the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law, and in equity; and in one of them there were express words of immediate grant, and a consideration to support it as a will."

To the same effect were the other opinions in this case. The cases to which Justice Buller alluded as cited by the Attorney General (Sir John Scott), were West's case, Moore 177, where it is laid down that if there is a letter expressing the disposition as to land it is sufficient:—*Green v Proude* 1 Mod. 117, where, though the instrument was sealed and delivered as a deed it was held to be a will. *Maltham v. The Duke of Devonshire*, 1 P. Will. 529 where a will directed the executors to pay £3,000 as the testator should afterwards appoint. He afterwards made a deed of appointment which was taken as part of the will.

I refer also to cases cited in note Q of 1 Williams on Evidence, p. 61; Rowan's Appeal, 1 C. 293.

But it is supposed the covenant of general warranty in the deed estops the plaintiffs. Undoubtedly the covenant of general warranty protects the consideration, and as that was in the form of services to be rendered, John W. Scott will be entitled to his action for damages *if he rendered those services.* This question has not been investigated in the present action; but if the old man turned the son out of possession of the premises, and took exclusive possession to himself and died in such exclusive possession, it is not very likely that a breach of covenant will be enforced against his personal representatives, which was not thought worth asserting against the old man himself.

But, however this may be, we see nothing in the covenant of warranty to change our construction of the operative words of the grant. As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revocable words. The doctrine of the cases is that, whatever the form of the instrument, if it vest no present interest but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed;—for all parties must be judged by the legal meaning of their words.

The revocable words of the first instrument having been revoked by the subsequent will, the estate must go to the devisees, and John W. Scott if entitled to any redress, must seek it by a personal action against the legal representatives of the decedent.

The judgment is reversed, and a *venire facias de novo* is awarded.

Agnew, J.

I dissent from the opinion just read.

The late Chief Justice Gibson, in dealing with the principle which rules this case, said in *Hileman v. Bowsbaugh* 1 Harris, 344,—"it is decisive against the testamentary character of the instrument that it is not absolutely a will. It must be exclusively so or it is a deed; for there is no middle ground.

Then, what have we? A deed in form—in all its parts and circumstances without the slightest cast of a will. Form, it is true, will not prevail against actual intent; but it is the evidence of intention, and casts the proof of actual intent on those who oppose it. But here both form and intention coincide, as the instrument clearly shows. The writing is not only styled an indenture, grants, bargains and sells an estate for a valuable as well as a good consideration; was sealed and delivered in the presence of witnesses, and was duly recorded as a deed in two months from its date,—but the valuable portion of the consideration was an immediate agreement of the grantee to live with the grantor in his lifetime, and to labor for and assist him in working his farm (the granted premises), and also to maintain the grantor's wife during her lifetime, in case she survived him. How can this portion of the deed be construed as a will? and how can revocability be affirmed of such an instrument? which according to the English decisions, by its acceptance, made this agreement a covenant on part of the grantee on which the action of covenant will lie, and in our state according to the decisions only varies the liability to assumpsit instead of covenant, when the instrument is not sealed by the grantee. It is no answer to say that the grantee did not perform the present service to which the deed bound him. That may be a good defence in equity to the covenant to stand seized, created by the deed, and therefore allow ground for a recision but it does not alter the nature of the writing. As a test of its true character let us suppose John W. Scott had lived with and labored for his father as stipulated in the consideration of the deed, will any one say that the instrument under which the services was performed though in form an indenture could be revoked as a will? Clearly not. It undoubtedly had the force of a power of attorney coupled with an interest, which though revocable as an instrument becomes irrevocable by the interest coupled with it. Indeed, it was more,—for it contained a covenant for title. On the performance of the stipulated service it took effect, and would be no longer within the grantor's control. Having received the consideration, or being in its continued receipt, his covenants in the instrument bound him, one of which was the express covenant to warrant and defend the estate and premises granted to John W. Scott and his heirs and assigns, against the grantor and his heirs, and all others, subject to (and this is the only exception in the covenant), the life estate reserved to the grantor. This is a clear covenant as to the remainder after the particular estate of the vendor had expired, and it was for a present and a valuable consideration in the labor and service to be performed. The language of the granting part of the deed is also a present conveyance of the land, and carries all within its terms, which, according to the established rule of interpretation, must be taken most strongly against the grantor.

The exception which follows the grant is therefore all that can avail him and what is it?

It is simply a reservation of the use and possession to the grantor and his assigns during his natural lifetime, and this exactly coincides with