also Re Arnold, 33 Beav. 162, 172.

(*g*) Semb., doubted by the testator: the Court seemed not to doubt that it was vested, according to the rule in Boraston's case, 3 Rep. 19, ante, Vol. I., p. 762.

(*h*) *I. e.*, if those others should turn out not to be vested till twenty-five, semb.

(*i*) Commissioners of Charitable Donations *v.* Cotter, 2 D. & Wal. 615, 1 D. & War. 498.

(*k*) Henderson *v.* Kennicot, 2 De G. & S. 492. Besides Sir E. Sugden's decision, Fry *v.* Lord Sherborne, 3 Sim. 243, was cited. But that was the case of a settlement, where it was held that, on attaining twenty-one, daughters became absolutely entitled to portions, which were expressly made payable at that age, or within six months after the death of their father, tenant for life of the lands charged (whichever event should last happen), notwithstanding a direction that if the daughters should die before their portions were *payable* they should not be raised.

(*l*) 8 B. & Cr. 231, ante, pp. 1538, 1547.

to survivors after a previous life estate "survivors" primâ facie meant those who were living at the death of the testator. But now the rule is, that such a gift provides for death happening in the lifetime of the tenant for life, which pari ratione should in a case like that before Sir E. Sugden, lead to a corresponding construction of the word "entitled."

On the other hand, in Turner *v.* Gosset (*m*), where the bequest was to several, and to their children after them, and if they should leave no children (which happened) then an equal share to be paid to each of four named persons, and "in case of the death of either of them before they should severally become entitled to the said share," it was given to the children or other issue of such of them as should be then dead leaving issue per stirpes. Sir J. Romilly, M. R., held that this meant "become entitled in possession."

Held to refer to the possession.

And if the legacy vests at birth in persons who must necessarily be born after the testator's death, the sense of entitled in interest is almost necessarily excluded, since they cannot die before becoming so entitled (*n*).

[*1627] * II. — 5. *Death before "receiving" a Legacy.* — Executory gifts over in the event of legatees dying before "receiving" their legacies have given rise to much litigation. Actual receipt may be delayed by so many different causes that the Court is unwilling to impute to the testator an intention to make that a condition of the legacy, and thus indefinitely postpone the absolute vesting of it. If, therefore, the will points out a definite time when the right to receive the legacy accrues, either expressly, as by directing payment at a particular age or time (*o*), or by implication from the dispositions of the will, as upon the determination of a prior life estate (*p*), the gift over will be referred to that time. And if there is a direction to pay at a specified time, as well as a prior life estate, the case falls within the decisions already noticed respecting gifts over on death before the legacy is "payable."

Gift over on death before "receiving;"

— construed receivable when the will points out a time for payment.

Thus in Rammell *v.* Gillow (*q*), where a testator bequeathed his property to trustees in trust to sell, to invest the proceeds, and to pay an annuity of 200*l.* to his wife during widowhood; and as to the residue during her life, and after her decease as to the whole, in trust

(*m*) 34 Beav. 593. See also Re Noyce, Brown *v.* Rigg, 31 Ch. D. 75.

(*n*) See Jopp *v.* Wood, 2 D. J. & S. 323 (settlement), where note that there was only one gift over of the whole fund in the event (which did not happen) of all the legatees dying before becoming entitled.

(*o*) Whiting *v.* Force, 2 Beav. 573.

(*p*) Re Dodgson's Trust, 1 Drew. 440. See also Wilks *v.* Bannister, L. R., 30 Ch. D. 512; Re Miles, Miles *v.* Miles, 61 L. T. 359. In Girdlestone *v.* Creed, 10 Hare, 487, a gift of "what I have received from the estate of A." was held to pass property so derived though not received.

(*q*) 15 L. J. Ch. 35, 9 Jur. 704.

to pay and divide the same equally amongst his children born or to be born as well sons as daughters as and when they should respectively attain twenty-one; but in regard to such of his children as had already attained that age he directed their shares to be paid to them at the expiration of twelve months after his wife's decease, or so soon after as the trustees should have assets in their hands; but, in the event of the decease of any of his said children, sons or daughters, before they should have *received or become possessed* of their divisional share aforesaid leaving issue, their share was to go to their children. Three of the sons (the plaintiffs) had attained twenty-one at the date of the will. The widow was still living. Sir James Wigram, V.-C., said, "If the widow had taken a life interest in the whole, and if the clause which relates to the children who had already attained twenty-one had directed that all the children should not receive what was given to them until the expiration of twelve months after the death of the widow, there would, I think, have been a very plausible ground for contending that, the payment being postponed merely for the convenience *of the life estate [*1628] of the parent, the case ought to be dealt with as in the cases referred to by the plaintiffs (*r*). If, on the other hand, no part had been given to the widow, it appears to me to be impossible, without direct violence to the language of the will, and without any reason for violating it, that the Court should put a different construction on it from that which it naturally bears." Here part was given to the widow for life, and part not; and the V.-C. thought that in a case in which it was impossible to say what the testator had in his contemplation, the reasoning that would apply to the part that was given to the widow for life could not be transferred to the rest. As to the shares of the plaintiffs, therefore, he held that they could not be dealt with as in the cases referred to, but would go over if the legatees died before "receiving" their shares. "What that means," he added, "I need not decide. . . . If the widow were to die, and at the end of a year one of them had not received anything, and that child was to die, I do not mean to say that that share would go over merely because it had not been actually received." As to children who had attained twenty-one since the date of the will (to whom, it will be observed, as well as to the plaintiffs, the gift over applied), he held that they took vested interests not liable to be divested.

If no such period is indicated by the particular will it becomes a question whether there is not some time at which, according to the general law regulating the subject, the gift may properly be said to be receivable and to which the testator may fairly be supposed to refer. Thus in Re Arrowsmith's

When referred to end of one year after testator's death.

(*r*) Viz., Schenck *v.* Legh, &c. ante, p. 1613, n. (*m*). See accordingly West *v.* Miller, L. R, 6 Eq. 59.

Trusts (*s*), where a testator gave his money out on security that should be due to him at his decease, in trust to be paid and divided unto and between his nephews and nieces who should be then living, with a gift over, in case any of them should die "before receiving their respective shares," to the surviving nephews and nieces; it was held by Sir R. Kindersley, V.-C., that "die before receiving" meant die within one year after the testator's death, that being the period which is generally allowed to executors for the getting in and distribution of their testator's estates, and at the end of which the shares might be said to be receivable (*t*). The words [*1629] * could not be construed "die before the testator," because the original gift was expressly to persons living at the testator's death, and that construction would render the gift over inoperative. This gave an indefeasible interest to all but one niece, who alone died within the year. On appeal, K. Bruce and Turner, L. JJ., agreed with the rest of the decision, but as to the share of the deceased niece, a decision having become unnecessary, Sir K. Bruce would not give any opinion, and Sir G. Turner said he was disposed to think an inquiry ought to have been directed whether *any part* of the fund was received or could properly, having regard to the state of the assets, have been paid over *within the year*. The executors, according to general rules (he said), might have paid it, but the V.-C.'s decision, that the gift over would take effect on death within the year, would prevent their making any payment within that period. . . . "There are two periods to which the words may refer, the period when the fund was actually got in, or the period when it could have been paid over to the legatees. To refer them to the former period would be a most inconvenient construction." He therefore preferred the inquiry.

Whether court may inquire whether receipt within the year was possible.

Again, in Re Collison (*u*), where a testator gave real and personal estate to trustees in trust to sell and out of the proceeds to pay debts and an annuity, and to set apart a fund for the latter, and subject thereto to divide the residue into six parts unto and among his six nephews and nieces (named), the shares of nephews to be paid as soon as practicable, the shares of nieces to be invested and the income paid for their separate use; in case any of his nephews should *die before him or before the division of his estate* their shares to go to their children if any, if no children then to the remaining legatees; there was a similar gift over of the shares of nieces. A niece died unmarried within one year after the testator's death; Sir E. Fry, J., adopted Sir R. Kindersley's reasoning in Re Arrowsmith's Trusts,

(*s*) 29 L. J. Ch. 774, 30 id. 148, 6 Jur. N. S. 1232, 7 id. 9, 2 D. F. & J. 474. See also Re Chaston, Chaston *v.* Seago, L. R., 19 Ch. D. 218; Re Wilkins, Spencer *v.* Duckworth, id. 634.

(*t*) So in Brooke *v.* Lewis, 6 Mad. 358, a gift to such as should be living at the time of *distribution* was held to mean at the end of one year from the testator's death.

(*u*) 12 Ch. D. 834.

and held that the reasonable and convenient interpretation of "division" was the year allowed by law for division. It was argued that the deceased niece was at all events entitled to her share of what *might* have been paid before her death. But the Judge said that though there was some authority for directing an inquiry when a division might have been made, "the decision in Hutcheon *v.* Mannington (*x*) proceeded on the extreme difficulty of deciding whether a thing *might or might not [*1630] have been done. I should (he added) be directing an inquiry of the description which Lord Thurlow rejected in that case, and such as the House of Lords in Minors *v.* Battison (*y*) held ought not to be directed. Moreover, . . . it must rest with those who say that a division ought to have been made earlier [than the end of the year] to adduce evidence that it could. So far as the evidence goes in the present case it shows the contrary. . . . On that ground, *independently of any other*, I should reject the presumption that the estate could have been divided at an earlier period."

Inquiry rejected.

Of the two cases here referred to, Minors *v.* Battison will be stated presently, and will (it is submitted) be found not directly to raise the point here in question. But Hutcheon *v.* Mannington (*z*) is both an illustration of the extreme reluctance of the Court to read a gift over on death before "receiving" as referring to actual receipt, and an important authority on the propriety of directing an inquiry whether the legacy could or could not have been received before the death of the legatee.

In that case a testator, after reciting that his fortune, consisting of 8,627*l.*, was all vested in Indian securities, gave several legacies, and annexed to each a gift over if the legatee should die before he "may have received" it. Then, after calculating the amount of the residue, he gave it to his father, "but in case of his death before he may have received the rest and residue of my estate before mentioned," then over. The father survived the testator some three years, and died without having received any part of the residue. For the plaintiffs, claiming under the gift over, it was argued that the testator, having express regard to the situation of his property, intended it to go over if the legatee did not live to receive it; that if real estate were given in trust to sell with all possible diligence, the Court would inquire into that; so here there ought to be an inquiry within what time he might have received it; the plaintiffs insisting that the estate could not have been got in before his death. Lord Thurlow said: "Suppose any of these legatees had

Hutcheon *v.* Mannington. Inquiry, what *might* have been received, rejected as impracticable.

(*x*) 1 Ves. Jr. 366.
(*y*) 1 App. Ca. 428.
(*z*) 1 Ves. Jr. 366, 6 id. 536, and see the judgment more shortly and in some respects differently stated, 4 B. C. C. 491 n.

died within a year after the testator, there might have been some ground for saying that the testator alluded to the known practice of the Court to compute interest on legacies from a year after the death of the testator. I rather believe he had some such [*1631] purpose *as you attribute to him in his contemplation. There is a faint indication of a purpose that there shall be some time or other when these interests shall go over, and that they shall not vest in the mean time. But has he conceived that intention and expressed it with such definite certainty that I can act upon it? I am to compute what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain. . . . Suppose he had given a real estate in the manner you specify; it is clear that it will neither depend on the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness; in some way it may be sold immediately; but I should not inquire when a real estate might have been sold with all possible diligence, for it might be the very next day or that very evening, and therefore, the Court always in such a case considers it as sold the moment the testator is dead; for where there is a trust, that is always considered here as done which is ordered to be done, and the Court cannot measure the time. Suppose this property had been in the West Indies instead of the East, it would have taken less time to be remitted; still less if in Jersey or Cumberland; and if only 100 miles off it would have cost a journey of two days at least. In this case it is an immeasurable purpose. I can do nothing with it; and it must be considered as vested from the death of the testator."

Of Lord Thurlow's construction of the words "may have received," Lord Eldon (who was the plaintiff's counsel in the case) repeatedly expressed his disapproval. On one occasion he said, "The natural construction was, if the legatee should die before the property should be actually remitted to him. But Lord Thurlow thought himself at liberty to put a construction upon the will that might by possibility be put upon it, supposing an intention that there should be an inquiry as to each and every part when it might be said that it could have been received" (*a*). And on another occasion he said he thought the construction was "too bold;" and that Lord Thurlow "thought there was an indication of a purpose such as was contended for by the plaintiff, but that it was impossible to inquire when each and every part of the estate could have been received, collected, and got in" (*b*).

Lord Eldon's observations on Hutcheon *v.* Mannington, 1st as to the construction;

As to the decision that it was impossible to inquire when the legacy might have been received, Lord Eldon said (*c*), "What- [*1632] ever *may be the difficulty of construing the expressions in Hutcheon *v.* Mannington, whenever a testator directs his

(*a*) 11 Ves. 497.
(*b*) 6 Ves. 536.
(*c*) Gaskell *v.* Harman, 11 Ves. 507; and see the inquiry directed in that case.

trustees to mortgage, sell, or convert his estate into money, this principle is clear, that no fraudulent or unnecessary dilatory dealing by trustees shall affect third persons. The duty of the Court would require them to discuss as a matter of fact that loose expression, 'what they might have received.'"

And in Law *v.* Thompson (*d*), where the gift over annexed to a simple legacy was in case of the legatee's death "before the said sum be paid into his hands," and the executors having renounced, great delay occurred in remitting the assets from India, so that the legatee died before payment; Sir J. Leach, M. R., held that though this meant actual payment, the rights of the legatee could not be defeated by the accidental circumstances of the case, and therefore he directed an inquiry whether, if the will had been proved by the executors, and reasonable diligence had been used by them, any and what part of the testator's property given to the legatee could have been remitted to him in his lifetime.

An inquiry extending over the lifetime of the legatee appears to differ from an inquiry limited to one year (such as was advocated by Sir G. Turner) only in the amount of labor involved.

Hitherto it has been assumed that if the testator clearly intends the legacy to be divested unless actually received by the legatee, such intention will prevail. Such was clearly the opinion of Lord Eldon, Sir W. Grant, and Sir J. Leach. Lord Eldon, in an often-cited judgment (*e*), says, "I admit the soundness of the proposition, that if a testator thinks proper, whether prudently or not, to say distinctly, showing a manifest intention that his legatees, pecuniary *or residuary*, shall not have the legacies or the residue unless they live to receive them in hard money, there is no rule against such intention if clearly expressed. But that would open to so much inconvenience and fraud that the Court is not in the habit of making conjectures in favor of such an intention. In Hutcheon *v.* Mannington, I admit I thought the meaning of those words was, what they shall have received; and I thought so even after the decision. The use I have since made of that case is as an authority that if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him." And Sir W. Grant said (*f*), that Lord Thurlow proceeded * on the ground "that he was called [*1633] upon to determine, not whether any particular event had or not happened before the death, but whether an event might by possibility have happened." That is to say, Lord Thurlow held the words to mean something that he thought was void, rather than hold them to mean something so inconvenient (because valid) as "die before he shall have received."

Is a gift over, on death without actually receiving, valid?

Early opinions, pro.

(*d*) 4 Russ. 92. (*e*) In Gaskell *v.* Harman, 11 Ves. 497. (*f*) 8 Ves. 555.

But Hutcheon *v.* Mannington has been cited in recent times as deciding that a gift over, if the legatee dies without actually receiving his legacy, is void. Thus, in Martin *v.* Martin (*g*), where a testator gave his property to be equally divided among his nephews and nieces, and if any of them should die before him or before they should have actually received what was to go to them under the will, their share to go over; it was held by Sir W. P. Wood, V.-C., that the gift over was void. He said, "It is a common impression on testators' minds that the event may occur of death before actual receipt of property given. The law has interfered on account of the extreme difficulty of meeting such a wish. In Hutcheon *v.* Mannington Lord Thurlow uses the expression, 'It is an immeasurable purpose.'"

Martin *v.* Martin, contra.

But, as already noticed, Lord Eldon dissented from the construction adopted in Hutcheon *v.* Mannington, precisely because the words there used were held *not* to mean "before actually receiving" (*h*). And no doubt of the validity of a divesting clause depending on actual receipt was suggested in Whitman *v.* Aitken (*i*), where to a simple legacy was annexed a gift over if the legatee should die before the legacy was actually paid or payable to him. The legatee died a few months after the testator, and effect was given to the gift over by Sir J. Stuart, V.-C., who construed the clause as providing for two events, — death in his own lifetime, which would be before the legacy was payable, and death after his own decease without having been actually paid.

The gift over upheld in Whitman *v.* Aitken.

However, in Minors *v.* Battison (*k*), Lord Thurlow's decision was again referred to as denying the validity of a gift over on death without actually receiving. Minors *v.* Battison did not directly raise this point; but it is a case which requires consideration: a testator gave his real and personal property to [*1634] * trustees in trust for his wife for life, after whose death there was a provision (whether a trust or only a discretionary power was the principal question in the case) for sale of the property and for division of the proceeds among the testator's children; and if any child should *survive the wife* and die before he or she should have *received* his or her share, such share was given over. The eldest son survived the wife more than a year, but died before any sale was made, and the question was whether his share was divested by the gift over. Sir C. Hall, V.-C., held that it was not, being of opinion that it was a trust and not a power; and he declared that *for the pur-*

Minors *v.* Battison.

(*g*) L. R., 2 Eq. 404; see also Re Kirkbride's Trusts, id. 400.
(*h*) And see the observations of Fry, J., on this case in Re Chaston, Chaston *v.* Seago, 18 Ch. D. at p. 227.
(*i*) L. R., 2 Eq. 414.
(*k*) 1 App. Ca. 428. The statement in the text, except of the gift over, is much abridged. The opinions of the V.-C. and of the L. JJ. are to be collected at pp. 432, 436, 438, 446, 447, 453.

poses of distribution the estate ought to be considered as sold and converted at the expiration of twelve months from the death of the testator's widow. This was reversed by the L. JJ., who held that there was no trust, but only a power to sell at the absolute discretion of the trustees. They, as well as the V.-C., construed "received" as de jure receivable; but held that the shares did not become de jure receivable until the trustees chose to sell: the exercise of their discretion as to any part fixed the time as to that part. But the original decision was restored in D. P.

Now, as it was not contended that actual receipt was meant, the validity of a divesting clause which does was not in question (*l*). But Lord Selborne made some observations on that question. Referring to the clause in that case, he said, "These words in their natural sense (from which there is nothing in the context to authorize any departure) relate to the death of a child during the interval between the death of the widow and the time when that child's share might be actually received, or at least de jure receivable. It was decided in Hutcheon *v.* Mannington, and Martin *v.* Martin, that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect. Lord Thurlow said, in the former of these cases, that it would be * contrary to common [*1635] sense to make the divesting of a vested interest depend upon the caprice or upon the dilatoriness of the trustee to sell (*m*); that in some way the property *might* be sold immediately, . . . that where there is a trust, that is always considered in equity as done which is ordered to be done, and that the Court cannot measure the time."

Lord Selborne's observations in Minors *v.* Battison.

But besides this Lord Selborne held that there the divesting clause failed, on the ground that what was given over was "such share," spoken of as a whole, and the testator had not with sufficient clearness for a divesting clause declared what was to go over in the event which had happened of part having been received or become receivable (which latter it was conceded satisfied the clause) and of part not having been received or (according to the L. JJ.) become receivable. In his opinion the estate became

Effect where part has been received and part not.

(*l*) For the same reason the propriety of a general inquiry whether a legacy might or might not have been received did not come in question. An inquiry whether the share of the deceased son might have been received within the year was immaterial, since he outlived the year. No inquiry of either kind was asked for by either side. But in Re Collison, sup. p. 1629, Sir E. Fry cited Lord Selborne's statement of what Lord Thurlow said, and added, "if that be so, it follows that I must reject the actual time of division of a part or of the whole of the estate, and, if I must reject the time of the actual division as too uncertain, the time when any part of the estate *might* have been divided is a fortiori too uncertain." Thus only through Lord Selborne's observations and only by inference from them has Minors *v.* Battison any bearing on the question of an inquiry.

(*m*) There is here an important variation from Lord Thurlow's real words, making it appear that he thought a divesting clause to take effect on death before actual receipt could properly be rejected on the ground that it would make the rights of legatees depend on the caprice of the trustee. Even with regard to a trust for sale, what he did say, though generally true, is not universally so; for the testator may have intended that those rights should depend on the actual sale, per Grant, M. R., 8 Ves. 556.

de jure distributable at the time of the widow's death, and "on this one point he differed from the decision of the V.-C." To meet this view the order was varied, and it was declared that in the events which happened the deceased son took an absolute vested interest in a share of the estate, "the whole being considered as converted into money and distributable *immediately* upon the death of the widow."

Order in Minors *v.* Battison.

This variation, though not material to the decision of the case, would seem to be very material in principle; for it annihilates the interval clearly contemplated in the divesting clause between the death of the widow and the time of "receipt," and thus appears to adopt (perhaps under the circumstances without much consideration) the opinion that the clause, whether it meant received or receivable, was entirely void, though for which of the reasons given by Lord Selborne does not appear.

The general question of the validity of such a clause was fully discussed in Johnson *v.* Crook (*n*), where residue was bequeathed equally between A. and B.; "but if A. shall die before he shall actually have received the whole of his share and without leaving issue, then, and whether the same shall have become payable or not, his share *or such* [*1636] *part* or parts thereof as he shall *not have* * *actually received* as aforesaid shall be paid to the said B." A. survived the testatrix some seven years, and died without receiving any part of the residue and without leaving issue. Sir G. Jessel, M. R., held that the intention to use the words "actually received" in their literal sense was placed beyond doubt by the addition of the words "whether payable or not;" that the latter words provided for non-receipt from any cause whatever, including fraud, accident, or mistake; that there was no uncertainty or difficulty in ascertaining whether the event had happened; and that the gift over had taken effect. He examined the cases, and arrived at the conclusion that Martin *v.* Martin was the first in which such a gift over was held void; that it was so decided simply per incuriam; and that although some of Lord Selborne's expressions in Minors *v.* Battison were difficult to deal with, the point did not directly arise in that case.

Gift over of the legacy, or of the unreceived part, upheld.

On the other hand, in Bubb *v.* Padwick (*o*), where residue was given in trust for all the testator's children who should attain twenty-one or (being daughters) marry, as tenants in common, but children so attaining vested interests were not to be entitled to receive their shares until his youngest child should have attained twenty-one, but the trustees were empowered to pay the share of each child as soon after he or she had attained such vested interest

Similar gift over held void.

(*n*) 12 Ch. D. 639. See Re Potts, Hooley *v.* Fountain, W. N., 1884, p. 106.
(*o*) 13 Ch. D. 517. See also Re Chaston, Chaston *v.* Seago, 18 Ch. D. 218; Wilks *v.* Bannister, 30 Ch. D. 512.

as the trustees thought proper; and in case any child should die before the youngest for the time being had attained twenty-one *without having actually received* the whole of his or her share, then *so much of the share,* original and accruing, of the child so dying as should not have been received by him or her was given over to the other children who should be living when the youngest attained twenty-one. Sir R. Malins, V.-C., decided that each child on attaining twenty-one or (if a daughter) marrying acquired an indefeasible interest. He said: "This principle has been acted upon for ninety years, — certainly from the time of the decision in Hutcheon *v.* Mannington, — that where there is a gift of property with a gift over if the legatee dies without receiving it, the gift over is too vague and indefinite; it is simply regarded as void, and the original gift remains."

In Roberts *v.* Youle (*p*), a testator gave his real and personal * property to trustees for sale, with authority to post- [*1637] pone the sale, and in trust to divide the proceeds among his three sons and his daughter (naming them), but directed the trustees to retain his daughter's share on certain trusts for her and her issue; "and in the event of any of his said children dying *before his* (testator's) *decease or the execution of all or any of the trusts* of the will leaving issue, he directed the trustees to pay to the issue of such deceased child or children the share or respective shares, his, her, or their respective parents would have taken and been entitled to if living, share and share alike." It was held by Sir C. Hall, V.-C., that the gift over was so ill-constructed, and (particularly with regard to the daughter's share) so embarrassing, that he could not give effect to it. He considered it unnecessary to say whether he agreed with Johnson *v.* Crook; he distinguished that case on the ground that what was there given over was not the whole share, but such part or parts thereof as should not have been received.

Gift over of "the share" of a legatee dying "before the execution of the trusts."

The last case is too special to have much effect on the general question. In Bubb *v.* Padwick, too, the will was peculiar, the intention being express that the shares should be vested in interest, *i. e.*, transmissible (*q*), though payment was postponed, yet that they should be divested, *i. e.*, not be transmissible, unless actually paid; which is contradictory. The Court, however, relied on no such special ground.

With regard to the distinction which depends on the words specially referring to an unreceived part, — to hold that, unless there are such words, the gift over will not carry such part, where other part has been received, and still more, that unless there are such words, the

(*p*) 49 L. J. Ch. 744, W. N. 1880, p. 136.
(*q*) This, no doubt, is not generally the sole effect of vesting; it also gives the intermediate income: but here the income was expressly disposed of.

gift over is void ab initio, would seem to push to an extreme point the doctrine that a clear vested gift is not to be cut down by subsequent ambiguous expressions (*r*).

There is, however, another distinction between Crook *v.* Johnson and the other cases, viz., that the testator had shown that he intended the legatee to take the risk of the non-receipt being caused by the misconduct of the trustee. Where this is not shown, the further question, whether the Court can inquire into the possibility of an earlier receipt — an inquiry which is needed to protect the legatee from misconduct in the trustee — must, it should seem (having regard [*1638] to Lord Eldon's opinion that such * misconduct shall not affect third persons), enter largely into the consideration of the main question, whether the clause is itself valid. In this way Hutcheon *v.* Mannington would have a material bearing on that question, and the Court would have to decide whether in ordinary cases it would follow that authority, or the opinion of Lord Eldon, Sir J. Leach, and Sir G. Turner.

II. — 6. *Death without leaving Children.* — It has been noticed in a former chapter (*s*) that where a legacy is given to one for life, and after his death to his children, with a gift over if the tenant for life dies without *leaving* children, the gift over is sometimes construed as meaning in default of objects of the prior gift, or, as it is commonly expressed, "leaving" is construed "having." Besides the favor always shown to provisions for children, it requires very strong words to defeat a prior vested gift (*t*). Thus, in Maitland *v.* Chalie (*u*), where a testator bequeathed a sum of money in trust for his daughter S. for life, and after her death, as to a moiety thereof, for her children equally to be divided between them at their respective ages of twenty-one, and if but one, then to that one at twenty-one, with maintenance during minority; and if any of such children should die before attaining twenty-one, his share to go to the survivors; but in case S. should die without *leaving* any child or children, or leaving such and they should die before attaining twenty-one, then to testator's next of kin living at the death of the longer liver of them, his said daughter and her children so dying under age. S. had issue two daughters who attained twenty-one, but died in their mother's lifetime. Sir J. Leach, V.-C., said, "A clear vested gift is in the first place given to the children of a daughter attaining twenty-

Gift over if A. dies without *leaving* children, object of prior vested gift, read without *having*.

(*r*) As to the distributive construction of a clause of forfeiture, see per Jessel, M. R., Re Roberts, Repington *v.* Roberts-Gawen, L. R., 19 Ch. D. at p. 528.

(*s*) Ante, p. 1057.

(*t*) 8 Jur. 14.

(*u*) 6 Mad. 243. See also Casamajor *v.* Strode, 8 Jur. 14; Re Thompson's Trust, 5 De G. & S. 667; Kennedy *v.* Sedgwick, 3 K. & J. 540, Re Brown's Trust, L. R., 16 Eq. 239; Lord Soudes' Will, 2 Sm. & Gif. 416.

one. If in the clause which gives the property over on failure of her children, the word 'having' be read for 'leaving,' the whole will will express a consistent intention to that effect. I feel myself bound by the authorities to adopt this construction." Then, citing Woodcock *v.* Duke of Dorset, and Powis *v.* Burdett (*w*), he declared that the two daughters, having attained twenty-one, took vested interests.

In the last sentence, "vested" is apparently used in the sense of "indefeasible." At all events, the appointment of a specified * time for vesting, though it may strengthen the case (*x*), [*1639] is not necessary. A simple gift in remainder to children (which by operation of law vests in them at birth) is enough to attract the rule. Thus, in Treharne *v.* Layton (*y*), where a testatrix gave all her real and personal estate to her granddaughter M. for life, and after the death of M., to her children in equal parts; and she ordered M. to make a weekly allowance to R. during his life. "In case my granddaughter dies *leaving no issue*, the whole of the property goes to the next of kin," they making the same allowance to R. during his life. It was held that "leaving" must be construed "having had," and that the real estate had vested indefeasibly in the only child of M., though he died before her.

In the last case "issue" in the gift over must have been read "children" by reference to the prior gift. It would otherwise have been difficult to construe the words "die leaving no issue" in any sense but "leaving no issue at her death," according to 1 Vict. c. 26, s. 29 (*z*).

But the principle of the cases where "leaving" is construed "having had," does not apply where it is clear that the vested gift is to be divested in some event. In such a case the language will not be strained merely to prevent the gift from being divested in another event. In Re Ball, Slattery *v.* Ball (*a*), a testator gave his residuary personal estate in trust for K. for life, then to his children, and in default of children, for R. and the heirs male of his body, and in case R. should die without leaving issue male, then for J. R. died in the lifetime of K., having had issue one son only, who died without issue in his father's lifetime. K. died without having had

Gift to A. with gift over if he die *without leaving issue*, "leaving" construed strictly.

(*w*) Ante, p. 1613, n. (*m*).
(*x*) See Gibbons *v.* Langdon, 6 Sim. 260.
(*y*) L. R., 10 Q. B. 459, in Ex. Ch. affirming Q. B.; ante, p. 1313, n. See also White *v.* Hill, L. R., 4 Eq. 265; per Jessel, M. R., Re Jackson's Will, 13 Ch. D. 192; Marshall *v.* Hill, 2 M. & Sel. 608. As to Ex parte Hooper, 1 Drew. 264, vide ante, p. 1305, n. Cases in which there is no ambiguity in the term used, as, "without leaving issue at the time of her death" (Young *v.* Turner, 1 B. & S. 550), or "should all his children die before himself" (Chadwick *v.* Greenal, 3 Gif. 221), are scarcely within the rule. So also, where the expression is "die without leaving any child her surviving," Re Hamlet, Stephen *v.* Cunningham, L. R., 38 Ch. D. 183, 39 Ch. D. 426.
(*z*) Ante, p. 1320.
(*a*) 36 Ch. D. 508, 40 Ch. D. 11. The decision of Sir J. Bacon, V.-C., to the contrary in Wight *v.* Hight, 12 Ch. D. 751, is overruled.

any child. It was held by the Court of Appeal (affirming the decision of Sir F. North, J.), that the gift over to J. took effect, for that the testator had clearly intended the vested gift to R. to be divested in some event, whichever construction of the word "leaving" might be adopted.

[*1640] * Though the Courts, in their reluctance to take away from the children an interest previously vested, have often construed the word "leaving" as equivalent to "having had" in the case of a gift of a capital fund, that principle of construction is not applicable to the case of an annuity, which ex vi termini involves the notion of personal enjoyment. A gift over of an annuity on death without "leaving" a child must therefore be strictly construed (*b*).

Gift over of an *annuity* on death without leaving issue construed strictly.

So "without leaving" in the gift over will not be construed "without having had" if the prior gift is expressly made to depend upon the corresponding contingency of "leaving children." Thus, in Bythesea *v.* Bythesea (*c*), where a testatrix bequeathed the residue of her personal estate in trust for her grandson for life, and after his decease, "*in case he should leave any child or children*, then in trust for all and every the child and children of her said grandson lawfully begotten, equally between them if more than one, share and share alike, as tenants in common; and if there should be one such child, then in trust for such only child, to be paid and payable to such child or children at his or their age or respective ages of twenty-one years;" and the testatrix declared, "that the part or share of each such child or children should be considered as a vested interest or vested interests in him, her, or them respectively;" and there was a gift over after the decease of the grandson, "in case he should not *leave* any such child or children." The grandson had one child only, who attained twenty-one, and died in his lifetime. It was held that the gift over took effect. Lord Cranworth said: "It was contended that the first contingency had in fact happened; for that in this case 'leaving' must be construed as 'having children;' for that the testatrix could not be held to intend that the gift to the children should depend on the accident of *some or one of them* surviving their father. The answer to this is that the words of the will are clear and unambiguous. It may be impossible to explain why the testatrix should have made such a disposition; but nevertheless she was at liberty to do so." The direction as to vesting was also relied on; but he thought this might apply only to the contingency happening of the grandson leaving a child surviving. Sir G. Turner, L. J., said that the authorities justified him in saying that the cases on settlements had [*1641] been carried as far as they should be, and that * the present

"Leaving" not construed "having had" if prior gift to children is contingent.

(*b*) Re Hemingway, James *v.* Dawson, 45 Ch. D. 453.
(*c*) 23 L. J. Ch. 1004, affirming Wood, V.-C., 17 Jur. 645.

case, even if it had been one of settlement, was distinguishable, for two reasons. First, that in all the previous cases there were provisions inconsistent with the notion that the gift was to depend on survivorship, while here the provisions were throughout contingent; secondly, that in all of them the question had arisen between the eldest son and the other children, or between the surviving children and the representatives of deceased children; and in none of the cases that he was aware of had there been a limitation over in favor of third persons. As to the cases in which the question had been, whether a clear vested interest was to be cut down by words importing contingency, he said they had no application to a case where the whole disposition was introduced by words importing contingency.

It is plain from Lord Cranworth's observations that, if there had been several children, and only some or one of them had survived the grandson, he would have been of opinion that all the children were entitled, the gift being to all the children generally, upon a contingency, (viz. "leaving any child") which would have happened. And this appears to be the rule (*d*).

But if one child survives parent, all will take;

But if after these introductory words the gift itself is to *such* children, it is confined to those who themselves survive their parent (*e*). So, if the shares are expressly directed to vest at the death of the parent, the only possible question in such a case being whether "vested" is to bear its literal meaning (*f*). And if the issue of a child who predeceases the parent are expressly provided for, the case is said not to be within the reason of those in which there is no such provision, and in which the Court has therefore adopted a particular construction for the purpose of protecting the predeceasing child from loss of his share (*g*). To give to all the children, if only one survives the parent, but unless one survives to give to none, is not a probable intention, and full weight will be allowed to any indications of an intention to give only to such as themselves survive (*h*), especially if there is an accumulation of such indications (*i*).

— unless excluded by context.

(*d*) Boulton *v.* Beard, 3 D. M. & G. 608 (no gift over); M'Lachlan *v.* Taitt, 28 Beav. 407, 2 D. F. & J. 449; Winn *v.* Fenwick, 11 Beav. 438; contra, is questioned by Lord St. Leonards, Pow. 596, 8th ed.

(*e*) Sheffield *v.* Kennett, 27 Beav. 207, 4 De G. & J. 593; Re Watson's Trusts, L. R., 10 Eq. 36. See also Re Heath's Settlement, 23 Beav. 193; Jeyes *v.* Savage, L. R., 10 Ch. 555. Bryden *v.* Willett, L. R., 7 Eq. 472, has not been followed.

(*f*) Selby *v.* Whittaker, 6 Ch. D. 239.

(*g*) Per James, L. J., 6 Ch. D. 249.

(*h*) Wilson *v.* Mount, 19 Beav. 292. See also Stevens *v.* Pyle, 30 Beav. 284; Hedges *v.* Harpur, 3 De G. & J. 139.

(*i*) Selby *v.* Whittaker, sup.

[*1642] *CHAPTER L.

EFFECT OF FAILURE OF A PRIOR GIFT ON AN ULTERIOR EXECUTORY OR SUBSTITUTED GIFT OF THE SAME SUBJECT; ALSO THE CONVERSE CASE.

Effect upon executory gift of failure of prior gift.

WHERE real or personal estate is given to a person for life, with an ulterior gift to B., as the gift to B. is absolutely vested, and takes effect in possession whenever the prior gift ceases or fails (in whatever manner), the question discussed in the present chapter cannot arise thereon.

Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift, *i. e.*, to arise on an event which determines the interest of the prior devisee or legatee, and it happens that the prior gift fails ab initio, either by reason of its object (if non-existing at the date of the will) never coming into existence, or by reason of such object (if a person in esse) dying in the testator's lifetime. It then becomes a question whether the executory gift takes effect, the testator not having in terms provided for the event which has happened, although there cannot be a shadow of doubt that, if asked whether, in case of the prior gift failing altogether for want of an object, he meant the ulterior gift to take effect, his answer would have been in the affirmative. The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication. Thus, in the well-known case of Jones *v.* Westcomb (*a*), where a testator bequeathed a term of years to his wife for life, and after her death to the child she was then (*i. e.*, at the making of the will) enceinte with; and if such child should die before the age of twenty-one, then one-third part to his wife, and the other two-third parts to other persons. The wife was not enceinte; nevertheless Lord Harcourt held that the bequests over took [*1643] effect; and the Court of K. B. (*b*), * on two several occasions (in opposition to a contrary determination of the C. P. (*c*)), came to a similar conclusion on the same will.

(*a*) Pre. Ch. 316, 1 Eq. Ca. Ab. 245, pl. 10.

(*b*) Andrews *v.* Fulham, 2 Stra. 1092; Gulliver *v.* Wickett, 1 Wils. 105; Doe *v.* Challis, 18 Q. B. 224, affd. in D. P. 7 H. L. Ca. 555 (Evers *v.* Challis); Watson *v.* Young, L. R., 28 Ch. D. 436. But the one event cannot be construed as included in the other, where the will elsewhere expressly provides for it, Swayne *v.* Smith, 1 S. & St. 56.

(*c*) See Roe *v.* Fulham, Willes, 303, 311.

So, in Statham *v.* Bell (*d*), where a testator, reciting that his wife was pregnant, devised that if she brought forth a son, then that he should inherit his estate; but if a daughter, then one moiety to his wife, and the other to his two daughters (he had one daughter then living) at twenty-one. If either died before that time, the survivor to have her sister's share; *if both died before that time*, then both shares to his wife and her heirs. The wife was not enceinte; and the other daughter dying under twenty-one, the wife was held to be entitled to the whole.

Failure of prior gift held to let in ulterior gift.

It would be immaterial in such case whether the wife had or had not an after-born child subsequent in procreation as well as birth, as such child would not be an object of the gift to the child with which the wife was then enceinte (*e*).

So, in Meadows *v.* Parry (*f*), where a testator bequeathed the residue of his estate to trustees, upon trust to apply the dividends and interest for the maintenance of all such children as he should happen to leave at his death, and born in due time after, equally, until the age of twenty-one, and then to transfer the funds to them; and in case any of the children should die before twenty-one, such deceased child's share to go to the survivors; and if there should be only one child who should attain that age, upon trust to pay the residue to such child: *and in case all of the children should die before attaining that age*, then he bequeathed the residue to his wife. The testator died without leaving, or ever having had, any issue; but Sir W. Grant, M. R., held that the bequest to the wife took effect.

Gift over, in case there be but one child, extended by implication to event of there not being any.

And, upon the same principle, a bequest over in the event of the prior legatee having but one child has been held to extend by implication to the event of her not having any child. Thus, in Murray *v.* Jones (*g*), where a testatrix, after bequeathing the residue of her personal property to her daughters and younger sons, provided that in case she should have but one child living at the time of her decease, or in case she should have two or *more sons and [*1644] no daughter or daughters living at the time of her decease, and all of them but one should depart this life under the age of twenty-one years, or in case she should have two or more daughters and no son or sons living at the time of her decease, and all of them but one should depart this life under twenty-one, and without having been married; or in case she should have both sons and daughters, and all but one, being a son, should die under twenty-one, or being a

(*d*) Cowp. 40.
(*e*) Foster *v.* Cook, 3 B. C. C. 347.
(*f*) 1 V. & B. 124. See also Fonnereau *v.* Fonnereau, 3 Atk. 315; Earl of Newburgh *v.* Eyre, 4 Russ. 454, where a question of this nature arose under a special will and was much discussed; Osborn *v.* Bellman, 2 Gif. 593, where this construction was made on a marriage settlement.
(*g*) 2 V. & B. 313. See also Aiton *v.* Brooks, 7 Sim. 204, ante, p. 1505.

daughter under that age and unmarried, then she bequeathed the property to another family. The testatrix died without having had a child; but Sir W. Grant, M. R., held that the ulterior gift nevertheless arose; his opinion being, that the case put by the testatrix, namely, that of her having but one child, did not contain a condition that she should have one child living at that time. His reasoning well deserves a particular statement. "At first sight," said the M. R., "a proposition relative to having but one child may seem to include in it and to imply the having one. That is true, if the proposition be affirmative; but by no means so, if the proposition be hypothetical or conditional. The proposition that A. has but one child, is as much an assertion that he has one as that he has no more than one; but when the having but one is made the condition on which some particular consequence is to depend, the existence of one is not required for the fulfilment of the condition, unless the consequence be relative to that one supposed child. As, if I say that, in case I have but one child, it shall have a certain portion, it is in the nature of the thing necessary that the child should exist to be entitled to the portion; but if I say that, in case I shall have but one child of my own, I will make a provision for the children of my brother, it is quite clear that my having one child is no part of the condition on which the supposed consequence is to depend. My having one child of my own would be rather an obstacle than an inducement to the making a provision for the children of another person. The case I guard against is the having a plurality of children; and it is only the existence of two or more that can constitute a failure of the condition on which the intended provision of my brother's children was to depend. The plain sense of the proposition is, that unless I have more than one the provision shall be made."

Sir William Grant's reasoning in Murray *v.* Jones.

Again, in Mackinnon *v.* Sewell (*h*), where the testatrix [*1645] bequeathed * her residue in trust for her daughter Caroline for life, and after her death for her daughter's daughter, if she should survive her mother and attain twenty-one; but in case she should not survive such mother and attain twenty-one, then in trust for such other child or children of the testatrix's daughter as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and if all such other children of the testatrix's daughter *should die before attaining twenty-one*, then in trust for M. The granddaughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive her mother: afterwards the daughter died. Sir L. Shadwell, V.-C., on the authority of the preceding cases,

Gift over extended by implication to event not falling within terms of will.

(*h*) 5 Sim. 78, affd. 2 My. & K. 202. See also Wilson *v.* Mount, 2 Beav. 397; Tennant *v.* Heathfield, 25 Beav. 512.

held that the bequest over to M. took effect; his Honor considering that the bequest over, in the event of the children that might survive the mother not attaining the age of twenty-one, was but equivalent to a bequest over in the event of there being no child who should survive the mother and attain twenty-one.

On the principle of the preceding cases, it could not be doubted that an executory gift made to take effect on the prior devisee's neglect or refusal to accept the devise (*i*) or perform some other prescribed act, would take effect, notwithstanding the object of the prior gift never happens to come into existence, such a contingency being implied and virtually contained in the event described. For (to proceed to the second class of cases before referred to), it has been decided that where a testator gives real or personal property to A., and in case of his neglect or failure to perform a prescribed act within a definite period after his (the testator's) decease then to B., and it happens that the prior devisee or legatee dies *in the testator's lifetime*, the gift over to B. takes effect.

Gift over on prior devisee's refusal to do a certain act. Effect of prior devisee not coming into existence, on gift over if he refuse to do a certain act.

Thus, in Avelyn *v.* Ward (*j*), where a testator devised his real estate to his brother A. and his heirs on this express condition, that he should, within three months after the testator's decease, execute and deliver to his trustee a general release of all demands on his estate; *but if A. should neglect to give such release*, the devise to him to be null and void, and in such case the testator devised to W., his heirs and assigns, forever. A. died in the testator's lifetime. Lord Hardwicke held that the gift over took * effect; observing that he knew of no case [*1646] of a remainder or conditional limitation over of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, *but if the precedent limitation by what means soever is out of the case, the subsequent limitation takes place.*

Death of prior devisee held to let in ulterior devisee.

And this doctrine is applicable to the case of a devise to a charity, which is void by law, with a gift over in the event of the inhabitants not appointing a committee or not being willing to carry out the scheme; whether the committee was appointed or not being held to be immaterial. This was decided by Sir W. P. Wood, V.-C., in Warren *v.* Rudall (*k*), in opposition to Att.-Gen. *v.* Hodgson (*l*) and Philpott *v.* St. George's Hospital (*m*). "I cannot," he said, "see any substantial distinction between the case of a devise over, after a devise to a nonentity, if the nonentity should die under twenty-one, or again, of a devise

Prior devise falling under the Mortmain Act.

(*i*) See Scatterwood *v.* Edge, 1 Salk. 229.
(*j*) 1 Ves. 420. See also Doe d. Wells *v.* Scott, 3 M. & Sel. 300, ante, Vol. I., p. 610, and p. 759, n. (*g*); Re Betts, 30 L. J., Prob. 167.
(*k*) 4 K. & J. 603, 9 H. L. Ca. 420 (Hall *v.* Warren).
(*l*) 15 Sim. 46.
(*m*) 21 Beav. 134.

over, after a devise to a deceased person, if the deceased person should fail to do a certain act, and the case before me of a devise to a charity, which cannot take, followed by a devise over in the event of that charity *which cannot take* omitting to perform a certain act." This decision was affirmed in the House of Lords. Lord Cranworth indeed, though inclined to admit the applicability of the doctrine, relied on the fact that no committee had been appointed, so that the contingency on which the gift over was limited had literally happened. But Lord Campbell and Lord Kingsdown agreed with the more general reasoning of the V.-C. (*n*).

Remarks on Avelyn *v.* Ward.

Lord Hardwicke's observation, however, is not to be taken in too extensive a sense; for it is clear, according to subsequent cases, that if the event upon which the prior gift is made defeasible and the subsequent gift to take effect, is one which may happen as well in the lifetime of the testator as afterwards (in which respect such case obviously stands distinguished from those just stated), and the events which happen are [*1647] such as would, if * the first devisee had survived the testator, have vested the property absolutely in him, the lapse of such prior devise by the death of the devisee in the testator's lifetime, *though it removes the prior gift out of the way,* does not let in the substituted or executory devise which was to take effect on the happening of the alternative or opposite event.

Effect where prior gift fails by lapse.

Thus, in Calthorpe *v.* Gough (*o*), where a legacy of 10,000*l.* was given to trustees, in trust for Lady Gough for life: and, in case she should die in the lifetime of her husband, as she should appoint; and, in default of appointment, to her children; *but if Lady G. should survive her husband, then for her absolutely.* Lady Gough survived her husband, but died in the lifetime of the testator. The M. R. held the legacy to be lapsed, and that the children were not entitled.

So, in Doo *v.* Brabant (*p*) a legacy was bequeathed in trust for A. until she attained twenty-one, and then to transfer it to A., her executors and administrators; and in case A. should die *under the age of twenty-one years* leaving any child or children of her body lawfully begotten, then in trust for such child or children; but in case A. should die under twenty-one without leaving any child or children, then over. A. attained twenty-one, and died in the lifetime of the

(*n*) The V.-C. retained his opinion, see Re Smith's Trusts, L. R., 1 Eq. 83. In Re Stringer's Estate (6 Ch. D. 1, ante, p. 856), the foregoing cases were cited as authorities for the position that, where property is given absolutely, with a gift over if the devisee dies without disposing of it, the gift over, which is clearly void for repugnancy if the devisee survives the testator, is valid if he dies before him. Jessel, M. R., "declined to accede to such a doctrine," and rejected the claim of the devisee over. On appeal, James, L. J., expressed great doubt whether the gift over was not valid in the event which had happened, viz. the lapse of the prior gift. Being valid (if at all) only on this ground, it is clearly not within the authorities here discussed.

(*o*) Cit. 3 B. C. C. C. 395.

(*p*) 3 B. C. C. 393, 4 T. R. 706, 2 R. R. 503; and see Lomas *v.* Wright, 2 My. & K. 775.

testator, leaving children; and Lord Thurlow was strongly inclined to decide in their favor but for the case of Calthorpe *v.* Gough. But on a case stated for the Court of King's Bench, that court certified that the legacy lapsed, and the Lords Commissioners decided accordingly.

Again, in Williams *v.* Chitty (*q*), where the testator devised in trust for and to the use of his daughter Sarah, her heirs and assigns; *but in case of her decease under twenty-one and unmarried*, in trust and to the use of his daughter Elizabeth, her heirs and assigns. Sarah died in the lifetime of the testator under age, but having been married. One question was, whether, in the event which had happened, the devise over to Elizabeth was good. Her counsel considered her claim to be so obviously untenable, that he gave up the point; and Lord Loughborough seems to have entertained a similar opinion.

* In the three preceding cases, it will be observed, the de- [*1648]
vise or bequest which lapsed was in favor of a designated individual; but in the next case (*r*) we have an example of the application of the principle to a case of more doubtful complexion, the gift being in favor of *a class*.

Effect where prior gift fails by lapse.

The devise, in substance, was to A. for life, remainder to his children in fee; and, if he should die without leaving issue, then over. A. died in the testator's lifetime, leaving a son, who also died in the testator's lifetime: and Sir C. C. Pepys, M. R., held that under these circumstances the devise over failed; observing that it was clear that, if A.'s son had survived the testator, the devise over could not have taken effect; and it was, he thought, established by authority that the situation of the parties was not altered by the fact of the prior devisee having died before the testator.

This is an important extension of the doctrine; for, as a devise to a fluctuating class, as children, operates in favor of such of them only as are living at the testator's decease, there might seem to be ground to contend, that, in effect, the case was one in which the failure of the gift was owing to the fact of no object having come into existence rather than to lapse. The principle of Tarbuck *v.* Tarbuck was, however, affirmed in Brookman *v.* Smith (*s*), where the devise was to A. for life, with remainder to the children of A. in fee, and with a gift over "in case every child born or to be born should die under twenty-one," A. had a child

Remark on Tarbuck *v.* Tarbuck.

(*q*) 3 Ves. 549, 3 R. R. 71. See also Miller *v.* Faure, 1 Ves. 85; Humberstone *v.* Stanton, 1 V. & B. 385; Williams *v.* Jones, 1 Russ. 517; Underwood *v.* Wing, 4 D. M. & G. 661, 8 H. L. Ca. 183 (Wing *v.* Angrave); Cox *v.* Parker, 25 L. J. Ch. 873, the report of which 22 Beav. 169 omits the important statement that William Michael Parker attained 21; also per Wood, V.-C., Re Sanders' Trusts, L. R., 1 Eq. 681.

(*r*) Tarbuck *v.* Tarbuck, 4 L. J. (N. S.) Ch. 129, stated more fully, ante, p. 1301.

(*s*) L. R., 6 Ex. 291, 7 Ex. 271. In Tarbuck *v.* Tarbuck, "leaving" was construed literally; *i. e.*, the failure of children was there, as well as in Brookman *v.* Smith, coupled in precise terms to a period having no reference to the testator's death. Such a case seems not necessarily to govern one where (as in Maitland *v.* Chalie, &c., ante, p. 1638) "die without leaving children" means simply failure of the preceding gift. See remarks on Doe *v.* Duesbury, ante, pp. 1303, 1304.

living at the date of the will who attained twenty-one, but died before the testator; and it was held that the gift over failed. Some of the judges relied on the expression "*born* or to be born" as necessarily referring to the child then living; but Blackburn, J., doubted whether this was not giving it too much importance; and it is plain that, though there had been no such words, and whatever might have been their opinion if Tarbuck *v.* Tarbuck had not decided the point, the Court would have declined to overrule that case.

It is presumed, however, that, if the gift had been *in terms* to such children as should be living at the testator's decease, the [*1649] *result would have been different, as the failure of the devise would then clearly have been the consequence, not of lapse merely, but of the non-happening of the contingency on which the gift was made contingent, and therefore the gift over would take effect (*t*).

Remark on preceding cases.

It is proper to apprise the reader, that the distinction which has been suggested as reconciling the construction adopted in the last five cases with that which prevailed in Jones *v.* Westcomb and Avelyn *v.* Ward, was not, until Brookman *v.* Smith, adopted or recognized as the ground of decision in those cases. On the contrary, Lord Thurlow in Doo *v.* Brabant treated Calthorpe *v.* Gough as inconsistent with and as overruling the line of cases in question. In support of the writer's suggested distinction, however, it is to be observed that Calthorpe *v.* Gough and Doo *v.* Brabant have been since followed as well in Williams *v.* Chitty, already stated, as in the subsequent case of Humberstone *v.* Stanton (*u*), without any denial of the authority of Jones *v.* Westcomb and Avelyn *v.* Ward, while, on the other hand, the principle of Jones *v.* Westcomb, and more especially that of Avelyn *v.* Ward, has been fully recognized in Doe d. Wells *v.* Scott (*x*), already referred to, and other cases (*y*).

There is, it is submitted, a solid difference between sustaining a devise which is to take effect in the event of a person not in esse dying under a certain age, though such person never come into existence, and holding it to take effect in the event of his being born and dying *above* that age in the lifetime of the testator. In the former case, the contingency of no such person coming in esse may be considered as included and implied in the contingency expressed; but, in the latter, the event to which it would be applied is the exact

(*t*) See Shergold *v.* Boone, 13 Ves. 370, ante, p. 1581.
(*u*) 1 V. & B. 385.
(*x*) 3 M. & Sel. 300, ante, Vol. I., p. 610.
(*y*) See 4 K. & J. 603, 9 H. L. Ca. 420. See also Re Tredwell, Jeffray *v.* Tredwell (1891), 2 Ch. 640, where however the principle was held not to apply. In that case the testator gave the income of a fund to his wife during her life or widowhood, and directed his trustees after her death to raise and pay certain legacies; it was held by the Court of Appeal that the legacies were not payable on the determination of the widow's life interest by her second marriage.

opposite or alternative of that on which the substituted gift is dependent (*z*). To let in the ulterior devise in such case would be to give the estate to one, in the very event in which the testator has declared that it shall * go to another, whose incapacity, by reason of death, to take, seems to form no solid ground for changing its object. In the event which has happened, the lapsed devise must be read as an absolute gift. [*1650]

The same principles which determine the effect upon a posterior or executory gift of the failure of a prior gift, apply also to the converse case, namely, that of the failure of an ulterior or executory gift, and the consequence of such failure on the prior gift. According to these principles, if lands are devised to A. and his heirs, and in case he shall die without issue living at his decease, then to B. and his heirs, and B. dies in the testator's lifetime, and afterwards A. dies accordingly without issue, having survived the testator; the event having happened upon which the ulterior devise would have taken effect, and that devise having failed by lapse in the testator's lifetime, the title of the heir is let in; or (if the will be regulated by the new law) then the title of the residuary devisee, the effect being precisely the same, in the events which have happened, as if the ulterior devise had been a simple absolute devise in fee (*a*). On the other hand, if the devise were to A. and his heirs, and if he should die without leaving issue at his decease, then to B. for life, with remainder to his children in fee, and A., having survived the testator, dies without leaving issue, and B. also dies without having had a child (whether such event happens in the testator's lifetime or after his decease), the devise to A. becomes absolute and indefeasible, by the removal out of the way of the executory devise engrafted thereon; such devise having failed (not by lapse, as in the former case, but) by the failure of the event on which it was made dependent (*b*). If B. had had a child, and such child had died in the testator's lifetime, the case would, it should seem, according to the principle of the case of Tarbuck *v.* Tarbuck (*c*), have become assimilated to the case first stated.

Effect upon prior gift, of failure of executory gift.

The difference then, in short, is between a failure of the posterior gift by lapse, letting in the title of the heir or residuary devisee (as the case may be), and a failure in event, of which the prior devisee has the benefit.

(*z*) If the event on which the substituted gift depends actually happens in the testator's lifetime, the substituted gift takes effect, ante p. 1575. There is a dictum in Greated *v.* Greated, 26 Beav. 628, 629, apparently contra: sed qu.

(*a*) See O'Mahoney *v.* Burdett, L. R., 7 H. L. 388, 407 (legacy).

(*b*) Jackson *v.* Noble, 2 Kee. 590. As to this case see Vol. I., p. 827.

(*c*) Ante, p. 1648.

[*1651] *CHAPTER LI.

GENERAL RULES OF CONSTRUCTION.

THERE are certain rules of construction common to both deeds and wills; but as, in the disposition of property by deed, an adherence to settled forms of expression is either rigidly exacted by the Courts, or maintained by the practice of the profession, the rules to which the construction of deeds has given rise are comparatively few and simple. But the peculiar indulgence extended to testators, who are regarded as inopes consilii, has exempted the language of wills from all technical restraint, and withdrawn them in some degree from professional influence. By throwing down these barriers, a wide field is laid open to the caprices of language; though, at certain points, we have seen, its limits are ascertained by rules sufficiently definite, and we are guided through its least beaten tracks by general principles.

General rules of construction.

It has been a subject of regret with eminent Judges (*a*), that wills were not subjected to the same strict rules of construction as deeds, since the relaxation of those rules introduced so much uncertainty and litigation; and was, indeed, at an early period, productive of so much embarrassment, as to draw from Lord Coke (*b*) the observation, that "wills, and the construction of them, do more perplex a man than any other learning; and, to make a certain construction of them, this excedit jurisprudentum artem. But," he adds, "I have learned this good rule, always to judge, in such cases, as near as may be and according to the rules of law."

This quotation will serve to introduce the observation, that though the intention of testators, when ascertained, is implicitly obeyed, however informal the language in which it may have been conveyed, yet the courts, in construing that language, resort to certain established rules, by which particular words and expressions, [*1652] standing unexplained, have obtained a definite * meaning; which meaning, it must be confessed, does not always quadrate with their popular acceptation. This results from the intendment of law, which presumes every person to be acquainted with its rules of interpretation (*c*), and consequently to use expressions in their

(*a*) See Lord Kenyon's judgment in Denn d. Moor *v.* Mellor, 5 T. R. 561; Doe *v.* Allen, 8 id. 502. See also Wilm. 398.

(*b*) 2 Bulst. 130.

(*c*) See Doe d. Lyde *v.* Lyde, 1 T. R. 596; Langham *v.* Sanford, 2 Mer. 22. But see Lord Thurlow's judgment in Jones *v.* Morgan, 1 B. C. C. 221; and Lord Alvanley's observations in Seale *v.* Barter, 2 B. & P. 594.

legal sense, — *i. e.*, in the sense which has been affixed by adjudication to the same expressions occurring under analogous circumstances: a presumption which, though it may sometimes have disappointed the intention of testators, is fraught with great general convenience; for, without some acknowledged standard of interpretation, it would have been impossible to rely with confidence on the operation of any will not technically expressed, until it had received a judicial interpretation. And, indeed, dispositions conceived in the most appropriate forms of expression, must have been rendered precarious by a license of construction which set up the intention, to be collected upon arbitrary notions, as paramount to the authority of cases and principles. In such a state of things the most elaborate treatise on the construction of wills, though it might, perhaps, like other curious researches, prove interesting to some inquirers into the wisdom and sagacity of our ancestors, could contribute little or nothing towards placing the law of property, as it regards testamentary dispositions, on a secure and solid foundation. It is, therefore, necessary to remind the reader, that the language of courts, when they speak of the intention as the governing principle, sometimes calling it "the law" of the instrument (*d*), sometimes the "pole star" (*e*), sometimes the "sovereign guide" (*f*), must always be understood with this important limitation, — that here, as in other instances, the Judges submit to be bound by precedents and authorities in point; and endeavor, as we have seen, to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture (*g*).

* The result, upon the whole, has been satisfactory; for, by [*1653] the application of established rules of construction, with due attention to particular circumstances, a degree of certainty has been attained, which must have been looked for in vain, if less regard had been paid to the principles of anterior decisions. And, though the cases on the construction of wills have become, by the accumulation of more than three centuries, immensely numerous; yet when we consider the vast augmentation which, during this period, and the last century in particular, has taken place in the wealth and population of the country; the several new species of property, which the ever varying exigencies of a commercial nation have from time to time called into existence, and to which the rules of construction

(*d*) Per Lord Hale, in King *v.* Melling, 1 Vent. 231.
(*e*) Per Wilmot, C. J., in Doe d. Long *v.* Laming, 2 Burr. 1112.
(*f*) Per Wilmot, C. J., in Roe d. Dodson *v.* Grew, 2 Wils. 322.
(*g*) "The intention must be discovered from the words of the will itself. The Court must proceed on known principles and established rules, not on loose conjectural interpretations, or by considering what a man may be imagined to do in the testator's circumstances:" per Henley, L. K., 1 Ed. 43. See 1 Ves. Jr. 564; 10 H. L. Ca. 85; L. R., 6 Ch. 239; ante, Vol. I., p. 501. See also per Lord Blackburn, Rhodes *v.* Rhodes, L. R., 7 App. Ca. 206, and per Cotton, L. J., Re Bedson's Trusts. L. R. 28 Ch. D. 526. But as to authority in mere verbal interpretations see 6 H. L. Ca. 108; L. R., 10 Ch. 398 n.; 4 Ch. D. 68; unless the words are precisely the same, 1 H. & M. 549; and even then authority has been said not to be absolutely binding, per Jessel, M. R., L. R., 23 Ch. D. 111.

were to be applied; the complexity which a more refined and artificial state of society has introduced into dispositions of property; and lastly, the more extensive use of the art of writing, leading to increased facility in the exercise of the testamentary power, — we are prepared to expect an incessantly growing accession to questions of this nature. But it will be found, I apprehend, that, so far from having increased in a corresponding ratio, they have, and particularly at a recent period, numerically diminished.

This must be attributed partly to the more frequent practice of resorting to, and the increased facility of obtaining, professional assistance in the preparations of wills; and partly to the maturity which the system of construction has gradually attained, and which enables persons conversant with the subject, in most cases, to predict with a considerable approach to certainty, what would be the decision of a court of judicature in any given case; and, consequently, to render an appeal to its authority unnecessary (*h*).

Some uncertainty, it will be admitted, is inseparable from the nature of the subject. Many of the rules of construction are such as necessarily involve uncertainty in the application of them to particular cases; and, in a few instances, the rules themselves are, we have seen, yet subjects of controversy. To discuss and illustrate these rules has been the design of the writer in the preceding pages.

[*1654] *It may be useful, however, in conclusion, to present to the reader a summary of the several rules of construction which have already been the subject of detailed examination.

Summary of the rules of construction.

I. That a will of real estate, wheresoever made, and in whatever language written, is construed according to the law of England, in which the property is situate (*i*), but a will of personalty is governed by the lex domicilii (*k*).

II. That technical words are not necessary to give effect to any species of disposition in a will (*l*).

III. That the construction of a will is the same at law and in equity (*m*), the jurisdiction of each being governed by the nature of the subject (*n*); though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other (*o*).

IV. That a will speaks, for some purposes, from the period of execution, and for others from the death of the testator; but never operates until the latter period (*p*).

(*h*) The stat. 1 Vict. c. 26, also, has obviated many questions regarding real estate. Nevertheless, there are in the present edition of this treatise nearly three times as many cases as in the first, and (in round numbers) 1,800 more than in the third.
(*i*) Pre. Ch. 577; ante, Vol. I., p. 1.
(*k*) Ante, Vol. I., p. 2.
(*l*) 3 T. R. 86; 11 East, 246; 16 id. 222.
(*m*) 3 P. W. 259; 2 Ves. 74; 4 Jur. N. S. 625; 27 L. J. Ch. 726.
(*n*) 1 Ves. Jr. 16; 2 id. 417; 4 Ves. 329.
(*o*) See now as to contingent remainders, ante, Vol. I., p. 832.
(*p*) Vide ante, Ch. X.

V. That the heir is not to be disinherited without an express devise or necessary implication (*q*); such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed (*r*).

VI. That merely negative words are not sufficient to exclude the title of the heir or next of kin (*s*). There must be an actual gift to some other definite object.

VII. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole, but where several parts are absolutely irreconcilable the latter must prevail (*t*).[1]

VIII. That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will (*u*), (though it may
* be used to rebut a resulting trust attaching to a legal title [*1655]
created by it (*x*), or to remove a latent ambiguity arising from words equally descriptive of two or more subjects or objects of gift (*y*)).

IX. Nor to vary the meaning of words (*z*); and, therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible (*a*), but

X. The Court will look at the circumstances under which the devisor makes his will,—as the state of his property (*b*), of his family (*c*), and the like (*d*).[1]

XI. That, in general, implication is admissible only in the absence of, and not to control, an express disposition (*e*).

XII. That an express and positive devise cannot be controlled by the reason assigned (*f*), or by subsequent ambiguous words (*g*), or

(*q*) Br. Devise, 52; Dyer, 330 b.; 2 Stra. 969; Ca. t. Hardw. 142; 1 Wils. 105; Willes, 309; 2 T. R. 209; 2 M. & Sel. 448. See also 3 B. P. C. Toml. 45; see Vol. I., p. 498.

(*r*) 1 V. & B. 466; 5 T. R. 558; 7 East, 97; 1 B. & P. N. R. 118; 18 Ves. 40. "There is hardly any case where implication is of necessity; but it is called necessary because the Court finds it so to answer the intention of the devisor." Per Lord Hardwicke, Coryton *v.* Helyar, 2 Cox, 340, 348.

(*s*) Ante, Vol. I., pp. 308, 589; 4 Beav. 318; 6 Hare, 145.

(*t*) 9 Mod. 154; 2 W. Bl. 976; 1 T. R. 630; 6 Ves. 100, 129; 16 Ves. 314; 3 M. & Sel. 158; 1 Sw. 28; 2 Atk. 372; 6 T. R. 314; 2 Taunt. 109; 18 Ves. 421; 6 Moore, 214; 6 Hare, 492; ante, Ch. XV. But see Barnard. C. C. 261.

(*u*) See judgment in 16 Ves. 486; 5 Rep. 68; Cas. t. Talb. 240; 3 B. P. C. Toml. 607; 2 Ch. Cas. 231; 7 T. R. 138; ante, Ch. XIII.

(*x*) Cas. t. Talb. 78; ante, Vol. I., p. 391.

(*y*) Ante, Vol. I., p. 408.

(*z*) 4 Taunt. 176; 4 Dow. 65; 3 M. & Sel. 171. But see 2 P. W. 135.

(*a*) 11 East, 441; ante, Vol. I., p 384.

(*b*) 1 Mer. 646; 7 Taunt. 105; 1 B. & Ald. 550; 3 B. & Cr. 870; 1 B. C. C. 472.

(*c*) 3 B. P. C. Toml. 257; 4 Burr. 2165; 4 B. C. C. 441; 3 B. & Ald. 657; 3 Dow. 72; 3 B. & Ald. 632; 2 Moore, 302.

(*d*) See 5 M. & Wel. 367, 368.

(*e*) Dyer, 330 b.; 8 Rep. 94; 2 Vern. 60; 1 P. W. 54; ante, Vol. I., p. 448.

(*f*) 16 Ves. 46; ante, Vol. I., p. 448.

(*g*) 2 Cl. & Fin. 22, 8 Bligh, N. S. 88; 4 De G. & J. 30; ante, Vol. I., p. 449.

[1] Additon *v.* Smith, 83 Maine, 551.

by inference and argument from other parts of the will (*h*); and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents (*i*); though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt (*k*).

XIII. That the inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous (*l*); nor is the fact, that the testator did not foresee all the consequences of his disposition, a reason for varying it (*m*); but, where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose (*n*).

XIV. That the rules of construction cannot be strained to bring a devise within the rules of law (*o*); but it seems that, [*1656] * where the will admits of two constructions, that is to be preferred which will render it valid; and therefore the Court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word by mistake for one which would have rendered the devise void (*p*).

XV. That favor or disfavor to the object ought not to influence the construction (*q*).

XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected (*r*), and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative (*s*); and of two modes of construction, that is to be preferred which will prevent a total intestacy (*t*).

XVII. That, where a testator uses technical words, he is presumed to employ them in their legal sense (*u*), unless the context clearly indicates the contrary (*x*).

XVIII. That words, occurring more than once in a will shall be

(*h*) 1 Ves. Jr. 268, 8 Ves. 42, Cowp. 99.
(*i*) Moore, 13 pl. 50; 1 And. 8; ante, Vol. I., pp. 449, 497.
(*k*) Ante, Vol. I., pp. 449, 498.
(*l*) 1 Mer. 417; 2 S. & Stu. 295; 3 D. J. & S. 553, 554.
(*m*) 3 M. & Sel. 37; 1 Mer. 358.
(*n*) 4 Mad. 67. See also 3 B. C. C. 401; 1 De G. & J. 32; 3 Drew. 724; 7 H. L. Ca. 89; 6 Ch. D. 248.
(*o*) 1 Cox, 324; 2 Mer. 389; 1 J. & W. 31; 8 Hare, 48, 186. But see 2 R. & My. 306; 2 Kee. 756; 3 Beav. 352.
(*p*) 3 Burr. 1626; 3 B. P. C. Toml. 209. See also 2 Coll. 336; L. R., 5 H. L. 548.
(*q*) See 4 Ves. 574. But see 2 V. & B. 269; and ante, Vol. I., p. 532.
(*r*) 18 Ves. 466; 4 C. B. N. S. 790.
(*s*) 3 Ves. 450; 7 id. 458; 7 East, 272; 2 B. & Ald. 441; ante, p. 994. But see 2 D. F. & J. 454; L. R., 6 H. L. 33.
(*t*) Cas. t. Talb. 161; 4 Ves. 406; 2 Mer. 386.
(*u*) Doug. 340; 6 T. R. 352; 4 Ves. 329; 5 Ves. 401; 6 Ch. D. 496; 19 C. B. N. S. 780; ante, Ch. XXXVII.
(*x*) Doug. 341; 3 B. C. C. 68; 5 East, 51; 2 Ba. & Be. 204; 3 Dow, 71.

presumed to be used always in the same sense (*y*), unless a contrary intention appear by the context (*z*), or unless the words be applied to a different subject (*a*). And, on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning (*b*).

XIX. That words and limitations may be transposed (*c*), supplied (*d*) or rejected (*e*), where warranted by the immediate * context, or the general scheme of the will; but not merely [*1657] on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument (*f*).

XX. That words which it is obvious are miswritten (as dying *with* issue, for dying *without* issue), may be corrected (*g*).

XXI. That the construction is not to be varied by events subsequent to the execution (*h*); but the Courts, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called upon to affix a signification to them (*i*).

XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intention in regard to both (*k*). There must be an apparent design to connect them (*l*).

XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible (*m*).

(*y*) 2 Ch. Cas. 169; Doug. 268; 3 Drew. 472.

(*z*) Ante, 949, n. (*s*).

(*a*) 1 P. W. 663; 2 Ves. 616; 5 M. & Sel. 126; 1 V. & B. 260. But see 14 Ves. 488.

(*b*) 4 B. C. C. 15; 13 Ves. 39; 7 Taunt. 85. The writer heard Lord Eldon lay down the rule in these words. But see Amb. 122; 6 Ves. 300; 10 Ves. 166; 13 East, 359; 13 Ves. 476; 19 Ves. 545; 1 Mer. 20; 3 Mer. 316, — where the argument that the testator, notwithstanding some variation of expression, had the same intention in several instances, prevailed.

(*c*) 2 Ch. Ca. 10 Hob. 75; 2 Ves. 32; Amb. 374; 8 East, 149; 15 East, 309; 1 B. & Ald. 137; ante, Vol. I., p. 465. But see 2 Ves. 248.

(*d*) Cro. Car. 185; 7 T. R. 437; 6 East, 486; 2 D. & Ry. 398. See also 2 Bl. 1014; and ante, Vol. I., p. 451.

(*e*) 2 Ves. 277; 3 T. R. 87 n.; 3 id. 484; 4 Ves. 51; 5 Ves. 243; 6 Ves. 129; 12 East, 515; 9 Ves. 566; and ante, Vol. I., p. 444.

(*f*) 18 Ves. 368; 19 id. 652; 2 Mer. 25.

(*g*) 8 Mod. 59; 5 B. & Ad. 621; 3 Ad. & El. 340; 2 D. M. & G. 300.

(*h*) Cas. t. Talb. 21; 3 P. W. 259; 11 East, 558, n.; 1 Cox, 324; 1 Ves. Jr. 475. But see ante, Vol. I., p. 217.

(*i*) 11 Ves. 457; 6 Ves. 133.

(*k*) Cro. Car. 368; Doug. 759; 8 T. R. 64; 1 B. & P. N. R. 335; 9 East, 267; 11 id. 220; 14 Ves. 364; 4 M. & Sel. 58; 1 Pri. 353; 4 B. & Cr. 667. See also Godb. 146.

(*l*) Leon. 57; Cas. t. Hardw. 143; 10 East, 503. This and the former class of cases chiefly relate to a question of frequent occurrence: whether words of limitation, preceded by several devises, relate to more than one of those devises. The statement of the rule in the text was cited with approval by Chitty, J., in Re Johnston, Cockerell *v.* Earl of Essex, L. R., 26 Ch. D. at p. 545.

(*m*) Finch, 139. See also 4 Ves. 325; 13 Ves. 486.

XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect than the contrary; and, accordingly, a provision for the death of devisees will not be considered as intended to provide exclusively for lapse, if it admits of any other construction (*n*).

(*n*) 2 Atk. 375; 4 Ves. 418; 4 Ves. 554; 7 Ves. 286; 1 V. & B. 422; 1 Pri. 264. See also 1 Sw. 161; 2 Ves. Jr. 501; M'Clel. 168.

APPENDICES.

APPENDIX A.

SUGGESTIONS TO PERSONS TAKING INSTRUCTIONS FOR WILLS.

I. General Suggestions.

Few of the duties which devolve upon a solicitor more imperatively call for the exercise of a sound, discriminating, and well-informed judgment, than that of taking instructions for wills. It frequently happens that, from a want of familiar acquaintance with the subject, or from the physical weakness induced by disease (where the testamentary act has been, as it too often is, unwisely deferred until the event which is to call it into operation seems to be impending), testators are incapable of giving more than a general or imperfect outline of their intention, leaving the particular provisions to the discretion of their professional adviser. Indeed, some testators sit down to this task with so few ideas upon the subject, that they require to be informed of the ordinary modes of disposition under similar circumstances of family and property, with the advantages and disadvantages of each; and their judgment in the selection of one of these modes is necessarily influenced by, if not wholly dependent on, professional recommendation. To a want of complete and accurate information as to the consequences of their proposed schemes, must be ascribed many of the absurd and inconvenient provisions introduced into testamentary gifts, to say nothing of the obscurities and inconsistencies which frequently throw an impenetrable cloud over the testator's real intentions. It may be useful to mention some particulars on which information should be obtained in taking instructions for a will, most of the inquiries being suggested by the various classes of cases discussed at large in this work, and being framed with a view to prevent such questions as those cases present. It will be obvious that the nature of the inquiries in every case must be greatly regulated by the situation in life and other circumstances of the testator.

They may be distributed into * those that relate —*first*, to the subject, and *secondly*, to the objects of testamentary disposition, including in the former some general points. [*1660]

(I.) *In relation to the* subject *of gift.*—1. Where real estates are to be specifically devised, the title-deeds, or a recent abstract of the title, should if possible be seen. The neglect of such investigation often occasions the omission of small parcels, or even more serious mis- Investigation of title.

descriptions, misstatements of tenure, omission of special provisions adapted to the state of the title, &c.

And if the testator has made a marriage or other settlement, or is entitled to any interest in settled property, the settlement or will should be inspected, in order to ascertain the nature and extent of his interest and powers. Under his marriage settlement he may have a power of jointuring and charging portions, and would probably possess a general power of appointment in default of issue. The result of such inspection may sometimes be to show that the property which the testator supposes to be at his own disposal is tied up by his settlement.

2. Where real estates are to be specifically devised, they should be described clearly and intelligently, and by reference to some permanent characteristic, as their locality. A reference to occupancy, being an incident liable to change, is in general better omitted, unless it form a necessary discriminating feature in the description.

Description of lands.

And where lands specifically devised are described by their local situation and occupancy, it should be carefully ascertained that the whole of the land answering to the locality, answers also to the occupancy, or, in other words, that both parts of the description are co-extensive, to avoid any question as to the less comprehensive term being restrictive.

3. If any contract for the sale or purchase of real estate is pending, or likely to be pending at the testator's death, the destination of the purchase money or of the estate should be provided for (*a*). In the case of a contract for purchase, power should be given to the executors or trustees to deal with the contract, and provision should be made for any question which may arise between the devisee and the residuary legatee, in case the contract should not be strictly enforceable, and for compensating the devisee if the contract fails.

Contract for sale or purchase.

4. Where the subject of devise is a mortgaged estate, inquiry should be made whether the devisee is to take it freed from the mortgage; and, if so, words should be used distinctly conferring on him the right to have it exonerated out of the testator's other property (*b*).

Mortgaged lands.

Emblements.

5. The emblements on a devised estate are sometimes of great value; and though if the estate descends they would go to the executor and not to the heir, yet when it is devised, they go to the devisee in the absence of a provision to the contrary, thus giving him a great advan-
[*1661] tage over a pecuniary legatee, or a general legatee for life, * who is not entitled to interest during the first year. The testator's intention on this head should be ascertained.

6. Where stocks, funds, or securities are specifically bequeathed, care should be taken to describe them accurately, and it should be pointed out to the testator that such gifts are liable to ademption by sale or change of investment. On the other hand, gifts of this nature are favored in the administration of the assets.

Specific bequests.

7. If the testator is in partnership, either in his general business or in any particular adventure, inquiry should be made how he wishes his interest to be dealt with. The articles of partnership should be examined, in order to see if they contain any power to be exercised by will.

Disposition of share in partnership.

(*a*) As to the powers of the personal representatives of a testator or intestate to convey land which at his death is subject to an enforceable contract for sale, see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 4. And as to the powers of tenants for life to complete contracts for sale entered into by their predecessors, see the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 6.

(*b*) See 17 & 18 Vict. c. 113, ante, p. 1455.

8. Testators sometimes receive moneys belonging to their children, for which the latter hold no security or acknowledgment. Inquiry should in all cases be made as to the existence, or the probability of the future existence, of any unsettled accounts or claims between the testator and his children. Testator holding money belonging to his children.

9. Where there is an immediate devise to a class of persons, who may not be in existence at the death of the testator, as to the children of A., who may then have no children, it should be ascertained what, in this event, is to become of the intermediate profits. In the absence of any provision of this nature, they will go to the residuary devisee or heir-at-law. A similar question may arise as to intermediate income of a gift of personal estate which may not take effect immediately. Intermediate income.

10. Under some circumstances, it may be proper to inquire whether any specific fund, constituted of real or personal estate, is to be appropriated for payment of debts, funeral and testamentary expenses, and legacies; and it should always be stated, whether a fund so appropriated is to exempt the general personal estate from being first applied, as is generally intended, though the intention frequently fails for want of an explicit expression of it. Fund for payment of debts, &c.

11. It should be ascertained whether any of the legatees are indebted to the testator; and if so, whether and in what manner the debts are to be brought into account. It should be clearly expressed whether or not legacies to creditors of the testator are to go in satisfaction of their claims. Legacies to debtors and creditors.

Are advancements by the testator to his children to be accounted for? Advancements.

12. Gifts of residuary real or personal estate should be expressed in general terms. Residuary gifts.

13. Where general or residuary real or personal estate is given to several persons in succession, it should be considered and expressly declared whether the conversion is to be immediate, or whether the tenant for life is to enjoy the property in specie; and whether the trustees are to have any and what discretionary power to delay or suspend the conversion. As to conversion of general or residuary estates.

Are household and domestic effects, and particularly consumable articles, to be converted? If not, who is to take them?

Are leaseholds to follow the destination of the freeholds, or to be converted with the personal estate?

14. If the conversion is generally, or as regards any particular property or investment, to be suspended, the testator should declare, *if such is his intention, that the actual income arising from property or investments of a precarious or perishable nature is to be enjoyed as income during the suspension, also whether any and what discretion is to be vested in the trustees as to such property and as to reversionary and other property not immediately salable with advantage. [*1662] Income of wasting property till conversion.

15. The following further questions arise with regard to getting in, converting, and dealing with the testator's general personal estate:— Further questions as to conversion

What investments are to be authorized? Are the trustees to have power to invest in land generally, or for a particular purpose, as the purchase of a residence? Whether, where a son or other near object of the testator's regard is

in business, the trustees are to lend any trust money to him, and to what amount and on what security? Whether any securities which the testator may possess at his death are to be retained? Whether any indulgence is to be shown to any particular debtors?

Power to vary investments.

16. A power for the trustees to vary securities should be inserted in the will, if it contains an express investment clause.

17. At what time are pecuniary legacies (if any) to be paid? Are such legacies to carry interest, and if so, from what time, and at what rate? Where a life interest is given in a specific fund or in the residuary personalty or any share of the residue, the tenant for life has income or interest from the testator's death; but in the case of a general legacy of money or stock, the tenant for life will have no income in respect of the first year, unless it is expressly given to him.

Payment of legacies, interest, &c.

18. Are all pecuniary legacies to abate in case of deficiency of assets? It is generally proper to give a legacy to the testator's widow for immediate use; such a legacy will abate pari passu with others, if the assets are deficient, unless the will contains a declaration to the contrary.

Abatement of legacies.

19. How are annuities to be raised and secured, whether by the charge or appropriation of a particular fund or estate, or by the executors purchasing a government annuity or otherwise?

Annuities.

20. Are pecuniary legacies and annuities to be paid free from legacy duty? Annuities (including rent-charges) and life-interests should generally be given free from legacy duty or succession duty.

Legacy duty.

Appointment of trustees for purposes of Settled Land Acts, and of Conveyancing Act, 1881, s. 42.

21. Where lands are devised in strict settlement, trustees should be appointed for the purposes of the Settled Land Acts, and also for the purposes mentioned in the 42nd section of the Conveyancing and Law of Property Act, 1881.

Extension of powers, &c., of Settled Land Acts.

22. Where lands are devised in strict settlement, it should be considered whether any and which of the following special powers and provisions, in addition to the powers conferred by the Settled Land Acts should be inserted in the will: —

(i.) Power for the tenant for life to exercise all or some of his statutory powers without any notice to the trustees (*c*).

(ii.) Power for the tenant for life to sell or lease the principal mansion-house, park, &c., without consent of the trustees or leave of the Court (*d*).

[*1663] * (iii.) Power for the tenant for life to raise money for purposes not authorized by the Acts (*e*).

(iv.) Power to effect improvements without any certificate, or order of Court (*f*).

(v.) Extension of powers to exchange and purchase lands (*g*).

(vi.) Extension of powers of investment and application of capital moneys (*h*).

(vii.) Proviso dispensing with capitalization of mining rents (*i*), or of proceeds of sale of timber (*k*).

(*c*) See S. L. Act, 1882, s. 45; S. L. Act, 1884, s. 5; S. L. Act, 1890, s. 7.
(*d*) See S. L. Act, 1890, s. 10, repealing S. L. Act, 1882, s. 15.
(*e*) See S. L. Act, 1882, s. 18; S. L. Act, 1890, s. 11.
(*f*) See S. L. Act, 1882, s. 26; S. L. Act, 1890, s. 15.
(*g*) See S. L. Act, 1882, ss. 4, 23.
(*h*) See S. L. Act, 1882, ss. 21, 25; S. L. Act, 1890, s. 13.
(*i*) See S. L. Act, 1882, s. 11.
(*k*) See S. L. Act, 1882, s. 35.

(viii.) Power for a sole trustee to receive and give receipts for capital moneys, and otherwise exercise the statutory powers conferred on "trustees of a settlement" (*l*).

23. It will sometimes be necessary, even where an infant devisee is to take the land *as land*, having regard to the circumstances affecting the devised estate, to consider whether the powers of management vested in trustees by the 42nd section of the Conveyancing and Law of Property Act, 1881, are sufficiently ample or special, or whether express powers should be substituted for, or given to the trustees in addition to such statutory powers. Powers of management.

It would seem that the section does not apply where land is devised in trust for sale with a discretion to the trustees to postpone the sale. In such cases, therefore, unless a trust of rents and profits till sale is declared in favor of the infant (*m*), it will always be advisable to insert express powers of management, which may be done by reference to the statute, or otherwise, as may be desired. Also where the devise is immediately to an infant in fee simple, as the section apparently applies only to the case of an infant taking an interest under a *settlement*, *i.e.*, a disposition by which successive interests are created.

24. Where an estate held under one title is devised in parcels, provision should be made for the custody of the title-deeds; and, in the case of contiguous properties, for any rights of way or other easements that may be required for the full enjoyment of any parcel. And if property included in one mortgage is devised in parcels to different persons cum onere, the manner in which the charge is to be borne should be stated. Splitting of estates held under one title. Easements. Estates in mortgage devised cum onere.

25. In disposing of copyholds, vest a power of appointment either in trustees or in the beneficial devisee. Where the power is given to trustees, it should be made to accompany the office. Where it is given to a beneficial taker, it should be made exercisable by will; so that in case of his death before admittance, his testamentary appointee will not have to pay a double set of fees and fines. The existence of a power of appointment over copyholds may often be the means of considerable saving to the estate. Power of appointment over copyholds.

26. It may be advisable to insert provisions empowering a person appointed a trustee, being a solicitor, or other professional person, to * transact business relating to the trust-estate, and to charge for his [* 1664] services. Also in some cases to empower a trustee to purchase the trust property. Privileges given to trustees.

27. A person who takes only a partial interest under the will should not, generally speaking, be appointed sole executor or trustee. Sole executor or trustee.

(II.) *In relation to the* objects *of Gift.*—When a testator proposes to make a disposition of his property in favor of his wife and children (naturally the first objects of his regard), several modes of disposition present themselves. One is to give the income to the wife for life, clothed or not with a trust for the maintenance of the children, and to give the inheritance or capital to the children equally, subject or not to a power in the wife of fixing their shares, or limiting the property to some in Provision for wife and children.

(*l*) See S. L. Act, 1882, s. 39.

(*m*) If a trust of rents and profits is inserted, the infant will be "beneficially entitled in possession" within the meaning of the Act (see s. 2, sub-s. (iii)), and s. 42 will apply.

exclusion of others, as she may think proper. Another mode is, to give the wife and children immediate absolute interest in the property in certain proportions, according to the nature of the distribution of personal property under the statute in case of intestacy; but this mode of disposition is less frequently adopted than the former. To empower the widow to regulate the shares is often found convenient, not only as it preserves her influence over her children, but because it enables her to adapt the disposition of the property to their various exigencies at the period of her death, and it has, moreover, a salutary effect in restraining the children from disposing of their reversionary interests.

1. The obvious inquiries (in addition to those immediately suggested by the preceding remarks) to be made of a testator, of whose bounty children are to be objects, are — at what ages their shares are to vest; — whether, if any child die in the testator's lifetime, or subsequently, before the vesting age, leaving children, such children are to be substituted for the deceased parents. If the vesting of the shares be postponed to the death of a prior tenant for life, or other possibly remote period, the necessity for providing for such events is of course more urgent; and in that case it should also be ascertained, whether, if the objects die leaving grandchildren, or more remote issue, but no children, such issue are to stand in the place of their parent.

In regard to children, &c.

2. If any of the objects of the gift (whether of real, or personal property) be females, or the gift be made capable of comprehending them, as in the case of a general devise or bequest to children, it should be suggested, whether their shares are not to be limited for life, subject to a restriction on alienation (with the view of effectually excluding marital influence), with a power of disposition, in default of issue, or absolutely, over the inheritance, or capital, as the case may be; and if it be intended to prevent that power of disposition from being exercised, under marital influence, without the possibility of retractation, it should be confined to dispositions *by will*, which, being ambulatory during her life, can never be exercised so as to fetter her power of alienation over the property. The will should declare how the property is to go, in case such power is not exercised.

Daughters' or other females' shares.

Where an inalienable provision for a married woman is charged upon land, it should be confined to a specific estate, or be accompanied with apt provisions for shifting the security.

[*1665] * 3. In limitations in tail, are the testator's own daughters to take before the daughters of his sons or grandsons? If so, the order of the limitations will be, to the first and other sons and their sons successively in tail male, remainder to the testator's daughters either as tenants in common or successively for life, and to their sons in tail male, remainder to the sons (or sons' sons) in tail general, remainder to the daughters in tail general. If not, the limitation to the sons (or sons' sons) in tail general will precede the limitation to the daughters.

Limitations in strict settlement.

4. If a gift be made to a plurality of persons, it should be inquired whether they are to take as joint tenants, or tenants in common; or, in other words, whether with or without survivorship; though it is better in general, where survivorship is intended, to make the devisees tenants in common, with an *express* limitation to the survivors, than to create a joint tenancy, which may be severed.

Survivorship.

5. In all cases of limitation to survivors, it should be most clearly and explicitly stated *to what period survivorship is to be referred*; that is, whether the property is to go to the persons who are survivors at the death of the testator, or at the period of distribution. It should always be anxiously ascertained, that the testator, in disposing of the shares of dying devisees or legatees among surviving or other objects, does not overlook the possible event of their leaving children or other issue. There can be little doubt that in many cases of absolute gifts to survivors, this contingency is lost sight of. This observation, in regard to the unintentional exclusion of issue, applies to all gifts in which it is made a necessary qualification of the objects that they should be living at a prescribed period posterior to the testator's decease, and in respect of whom, therefore, the same caution may be suggested.

To what period referable.

Suggestion as to clauses of survivorship.

6. It may be observed, that where interests not in possession are created, which are intended to be contingent until a given event or period, this should be explicitly stated; as a contrary construction is generally the result of an absence of expression. Explicitness, generally, on the subject of vesting, cannot be too strongly urged on the attention of the framers of wills.

As to vesting.

7. Where the children do not take absolutely vested interests until their majority or marriage, the question will arise whether the income or any portion of it is to be applied for maintenance until the period of vesting, and, if not *all* so applied, what is to become of the excess.

As to the insertion of express powers and provisions in regard to maintenance and accumulation.

The Conveyancing Act, 1881, sections 42, 43, confers on trustees powers of applying income of property of infants during minority or in the case of women until marriage; section 42 applies only to income derived from land to which the infant is beneficially entitled in possession; section 43 applies to all property held in trust for an infant; both sections contain provisions for the accumulation of unapplied income, and it will be observed that the destination of income under the respective sections is not identical. These powers and provisions may be modified, or altogether excluded, if desired. In ordinary cases, probably, the statutory powers and provisions may be relied on, but it must be borne in mind that they do not apply in any of the following cases: —

* (i.) Where the vesting is, or may be postponed until after the [*1666] attainment of the age of twenty-one years (*n*);

(ii.) Where the infant on attaining twenty-one would only be entitled to the legacy without interest (*o*);

(iii.) Where the gift is to a class liable to be increased by the birth of persons who will be entitled to participate, so that the share of each existing member is unascertainable (*p*);

(iv.) The provision in s. 43 as to destination of surplus income does not apply, where the gift though absolute is defeasible (*q*);

In all such cases express powers of maintenance should be inserted.

The statutory provisions for maintenance confine each object to the benefit of the income from his own expectant or vested share. It may sometimes

(*n*) Re Judkin's Trusts, 25 Ch. D. 743.
(*o*) Re Dickson's Trusts, Hill *v.* Grant, 39 Ch. D. 331.
(*p*) Re Jeffrey, Burt *v.* Arnold, (1891) 1 Ch. 671.
(*q*) Re Wells, Wells *v.* Wells, 43 Ch. D. 281.

Power to apportion maintenance funds.

be better to make a common fund of the shares of all the minors for the time being, to be applied in such proportions as the trustees think fit.

Maintenance out of capital.

If it is desired that capital shall be applicable for maintenance, an express declaration to this effect must be inserted in the will.

Where children are to be maintained by the widow it should be made clear whether any enforceable trust is to be imposed on her, and whether she is to have a discretion as to the proportion, and whether their right to maintenance is to cease on their attaining twenty-one or marrying; and if it is then to cease, some provision for them should be made, to take effect in possession in that event (*r*).

Income to widow for maintenance of children.

8. There is no statutory power of advancement. Where the children do not take absolutely vested interests until their majority or marriage, it is useful to confer an express power on the trustees, with the consent of the widow, or other person taking the prior life interest, to advance some proportion (the maximum of which is usually fixed at half or one-third) of their presumptive shares, in order to place out the sons as apprentices, &c., or for other such purposes. Even where the children take vested (*i. e.*, absolutely vested) interests at their birth, a power of advancement may be requisite where the prior legatee for life is a married woman restrained from alienation, and, therefore, incompetent to accelerate the payment of the shares by relinquishing her life interest. In no other case can the power be wanted under such circumstances.

Power of advancement.

9. If you have not certain knowledge on the point, endeavor to learn whether there is any doubt as to the legitimacy of any of the testator's children, or the legality or fact of his marriage with his reputed wife; and suggest the consequences of an insufficient description of such objects by their reputed character only.

Legitimacy of legatees.

10. If provision is made for illegitimate persons, inquire what is to become of the property in case of their death under age or without having effectually disposed of it by will or otherwise. A mere annuity or life interest will often be the best provision; but if an interest in the capital is to be given, the best course, in order to exclude the *title of the Crown in all events, is to confer on such objects a life estate, with a power of appointing the corpus by deed or will, and to insert a gift over in default of appointment.

Gifts to illegitimate persons.

[*1667]

Power to settle shares of infant legatees.

11. Are the trustees to have power to settle the legacies or shares of legatees, or devisees marrying in infancy, or (which is better) are such legacies to be absolutely settled in such event?

Authority to pay small legacies to parents of infant legatees.

12. It is often both convenient to the trustees and useful to the objects to authorize the payment or delivery of pecuniary or specific legacies, of small amount or value, to the parents of infant legatees, with a direction that their receipts shall discharge the trustees.

Power to appoint life interest to wife or husband.

13. Is any legatee or devisee for life to have a power to appoint a life interest or annuity to a surviving wife or husband? In the case of a female legatee, it should be ascertained whether the power is to be made exercisable by deed or will, or by will only.

(*r*) See Pride *v.* Fooks, 2 Beav. 430; Conolly *v.* Farrell, 8 Beav. 347; Re Camac's Trust, 12 Jur. 470; Longmore *v.* Elcum, 2 Y. & C. 363.

14. Where a testator proposes to recommend any person to the favorable regard of another whom he has made the object of his bounty, it should be ascertained whether he intends to impose a legal obligation on the devisee or legatee in favor of such person, or to express a wish without conferring a right. In the former case, a clear and definite trust should be created; and in the latter, words negativing such a construction of the testator's expressions should be used. Equivocal language in these cases has given rise to much litigation.

Words of recommendation, &c.

15. Where a testator is married and has no children, and it be unreasonable to contemplate his having issue by his present wife, provision should be made for the contingency of such issue coming in esse, or if this is not done, the dispositions of his will should be made expressly contingent on his *leaving* no issue surviving him; for, as the birth of children alone is not a revocation, they may be excluded under a will made when their existence was not contemplated; and cases of great hardship of this kind have sometimes arisen from the neglect of testators to make a new disposition of their property at the birth of children; indeed, it has sometimes happened that a testator has left a child in ventre, without being conscious of the fact; for the same reason provisions for the children of a married testator, who has children, should never be confined to children in esse at the making of the will. A gift to the testator's children generally will include all possible objects. Where, however, the gift is to the children of *another* person, and it is intended (as it generally is) to include all the children *thereafter to be born*, terms to this effect should be used, unless a prior life-interest is given to the parent of such children; in which case, as none can be born after the gift to them vests in possession, which is the period according to the established rule of ascertaining the objects, none can be excluded.

Making will conditional on testator's leaving no issue.

To the preceding suggestions, it may not be useless to add, that it is in general desirable that professional gentlemen taking instructions for wills should receive their instructions immediately from the testator himself, rather than from third persons, particularly where such persons are interested. In a case in the Prerogative Court (*s*), * Sir J. Nicholl "admonished professional gentlemen generally, that where instructions for a will are given by a party not being the proposed testator, a fortiori where by an interested party, it is their bounden duty to satisfy themselves thoroughly, either in person, or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity, or in other words, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will at all." [*1668]

As to the persons through whom instructions are received.

As the last, and not the least important precaution, the testator's solicitor should select as attesting witnesses persons of respectability and intelligence, not being devisees or legatees, or the husbands of devisees or legatees.

Witnesses.

II. Suggestions as to Wills intended to operate Abroad.

English conveyancers are occasionally required to draw wills which are intended to take effect under the laws of a foreign country (*t*). This may hap-

(*s*) Rogers *v.* Pittis, 1 Add. 46.

(*t*) For the purposes of these remarks, the expression "foreign country," includes Ireland, Scotland, and the colonies and dependencies of the United Kingdom.

As to execution of wills according to formalities required by foreign laws.

pen either (i.) where the testator has immovable property situate in a foreign country, so that the will must, in order effectually to dispose of such property, be executed with the formalities required by the law of the country in which the property is situated; or, (ii.) where the testator being resident but not domiciled in this country has movable property, the testamentary disposition of which will be regulated by the law of the country of the testator's domicile. Where therefore a testator possessed of immovable property abroad, or having a foreign domicile, desires to make his will in this country, care must be taken to comply with the formalities in regard to execution and attestation required by the laws of the country in which the will is intended to operate.

A will purporting to dispose of land in a foreign country should if possible be prepared under the advice of a lawyer who is familiar with the law of the country in which the property is situate. If, however, under the pressure of emergency it is impossible to obtain such advice, it will be advisable to make two wills, one of a short and simple character disposing of the foreign land, and to be executed according to the formalities required of the *lex rei sitæ* (*u*), and another, which will be the principal will, disposing of all the testator's other property, to be executed according to the formalities required by the English law, and whereby all persons interested thereunder should be expressly put to their election to confirm the dispositions of the foreign lands.

Wills disposing of land in a foreign country.

All testamentary dispositions of any property, which are intended to operate abroad, should be of the simplest and most general character [*1669] * consistent with the testator's intentions; and they should be expressed in clear terms, avoiding as far as possible the use of technical expressions, which, however familiar and intelligible to English lawyers, may raise questions of doubt and difficulty when they come to be translated into another language and interpreted by a foreign court. If the testator desires to make dispositions of a complicated character, it may be suggested that he should be advised in the first instance to make a provisional will in a comparatively simple form, embodying therein the dispositions to which he attaches most importance; and that the preparation of a more formal document should be deferred till the testator returns to the foreign country, or till his English solicitor can communicate his instructions (which should be expressed in as clear and untechnical language as possible) to a competent lawyer practising in that country.

Preparation of wills intended to operate abroad.

Attention to the matters above referred to is to be impressed upon testators and their legal advisers, not only in order to insure that wills intended to operate abroad may be recognized as valid by foreign Courts, but also in order to prevent questions as to election being raised where the testator's property is situated partly in this country and partly abroad,—questions which often cause much dispute and litigation.

It should also be borne in mind that the liberty of testamentary disposition

(*u*) It may sometimes be necessary to include in such a will dispositions of personal property connected with the land, as business plant, machinery, &c.; in such a case, the will dealing with such property should also be executed according to the formalities required by English law so as to render it effectual as to the personalty. It is often advisable where a testator has properties in different countries that he should make separate wills dealing with such properties respectively, with a view of facilitating the administration of his estate. As to the practice with regard to probate of separate wills, see Re Astor, 1 P. D. 150; Re Calloway, 15 P. D. 147; Re Granat de la Rue, 15 P. D. 185.

accorded by English law is in many states recognized only to a limited extent; *e. g.*, in France, and in other countries whose legal system is based on the Code Napoleon, a testator leaving relatives ascendant or descendant, is competent to dispose of only a part of the property of which he is possessed at his death (*w*). Moreover the powers of limiting successive estates or interests and of vesting property in trustees for the benefit of devisees and legatees, are not very generally recognized in foreign countries.

Restrictions by foreign law on testamentary power.

Where a testator has resided and acquired property in several parts of the world, and there is a doubt as to where he is domiciled, the prudent course will be to execute the will in such form as to make it as far as possible valid in any event; the will should therefore be executed (i.) with all formalities required by our law so as to render it valid wherever the provisions of our Wills Act have been adopted, (ii.) with three witnesses, so as to enable it to operate on land where devises are regulated by the Statute of Frauds, and (iii.) in holograph, *i. e.*, written throughout, dated, and signed by the testator himself, or else executed as a mystic testament (*x*), so as to operate effectually in countries where the civil law prevails.

Suggestion as to execution where testator's domicile is doubtful.

It may be useful in this place to indicate the formalities as to the form, execution, and attestation required to render wills valid in some of the principal "foreign" countries, and also the circumstances (so far as the Editor has been able to ascertain them) which are deemed to effect a revocation of existing wills, so as to render immediately necessary the making of a new will so as to prevent an intestacy.

(i.) **United Kingdom.** — The Wills Act extends to Ireland as well as to England; consequently the legal requirements as to the form, execution, and attestation of wills and the law as to the [*1670] revocation of wills are the same in both countries.

Ireland.

The Wills Act does not extend to Scotland (*y*).

Scotland.

Previous to 1868 a testament was effectual only with regard to the movable estate of the testator; the owner of heritage could settle the succession thereto only by conveyance de præsenti. But by the statute 31 & 32 Vict. c. 101, s. 20, owners of lands may settle the succession thereto in the event of their death by testamentary writings to be duly executed in the manner required or permitted in the case of testamentary writings by the law of Scotland. By the law of Scotland it is "permitted" to any person to make his will according to the formalities of making a will in the place of execution. Consequently, the owner of heritable estate in Scotland may, by will made in England and executed and attested according to the law of England, dispose of any heritable estate in Scotland of which he is possessed; and such heritable estate will pass by a general devise of all his property (or estate) wherever situate unless expressly excepted.

Wills of land permitted by Scotch law.

If the will is not executed in England, the requirements of Scotch law as to execution must be strictly complied with. They are as follows: —

(*w*) See Code Civil, Liv. III., Tit. iii., Ch. 3; Codice Civile (Italy), Lib. III., Tit. ii., Sez. 4, &c. It would seem, however, that these restrictions do not generally apply to testamentary dispositions made by persons who are not subjects of the particular State.

(*x*) See post, p. 1675, note (*d*).

(*y*) See further as to the law of Scotland in regard to executions and attestations of wills, Watson, Dict. of Law of Scotland, sub-tit. "Wills"; MacLaren on Wills, i. 231 et seq.; 1 Bells, Comm. 324 et seq.

Formal requisition to validity of wills.

A testament or will must be in writing and signed by the testator; if the will consists of several sheets, the testator must sign at the foot of each sheet as well as at the end of the will (*z*).

Sealing is not now required. Wills may be either holograph or "tested." A will neither holograph nor tested is invalid.

A holograph will in the testator's handwriting does not require to be attested, but is completed by the mere signature of the testator.

By the statute 37 & 38 Vict. c. 94, every holograph writing of a testamentary character is to be presumed to have been executed and made of the date it bears.

All other wills must be "tested," and subscribed by two or more witnesses, who must have seen the testator sign, or heard him acknowledge his signature. It is not necessary that the acknowledgment should be made to the two witnesses in the presence of each other. The description, by residence, of the witnesses must be added to their names, as set forth in the testing clause of the will. If the will is on several sheets, it is sufficient if the subscription of the witnesses is on the last sheet only.

By the statute 37 & 38 Vict. c. 94, s. 41, a testament by a person who is unable to write is valid if, after being read over to him, it is executed on his behalf by a notary or justice of the peace in the presence of two witnesses (*a*).

[*1671] *If a testator has no issue at the time of making his will, the subsequent birth of children raises a strong presumption in equity that the disinheritance was contrary to intention so as to revoke the will, according to the rule of the civil law which imported into such a will the implied condition "si testator sine liberis discesserit." On the birth of a child, therefore, a new will, or a codicil confirming, with or without modification, the previous will should be made. A will may also be revoked by destroying or cancelling it, or by a subsequent will expressly revoking or containing dispositions inconsistent with the former will (*b*).

Revocation of wills.

What English laws have force in the colonies.

(ii.) **Colonies and Dependencies.** — With respect to the laws in force in British possessions abroad, there is a memorandum in 2 P. Wms. 75, that it was determined in the Privy Council (*c*), —

"1st. That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new-found country is to be governed by the laws of England; though, after such country is inhabited by the English, acts of Parliament made in England without naming the foreign plantation, will not bind them; for which reason it has been determined that the Statute of Frauds does not bind Barbadoes (*d*).

(*z*) By s. 38 of the Conveyancing and Land Transfer Act (Scotland), 1874, the various formalities formally required for the validity of probative instruments are dispensed with, but the requirement of the common law as to the signature by the testator of each of the several sheets of his will is not referred to in that section, and such requirement is, in order that the will should be *ex facie* valid (or probative), still in force.—By s. 39 of the same statute a deed (which in Scotland includes a will) "subscribed by the grantee and bearing (i.e., purporting) to be attested by two witnesses subscribing" may, notwithstanding any informality of execution, be set up, by a proceeding in the Scotch Court, and with the aid of parol evidence. But of course no conveyancer, in advising on the execution of a will, would rely upon this section.

(*a*) This enactment gives statutory confirmation to the customary rule previously existing which was regarded as having the force of law; see Hogg *v.* Campbell, 2 Macp. 849.

(*b*) See further as to the law of Scotland, in regard to revocation of wills, MacLaren on Wills, i., et seq.

(*c*) See to the same effect, Blankard *v.* Goldy, Salk. 411, Holt, 341, Comb. 228; and Dutton *v.* Howell, Show. P. C. 32.

(*d*) Sheddon *v.* Goodrich, 8 Ves. 487; Rex *v.* Vaughan, 4 Burr. 2500. This rule seems to

"2dly. When the King of England conquers a country it is a different consideration; for then the conqueror, *by saving the lives of the people conquered*, gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases.

"3dly. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless when these are contrary to our religion (*e*), or enact anything that is malum in se, or are silent, for in all such cases the laws of the conquering country shall prevail."

In the case of a conquered country, as the Queen has absolute power to impose what terms of capitulation she pleases, she may establish what constitution and laws she pleases, without the consent of Parliament; but these once made are binding, and cannot be altered by her successors without the consent of Parliament (*f*).

Sometimes the laws of England are extended to conquered colonies; but in that case, as well as in the case of newly-planted colonies, it is a rule that such only of the laws of England apply to the colony as existed at the time it first became subject to the English laws, and as are applicable in object and operation to the circumstances of the colony (*g*). In Att-Gen. *v.* Stewart (*h*), it was held that the Mortmain * Act, 9 Geo. 2, being [*1672] aimed exclusively at a state of things which existed in England only, did not extend to any colony which afterwards became subject to the English laws. So it seems no penal statutes extend to the colonies (*i*). But the rule against perpetuities exists independently of statute, and is founded on public policy, and therefore is generally in force in the colonies; so also is the exception to that rule which exists in favor of charities (*k*).

The provisions of the English Wills Act (*l*), and of the Amendment Act of 1852 (*m*), as to the execution, attestation, and revocation of wills, has been adopted by most of the colonies and dependencies of the United Kingdom. These provisions are in force in Antigua (*n*) the Australian settlements, viz., New South Wales (*o*), Queensland (*p*), South Australia (*q*), Victoria (*r*), and Western Australia (*s*); the Bahama Islands (*t*); Barbadoes (*u*); Bermuda (*x*); British Columbia (*y*), Canada, Upper (*z*); Grenada and the Grenadines (*a*); Hon-

Colonies, &c., in which the Wills Act is in force.

have been ignored on some occasions. Thus, in Ex parte Anderson, 5 Ves. 240, an order was made by Lord Alvanley, for a conveyance of lands in Calcutta by an infant trustee, under the stat. 7 Anne, c. 19, although that act does not name the colonies; and cases were then cited of similar orders by Sir Thomas Sewell and Lord Thurlow.

(*e*) So laid down also in Calvin's case, 7 Rep. 17; but erroneously, as appears by the practice in regard to the East Indies. See also Hall *v.* Campbell, Cowp. 209.

(*f*) See Calvin's case; Hall *v.* Campbell.

(*g*) 1 Blackst. Com. 100.

(*h*) 2 Mer. 143; see Howell's State Trials, Vol. xx. 289.

(*i*) See Dawes *v.* Painter, Freem. 75.

(*k*) Yeap Cheah Neo *v.* Ong Cheng Neo, L. R., 6 P. C. 381.

(*l*) 1 Vict. c. 26.

(*m*) 15 & 16 Vict. c. 24.

(*n*) Col. Act of 1859, No. 144.

(*o*) Col. Acts, 3 Vict. No. 5, and 17 Vict. No. 5.

(*p*) Cons. Stats. of 1874, 31 Vict. No. 34.

(*q*) Col. Acts, 5 Vict. No. 16, and 25 & 26 Vict. No. 15.

(*r*) Cons. Stats. of 1866, 27 Vict. No. 222.

(*s*) Ordinances, 2 Vict., No. 1, and 18 Vict. No. 13.

(*t*) Col. Acts, 4 Vict. c. 23 and 17 Vict. c. 21.

(*u*) Col. Act of 1869, No. 464; but holograph wills of land under the Colonial Act of 2 Geo. 3, are apparently valid.

(*x*) Col. Act of 1840, No. 4.

(*y*) Col. Act, 30 Vict. c. 103.

(*z*) Rev. Stats. of 1877, c. 106.

(*a*) Laws of Grenada, No. 145.

duras (*b*); India (*c*); Jamaica (*d*); Natal (*e*); Newfoundland (*f*); New Zealand (*g*); Nova Scotia (*h*); Prince Edward's Island (*i*); St. Vincents (*k*); Tasmania (*l*); and Trinidad (*m*).

By the Civil Codes of Lower Canada (*n*) and St. Lucia (*o*) wills may be notarial, holograph, or in English form, *i.e.*, executed and attested as required by the Wills Act. But by the law of St. Lucia a will in English form must be signed or initialed by the testator on each sheet.

Colonies in which the Statute of Frauds is still in force.

The Statute of Frauds (*p*) whereby three witnesses are required for the validity of devises of real estate are apparently still in force in the Leeward Islands (*q*), viz., Antigua, Montserrat, Nevis, St. Christopher's (which includes Anguilla), and the Virgin Islands; also in New Brunswick.

The statute 25 Geo. 2, c. 6, which avoids gifts to the attesting witnesses to a will, extends to all colonies where the Statute of Frauds, or any similar statute is in force. And this enactment is not repealed as to them by the statute 1 Vict. c. 26. In such colonies the revocation of wills is regulated by the law in force in England prior to 1838.

Gifts to witnesses.

[*1673] *In the Straits Settlements wills of immovable property seem to be regulated by the Indian Act of 1838, No. 35, whereby such wills are required to be executed and attested according to the formalities required by the English Wills Act.

The Straits Settlements.

Wills made in the English form, of British subjects, whatever their domicile are rendered valid as regards personal estate by virtue of the Imperial Act 24 & 25 Vict. c. 114 (*r*), which is recognized as in force in these Settlements.

Colonies governed by the Roman-Dutch law.

The Roman-Dutch Law is in force in British Guiana (including Demerara, Berbice, and Essequibo), the Cape of Good Hope, and Ceylon; but in all three colonies the validity of wills in the English form is to some extent recognized.

British Guiana.

By the law now in force in British Guiana wills are rendered valid so as to take effect in the colony if executed and attested in the manner prescribed by the Wills Act (*s*).

At the Cape of Good Hope, before the 1st January, 1844, seven or more witnesses were generally required for the attestation of wills; but now execution and attestation in manner prescribed by the Wills Act is sufficient, provided that, where the instrument is written upon more leaves than one, the party executing the same and also the witnesses must sign their names upon every leaf (*t*).

Cape of Good Hope.

(*b*) Cons. Laws, Pt. XVI., c. 44, ss. 38-51.
(*c*) Succession Act of 1865, s. 50.
(*d*) Col. Acts, 3 Vict. c. 51, and 25 Vict. c. 26.
(*e*) Col. Act of 1868, No. 2.
(*f*) Cons. Stats. of 1872, c. 30, s. 1.
(*g*) Col. Acts. 18 Vict. No. 1, 21 & 22 Vict. No. 2, and 24 Vict. No. 19.
(*h*) Rev. Stats. of 1864, c. 112.
(*i*) Col. Acts, 6 Vict. c. 26, and 23 Vict. c. 3.
(*k*) Wills Ordinance, 1878, No. 36, ss. 8-20.
(*l*) Col. Acts, 4 Vict., No. 9, and 16 Vict., No. 4.
(*m*) Ordinances of 1844, No. 1.
(*n*) Cod. Civ. Acts 842, 851. See as to wills in notarial form, Eventurel *v.* Eventurel, L. R., 2 P. C. 462.
(*o*) Civil Code of 1879, c. 3.
(*p*) 29 Car. 2, c. 3.
(*q*) See Dewar *v.* Maitland, L. R., 2 Eq. 834.
(*r*) See ante, p. 7.
(*s*) Ordinance 20 of 1839.
(*t*) Ordinance of 1845, No. 15. See as to mutual wills made by husband and wife under the Roman-Dutch law, Denyssen *v.* Mostart, L. R., 4 P. C. 236.

As regards Ceylon, by the Ordinance No. 21 of 1844, it is enacted that "every will made beyond the limits of this colony containing any devise or disposition of immovable property situate within this colony, which shall have been duly made and executed according to, and in conformity with the forms and solemnities prescribed by the law of the country where the same shall have been so made and executed, by any person who by the law of such country or of this colony is competent to make a will shall be valid and effectual to pass the property in any immovable property so devised or disposed of by any such testator. And every will duly made and executed in manner aforesaid in any place beyond the limits of this colony by any person who shall be competent to make a will by the law of the place where he shall be domiciled at the time of making and executing the same, shall be valid and effectual to alienate and pass the property in any movable property by such will bequeathed or disposed of" (*u*). Ceylon.

As regards a person domiciled in Ceylon, but temporarily resident in this country, his will, in order to operate on his movable property, must apparently be executed and attested in accordance with the Roman-Dutch law (*x*), as modified by the Ordinances, viz., the will must be in writing signed at the foot or end thereof by the testator or by some other person in his presence by his direction ; and such signature must be made or acknowleged by the testator in the preseuce of a notary public and two or more witnesses, who must be present at the same time and duly attest such execution; or if no notary be present, then such signature must be made or acknowledged * by [*1674] the testator in the presence of five or more witnesses present at the same time, and such witnesses must subscribe to the will in the presence of the testator but no form of attestation is necessary. See Ord. No. 7 of 1840, sect. 3.

The laws of the Channel Islands, viz., Guernsey, Jersey, &c., are founded on the old Norman customs as modified by Acts of the States. The Channel Islands.

By Art. 8 of the "Act" of the States of Jersey of the 24th of June, 1851, confirmed by order in Council of the 7th of August, 1851, and containing the law relating to wills, it is enacted that in order to render valid testamentary gifts of immovable property it is necessary that the testator in the presence of two witnesses should have subscribed his signature at the end of the will, or acknowledged his signature so subscribed, and that the two witnesses present at the same time should have subscribed their signature to the will, in the presence of the testator. If the will is not holograph it must be read over in the presence of the testator and the two witnesses. To render valid a holograph will, the attestation of the witnesses must be dated (*y*).

By Art. 10 a devise of immovable property made within the 40 days preceding the testator's death is void, unless the death is occasioned by accident.

By Art. 11, in the case of a will of immovable property made out of the island, one of the witnessess must be a notary.

By the law and custom of Jersey, a person who leaves a wife but no children, may bequeath one-half of his movable property; but if he leaves a child or children he can dispose by will of only one-third of such property. The

(*u*) See as to wills in Ceylon, Gavin *v.* Hadden, L. R., 3 P. C. 707; Diaz *v.* De Livara, 5 App. Ca. 123.

(*x*) Formerly wills under this law were either open or close, but all wills now require the same form of open execution.

(*y*) See as to this, Manger *v.* Le Gallais, L. R., 1 P. C. 470. As to competency of witnesses, see Falla *v* Godfray, 14 App. Ca. 70.

other half or two-thirds vests absolutely in the beneficiaries to the exclusion of the executors (*z*). Testamentary dispositions purporting to bequeath more than the permitted proportion are liable to be reduced.

Mauritius. The Code Civil is established in the Mauritius (*a*).

Malta. The law of Malta is founded on the civil law.

(iii.) **Foreign States** (*b*). —*Austria.*— By Austrian law (*b*) wills may be made (1) by public act before a tribunal, or (2) by private act either in writing or verbally, and, if in writing, either with or without witnesses. A written will, if unattested, is invalid unless holograph and signed by the testator. A will written by another person must be signed by the testator and acknowledged by him as his will before three witnesses at least, of whom two must be present at the same time, and all must append or indorse their signatures (*b*). Wills are revoked by subsequent birth of children.

Belgium.—The law of Belgium as regards the execution, attestation, and revocation of wills, &c., is the same as that of France (*c*), *vide infra.*

Denmark. — By the Code of Christian V., as modified by the Or-
[*1675] dinance of 21st March, 1845, wills must be in writing *signed by the testator in the presence of a notary, or of two witnesses.

France. — Code Civil, Art. 969. A will may be holograph, or made by public act, or in the mystic form.

Art. 970. A holograph will shall not be valid unless it is written throughout, dated, and signed, by the hand of the testator; it is not subjected to any other formality.

Arts. 971 to 975 relate to wills by public or notarial act.

Arts. 976 to 980 relate to mystic testaments (*d*).

Art. 999. A Frenchman (*e*) resident in a foreign country may make his testamentary dispositions by an instrument under his own signature as prescribed in Art. 970, or by an instrument authenticated according to the formalities in use in the place where such instrument shall be executed.

Art. 1000. Wills made in a foreign country cannot operate on property situated in France until after they have been registered in the public office of the testator's domicile, if he has preserved one, or otherwise in the public office of his last known domicile in France; and in case the will should contain dispositions of immovable property there situate, it must also be registered in the public office of the place where such property is situate without being subject to double duty.

By the law of France, if a foreign subject, even though resident in France, but not having acquired by license a domicile in that country, makes a will according to the forms required by the laws of his own country to give validity

(*z*) See also La Cloche *v.* La Cloche, L. R., 3 P. C. 125.

(*a*) See H. M. Proc. and Adv. Gen. *v.* Bruneau, L. R., 1 P. C. 169.

(*b*) See Austrian Civil Code, Pt. II. c. 9, ss. 577–579.

(*c*) See St. Joseph, Concordance entre les Codes, Vol. II., p. 52.

(*d*) Close or mystic testaments are recognized in most countries whose legal systems are based on the civil law. By the Code civil of France these instruments may be written by the testator, or by another person by his direction, and must be signed by the testator, and delivered to a notary, folded up and sealed, or enclosed in a sealed envelope, in the presence of at least six witnesses; the instrument or the envelope must be indorsed with an attestation clause (acte de souscription) which must be signed by the testator and by the witnesses, who must be males of full age, and French subjects, in enjoyment of full civil rights. The formalities attending the delivery vary in different states: generally, the presence of seven witnesses is required.

(*e*) See Re Lacroix, 2 P. D. 97, where an affidavit of an advocate of the Court of Appeal of Paris to the above effect was accepted by Sir J. Hannen, J., as evidence of the French law on the subject. See also ante, Vol. I., p. 7, note (*h*).

to wills executed by citizens of that country, such will is valid, and would be carried into execution by the French Courts, whatever may be the domicile of the testator at the time of making such will, or at his death (*e*).

Germany — No general code or system of law prevails throughout the German Empire, but each of the different German States is regulated by laws of its own. In Brunswick, Hanover, Saxony, Saxe-Weimar, and some other parts of Germany, the so-called Common Law (Gemeine Recht) prevails, that is to say, the Roman Law with certain modifications which have been from time to time introduced therein by particular statutes, or by doctrines, which have received the sanction of judicial decisions in the several States.

According to this Common Law, as regards the formal validity of wills, the principle "locus regit actum" prevails, so that a will is valid in point of form, if it complies with the solemnities as to execution and attestation, &c., required by the law of the country in * which the will is [*1676] made (*f*). Thus a will made in England, whether by a subject of a German State in which the Common Law prevails, or by any other person, will be recognized by the Courts of that state as valid in point of form, so as to dispose of property in that state, if it is executed and attested in manner prescribed by English law. The validity, in point of substance, of testamentary dispositions of immovable property is deemed in Germany, as elsewhere, to be regulated by the lex rei sitæ.

Baden.

The Code of the Grand Duchy of Baden is founded on the French Code civil, with certain additions and modifications, which do not appear to apply to the question, as to the formal validity of wills made out of the country. The law of Baden as regards this matter, and also as regards the revocation of wills, and the restrictions imposed on the power of testamentary disposition, would seem to be similar to the law of France (*q. v.*).

Bavaria.

By the Civil Code of Bavaria, (*g*) a will must be attested by seven witnesses present at the same time, and a notary must also be present and authenticate the signatures of the witnesses.

Prussia.

By the Code of Frederick II., which is still in force in Prussia, wills must generally be made before a tribunal with elaborate solemnities, with regard to which precise and strict directions are given. The only exception expressly made by law appears to be in favor of ambassadors and persons attached to embassies, who are permitted to make testamentary dispositions according to the formalities of the country in which they reside (*h*).

Wurtemberg.

The law of Wurtemburg recognizes (besides public wills, made before a tribunal) private wills made and executed by notarial act in the presence of five witnesses, or else attested by seven witnesses before a magistrate; and mystic testaments (*i*).

Holland. — The Civil Code of Holland recognizes (1) holograph wills, which,

(*e*) See note (*e*) preceding page.

(*f*) Many of the leading foreign jurists (*e. g.*, Paul Voet, John Voet, Vattel, Rodenburg, Huberus, &c.), do not recognize the doctrine of our common law, that the lex domicilii and the lex rei sitæ govern the validity in point of form of wills purporting to dispose of movable and immovable property respectively. As regards immovable property, they point out the inconvenience resulting from this doctrine, namely that it would require a testator possessed of land in several countries to execute his will according to as many different forms, which, at the time of making the will, it might be difficult or impossible to ascertain. And they hold that an instrument executed according to the solemnities required to give it formal effect by the law of the country in which it is made ought to be judicially recognized as valid in point of form in all countries. See Story, Conflict of Laws, ss. 435 et seq., 475.

(*g*) Liv. III., Ch. iii., ss. 3, 4, 5.

(*h*) Law of 3 April, 1823.

(*i*) St. Joseph, Concordance, Vol. IV., p. 460.

in order effectually to dispose of the testator's property, must be delivered to a notary in the presence of two witnesses; a holograph will, merely dated and signed by the testator, operates only for the purpose of appointing executors, giving directions as to the funeral, and making specific bequests of chattels, such as furniture, personal ornaments, &c.; (2) wills by notarial act in presence of two witnesses; and (3) mystic testaments.

A will made out of Holland, according to the formalities as to execution and attestation required by the law of the country where the will is made, is valid in point of form to pass all the testator's property in Holland, [*1677] whether movable or immovable, provided such * will be not made by a Dutchman. But a Dutchman is not allowed to make a will abroad except by an authenticated act ("authentche Akte," Art. 992 of the Dutch Civil Code) according to the form prescribed in the country in which the will is made. In Holland, a will by notarial act is recognized as an "authentche Akte." As the English law does not recognize any means of "authenticating" a will beyond attestation, it would be prudent that a Dutchman making his will in this country should do so by notarial act, but in other respects that he should execute the will and cause it to be attested according to the forms prescribed by English law.

Italy. — The law of Italy recognizes two ordinary forms of wills, viz. holograph wills and wills by notarial act. The formalities as to execution and attestation of these instruments respectively are prescribed by the Codice Civile, Arts. 775 to 788, and are very similar to those prescribed by the Code civil of France.

But by the Preface to the Code, it is enacted that "the extrinsic form of testamentary acts is determined by the laws of the place in which they are made" (Art. 9); and that "the substance and effect of testamentary dispositions are deemed to be regulated by the national law of the disposors" (Art. 10). The effect of these enactments would seem to be that (i.) a British subject may, by a will made in this country and executed and attested according to the formalities required by English law, effectually dispose of his immovable property situate in Italy, in any manner and to any extent permitted by our law, even, as it is conceived, to the extent of devising the land in strict settlement; and (ii.) that an Italian subject temporarily resident in this country may, by a will similarly executed and attested, effectually dispose of his immovable property in Italy and all his movable property, so far as the law of Italy will permit of his so doing.

By Art. 888 of the Civil Code it is enacted that a will shall be revoked if made in ignorance of the existence of children or descendants, or by the subsequent birth of children born in wedlock, or by the subsequent recognition of children by legitimation or adoption, unless the testator has provided for such contingencies.

Portugal. — Wills may be either (1) close or mystic, or (2) open. Open wills may be written by a notary, or by the testator himself, or by another at his request, but in all cases it would seem that five witnesses must be present and attest the execution of the instrument; if the will is made by a notary it need not be read to the witnesses. In case of imminent death, nuncupative or verbal wills are permitted, if made in the presence of at least six witnesses, and as soon as possible reduced to writing (*j*).

(*j*) The civil law of Portugal has not as yet been codified, but is embodied in numerous statutes, commencing with the Ordinances of Philip II., and supplemented, where the statutes

Russia. — Wills may be (1) authentic, *i. e.*, signed by the testator and delivered according to prescribed formalities to the proper tribunal; or (2) private, *i. e.*, either holograph, or written by another * person [*1678] by the testator's direction, signed by the testator, and by the amanuensis, and three witnesses (*k*).

Spain. — The Civil Code in its present state was promulgated by the law of 24th July, 1889; it is founded on the French Code civil, but presents certain points of difference as regards the matters under consideration. The provisions as to the form, execution, and attestation of wills are contained in Liv. III. tit. iii. ch. 1, ss. 3 et seq. Ordinary wills may be holograph, public, or mystic. Holograph wills must be written throughout, dated and signed by the testator (*l*); foreigners may make holograph wills in their own language. Public wills must be received by a notary in the presence of three witnesses, to whom the testator must declare his wishes; the notary must then draw the will accordingly and read it over to the testator, who must declare that it is in conformity with his wishes; it must then be signed by the testator and attested. If written in a foreign language it must be translated into Spanish by two interpreters, and both copies must be executed and attested. Mystic testaments, if not written throughout by the testator himself, must be signed by him at the foot of every sheet as well as at the end of the will. Spanish subjects resident in a foreign country may make wills in accordance with the laws of the country in which they reside, or may make public or mystic wills before a Spanish diplomatic or consular agent instead of before a notary, and the agent is in such a case responsible for the observance of the prescribed formalities.

Sweden and Norway. — The Swedish Code (*m*) recognizes as valid (1) parol wills made in presence of two witnesses, (2) wills in writing signed by the testator himself with his own hand, with mention of date and place of execution, and attested by two witnesses, and (3) holograph and unattested wills, if written throughout and signed by the testator, but such wills are null unless it is proved that it was impossible for the testator to procure witnesses. As regards attested wills, the witnesses must be specially called in for the purpose of attesting the will, and they must act in the presence of each other; they must have been previously acquainted with the testator, and must be competent witnesses (testes habiles), *i. e.*, persons known for trustworthiness and conscientiousness, and capable of rightly understanding what took place on the occasion — and, in the case of parol wills, Sweden.

are silent, by usages which have the force of law and by recourse to the Roman law. The above statement of the law as to the form and execution of wills is taken from Pinto's Tratado regolar e pratico de testamantos e successoes (6th ed. 1851).

(*k*) The Civil Law of Russia is embodied in the Svod or Digest of Civil Law, successive editions of which are published from time to time containing the additional Ukases or Ordinances which have been issued since the last Edition appeared. The above statement of the law, as to the form and execution of wills, is taken from a French translation of the Svod made by M. St. Joseph in 1859. See his Concordance, Vol. III., p. 349. There is no international agreement between Russia and England (such as exists between Russia and Germany) validating wills made in this country in accordance with the formalities required by our law. And it may be observed that no will made in this country, however executed, would be effectual to dispose of property in Russia unless its disposition clauses are in accordance with Russian law.

(*l*) Such wills, if made in Spain, must be on stamped paper; but this formality is dispensed with as regards wills made in a foreign country, see s. 9.

(*m*) Tit. II., Ch. xvi., xvii., and xviii.; Laws of 10 April, 1810, of 20 May, 1835, and of 21 December, 1857; see St. Joseph, Concordance, Vol. III., p. 516. See also Privy Councillor Olivecrona's Treatise on Wills according to Swedish Law (1880), pp. 1–426.

capable of accurately bearing in mind the particulars of the testator's
[*1679] expressed last wishes. If the will is in writing, the testator * must in the presence of the witnesses declare the document to be his last will and testament. The attestation clause must certify to the testator's signature and declaration, and that he was, at the time of executing the will, of sound and disposing mind, and that he acted of his own free will. A written will executed in England according to the formalities required by English law, is recognized as valid by the Swedish Courts on the principle of the rule "locus regit actum." Such a will, if made by a British subject, would effectually dispose of movable property in Sweden according to the expressed wishes of the testator. But as a British subject cannot, without the king's license, hold immovable property in Sweden, so he cannot, as regards such property, introduce into his will clauses or conditions conflicting with Swedish law, *e. g.*, he cannot create an entail; nor can he affect the rights of his surviving consort in connection with the estate; nor, if he leave issue, can he dispose of more than one moiety of the estate, the other moiety belonging by law to the issue as their "pars legitima."

In Norway wills must be signed by the testator, and acknowledged in the presence of a notary and of two witnesses (*n*). If the will is not written by the hand of the testator, it must be read over to him by the notary, who must certify that this rule has been observed. In cases of emergency, parol wills may be made in the presence of a notary or of two witnesses, who must take down the wish expressed forthwith. If a will be made abroad in conformity with the law of Norway, it may be executed before a Norwegian Minister or Consul, who will act in lieu of a notary. But a will made in a foreign country, whether by a Norwegian, or by an Englishman or other foreigner, if in every respect executed according to the requirements in point of form prescribed by the law of such foreign country, is recognized as valid by the Norwegian Courts. A Norwegian testator who leaves issue can only dispose of one-fourth of his property to the detriment of such issue; but this restriction does not apply to English or other foreign testators.

Norway.

Switzerland. — Each of the twenty-two Cantons which make up the Swiss Confederation is regulated by its own particular laws.

The Canton of Geneva has adopted in its entirety the French Civil Code; and the codes of the following states appear to have adopted its provisions relating to the formal requirements for the validity of wills namely, Aargau, Berne, Friburg, Lucerne, Soleure, Ticino, Valais, and Vaud. Subsequent birth of children revokes a previous will in Berne, Ticino, Valais, and Vaud.

Schaffhausen, Schwytz, Thur, Uri, Unterwalden, and Zug have preserved their ancient statutes. And in the remaining Cantons the law has not been codified, but is embodied in statutes and judicially-recognized doctrines for the most part based on the Civil Law (*o*).

United States of America. — The formalities required for the validity of wills vary in the different states (*p*).

The Statute of Frauds (29 Car. 2, c. 5) is in force in fourteen States, viz. Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan,
[*1680] Mississippi, New Hampshire, New Jersey, North Carolina, * Rhode Island, South Carolina, Vermont, and Wisconsin. A will disposing

(*n*) Law of 31 July, 1854.
(*o*) St. Joseph, Concordance. Vol. III., p. 535.
(*p*) See Washburn's Law of Real Property (Ed. 1868), Vol. III., pp. 429, *et seq.*

of realty situate in any of these States, therefore, requires to be attested by three witnesses.

By the laws in force in New Hampshire and Vermont a will must be sealed as well as signed by the testator.

Two attesting witnesses are required by the laws of sixteen States, viz. Alabama, Arkansas, California, Delaware, Illinois, Iowa, Kentucky, Minnesota, Missouri, New York, Ohio, Pennsylvania, Tennessee, Texas, and Virginia.

In Pennsylvania, though two witnesses are required, it is not essential that they should attest and subscribe the will in the presence of the testator.

According to the statutes of most of the States devises and legacies to attesting witnesses are void.

The law of Louisiana (which was originally a French colony) as to the form, execution, and attestation of wills is peculiar. By the Civil Code of that State, three classes of wills are recognized (see Art. 156), viz. (i.) Nuncupative or open testaments; (ii.) Mystic or sealed testaments; and (iii.) Holographic testaments. But Art. 1589 renders immaterial, for the purposes of these remarks, any examination of the formalities required for nuncupative or mystic testaments, for it enacts that "Testaments made in foreign countries . . . shall take effect in the State if they be clothed with all the formalities prescribed for the validity of wills in the place where they have been respectively made."

South America. — In most of the States of S. America the formalities requisite to the validity of testamentary dispositions are regulated by the civil law formerly in force in Spain. Wills may be either (i.) close or mystic, or (ii.) open or nuncupative, *i.e.*, made either verbally or in writing, but, in either case, made in the presence of a notary and three witnesses, or, if no notary is present, in the presence of five witnesses; these witnesses must be persons resident at the place where the will is made; but it is in all cases sufficient if seven witnesses, wherever resident, are present when the will is executed. If the will is in writing the witnesses should attest it; if it is verbal, one of them should as soon as possible reduce to writing the testator's wishes, and all should attest this document (*q*).

Brazil.

The law of Brazil as to execution of wills is similar to that of Portugal.

Bolivia.

The law of Bolivia recognizes as valid (1) holograph wills, which apparently do not require to be attested; (2) wills by notarial act in presence of three witnesses; (3) close or mystic wills; and (4) nuncupative wills. Wills of the last-mentioned category may be made either verbally or in writing; in either case three witnesses are required; if the will is in writing, the will must be read over in presence of the witnesses, and a memorandum to that effect must be appended to the will, and the will must be signed by the testator and the witnesses (*r*).

(*q*) See Manual del Abogado americano, by Don J. Escriche, Liv. II., tit. 4.
(*r*) Cod. Civ. of Bolivia, Tit. II., c. 1.

[*1681]

*APPENDIX B.

THE STATUTE OF WILLS.

1 VICT. CAP. 26.

An Act for the Amendment of the Laws with respect to Wills.

[3d July, 1837.]

EXPLANATION OF TERMS.

BE it enacted by the Queen's most Excellent Majesty, by and with the consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same. That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power; and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an Act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or [*1682] thing; and every word importing the *masculine gender only shall extend and be applied to a female as well as a male.

Meaning of certain words in this Act;

"Will."

12 Car. 2, c. 24.

14 & 15 Car. 2, (I.)

"Real estate."

"Personal estate."

Number.

Gender.

REPEAL CLAUSE.

II. And be it further enacted, That an Act passed in the thirty-second year of the reign of King Henry the Eighth intituled "The Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his lands;" and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an Act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an Act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate, pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates pur autre vie; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America, except so far as relates to his Majesty's colonies and plantations in America;" and also an Act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain doubts and questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates pur autre vie to which this Act does not extend.

Repeal of the statutes of wills, 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5.

10 Car. 1, sess. 2, c. 2, (I.)

Sects. 5, 6, 12, 19, 20, 21 & 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12, (I.)

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10, (I.)

Sect. 9 of 14 G. 2., c. 20.

25 G. 2, c. 6, (except as to colonies).

25 G. 2, c. 11, (I.)

55 G. 3, c. 192.

[*1683] *GENERAL ENABLING CLAUSE.

III. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate (*a*) and all personal estate (*b*) which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will (*c*), or notwithstanding that being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto (*d*), or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made (*e*), or notwithstanding that the same in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament (*f*); and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will (*g*); and also to all rights of entry for conditions broken, and other rights of entry (*h*); and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will (*i*).

All property may be disposed of by will;

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates pur autre vie;

contingent interests;

rights of entry; and property acquired after execution of the will.

FEES ON COPYHOLDS.

IV. (*k*) Provided always, and be it further enacted, That where any real estate of the nature of customary freehold, or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall [*1684] not have surrendered the same to the use of his will, * no person entitled or claiming to be entitled thereto by virtue of such will

(*a*) pp. 48, 57, 291, 612.
(*b*) p. 50.
(*c*) pp. 57, 620.
(*d*) p. 57.
(*e*) Id.
(*f*) p. 59.
(*g*) p. 48.
(*h*) p. 50.
(*i*) p. 51.
(*k*) See 4 & 5 Vict. c. 35, ss. 88, 89, 90.

shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money, as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator; provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

As to the fees and fines payable by devisees of customary and copyhold estates.

COPYHOLD.

V. And be it further enacted, That when any real estate of the nature of customary freehold, or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir, in case of the descent of the same real estate; and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services, as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of descent.

Wills, or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

and the lord to be entitled to the same fine, &c., when such estates were not previously devisable as he would have been from the heir in case of descent.

ESTATES PUR AUTRE VIE.

VI. (*l*) And be it further enacted, That if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the *same shall be chargeable in the hands of the heir, if it shall [*1685]

(*l*) p. 60.

come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

Estates pur autre vie.

AGE OF TESTATOR.

No will of a person under age valid;

VII. (*m*) And be it further enacted. That no will made by any person under the age of twenty-one years shall be valid.

MARRIED WOMEN.

nor of a feme covert, except such as might have been previously made.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made (*n*) by a married woman before the passing of this Act (*o*).

EXECUTION OF WILLS.

Will to be in writing, and signed or acknowledged in the presence of two witnesses at one time, who attest.

IX. (*p*) And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed (*q*) at the foot or end (*r*) thereof by the testator, or by some other person in his presence and by his direction (*s*); and such signature shall be made or acknowledged (*t*) by the testator in the presence of two or more witnesses, present at the same time (*u*), and such witnesses shall attest and shall subscribe (*x*) the will in the presence (*y*) of the testator, but no form of attestation (*z*) shall be necessary.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

EXECUTION OF TESTAMENTARY APPOINTMENTS.

X. (*a*). And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have [*1686] been expressly required * that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

(*m*) p. 34.
(*o*) p. 306.
(*q*) pp. 77, 79, 93.
(*s*) pp. 77, 88, 93.
(*u*) p. 85.
(*y*) pp. 85, 88.
(*a*) pp. 32, 642.
(*n*) pp. 34, 40, 640.
(*p*) p. 77.
(*r*) pp. 77, 81.
(*t*) pp. 83, et seq.
(*x*) p. 85.
(*z*) p. 91.

WILLS OF SOLDIERS AND SEAMEN.

Soldiers' and mariners' wills excepted.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

PETTY OFFICERS, SEAMEN, AND MARINES.

Act not to affect certain provisions of 11 G. 4 & 1 W. 4. c. 20, with respect to wills of petty officers, and seamen and marines.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled, "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy, respecting the wills of Petty Officers and Seamen in the Royal Navy, and Non-commissioned Officers of Marines, and Marines so far as relates to their Wages, Pay, Prize Money, Bounty Money and Allowances, or other Moneys payable in respect of Services in her Majesty's Navy."

PUBLICATION.

Publication not to be requisite.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof.

ATTESTING WITNESSES' COMPETENCY.

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

XIV. (*b*) And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

GIFTS TO ATTESTING WITNESSES.

Gifts to an attesting witness to be void.

XV. (*c*) And be it further enacted, That if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment 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 [*1687] will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

CREDITOR ATTESTING WITNESS.

XVI. (*d*) And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or

(*b*) pp. 71, 93. (*c*) p. 71.
(*d*) p. 72.

Creditor attesting to be admitted a witness.

the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

EXECUTOR ATTESTING WITNESS.

Executor to be admitted a witness.

XVII. (*e*) And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

REVOCATION BY MARRIAGE.

XVIII. (*f*) And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

Will to be revoked by marriage.

REVOCATION BY PRESUMPTION.

No will to be revoked by presumption.

XIX. (*g*) And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

REVOCATION BY SUBSEQUENT WILL OR CODICIL, OR BY DESTRUCTION OF INSTRUMENT.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required (*h*), or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed (*i*), or by the burning, tearing, or otherwise destroying the same (*k*), by the testator, or by some person in his presence, and by his direction, with the intention (*l*) of revoking the same.

No will to be revoked but by another will or codicil, or writing, or by destruction.

[*1688] *OBLITERATIONS AND INTERLINEATIONS.

XXI. (*m*) And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on

No alteration except in certain cases, in a will, shall have any effect, unless executed as a will.

(*e*) p. 72.
(*f*) pp. 112, 1100.
(*g*) p. 112.
(*h*) p. 133.
(*i*) Id.
(*k*) p. 113.
(*l*) p. 118.
(*m*) pp. 113, 118.

some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

REVIVAL OF REVOKED WILL.

XXII. (*n*) And be it further enacted, That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the 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.

No will revoked to be revived otherwise than by re-execution, or a codicil to revive it.

REVOCATION — SUBSEQUENT CONVEYANCE.

XXIII. (*o*) And be it further enacted, 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.

A devise not to be rendered inoperative by any subsequent conveyance or act.

WILL SPEAKS, FROM WHAT PERIOD.

XXIV. (*p*) And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A will shall be construed to speak from the death of the testator.

*LAPSED AND VOID DEVISES. [*1689]

XXV. (*q*) And be it further enacted, That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

A residuary devise shall include estates comprised in lapsed and void devises.

GENERAL DEVISE — COPYHOLDS AND LEASEHOLDS.

XXVI. (*r*) And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any

(*n*) pp. 126, 155, 156.
(*o*) pp. 126, 127.
(*p*) pp. 158, 160, 296, 305, 396, 612, 624, 640; O'Toole *v.* Brown, 4 Ell. & Bl. 572.
(*q*) pp. 321, 608, 612, 613.
(*r*) pp. 625, 627.

A general devise of lands shall include copyhold and leasehold as well as freehold lands.

person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

GENERAL DEVISE — APPOINTMENT.

XXVII. (*s*) And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any 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.

A general gift shall include estates over which the testator has a general power of appointment.

FEE SIMPLE WITHOUT WORDS OF LIMITATION.

XXVIII. (*t*) And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

A devise without any words of limitation to pass the fee.

[*1690] *WORDS IMPORTING FAILURE OF ISSUE.

XXIX. (*u*) And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words, which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or, if

Words importing failure of issue to mean issue living at the death.

Proviso.

(*s*) pp. 301, 634.
(*t*) 521, 948, 1135, 1277.
(*u*) pp. 521, 1285, 1320, 1357 n.

there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

ESTATE OF TRUSTEES.

XXX. (*x*) And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

ESTATE OF TRUSTEES.

XXXI. (*y*) And be it further enacted, That where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

LAPSE OF ESTATE TAIL.

XXXII. (*z*) And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the 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 shall appear by the will. [*1691]

Devises of estates tail shall not lapse, when.

LAPSE — CHILDREN OR ISSUE DYING IN TESTATOR'S LIFETIME.

XXXIII. (*a*) And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

(*x*) p. 1165.
(*z*) pp. 322, 1202.
(*y*) Ibid.
(*a*) p. 333.

WHEN ACT OPERATES.

Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who die before 1838.

XXXIV. And be it further enacted, That this Act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed (*b*) or re-published, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

SCOTLAND.

Act not to extend to Scotland.

XXXV. And be it further enacted, That this Act shall not extend to Scotland.

(*b*) p. 160.

*APPENDIX C. [*1692]

THE MORTMAIN AND CHARITABLE USES ACT, 1891.

SINCE the first sub-division of the ninth chapter of this treatise passed through the press, an Act of Parliament (*a*) has come into operation the short title of which is "The Mortmain and Charitable Uses Act, 1891," and which materially alters, and, indeed, puts on an entirely new footing, the law on the important question as to what property may be given by will to charity. Alteration in the law as to gifts to charity.

It will be convenient in this place to state in full the recent Act, and then to consider its provisions in detail. This Act is as follows: —

54 & 55 VICT. c. 73.

An Act to amend the Mortmain and Charitable Uses Act, 1888, and the Law relating to Mortmain and Charitable Uses.

5th August, 1891.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

§ 1. This Act may be cited as the Mortmain and Charitable Uses Act, 1891. Short title.

§ 2. This Act shall not extend to Scotland or Ireland (*b*). Extent of Act.

§ 3. "Land" in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; and the definition of land contained in the Mortmain and Charitable Uses Act, 1888, is hereby repealed (*c*). Definition of "land." 51 & 52 Vict. c. 42.

§ 4. In this Act the word "assurance" shall have the same meaning as in the Mortmain and Charitable Uses Act, 1888 (*d*). Meaning of "assurance."

(*a*) 54 & 55 Vict. c. 73.

(*b*) As to testamentary gifts of land and money to be laid out in land in Scotland and Ireland for charitable purposes, see ante, p. 201.

(*c*) *I. e.* "for the purposes of this Act." The definition and repeal contained in this section are, in common with the remainder of the Act, confined by s. 9 in their operation to wills of testators dying after the passing of the Act. As regards conveyances inter vivos no less than as regards wills of persons dying before the passing of this Act, the definition of land contained in the Act of 1888 remains in full force, and such assurances are still subject to the restrictions imposed by the last named Act, as to which see ante, p. 179.

(*d*) See this definition stated ante, p. 179, note (*a*).

Land assured by will for a charitable purpose to be sold.

§ 5. Land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the [*1693] testator, or such extended *period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners.

§ 6. So soon as the time limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the official trustee of charity lands, and the Charity Commissioners shall take all necessary steps for the sale or completion of the sale of such land to be effected with all reasonable speed by the administering trustees for the time being thereof, and for this purpose the said Commissioners may make any order under their seal directing such trustees to proceed with the sale or completion of the sale of the said land or removing such trustees and appointing others, and may provide by any such order for the payment of the proceeds of sale to the official trustees of charitable funds in trust for the charity, and for the payment of the costs and expenses incurred by the said administering trustees in or connected with such sale, and every such order shall be enforceable by the same means and be subject to the same provisions as are applicable under the Charitable Trusts Act, 1853, and the Acts amending the same, respectively, to any orders of the said Commissioners made thereunder.

Land after expiration of time limited for sale to be sold by order of Charity Commissioners.

16 & 17 Vict. c. 137.

Personal estate by will directed to be laid out in land not to be so laid out.

§ 7. Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land.

§ 8. It shall be lawful for the High Court, or any judge thereof sitting at chambers, or for the Charity Commissioners, if satisfied that land assured by will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity and not as an investment, by order to sanction the retention or acquisition, as the case may be, of such land.

Power to retain land in certain cases.

Application of Act.

§ 9. This Act shall only apply to the will of a testator dying after the passing of this Act.

§ 10. Nothing in this Act contained shall limit or affect the exemptions contained in Part Three of the Mortmain and Charitable Uses Act, 1888, or apply to any land or personal estate to be laid out in the purchase of land acquired under any assurance to which such exemptions or any of them apply, or shall exclude or impair any jurisdiction or authority which might otherwise be exercised by a court or judge of competent jurisdiction or by the Charity Commissioners.

Saving.

It has been seen that under the Mortmain Act of Geo. 2 (*e*) and also under the Mortmain and Charitable Uses Act, 1888 (*f*), testamentary gifts for charitable purposes of land or any estate or interest therein, or of money to be laid out in the purchase of, or secured on land

General effect of the Act.

(*e*) 9 Geo. 2, c. 36, ante, p. 178.
(*f*) 51 & 52 Vict. c. 42, ante, p. 179.

or of any personalty savoring of land or of any property to be applied for purposes necessarily involving the acquisition of land were, with certain special exceptions, void. The recent Act has entirely altered the state of the law in this * respect. In the first place, it renders lawful charitable gifts by will of land, provided only that land so given must not, except in certain special cases, be retained by the charity, but must be sold within a limited period (*g*). [*1694]

Charitable devises of land.

This Act also, by substituting a new definition of "land" for that given by the Act of 1888, does away with the former distinction between pure and impure personalty for the purposes of testamentary gifts to charitable uses, and renders such gifts of any personal property valid equally, and, except as regards leaseholds, without restriction. Moreover, the Act provides that in case of personal property being given by will to or for the benefit of a charity, with a superadded direction for its application in the purchase of land, the direction shall be disregarded, and the gift shall be good released from the direction.

Distinction between pure and impure personalty abolished.

Directions to purchase land.

It is obvious that the result of these changes in the law is to do away with the necessity of inserting in wills containing charitable gifts any direction for the marshalling of the testator's property for the purposes of such gifts. And where a charitable legacy is given free of duty, the duty may now be paid out of impure personalty.

Marshalling of assets.

Legacy duty.

It will be observed that by the definition given in the 3d section, "land," for the purposes of the Act, includes "tenements and hereditaments of any tenure (*h*)." It would seem clear that leasehold lands must be deemed to be included in this definition, so as to subject a testamentary gift of such to charitable uses to the restrictions as to sale imposed by this Act (*i*).

As to leaseholds.

The exclusion from this definition of "land" of "money secured on land or other personal estate arising from or connected with land" renders impure personalty (other than leaseholds) capable of being freely and effectually given by will to charity. Thus charitable bequests of money secured on mortgage of land whether in fee or for years, or by deposit of title deeds, and of arrears of interest on any such mortgage, and of money charged by way of mortgage, or sums invested on any such mortgage, also charitable bequests of money secured by judgments charging land or by vendor's lien — all of which gifts were formerly void — are now rendered valid as regards wills of testators dying after the passing of the Act. So also, a charitable gift may now be made by will of or out of the proceeds of land devised on trust for sale. And the fact that a sum of money bequeathed to charity is to be raised by sale of lands which have not been sold at the testator's death will not avoid the gift.

Bequests of money secured on land, &c.

As regards the benefit of the security, when money secured by mortgage is given by will to charity, the position would now seem to be as follows: — The legal estate in the mortgaged land, that is to say, the land itself at law, subject to the equitable right of redemption subsisting in the mortgagor, will immediately on the death of the testator

Moneys secured by mortgage.

(*g*) S. 5.

(*h*) In strictness it would seem that "tenements" mean property whereof a man is seised ut de libero tenemento, Co. Lit. 19 b. The word has however come to have a more general signification, including land or any interest therein, see Burton's Compendium, 1.

(*i*) By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, "unless the contrary intention appears," the expression "land" in all Acts of Parliament passed since 1850 includes messuages, tenements, and hereditaments.

vest in his "personal representatives," notwithstanding any expres-
[*1695] sions in the will purporting to devise such legal estate * directly to the charity or to trustees for its benefit (*k*). But by the statute 33 & 34 Vict. c. 34, s. 1, corporations and trustees holding money in trust for any public or charitable purpose are empowered to invest the same in real securities without being deemed thereby to have acquired or become possessed of land in mortmain. It would therefore seem that the executors may make a transfer of the mortgage security to the charitable legatee, and that the latter may accept such transfer and continue to hold the security in accordance with the provisions of the last mentioned Act (*l*).

The recent enactment removes all doubt as to the validity of testamentary gifts to charitable uses of bonds and debentures secured by public bodies on rates or tolls, notwithstanding that such instruments amount to a specific assignment of the rates or tolls (*m*).

Bonds secured on tolls, &c.

A rentcharge issuing out of real estate is an incorporeal hereditament (*n*), and must, it would seem, be regarded as included in the definition of land contained in the recent Act, so as to render a devise thereof valid, but subject to the obligation of the charity-devisee to sell it.

Rentcharges.

Such growing crops as come under the category of emblements, pass to the devisee if the estate is devised, or otherwise pass to the executors; in either case, they have hitherto been regarded as savoring of realty (*o*), but now they may obviously be given by will to charitable purposes. Other growing crops, till severed, are realty, being part of the land to which they are attached (*p*).

Growing crops.

A share in the New River Water and certain other similar shares are real property (*q*). A charitable gift by will of such a share or of a partial interest therein, would accordingly seem to be subject to the restrictions imposed by the Act on devises of land (*r*).

New River shares.

The same rule would apparently apply to a gift of a share in a company or partnership holding land which is vested in trustees for the individual shareholders in proportion to their shares, so as to entitle the beneficiaries to call on the trustees for part of the land itself. The question whether a testamentary gift to charity of a share in a partnership holding land is valid without restriction, or valid only subject to the statutory restriction as to sale would seem to depend on whether, by the terms of the assurance under which the partnership holds, the land is held as part of the joint stock and capital of the business, so
[*1696] that the beneficial interest is * constructively converted into personal estate connected with land, or is held as realty.

Shares in land-owning companies and partnerships.

Although, by virtue of sect. 4 of the Act of 1891, the term "assurance" in that Act includes not only devises, bequests, and other assurances by will, but

(*k*) See s. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).

(*l*) The transfer will not require any of the formalities required for conveyances of land in mortmain imposed by the 9 Geo. 2, c. 36, and continued by the Act of 1888. The remedy of a charity-mortgagee is by sale, not foreclosure, see sect. 2 of the stat. 33 & 34 Vict. c. 34.

(*m*) See as to such gifts, ante, pp. 185, 186.

(*n*) See Burton's Compendium, 330; Williams' Real Property.

(*o*) See ante, p. 186.

(*p*) See Gilb. Ev. 214; Com. Dig. Biens. (H). The point is not of much practical importance, as testamentary gifts to charitable uses of growing crops are not of frequent occurrence, and (except in the case of underwood or timber on a timber estate, see Dashwood *v.* Maguire (1891), 3 Ch. 306), they would, as a matter of course, if so given, be sold within the year.

(*q*) See Buckeridge *v.* Ingram, 2 Ves. Jr. 652, 663.

(*r*) These shares are of great value, one having recently been sold for more than 100,000*l.* A single share is generally owned by several persons as tenants in common.

Scope of the Act confined to assurances by will.

also various kinds of instruments operating inter vivos, the provisions of the Act exclusively apply to testamentary dispositions for charitable purposes. Inasmuch therefore as the restrictions imposed by sect. 4 of the Mortmain and Charitable Uses Act, 1888, are still in power as regards charitable gifts inter vivos of land of any tenure, it may be well that where such a gift is made, the donor should also by his will devise the lands comprised in the deed to the charity so as to prevent the avoidance of the gift in case he should die before the expiration of twelve months from making the gift.

Devised lands to be sold within a year.

The effect of sects. 5 & 6 of the recent Act is to render valid testamentary gifts of land, as defined by the Act, to charitable purposes, but to compel the devisee, being either a charitable corporation or a trustee for charitable uses, to sell the land within one year after the testator's death, or within such extended period as may be determined by the Court, or a Judge, or the Charity Commissioners (*s*).

Otherwise to vest in official trustee.

On the expiration of the time limited without "*completion*" of the sale (*t*), the lands unsold are forthwith to vest in the official trustee of charity lands, and the charity are to take all necessary steps for the sale or completion of the sale of such land with all reasonable speed (*u*), by the administering trustees thereof, and may make orders for the purpose of effectuating such sale.

Reversionary interests in land.

A reversionary interest in land may apparently be validly devised under the Act to charitable uses, but the Act contains no provision excepting a reversion from the general direction that lands devised to charity are to be sold within a year from the testator's death or within such further time as shall be determined. It may sometimes happen that the trustee cannot within the year make a title to a reversion free from the testator's debts, or it may appear that the property cannot be disposed of to advantage until it falls into possession. In such cases it may perhaps be expected that the proper * authorities will consider that there [*1697] are sufficient grounds for extending the time for sale.

Devises of land to charitable corporations.

The effect of sect. 5 on testamentary gifts of land to incorporated charities does not seem to be quite clear. Hitherto all such gifts have been absolutely void, formerly under the sect. 9 Geo. 2, c. 36, and later under sect. 4 of the Mortmain and Charitable Uses Act, 1888, but gifts inter vivos of lands to incorporated charities, though valid if the formalities required by statute had been complied with, were liable to for-

(*s*) The period of twelve months from the testator's death will often be found inconveniently short for valuation of the land, preparation of conditions of sale, and other matters preliminary to a sale. And it may sometimes happen that the executors of the testator may not be in a position to give their assent to a devise or bequest of the lands till at or near the expiration of a year from the death, which period is by a well-established rule allowed to them for sanctioning the state of the testator's affairs and getting in and administering his estate. It is therefore to be anticipated that applications for extension of time for sale of lands devised to charity will be of frequent occurrence with a view to avoiding the further expense and inconvenience which would result from the vesting of the lands in the official trustee.

(*t*) The use of the word "completion" in this section clearly negatives any construction of sect. 5, whereby a binding contract for sale entered into within the year, but not completed by conveyance, might be deemed to satisfy the statutory direction for sale.

(*u*) There would not seem to be any power to postpone the sale except on an application made before the expiration of a year from the testator's death. It is not within the scope of the present Treatise to discuss the provisions of the Act relating to procedure. These provisions raise numerous points of difficulty which will require, and, doubtless, before long, receive judicial elucidation.

feiture to the Crown unless the corporation had obtained a license to take and hold land in mortmain (*x*). Sect. 5 does not expressly exempt such testamentary gifts from liability to forfeiture, nor does it in any way refer to such liability. If, therefore, this section be strictly construed, its effect would seem to be merely to put testamentary gifts to incorporated charities on the same footing as similar gifts effectuated by valid assurances inter vivos, and so, when read in connection with sect. 1 of the Act of 1888, to subject them to forfeiture on entry by the Crown, unless the proper licenses have been obtained for the assurance and acquisition of land in mortmain.

It is conceived, however, that a more liberal construction would probably be adopted, so as to avoid giving only such a restricted operation of the recent Act, on the ground that the direction, contained in sect. 5 for the immediate sale of lands devised to charitable uses prevents lands so devised from being properly said to be acquired "in mortmain," and thus takes them out of the mischief of sect. 1 of the Act of 1888, on the principle "cessante ratione cessat, lex."

The 7th section of the Act of 1891 renders valid gifts of money to or for the benefit of a charity with a superadded direction or trust to invest the money in the purchase of land, and to hold the land for the purposes of the charity, but the gift is to be read as if no such direction or trust had been expressed in the will. Thus, if a sum of money be bequeathed upon trust to purchase land generally, and to apply the rents and profits thereof for charitable purposes, or be bequeathed for or towards the purchase of a site for a particular school or church, or other building connected with charitable purposes, then, chiefly in the former case, and also, as it would seem, in the latter (subject to the provisions of sect. 8) the expressed trust or purpose will be disregarded, and the gift will be taken by the charity or its trustees, with power to invest the money in some other manner for the benefit of the charity. But sect. 7 leaves untouched gifts of money for purposes necessarily involving the acquisition of land by the charity-donee, and the omission seems to raise questions of some doubt and difficulty. Such gifts have hitherto been held to be void, and there is nothing in the recent Act which expressly or, as it would seem, by necessary implication, renders them valid. Thus, if a testator gives £500 for the purchase of a site, and a further gift of £500 for the erection of a school thereon, the first gift will be good, the direction to purchase land being disregarded; but the second gift is for a specific purpose which necessarily assumes that the direction shall be carried into effect, and it does not seem clear that, the purpose being incapable of being carried [*1698] out, this gift * would not fail. So also if the gift be of £1000 for the purchase of a site and the building of a school thereon, it would seem arguable that the whole gift would be now, as formerly, void, unless it could be ascertained how much of the gift was attributable to such purpose. And the case against the validity of the gift would be still stronger if the will contained no direction to purchase land at all, but contained a gift of money for the purpose of establishing a charity, which would require the acquisition of land for its establishment.

Bequests of money to be laid out in land.

No doubt these difficulties will in many cases be removed by the operation of sect. 8 of the Act, which empowers the Court, or a judge at chambers, or the Commissioners, to sanction the acquisition or retention of land for the actual

(*x*) As to the exemption of certain charitable corporations from this liability, see ante, p. 200 et seq.

occupation of charitable institutions (*y*). It has been seen that gifts of money to be laid out in building on or other purposes connected with land already in mortmain are good, and it is conceived that the same rule would apply to gifts of money to be applied in connection with land which a charity is allowed to acquire or retain under this section.

The 9th section limits the scope and operation of the Act to wills of testators dying after the passing of the Act, viz., the 5th August, 1891, and so prevents the Act from having a retrospective effect. Accordingly, the validity of testamentary gifts to charitable uses of land or hereditaments, corporeal and incorporeal, and of charges on land, and of personalty "savoring of realty," must be determined according as the testator died before or after the passing of the Act. If therefore a testator were to bequeath to a charity "only such part of his estate as may by law be bequeathed to charitable purposes" (*z*), and were to give the residue of his property to a named person, the question as to whether the charity is to take only the pure personalty or to take the whole of the testator's property ousting the residuary donee altogether, would apparently depend on whether the testator died before, or on, or after the 5th of August, 1891 (*a*).

Act not retrospective.

(*y*) If a charitable gift should be directed to be laid out for purposes other than purposes connected with land required, in the opinion of the Court, for actual occupation for the purposes of the charity, it would seem that the gift would be administered cy-près or fail according as to whether or not the will indicates an intention in favor of charity generally. See ante, pp. 204, et seq.

(*z*) As in Wills *v.* Bourne, L. R., 16 Eq. 487, ante, p. 198.

(*a*) See ante, p. 306. This has been so decided, by North, J., in the very recent case of Re Bridger, Brompton Hospital *v.* Lewis, W. N. 1892, p. 149.

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